The Issues Paper

The Assistant Treasurer, with the agreement of the Business Regulation and Competition Working Group (which reports to the Council of Australian Governments), has requested that the Commission undertake a study to benchmark Regulatory Impact Analysis (RIA) processes in Australian jurisdictions.

The Commissioner leading this study is Mr Robert Fitzgerald. Mr Paul Coghlan has been appointed as an Associate Commissioner.

Key dates
Receipt of terms of reference: 28 February 2012
Due date for submissions: 14 May 2012
Release of draft report: end August 2012
Final report to Government: 28 November 2012

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The Productivity Commission

The Productivity Commission is the Australian Government’s independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission’s independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission’s website (www.pc.gov.au) or by contacting Media and Publications on (03) 9653 2244 or email: maps@pc.gov.au
Terms of reference

BENCHMARKING STUDY OF THE EFFICIENCY AND QUALITY OF COMMONWEALTH, STATE AND TERRITORY AND COUNCIL OF AUSTRALIAN GOVERNMENTS REGULATORY IMPACT ANALYSIS PROCESSES

Productivity Commission Act 1998

The Productivity Commission is requested to undertake a study to benchmark the efficiency and quality of Commonwealth, state and territory and Council of Australian Governments (COAG) Regulatory Impact Analysis (RIA) processes, as at January 2012.

The Commonwealth and each state and territory have well established individual RIA processes to guide decision makers in respective jurisdictions in considering proposals for new or amended regulation, with the broad objectives of ensuring that such regulation is efficient, effective and supports well functioning markets. RIA processes also apply in respect of proposals for new or amended national regulatory initiatives being considered at the COAG level.

A number of initiatives have been pursued through COAG in recent years with a view to identifying opportunities to strengthen jurisdictions’ RIA processes to better meet these objectives. In its 2010 regulatory review *Australia: Towards a Seamless National Economy*, the OECD noted that regulatory management practices in Australia were at or close to international best practice, but that there may be opportunities to strengthen arrangements, particularly so as to ensure that new barriers to doing business nationally are not created.

During 2010, under the auspices of COAG’s Business Regulation and Competition Working Group (BRCWG), jurisdictions assessed their RIA processes against an agreed set of design criteria that were broad ranging but put particular weight on the OECD recommendation regarding the national market implications of regulatory proposals. Following this exercise, jurisdictions agreed to review their RIA processes during 2011 to consider opportunities to enhance current arrangements in five broad areas:

- to ensure implications for national markets are given appropriate consideration when new or amended regulation is proposed and/or proposals to remake sunsetting regulation are being considered;
the establishment of objective criteria for evaluating proposals to remake sunsetting regulation;

the publication of Regulation Impact Statements (RISs) or equivalent at or close to the time of policy decision;

fostering cultural change in regulation making; and

the use of common commencement dates as a device for reducing the regulatory burden on business.

In undertaking this study, the Commission is to closely examine and assess the efficiency and effectiveness of the key features of the variety of RIA processes that apply across jurisdictions to provide a basis for establishing best practice so that individual jurisdictions can learn from the experience of others and to enable existing processes to be refined where appropriate to maximise their effectiveness. The purpose of the benchmarking study is not to develop a harmonised approach to RIA processes, but to compare processes and identify leading practices, including the practical effectiveness, integration and policy influence of RIA processes with regard to:

- the mechanisms in place to ensure accountability and compliance with RIA processes;
- specific evidence of where the RIA process has resulted in improved regulation;
- how and when in the decision-making cycle Ministers, or other decision makers, engage with RISs; and
- whether there are leading practice examples in RIA that might usefully inform reform consideration by individual jurisdictions.

In assessing the efficiency and quality of both COAG and jurisdictional RIA processes, the Commission should have regard to the following considerations:

- whether RIA processes place appropriate weight on the national market implications of regulatory proposals;
- the extent to which RIA requirements are mandatory;
- the ‘regulatory significance’ threshold, and related thresholds, such as impacts on specific sectors and regions, at which mandatory RIA processes are triggered;
- guidance in regard to consultation processes and other features to enhance transparency such as publication of RISs and the assessment of RIA adequacy;
- whether RIA applies to primary and subordinate legislation, legislative and non-legislative instruments and quasi-regulation;
- whether RIA requires consideration of competition impacts;
• whether RIA requires consideration of the evaluation and review arrangements following the implementation of proposals, including whether or not policy objectives remain appropriate;

• quality assurance processes, such as the independence and level of seniority for RIS sign-off;

• requirements for consideration of both regulatory and non-regulatory options in RIA processes;

• requirements for regulation that includes sunset clauses to also include guidelines for evaluation of the case for maintaining that regulation; and

• the extent to which the benefits and costs of options are robustly analysed and quantified and included in a cost benefit or other decision-making framework.

The Commission should consult as appropriate. The final report is to be completed within nine months of receiving these terms of reference. The Commission is to provide both a draft and final report, and the reports will be published.

MARK ARBIB
ASSISTANT TREASURER

[received 28 February 2012]
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1 What has the Commission been asked to do?

The Productivity Commission has been asked to undertake a study to benchmark the efficiency and quality of Commonwealth, state and territory, and the Council of Australian Governments (COAG) Regulatory Impact Analysis (RIA) processes, as at January 2012.

In undertaking the study, the Commission is to closely examine and assess the efficiency and effectiveness of the key features of the variety of RIA processes that apply across jurisdictions. The purpose of the benchmarking study is not to develop a harmonised approach to RIA processes, but to compare processes and identify whether there are leading practice examples in RIA that might usefully inform consideration for reform by individual jurisdictions.

The full terms of reference for the study are included at the front of this document.

This RIA benchmarking study contributes to the COAG implementation plan for its ‘regulation making and review’ reform stream in the National Partnership Agreement to Deliver a Seamless National Economy. The focus of the reform stream is on developing and enhancing processes for regulation making and review (COAG Reform Council (CRC) 2010), with the overarching objective of improving the quality of regulation. One important aspect of this is ensuring that RIA processes consider national market implications so that regulations do not create or maintain unnecessary barriers to doing business across jurisdictions. This study was added as a milestone for the reform stream to move the focus from ‘principles and the implementation of better regulatory decision-making processes’ to an assessment of whether these changes are delivering improved regulation and identifying the need for further reforms (CRC 2009).

Recently, a number of concerns, or areas for potential improvement in RIA processes, have been identified and provide further impetus for this study. The OECD (2010a) identified the need to strengthen the contribution of RIA to policy development, including by improving the quantitative evidence underpinning decisions, and the need for greater accountability arrangements. The Business Council of Australia (BCA) considers that there is scope to improve Australia’s regulatory model to ‘prevent bad regulation from being made in the first place’ (BCA 2010). Specific concerns raised by the BCA or other business groups — for example, the Australian Chamber of Commerce and Industry (ACCI 2011) and the Property Council of Australia (PCA 2011) — include the lack of rigour in impact analysis (in particular, in relation to regulatory proposals of greater significance), the need for more independent scrutiny of RISs, inadequate consultation processes, and the number of exceptions and exemptions under RIA processes.
Further issues have been raised around the ability of existing RIA processes to deal with broad systemic reforms that lead to a range of interrelated enabling regulation. This includes reforms that arise from independent review processes, for example changes in consumer law, following the Commission’s *Review of Australia’s Consumer Policy Framework* (PC 2008).

With the increasing need for post implementation assessments of exempted regulation and the rising volume of regulation that is subject to mandatory reviews or sunsetting, concerns have also been raised about the ability of the current RIA mechanisms to deal effectively with such regulatory assessments.

**Study process**

This is a public review and the Commission invites individuals, government agencies, businesses and organisations with an interest in this area to participate through its submission process. Input from stakeholders will be critical in developing soundly based assessments and reform options.

The Commission will consult extensively in all Australian jurisdictions. In preparing its report, the Commission will draw on these consultations, on written submissions and on other research and information sources, including the analysis and findings in previous reviews and studies. The approaches employed in other countries, will be considered where appropriate. The Commission will base its assessments on arrangements that are likely to give the best outcomes for the community as a whole, within jurisdictions and nationally.

A number of performance benchmarking studies for COAG have been undertaken by the Commission in recent years — including a current project which is benchmarking the extent to which particular approaches to the exercise of regulatory responsibilities by local governments affect business costs. The approaches taken in these studies will also be used to inform the RIA benchmarking study.¹

The Commission has released this issues paper to assist individuals and organisations to participate in the study. The paper sets out some of the issues on which we are seeking views, but it is not exhaustive. The Commission strongly encourages participants to make submissions on any issues or questions raised in this paper or any other issues that you consider relevant under the terms of reference. Wherever possible, participants should provide supporting evidence and

¹ For further information on the Commission’s performance benchmarking program see PC (2011a).
information, such as data and examples from Australia or overseas, to illustrate arguments. Attachment A provides further information on how to make a submission.

Following consultations and receipt of submissions, a draft report will be prepared and released for public comment. There will be an opportunity for public submissions on the draft report. The Commission will then prepare and present its final report to the Australian Government for consideration by COAG.

2 What is RIA and how can it contribute to better regulation?

Regulation can be necessary to achieve a range of social, environmental and economic objectives. However, if it is to achieve agreed goals and yield the greatest net benefit to the community, it must be well designed, and effectively and efficiently implemented and enforced.

Regulation invariably imposes costs as well as benefits. Costs include administrative costs borne by governments, compliance costs on business and other affected groups in the community and economic costs arising from regulatory distortions — for example where regulation reduces competition and affects incentives for investment and innovation. Some illustrative estimates of the costs of regulation are presented in box 1.

Some costs are necessary to achieve the objectives of regulation, but poor quality regulation can result in excessive administration and enforcement costs for governments and impose ‘unnecessary’ regulatory burdens on business or other affected groups (box 2). A particular problem relates to regulatory overlap or inconsistency between jurisdictions (Banks 2006). As an indication of the likely magnitude of such unnecessary costs, the Commission recently published preliminary estimates of the impacts of selected COAG business regulation reforms (PC 2011b). The Commission found that full implementation of just 17 of the ‘Seamless National Economy reforms’, aimed at reducing the regulatory burden imposed on firms that operate in multiple jurisdictions, could in the longer run provide cost reductions to business of around $4 billion per year and increase gross domestic product (GDP) by nearly one half of a per cent (around $6 billion per year).
Box 1  Estimates of the costs of regulation

- *Regulation and its Review* (PC 2005a), reported that the administration expenses of 15 dedicated Australian Government regulatory agencies approached $2 billion in 2003-04 (*equivalent to $2.5 billion in current dollars*), with the Australian Tax Office accounting for a further $2.3 billion in the same year (*$2.8 billion in current dollars*).

- An early study by Productivity Commission researchers (Lattimore et al. 1998) estimated the administrative compliance costs on business from regulation at around $11 billion in 1994-95 (*$16.9 billion in current dollars*), of which around 85 per cent was borne by small and medium-sized enterprises.

- Based on a survey undertaken by the OECD in 2001, the Commission estimated that the compliance costs of regulations could be as high as 4 per cent of gross domestic product (GDP) — up to $35 billion in 2005-06 (*$40.5 billion in current dollars*) (PC 2006).

- The Regulation Taskforce (2006) reported the estimates provided by the New South Wales Chamber of Commerce that the average business in NSW spends 400 hours a year, or nearly $10,000 (*$11,500 in current dollar terms*) complying with regulations or meeting legal obligations.

- The administrative costs of regulation in Victoria were estimated at $1.03 billion in 2006 (*$1.2 billion in current dollars*), based on the methodology applied in the United Kingdom (UK) (VDTF 2007). Most recently, an AIG (2011) survey of Chief Executive Officers estimated that, on average, the costs of meeting regulation was almost 4 per cent of their total annual expenditure.

- In 2005, the UK Government estimated total administrative burdens associated with their regulation to be £20-40 billion (1.6 to 3.2 per cent of GDP), while that in the Netherlands was estimated at €16 billion (3.6 per cent of GDP) in 2002. Denmark and Belgium have estimated total administrative burdens to be around 2 per cent of GDP (PC 2006).

- The costs arising from the effects of regulation on incentives and other distortions are harder to estimate. Limited evidence suggests that these costs can be larger than compliance costs. Based on a regression analysis of a World Bank indicator of regulatory quality, the United States Small Business Administration estimated the total cost of US regulations at US$1.2 trillion in 2008 (around 8.5 per cent of GDP) (Crain and Crain 2010).

- In addition, estimates of efficiency benefits from previous regulatory reforms in Australia have been large — for example, the Commission has estimated that real GDP was about 2.5 per cent higher as a result of National Competition Policy (NCP) reforms to utilities and infrastructure (PC 2005b).

*Source: PC (2011c).*
Box 2  **Sources of ‘unnecessary’ regulatory burdens**

*Rethinking Regulation* identified five features of regulations that contribute to burdens on business not justified by the intent of the regulation.

- **Excessive coverage, including ‘regulatory creep’** — regulations that appear to influence more activity than originally intended or warranted, or where the reach of regulation impacting on business, including smaller businesses, has become more extensive over time.
- **Regulation that is redundant** — some regulations could have become ineffective or unnecessary as circumstances have changed over time. Other poorly designed regulations might give rise to unintended or perverse outcomes.
- **Excessive reporting or recording requirements** — companies face excessive or unnecessary demands for information from different arms of government. These are rarely coordinated and often duplicative.
- **Variation in definitions and reporting requirements** — this can generate confusion and extra work for businesses than would otherwise be the case.
- **Inconsistent and overlapping regulatory requirements** — regulatory requirements that are inconsistently applied, or overlap with other requirements, either within governments, or across jurisdictions. These sources of burden particularly affect businesses that operate across jurisdictional boundaries.


The Regulation Taskforce (2006, p. 182) concluded that ‘[t]he pre-condition for achieving better regulation boils down to ensuring that the case for it is well made and tested, both at the outset and over time’. RIA is designed to improve the quality of regulatory decisions by providing relevant information to decision makers and stakeholders about the expected consequences of different policy options. By providing a better informed and objective basis for making regulations, RIA seeks to ensure that regulations deliver the greatest benefit to the community relative to the overall costs they impose.

As a process, RIA involves the consistent, systematic and transparent assessment of alternative approaches to problems which may warrant government intervention. RIA is also a vehicle for communicating relevant information to decision makers and the community. The RIA document — called a regulation (or regulatory) impact statement (RIS) in many Australian jurisdictions — sets out the problems, objectives and the impacts of a range of feasible regulatory and non-regulatory options. It can provide a framework and focus for community consultation during

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2 Regulatory impact analysis is also referred to in some jurisdictions as: regulation impact analysis; regulatory/regulation impact assessment; or impact analysis/assessment. Generally, in this issues paper, the Commission will use the term RIA when referring to the process, and RIS when referring to the resulting document or report.
policy development. After government decisions are taken, RIA can enhance accountability by making the basis for those decisions transparent to the community. An illustrative schematic representation of the RIA process and its essential elements is provided in figure 1. Not all jurisdictions’ processes embody all the features or sequencing shown. Furthermore, in some jurisdictions (such as Tasmania) the earlier steps in the process may be undertaken as part of the broader policy development process, with the formal RIA process seen to begin well after the problem and broad options for addressing it have been identified.

Figure 1  The RIA process
The OECD has been a long standing advocate of the use of RIA as a mechanism for assessing the likely benefits and costs of regulatory proposals and of its potential, when fully integrated into policy-making processes, to enhance regulators’ ability to identify the solutions that will meet government objectives in the most effective and efficient manner.

Some studies have shown RIA processes to be a cost-effective mechanism for improving the quality of regulation. Abusah and Pingiaro (2011), for example, found that the RIA process in Victoria had led to significant reductions in the costs imposed by Victorian regulations. They estimated that between 2005-06 and 2009-10, the RIA process achieved gross savings of $902 million (in current dollar terms) over the 10 year life of the regulations and that for every dollar incurred by the key parties involved in the RIA process, gross savings of between $28 and $56 were identified. More generally, the OECD has found, based on the experience of member countries, that RIA’s influence on the quality of regulation has been mixed and that its success depends critically on how well it is implemented and structured in practice (box 3).

RIA is just one of a range of strategies to improve regulatory decision making, and thus the effectiveness and efficiency of new and existing regulations. Important complementary and supporting strategies and tools include: managing and coordinating regulatory reform; public consultation policies and other measures to improve transparency and accountability; consideration and use of regulatory alternatives; administrative simplification, red-tape reduction programs and other mechanisms designed to reduce regulatory compliance burdens; and reviews of existing regulation.

Australian governments have been pursuing a range of regulation reform strategies, including through a comprehensive agenda under the auspices of COAG. Recently, the Prime Minister announced the creation of a new Business Advisory Forum ‘[t]o advise governments on how best to coordinate and progress the remaining areas of competition and regulatory reform; and [t]o nominate new areas of regulatory reform that will help lift productivity …’ (Office of the Prime Minister 2012). The Forum is to complement the existing work being undertaken by COAG’s Business Regulation and Competition Working Group (BRCWG).
Box 3  Experience with RIA in other OECD countries

The first OECD member countries adopted RIA in 1974. The 1997 OECD Report on Regulatory Reform recommended that governments ‘integrate regulation impact analysis into the development, review, and reform of regulations’ (OECD 1997a, p. 29) and by 2000, half of the 28 OECD countries had adopted RIA programs. More recent OECD surveys of regulatory management systems reveal that all member countries now routinely carry out some form of RIA on new regulations before finalising and implementing them and many countries also use RIA when reviewing existing regulations (OECD 2008).

More than three decades of experience indicates that implementation of an effective and efficient RIA system is a long-term process that requires ongoing refinement of systems. Reviews of RIA processes in OECD member countries have resulted in refinements that have typically widened the application and scope of RIA and increased the degree of analytical rigour required.

The OECD has for many years (see for example, OECD 2002) reported widespread agreement amongst regulatory management officials that RIA ‘when it is done well’ improves the cost-effectiveness of regulatory decisions, reduces the number of low-quality and unnecessary regulations, improves the transparency of decisions, and enhances consultation and the participation of affected groups. However, they also acknowledge non-compliance and quality problems associated with the implementation of RIA and that ‘the results of many reviews of the effectiveness of RIA suggest mixed success with influencing the quality of individual regulations’ (OECD 2009, p. 3).

International experiences show that there can be divergence between what is accepted as a sound regulatory policy in principle and what happens in practice:

It is thus paramount to ‘mind the gap’ between principles and practice. Regulatory policies are often well defined on paper but putting them into effective practice is proving more elusive. Tools and processes may be defined at a strategic level, but considerable work is then needed to give them concrete substance at the practical level of policy and law making. This appears to be especially true of ex ante impact assessment. (OECD 2011a, p. 19)

This gap between policy and practice can lead to a number of potential problems, including: wasting scarce review resources; breeding cynicism within business and government about the value of RIA processes and reviews; and, by giving the appearance of a rigorous review, giving unwarranted legitimacy to poor or unnecessarily burdensome regulation. In a study of the British RIA process, Boyfield (2007, pp. 9, 11) found RIA to be a ‘bureaucratic sham’, treated ‘as a bolt-on extra designed to justify a regulation’ rather than being used to shape and inform policy formulation.

More generally, Renda (2006) concluded:

Evidence from other international experiences as well as from the past EU experience reveal that it is preferable to not have RIA, than to have a bad one. (p. 135)
3  Overview of RIA processes and reviews in Australia

As noted in the study terms of reference, the Commonwealth and each state and territory in Australia have established RIA processes for new or amended regulation. COAG RIA processes also apply in respect of proposals for new or amended national regulatory initiatives.

The Australian Government was an early adopter of RIA among OECD countries, having first instituted RIA as a requirement for Cabinet proposals in 1985. It has consistently been recognised by the OECD as one of the leaders in the implementation of RIA and its requirements are considered to have a high degree of consistency with RIA best practices (OECD 1996 and 2010a).

The Australian Government’s RIA requirements have been reviewed and revised a number of times in recent years. Significant revisions took effect in November 2006, following the report of the Regulation Taskforce (2006), and again in July 2010. The OECD published a review in early 2010 Australia: Towards a Seamless National Economy, as part of its program of reviews of regulatory reform in member countries. Currently, a further review of RIA as applied by the Australian Government is being undertaken by Robert Milliner and David Borthwick and is to report to the Minister for Finance and Deregulation by 20 April 2012. The review will assess the extent to which the Government’s Best Practice Regulation Handbook and its interpretation and administration by the Office of Best Practice Regulation (OBPR) are consistent with the OECD guiding principles for regulatory quality and performance.

Amongst the states and territories, Victoria was the first to introduce RIA in 1985, followed by New South Wales in 1989 (Deighton-Smith 2007). Most of the other jurisdictions established RIA processes in the 1990s. Initially RIA was typically required only for subordinate legislation or statutory rules, but the requirements in all jurisdictions now cover primary legislation (common types of regulation are defined in box 4). Western Australia was a late adopter of a formal RIA process, introducing requirements applying to primary legislation in 2009 and then extending coverage to subordinate legislation with the introduction of revised guidelines in 2010. COAG RIA requirements have also applied, since 1995, to agreements or decisions of a regulatory nature made by Ministerial Councils and national standard-setting bodies.

All Australian governments have also agreed, in the COAG Regulatory Reform Plan (endorsed by BRCWG on 30 June 2009), to establish and maintain effective arrangements that maximise the efficiency of new and amended regulation, and avoid unnecessary compliance costs and restrictions on competition, by:
• establishing and maintaining gatekeeping mechanisms as part of the decision-making process
• improving the quality of RIA through the use, where appropriate, of cost-benefit analysis
• better measurement of compliance costs from new and amended regulation
• broadening the scope of RIA, where appropriate, to recognise the effect of regulation on individuals, the cumulative burden of regulation, and consideration of alternatives to new regulation
• applying the regulatory reform arrangements to ministerial councils (COAG 2007a, p. 8).

Box 4 Types of regulation

- **Subordinate legislation**, which comprises rules or instruments which have been made by an authority to which Parliament has delegated part of its legislative power. These include disallowable instruments such as statutory rules, ordinances, by-laws, and other subordinate legislation which is not subject to Parliamentary scrutiny.
- **Quasi-regulation**, which encompasses those rules, instruments and standards by which government influences business to comply, but which do not form part of explicit government regulation. Examples can include government-endorsed industry codes of practice or standards, government-issued guidance notes, industry-government agreements and national accreditation schemes. Whether or not a particular measure is deemed to be quasi-regulation depends on the nature of government involvement and whether there is a ‘reasonable’ expectation of compliance.
- **Co-regulation**, is a hybrid in that industry typically develops and administers particular codes, standards or rules, but the government provides formal legislative backing to enable the arrangements to be enforced.

COAG further agreed that all governments will ensure that regulatory processes in their jurisdictions are consistent with the following best-practice principles for regulation making:

1. establishing a case for action before addressing a problem;
2. a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;
3. adopting the option that generates the greatest net benefit for the community;
4. in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:
   a. the benefits of the restrictions to the community as a whole outweigh the costs, and
   b. the objectives of the regulation can only be achieved by restricting competition;

5. providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;

6. ensuring that regulation remains relevant and effective over time;

7. consulting effectively with affected stakeholders at all stages of the regulatory cycle; and

8. government action should be effective and proportional to the issue being addressed (COAG, 2007b, p. 4).

More recently, under the auspices of BRCWG, jurisdictions assessed their own RIA processes in 2010 against an agreed set of eleven design criteria that were broad ranging but put particular weight on the OECD recommendation regarding the national market implications of regulatory proposals. Following this exercise, jurisdictions reviewed their RIA processes during 2011 to consider opportunities to enhance existing arrangements in five broad areas:

- to ensure implications for national markets are given appropriate consideration when new or amended regulation is proposed and/or proposals to remake sunsetting regulation are being considered
- the establishment of objective criteria for evaluating proposals to remake sunsetting regulation
- the publication of RISs or equivalent at or close to the time of policy decision
- fostering cultural change in regulation making
- the use of common commencement dates as a device for reducing the regulatory burden on business.

Many of the states and territories have also undertaken comprehensive reviews of their broader regulatory processes in recent years and are in various stages of implementing associated reforms (see for example, VCEC 2011, VDTF 2012, IPART 2006, BRO 2011).
4 Assessing the contribution of RIA processes

A starting point for a benchmarking of RIA processes is the identification of what might be considered to be agreed best practices for RIA. COAG guidance on RIA and best practice regulation principles were discussed above. The OECD also provides some guidance on this — most recently, through the development of a recommendation on RIA, which forms part of the broader Draft Recommendation of the OECD Council on Regulatory Policy and Governance (box 5). This recommendation gives guiding principles for member countries to initiate RIA processes that are integrated in a policy cycle of regulatory design, enforcement, review and evaluation. Other elements of the broader draft recommendation that are closely linked to RIA or relevant to best practice regulation making processes include those covering: the importance of high level political commitment; oversight of regulatory policy; coordination across jurisdictions; transparency; and consultation.3

Box 5 Draft Recommendation of the OECD Council on Regulatory Policy and Governancea

The OECD Council on Regulatory Policy and Governance recommends, in regard to RIA, that member countries:

Integrate Regulatory Impact Assessment into the early stages of the policy process for the formulation of new regulatory proposals. Clearly identify policy goals, and evaluate if regulation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than regulation and identify the tradeoffs of the different approaches analysed to identify the best approach.

1. Adopt ex ante impact assessment practices that are proportional to the significance of the regulation, and include benefit cost analyses that consider the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear costs. (4.1)

2. Ex ante assessment policies should require the identification of a specific policy need, and the objective of the regulation such as the correction of a market failure, or the need to protect citizens’ rights that justifies the use of regulation. (4.2)

3. Ex ante assessment policies should include a consideration of alternative ways of addressing the public policy objectives, including regulatory and non regulatory alternatives to identify and select the most appropriate instrument, or mix of instruments to achieve policy goals. The no action option or baseline scenario should always be considered. Ex ante assessment should in most cases identify approaches likely to deliver the greatest net benefit to society, including complementary approaches such as through a combination of regulation, education and voluntary standards. (4.3)

(continued next page)

3 The Draft Recommendation is expected to become a ‘Final’ Recommendation after OECD Council approval in late March 2012.
4. When regulatory proposals would have significant impacts, ex ante assessment of costs, benefits and risks should be quantitative whenever possible. Regulatory costs include direct costs (administrative, financial and capital costs) as well as indirect costs (opportunity costs) whether borne by businesses, citizens or government. Ex ante assessments should, where relevant, provide qualitative descriptions of those impacts that are difficult or impossible to quantify, such as equity, fairness, and distributional effects. (4.4)

5. Regulatory Impact Analysis should as far as possible be made publicly available along with regulatory proposals. The analysis should be prepared in a suitable form and within adequate time to gain input from stakeholders and assist political decision making. Good practice would involve using the Regulatory Impact Analysis as part of the consultation process. (4.5)

6. Ex ante assessment policies should indicate that regulation should seek to enhance, not deter, competition and consumer welfare, and that to the extent that regulations dictated by public interest benefits may affect the competitive process, authorities should explore ways to limit adverse effects and carefully evaluate them against the claimed benefits of the regulation. This includes exploring whether the objectives of the regulation cannot be achieved by other less restrictive means. (4.6)

7. When carrying out an assessment, officials should: (4.7)
   - Assess economic, social and environmental impacts (where possible in quantitative and monetized terms), taking into account possible long term and spatial effects;
   - Evaluate if the adoption of common international instruments will efficiently address the identified policy issues and foster coherence at a global level with minimal disruption to national and international markets;
   - Evaluate the impact on small to medium sized enterprises and demonstrate how administrative and compliance costs are minimised.

8. RIA should be supported with clear policies, training programmes, guidance and quality control mechanisms for data collection and use. It should be integrated early in the processes for the development of policy and supported within agencies and at the centre of government. (4.8)

   a Recommendation number four of the Draft Recommendation. The numbers in brackets are the reference numbers from the source document.

Source: OECD (2011b, pp. 9-10).

This OECD draft recommendation on RIA is more detailed than previous OECD guidance, advocating particular practices with respect to some aspects of RIA.4

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4 The OECD’s ten best practices (OECD 1997), for example — used for many years as the basis for the assessments of member country RIA systems — were drafted at a much higher level of generality.
That said, the draft recommendation does not suggest a single best practice model for RIA.

In undertaking its benchmarking, the Commission intends to refer to the COAG best practice principles and the OECD draft recommendation as broad guides to best practice in RIA system design. It will also go further to look at other indicators of effective and efficient RIA processes as implemented, in order to highlight leading practices.

Ideally, the contribution of RIA processes to better decision-making, regulatory outcomes and community welfare would be assessed through a comprehensive and objective analysis of costs and benefits. This would require detailed information on the net benefits of regulations subject to the process, counterfactual information on regulation or policy that would have been implemented in the absence of the proposal, and what the net benefits of the regulations would have been if they had not been subject to the RIA process. Such calculations would include the costs associated with RIA processes.

A fundamental problem is the difficulty of establishing the nexus between a RIA process (or even more so, individual aspects of RIA, such as accountability arrangements) and improvements in the quality of regulation. Typically, a range of regulatory policies, strategies and institutional arrangements are likely to play a part. It is also generally difficult to determine what would have occurred if the particular regulation were not implemented or if a different institutional framework existed. Furthermore, RISs often do not include extensive quantification of costs and benefits for both the proposal and the less preferred options.

**A broad framework for assessing the contribution of RIA processes**

A reliable measure of the impacts of different RIA processes is expected to require a range of performance indicators. In principle, the five broad questions below are likely to provide a useful framework for evaluating the contribution of RIA processes. The Commission will be compiling qualitative (and where available, quantitative) evidence and seeking to develop performance indicators that provide information relevant to each of the questions.

1. *Is the design of the RIA process/requirements consistent with good practice?*

Some indicators of this may be the extent to which RIA processes are consistent with agreed guidelines and best practices (such as those of COAG and the OECD), and how aspects of each system compare with leading practices in other Australian jurisdictions or overseas.
2. Have the processes been implemented well — that is, are RISs of a high standard?

Data on compliance with requirements will be requested from each jurisdiction — recognising that the level of compliance monitoring varies significantly across jurisdictions and noting that generally *disaggregated* information, for example, on inadequate RISs or individual quality aspects of RISs, is not reported.

Sample RISs from each jurisdiction may be compared at a broad level by the Commission, across regulatory areas and/or across jurisdictions within given regulatory areas.

A qualitative comparison of actual regulatory impacts and outcomes against those estimated in the RIS is another possible indicator of its quality (accuracy), but the value of this indicator will depend on the extent to which the implemented policy has deviated from the design, as specified at the time the RIS was prepared.

Evidence based on the perceptions of government and industry stakeholders could also inform the analysis.

3. Have RIA actually influenced policy development and decision making?

Indicators of RIA influence may include: evidence that decision makers are using information contained in RISs; ministerial commitment to the process; and demand for good quality analysis before making decisions. How and when in the decision making process decision makers draw on RISs is of particular importance to RIA influence.

Another more concrete indicator of influence may be changes to the policy (or recommended option) during the course of the development of the RIS or withdrawal of a proposal as a result of the process. Case study examples or anecdotal evidence will be sought from agencies and decision makers to provide insights on specific revisions to regulatory proposals that may have resulted from the RIA process.

4. Is there evidence of improved regulatory outcomes?

One indication of this may be the observed outcomes resulting from use of RIA processes considered to be consistent with good practice (including high standard RISs) compared with outcomes where no formal RIA process was undertaken. Indicators of better regulation might include: effectiveness in achieving regulatory objectives; compliance costs or unnecessary regulatory burdens; degree of prescription or flexibility in allowing for performance/outcome-based regulation; ease of compliance and enforcement.
5. Has RIA contributed to improved transparency and better governance over time?

Some indicators of a contribution to transparency and better governance may include: evidence of improved awareness amongst regulatory officials of key regulatory quality issues; evidence of effective integration of the RIA processes into policy development and a substantive change in the regulatory culture within departments and agencies; business perceptions of an improvement by policy makers in consultation practices and of more thorough consideration of alternatives; reference to RIA in public debates on regulatory issues, for example by industry stakeholders, review bodies or the media.

Performance assessments against the first two elements of the above framework are the most feasible. At the other end of the spectrum, while it may be possible to identify some improvements in the quality of regulations and social and economic outcomes where the RIA process has been implemented, it will be difficult to prove a causal link.

The Commission is seeking the views of stakeholders on specific methodologies and performance indicators that might be used to evaluate the effectiveness and efficiency of the RIA process, in contributing to better regulatory decisions.

*What existing information can be used to indicate the impact of RIA processes on decision making and regulatory outcomes? What additional information could feasibly be collected in the future to improve the evidentiary base on the contribution of RIA?*

*What specific examples could help illustrate the extent to which RIA has influenced the policy development process and decision making? For example:*

- not proceeding with regulatory action — by demonstrating that a non-regulatory option or the status quo is a better solution to the problem
- where regulation is found to be justified — by identifying more effective and efficient design elements that were subsequently built into the regulation
- building stakeholder support for proposals — through effective consultation processes and/or by allaying fears of adverse regulatory impacts
- altering the objective to be achieved — by raising warning signs and suggesting further analysis and verification
- over time, evidence that departments and agencies are implementing improved regulatory development processes.
Is there evidence that the quality of regulation has been improving? To what extent are any improvements due to RIA processes? Do differences in RIA systems help explain differences in regulatory outcomes within and across jurisdictions?

Costs of RIA processes

In order to evaluate the overall efficiency of RIA processes, it is necessary to focus on the costs of those processes as well as the benefits they generate. A good RIA system is one that serves the ends of better informed decision making and more open and transparent government processes, while avoiding unnecessary costs and delays. Major sources of cost include:

- preparing RISs (costs to regulatory departments for in-house and external analysis)
- oversight bodies (including reviewing draft RISs, conducting training and producing guidance material)
- industry and other stakeholder participation in meetings, reviewing analyses, focus groups, public hearings and preparing submissions
- delays in policy implementation (and the realisation of benefits associated with regulatory reform) that can be attributed to requirements to conduct RIA.

Some costs, such as those associated with stakeholder consultation, would generally be incurred as part of the policy development process irrespective of there being a RIA process. In gathering and reporting information on costs, the Commission will therefore be seeking to identify the incremental or ‘additional’ costs that can be attributed to RIA.

A shortage of personnel with the skills required to undertake and assess RIA could increase agency costs (for example, by necessitating the greater use of external consultants) and in some cases reduce the efficiency of the RIA processes. As discussed in section 5 below, targeting of RIA efforts may improve the cost effectiveness and efficiency of RIA processes. A staged RIA process can also potentially improve cost-effectiveness — with an initial screening involving preliminary analysis to determine whether more detailed RIA is necessary.

One aspect of RIA processes that impacts on the overall cost of the system is the extent to which oversight bodies are required to be consulted — particularly in relation to whether proposals with minor impacts may trigger RIA requirements. Some jurisdictions have found that reducing the volume of proposals requiring preliminary assessments and lessening the number of requests for exceptions can
reduce the administrative burden for departments and agencies and the oversight body, increasing the cost effectiveness of systems by allowing resources to be concentrated on proposals with potentially larger impacts.

Further, as recently noted by the Commission (PC 2011c, p. LI), the expected large number of Commonwealth legislative instruments due for review is considerable and ‘this could place an overwhelming burden on departments and agencies and the OBPR’. At the same time the number of new Commonwealth regulations that did not satisfy RIA requirements, thereby needing post-implementation reviews, has been increasing significantly.

**What are some of the key factors that influence the costs of RIS preparation and other costs of RIA processes? How can the cost effectiveness of RIA be improved?**

**Are there specific strategies that should be considered to reduce the review costs associated with the prospective large volume of sunsetting regulation?**

5 **The effectiveness and efficiency of key features of RIA processes**

In addition to assessing the overall contribution of RIA to improving policy development processes and regulatory outcomes across jurisdictions, the Commission will be endeavouring to identify key aspects of RIA processes which may explain differences between jurisdictions in the effectiveness and efficiency of RIA processes. In particular, the terms of reference ask the Commission to identify leading practices — that is, the measures and design characteristics that are most likely to assist in achieving the objective of more efficient and effective regulations.

A number of key features of RIA systems are considered below. The discussion includes brief background information on how, in principle, these features might impact on the efficiency and effectiveness of RIA processes and how they are applied in Australian jurisdictions. In some cases possible leading practices from overseas are also highlighted.

**Scope of RIA requirements**

OECD (2011b) suggests that RIA should be applied to new regulatory proposals and that ‘the methods of RIA should be integrated in programmes for the review and revision of existing regulations’ (OECD 2011b, p. 10). In practice, the scope of RIA is usually limited to certain types of legislative instruments, to proposals with
expected impacts above some threshold, and to those which have not otherwise been exempted from RIA requirements.

All Australian jurisdictions have mandatory RIA requirements for regulatory proposals in relation to bills and statutory rules. For other legislative instruments and quasi-regulation, the requirements vary between jurisdictions. Jurisdictions similarly vary on whether RIA requirements are set out in legislation (as is the case for subordinate legislation in most states and territories) or in Cabinet handbooks and other policy documents (as is generally the case for primary legislation).

Australian jurisdictions employ a range of approaches to periodically reviewing the stock of regulation to ensure that it remains necessary, effective and efficient. This includes the use of embedded statutory reviews, sunsetting provisions, regulation stocktake exercises, redtape reduction programs and targeted reviews (PC 2011c). The extent to which RIA is required when conducting such reviews varies across jurisdictions and also depends on the nature of the review or the regulation’s impacts. For example, in all jurisdictions, consistent with National Competition Principles Agreement requirements (COAG 1995), the maintenance of any regulation that restricts competition must be supported by more rigorous impact analysis.

**Triggers for RIA**

Given the potentially significant costs of undertaking RIA (section 4), the targeting and prioritising of effort and resources to those regulations where impacts are most significant and where the prospects are best for improving regulatory outcomes, is likely to be particularly important to the contribution of RIA.

In most Australian jurisdictions, tests of significance are used to identify and exempt those regulations that are likely to fall below a threshold at which RIA is likely to be cost effective. For example, under the Australian Government requirements, a RIS is mandatory for all decisions that are likely to have a regulatory impact on business or the not-for-profit sector ‘unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements’ (Australian Government 2010, p. 8). This includes amendments to existing regulation and the rolling over of sunsetting regulation. A similar threshold significance test applies in the COAG RIA requirements and, with a wide variety of terminology, in the states and territories. The threshold tests also vary between jurisdictions in: the legislative instruments to which they apply; the focus on negative or positive aspects of impacts as a trigger; use of competition restrictions as a trigger; and the use of indicative monetary thresholds.
Exemptions and exceptions

Certain types of regulatory proposals are exempt (or covered by exceptions) from RIA requirements in most jurisdictions — for example those of a machinery nature, those that do not substantially alter existing arrangements, or those that have been subject to a sufficient level of relevant analysis through other fora. In addition, exemptions or waivers may be granted for proposals that would otherwise trigger the requirements in circumstances such as emergency situations or in the case of election commitments.

Where a waiver or an exemption has been granted the agency (or in the case of COAG requirements, the Ministerial Council/National Standard-Setting Body) will, depending on the jurisdiction or circumstance, have to prepare a RIS or post-implementation review (PIR) within one to two years of making the regulation. The Commission, in its recent report Identifying and Evaluating Regulation Reforms (PC 2011c, p. xxii), considered that the ‘analysis of regulation assessed as having a material impact should in principle be comparable whether it is part of a RIS prepared before the regulatory decision is made, or is part of the PIR prepared afterwards’.

What is the appropriate scope of RIA requirements, including in relation to:

- types of regulatory instrument?
- reviews of existing regulation, including sunsetting regulation?
- government bodies involved in the development and making of regulations?

Are threshold triggers/significance tests for RIA requirements appropriate and are they defined clearly? Are such triggers successful in ensuring RIA processes are appropriately targeted to improve cost effectiveness, while at the same time ensuring all significant proposals are subject to adequate analysis? If not, what changes should be considered?

Are oversight bodies consistent in their advice and interpretation with respect to when a RIS is required? Should oversight bodies have the final say as to whether a RIS is required in any particular instance?

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5 In some jurisdictions (for example under the Australian Government system) a post-implementation review must be prepared for any regulation which, when proposed, triggered the requirements but proceeded to the decision maker without an adequate RIS.

6 At the Australian Government level, PIRs to be undertaken include important areas of regulation with significant potential impacts and the overall number of PIRs has been rising. The Commission (PC 2011c) suggested that the PIR route may be seen by some agencies as a way to avoid or defer proper scrutiny of regulatory proposals.
Are the processes for granting exemptions from RIA appropriate? To what extent are significant proposals avoiding timely and rigorous scrutiny through the granting of exemptions?

Where exemptions are granted, are there requirements for subsequent RIA or post-implementation reviews? Are these requirements appropriate? Are they being satisfied? How could these requirements be improved?

Integration with the policy making process

Integrating RIA with the policy making process is essential if the scrutiny and analytical rigour it brings are to become a routine part of policy development. Since RIA provides an assessment of regulatory and non-regulatory alternatives, it is important to integrate it at an early stage of the process — ideally as soon as it is considered that regulation may be necessary. As noted by Banks (2005), if RIA is undertaken too late in the policy development process it may not be of any real assistance to decision makers:

In those circumstances, it effectively becomes little more than an expost justification for a policy decision already taken, subverting its role.

When this happens, the telltale signs in the RIS tend to be inadequate consideration of alternative options, and lack of consultation, both of which are critical to good decision making. (Banks 2005, p. 10)

Integration requires significant cultural change both within regulatory agencies and by decision makers that use the analysis. Any evidence that officials regard RIA more as an additional procedural requirement to explain the merits of policy decisions, rather than an aid to determining decisions, would suggest that cultural change has not been effectively realised.

Strong political commitment, effective training and guidance, and appropriate incentives/sanctions and accountability mechanisms can play a part in achieving the cultural change necessary for the effective integration of RIA into policy development.

What evidence is there that RIA has been effectively integrated into policy-making processes? Has there been necessary cultural change in regulation development?

- How and when in the decision making cycle are Ministers, or other decision makers, engaging with RISs?
• **Is RIA being undertaken early enough in the policy development process to enable consideration of all feasible alternatives, including regulatory and non-regulatory options?**

• **To what extent is the preparation of a RIS still being treated as an ‘add on’ task — after a course of action has already been agreed?**

*What have been some of the major challenges in achieving desirable cultural change within agencies?*

*How might RIA processes be best refined or streamlined to improve their integration into policy development?*

**Agency responsibility and capacity for RIS preparation**

In all Australian jurisdictions, as is generally the case overseas, responsibility for preparing the RIS rests with the agency sponsoring the regulation. This improves ‘ownership’, contributes to cultural change and integration of RIA into decision making, and enables the process to draw on expertise and information presumed to reside in the sponsoring agency. However, the sponsoring agency also has a stake in the policy and may not be as impartial as an independent body. Some degree of external oversight is therefore also generally a feature of RIA processes (see accountability and quality assurance).

Whilst the sponsoring agencies are typically ‘responsible’ for preparation, the analysis and drafting is sometimes contracted out to consultants or others with specialist skills.

Educating those responsible for RIS preparation is critical to building agency capacities to conduct high quality RIA. This includes not only developing the necessary skills and knowledge of essential methodological and data collection issues, but also an understanding of the purpose of RIA and the need for it to be integrated into policy development processes.

Jurisdiction tools to educate officials charged with preparing RISs include: formal training, briefings, meetings, helpdesk services and guidance materials (typically provided by independent oversight bodies, but also sometimes developed ‘in house’ by regulatory agencies), and provision of sample RISs. The Australian Government’s OBPR has increasingly utilised secondments of its staff to agencies with the aim of building capacities within agencies and facilitating cultural change.

*Do agencies responsible for preparing RISs generally have the necessary skills and expertise? If not, why not?*
What arrangements are in place to ensure institutional learning and knowledge transfer (between and within departments), to build on the knowledge/experience gained when completing RISs?

How can consultants and others with specialist expertise best be utilised to improve the quality of RISs? What are the implications of their involvement for the development of agency capacities and achieving cultural change?

How can RIA training and guidance material — both in-house and provided by oversight bodies — be improved?

Apart from training and guidance material, what other strategies should be employed by governments to develop and maintain agency RIA capacities and foster cultural change in regulation making?

Analytical requirements

Whilst there are differences in coverage and terminology, generally in Australian jurisdictions and in the COAG requirements, a RIS should include the following:

- the problem or issues that give rise to the need for action
- the desired objectives
- a range of options that may constitute feasible means for achieving the desired objectives
- a consultation statement
- an assessment of the benefits and costs of the options
- a conclusion or recommended option
- a strategy to implement and review the preferred option.

Given these broad requirements, the Commission will be seeking to compare and benchmark the RIA analytical requirements across jurisdictions on a number of specific elements, including:

Consideration of both regulatory and non-regulatory options — consistent with COAG agreed best practice principles, all Australian jurisdictions require consideration of both regulatory and non-regulatory alternatives but differ on the timing for consideration of non-regulatory options.

Analysis commensurate with significance — the level and depth of analysis is required to be proportionate to the significance of the problem and likely impacts in all jurisdictions. This is consistent with OECD advice that regulators should have
some flexibility in the analytical methods applied and the extent of quantification required (OECD 2002).

Which impacts must be assessed? — While all Australian jurisdictions essentially require a cost-benefit framework and there is an expectation that RIA include an assessment of all important costs and benefits, there is some variability in the types of benefits and costs included in each jurisdiction. For example, in the Australian Government requirements the RIS should ‘identify the groups in the community likely to be affected by each option and specify significant economic, social and environmental impacts on them’ (Australian Government 2010, p. 17). A number of jurisdictions emphasise consideration of particular impacts. For example, small business compliance costs must be assessed in New South Wales, Victorian and Australian Government RIA and there is a particular focus on competition impacts in Tasmania. National market/cross border implications (defined in various ways in guidance material) do, at least to some extent, need to be considered in RISs in most jurisdictions. The guidelines adopt different approaches but mention, for example, the need to consider how a similar policy problem has been addressed in other jurisdictions, the implications of the regulatory proposal for businesses trading across borders, and/or the scope for mutual recognition or harmonisation.

Net benefit test — Jurisdictions differ as to whether the RIS must demonstrate that the recommended option will generate the greatest net benefit to the community (Queensland, South Australia, Tasmania and COAG requirements); or a lower hurdle such as that: the preferred option results in a net benefit to the community (Western Australia and the ACT), a net benefit under certain circumstances, or is simply in the public interest.

Evaluation and review requirements — There is a requirement in most jurisdictions that the RIS consider evaluation and review arrangements following the implementation of proposals. Automatic sunsetting provisions are widely used in most jurisdictions. Generally RIA requirements apply to amendments to existing regulation as well as to new regulation. The requirements in some jurisdictions, for example those of the Australian Government and Victoria, also explicitly state that RIA is required before rolling over of sunsetting regulation.

What are some of the common weaknesses in RIS analysis and how can the quality of analysis be improved?

Does RIS analysis undertaken for national regulation include an appropriate level of detail on specific impacts in individual states and territories?
Are the implications for national markets given adequate consideration when new or amended regulation is proposed and/or proposals to remake sunsetting regulation are being considered?

Where regulation includes a built in requirement for review (for example, sunset clauses), should specific guidance also be provided on the nature of the impact analysis to be undertaken, including evaluation of the case for maintaining the regulation?

Does the requirement that a RIS demonstrate that the recommended option is the one that would generate the ‘greatest net benefit’ contribute to better regulatory decisions? What is the rationale for the lower ‘net benefit’ test used in some jurisdictions?

To what extent have data constraints been an issue affecting the quality and/or timing of RISs? Has proper use been made of existing information? What efforts have been made to bridge identified data gaps and what other measures could be taken to improve the quality and accessibility of data?

Accountability and quality assurance

The terms of reference for this study specifically ask the Commission to have regard to quality assurance processes and to identify leading practices in relation to the mechanisms in place to ensure accountability and compliance with RIA processes.

Clear accountability mechanisms and quality assurance processes are critical to ensuring the effectiveness of RIA requirements. Various aspects of RIA systems have particular implications for quality control, including: political commitment, independent oversight, quality control within agencies as well as a range of other strategies and processes.

Political commitment

Part of the OECD’s recommendations for regulatory systems is political commitment to RIA, including endorsement of RIA ‘at the highest political level’ and clear ministerial accountability for compliance. As stated by the OECD:

Because of its capacity to prevent rent seeking and promote the highest social benefit in regulation, RIA has many potential opponents. Departments may have an incentive to evade the requirements of RIA, either because of resource demands or because it precludes a favoured use of regulatory powers. It is difficult for regulatory oversight bodies on their own to compel agencies to use RIA effectively. To overcome opposition to RIA and assist it to be effective and useful in supporting reform it should be endorsed at the highest levels of government. (OECD 2010b, p. 44)
Governments can communicate their continuing commitment to RIA, for example by: reaffirming the value of RIA in the policy making process; reissuing or strengthening policies; by giving a clear indication the government is striving to use and improve the quality of RIA; by ensuring a high level of compliance with requirements; or through the appointment of a minister responsible for RIA and the promotion of regulatory quality.

Independent oversight

The OECD (2011a) recommends that a central body with adequate authority is needed to oversee the RIA process and ensure consistency, credibility and quality. All Australian oversight bodies reside at the centre of government (table 1). No oversight body has strict statutory independence, although the Victorian Competition and Efficiency Commission is an independent advisory body. The Australian Government OBPR was, until late 2007, a part of the statutorily independent Productivity Commission.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Regulatory Oversight Body</th>
<th>Position in Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cwlth</td>
<td>Office of Best Practice Regulation (OBPR)</td>
<td>Department of Finance and Deregulation</td>
</tr>
<tr>
<td>COAG</td>
<td>OBPR</td>
<td>Department of Finance and Deregulation</td>
</tr>
<tr>
<td>NSW</td>
<td>Better Regulation Office</td>
<td>Department of Premier and Cabinet</td>
</tr>
<tr>
<td>Vic</td>
<td>Victorian Competition and Efficiency Commission</td>
<td>Independent state body — Department of Treasury and Finance Portfolio</td>
</tr>
<tr>
<td>Qld</td>
<td>Regulatory Review Branch</td>
<td>Department of Treasury</td>
</tr>
<tr>
<td>WA</td>
<td>Regulatory Gatekeeping Unit</td>
<td>Department of Treasury</td>
</tr>
<tr>
<td>SA</td>
<td>Cabinet Office</td>
<td>Department of the Premier and Cabinet</td>
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<tr>
<td>Tas</td>
<td>Economic Reform Unit</td>
<td>Department of Treasury and Finance</td>
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<td>NT</td>
<td>Regulation Impact Unit/Regulation Impact Committee</td>
<td>Department of Treasury</td>
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<td>ACT</td>
<td>Regulation Policy Unit</td>
<td>Department of Treasury</td>
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* Victorian Competition and Efficiency Commission is an independent advisory body established under the *State Owned Enterprises Act 1992 (Vic).*

Oversight bodies perform a range of functions. These vary between jurisdictions, but include reporting on RIA compliance, providing technical assistance and training, advising on when a RIS is required, and reviewing the quality of individual
RISs. Some oversight bodies have strong gatekeeper powers to enforce RIA requirements.

**Quality control within agencies**

Officers responsible for drafting RISs need to have the required skills and there should be sufficient coordination, oversight and quality assurance within agencies. The systematic implementation of internal quality control mechanisms is potentially as important as external oversight for the achievement of the necessary long-term cultural change within agencies.

Some agencies in Australian jurisdictions have adopted internal quality assurance strategies such as a centralised approach to managing the preparation of RISs; in-house training on RIA; and agency specific best practice policy development guidance material. In the United Kingdom, in addition to the central Cabinet Office Regulatory Impact Unit, there is a system of satellite departmental Regulatory Impact Units. In the United States, in addition to government-wide guidelines, each federal agency is required to issue their own guidance, with the aim of ensuring the quality and objectivity of information, including in RIA.

**Other strategies or processes**

Other accountability and quality assurance strategies or processes used in some jurisdictions include:

- *certification* of the RIS by a senior official, minister or oversight body
- *external input/review* of RISs by another agency or independent expert
- *compliance monitoring* to provide timely feedback to agencies
- *sanctions for non-compliance* such as preventing a proposal from proceeding to the decision maker
- *follow up or ex post scrutiny* of RIA compliance and ensuring stakeholder input has been adequately addressed.

**Are there adequate mechanisms in place to ensure accountability and compliance with RIA processes?**

**How can RIA processes be better insulated from political expediency? How can systems avoid the abandoning or bypassing of RIA processes when there are pressing political demands?**
What are the appropriate functions for a regulatory oversight body and which aspects of their operations are the most significant determinants of their effectiveness? Does the degree of independence matter?

Are the sanctions for non-compliance with RIA requirements adequate?

Should RIA processes include the power to stop regulatory proposals without an adequate RIS proceeding to the decision maker? If so, should this power be vested in the oversight body or another body?

To what extent do agencies conduct reviews of the accuracy of their ex ante RIS estimates? Should such reviews be undertaken routinely?

To what extent is there independent scrutiny and performance monitoring of RIA processes? Should government auditors or other external bodies conduct assessments of RIA, including the quality of RISs, assessments by oversight bodies and exemptions granted?

Consultation and other transparency mechanisms

Transparency in regulation making and review is important because it can: improve accountability and reduce the risk of regulatory capture by particular interest groups; facilitate the development of better options and better designed regulation by providing information to decision makers and an opportunity for stakeholder input; and, by raising awareness, it can lead to higher levels of acceptance and compliance with regulations.

RIA aids transparency by providing a framework for involving stakeholders in the policy development process and communicating relevant information to decision makers and the community. OECD (2011a) recommends that RIA should be provided transparently and made publicly available, along with regulatory proposals, in a suitable form and within adequate time to assist decision making.

RIA transparency may be broadly considered in terms of: consultation/public involvement in the development of the RIA; communicating information to decision makers; and communicating the information to stakeholders and the community.

Consultation/public involvement during policy development

Consulting effectively with affected stakeholders at all stages of the regulatory cycle is one of COAG’s agreed best practice principles (COAG 2007b). All Australian jurisdictions have a requirement that those affected by regulatory
proposals be consulted during the policy development process and the RIS should summarise stakeholder views. Some jurisdictions have provided more extensive guidance material on how consultation is to be conducted — see for example, the Victorian Guide to Regulation (Government of Victoria 2011) and the Australian Government’s Best Practice Regulation Handbook (Australian Government 2010). The latter contains best practice consultation principles which are to be met by all agencies when developing regulation (box 6).

**Box 6  Australian Government whole of government principles for consultation**

The following best practice consultation principles are to be met by all agencies when developing regulation:

- **Continuity** — Consultation should be continuous, and start early in the policy development process.
- **Targeting** — Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. This includes state, territory and local governments, as appropriate, and relevant Australian Government agencies.
- **Timeliness** — Consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.
- **Accessibility** — Stakeholder groups should be informed of proposed consultation and be provided with information about proposals through a range of means appropriate to these groups. Agencies should be aware of the opportunities to consult jointly with other agencies to minimise the burden on stakeholders.
- **Transparency** — Policy agencies need to explain clearly the objectives of the consultation process and the regulation policy framework within which consultations will take place, and provide feedback on how they have taken consultation responses into consideration.
- **Consistency and flexibility** — Consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.
- **Evaluation and review** — Policy agencies should evaluate consultation processes and continue to examine ways of making them more effective. (Australian Government 2010, p. 44)

Consultation on draft RISs is common practice in the states and territories, and is a feature of the COAG RIA requirements, but is not a requirement under the Australian Government RIA system. Jurisdictions also differ in relation to how submissions are to be treated and some jurisdictions mandate minimum time periods for consultation (for example, NSW and Victoria).
Communicating information to decision makers

Clear communication of the analysis to decision makers, with options and impacts clearly identified, can facilitate its contribution in informing decision making. One page summaries of RIS documents must be provided to decision makers in New Zealand and under the Australian Government requirements. European Commission impact assessments must include an explanatory memorandum, which is similar to an executive summary.

Communicating the information to the community

Typically, once a new regulation has been finalised, the RIS is made public. This may be by way of tabling in parliament, publication in a government gazette, or on a website. Accessibility of RISs enhances accountability, builds awareness amongst stakeholders of regulatory impacts and can facilitate public debate on regulatory issues and the accuracy of RIS analysis. Publication practices vary across jurisdictions and within some jurisdictions depending on the type of regulation (for example not all jurisdictions mandate publication of RISs for non-disallowable subordinate regulation).

Publicly available information on RIS compliance for particular proposals or more generally for agencies provides useful information to those affected by new or amended regulation and creates a stronger incentive for agencies to satisfy RIA requirements. Compliance information is most valuable if it is made available as close as possible to the time of a regulatory policy decision and a final assessment being made on the adequacy of the RIS. The Australian Government has one of the most comprehensive approaches to public reporting of compliance information, including timely publication of information on whether or not an individual regulatory proposal had an adequate RIS. However, no Australian jurisdiction publishes the reasons for a RIS being assessed as adequate or inadequate.

How effective are existing mechanisms for enhancing transparency, such as: consultation processes; publication of draft/final RISs; and publication of compliance information? How can RIA transparency be improved?

Is consultation and, where relevant, release of the consultation RIS occurring early enough in the policy development process?

Would publication of the oversight body’s assessment of the adequacy of each RIS create a stronger incentive for agencies to undertake RIA of an appropriate standard?
References


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IPART (Independent Pricing and Regulatory Tribunal) 2006, Investigation into the burden of regulation in NSW and improving regulatory efficiency, October.


—— 2006, Potential Benefits of the National Reform Agenda, Report to the Council of Australian Governments, Canberra.


Attachment A: How to make a submission

This is a public study and the Commission invites interested people and organisations to make a written submission.

Each submission, except for any information supplied in confidence (see below), will be published on the Commission’s website shortly after receipt, and will remain there indefinitely as a public document. Copyright in submissions sent to the Commission resides with the author(s), not with the Commission.

How to prepare a submission

Submissions may range from a short letter outlining your views on a particular topic to a much more substantial document covering a range of issues. Where possible, you should provide evidence, such as relevant data and documentation, to support your views.

All submissions should be provided as public documents that can be placed on the Commission’s website for others to read and comment on. However, under certain circumstances the Commission can accept sensitive material in confidence, for example, if it is of a personal or commercial nature, and publishing the material would be potentially damaging. You are encouraged to contact the Commission for further information and advice before submitting such material. Material supplied in confidence on personal or commercial grounds should be provided under separate cover and clearly marked ‘PERSONAL IN CONFIDENCE’ or ‘COMMERCIAL IN CONFIDENCE’ accordingly.

How to submit a submission

Each submission should be accompanied by a submission cover sheet. The submission cover sheet is available on the study webpage and a copy is included with this issues paper (attachment B. For submissions received from individuals, all personal details (e.g. home and email address, phone and fax number) will be removed before it is published on the website for privacy reasons.

The Commission prefers to receive submissions as a Word document attachment to an email (see address below). PDF files are acceptable. To ensure your PDF is as electronically readable as possible, the Commission recommends that it is derived from word processing software (e.g. Microsoft Word or Lotus notes) and not from a scanner, fax or photocopying machine.
Track changes, editing marks, hidden text and internal links should be removed from submissions before sending to the Commission. To ensure hyperlinks work in your submission, the Commission recommends that you type the full web address (e.g. http://www.referred-website.com/folder/file-name.html).

Submissions can also be accepted by fax or post (see address below).

By email*: ria.benchmarking@pc.gov.au

By fax: 02 6240 3311

By post: RIA Benchmarking Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

* If you do not receive notification of receipt of an email message you have sent to the Commission within two working days of sending, please contact Jill Irvine (02 6240 3223).

Due date for submissions

Please send submissions to the Commission by Monday 14 May 2012.
Attachment B: Submission cover sheet
Productivity Commission

SUBMISSION COVER SHEET
(not for publication)

Please complete and submit this form with your submission to:
RIA Benchmarking Study OR By facsimile (fax) to:
Productivity Commission Jill Irvine (02) 6240 3311
GPO Box 1428 By email:
Canberra City ACT 2601 ria.benchmarking@pc.gov.au

Organisation or Individual: 

Principal contact: 
Position: 
Phone: Fax: 
Mobile: 
Email address: 

Street address: 
Suburb/City: State P’code: 

Postal address: 
Suburb/City: State P’code: 

Please note:
- For submissions made by individuals, all personal details other than your name and the State or Territory in which you reside will be removed from your submission before it is published on the Commission’s website.
- Copyright in submissions resides with the author(s), not with the Productivity Commission.
- Submissions will be placed on the Commission’s website, shortly after receipt, unless prior contact has been made concerning material supplied in confidence, or to request a delayed release for a short period of time. Submissions will remain on our website as public documents indefinitely.

Please indicate if your submission:

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- contains SOME material supplied in confidence (provided under separate cover and clearly marked COMMERCIAL IN CONFIDENCE, or PERSONAL IN CONFIDENCE)