Regulation Review Committee

Parliament of New South Wales

REPORT BY THE PUBLIC MANAGEMENT SERVICE OF THE OECD ON REGULATORY IMPACT ASSESSMENT IN NEW SOUTH WALES

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Regulation Review Committee

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Functions of Regulation Review Committee

The Regulation Review Committee was established under the Regulation Review Act 1987. A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

(a) that the regulation trespasses unduly on personal rights and liberties;
(b) that the regulation may have an adverse impact on the business community;
(c) that the regulation may not have been within the general objects of the legislation under which it was made;
(d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
(e) that the objective of the regulation could have been achieved by alternative and more effective means;
(f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
(g) that the form or intention of the regulation calls for elucidation; or
(h) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the Guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable.

A further function of the Committee is to report from time to time to both Houses of Parliament on the program for the staged repeal of regulations under the Subordinate Legislation Act 1989. Under this legislation all regulations currently in force in NSW are being re-examined, on cost benefit and cost effectiveness principles, starting on a chronological basis with the oldest of the regulations. This report has been prepared in connection with that process.

Chairman's Foreword

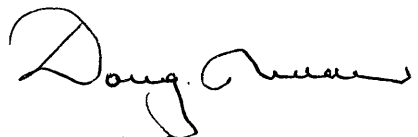
This report, prepared by the OECD, examines the merits of the statutory scheme governing the making of all regulations in New South Wales. It does so by studying those controls in the context of international best practice in OECD countries.

On 18 July 1997 the Sixth Australasian and Pacific Conference on Delegated Legislation passed a resolution that the Commonwealth and each State and Territory be invited to participate in a joint appraisal of the strengths and weaknesses of employing cost benefit and sunset requirements to scrutinise acts and regulations. Consistent with that resolution I had hoped that the OECD would be able to examine the regulatory impact analysis controls Australia-wide but this was not practicable at this stage. Nevertheless the report contains a wealth of useful data and reflection on many aspects of the NSW regulatory scheme which are common to other parts of Australia. The report will therefore be of use in the regulatory development of other States and Territories, particularly in regard to reviews recently conducted by Queensland and Western Australia and contemplated by Victoria. It is also of significant relevance to the emerging Australian interest, reported by the OECD, in the possible introduction of regulatory budgeting.

The OECD report comes after 10 years of operation of the Subordinate Legislation Act and the Regulation Review Act so it has an excellent vantage point from which to identify the various strengths and weaknesses of the present regulatory controls and to offer constructive avenues for their improvement. The report finds that the basic approach taken to regulatory impact assessment (RIA) contained in the Subordinate Legislation Act is sound and has delivered important gains in terms of regulatory quality and public participation in the regulation-making process. However a number of significant weaknesses exist.

These shortcomings are addressed in recommendations covering three areas. The first group are directed to an overhaul of the Subordinate Legislation Act to better reflect best practice in RIA. The second is aimed at ensuring that specific responsibilities for reform are allocated at political and administrative levels. The third group of recommendations have the objective of promoting RIA consistency at Federal and State levels, an important aspect in view of the likely re-introduction of the Federal Legislative Instruments Bill. These recommendations by the OECD, a world authority on regulatory reform, justify vigorous and pro-active examination by the Government and by the Parliament with a view to their adoption.

I express my Committee's thanks to the OECD for preparing this report.



Doug Shedden, MP
Chairman
Regulation Review Committee

REGULATORY IMPACT ASSESSMENT IN NEW SOUTH WALES:

AN APPRAISAL AGAINST OECD BEST PRACTICE RECOMMENDATIONS

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Chapter 1: Introduction

1. Regulatory management and reform is rapidly becoming a major issue for Governments in OECD member countries. Almost all of the 29 Member countries now has an explicit regulatory reform programme in place, up from only 3 or 4 at the start of the 1980s. These reform programmes are continuing to develop rapidly, becoming more detailed and ambitious as experience with the tools and institutions of reform accumulates and evidence mounts of the size of the benefits obtainable.

2. Reform has developed conceptually in parallel with these changes. Initial notions were of "deregulation", a clearing away of regulatory "impediments" in order to improve business environments and restore lost economic growth and prosperity. Major gains were achieved from economic deregulation of major sectors of the economy - a process that continues in many countries. However, attention has progressively turned to social regulations, which aim to protect and enhance a range of non-economic values, such as health, safety and the environment. While social regulations are among the most costly for business, deregulation is clearly neither feasible nor desirable in most cases. Thus, the notion of regulatory reform as a process of enhancing regulatory effectiveness and reducing costs - that is, of improving regulatory quality, was developed. Initially regarded as essentially a "one off" process, the process of reform has increasingly come to be seen in dynamic terms. As economic and social factors continue to change, even regulations which meet strict quality tests at the time of their introduction become outdated and ineffective over time. Thus, the concept of regulatory management, as an ongoing process of regulatory quality assurance, has come to the forefront.

3. Regulatory reform aims to maximise regulatory quality; that is, to ensure that regulation promotes the basic social welfare criterion of maximising net social benefits. In practice, this means striving to ensure that the costs of each regulation are justified by its benefits and that the regulation chosen yields the highest possible excess of benefits over costs. Achieving this result requires the application of effective processes both to the development of new regulation and to the review and reform of existing regulation.

4. Regulatory Impact Analysis (RIA) is one of the most widely used tools for assuring regulatory quality among OECD countries. 24 of the 29 member countries now implement a formal RIA requirement, a number that has increased from 18 only two years ago. The fundamental importance of RIA is that it requires policy-makers to take a systematic approach to the identification and analysis of the impacts of a regulatory proposal, or of an existing regulation. In doing so, it favours rational and objective decision-making based around an explicit use of the net social benefit principle.

5. Considerable work on RIA practices has been undertaken by the OECD, largely under the auspices of the regulatory management and reform group of the Public Management Service. In 1995, the OECD Council published its Recommendations on Improving the Quality of Government Regulation, incorporating the OECD Reference Checklist for Regulatory Decision-Making. The Recommendation and Checklist set out an approach to regulatory quality which is grounded in the use of RIA. A major meeting on RIA practices was held by the regulatory management and reform group in May 1996, and in 1997 a book entitled *Regulatory Impact Analysis: Best Practices in OECD Countries* was published. In May 1997, Ministers welcomed the OECD Report on Regulatory Reform and undertook to work toward the implementation of its specific recommendations on improving regulatory quality. These included the adoption of principles of good regulation including ensuring benefits justify costs, that market distortions are avoided or minimised and that innovation be promoted through incentives and goal-based approaches - all features that require the systematic use of RIA to ensure. Since early 1998, OECD has been engaged in a series of country studies of capacities to make high quality regulation and the creation of a 27 country

database on regulatory quality. The OECD has also built a databse on capacities in Member countries to assure regulatory quality.

6. The current report draws on this body of experience in order to provide an assessment of New South Wales' use of RIA. The report, firstly, benchmarks the formal requirements and processes governing RIA against OECD best practice recommendations, and secondly, assesses the performance of these requirements in practice in terms of the quality of the analysis achieved and the extent to which this analysis has been instrumental in achieving improved regulation. These two distinct approaches to the analysis of RIA have separate purposes. Scrutiny of the design elements of the RIA system aims to identify system based strengths and weaknesses and come to conclusions about the potential of the existing formal structures to ensure high quality outcomes - and the key bottlenecks at the systemic level. The assessment of performance looks at how well the formal policies are being applied in practice and should allow some conclusions to be drawn as to the actual effect of the use of RIA on regulatory quality.

7. The assessment of the use of RIA analysis must be conduced in a broader context, because the achievement of the full potential benefit of RIA on regulatory quality requires that it be integrated with other policy elements. In particular, RIA should inform public consultation processes and in turn be informed by them. Other policy elements, such as lawdrafting standards and the identification of alternatives, will also have a key impact on RIA. Training of policymakers in RIA disciplines will also be crucial to both their short term capacities to produce high quality analysis and the long term cultural change toward consideration of RIA as an integral part of policy development. Political support is essential, particularly in ensuring the latter development.

8. Consequently, this report considers RIA in relation to this range of supporting policies in reaching its conclusions. It then presents a structured set of recommendations for the further development and improvement of the NSW RIA system and its supporting elements in order to move it toward international best practice. The report was prepared within the Public Management Service (PUMA) of the OECD by Rex Deighton-Smith and Greg Bounds. The authors are grateful for the invaluable assistance and editorial comments received from Mr Jim Jefferis, Director, Regulation Review Committee Secretariat.

Chapter 2: Current RIA practices within the OECD

9. The great majority of OECD member countries are now committed to the use of RIA: In 1998, 24 of the 29 Member countries use some form of RIA in developing either primary or subordinate legislation or both. The use of RIA is a rapidly changing area of policy - in 1996, the number of member countries using RIA was 17, or little more than 2/3 of the current number. The number of countries using RIA for five years or more is only 13, or slightly over half the current total. This rapidly changing picture extends also to the forms of RIA being employed. Numerous countries have initially implemented quite limited RIA requirements before extending their scope - both formally and administratively - as experience with implementation accumulates and as support for, and confidence in, the instrument mounts. Significantly, the progression has been strictly in one direction: No country has abandoned the use of RIA once having commenced, and all changes to the detail of RIA systems have been in the direction of increasing the scope and rigour of the analytical requirements.

10. Given the rapid movement described above, it is unsurprising that the particular forms of RIA used continue to differ widely among member countries. Moreover, there is considerable variation within countries in the use of RIA. Requirements usually vary between primary and subordinate legislation and frequently vary between policy areas. Variations also exist between the treatment of major regulation and that of less significant provisions.

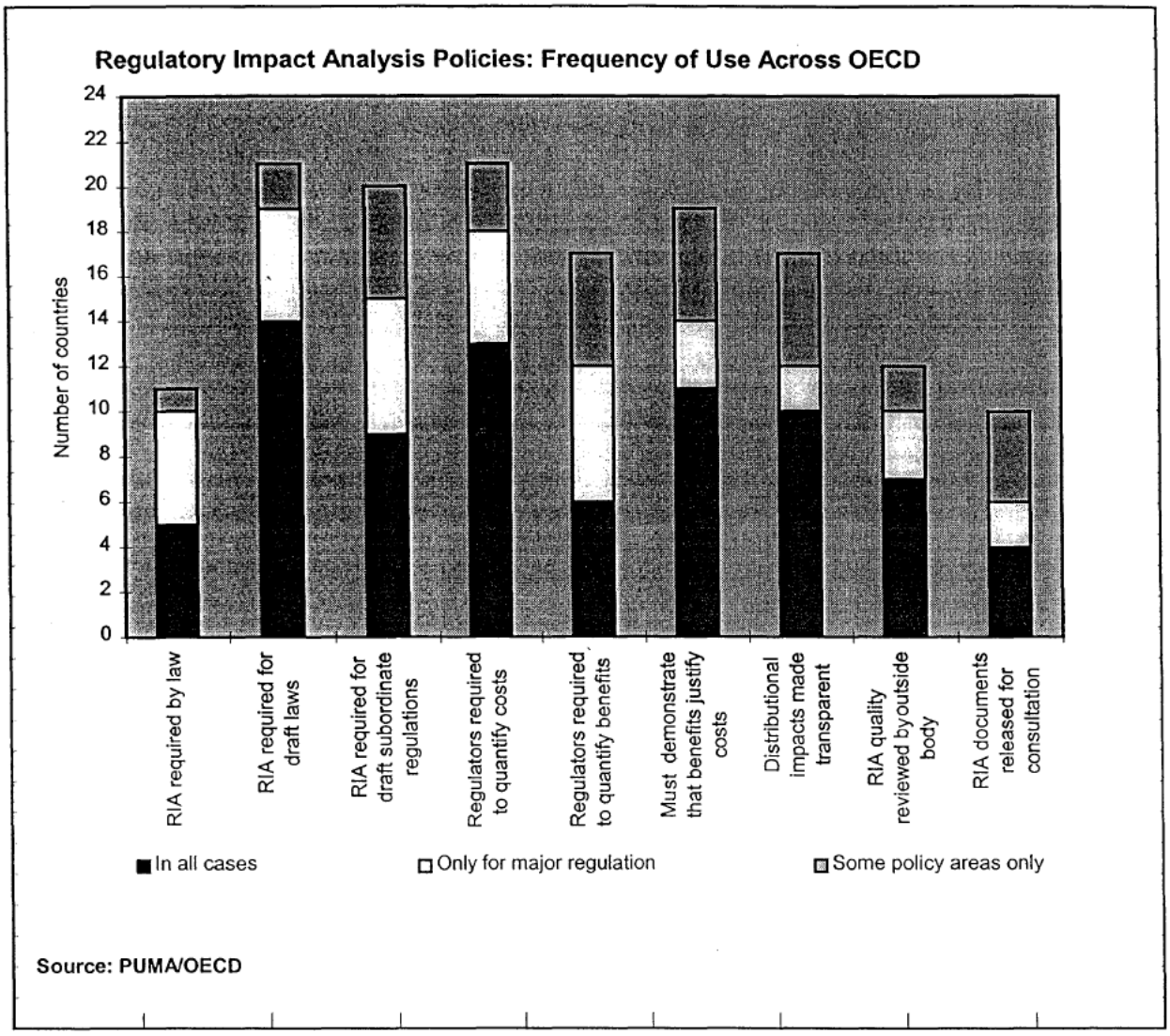
11. The graph below provides a snapshot of RIA practices within the OECD. It is derived from a regulatory indicators questionnaire administered in early 1998 and incorporates responses from 27 member countries, with only Luxembourg and Poland not being included. The data is essentially self-assessed, with limited follow up discussions with the Secretariat having been employed in a few cases. Consequently, there may be some difficulties in the comparability of answers in some areas. A key feature of the graph is that it distinguishes between the generalised use of particular RIA elements and their use in restricted circumstances - whether in terms of targeting toward major regulations or of variation in requirements between different policy areas.

12. The graph indicates that most countries use RIA in respect of both primary legislation (21 countries) and subordinate legislation (20 countries). However, its use in respect of subordinate legislation is somewhat more discretionary, with only 9 countries using RIA in all cases (cf. 14 for primary legislation) and 5 countries using in only "some policy areas". Legislative backing for RIA exists in fewer than half the practitioner countries, while only 5 have a generalised legislative requirement.

13. The benefit-cost principle is widely acknowledged as the basis for RIA: 19 countries state that regulators are required to demonstrate that benefits justify costs in at least some cases. However, in only 11 countries is this required in all cases. However, this requirement must be understood in broad terms: only six countries require that regulatory benefits be quantified in all cases, while a further six require that they be quantified in the case of major regulation. For a significant number of countries, the RIA requirements relates to a restricted range of costs and benefits, while in a number of others, where a more general requirement exists, specific methodological requirements do not exist. In 1996, only four countries were found to formally require the use of benefit-cost analysis, while another seven had a general requirement for "consequence analysis" to be conducted. Three concentrated only on fiscal costs and two more only on business compliance costs.

14. A key criticism levelled at the use of RIA, and of benefit-cost analysis specifically, has been that it does not systematically account for the sectoral impacts of different policy choices and the possibility of negative distributional consequences. The evidence suggests strongly that OECD countries have responded to these charges in their policy design: In 17 countries, distributional impacts of policy proposals are required to be made explicit in preparing RIA. Moreover, 15 countries require impacts on

Small and Medium Enterprises to be set out, while 16 require employment impacts to be discussed explicitly. Thus, RIA is apparently being employed to bring a systematic approach to consideration of equity, as well as efficiency, based issues.



15. In sum, the picture in OECD countries is one of a high level of consensus on the importance of RIA as a tool to promote better quality regulation and a rapid movement toward implementation as countries seek to integrate essential RIA principles with existing institutional and legal structures and traditions and to develop the specific skills needed for the effective conduct of RIA. The following chapter, detailing the OECD best practice recommendations for RIA indicates that, while there is considerable variation in current practices, there is a high degree of consensus about the forms which fully implemented RIA programme should take and its relationship to other policy and institutional elements.

Chapter 3: OECD Best practices in the use of RIA

16. This chapter summarises and discusses the current state of knowledge within OECD on best practices in using RIA. It reflects the experience of 24 Member countries that use some form of RIA as well as the results of an extensive programme of work conducted by the Public Management Service (PUMA) of the OECD Secretariat over several years. In particular, this discussion draws from the 1997 OECD publication *Regulatory Impact Analysis: Best Practices in OECD Countries*, which was the result of a meeting of RIA practitioners and academics from 25 countries convened by PUMA in May 1996.

17. The experience of member countries indicates that a number of generally applicable principles of good system design can be identified for RIA, although this does not imply that a single system will be desirable in all places at all times. Table 1 sets out ten elements of "best practice" that have been identified as of key importance in securing the maximum benefits from the operation of RIA. They form the framework within which the current NSW RIA process is assessed in Chapter 5. This chapter expands on the application of the ten best practice principles.

Table 1: Getting maximum benefit from RIA: Best practices.

1. **Maximise political commitment to RIA.** Reform principles and the use of RIA should be endorsed at the highest levels of government. RIA should be supported by clear ministerial accountability for compliance.

2. **Allocate responsibilities for RIA programme elements carefully.** Locating responsibility for RIA with regulators improves "ownership" and integration into decision-making. A central body is needed to oversee the RIA process and ensure consistency, credibility and quality. It needs adequate authority and skills to perform this function.

3. **Train the regulators.** Ensure that formal, properly designed programmes exist to give regulators the skills required to do high quality RIA.

4. **Use a consistent but flexible analytical method.** The benefit/cost principle should be adopted for all regulations, but analytical methods can vary as long as RIA identifies and weighs all significant positive and negative effects and integrates qualitative and quantitative analyses. Mandatory guidelines should be issued to maximise consistency.

5. **Develop and implement data collection strategies.** Data quality is essential to useful analysis. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high quality data at minimum cost within time constraints.

6. **Target RIA efforts.** Resources should be applied to those regulations where impacts are most significant and where the prospects are best for altering regulatory outcomes. RIA should be applied to all significant policy proposals, whether implemented by law, lower level rules or Ministerial actions

7. **Integrate RIA with the policy-making process, beginning as early as possible.** Regulators should see RIA insights as integral to policy decisions, rather than as an "add-on" requirement for external consumption.

8. **Communicate the results.** Policy makers are rarely analysts. Results of RIA must be communicated clearly with concrete implications and options explicitly identified. The use of a common format aids effective communication.

9. **Involve the public extensively.** Interest groups should be consulted widely and in a timely fashion. This is likely to mean a consultation process with a number of steps.

10. **Apply RIA to existing as well as new regulation.** RIA disciplines should also be applied to reviews of existing regulation.

3.1. Rationale for RIA

18. The primary role of Regulatory Impact Analysis (RIA) is to guide policy choice. Its aim is to ensure that the benefits to society from a regulatory action are maximised and the costs minimised. A key focus is to promote transparency, and accountability at all stages of the process, as well as drawing input from groups that can provide important policy insights. In this way it tends to highlight long term policy outcomes over shorter term ones and to promote important but diffuse interests over narrower but more concentrated ones.

19. RIA is a means rather than an end. A systematic approach is essential and the design of the mechanisms in which RIA operates is basic to its success. To be effective RIA must be intrinsically linked to the regulatory development process and integral to the business of Government. However, for this integration to occur, cultural change is usually required among regulators, interest groups and politicians. As a result, the implementation of RIA must be a long term process supported and strengthened at the political level.

3.2. System design for high quality RIA

20. Numerous pressures brought to bear on regulators can undermine the effectiveness of RIA. To maximise its benefits requires the development of a culture of acceptance and commitment to the process in the private and public sectors and the general public. It is necessary to pursue the longer term task of embedding RIA in the administrative and political culture. RIA is often seen by regulators as ancillary to their role. RIA serves diverse interests while regulators are likely to be most responsive to the views of their perceived constituencies. Immediate political demands for action can operate to reduce the commitment of regulators to a thorough analytical approach. If they are unfamiliar with the nature and purpose of RIA, regulators may be reluctant to accept it as a guide to decision making.

Oversight

21. Oversight of the conduct of RIA is therefore essential as a quality control mechanism. An oversight body located at the centre of Government is better placed than the regulator to take a "whole of Government" view of policy issues and to develop policy expertise in the analytical requirements of RIA. However, the challenge for system design is to ensure that regulators take active responsibility for the conduct of developing good RIA. The development of the analyses should remain the responsibility of the regulator. Most member countries that use RIA ensure analytical quality by issuing guidance on the conduct of RIA and then providing for a review of the results by independent bodies within Government.

22. Oversight of RIA may occur during the its conduct at the administrative level, or at the end of the process by the legislature. The value of the former is that it can be conducted in a co-operative framework by a body expert in the process and able to contribute to the quality of the process. Legislative oversight tends to occur after the RIA process is concluded and is thus less interactive. However, incorporating oversight in the Legislature may assist in integrating RIA in the political process making it less susceptible to political pressures emanating from the Government of the day. Of course, these two forms of oversight can be mutually supporting and are used simultaneously in some countries.

23. The third form of control over RIA quality is to allow conformity with specific RIA requirements to be challenged through the judicial system. However, this strategy is likely to be criticised for its expense and the uncertainty it can introduce to the status of regulations.

Training and the provision of guidance material

24. The analytical tasks involved in RIA are sometimes contracted out to private bodies. Although this may be necessary in some cases where particularly difficult analysis is required, frequent use of external consultants may lead to an undesirable separation of RIA and the process of policy development. If RIA is only commenced when the policy development is nearly complete, its focus can easily become that of providing a *post hoc* rationalisation for a decision already taken. Good system design will ensure that RIA is commenced early in the process and able to inform policy development and thus contribute to the achievement of the long term cultural change among regulators toward an integration of RIA perspectives and policy development processes.

25. Early oversight by a central body will assist this. A requirement for early consultation will also promote at least preliminary analysis of particular proposals sufficient to draw informed public comment.
Training is of key importance to equip regulators with the appropriate skills and the confidence to use their own resources to meet the analytical requirements of RIA.

26. Regulatory reform authorities must ensure that training inculcates a sound, and widespread, understanding of the purposes of RIA and of regulatory reform policy more generally. This is crucial in ensuring consistency in the conduct of RIA across policy areas. Because of the importance of achieving the long term cultural shift noted above, internal training is preferable to the use of external consultants. Training should also be supplemented by formal guidance material with official status. In addition to providing an easy reference source for the completion of RIA, formal guidance material assists in achieving the consistency of approach vital to maximise the contribution of RIA to overall efficiency. Regulatory reform authorities within government are also in some countries taking a proactive role, supplementing training by providing assistance where input of high level technical skill is required to complete specific analyses.

Scope of application of RIA

27. The RIA systems of member countries vary widely in terms of the range of legislative instruments to which they apply; but virtually all legislative instruments, from primary legislation to lower level rules, incorporated material and even guidance material are subject to RIA scrutiny in at least some countries. The application of RIA to primary legislation has historically been less common than to delegated legislation, with the reasoning usually cited being a concern that RIA may somehow interfere with the workings of Government, or that its application to primary legislation would be unwieldy. However, the application of RIA to primary legislation has recently seen a remarkable upsurge and it is now used to varying degrees in 21 Member countries. At a theoretical level, too, it is clear that the potential benefits of RIA can be greater with respect to primary legislation.

28. RIA resources must be targeted on the most important rules. An initial threshold analysis is required to determine the likely significance of the proposal and the resources that will then be applied to its assessment. Minor rules may only require a cursory analysis, while very costly regulations may justify considerable investment in data collection to enhance the benefits of policy improvements. Targeting RIA resources to the most important rules will maximise the benefits of policy improvements. Importantly, this will contribute to the credibility of the results of RIA and encourage its support at an administrative and political level.

Integration of RIA and public consultation

29. To be effective, RIA requires extensive public involvement. Affected parties have better access to much relevant information than do regulators. There must be adequate contact between these groups in

order to maximise the information on which choices are based. RIA can also inform the process of public consultation by providing information on objectives, assumptions and options, thereby increasing the ability of the public to provide a focused response containing useful information and allowing faulty reasoning and assumptions to be reliably identified and corrected.

30. Efficiency and accountability require that the results of consultation are able to influence the policy outcomes at the highest level. A well designed system for RIA should provide a number of mandated consultation opportunities commencing with broad policy choices and moving progressively to specific issues related to the detailed design of a regulatory proposal. Different groups will need to be involved at the different stages of consultation.

3.3. Analytical methods and RIA effectiveness.

31. As a staring point, an effective analytical method must take a critical approach to the "threshold question" of whether the issue identified is of sufficient magnitude to justify regulation. An effective way to do this is to require a section in the RIA setting out the nature and extent of the problem and the justification for Government intervention. The case for intervention should consider risk assessment, the need to target limited government and private sector resources and the possibility that regulatory failure may be greater than the market failure which underlies the policy proposal.

32. The question of which analytical method is used is central to the design and performance of an effective RIA system. Several RIA methods are employed in one or more member countries including: benefit/cost analysis, cost effectiveness or cost/output analysis, fiscal or budget analysis, socio-economic impact analysis, consequence analysis, compliance cost analysis and business impact tests. Benefit Cost Analysis (BCA) is the most comprehensive and systematic RIA method. It is able to account for all important impacts including distribution and timing considerations. Accordingly, BCA is generally the preferred method for identifying "socially optimal" public policy alternatives. However, an analytical preference for BCA must be considered in the context of practical constraints on data availability, analytical skills and budgets. Nonetheless, the principles of BCA should not be rejected simply because BCA can be difficult to undertake quantitatively in practice.

33. A best practice RIA system recognises that analysis is required for all regulatory decisions to demonstrate that the costs of an action are justified by the benefits, but that the form of the analysis should be based on practical judgements about feasibility and cost. Regulators should have some flexibility within a standardised framework for choosing the method of analysis they wish to use. Essentially, there should be a more rigorous method for high cost regulations and a less rigorous method for low cost regulations. The aim should be to instil BCA as "a habit of mind" within the administration. Standardisation of methods establishes an understanding of adequate analysis, allowing analysis to be compared across regulations and improving public appreciation. One aim of providing training and guidance material is therefore to ensure that all regulators make comparable choices about RIA methods and apply the methods the same ways.

34. Many policy options have wide ranging indirect effects that are not immediately apparent, including implications for trade, competition, competitiveness, employment or the environment. Although some of these impacts may have offsetting counter effects or be transitional in nature, they may nonetheless be important in the political decision process and therefore important to include in the analysis. BCA provides a theoretical framework capable of dealing with indirect impacts, however specific tools may be needed to ensure that they are identified for inclusion. The key mechanism for identifying that all likely impacts are identified is public consultation. In addition, specific and general check lists of possible impacts can be identified and included in guidance documents for the reference of regulators undertaking RIA.

3.4. RIA and the review of existing regulation

35. RIA is primarily considered as a tool for the analysis of competing policy options for new regulatory proposals. However, most countries that have adopted RIA programmes have also used RIA as a means of applying quality assurance to the stock of existing regulation. In this case the function of RIA is the same. RIA is applied to determine whether the existing regulation continues to yield net benefits large enough to justify intervention, and examines whether alternative approaches would have higher net benefits. Determination of whether a rule produces a net benefit should be easier for existing regulation. There is a body of experience to draw on and the effects of the regulation should be known, or at least able to be investigated. Accordingly, more rigorous standards of BCA are likely to be achievable when reviewing existing regulation.

36. However, there are several important planning and implementation issues relevant to the review of existing regulation. The quantity of existing regulation is potentially vast, while the necessary expertise for RIA is generally scarce. Thus the prospect of maintaining political momentum and achieving a thorough review within a manageable time frame, is limited. Several Governments have reported that systematic reviews of all existing regulations have in practice been less rigorous than was expected and delivered limited results.

37. To overcome this, strategies are required to target analytical and reform efforts to the most fruitful areas. One method is to apply filters based on examining specific regulatory constraints to determine priorities. For example, Australia's review of legislation that has the potential to restrict competition, or the focus given by Japan and Finland to permitting and licensing procedures. Another approach is to target for review particular industries, professions or sectors with strategic economic importance. A third alternative is the use of expert bodies to nominate priority areas for concentrating reform efforts. Even where priorities for attention have been successfully identified, it must be acknowledged that major programmes of reform can still take periods of several years to complete.

38. Existing regulations will invariably have constituencies that benefit from the regulations and are vocal in their opposition to change. Therefore, changing existing rules can be more difficult than making good rules in the first place. However, by identifying the dispersed costs of a regulation, RIA can be useful in exposing self interested arguments and reducing the possibilities for regulatory capture.

39. In planning reviews of existing regulation, choices must be made regarding the level of aggregation of the regulation to be reviewed. A highly aggregated approach will capture important interdependencies between elements of the regulatory structure, as well as identify the cumulative weight of regulations on a particular sector. In this instance, RIA will contribute by ensuring that interdependencies are identified and that particular impacts are neither double counted or overlooked. Against this must be weighed the potential for loss of focus or timeliness where unduly large review tasks are attempted.

40. Immediate changes to regulation can result in windfall losses to groups that have already incurred the sunk costs of compliance. Accordingly, reform approaches may need to consider transitional strategies to ensure that any significant inequities arising from reform proposals are ameliorated and that support for reform is maintained. This may include the use of transitional assistance informed by RIA that makes transparent the relative costs of various transitional proposals and the gains from reform.

41. Economic, social and institutional change over time will mean that the regulatory structure progressively departs from the optimal. Although this tendency may be reduced to some extent by the adoption of performance based regulation, the process of reviewing regulation must still be made a permanent element of the reform programme. Some countries have addressed this systematically by providing for the automatic sunsetting of regulation, usually over five to ten years, and requiring that

replacement regulation be subjected to the same RIA disciplines as new regulation. In general this approach has only applied to lower level rules, which can lead to conflict where the principal statute becomes outdated and, as a result, the rule is unable to pass RIA scrutiny. Recognition that primary legislation also requires frequent review is reflected in the inclusion by parliaments of clauses requiring reviews of statutes within a certain period.

3.5. Total Regulatory Burden

42. It is important to appreciate the potential impact of overall regulatory costs and the consequences of continually adding to the weight of regulatory burden. Although RIA should ensure that all new regulation has a positive net present value to society, in practice it will not generally capture the full opportunity costs of regulation. By increasing uncertainty as to returns, the addition of regulation to the aggregate burden can impact on the attractiveness of the investment environment and affect the perceptions of economic actors..

43. Regulations reduce personal choices. Furthermore, there is a limit to the extent that society will accept the Government's direction of resources to regulatory compliance, although the level of that limit will vary according to different societal values. Finally, regulation may have an uneven impact and community resistance to accept additional distributional consequences can obstruct further regulation. Of course flexible, streamlined, low cost regulation will create less of a burden, and Governments can afford to use more of this than " low quality" regulation.

3.6. The Political Dimension: Maximising the Impact of RIA

44. RIA is a powerful tool to improve the quality of political decision making. However, the application of insights derived from RIA can be constrained by the actions of groups that oppose reform, or seek regulation based on principles other than those adopted in RIA. Accordingly, it is important to focus on how the design and implementation of a system of RIA can maximise its impact in a political context. Consistently, member Governments are under increasing pressure to improve competitiveness and respond to budgetary constraints while public demand for action on a range of social and environmental issues continues to grow. RIA can aid the political success of Governments by improving policy efficiency, thereby releasing resources to pursue other policy goals. Recognition of this aspect of RIA at the political level is key to obtaining the support of politicians and interests groups for its continued use and development.

45. Broad publication of the principles of RIA will result in improved policy debate and better policy outcomes. Thus the important functions of education and transparency are applicable to all levels of decision making including politicians, interest groups and the general population. The systematic implementation of RIA should aim to maximise ownership of RIA at the political level. A number of member countries have emphasised the importance of a structured approach which clearly establishes agreed principles of reform at the highest level. This has effectively included the allocation of specific responsibilities for regulatory reform to Ministers in the major regulatory portfolios, the requirement for Ministers to approve RIAs personally and the use of parliamentary oversight and scrutiny processes.

3.7. Emerging Issues in the application of RIA

46. Better quality regulation is a key goal of public sector management reform. Better regulatory development systems will lead to better regulation, and hence greater government effectiveness, allowing the public sector to better meet competing demands for lower costs, and improved performance and

service standards. However, while RIA is a key contributor to improving regulation-making, some regulatory trends pose particular challenges for RIA:

- ***Performance based regulation*** that specifies outputs, rather than means or inputs, is replacing "command and control" regulation. As this approach permits flexibly in compliance strategies, it can pose problems for compliance cost assessment. One approach is to focus on supporting "guidance documents" which often supplement performance based rules. If the documents identify "deemed to comply" requirements, they can be used to obtain an "upper bound" estimate of compliance costs.

- The practice of ***incorporating standards*** written by non-government bodies in regulation can also pose a problem for RIA. This arises both because of the difficulty of effectively analysing a mass of detailed and technical material and because of the difficulty of ensuring that changes made to the standard during the life of the regulation can be effectively scrutinised.

- ***Non regulatory alternatives*** are increasingly being used by OECD governments to achieve their regulatory objectives in a more efficient and effective way. However, RIA systems generally extend only to regulation. There is a need to extend quality control systems to the use of these other policy tools.

- In a similar context, anecdotal evidence suggests that ***informal regulatory instruments*** such as guidance notes, instructions, agreements, Ministerial Policies and other "quasi regulatory" means are increasingly being used by administrations in place of formal regulations. These types of instruments are not generally covered by formal RIA programmes and, indeed, the increased use of them may, to some extent, reflect attempts to avoid the scrutiny requirements that RIA imposes.

- The phenomenon of ***regulatory inflation*** may reduce voluntary compliance. Increasing volumes of regulation means that affected individuals are less likely to be aware of the rules with which they must comply. Furthermore, even if individuals are aware of the compliance requirements, the regulatory burden may become so great that they will no longer comply voluntarily.

  The implication of this is that enforcement effort will have to increase while regulatory effectiveness declines. If these impacts are significant, attention will need to be paid to them in RIA preparation, taking into account the cost of additional resources for enforcement and any reduction in the effectiveness of regulation.

47. As the above examples indicate, the design and conduct of RIA is not a "once off" activity but, as with regulation itself, must be constantly revised and updated in the light of new knowledge and changes in the challenges faced by governments and the tools they are adopting.

Chapter 4: Statutory requirements and administrative arrangements for RIA in New South Wales

4.1. Introduction.

48. The formal procedural requirements for Regulatory Impact Analysis in NSW are principally contained in two complementary Acts: the *Regulation Review Act* 1987, and the *Subordinate Legislation Act* 1989. The former establishes the Regulation Review Committee of Parliament. The Committee has a specific reference to examine all regulations and to consider if the special attention of Parliament should be drawn to any particular regulation. The latter stipulates the requirements applicable to the making and staged repeal of Subordinate Legislation. This Act sets in place procedures that must be followed by Ministers in the process of preparing statutory rules, including the extent and type of Regulatory Impact Analysis that must be conducted.

49. The *Subordinate Legislation Act* is thus the principal reference for Regulatory Impact Analysis. It applies a statutory requirement that Ministers undertake Regulatory Impact Analysis on new subordinate legislation. The schedules to the Act provide a guide to the extent and type of analysis that is to be undertaken when preparing new statutory rules. The Act also allows for exemption from the requirement to undertake Regulatory Impact Analysis in certain circumstances.

50. This Chapter provides an outline of the provisions of the *Regulation Review Act* 1987, and the *Subordinate Legislation Act* 1989. It describes the specific legislative provisions pertaining to the conduct of Regulatory Impact Analysis in NSW and the administrative arrangements in place to support the legislative framework. For the most part, these arrangements relate to the activities of the Regulation Review Committee and the Secretariat that supports the work of the Committee.

4.2. Regulation Review Act 1987

51. The *Regulation Review Act* 1987, establishes the Regulation Review Committee of Parliament. The Committee is bi- partisan and representative of both houses of Parliament. The Act requires that the Committee consist of nine members; two members of, and appointed by, the Legislative Council (Upper House), and seven members of, and appointed by, the Legislative Assembly (Lower House). The Act also establishes the procedure for the appointment of Chairman and Vice-Chairman, the procedure for voting and the functions of the Committee.

52. The Committee is empowered to consider *all* regulations during the period that they are subject to disallowance by either house of Parliament. That period expires after a lapse of fifteen sitting days from the date of tabling of the regulation before Parliament. (section 41 (1) *Interpretation Act* 1987).

53. The Committee must also consider whether the special attention of Parliament should be drawn to any regulation on *any* ground. However, section 9(1)(b) of the Act provides clarity by also directing the Committee to consider if the special attention of Parliament should be drawn to any regulation on the following specific grounds:

- that the regulation trespasses unduly on personal rights and liberties;
- that the regulation may have an adverse impact on the business community;

- that the regulation may not have been within the general objects of the legislation under which it was made;
- that the regulation may not accord with the spirit of the legislation under which it was made, although it may be within power;
- that the objective of the regulation could have been achieved by alternative and more effective means;
- that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
- that the form or intention of the regulation calls for elucidation, or;
- that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act* 1989 or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with to the extent that they were applicable in relation to the regulation. (Essentially that the statutory requirements in regard to RIA were not complied with).

54. The Committee is empowered to make such reports and recommendations to Parliament as it considers desirable following its consideration of any regulations; including recommending that a regulation, or part thereof, should be disallowed.

55. The Act requires the Committee to initiate a systematic review of regulations based on the staged repeal of regulations and report to Parliament in relation to that review. In 1989 Parliament accepted a recommendation from the Committee to pass the *Subordinate Legislation Act* 1989. Part 3 of that Act provides for the progressive repeal, over the period 1 September 1991 and 1 September 1995, of all statutory rules in force immediately before 1 September 1990. It further provides for the progressive repeal of any subsequent statutory rule on 1 September following the fifth anniversary of the date of its publication in the Government Gazette.

56. The Committee also has the function of inquiring into any question in connection with regulations referred to it by a Minister of the Crown and reporting its findings to Parliament. The Committee may exercise this function whether or not the regulations are still subject to disallowance by either or both houses of Parliament. However, this review mechanism has not been used since the passage of the Act. This is apparently due to the lack of referrals from Ministers, as the Committee has indicated a clear willingness to undertake this responsibility.

57. The Committee is expressly excluded from examining government policy, unless the Committee is considering whether regulations implement government policy, or the matter has been specifically referred to the Committee by a Minister of the Crown. In exercising its functions, the Committee is empowered to send for persons, papers and records. The Committee is also empowered to receive evidence in private.

The Committee Secretariat

58. The Committee is supported by a research Secretariat that provides the Committee with a written briefing paper on each regulation. The Secretariat comprises a Director, a Project Officer, a Research Officer, a Committee Clerk and an Assistant Committee Officer. The Secretariat communicates directly with the bureaucracy concerning the aims and intention of regulations.

4.3. Subordinate Legislation Act 1989

59. The *Subordinate Legislation Act* 1989 was drafted in response to the recommendations of a report of the Regulation Review Committee presented to Parliament on 27 July 1989. The Act was passed by the NSW Parliament on October 12 of the same year. The report recommended Legislation for the staged review of New South Wales statutory rules, including the requirement for the preparation of a regulatory impact statement in respect of principal statutory rules. The *Subordinate Legislation Act* 1989 largely follows the form of the legislation recommended in the Committee's report.

General Provisions of the Act

60. The *Subordinate Legislation Act* 1989 relates to the making and staged repeal of Subordinate Legislation. It sets in place procedures that must be followed by Ministers in the process of preparing statutory rules. The Act requires that, before a statutory rule is made, the responsible Minister must ensure that the guidelines set out in schedule 1 of the Act are complied with. The Schedule imposes a general requirement on Departments to conduct a preliminary assessment of the need for, and the impact of the regulation. The specific requirements of schedule 1 are discussed below. Regulatory Impact Statements, complying with schedule 2 of the Act, are required to be prepared for principal statutory rules only. Principal statutory rules are rules that contain provisions apart from direct amendments or repeals. Amending regulations are exempt from the requirement for the preparation of a Regulatory Impact Statement.

61. The Act stipulates that public consultation must occur regarding the principal statutory rule. Specifically, the provisions of the Act require a notice to be published advertising the intention to make the regulation and the availability of the regulatory impact statement, allowing at least 21 days for public comments. Consultation is required to take place with "appropriate representatives of consumers, the public, relevant interest groups and any sector of industry or commerce, likely to be affected by the proposed statutory rule." Section 5 (2) (b)

62. The Act contains the general provision that the nature and extent of the consultation and publicity undertaken in regard to the proposal is required to be commensurate with the impact anticipated to arise from the making of the statutory rule. All consultation comments received are required to be appropriately considered by the Minister prior to making the proposed rule.

63. The Regulation Review Committee is required to receive a copy of the Regulatory Impact Statement, as well as all comments and submissions received, within fourteen days of the publication of the statutory rule. Schedule 2 to the Act requires the Regulatory Impact Statement to detail the consultation program undertaken. The extent of consultation is examined by the Committee and follow up with interest groups is routinely carried out by the secretariat. Under section 5 (4) the Committee examines the submissions to evaluate whether substantive comments have been reflected in the text of the published regulation. If the consultation comments are not acknowledged, the Committee will write to the Minister seeking an explanation of the position that was taken.

Circumstances in which Regulatory Impact Statements are not required.

64. Regulations are exempt from the requirement to prepare Regulatory Impact Statements in certain cases. The circumstances which are exempt from the section 5 requirement are those where:

- the Minister certifies in writing that, on the advice of the Attorney or Parliamentary Counsel, the proposed rule relates to matters set out in Schedule 3 concerning matters not requiring a Regulatory Impact Statement. Schedule 3 is discussed in more detail below. In practice the Parliamentary Counsel is the principal authority in this regard.

- the Minister administering the Subordinate Legislation Act, for the time being the Premier, claims an exemption on the basis of public interest that the regulation should be exempt from the requirement to prepare a regulatory impact statement. In this case the relevant requirements for a Regulatory Impact Statement are required to be complied with within four months.

- the responsible Minister certifies that the rule is made by someone outside the direct control of the Minister and that it was not practicable in the circumstances of the case for the responsible Minister to comply with section 5.

Administrative arrangements

65. A statutory rule must not be submitted for making by the Governor unless the responsible Minister submits certificates as evidence that requirements of the Subordinate legislation Act have been complied with, including advice from Parliamentary Counsel as to whether the proposed rule may be legally made.

Staged repeal of statutory rules

66. The Act provides for a staged repeal of all pre-existing regulation, which was completed in 1995. Thereafter, all new statutory rules are to sunset on 1 September following the fifth anniversary of their coming into operation.

Postponement of repeal

67. The Governor may by order postpone repeal of any regulation (except those listed in section 10 (3) - (7) with specific repeal dates) by one year on up to five successive occasions. On the third and subsequent occasions the Regulation Review Committee must be given one month's notice of the proposed postponement. In such cases the Committee may make such reports to Parliament on the postponement of the rule as it thinks desirable. Section 10 of the Act lists repeal dates for a number of specific sets of regulations and has, in recent times, been amended to provide for further postponements of repeals of regulations that have already passed the five postponements allowed under Section 11.

68. The Premier issued guidelines in November 1997 setting out the circumstances in which an extension of the operation of the regulation is considered warranted. These were essentially threefold: cases in which Cabinet has already approved a review; regulations that are "particularly lengthy and complex", provided that the postponement does not extend beyond 1 September 1999; and cases in which the principal legislation or the regulations themselves are subject to a national review process, again provided that the postponement does not extend beyond 1 September 1999.

Schedules to the Act

69. The Schedules to the Act provide important guidance for compliance with the requirements of the Act and the preparation of Regulatory Impact Statements. Schedule 1 describes matters to be considered when determining whether to proceed with a statutory rule. Schedule 2 stipulates the matters that must be included in a Regulatory Impact Statement. Schedule 3 lists those matters that do not require the preparation of a Regulatory Impact Statement. Schedule 4 lists a number of instruments excluded from the requirements of the Subordinate Legislation Act .

Schedule 1: Guidelines for the Preparation of Statutory Rules

70. The guidelines in Schedule 1 require a consideration of a range of matters before a statutory rule is proposed to be made. The matters in this schedule are similar to those requiring formal evaluation in a regulatory impact statement. The key exception is that Schedule 1 does not require the evaluation to be formally undertaken. It is designed to function as a guide to the Minister to assist in determining whether to proceed firstly with a regulation and secondly to determine if a regulatory impact statement is required.

71. Under the guidelines a statement of the objectives of the rule is required to be formulated, including the reasons for them. The objectives are required to be checked to ensure that they:

- are reasonable and appropriate
- accord with the objectives, principles, spirit and intent of the enabling Act; and
- are not inconsistent with the objectives of other Acts, statutory rules and stated Government policies.

72. Alternative options, and the option of not proceeding with any action must be considered. An evaluation is required of the economic and social costs and benefits of each option compared with the outcome expected from proceeding with the statutory rule. The guidelines specifically require a consideration of direct and indirect and tangible and intangible costs.

73. This schedule specifically requires that consultation occur with other responsible agencies that may be affected by the proposed rule to ensure that there is no overlap, duplication or conflict.

74. In determining whether, and how objectives should be achieved, the responsible Minister is directed to have regard to the following principles that:

- adequate information and consultation concerning the need for and consequences of the proposed action (rule).

- anticipated benefits outweigh anticipated costs taking into account the impact on the economy, on consumers, members of the public, relevant interest groups and any sector of the industry and commerce that may be affected.

- the alternative chosen should normally be the one which involves the greatest net benefit to the community

75. Finally the schedule directs that rules are required to be expressed unambiguously in plain English.

Schedule 2: Provisions applying to regulatory impact statements

76. The guidelines in Schedule 2 address those matters which must be included in regulatory impact statements. Specifically, a Regulatory Impact Statement is required to include the following:

- a statement of objectives and the reasons for them;
- an identification of alternative options for achieving the objectives;
- an assessment of the costs and benefits of the proposed rule, including resource allocation, administrative and compliance costs of the proposal and each alternative, as well as the option of not proceeding with any action.;

- an assessment as to which alternative offers the greatest net benefit or least net cost to the community;
- a statement of the consultation program to be undertaken.

77. Costs and benefits are to include economic and social costs including direct and indirect costs.

78. A Regulatory Impact Statement for a committee's foundation regulation, within the meaning of the *Agriculture Industry Services Act* 1998, must contain an assessment in accordance with the principles of the National Competition Principles Agreement 1995. There is no other reference to National Competition Policy reviews for new regulatory proposals.

Schedule 3: Matters not requiring a Regulatory Impact Statement

79. Under section 6 (1) (a) of the Act, the Minister is not required to proceed with a Regulatory Impact statement if he certifies in writing that he has received advice from the Attorney General or the Parliamentary Counsel that the statutory rule relates to matters set out in this schedule. In practice it is the Parliamentary Counsel that solely provides this advice to the Minister. The content of this advice is not required to be reported to the Regulation Review Committee.

80. Matters listed in the schedule as not requiring a Regulatory Impact statement:

- matters of a machinery nature;
- direct amendments or repeals;
- matters of a savings or transitional nature;
- matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another state or Territory;
- matters involving the adoption of international or Australian standards or codes of practice, where an assessment of the costs and benefits has already been made;
- matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public, having regard to the matters that must be considered under schedule 1 when preparing a regulatory impact statement.

81. A management plan for a share management fishery under the Fisheries Management Act 1994 is also exempt from the requirement to prepare a Regulatory Impact Statement.

Schedule 4: Excluded instruments

82. The final schedule of the Act lists a number of instruments that are effectively excluded from the requirements to undergo analysis of a regulatory impact statement. In summary these are:

- standing rules and orders of the Legislative Assembly and Legislative Council which relate to administrative arrangements between the houses;
- regulations under the Constitution Act 1902;
- regulations under the companies legislation made as a result of agreement between the States and the Commonwealth;
- by-laws of bodies not subject to Ministerial control;

- rules of Court.

4.4. Interpretation Act 1987

Disallowance

83. Part 6 of the *Interpretation Act* 1987, specifies the statutory requirements concerning the making and tabling of statutory rules as well as the procedure for disallowance under section 41. A resolution may be passed by either house disallowing a statutory rule at any time before notice of the rule is laid before the house, or within fifteen days after notice is laid before the House. The rule ceases to have effect following disallowance. Under section 8 (2) of the *Subordinate Legislation Act* 1989, no statutory rule, being the same as one that has been disallowed, may be published in the Gazette (or effectively made) within four months after the date of disallowance, unless the resolution has been rescinded by the House of Parliament by which it was passed.

4.5. Subordinate Legislation Amendment (Regulatory Flexibility) Bill 1998[1]

84. This Bill would amend the Subordinate Legislation Act to create a general requirement for major regulation to be framed in performance based terms. It would chiefly apply to regulation subject to RIA requirements under the Act. Exemptions from the general requirement for performance-based regulation are twofold: where this would not be appropriate on benefit/cost grounds and where this would not be "reasonably practicable". Clause 9B(4) also notes that the performance-based regulation requirement does not prevent the use of "deemed to comply" requirements.

85. Where a Minister determines that one of the available exemptions should be relied upon, (s)he is then subject to a general requirement that an alternative compliance provision should apply to the regulation. An alternative compliance mechanism is defined as:

> *"A provision.....that authorises the exemption of a person or thing from a statutory rule subject to compliance with alternative requirements to meet the objectives (express or implied) of the statutory rules and of the relevant provisions of the Act under which it was made".*

86. Equivalent exemptions to those noted above in relation to performance based regulation are then applied. Clause 9D sets out the requirements for alternative compliance mechanisms. In chief, the Minister must be satisfied that the ACM would be "at least as effective" as the regulation in meeting the objectives of the regulation and governing Act and that the ACM would not cause "an appreciable increase in risks to human health or safety or to the environment". Further provisions are that an ACM can only be applied to someone at their request and that notice of the making of ACMs must be published. The Minister is given absolute discretion, but can seek advice from a government agency or specially constituted panel. The Minister is able to issue guidelines for the making of ACMs and is required to keep a register of those in force. Two consequential amendments to the Act are made. Firstly, the objectives of all newly made regulations are required to be stated in the text of the regulation or in the explanatory memorandum. Secondly, regulatory impact statements are required to assess whether regulation should be performance based and, if not, whether an ACM should apply.

[1] At the time of writing, this Bill is being considered by the NSW Parliament. However, in view of the probability of its shortly becoming a significant part of the legislative framework governing regulatory quality in NSW, it has been included in this report.

87. As this Bill is yet to be passed by Parliament, its likely effect has not been discussed in the context of Chapter 5's assessment of the NSW system against OECD best practices. Instead, a discussion of the logic and specific provisions of the Bill is included at the end of Chapter 6. This allows the Bill to be discussed separately from the existing system and allows its likely impact on it to be highlighted.

4.6. Administrative Requirements - The Premier's Memoranda

Tabling of regulatory impact statements in Parliament

88. Memorandum 98-15 issued by the Premier notes the concerns of the Parliamentary Regulation Review Committee with the quality of Regulatory Impact Statements and the lack of understanding by Ministers about the process. The memorandum seeks to address this by directing all Ministers to table in Parliament a copy of the Regulatory Impact Statement relating to a regulation, in the same sitting week that Parliament is given notice of the making of the new regulation, or as soon as possible thereafter. The memorandum also urges Ministers to table other relevant material.

Staged Repeal of Statutory Rules

89. Memorandum 97-30 issued by the Premier clarifies the circumstances in which it is permitted by the Subordinate Legislation Act to postpone the scheduled repeal of regulations. The memorandum advises that postponement will only be considered where:

- Cabinet has approved a review of the principal legislation or regulations themselves;
- the regulations are particularly lengthy or complex and the proposed timetable will permit new regulations to be in force by 1 September 1999;
- the principal legislation or regulations are subject to a national review and the timetable for replacement does not extend beyond 1 September 1999.

90. The memorandum requests Ministers to co-ordinate, as far as possible, the conduct of reviews under the *Subordinate Legislation Act* and National Competition Policy Reviews of primary legislation.

91. The memorandum further notes that the *Subordinate Legislation Act* requires that the Regulation Review Committee of Parliament be given at least one months notice before the repeal of regulation can be postponed on a third, fourth or fifth occasion. It requests Ministers to ensure that the Committee is notified as soon as possible to enable them to comment on the circumstances of the postponement.

Chapter 5: Assessment of NSW RIA programme against OECD best practices.

92. The 1997 publication *Regulatory Impact Analysis: Best Practices in OECD Countries* (OECD/PUMA) identifies ten best practices relating to the conduct of RIA and supporting policies designed to maximise its ability to improve regulatory quality. This chapter benchmarks current legislation and practice in New South Wales against these best practices in order to focus on key strengths and weaknesses and provide the basis for the policy recommendations contained in Chapter 8.

5.1. Maximise political commitment to RIA.

93. The task of integrating RIA perspectives fully into regulatory decision-making is long-term in nature and implies a cultural change in regulatory agencies, with increased emphasis on broad "whole of government" perspectives, at the expense of the tendency to respond to narrower constituencies. Ensuring that RIA receives consistent support at the highest political levels assists this long-term integration of RIA into the policy process and supports reform authorities within the administration in their role of maintaining and improving analytical quality standards.

94. OECD countries have found that political support for RIA disciplines can be expressed firstly through the promulgation of explicit policies and requirements as formal Government policy and secondly through allocation of specific responsibilities at the Ministerial level.

95. A tangible expression of political commitment to regulatory reform, and to RIA specifically, can be found in the fact that, since its inception in 1989, the RIA process has been ruled by a specific piece of legislation, the *Subordinate Legislation Act 1989.* With the adoption of this Act, NSW became the second Australian State (after Victoria, after whose *Subordinate Legislation Act 1984* the NSW Act was closely modelled) to formally require RIA for all significant subordinate legislation.

96. On the other hand, the Act failed to support RIA by providing a quality assurance role for an independent body within the administration, as did the Victorian model. Moreover, while such a body existed in the then Department of State Development at the time the Act was passed, being invested with other, less specific, regulatory reform responsibilities, it was soon after abolished, clearly detracting from the perceived commitment of the then government to regulatory reform. However, little time elapsed between this action and the commissioning of a high profile review of regulation (the "Sturgess Report"), which recommended the establishment of such a unit. As a result, a specialist Office of Regulatory Reform was re-established - now strengthened by being located in the centre of government as part of the Cabinet Office - less than two years after its abolition. Legislative change also occurred at around this time, with amendments in 1993 to the Subordinate Legislation Act varying the sunsetting arrangements applying to new regulation. The pendulum swung again in 1995/6, with this Office being amalgamated into the Intergovernmental Relations and Regulatory Reform Branch of the Cabinet Office. While the change was likely influenced by the newly prominent National Competition Policy initiatives and their importance for regulatory reform at a national level, the combination of regulation reform with other responsibilities could also be seen as a blurring of the focus on reform.

97. In general then, the picture is of a political attitude which has at times been strong and active, but which has not been sustained over the longer term and has even moved in contradictory directions within short periods of time. In such circumstances it is unlikely that regulators would feel a sustained pressure of expectations of better RIA performance from the political level.

5.2. Allocate responsibilities for RIA programme elements carefully.

98. In 1997, the OECD stated that "Locating responsibility for RIA with regulators improves "ownership" and integration into decision-making. A central body is needed to oversee the RIA process and ensure consistency, credibility and quality. It needs adequate authority and skills to perform this function."[2] The key to this recommendation was the notion of balance between centralised and decentralised approaches to RIA in the interests of developing constantly improving RIA standards over the long term.

99. New South Wales scores relatively poorly on this criterion. On the one hand it has, for most of the past decade (see above regarding the abolition and re-establishment of the unit) had a central body with responsibility for regulatory reform and that body has conducted training and published guidance on the conduct of RIA. On the other, the body has at no point had any legislative or clear administrative authority to oversee the actual conduct of RIA or to act to improve the quality of analyses made in respect of particular legislative proposals. By contrast, 12 OECD countries require an independent quality check on RIA in at least some cases, including the United States, Canada, New Zealand, Great Britain and the Netherlands. Within Australia, the Federal Government has required such scrutiny (although relating only to matters coming before Cabinet) since the mid-1980s, while the Victorian Government has had a legislated requirement since 1984 and the Queensland Government implemented a similar requirement in 1990 as, more recently, has the Tasmanian Government.

100. While a formal role has not been given to the Intergovernmental Relations and Regulatory Reform Branch of the Cabinet Office (and its predecessors), the Parliamentary Regulation Review Committee has the responsibility, under Section 9(1)(b)(viii) of the Subordinate Legislation Act to report to Parliament on departures from the requirements of the Act. It has, in implementing this requirement, consistently monitored RIA quality and repeatedly reported to Parliament, as well as to individual Ministers on the extensive shortcomings it has found. Evidence suggests that it has had notable successes in this regard. However, it is clear that parliamentary and administrative scrutiny of RIA are not mutually exclusive. The Victorian situation, for example, involves both a relatively active Scrutiny of Acts and Regulations Committee (and its predecessor the Legal and Constitutional Committee) and a requirement that independent advice on the quality of the RIA be obtained (prior to 1994 exclusively from the ORR and, more recently, from any qualified source). Experience with this system indicates that feedback from the parliamentary to the administrative level is possible, with the expectations of the final arbiters of the regulations able to be transmitted informally to regulatory agencies during the process of regulatory development.

101. Moreover, it is clear that the role played by administrative and parliamentary scrutiny processes differs. Parliamentary scrutiny is undertaken after regulations are finalised and is thus a less flexible and interactive process. By contrast, scrutiny at the administrative level can be conducted as a dialogue, with expert feedback and advice available on technical issues and therefore able to improve the quality of analysis and the consideration of alternatives prior to final commitments to a particular regulatory course being made.

5.3. Train the regulators.

102. The conduct of RIA requires that regulators possess certain specific skills, which are not likely to be widespread in the administration. Equally important is that the purpose and benefits of RIA in the policy process be understood. Formal, well designed training programmes are needed to ensure that these

[2] Regulatory Impact Analysis: Best Practices in OECD Countries (OECD/PUMA) Paris 1997. p 215.

skills and insights are widespread among regulators. The specific nature of the material involved implies that specialist regulatory reform offices are best placed to provide this training.

103. Soon after the introduction of RIA to NSW the Business Deregulation Unit of the Department of State Development (the central regulatory reform body within the administration at that time) commenced a quite extensive training programme, which continued until late 1992. During this time, approximately five hundred regulatory agency personnel received training and guidance via a programme of one day seminars and the production and distribution of a relatively detailed training manual.

104. However, despite this strong initial performance, no subsequent training specifically aimed at RIA has been undertaken by the BDU or its successors. Thus, training efforts have been almost completely absent for over six years, although two day courses on writing Cabinet minutes are held regularly and include an introduction to the RIA process requirements, while a simplified and updated guidebook on regulation-making, including RIA, appeared in 1995.

105. The reasons for this abandonment of training effort appear twofold. Firstly, the BDU was apparently satisfied for a significant period that the extensive training initially conducted had ensured that relevant skills were sufficiently widely disseminated among regulatory agencies. More recently, as the need to renew efforts has reasserted itself, government priorities which favour National Competition Policy reviews and other targeted regulatory reform processes over RIA support have created difficulty in committing resources to a renewed training effort.

106. Secondly, there have clearly been considerable differences in view on the training required between the BDU and successors and the Parliamentary Regulation Review Committee. The latter argued in its 1993 Report on Future Directions for Regulatory Review in New South Wales[3] that the initial training programme, while useful, did not go far enough in training staff in regulatory analysis. At the same time, it argued that the RIA manual prepared by the BDU and, in particular, the subsequent edition prepared for BDU by a private consultant were too lengthy and theoretical and that they were likely to constitute a disincentive to the preparation of RIA and sap the NSW regulatory process of its vitality.[4]

107. The Committee's view was apparently that what was required was more detailed training coupled with a less detailed and more practically oriented manual. It proposed to take over the training function itself and sought budgetary allocation to provide this via consultant. In the event, this was not provided and it appears likely that the different views taken between BDU and its successor bodies on the one hand and the Committee on the other, possibly compounded by limited dialogue between the two, have contributed to an outcome in which training needs have not been well met. Notably, the former Chairman of the Regulation Review Committee has recently expressed the view that training responsibilities should be formally given to the Intergovernmental Relations and Regulation Reform Branch of Cabinet Office[5], while the current head of that branch has indicated that a review of regulatory processes currently being conducted by them has lead to an initial conclusion that there is a need to recommence training activities, including the issue of new guidance material[6].

108. Among common law countries with RIA requirements, the United States, Canada and Great Britain have all implemented structures in which the body within the administration with responsibility for regulatory reform issues guidance and conducts training. In Victoria, where the Parliamentary Scrutiny of Acts and Regulations Committee has a similar legislative function in regard to RIA to that of the NSW

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[3] *Future Directions for Regulatory Review in New South Wales*, Parliamentary Regulation Review Committee, Report No. 23, November 1993.

[4] Ibid. p18.

[5] *Hansard*, Legislative Assembly of NSW, 23 September 1998. Mr. Adrian Cruickshank, MP.

[6] Telephone consultations with Mr J. Booth, Policy Manager, Intergovernmental Relations and Regulatory Reform Branch, Cabinet Office, Government of New South Wales, November 5, 1998.

Regulation Review Committee, the training function has been conducted by the Office of Regulation Reform, which has invited involvement from SARC. In addition, ORR officers have generally sought to act as a conduit for SARC views on RIA requirements in order to allow regulators to better ensure RIA meet those requirements in the first instance. This dialogue between administrative and parliamentary reform bodies has generally been regarded as fruitful.

109. Another aspect of the training process, however, is the informal transmission of knowledge that occurs through dialogue on specific RIA. Where regulatory reformers have oversight responsibility there are considerable opportunities to develop such relationships and reinforce formal training initiatives. However, the lack of such a role for the NSW ORR has meant that this opportunity does not exist and so the impact of the formal training programmes conducted may have been limited.

5.4. Use a consistent but flexible analytical method.

110. OECD best practices argue that RIA should be based on the benefit/cost principle. That is, that the decision criterion to be employed should be the utilitarian one of maximising net social benefits. New South Wales has, since its initial adoption of a RIA requirement via the *Subordinate Legislation Act 1989*, adopted a formal cost/benefit requirement. Section 5 of the Act requires that an assessment of the costs and benefits of the proposed rule "including the costs and benefits relating to resource allocation, administration and compliance" be completed. The Act clearly requires that a broad view of the impact of the regulation be taken in the RIA. Identified alternatives to the proposed regulation are also required to be subjected to analysis in identical terms. Moreover, the section specifically requires that the regulator undertake an assessment of "which of the alternative options involves the greatest net benefit or the least net cost to the community". Thus, the Act specifically requires that the course of action with the highest net social benefit be identified. These requirements are fully in conformity with the OECD best practice principle.

111. It must be noted, however, that a dual system of RIA effectively applies to NSW regulation. As explained in Chapter 6 below, much NSW regulation has its origins in nationally agreed regulatory harmonisation schemes. Such regulation is subject to a (similarly nationally agreed) specific RIA regime which effectively replaces those that would otherwise be applied in the state jurisdictions.

112. The principles of this national RIA system (which should not be confused with that applying to regulation made by the Federal Government) are largely consistent with those of the NSW system. They are published together with a detailed set of guidelines[7] which include discussion of methodological issues. Three methodologies are put forward; risk assessment, benefit-cost analysis and cost effectiveness analysis. A prescriptive view is not taken, although the guidelines appear to favour the use of risk assessment and BCA wherever possible, as indicated by the general requirement that:

> "Proposed regulation should be subject to a regulatory impact assessment process which quantifies the costs and benefits of the proposal to the greatest extent possible"[8].

113. The CoAG principles also require the identification of alternatives to the proposed regulation and an assessment of the costs and benefits of each in terms which allow a comparison with the merits of the regulatory proposal.

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[7] *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies*. Council of Australian Governments, (revised edition), November 1997.
[8] Ibid., p10.

114. The OECD best practice principles for RIA also state that mandatory guidelines should be issued to maximise methodological rigour and consistency in the application of RIA disciplines across different policy areas. NSW does not rate highly against this principle. During the nine years of operation of the RIA requirement, only two specific sets of guidance have been issued. The first, "*Regulatory Impact Statement Instruction Manual*" was published by the Business Deregulation Unit of the Department of State Development shortly after the Subordinate Legislation Act 1989 came into effect, and was largely derived from the guidelines issued by the Victorian Regulation Review Unit for compliance with the RIA requirements of the equivalent Victorian legislation. It also drew on the Parliamentary Regulation Review Committee's July 1989 report.

115. A revised guidebook was prepared by a consultant to the Business Deregulation Unit during 1992. This was a considerably expanded document, covering more than 200 pages, by comparison with the first edition's 63 pages. However, the Regulation Review Committee noted in its November 1993 report[9] that

> "This manual did not gain acceptance by government departments and was considered to be too theoretical in approach".

116. The result, according to the committee, was that the original manual continued to be the source of effective guidance, despite the fact that it contained no discussion of the process of conducting preliminary assessments as required by Schedule 1 of the Act, no discussion of consultation processes, and no discussion of methods of assessing administrative, compliance and resource allocation costs.

117. In February 1995, the then Regulation Review Unit of the Cabinet Office published a guidebook entitled "*From Red Tape to Results*". This document had as its intent to

> "...equip New South Wales government agencies with the necessary tools to bring best practice approaches to their regulation.....by revisiting rationales for regulatory intervention and providing an overview of the international and State government regulatory environment which has called forth alternative approaches to traditional command-and-control regulation."[10]

118. The document is structured as a best practice guide to regulatory decision-making, including a discussion of identifying and weighing alternatives, the conduct of cost/benefit analysis and the rationales for regulatory intervention. As such, the document would clearly be of considerable relevance to a regulator faced with the task of preparing an RIA. However, the document does not at any point mention the Subordinate Legislation Act or the legislative requirement to conduct an RIA. Consequently, it is of no value in guiding agencies through their specific obligations under the legislation, nor on issues such as data collection. Nonetheless, according to the Intergovernmental Relations and Regulatory Reform Branch of Cabinet Office, this is the document to which regulators have, for the last 3 1/2 years, been referred when seeking guidance on carrying out their obligations under the Subordinate Legislation Act.

119. By contrast, the Victorian Office of Regulation Reform has published five editions of its manual covering RIA and related Subordinate Legislation Act requirements since taking over responsibility for the approval of draft RIA in 1989. While the first edition was prepared by a consultant as soon as the task was allocated to ORR, all subsequent editions have been produced internally. The document has evolved in accordance with the experience accumulated in assisting regulators in RIA preparation, reviewing the quality of draft & final RIA and conducting training of regulators. The focus has therefore been on ensuring that the information provided is responsive to the needs of regulators involved in the process and

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[9] Report on Future Directions for Regulatory Review in New South Wales. Regulation Review Committee, November 1993, p17.

[10] *From Red Tape to Results*. NSW Cabinet Office, February 1995, p1.

is provided in an intelligible form. The current edition of the manual explains the procedural requirements established by legislation, discusses specific requirements for different categories of regulation, and provides a detailed RIA "checklist", which leads the reader step by step through the process of preparing a regulatory impact statement. The manual also includes a discussion of the purpose of the RIA and associated requirements. Companion manuals are also available on the issues of regulatory alternatives and principles of "good" regulation. All of this material will be available on internet from early 1999.

120. In addition, the rewritten *Subordinate Legislation Act 1994* provided for official guidance material to be prepared from time to time under the authority of Section 26 of the Act. This is formulated jointly by the Cabinet Office and the Office of Regulation Reform and covers a range of additional issues including the appropriate uses of regulations (cf. primary legislation or non-legislative instruments), the appropriate use of performance based regulations, procedures to ensure that the need for regulation is established, consultation procedures, the incorporation of non-legislative instruments in regulation and drafting styles. Taken together, this guidance material is both much more comprehensive and more timely than that available in NSW, as well as being better targeted to the needs of regulators. Given the similarity of the underlying legislative requirements, it provides a useful potential model for developing better guidance in NSW.

121. A further comparison with the NSW case is that of the situation governing NSW regulation developed and assessed pursuant to national uniformity schemes. A "Principles and Guidelines" document[11] provides regulators in this context with both a discussion of the features and principles of "good" regulation and detailed guidance on the required procedural steps for conducting RIA. Issues discussed include presumption in favour of adopting international standards, maximising flexibility of standards, attention to compliance and enforcement strategies, bureaucratic discretion, communication of regulatory requirements and plain-language drafting. While these sections of the CoAG document are often very brief, providing guidance in only the broadest terms, they do function at a minimum as a checklist, raising these issues for the consideration of regulators and effectively requiring them to be able to respond to concerns in these areas. The bulk of these issues remain unaddressed in NSW guidance material.

5.5. Develop and implement data collection strategies.

122. High quality data is essential to useful analysis. One of the most frequently heard criticisms of RIA is that the data requirements for the conduct of adequate analysis are unduly onerous. If this is not to be the case, methodological guidance on the collection of data, as well as its analysis, is required. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high quality data at minimum cost within time constraints.

123. In 1997, OECD published a discussion of a range of data collection methodologies for RIA[12], based largely on US experience with implementing RIA over 20 years. A number of Member countries have recently implemented specific programmes to improve their data collection for RIA based on survey methodologies. For example, Canada in 1995 commenced the pilot use of a software based Business Impact Test to obtain estimates of likely regulatory costs from affected businesses. In 1997 an upgraded system was released to coincide with the adoption of a formal policy requiring its systematic use. Similarly, in Denmark, the Ministry of Business and Industry administers a system of Business Test Panels which has recently been expanded to draw on input from a wider range of Danish businesses. The

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[11] *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*. Council of Australian Governments. November 1997

[12] Collecting and Using Data for Regulatory Decision-Making, Ivy E Broder & John F Morrall III in *Regulatory Impact Analysis, Best Practices in OECD Countries*. OECD/PUMA, Paris 1997.

European Commission has, during 1998, commenced trials on a variant of the Danish system in seven member countries, with a view to using it as a major tool in its programme to improve existing Business Impact Test procedures for European legislation.

124. Another approach to the data collection issue is to provide active assistance on a case by case basis. This has been done since 1995 in the Netherlands via its Regulatory Helpdesk function. The Helpdesk is jointly run by the Ministries of Justice and Economic Affairs, both of which have specific regulatory reform responsibilities, and supported by the Ministry of Environment. It makes available specific expertise, including statistical assistance, to guide regulators through all phases of RIA including the design and collection of data requirements.

125. Notwithstanding the above initiatives, the implementation of data collection strategies remains relatively undeveloped in OECD countries. The NSW system does not currently include any such initiatives and this appears to be an area for consideration for future efforts to support reform, particularly in light of the concerns expressed that, notwithstanding the relatively lengthy experience with a system of generally high quality formal processes, the actual standard of analysis achieved and impact on regulatory quality has fallen short of expectations.[13]

5.6. Target RIA efforts.

126. RIA is itself a resource intensive process. Consequently, it is essential that resources devoted to RIA are applied to those regulations where impacts are most significant and where the prospects are best for altering regulatory outcomes. This also implies that RIA should be applied to all significant policy proposals, regardless of whether they are implemented by law, lower level rules or Ministerial actions.

a. Primary vs subordinate legislation

127. New South Wales has, in common with that of all other Australian States requiring RIA, imposed RIA requirements through a specific piece of legislation, which sets out the substantive and procedural requirements to be met in some detail. The format of the legislation is one which creates a generally applicable RIA requirement, subject to a threshold test, and subsequently establishes a limited range of exemptions, of both a specific and a functional kind. Through this mechanism, a wide RIA coverage of subordinate legislation has been established and maintained over time, notwithstanding continuing pressures for further exemptions to be made occurring from time to time and an increasing use of subordinate instruments of uncertain status in an attempt to escape the rigour of the RIA requirements.

128. The approach historically adopted by the Australian Federal Government provides a stark contrast. The Federal Government has imposed impact assessment requirements since the mid-1980s but have used purely administrative arrangements to implement them[14]. Being integrated with the process of Cabinet consideration of legislation, their coverage was largely restricted to assessment of primary legislation, as well as a small percentage of subordinate legislation. A significant change has been in progress since 1994, however. The Legislative Instruments Bill (see Chapter 7.3) would broaden the scope of RIA at the Federal level to by creating a legislatively mandated process for all significant subordinate legislation but, being silent on RIA for primary legislation, would leave this to be carried out through administrative mechanisms as at present.

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[13] See, for example, the speech of Mr. Adrian Cruickshank MP to the Legislative Assembly of 23 September 1998. (Hansard).

[14] It was determined to abandon this approach in favour of specific legislation in the early 1990s and the *Legislative Instruments Bill* was first introduced to Parliament in 1994. It has subsequently been much revised, under two governments, but has yet to become law.

129. While the Federal Government has moved to bring subordinate legislation within the RIA net, there has been no equivalent movement by the Australian State governments to apply RIA to primary legislation. This is particularly noteworthy in the case of Victoria and New South Wales, which were early adopters of RIA requirements among OECD countries. The continued limitation of RIA disciplines to subordinate legislation in these jurisdictions stands in contrast to the fact that 14 countries now require some form of RIA on all of their primary legislation, while a further seven countries do so in limited circumstances. Moreover, there is currently an inconsistency between primary legislation developed via national uniformity agreements, which is subject to RIA via the CoAG principles discussed above, and purely state based legislation, which is subject to no such formal scrutiny.

130. An additional inconsistency of treatment found in the NSW Subordinate Legislation Act relates to the distinction drawn between "principal" and "amending" statutory rules. The RIA process in NSW applies only to the former category of rules. This distinction exists in addition to the "appreciable burden" threshold, below which RIA is not required, and seems to serve no useful purpose, while undermining the coverage of the Act. It is clearly possible for major amendments to a regulation to significantly alter its overall impact, and yet such changes are not required to be assessed. The exemption may be related to the very rapid (5 yearly) sunsetting cycle contained in the Act, with the view taken that the whole import of the regulation must be analysed and justified at five yearly intervals in any case. However, two problems exist with this view. Firstly, the operation of the multiple postponement provisions under Section 11 of the Act mean that the appearance of a very rapid sunsetting and review cycle is to some extent illusory. Secondly, there is to some degree a presumption of continuance for a regulatory regime that has already been operating for some time, which suggests that it may be more difficult to remove an unsatisfactory amendment at a following "sunsetting" than to prevent its making (through the rigorous use of RIA) in the first instance.

b. Incorporated material

131. Legislation in many countries has increasingly incorporated material drafted by bodies external to government as part of its substance, particularly in relation to technical requirements. This trend seems to be particularly marked in Australia, where Standards Association of Australia standards are routinely incorporated into the legislation of State and Federal Governments. The widespread use of incorporated material poses a particular challenge to RIA. One key problem is in determining the impact of material that has been drafted outside the normal legislative drafting process and thus may be unclear in its application and import.

132. Secondly, some laws allow for updated versions of incorporated materials to become law automatically and without further scrutiny. Thus, even if the impact of the initial document has been adequately assessed, there may be little or no control over such subsequent changes. This problem was recognised in Victoria several years ago and scrutiny provisions were strengthened through amendments to the *Interpretation of Legislation Act*, requiring the tabling in Parliament of all amended documents that are incorporated in law at the time of their amendment. Failure to table amended material effectively renders it invalid[15]. New South Wales has not incorporated an equivalent process and, in fact, does not even require that incorporated material be tabled along with regulation when regulation is first adopted. Thus, opportunities for effective scrutiny of incorporated material are relatively limited.

c. Threshold tests.

133. The above sections consider the question of whether RIA requirements are framed sufficiently broadly to capture all significant regulation, but targeting also requires that RIA resources are not diverted

[15] *Interpretation of Legislation Act.* State of Victoria. Section 32(4).

to low value uses in analysing relatively insignificant regulation. This requires the operation of some form of threshold test. OECD countries have adopted a number of different threshold criteria. One option, employed at the Federal level in the United States, is to establish a dollar cost threshold: Full benefit/cost analysis is required of US regulations only if a preliminary analysis suggests that compliance costs will exceed $100 million per annum. As a result, a relatively small percentage of regulations are required to undergo a rigorous BCA, although a much larger number of less extensive RIA are completed.

134. A different approach is taken in the Netherlands, where decisions on the application of RIA requirements are taken on a case by case basis. The Dutch RIA requirement is based on a template of questions covering business effects, environmental effects and feasibility and enforceability issues. A Ministerial Committee determines which of these questions will be applied in conducting the RIA of a particular regulatory proposal, thus ensuring that redundancies are avoided and RIA effort is targeted toward the key issues in the individual case.

135. All Australian states have adopted variations of the threshold test first used in the Victorian Subordinate Legislation Act 1984, which based the applicability of RIA on the question of whether the regulatory proposal would impose "an appreciable burden, cost or disadvantage" on any sector of the community. This phrase does not, of itself, provide any real operational guidance as to the threshold for conducting RIA and different approaches have been taken to its practical interpretation in different States. In Victoria and in Queensland, interpretation has been left to the Parliamentary Committees responsible for overseeing the conduct of RIA. However, the NSW Act takes a significantly more structured approach.

136. Section 4 of the Act requires that, wherever a principal statutory rule is made, a preliminary impact analysis of the proposal and identified alternatives should be conducted, following Schedule 1 of the Act. Section 6 and Schedule 3 of the Act, taken together, provide for the Minister responsible for a regulation to declare that a RIA is not required if, on the basis of a Schedule 1 assessment, the Attorney-General or Chief Parliamentary Counsel advise that the regulation is not likely to impose an appreciable burden, cost or disadvantage on any sector of the public. In practice, it is not possible to say whether such a preliminary analysis is routinely, or even frequently, carried out in any formal sense. Certainly, the Parliamentary Counsel's office, which provides all such advice in practice, does not receive copies of these preliminary analyses. The Regulation Review Committee has frequently sought advice from Ministers on the nature of the preliminary analysis conducted in this circumstance and reports that the responses received vary widely in their level of detail and in the degree to which they are judged satisfactory. It seems that, in many cases, such responses may include an element of *post hoc* justification, rather than the reporting of *ex ante* activities formally conducted and documented.

137. The lack of clarity in practice as to preliminary analysis of regulatory needs and options may be one reason that a relatively broad view of the "appreciable burden" test has been undertaken and a quite large number of RIA have been prepared, including RIA on regulations of quite minor effect or where options for action are few. That is, given a level of doubt as to the robustness of preliminary analyses, a "precautionary" view may be taken to some extent, requiring RIA to be undertaken due to uncertainty as to the size of the impact of the proposal. However, some data cast doubt on this interpretation, suggesting that the formal arrangements for applying the "appreciable burden" test may not be the most important determinant of actual practice. A recent report from Queensland[16] shows that the proportion of new regulations subjected to RIA in NSW and Victoria is virtually identical at around 20 per cent, notwithstanding the difference in approach, whereas in Queensland, which has adopted an approach closer to that of Victoria, RIA are being conducted in fewer than 2 per cent of cases. Its recommendations

[16] *Report on the Operation of the Regulatory Impact Statement Process in Part Five of the Statutory Instruments Act 1992*. Scrutiny of Legislation Committee, Legislative Assembly of Queensland, p 2.

focused on improving Ministerial accountability for the preparation of RIA and on increasing the level of scrutiny able to be exercised by the Committee itself.

138. Regardless of the reasons for a wide view of "appreciable burdens" being taken, the question remains as to whether this constitutes an appropriate targeting of RIA resources, if RIA have frequently been conducted in circumstances in which the prospects of changing regulatory outcomes were slim and in which the potential gains from regulatory improvement were, similarly small. A particular concern voiced in a number of Australian jurisdictions including NSW has been that support for the RIA process among regulators has been undermined by the need to conduct these kinds of RIA where their contribution to the policy process is, apparently, nil. However, RIA guidance material indicates that resource use should be proportionate to the likely impact of the proposed regulation and it is clear that RIA prepared for minor regulation have, in fact, used few resources. Moreover, because a larger number of RIA are thereby prepared, more regulators become directly involved in the process and come to an understanding of its requirements and purposes. Hence, this more widespread requirement could help to hasten the cultural change required if RIA is to become firmly embedded in policy processes. On balance, it is not clear that the breadth of the existing RIA requirement (within the range of subordinate legislation) is inappropriate, although there may be merit in considering the Dutch approach insofar as it allows for a "tailored" approach to certain RIA in which a formal benefit/cost analysis may not be feasible or appropriate.

139. Notwithstanding this general conclusion, there does appear to be potential to improve this aspect of the functioning of the legislation. A greater level of confidence in the conduct of these preliminary reviews could be achieved by adopting a more formal approach to the provision of preliminary analyses, with consideration being given to substituting a more economically expert body, such as the Intergovernmental Relations and Regulation Review Branch of Cabinet Office, to provide the advice required as to whether RIA is needed for particular regulations.

140. A second form of targeting of RIA effort is contemplated by the Act via the wording of Section 5(1), which contains the general requirement to prepare RIA. Section 5(1) states that:

> "...the responsible Minister is required to ensure that, ***as far as is reasonably practicable***, a regulatory impact statement complying with Schedule 2 is prepared" (emphasis added)

141. The intention of this "practicability" modifier is, presumably, to recognise that RIA effort should be commensurate with likely regulatory burden and that a complete benefit-cost analysis is sometimes impossible and frequently unduly resource intensive, having regard to the impact of the regulations. Clearly, this would constitute appropriate practical guidance to regulators required to complete RIA and it represents a formal recognition in legislation of a matter more often dealt with in guidance and interpretation material in other jurisdictions. However, regulators frequently argue that the practicability test should be read as allowing a lesser standard of RIA to be accepted where they lack expertise in RIA disciplines and where they believe they cannot commit adequate resources to the task. Such a reading is clearly inconsistent with the long-term goal of integrating RIA into policy-making and compromises the quality and usefulness of RIA. While the Regulation Review Committee has resisted such an interpretation of Section 5(1), a clarification of the legislative requirement, which indicated that the practicability test related only to the usefulness of further RIA effort relative to the prospect of beneficial change to the regulatory proposal, is desirable.

5.7. Integrate RIA with the policy-making process, beginning as early as possible.

142. The fundamental aspect of the OECD's view of RIA best practice is that a fully functioning RIA system should be an integral part of the policy development process, rather than a checking process or,

worse still, an "add-on" requirement for external consumption. Experience in numerous countries shows that this is a long-term goal that requires a cultural change among regulators. Indeed, even in countries with the longest experience of RIA, it is clear that there remains much room for improvement in this regard, while there is often significant variation between regulatory agencies in the approach and attitude to RIA.

143. Evidence suggests that a lack of integration of RIA with the policy process is a major issue in NSW. The Regulation Review Committee, which reviews all RIA, believes that "most regulatory impact statements fail to comply with substantive requirements of the Subordinate Legislation Act".[17] They believe that in the majority of cases, RIA are prepared after a regulatory proposal has been finalised and that there is little systematic consideration of the merits of regulatory alternatives as part of the process.

144. The opinion of the Intergovernmental Relations and Regulation Reform Branch appears somewhat more positive, with RIA seem as a major cause of a cultural change in attitudes to regulation-making. Significant shortcomings in RIA quality are also perceived, but RIA is seen, nonetheless to have impacted positively on regulatory quality. However, it is seen as only one of a number of contributors in this area, with the acceptance of broader regulatory reform programmes also perceived as a source of pressure for change and the National Competition Policy initiatives in particular seen as having a major role in recent years.

145. A sample of RIS completed in NSW since 1994 was reviewed as part of the preparation of this report. The sample was drawn from Committee files and comprised two parts, in order to be representative of RIS judged to be relatively good and those judged to be relatively poor. This review generally supported the views presented above that the RIA process is not well integrated with the policy process. It should be noted that a large number of these RIS provided clear descriptions of the purposes and key provisions of the regulations in question. A smaller percentage identified the specific problems being addressed and, hence, the real objectives underlying the regulation. However, the key problems encountered even with a number of the "good" RIS were a general absence of consideration of realistic and innovative alternatives to regulation and a low level of quantification of both costs and benefits of regulatory proposals and alternatives.

146. For example, in one RIS relating to the regulation of a professional group, the RIA identified as an option a co-regulatory scheme currently operative for that profession in another Australian state. It did not provide any data on the experience of that State with the co-regulatory scheme, nor did it provide any explanation of the reasons for the adoption of the scheme by that State or even discussion of the theoretical benefits of a co-regulatory approach to professional regulation. It must be concluded that the RIA process had not been integrated with policy-making and had not been used by regulators as a decision-making tool. Nonetheless, this was regarded as being among the relatively "good" RIS received by the Regulation Review Committee. This issue will be considered further in Chapter 6, below, which discusses the performance of the RIA system to date.

5.8. Communicate the results.

147. The OECD best practice principles emphasise the need to communicate RIA results to decision-makers in clear and non-technical ways in order to maximise its ability to contribute to the policy choices made. Concrete implications and options should be explicitly identified and explained. The use of a common format aids effective communication.

[17] *Hansard,* Legislative Assembly of NSW. 23 September 1998. Mr. Adrian Cruickshank, MP.

148. This recommendation is, necessarily, based on the presumption that RIA is properly integrated into the policy process (see 7. above) and that RIA results are reached before policy decisions are taken. As noted above, there are reasons to believe that this is infrequently the case in NSW at present. However, the constraints on the current report have prevented the examination of the link between RIA results and final regulatory decision-making.

5.9. Involve the public extensively.

149. OECD's work on regulatory reform clearly indicates that public consultation and RIA should be seen as mutually supportive processes if the benefits of each are to be fully attained. Public consultation constitutes one of the most cost effective means of obtaining the scarce data that RIA requires. At the same time, provision of information through RIA can enhance the effectiveness of consultation. Consultation is a reliable means of exposing faulty reasoning in RIA and bringing to light unanticipated impacts. To attain these benefits, interest groups should be consulted widely and in a timely fashion. This is likely to mean a consultation process with a number of steps.

150. The NSW RIA system ranks highly on these criteria. All RIA are released for public consultation purposes, whereas only four OECD countries release all RIA relating to national regulation for consultation. Moreover, the Subordinate Legislation Act requires that RIS document the consultation that has already been conducted in the course of its preparation. Hence, the legislation effectively requires that a consultation process with a minimum of two steps be undertaken and that the first of these be undertaken prior to the finalisation of the analysis. In practice, however, this requirement does not appear to be widely implemented. Review of the sample RIS provided for this report indicates that, in the majority of cases, the consultation section of the document discusses the consultation steps proposed to be taken on the release of the RIS, rather than documenting consultation already undertaken in the course of its preparation. This is an area in which active steps to enforce the strong formal requirements already in place would be expected to yield significant gains in RIA and regulatory quality.

151. Participants in the process clearly believe that, despite remaining problems, the Subordinate Legislation Act's requirements have acted as a major driver of a fundamental cultural change among regulators. Consultation is now widely accepted as an integral part of the regulation-making process and this represents a clear contrast with earlier practices. The traditional regulatory culture did not, as in some other countries such as the United States and the Scandinavian countries, include a deeply embedded value of widespread consultation. This value is now a long way toward being established throughout Australia. Systematic, legislatively based requirements such as those of the NSW Subordinate Legislation Act and its counterparts in other States appears to have played a significant part in this process of change which has itself been part of a wider move toward principles of open government, including the embrace of Freedom of Information legislation and the adoption of more widespread, systematic and transparent processes for appeals from administrative decisions.

152. The extent of actual public involvement in the regulatory process via the consultation processes is highly variable in regard to different regulations and continues to favour organised groups over individuals, as is the case in virtually all countries. For a sample of RIA compiled for this report and covering the whole of the period since the Subordinate Legislation Act came into force, the number of submissions received ranged between 4 and 96, with an average of 24. Comparing RIA from 1990-91 with those from 1995-98 revealed no change in the average number of submissions. Although the small sample size involved does not allow a high level of confidence in this conclusion, it does seem *a priori* to be cause for concern that the extent of public involvement in the RIA process has not obviously increased over the course of a decade's experience. On the other hand, a qualitative assessment of the submissions indicates that they have on the whole become more sophisticated and have become a more important element in the process for both regulators and for the Committee in its review activity.

5.10. Apply RIA to existing as well as new regulation.

153. The principles and methodology of RIA are equally applicable to the review of existing regulation as to the assessment of new regulatory proposals and should be just as systematically applied when such review activity is undertaken. Indeed, the conduct of *ex poste* review is less demanding from the point of view of data collection, indicating that RIA has, at least potentially, more to contribute in the regulatory review context than in assessing new proposals.

154. Despite this fact, OECD's database on regulatory practices shows that RIA is less widely used by member countries in their regulatory review activity than it is to assess new regulation. Only 6 of 27 Member countries included in the database state that RIA is "routinely" used in the conduct of regulatory reviews, while another 3 countries (including Australia federally) state that RIA is "frequently" used in such reviews. Data are scarce on the reasons for this apparently counter intuitive failure to use RIA more widely in review. One plausible hypothesis is that much review activity is decentralised throughout the administration, external consultants and Parliamentary Committee processes and that this contrasts with the centralised quality control processes often undertaken when RIA is applied to new regulatory proposals. Thus, in the absence of a central quality control function, it is difficult to ensure that reviewers not confident in the use of RIA will systematically bring it to bear.

155. In assessing NSW performance against this best practice, a number of elements must be considered. Firstly, the Competition Principles Agreement requires all jurisdictions to review periodically all regulation which imposes restrictions on competition in order to verify that there remains a net social benefit associated with the restriction and that the benefit cannot be attained in any other way (than by restricting competition). Thus, regulation falling under this heading, which the 1996 census of legislation suggested would be a large proportion, is formally subject to a RIA requirement. However, the nature of these reviews remains largely unspecified in the agreement and the arrangements made vary considerably both within and between states, although all are subject to review by the National Competition Council, which must certify substantial compliance with the agreement.

156. Similarly, regulation which derives from national uniformity agreements subject to the CoAG principles (see above) is required to be reviewed at intervals of no more than ten years. Upon such review, regulation of this kind is likely to be subjected to RIA disciplines, since any replacement regulation (including amended regulation) would be subject to RIA requirements as per the CoAG principles. There is, however, nothing in the CoAG principles to specifically require that such reviews incorporate the use of RIA disciplines.

157. In sum, the two broad categories of regulation above, embracing both primary and subordinate legislation, would be subjected to RIA requirements in most cases upon review. For regulation falling outside these categories, the situation varies between primary and subordinate legislation. In the latter case, regular sunsetting at 5 yearly intervals under the Subordinate Legislation Act means that any regulation which is retained after review, whether in modified form or not, is again subjected to the RIA provisions applicable to new regulation. This is a very deliberate feature of the systematic sunsetting requirements of the Act. Review of primary legislation is based on administrative requirements and is, hence, somewhat less systematic. It is driven largely by a 1992 Memorandum from the Premier requiring that Ministers[18] "include review clauses in all legislation where this would be appropriate", with reviews required to determine whether the Act's policy objectives remain valid and whether the Act's substantive provisions remain the appropriate way to achieve them. Parliamentary Counsel has acted to ensure that

[18] *Review Clauses in Legislation.* Memorandum from Premier Nick Greiner MP. 1992 (unnumbered & undated, but circulated as an attachment to internal Drafting Circular 1992, No.1. Parliamentary Counsel's Office).

such clauses have subsequently been included in most substantive legislation produced, with the review generally being required to be completed during the sixth year of operation of the Act. This represents a major quality control initiative for primary legislation. However, no specific requirements are established as to the conduct of these reviews. Hence, there is no systematic mechanism for ensuring that reviews of primary legislation incorporate RIA disciplines. This appears to be a significant gap in the system and an area for consideration of future action in order to ensure consistency of treatment of different kinds of legislative review activity and to ensure that the potential benefit of review activity is maximised.

5.11. Assessment of NSW RIA requirements against OECD RIA Indicator

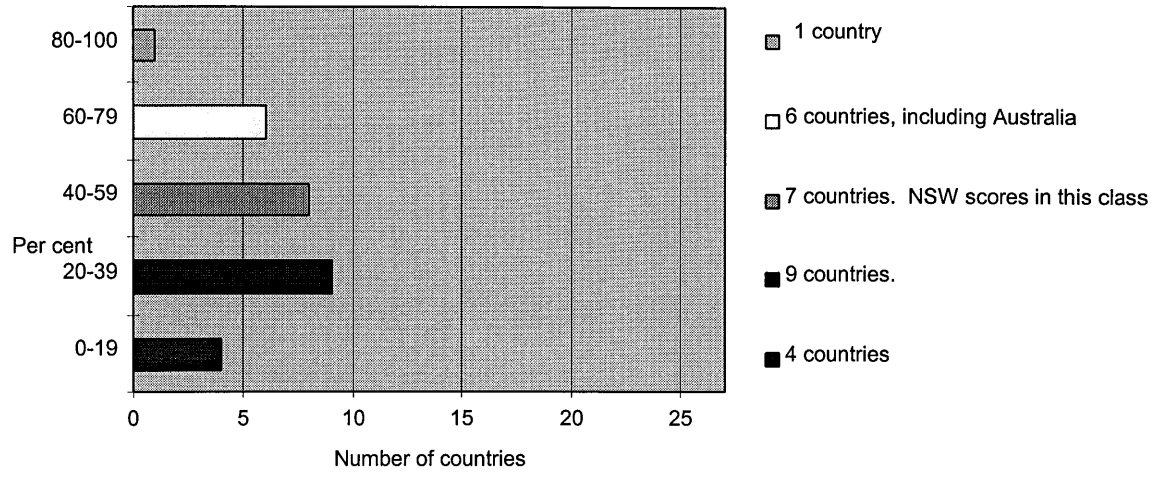
158. As part of the programme of follow up activity to the 1997 OECD Report on Regulatory Reform, a database describing aspects of regulatory systems and processes is currently under development. The database is based on a consolidated questionnaire answered by Member countries in March - May 1998. The PUMA element of this questionnaire asked approximately 160 questions on aspects of the processes of regulation-making and regulatory review. Responses were received from 27 of the 29 OECD Member countries. Initial analysis of the database, conducted by Secretariat with critical input from the regulatory management and reform group - a network of regulatory reform experts in Member countries - has focused on the development of a number of indicators of regulatory capacities. This work is, as yet, at an early stage of development. However, application of the indicator of RIA process quality developed as part of this work allows an additional, comparative view of the NSW system to be taken.

159. This indicator focuses on countries' ability to ensure systematically the quality of new regulatory proposals. It is a complex indicator that looks at many facets of the design of a RIA system. It favours RIA systems that are widely applicable, that are based on the benefit/cost principle, that include an independent verification of analytical standards and that include public consultation conducted on the basis of RIA documents. It also favours RIA systems which include explicit consideration of distributional consequences of regulation. Finally, an element of performance assessment is included, via questions that ask to what extent costs and benefits are quantified in practice.

160. A slight weighting has been applied in favour of specific requirements, vis-à-vis more general ones, as it is clear that the effectiveness of RIA varies widely in practice and that these variations appear to be closely related to the degree to which these specific requirements are implemented. (See *Regulatory Impact Analysis: Best Practices in OECD Countries*. OECD/PUMA, 1997). The graph presented below has had the horizontal axis re-scaled in percentage terms, with 100 per cent representing the maximum possible score on the indicator. The graph shows the distribution of scores in a quintile based grouping[19].

[19] Individual country rankings are not identified as this material remains "work in progress", with both data and indicator design enhancement efforts continuing at present.

Indicator of the quality of Regulatory Impact Analysis process requirements: NSW compared to OECD Member countries



Source: PUMA/OECD

161. While virtually all Member countries have RIA requirements, scores on this indicator are moderate on average and are quite widely distributed. Only one country scores above 80 per cent, while a total of seven countries score 60 per cent or more. 13 countries, or almost half, score below 40 per cent. The low scores relate to the fact that the degree of quantification achieved in practice is quite low in most countries, that RIA requirements have only partial coverage in most countries and that the degree of external scrutiny of RIA, both in terms of independent expert assessments within government and exposure to public consultation, is quite low.

162. It should be noted that the score attributed to NSW' system has been determined by the authors of this review, based on their research into the system, review of a sample of actual RIS and discussions with some of the key participants in the system. By contrast, the scores attributed to the OECD Member countries are based on self-assessment, with only limited dialogue with Secretariat conducted to date to ensure consistency and quality control. As a result, there may be some problems of comparability.

163. NSW' performance is quite strong in relative terms. It's score places it toward the upper end of the third quintile, with only seven countries ahead of it in the first two quintiles. Key strengths of the NSW system in terms of the indicator are its legislative basis, application to all subordinate legislation, use of benefit-cost analysis and full integration with a mandatory and open system of public consultation. Weaknesses are that it does not apply to primary legislation, does not include independent assessment of RIA quality conducted within the administration and achieves a relatively low level of quantification of costs and benefits in practice. A specific requirement to consider the distribution of costs and benefits is also, arguably, absent.

Chapter 6: Discussion of NSW RIA in performance terms

164. Chapter 4 has discussed the NSW RIA system in terms of its formal process elements. Concentration on process issues is important since it is only through the application of best practice processes that high quality regulatory outcomes can be systematically assured. However, sound processes will not necessarily yield good quality outcomes, as there is room for considerable variation in their implementation as a result of the quality and quantity of resources brought to bear, formal and informal messages as to the importance attached to these areas of Government policy and legislation and the impact of the external environment, including community attitudes and expectations. Finally, sound implementation of RIA systems requires the development of specialist expertise and a supportive culture within the administration over the longer term.

165. This chapter therefore considers evidence on the performance in practice of the NSW RIA system. Performance evaluation is necessarily difficult, as direct measures of regulatory quality are controversial and require considerable resource input, while Governments have generally devoted relatively few resources to programme evaluation in this, as in other, areas. What follows is, therefore, necessarily very much less than a full picture. It is drawn from a review of a sample of recent RIA conducted by the authors of this review, from data provided to the review and from discussions with major players in the NSW system.

6.1. Review of RIA provided

166. Review of the quality of RIA is itself an indirect measure of the impact of the system on regulatory quality. However, it is one step closer to that outcome. It is reasonable to conclude that a soundly argued RIA, which clearly identifies regulatory objectives and a range of feasible alternatives, and which includes a sound analysis of the impacts of each option, is evidence of a strongly functioning policy process that is likely to generate high quality regulatory outcomes consistently.

167. The review was provided with two samples of RIA completed in the period 1994-1998, with the samples being drawn to be representative of both good and poor quality RIA in the opinion of the Regulation Review Committee. The sample RIA were examined in regard to their explanation of the nature of the problem and rationale for regulation, identification of objectives, identification of feasible alternatives and their identification and quantification of costs and benefits. Finally, an overall quality assessment was attempted.

168. A first observation is that the RIA in all cases provide a clear picture of the nature of the regulation being proposed and of the specific elements of which it is composed. However, the RIA are almost uniformly poor in identifying the nature and extent of the problem that the regulations seek to address, while the underlying objectives of the regulation are also poorly identified. Thus, while some of the basic information requirements for successful consultation are established, it would in many cases be impossible for interested parties to argue cogently about the necessity of the specific regulations unless they had access to their own information about the size of the problem and trends in it over time.

169. Notwithstanding that regulation is not infrequently a political response to a one-off or rare event (as admitted overtly in one RIA submitted), regulators can, in most cases, identify the nature and extent of the problems that regulations seek to address. That this group of RIA fails to do so therefore is indicative of quality control problems, rather than resource limitations. This is in part a systemic problem as Schedule 2 of the Subordinate Legislation Act, which sets out RIA requirements, does not include specific reference to these matters.

170. The picture with regard to identification of alternatives is mixed. In a number of cases reviewed, the regulations related to relatively minor or machinery issues in respect of which the range of feasible alternatives is, indeed, likely to be quite narrow. In some cases, attempts had, however, been made to identify these and alternatives were often considered on an "issue by issue" basis, rather than constituting a presentation of two or three regulatory "models". However, overall, the range of alternatives considered was narrow and the specific detail that would be required to constitute a feasible alternative was frequently not identified, leading to the strong presumption that alternatives had been identified *"post hoc"* in a mechanistic fashion. One particular issue was that the choice between alternatives was often presented in simplistic "regulation, no regulation, self-regulation" terms, with few RIA attempting to compare different regulatory options. This was true even in one case where a high quality policy proposal was being discussed: The move from a generalised to a targeted licensing scheme was not discussed in terms of the options for type and degree of targeting.

171. Virtually all RIA contained quantification of likely costs. However, there was little evidence of consistency in methodology, such as would be expected in the presence of a widely observed set of methodological guidelines. For example, in one case the non-salary costs of public sector administrators were estimated through the addition of 30 % to salary costs, compared with the 80 - 120 % benchmarks which would normally be expected. In another case, the use of police resources was effectively regarded as costless by being dismissed as "being met from redeployment of existing budget allocations". In several cases, including that of the most sophisticated RIA reviewed, the costs of the proposed regulation were quantified, while the costs of the alternatives identified were not treated.

172. Not surprisingly, a smaller proportion of the RIA sought to quantify likely benefits. In many of the cases where this was done, the benefit estimates were based on simple and unsupported assumptions as to the likely effectiveness of the regulations in treating a range of problems. In no case did these refer to prior trends in the evolution of the problem or to the performance of similar regulatory solutions previously utilised in other jurisdictions. There was a tendency to dismiss alternatives as having no significant benefits attaching to them, despite the fact that this should rule such alternatives out of consideration on the grounds of lack of feasibility. A particularly glaring case was the discussion as an alternative of the use of a particular industry based co-regulatory scheme in another Australian State without any reference to the rationale that had lead to its introduction (or to the theoretical rationale for such schemes in general) and without any reporting of data on the experience with that alternative in that state. Notwithstanding this, the Committee identified this RIA as a relatively "good" one, by the standards they are accustomed to seeing.

173. A widespread issue in regard to the treatment of costs and benefits of more complex regulation is the indiscriminate use of research findings supposedly to support the case for the regulatory proposals, without any logical link between the proposals and the research findings being demonstrated. For example, a regulation dealing with asbestos hazards noted that a large percentage of mesothelioma cases have been connected with "the manufacture, transportation, construction and demolition of asbestos cement products", apparently in order to justify a conclusion that demolition was inherently risky. Immediately below this observation, data were cited indicating that unprotected demolition workers would, in any case, receive exposures generally below the proposed maximum regulated level.

174. In general, the review of specific RIA suggests that the exposure of the nature of the proposal and the underlying reasoning which is presented in these documents would be sufficient to enable a well resourced individual or organisation who already possessed significant data and understanding of the issues raised to participate effectively in a consultation process. The quality of the data, analysis and explanation is not, however, likely to be sufficient to provide for effective participation by the less well resourced or by the intelligent layman. Hence, the quality of RIA does appear to be a significant issue in limiting the breadth and effectiveness of consultation able to be undertaken.

175. Moreover, the analyses presented to not support a picture of a sophisticated and well functioning policy development apparatus. Lack of consideration of a wide range of options is a particular issue, with arguments in favour of proposals often being based on the fact that they are consistent with national regulation or international conventions, rather than dwelling on the merits of these. Moreover, there is little evidence of real research and data collection having been conducted prior to the adoption of regulatory proposals.

176. On the other hand, there is some evidence to suggest that the RIA requirements imposed are being adopted in a "pro forma" fashion without thought of applying them to the specific proposals in question in a more sophisticated way. Analyses of costs and benefits, particularly in regard to minor regulations not well suited to the conduct of such a formalised process, are often little more than fantasy musings which make no real contribution to the understanding of the merits of the policy or reasons for its adoption, nor assist in improving the quality of the policy debate.

6.2. Critical review of data and views of major participants.

6.2.1 Improvements to initial regulatory proposals

177. The contribution of the RIA process to regulatory quality is produced in a number of ways, some of which are necessarily difficult to observe. Both the Regulation Review Committee and the Intergovernmental Relations and Regulatory Reform Branch of the Cabinet Office believe strongly that the existence of the Subordinate Legislation Act requirements have significantly increased effective consultation with both business and the general public during the preparation of regulations and, not surprisingly, that the quality of initial regulatory proposals (i.e. those formulated before RIS are prepared) has frequently been improved as a result. This form of quality improvement is, however, intrinsically difficult to measure.

178. More easily observable are changes made to regulatory proposals during the RIA process. A relatively high incidence of such changes is likely to indicate that the RIA process is functioning effectively in exposing unanticipated effects, bringing superior alternatives to light or exposing other flaws in the analysis. Relatively few countries have systematically tracked the extent to which such changes have occurred. One example, however, is the Netherlands, which found that in the first 1 1/2 years of the operation of its expanded RIA system (1995-6) approximately 17 per cent of the proposals subjected to RIA were either modified or abandoned[20]. A similar exercise was conducted in Victoria in the early 1990s and concluded that approximately 20 per cent of proposals submitted to the Office of Regulation Reform as draft RIS over a twelve month period were either withdrawn or modified.

179. In NSW, the Regulation Review Committee has identified five cases in which regulations were modified or abandoned during 1997-8 during the course of the RIA process. This represents approximately 9 per cent of RIA reviewed by the committee or approximately 4 per cent of principal statutory rules adopted during this period.[21] It is probable that this apparently quite low rate of modification to proposals derives in part from the absence of a scrutiny procedure during the course of the development of the regulation and RIA. In the Netherlands and in Victoria, there are specialist regulatory reform bodies within the administration with a responsibility to review and provide advice on RIA during their preparation. This contrasts with the New South Wales model in which review is conducted solely by

[20] Formsma, S. "The Dutch Approach: Carrot and Stick" in *Improving the Quality of Legislation in Europe* Kellerman A., Ciavarrini Azzi G., Jacobs S.H., & Deighton-Smith R. (Eds) Kluwer Law International, The Hague, 1997. p220.

[21] Sources: Mr Jim Jefferis, Director, NSW Parliamentary Regulation Review Committee Secretariat; Office of Parliamentary Counsel.

the Committee after the regulation has been finalised and come into effect. Clearly, there are practical disincentives to disallowance or substantial amendment to regulations that have already been issued which do not exist in the case of changing or abandoning proposals still under development.

180. There is, however, some ambiguity attached to the interpretation of rates of modification of proposals. As regulators become accustomed to RIA disciplines and adopt better regulatory principles the quality of initial proposals should improve, such that subsequent modification is less frequently required. This effect may also be noted where a policy of taking a more interventionist approach in assisting regulators with policy and RIA development is taken by the reform body within the administration. For example, the United States' Office of Management and Budget has argued that the observed decline during the mid-1990s in the number of regulations that it returns to regulatory agencies for modification is largely attributable to this effect[22]. However, discussions with Intergovernmental Relations and Regulatory Reform Branch officials indicates that this strategy has not been adopted in NSW. Moreover, despite NSW relatively lengthy experience with RIA, the above review of Regulatory Impact Statements does not suggest that the quality of initial proposals and analyses has reached a level which would render modifications less widely needed.

6.2.2. The sunsetting process

181. A second indicator of the extent to which RIA disciplines are changing attitudes and practices among regulators can be derived from the available data on the sunsetting process. NSW is among several Australian States that use sunsetting systematically, with all subordinate legislation subject to automatic repeal. There is, however, quite limited experience with the widespread use of sunsetting among OECD Member countries. Only three countries routinely or frequently use sunsetting in relation to subordinate legislation, while eight use it "sometimes" and eight not at all. At least theoretically, systematic sunsetting should be a powerful tool of reform, due to its ability to force regulators to justify the whole stock of regulation over a limited period and its consequent ability to remove large amounts of poor quality regulation from the Statute books, effectively reversing the onus and requiring regulators to make a case for the continuance of existing regulation.

182. Data for NSW indicates that sunsetting has been successful in removing outdated regulation and clarifying regulatory requirements. The total number of principal statutory rules in force fell from 976 in September 1990 to 527 in September 1998, a decrease of 46 per cent. The decline in the number of pages of regulation was similar: from 15075 to 8494 over the same period, a fall of 43.6 per cent. Notably, the whole of this decline occurred during the period in which existing regulations were subjected to their first sunsetting: The total number of statutory rules (and of pages of statutory rules) remained approximately constant between 1996 and 1998.

183. Sunsetting has clearly removed much redundant regulation from the statute books and there is also evidence, albeit of a more equivocal nature, to suggest that it has played a significant role in the updating and rewriting of other regulation which has remained in existence. For example, data shows that 63 sets of principal statutory rules lapsed on 1 September 1998, while only 30 - less than half - were rewritten and reintroduced under the existing heads of power[23]. It is not clear how many of the remaining rules were, in substance, re-established under the authority of newly made primary legislation and how many substantively lapsed. However, it is at least possible to say that, for more than half of the sunsetted regulations, the whole regulatory approach has been completely reviewed and rewritten or they have been removed from the statute books. This suggests a high level of regulatory reform activity to which sunsetting may well have contributed significantly.

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[22] Katzen, Sally, Administrator, Office of Information and Regulatory Affairs (OMB), Executive Office of the President. Quoted in *Business Daily,* Los Angeles, March 18, 1997.

[23] Data in this section were compiled by the Office of the Chief Parliamentary Counsel and by the Secretariat to the Joint Parliamentary Regulation Review Committee and were supplied to the review by the latter body.

184. However, a less positive view of the effect of the sunsetting process is given by review of the impact of Sections 10 and 11 of the Subordinate Legislation Act. Section 11 provides for the postponement of the sunsetting of a regulation for one year on the order of the Governor-in-Council - a process that can be repeated up to five times. Section 10 provides for specific, alternative repeal dates for certain named regulations. In addition to the 63 regulations repealed on 1 September 1998, 101 regulations that would have lapsed on that date were retained in force through the use of Sections 10 (18 uses) and 11 (83 uses) of the Act. More tellingly, 52 of the 83 cases of postponement under Section 11 (i.e. 63 per cent of the total) were third, fourth or fifth year postponements, while the 18 uses of Section 10 related to regulations for which all five postponements allowable under Section 11 had already been utilised. In sum, then, of the 101 regulations whose sunsetting was postponed in 1998, about 70% were being postponed for the third, fourth, fifth or sixth time.

Table 2: Postponements of repeals, Stages 1 to 5.

Repeal Stage	period from	to	Repeal date	Rules remaining in force at 1 September 1998	Pages in force at 1 September 1998
1	prior to	1 September 1941	1 September 1991	4	430
2	1 September 1941	31 August 1964	1 September 1992	10	664
3	1 September 1964	31 August 1978	1 September 1993	10	545
4	1 September 1978	31 August 1986	1 September 1994	44	531
5	1 September 1986	31 August 1990	1 September 1995	18	387

Source: *Status of Statutory Rules. 1 September 1998.* Office of Parliamentary Counsel

185. The above table illustrates the overall impact of this widespread use of the postponement mechanism. It summarises the number of regulations (and pages of regulation) made before 1 September 1990 that remained in force as at 1 September 1998. That is, all 86 of the regulations in this category (totalling 2557 pages of regulation) have been in force for a minimum of eight years and therefore have had their repeal postponed on at least four occasions. That 14 regulations, totalling almost 1100 pages, remain on the statute books despite having been made prior to 1964 suggests strongly that the objectives of sunsetting have been, to a significant degree, defeated. The 1913 traffic regulations remain in force despite having originally been due for sunsetting almost a decade ago, and are likely to remain in force for some years to come, as the agreement of nationally uniform replacements is awaited. Had they been replaced as envisaged in 1990, the community could have profited from traffic regulation written in plain English and laid out in logical form, rather than being the product of innumerable amendments, for all of the past decade. It is difficult to envisage a more widely applicable set of regulations and, hence, one in which such a change would have been more visibly beneficial.

186. Provision for a postponement mechanism was recommended by the Regulation Review Committee in the July 1989 Report[24] that lead to the establishment of the Subordinate Legislation Act. The Committee saw postponement as being appropriate for use " in circumstances where the particular

[24] *Legislation for the Staged Review of New South Wales Statutory Rules.* Regulation Review Committee, Parliament of New South Wales, July 1989. pp 34-5.

department already had put before Government proposals for replacement of the particular statutory rules and its associated Act". In line with this view of postponement as being a means of providing for regulatory continuity in circumstances in which reforms were already in train, the Committee recommended that the postponement should be usable no more than twice for a given regulation. However, the version of the Committee's draft Bill passed by Parliament had amended this to make postponement usable up to five times in succession. Whatever the original intent of this change, the above data, together with other data showing that the use of repeated postponements has been even greater in past years[25] suggests that the change has functioned in practice as a means of frustrating the Act's intent that there should be a very short "sunsetting" cycle of five years. This is paradoxical, given that the five year sunsetting period was also substituted by the Government in place of the Committee's initial recommendation of a seven year cycle. In practice, it appears that the effective average life of a regulation in New South Wales is in the range of eight to nine years, but the actual life span varies from five years to eighty five years and more.

187. As noted in Chapter 4, the Premier issued Memorandum 97-30 to all Ministers in November 1997, setting out a very narrow range of circumstances in which postponements under Section 11 would be judged appropriate. The above data for the year to 1 September 1998 seems to indicate that there has been very limited compliance with this Memorandum. Moreover, the Memorandum does not even broach the use of amendments to Section 10 of the Act to cover sixth and subsequent postponements, and yet this has occurred with respect to 18 sets of regulations during 1998. An additional problem is that the requirement that the Regulation Review Committee be notified a month in advance of a proposed third or subsequent postponement, so that it can advise the Premier on its desirability before he makes the decision, is frequently defeated in practice. This occurs because the committee is usually given the minimum notice, which is too short to allow a regulation to be remade should postponement be opposed. A further problem is that the Premier has often approved the postponement prior to the committee being able to render its advice.

188. A revisiting of this process to improve certainty and consistency clearly needs to be considered. The current formal requirement for a five yearly sunsetting is considered unreasonably short by all major participants in the process, including Chief Parliamentary Counsel, Regulatory Reform Branch of Cabinet Office and most regulatory agencies. Moreover, it is at odds with the practices of all of the other Australian jurisdictions using sunsetting, three of which (Victoria, Queensland, Tasmania) use 10 year cycles, while South Australia uses a 7 year cycle. Only the Federal Government's proposed Legislative Instruments Bill includes a 5 year sunsetting clause.

189. As noted above, the Regulation Review Committee originally argued for a longer cycle and has been confirmed in this view by its experience with the current arrangements. The widespread perception that the current cycle is too short appears to be a key reason for the extensive use of multiple postponements, although it may also be that limited acceptance of the logic of sunsetting has encouraged an attitude of widespread willingness to undermine the substantive requirement of this part of the *Subordinate Legislation Act*. Moreover, it is difficult to credit that a significant amount of regulation would pass from being high quality to being in need of substantial change within a five year timeframe. To the extent that major change does not occur, the sunsetting requirement represents a diversion of policy resources (and reform effort) from potentially more productive uses, as well as being likely to reduce long-term support for reform. A study of the impact of sunsetting on regulations not more than five years old would provide a firmer basis for considering this issue, but would need to be conducted in sufficient depth to allow distinction between a lack of change due to insufficiently rigorous review and lack of change due to the regulations remaining substantially in line with "best practice".

[25] 65 of 100 repeals postponed in 1997 and 79 of 127 repeals postponed in 1996 were 3rd, 4th or 5th postponements, according to the Office of Parliamentary Counsel.

6.2.3. Targeting of RIA efforts

190. The issue of how effectively targeted are the resources devoted to RIA is largely discussed in Chapter 4.2. above. However, there is an element of targeting that is not directly related to the formal scrutiny arrangements made and that should be discussed in terms of its impact on the performance of the system in practice. This is the possibility that the implementation of a rigorous assessment requirement for one type of regulation may, if not accompanied by similar disciplines in regard to other forms of regulation, create the wrong incentives to regulate particular matters through the use of different, and less appropriate, legislative instruments. Specialist legislative drafters tend to have a clear view of the types of material that are appropriate for inclusion in primary legislation, in delegated legislation and in technical standards and other guidance material. However, this material is generally regarded as difficult to codify and thus is often only partially available, if at all, in published form for the guidance of regulators. This, in turn, can limit the ability of draftsmen to resist avoidance of scrutiny processes by the use of different, less effectively scrutinised, regulatory instruments.

191. The possibilities of engaging in "strategic" behaviour of this type are increased to the extent that the degree of scrutiny applied to different instruments differs. Thus, in jurisdictions such as NSW and, in fact, most other Australian States, where RIA requirements are confined to delegated legislation, the prospect of this behaviour is relatively great. Evidence on its extent is necessarily difficult to adduce, but a number of indicators of concern are apparent. In 1992, the Administrative Review Council[26] reported that the use of "legislative instruments" other than statutory rules (i.e. regulations as generally understood) had increased approximately tenfold over a decade in which the use of Acts and of statutory rules had been essentially constant. This was attributed in large part to departments wishing to maximise bureaucratic discretion and avoid procedural requirements and scrutiny. The report went on to make a number of recommendations that aimed to limit and control the use of such instruments. In 1997, the Small Business Summit resolved to study the use of "grey" regulation and the issues for scrutiny and quality control arising from it. Similarly, the Kean Report[27] on standards making discussed shortcomings in the tests applied in developing standards from the point of view of their increasingly frequent adoption as part of regulation. In Victoria, concerns that State Environmental Protection Policies and Industrial Waste Management Policies formed a significant area of legislative activity that fell outside the RIA requirements of the Subordinate Legislation Act lead in 1994 to amendments to the Environment Protection Act 1970 to create a parallel RIA scrutiny regime tailored toward these specific instruments.

192. This report has not been able to research the extent of this problem in practice in NSW. However, Parliamentary Counsel believes that the problem does exist in NSW, while the fact that RIA tests are not applied to primary legislation suggests *a priori* the likelihood that the problem would arise.

193. The wording of Section 3 of the Subordinate Legislation Act, insofar as it relates to its coverage, does not give confidence that many delegated legislative instruments beyond "regulations" narrowly defined would be captured. Moreover the experience of other jurisdictions, and concerns noted above at the national level, suggest that this is an issue for further investigation. The work currently being undertaken as a result of the Small Business Summit may provide a useful input, though the scope of the issue is such that this does not appear to be the most appropriate forum.

6.2.4. Disallowance of regulations

194. Disallowance provides the ultimate sanction on regulators for non-compliance with the process requirements of the Subordinate Legislation Act and, hence, is a key element of quality control. NSW

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[26] *Report of the Administrative Review Council on Rule Making by Commonwealth Agencies*. Report No. 32., 1992, presented to the Senate Standing Committee on Regulations and Ordinances.

[27] *Linking Industry Globally,* Report of the Committee of Inquiry into Australia's Standards and Conformance Infrastructure. (the Kean Report)

legislation provides for the disallowance of regulations on the motion of either House of Parliament, in contrast to other States such as Victoria where both Houses are normally required to vote for disallowance[28]. This difference should provide for a stronger discipline on compliance with the Subordinate Legislation Act, since disallowance would be more easily achieved, particularly in circumstances in which the Government does not have a majority in the upper house. In fact, the number of motions for disallowance of regulations made in the current Parliament, in which the Government does lack a Legislative Council majority, has been significantly higher than the historical average. This difference is largely accounted for by motions emanating from sources other than the Regulation Review Committee and reflects responsiveness to strong lobbying by interested parties in many cases.

195. Disallowance of regulations would, in general, be expected to be quite rarely used. The need to ensure consistency and certainty in relation to the regulatory structure acts to deter reliance on disallowance. For Ministers, a negotiated settlement of the concerns of the Regulation Review Committee is clearly preferable in most cases to the prospect of having regulations for which they are responsible struck out and the Parliament overruling the Government. In practice, the Committee believes, "Most achievements of the Regulation Review Committee will depend on consultation rather than disallowance of a regulation".[29] However, if such negotiated solutions are to be effective, and if regulators are to see the Subordinate Legislation Act as imposing a binding set of requirements, there must be a credible prospect of disallowance.

196. Information from the Regulation Review Committee indicates that recommendations for disallowance of regulations have been rare in practice. An average of approximately one to two such recommendations per year is estimated for the early period of the Act's operation, with the disallowance motion referring to a particular element of a regulation, rather than to the regulation as a whole, in most cases. No disallowance motions have been moved since May 1993. Two factors are cited as leading to this change. Firstly, an increased emphasis has been placed on the use of co-operative and negotiated arrangements by the Chairman of the Committee, with Ministers responding to this. Secondly, the absence of a Government majority in the Legislative Council in recent years has meant that disallowance recommendations have increasingly been made independently of, and often preceding, Committee scrutiny of regulations.

197. The Victorian experience of disallowance has been broadly similar. On the recommendation of the then Legal and Constitutional Committee, six regulations were disallowed in the first year of operation of the *Subordinate Legislation Act 1984*, following evidence of widespread non-compliance with its provisions, but formal disallowance has not subsequently been used as a result of SLA considerations. There have, however, been several cases in which Ministers have agreed to repeal and remake regulations in order to avert the probability of formal disallowance; a situation that is, in terms of the incentive effects discussed here, substantively similar. Moreover, as the 1985 disallowances of regulation were the result of complete non-compliance with SLA procedures, they were disallowances of complete Statutory Rules. This has arguably resulted in disallowance being seen as an instrument to be applied to the entirety of a regulation to this date in Victoria.

198. Evidence provided by the Regulation Review Committee for this Report indicates a large number of cases in which specific undertakings have been received from Ministers in response to Committee requests, including several in which changes to regulations resulted (see above). However, it is apparent that in certain cases the undertakings given have been to be more vigilant in ensuring due processes were followed in subsequent regulation-making - something which is neither easily enforceable nor helpful in addressing particular concerns with the regulations in question. Here, the judgement to be

[28] N.B. In the Victorian case, specific provisions within individual regulations providing for disallowance by either House are increasingly frequently used and over-ride the general provision of the *Interpretation of Legislation Act* which requires a vote from both Houses.

[29] Source: Mr Jim Jefferis, Director, Regulation Review Committee Secretariat, November 1998.

made is whether the inadequacies of the regulation, or the process followed in making it, are sufficient to justify the disruption and uncertainty involved in requiring an *ex poste* change. This then raises the question of whether a system that relies on an *ex poste* quality control mechanism is optimal.

199. A contrast between the role of Parliamentary scrutiny committees in relation to draft laws and in relation to regulations should be highlighted. In all Australian jurisdictions in which a Parliamentary committee has a role in reviewing new regulations, the role is conducted in an *ex poste* fashion. By contrast, those committees that exercise a scrutiny function in respect of draft legislation do so *ex ante,* so that their conclusions are able to inform the parliamentary debate and act as an input to the final shape of the legislation before it comes into effect. Interestingly, in Victoria, the same committee, the Scrutiny of Acts and Regulations Committee, exercises both an *ex ante* role in respect of bills and an *ex poste* role in respect of regulations. The adoption of an *ex poste* scrutiny regime for regulations has resulted from a desire to ensure that the regulation-making process is not unduly elongated by the scrutiny procedures. This is understandable in that lower-level rules are designed to be more responsive policy instruments than primary legislation. However, the trade-off is clearly seen in a lesser willingness to challenge procedural non-compliance in particular than would be the case under an *ex ante* system.

200. It seems clear that an improved degree of control over both regulatory and procedural quality could be exercised by moving from a solely *ex poste* approach to one which also included *ex ante* elements. OECD best practices support the exercise of an independent quality control function within the administration (hence, implicitly, in an *ex ante* fashion). This approach is currently adopted in whole or part by 12 of the member countries conducting RIA, or half of the total. Moreover, the experience of the NSW Regulation Review Committee also suggests clearly that a more timely intervention would yield better results. It is certainly possible to envisage a system of *ex ante* review by the Committee. This is an area in which OECD countries experience is limited - indeed only two countries systematically use Parliamentary bodies to review RIA quality at all, while two more use such bodies in some cases[30]. However, in the light of likely concerns as to the impact on the time taken to make regulation, the alternative of legislatively requiring that an independent body within the administration exercise specified quality control functions should receive prominent consideration.

6.2.5. Role and status of the Intergovernmental Relations and Regulatory Reform Branch, Cabinet Office

201. The experience of many OECD Member countries is that one of the largest single contributors to the achievement of consistent high quality RIA that lead to improved policy decisions is the exercise of a strong role by a specialised regulatory reform body located at or near the centre of government. In the United States, the Office of Management and Budget, located in the Executive Office of the President has a central role in vetting proposed regulation and ensuring RIA are completed to high standards. In the Netherlands, the Helpdesk run jointly by regulatory reform specialists in the Ministries of Economic Affairs and Justice has rapidly improved RIA quality.[31] By contrast, the equivalent bodies within the NSW Government have played a limited role in improving the contribution of RIA and associated Subordinate Legislation Act disciplines to regulatory quality outcomes.

202. Several reasons for this exist. As noted above, legislation has not conferred a formal role on any body within the administration to vet and approve RIA. However, where the various reports of the Regulation Review Committee have pointed to specific areas of concern, often over a lengthy period, there is little evidence of specific activities being undertaken to address the concerns raised. Certainly,

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[30] Data for March 1998, derived from the OECD Regulatory Indicators Database (unpublished to date).

[31] See *"Improving Government Capacity to Produce High Quality Regulation: Draft Country Study of the United States"* and *"Improving Government Capacity to Produce High Quality Regulation: Draft Country Study of the Netherlands"*, OECD/PUMA, 1998. [PUMA/REG (98)1 and PUMA/REG (98)2 (Official Documents - restricted availability)]

training activity has lagged, after an initial period of relatively high investment, as has the production of written guidance material on RIA and related topics. The chequered history of the Branch and its predecessors, described above and encompassing abolition, re-establishment and reorganisation, as well as a persistent low level of resourcing, is likely to have compromised its ability to undertake these tasks. However, government priorities have also played a role, with the RIA function being frequently seen as a lower priority element of reform than targeted review activity and/or "red tape reduction" measures. Action to address these issues should be a high priority if the performance of RIA processes in NSW is to be improved. A specialist Office of Regulation Reform is needed, with sufficient political, legislative and administrative authority, as well as sufficient resources, to play a central role in monitoring and improving the quality of RIA and providing strategic advice to government on its further reform.

6.3. Subordinate Legislation Amendment (Regulatory Flexibility) Bill 1998

203. This Bill creates a very strong presumption in favour of the use of performance based regulation. While many governments have adopted policies in favour of performance based rules and the use of such rules has, accordingly, increased over several years, the use of a legislated requirement may be unique. Such a requirement would be expected to have a stronger effect on regulatory outcomes than the government policy guidelines used, for example, in Victoria.

204. Further supporting this requirement is the secondary presumption in favour of the use of Alternative Compliance Mechanisms (ACMs) where a decision is made not to use a performance based regulation. Where an ACM is adopted, many of the advantages of a performance based rule are, effectively, obtained. This "regulatory flexibility" concept is, again, believed to be unique in the OECD. The Canadian Government introduced a Bill based on this logic to Parliament in December 1994[32], but it was allowed to lapse following concerns expressed by a number of stakeholders and, in particular, trenchant criticism from the Joint Standing Committee on the Scrutiny of Regulations[33]. The Committee saw the Bill as significantly detracting from the principle of equality before the law for a range of reasons. The Victorian Law Reform Committee reported on regulatory flexibility regulation in October 1997[34]. It recommended the adoption of a broadly similar process to that envisaged by the Canadian Bill, but included specific additional features aimed at forestalling criticisms of the kind made in Canada. The Victorian Government stated to Parliament in 1998 that it intended to adopt the broad outline of the Committee's proposal, but has yet to introduce legislation.

205. The concept of regulatory flexibility has aroused considerable interest among regulatory reformers. It is theoretically equivalent to performance based regulation, but is potentially able to obtain the latter's advantages over a wider field. Regulatory flexibility can be applied to the mass of existing regulation. However, the NSW model does not do this being, rather, restricted to new regulation. This is presumably a result of the very rapid sunsetting cycle in NSW, but would become an issue of importance were this Report's recommendations for the elongation of that cycle to be implemented. Regulatory flexibility can also capture many of the benefits of performance based regulation in circumstances in which governments may be unwilling to legislate in performance terms, perhaps due to perceived community sensitivities over important safety issues, for example.

206. Regulatory flexibility has, however, quickly found strong opposition in jurisdictions in which it has been discussed. In addition to the Canadian situation noted above, significant concerns arose in

[32] Regulatory Efficiency Bill C-62.

[33] *Report on Bill C-62*. Parliament of Canada, Joint Standing Committee for the Scrutiny of Regualations, 16 February, 1995. It is understood that this report, prepared by the Committee Secretariat, was never formally adopted by the Committee.

[34] *Regulatory Efficiency Legislation*. Parliament of Victoria, Law Reform Committee. October 1997.

Victoria both before and during the Law Reform Committee's research on the issue. Key concerns regarding ACMs include:

- **Competitive impact.** Preparing ACMs may be resource intensive and thus largely suited to major corporations. The result may be that access to ACMs which lower regulatory costs may function as a competitive advantage for large firms.
- **Deterrence problems.** An ACM may implement such a different approach to compliance that existing regulatory penalties are, effectively, inapplicable in the case of breaches. To the extent that this is so, there may be real problems in ensuring adequate sanctions for non-compliance that is not severe enough to warrant cancellation of the ACM.
- **Transparency principles.** ACMs effectively substitute for regulation, and yet without specific treatment of the issue there is no guarantee of a community "right to know" what standards certain firms are being required to comply with.
- **Ministerial discretion.** Unless ACMs, or the guidelines for their review, can be scrutinised and disallowed by Parliament, there is a significant shift in regulation-making power from the Parliament to the Executive.

207. These problems were discussed in the Victorian Law Reform Committee's report and specific proposals were made to address each of them. A consideration of these proposals suggests that they ought to be effective in meeting the concerns raised. However, the current NSW Bill is silent on all of these issues. Moreover, in contrast to the Victorian case in which a public call was made for submissions and active international search was made for expert opinion, no consultation whatsoever was undertaken in NSW on the basis of the specific proposals contained in this Bill[35]. As a result, there must be concern that public support for the Bill may be compromised and that the achievement of the Bill's objectives may be undermined by a lack of sufficient procedural safeguards. Action to address these concerns should be urgently considered, given the pioneering nature of the legislation and the consequent potential for the concept of regulatory flexibility to be undermined due to failures that might, in reality, be due to specific and remediable shortcomings in the legislation.

[35] Consultation was conducted on the basis of the Green Paper *Regulatory Innovation: Regulation for Results* during 1996. However, the Green Paper contained a range of proposals and did not emphasise the role of regulatory flexibility. It is understood that no consultation was conducted on the basis of the specific proposals contained in the *Subordinate Legislation Amendment (Regulatory Flexibility) Bill* prior to its introduction.

Chapter 7: The National Context

208. As the regulatory reform effort has developed and matured in Australia, there has been an increasing convergence in approaches, both to RIA issues and on wider reform topics. As a result of this, a review of NSW RIA procedures must take account of the wider national context in making recommendations for the future of RIA in NSW. This chapter discusses three distinct elements of the national context. The first is the rise of regulatory harmonisation agreements among the states and the implications of this for regulatory quality. The second is the initiative taken by the Council of Australian Governments in order to establish a single, consistent set of regulatory guidelines and RIA disciplines to guide regulation made under harmonisation agreements. The third is the Federal Government's *Legislative Instruments Bill*. The Bill is important because it proposes a number of significant new steps in the use of RIA and related processes which go beyond those adopted in the majority of States since the mid-1980s. Moreover, the Federal Government has recently taken a leading role on regulatory reform matters, committing itself to a 50 per cent reduction in regulatory burdens on business, commissioning the Bell Report and convening an annual series of "Small Business Summits" in order to move toward implementation of this commitment. Thus, some major provisions of the most recent Legislative Instruments Bill (from 1996) are discussed in this chapter in terms of their likely importance for future RIA developments in NSW.

7.1. Regulatory harmonisation and regulatory quality

209. Since the 1980s a rapidly expanding range of regulatory harmonisation agreements have been adopted by standing Councils of Ministers responsible at State and Territory levels for particular portfolio areas. The specific nature of these agreements varies from strict uniformity agreements, with jurisdictions agreeing *ex ante* to pass "template" legislation, to harmonisation arrangements based on the agreement of essential principles or "common essential requirements". In general, however, it can be said that they are the vehicle for the achievement of a high degree of regulatory uniformity across a wide range of policy areas that are within the constitutional responsibility of the States and Territories.

210. As these agreements increased in number and scope in the later 1980s and early 1990s, concern arose at the increasing incidence of agreed national requirements having difficulty in meeting individual States' RIA processes. States with relatively highly developed RIA systems saw that, in some cases, the proposed uniform agreements would not pass the required scrutiny. The potential for the benefits of achieving regulatory uniformity to be undermined by the costs of adopting poorer quality regulation than would otherwise be permitted by State scrutiny processes was clear. The CoAG Principles and Guidelines (discussed in Section 7.2. below) were developed primarily as a response to this concern.

211. However, while this issue was recognised, another has remained largely undiscussed. Despite the now extremely widespread use of harmonisation arrangements in Australia, no clear principles have been developed to guide the decision as to whether harmonisation or uniformity agreements should be adopted in particular areas. While the European Union has developed the principles of proportionality and subsidiarity to guide the process of determination of whether regulation should occur at European , national or sub-national levels, the use of harmonisation and uniformity agreements in Australia was being determined by individual Ministerial Councils without equivalent overarching guidance.

212. Significant costs can attach to the adoption of regulatory harmonisation programmes, with closer harmonisation (e.g. strict uniformity requirements) likely to be more costly than looser arrangements. Therefore, a benefit/cost approach to this issue requires that sufficient offsetting benefits be reliably identified before a decision to adopt a harmonised approach is taken. The need for this discipline arises

because there can be a number of powerful forces tending to favour harmonisation, thus creating pressure on policy-makers to move in this direction.

213. The costs of harmonisation initiatives are of three types. Firstly, significant policy-making resources are employed in all affected jurisdictions in developing proposals for harmonised standards and negotiating between them to achieve a final outcome. Some agreements have taken several years to conclude, hinting at the potential size of these costs in more contentious areas of regulation. Secondly, there may be sound reasons for differences in regulatory standards between jurisdictions. These can be related to differences in values and preferences or to differences in objective factors - for example, climate. Adoption of a uniform outcome necessarily means that standards that are sub-optimal for some jurisdictions are adopted. Thirdly, because of the resource intensive and time consuming nature of the process of making harmonised regulation, there is a likely tendency toward inertia as time passes. If necessary modifications to regulation to respond to changing circumstances and preferences are delayed or abandoned, a significant dynamic cost attaches to the use of harmonisation.

214. The adoption of the principles of subsidiarity and proportionality in Europe represents an attempt to ensure that these costs are weighed in the process of deciding at what level of government regulation should occur. They therefore have the potential to add an important regulatory quality assurance element. An expression of the principle of subsidiarity has been incorporated into the Maastrict Treaty. Article 3b states:

> *In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the propose action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.*[36]

215. The principle clearly embodies a presumption in favour of regulating at the lowest possible level of government, which is often expressed in terms of "keeping government as close as possible to the people". It is arguable that adoption of this presumption may in part be a reaction to the necessary ceding of elements of national sovereignty involved in the construction of the Community. However, a recognition of the greater costs and dangers of regulation at a higher level of government is also an important consideration. The Treaty therefore imposes a requirement that there be clear offsetting benefits, in terms of effectiveness, in acting at a Community level.

216. The principle of proportionality acts in concert with that of subsidiarity. It effectively mandates the application of a "threshold test" to proposals for Community legislation. That is, the proposal to regulate at Community level is required to be proportionate to the objective sought to be achieved, having regard to the possibilities of regulatory failure and the costs involved.

217. The adoption of Mutual Recognition represented a concrete expression of the principles of subsidiarity and proportionality at the European level. Mutual recognition was envisaged as an arrangement by which most of the benefits of regulatory uniformity could be obtained without the costs of achieving this uniformity being incurred. This was particularly important in the achievement of the Single Market Programme, providing for the free movement of goods, services, capital and labour.

218. Australia has also adopted the mutual recognition concept. However, it is arguable that the impact of mutual recognition in Australia has been perverse, vis-a-vis the intentions originally underlying it. The introduction to the CoAG Principles and Guidelines, released three years after the adoption of the Mutual Recognition Agreement, states that:

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[36] See *Treaty for the Formation of the European Community (1992)*, Article 3b. Available at the European Commission website www.europa.eu

> *The operation of the Mutual Recognition Agreement has also highlighted discrepancies in standards between jurisdictions and has created an impetus for the development of national standards. Under that agreement, Ministerial Councils can be called upon to make a standard on any product in the marketplace or develop nationally uniform criteria for the registration of any occupation.* ***Given this mechanism for the development of nationally applicable standards****....*(emphasis added).

219. This paragraph represents a widespread view of the import of mutual recognition, but it is one largely unsupported by the text of the Mutual Recognition Agreement. This states that:

> *The Heads of Government have agreed that the mutual recognition principles should apply in all areas where achievement of national uniformity of regulations is not essential to the efficient working of the Australian economy and that national uniformity will apply where such is necessary to facilitate international trade.*[37]

This paragraph clearly shows that the Agreement contains a presumption against uniformity and in favour of mutual recognition. The use of uniformity is to be limited to cases where it is "essential" to the efficient workings of the national economy, including the facilitation of international trade. Clearly, mutual recognition as a concept was intended to promote acceptance of, not highlight, divergences ("discrepancies") in standards between jurisdictions. It was certainly not intended as a "mechanism for the development of nationally applicable standards". According to a major review of mutual recognition conducted in 1997;[38]

> *Mutual recognition is based on the premise that regulations and standards covering goods and occupations in one state or territory meet community expectations and should be acceptable in other jurisdictions.*

The same review argues that, when mutual recognition was first mooted by Australian governments in 1991, it was envisaged as an alternative to national uniformity that would operate in parallel with uniformity schemes, with the use of the latter largely limited to cases where significant externalities existed with implications for the public good. Thus, while CoAG Principles document cited above is strictly correct in stating that Ministerial Councils can be called upon to determine nationally applicable standards for any product or occupation, the circumstances in which this can occur are strictly limited: a limitation which is further reinforced by the need for a two thirds majority in favour of the adoption of such standards - effectively a requirement for agreement by at least six of eight jurisdictions.[39]

220. Notwithstanding these original intentions, a brief consideration of the broad areas in which uniformity has been adopted as the goal in preference to mutual recognition raises doubts as to whether significant externalities with distortive implications for interstate trade exist in all cases. The list includes food, occupational health and safety, dangerous goods, trade measurement, registration and labelling of agricultural and veterinary chemicals and boilers and pressure vessels.[40] In fact, there are currently more than 40 standing Ministerial Councils involved in pursuing regulatory harmonisation or uniformity.

221. Given this context, consideration should be given to identification and adoption of appropriate principles and practical tests to guide the choice as to whether and when to develop national uniformity schemes or schemes of regulatory harmonisation, as opposed to reliance on state based regulation and

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[37] *Intergovernmental Agreement Relating to Mutual Recognition*, 11 May 1992, Recital C.

[38] *The Impact of Mutual Recognition on Regulations in Australia*, Dr Steven Rimmer, Industry Commission, 1997. p1.

[39] *Intergovernmental Agreement Relating to Mutual Recognition,* Section 4.3.2., Section 4.7.2.

[40] *The Impact of Mutual Recognition on Regulations in Australia, op.cit.*, p2.

mutual recognition where applicable. Where uniformity is seen as appropriate, the question of whether the regulatory power should be transferred to the Federal jurisdiction necessarily arises, given the obvious benefits in terms of policy responsiveness and the efficiency of policy-making which attach to decision-making by a single jurisdiction, versus achieving and implementing agreement among eight jurisdictions.

7.2. RIA requirements mandated by the Council of Australian Governments

222. The Council of Australian Governments (CoAG) is the name for the gathering of the heads of the eight State and Territory Heads of Government, together with the head of the Federal Government. This group meets approximately bi-annually. In April 1995 CoAG agreed to the introduction of a framework of principles and guidelines to be used by Ministerial Councils and national standard setting bodies when developing proposals for national standards and/or regulation. One of the key features of this agreement is the requirement for all regulatory proposals to undergo regulatory impact analysis.[41]

223. The current CoAG requirement incorporates amendments made to the original framework in November 1997[42]. A key aspect of these requirements is their breadth of coverage. The principles of good regulation are to apply to

> "..decisions to be given effect through principal and delegated legislation, administrative directions or other measures which, when implemented, would encourage or force businesses to pursue their interests in ways they would not otherwise have done"

Similarly, regulatory impact assessment is to be applied to all

> "legally enforceable instruments which impose mandatory requirements upon business and the community as well as to those voluntary codes and advisory instruments...for which there is a reasonable expectation of widespread compliance".

224. Clearly, the CoAG requirements represent a major step forward by comparison with NSW and other State Subordinate Legislation Acts in that they purport to have the broadest possible coverage, thus providing consistency in quality control mechanisms for all legislative instruments and ensuring that there is little room for strategic behaviours aimed at avoiding scrutiny requirements.

225. The principles of good regulation demonstrate a high degree of consistency with OECD best practices as set out in the 1995 Recommendation of the OECD Council and the 1997 OECD Report on Regulatory Reform[43]. They cover a wide range of issues including minimising trade restrictive and anti-competitive effects, use of international standards and practices, regular review of regulation, use of performance standards and plain language drafting, regulatory flexibility and control of bureaucratic discretion.

226. The RIA requirements are based on a more flexible approach to methodology than has, at least formally, been adopted in Australia previously. The need for systematism is stressed, but no direct

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[41] Regulation and Its Review, 1996-7. Industry Commission, Annual Report Series. Government of Australia. pp47-9.

[42] *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies.* Council of Australian Governments, November 1997.

[43] *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation; Including the OECD Reference Checklist for Regulatory Decision-Making*, OECD/PUMA, Paris. 1995.
The OECD Report on Regulatory Reform. OECD, Paris, 1997. See Chapter 2: Regulatory Quality and Public Sector Reform.

instructions as to analytical tools are given. Instead, risk analysis, cost-benefit analysis and cost-effectiveness analysis are briefly introduced, with the instruction that "depending on the circumstances, one or more of the following techniques may be used". There is some inference in the discussion of the techniques that cost-benefit analysis should be used wherever possible, as well as the instruction that, even where cost-effectiveness analysis is used benefits should still be quantified as far as possible. The explicit treatment of risk assessment is unique in Australian RIA and represents a step forward in RIA requirements, while the explicit acceptance of the use of cost-effectiveness analysis as an alternative to cost/benefit analysis may represent no more than an acknowledgment of the reality that formal cost/benefit analysis is not possible in regard to some kinds of regulation. There does, however, appear to be some possibility that the wording of the requirements is sufficiently imprecise as to yield results in which cost/benefit analyses are not conducted in situations in which they would be beneficial.

227. RIA are required to demonstrate the need for regulation and identifies objectives, identify and assess feasible alternatives, considers distributional factors, demonstrate a likely nett benefit from the proposed regulation and demonstrate consistency with international standards. Procedural requirements include the setting of a date for review or sunsetting of the regulation, conduct of a consultation process on the basis of a published RIA and consideration by the Ministerial Council of the submissions made as part of this consultation. The procedural requirements also include a review of the RIA by the Federal Office of Regulation Review. The ORR does not have the ability to prevent the regulation-making process proceeding but can report to the Committee on Regulatory Reform established under CoAG. A second form of quality control is also provided. Where two or more jurisdictions are dissatisfied with the RIA undertaken or the process followed the heads of government of those jurisdictions may write to the Chair of the Ministerial Council requesting an independent review of the process. In this case, the standard-setting procedure is suspended pending the undertaking of a review. Again, the Ministerial Councils are not bound by the results of a review, but if they do not act according to its recommendations the matter can be considered by Heads of Government.

228. These procedural requirements demonstrate a high level of consistency with those in use in the Australian States, as was intended when the Guidelines were formulated. The independent assessment requirements, potentially being twofold, seem to have greater rigour than in any of the State systems, although the lack of an ability to freeze regulatory action where RIA is inadequate, other than at the specific request of two Heads of Government, somewhat weakens the process. In this context, it must be noted too that Governments using this objection mechanism must also agree to pay the costs of independent reviews of the impact assessment. There is certainly an unusually large degree of political involvement designed into the impact assessment process. This may have benefits in terms of improved legitimacy, although some loss of independence by technical specialists in the administration also appears to be implied.

Procedural consistency

229. The NSW Subordinate Legislation Act 1989 recognises the potential conflict between uniformity and regulatory quality assurance and, having been drafted six years prior to the adoption of the CoAG RIA requirement, resolved the issue by providing a blanket exemption from NSW RIA requirements in the case of "Matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or of another State of Territory".[44] This exemption, which remains in force, is framed in extremely broad terms, arguably providing a RIA exemption to any legislation in respect of which a "substantially uniform" antecedent can be found in even one other Australian jurisdiction. By taking this view, the NSW Parliament clearly resolved the potential conflict *ex ante* and in all circumstances in favour of uniformity. By contrast, the Victorian Subordinate Legislation Act 1994 (itself passed before the CoAG principles were agreed) provides a

[44]See the *Subordinate Legislation Act 1989*, Section 6(1)a and Schedule 3(4).

narrower exemption, which is limited to the implementation of national uniformity agreements in cases where a RIA process substantially equivalent to that required under the Victorian Act has already been carried out.[45] As noted above, the NSW Parliament has recently revisited this issue, adding a second exemption for the implementation of uniformity schemes which is limited to circumstances in which equivalent RIA have been conducted.

230. While these two exemptions would seem to overlap significantly, it may be that, given the passage of the CoAG principles, this difference will have little real effect (as all such rules will, necessarily, have had a similar RIA discipline applied at the national level). This will be true to the extent that the CoAG principles do, indeed, lead to the application of similar RIA rigour to that provided in State jurisdictions. Limited evidence is available on this issue at present, though a review of the procedural requirements noted above suggests that it is likely that this will be the result. Nonetheless, it may be argued that requirements in State legislation which effectively mandate the following of these CoAG principles provide a significant element of their authority and that the NSW Act would therefore be improved via the removal of the previous, blanket exemption.

231. In summary, the CoAG principles and guidelines are in a number of respects more comprehensive than, and superior to, the legislative framework currently operating in New South Wales. This may largely reflect their more recent origin, and hence the accumulation of knowledge on regulatory reform best practices rather than underlying differences in approach, particularly given that NSW was instrumental in their drafting. Review of NSW requirements in the light of these CoAG principles and guidelines is warranted, with potential gains in terms of both consistency of treatment and effective quality assurance for non-uniform NSW regulation. A particular issue is the considerably broader coverage of the principles and RIA guidelines under CoAG, a factor that is also prominent in the Legislative Instruments Bill discussed below.

7.3. The Federal *Legislative Instruments Bill*

History

232. The proposal for a *Legislative Instruments Bill* initially arose from a 1992 report prepared by the Administrative Review Council entitled *Rule Making in Commonwealth Agencies*. The Council had noted that delegated legislation underwent little public scrutiny, despite the effect it could have on the affairs of individuals and business. It recommended passing a single Act to: clarify the use of subordinate legislation; require limited public consultation during the preparation of rules; and impose ten year sunsetting on all new rules. The proposals by the Council were generally consistent with the requirements for the assessment of subordinate legislation that were already in place in NSW and Victoria.

233. On 30 June 1994, the *Legislative Instruments Bill* was introduced in the Senate. It was subsequently referred by the Senate to the Senate Standing Committee on Regulations and Ordinances, which endorsed the objectives of the legislation with some qualifications on matters of detail. In November 1994, the Attorney General asked the Committee on Legal and Constitutional Affairs to report on the legislation. In February 1995 the Committee reported, recommending the passage of the Bill, but proposing significant changes, including a requirement for mandatory public consultation on all legislative instruments and the introduction of a sunsetting regime.

[45] Interestingly, an exemption written in similar terms to the Victorian one is contained within amending legislation currently before the Parliament (Subordinate Legislation Amendment (Regulatory Flexibility) Bill 1998). The amendment does not, however, envisage repealing the existing exemption, apparently leaving open the possibility of overlap and inconsistency between the two provisions.

234. Although the Government supported the Committee's recommendations, the Bill had not been passed when Parliament was prorogued prior to the 1996 election. The Bill was considered by Parliament again in 1997 and is currently undergoing some re drafting by the present Government in preparation for reconsideration by Parliament before the end of the current session.

Key proposals

235. The *Legislative Instruments Bill* proposes a range of regulatory quality assurance mechanisms for delegates legislation that is broadly similar to those in place in most States, including NSW, but which includes a number of new or enhanced features. This section does not comprehensively summarise the Bill but, rather, draws attention to key elements, particularly where they differ from existing practices and appear to represent significant improvements.

Coverage

236. The Bill's general provisions apply to all delegated legislative instruments, defined as instruments of a legislative character made in the exercise of a power delegated by Parliament. It is clear that the application of the Bill is intended to be broad and to cover all existing subordinate legislation which must be tabled in Parliament. The definition avoids problems of nomenclature by not being limited to a specific range of instruments. The definition provided in the Bill is comprehensive and provides guidance indicating that an instrument is legislative if it determines or alters the law rather than applying the law. A different approach is taken, however, to the definition of " legislative instruments with the potential to affect business", to which the Bill applies additional consultation requirements. Instead of relying on a general definition, all principal legislation specifically considered to affect business is to be identified in Schedule 2 of the to the proposed Act. Departments have been asked to consider which legislation within their administration should be included in the schedule to the Bill.

237. It is not clear why two such different approaches have been taken within the same Bill. The Schedule approach clearly has the disadvantage of requiring frequent updating if it is to remain relevant, while an *ex ante* definition would seem inherently less satisfactory than the alternative of allowing Ministers to determine, based on initial discussions, which Bills require a consultative approach and subjecting this decision to challenge. By contrast, the provision of a broad definition of legislative instruments seems potentially to be a step forward compared with the narrower definitions used in most State Acts, which often exclude significant delegated legislative instruments from scrutiny in practice.

Consultation

238. In cases where legislative instruments are made under primary legislation listed in schedule 2, the Bill obliges the Minister to undertake a series of procedures commencing with preliminary consultation. As a first step the Minister is required to notify any representative and affected groups of the intention to make the legislative instrument and to invite comments on the proposal. The Bill explicitly encourages voluntary consultation on all other instruments not identified as directly affecting business. However, where the enabling legislation is not listed in the schedule this preliminary consultation is not mandatory. The process of identifying enabling Acts for inclusion in the schedule is therefore crucial. In practice, a wide variety of legislation would be expected to be judged as likely to affect business and, hence, included in the Schedule. However, the restriction of consultation requirement to this category of legislation makes it a less encompassing requirement than that used in the States and apparently betrays a narrow view of the purpose of regulatory quality initiatives. Clearly, major regulations with impacts on, for example, individual rights would be prime candidates for a full and open consultation process, but would be likely to be excluded by this Bill.

239. A second consultation phase is required to be conducted on the basis of the Legislative Instrument Proposal (LIP - see below). Once the LIP is certified as adequate, the rule maker is required to invite written submissions relating to the proposed instrument for a period of twenty one days. If the responsible Minister receives advice that the rule is likely to be controversial or sensitive, the Minister must determine whether or not to invite participation in a public hearing, and document the reasons for that decision. The Bill contains provisions to ensure that the LIP is made widely available, that consultation is advertised widely in each State and Territory and that representative groups are specifically identified and included. Submissions received are required to be considered before the instrument is made. At the end of this process, the rule maker is required to prepare a written consultation statement detailing compliance with the procedure required by the proposed Act.

240. Taken together, these consultation requirements are extremely robust and reflect best practices. In particular, the provision for an *ex ante* identification of interested parties mandates a proactive approach to consultation that is likely to help increase effective participation. Moreover, the requirement to summarise explicitly the consultation history and responses provides useful accountability. This seems to represent a strengthening of similar requirements in State Acts.

241. A failure to comply with the consultative requirements of the proposed Act does not affect the validity or enforceability of an instrument. However, information regarding the consultative process is required to be communicated to Parliament, providing the basis for possible disallowance following scrutiny by either house.

Regulatory Impact Analysis

242. Following preliminary consultation, the Bill requires the preparation of a Legislative Instruments Proposal (LIP) including specific requirements for the conduct of regulatory impact analysis. The LIP must contain, *inter alia*, a statement of the issues giving rise to the need for the proposed instrument and the objective of the instrument. It must also include a statement of the various options that may constitute a viable alternative, and a statement of the direct and indirect social and economic costs and benefits of the proposed instrument, including any restriction on competition. These requirements are similar to those of the Subordinate Legislation Acts of NSW and Victoria. Notably, like the Victorian Act but in contrast to the NSW Act, the *Legislative Instruments Bill* requires an expert and independent assessment to verify the quality of the regulatory impact assessment.

243. The rule maker is required to seek written certification from a regulatory review body that the preliminary consultation process was adequate and that the LIP sufficiently addresses the matters that it is required to address under the Act. A regulatory review body is defined as a body, not necessarily within the Australian Public Service, so declared by regulation. At this stage the Federal Office of Regulation Reform (ORR) within the Productivity Commission is likely to undertake this role. The ORR produces a guidebook to assist regulators to undertake RIA. This guidebook, *A Guide to Regulation*, is available on the Internet and is currently being updated. This provision for a "competitive market' in the provision of independent advice has precedent only in Victoria's *Subordinate Legislation Act 1994.* However the reference to a "Regulatory reform body" is more restrictive than the Victorian requirement for independent advice and probably does not imply the risk of advice being "bought" which appears inherent in the Victorian system. Given this, provision for more than one source of advice may be on balance a benefit by preventing the possibility of bottlenecks in advice provision, though the likelihood of such a problem occurring does not appear great in effect.

Register of Instruments

244. The Bill creates the statutory position of the Principal Legislative Counsel within the Attorney General's Department, with responsibility for ensuring the quality of drafting of legislative instruments

and maintaining its availability for inspection by the public. The PLC is to create a Federal Register of Legislative Instruments, to be kept on computer and made available for inspection by the public. The register is to contain all legislative instruments, with new instruments being added as made and existing instruments registered progressively over 27 months after the Bill comes into effect. An instrument will not be enforceable unless registered.

245. The use of a register would be unique in Australia. However, this mechanism for improving access to regulation is being increasingly widely used in OECD countries and represents a promising use of technology to make government more open. Currently 16 OECD countries make use of such a register. The implementation of a similar register should be considered in NSW as an adjunct to the sunsetting requirements in place.

Sunsetting

246. The proposed Act will require the automatic repeal, or sunsetting, of each legislative instrument five years after the instrument commences. All existing instruments 'backcaptured' into the register will also be automatically repealed five years from the last date that they could have been put on to the register. Thus, all existing instruments would be repealed within 7 years 3 months after the commencement of the Act.

247. Some derogations from the strict five year rule are contemplated. The Bill would authorise the Attorney-General to issue a certificate extending the sunsetting period of an instrument for up to one year when drafting or consultation cannot be completed in time. The governor-general may also make regulations to provide for a fifteen year sunsetting period for instruments intended to confer long term rights on a person or body, if the standard sunsetting regime would frustrate that purpose.

248. The proposed five year sunsetting is, of course, the same as that currently applying in NSW. NSW experience suggests that, in practice it is likely to be too short a period of time to maximise the effective use of resources dedicated to undertaking RIA under the proposed Act. If the sunsetting of instruments occurs too frequently, the process of review may be seen as ineffective, with the consequent risk of losing support for the process. The limited availability of "postponements", by comparison with the NSW Act would appear likely to bring this problem to the surface quite quickly. A danger may also exist that the provision for a 15 year sunsetting may be used significantly more widely than currently anticipated in order to undermine the 5 year sunsetting requirement.

Parliamentary Scrutiny

249. The proposed Act provides for Parliamentary Scrutiny of legislative instruments. In order to have effect, all instruments must be placed before the House of Representatives and the Senate within six sitting days, regardless of whether they are of a type that is disallowable. This reduces by nine days the present maximum period that an instrument may be in effect before being subject to scrutiny and possible disallowance. Any document incorporated by reference must, on request, be made available to the Parliament for inspection.

250. It is notable that the Parliamentary scrutiny provisions to not provide a formal role for a specific Parliamentary committee to consider rules and make recommendations to Parliament, unlike the State Acts. This appears to be a significant weakness, as it is unclear how shortcomings in instruments would be brought to the attention of the Parliament for its consideration. Moreover, despite provision for either House to notify a Minister that an instrument will be disallowed up to six months hence, and to require a remaking or amendment within this time to take account of its concerns, there does not appear to be an effective means by which negotiated solutions to identified problems (short of disallowance) could be

implemented, despite the fact that these have been the most widely used mechanisms by State Parliaments.

Review of Act

251. The Bill provides for the review of the operation of the Act within fifteen months after the third anniversary of its commencement. The review panel must include representatives of the Administrative Review Council, the Attorney General's Department, the Department of Finance, the regulatory review body as well as persons with experience in business, consumer affairs and with delegated legislation. The Bill also provides for a further review by representatives of the same bodies after seven years of operation. This second review is specifically required to include an evaluation of the effectiveness of the sunsetting regime.

252. Provision of specific review provisions in legislation is increasingly common in OECD countries, though a requirement for two successive reviews is quite rare. It is also notable that a review of an Act that has (to date) had a Parliamentary gestation period of almost 5 years is to be commenced within three years of its coming into force.

General Assessment

253. The effect of the *Legislative Instruments Bill* will be to extend the same type of scrutiny provisions that are applied to the exercise of delegated legislative powers by the State Subordinate Legislation Acts, and at the level of Heads of Government by the requirements of the CoAG Principles and Guidelines, to the preparation of Federal delegated legislation. The Bill includes useful steps forward in relation to coverage of delegated legislation, proactive consultation and the register of regulations in force. However, concerns exist in relation to the limited coverage of its consultation requirements, the rapidity of its sunsetting schedules and the lack of supporting mechanisms for Parliamentary scrutiny. It is notable, too, that the opportunity has not been taken to place RIA procedures for primary legislation on a more formalised footing.

Chapter 8: Conclusions and recommendations

8.1. Conclusions

254. New South Wales was a relatively early adopter of Regulatory Impact Analysis for proposed subordinate legislation and remains one of few jurisdictions in the OECD to make systematic use of sunsetting as a regulatory reform mechanism. The provisions contained in the Subordinate Legislation Act show a quite high degree of consistency with OECD's best practice recommendations for RIA, although a number of areas in which improvements can be made are identified in the detailed recommendations made below. The recent amendments to the Act to incorporate a mechanism for introducing regulatory flexibility constitute a pioneering use of this mechanism on a broad scale and have the potential to contribute significantly to regulatory quality in New South Wales.

255. While the quality of the formal RIA process requirements in place in NSW is relatively high, the limited assessment conducted by this review suggests that their impact on regulatory quality has, in some important respects, fallen short of expectations and that many potential benefits of RIA currently remain unrealised. It is clear that the process has greatly enhanced effective public participation in the regulation-making process and that some significant changes are being made to regulation in response to information and opinions received in the course of the consultation processes that have been integrated with RIA. Moreover, the Parliament has played a positive role in providing a discipline on regulatory activity through its willingness to disallow regulations, whether wholly or in part, on occasion.

256. On the other hand, the quality of RIA conducted by agencies continues, in general, to be lower than is reasonably achievable. While international comparisons are extremely difficult due to differences in legislation, institutional arrangements and other key factors, it seems clear that a higher standard has been achieved in Victoria in a similar legislative and institutional context. The relative under-performance in NSW has roots in part in the lack of priority, and hence resources, allocated to RIA by regulatory agencies. This lack of priority in turn reflects institutional failures in the New South Wales system, notably the failure to establish a strong role for a body within the administration with specific regulatory reform responsibilities and the inconsistent and partial support that RIA and associated regulatory reform processes and bodies have received at the political level since the late 1980s.

257. A key environmental factor for regulatory reform and, in particular, RIA in New South Wales is provided by the Federal and national context of regulatory reform in Australia. On the one hand, the Federal Government is continuing to work toward the adoption of comprehensive and far reaching RIA requirements via its Legislative Instruments Bill. While this Bill has continued to evolve since first being but forward in 1994 by the previous Government, it proposes a broad approach to RIA and contains a large number of best practices and promising practices. Future RIA initiatives in NSW will clearly need to have regard to these developments at the Federal level.

258. The "national" context is that deriving from the trend over the past decade toward a high level of regulatory co-operation among Australian States and Territories. As a result of this development, much state level regulation is now designed in national level bodies and, via the CoAG principles and guidelines, subjected to separate RIA requirements as part of this development process. Consistency between the processes applied is clearly a key issue for NSW and implies an active approach to ensuring that the CoAG principles and mechanisms constitute best practices as well as ensuring adequate consistency of NSW own requirements.

259. The recommendations below are divided into three broad areas. The first is recommendations for the overhaul of the Subordinate Legislation Act in order to better reflect best practices in formal RIA

requirements and processes. The second consists of recommendations for improving the supporting mechanisms that are essential to the optimal functioning of these formal requirements. The third consists of recommendations for action to ensure that the federal & national context is adequately dealt with in the RIA context. The recommendations should be seen as interdependent if the gains from a fully functioning RIA system are to be achieved.

8.2. Recommendations

8.2.1. Substantive provisions

The basic approach to Regulatory Impact Assessment contained in the Subordinate Legislation Act 1989 is sound and has delivered limited but important gains in terms of regulatory quality and public participation in the regulation making process. However, the Act should be substantially redrafted to address a number of significant weaknesses. In particular:

- *Recommendation 1: The Subordinate Legislation Act should be broadened to incorporate appropriate mechanisms to ensure RIA disciplines equivalent to those applicable to delegated legislation are also applied to primary legislation.*

Systematic analysis of primary legislation has potential gains at least as large as those deriving from RIA of subordinate legislation. Despite being an early adopter of RIA for subordinate legislation, NSW has not followed the practice of the majority of OECD countries in providing for RIA scrutiny of primary legislation. While the adoption of systematic *ex poste* review requirements for primary legislation provides a useful quality control discipline, it is not a substitute for a requirement for *ex ante* assessment. While the Australian Federal Government's experience shows that such scrutiny can be provided for administratively, consideration should be given to a legislated requirement that would also provide for the integration of consultation opportunities based on the release of RIA information.

- *Recommendation 2: The coverage of the Act should be broadened to include amending, as well as principal, statutory rules.*

The legislative distinction between principal and amending rules bears little relation to the extent of the impact of a rule. Amending regulations may have major regulatory impacts and should be subject to the same threshold tests to determine if RIA is warranted as are applied to principal rules.

- *Recommendation 3: The coverage of the act should be broadened to include all substantive delegated legislative instruments.*

Consideration should be given to the adoption of a broad definition of " delegated legislative instruments" such as that employed in the Federal Legislative Instruments Bill, in order to ensure that major gaps in the coverage of RIA disciplines are avoided and incentives for a strategic use of different forms of legislative instrument do not arise or persist.

- *Recommendation 4: The Act should specifically require that incorporated materials, such as national standards, be assessed in RIA and tabled with the regulations that incorporate them*

National standards often impose the bulk of a regulation's real burden or, where optional, can be an invaluable guide to assessing the likely burden of a performance based regulation. They should be specifically required to be incorporated in the RIA and tabled for review in the Parliament along with the regulations that incorporate them.

- *Recommendation 5:* *The sunsetting cycle should be extended to 10 years to ensure that review activity is required only where there is a strong possibility that regulation has become outdated and requires significant change. In conjunction, the availability of postponements to the sunsetting requirement should be reduced to a single twelve-month postponement.*

The current sunsetting cycle is universally regarded as too short by major participants in the process and, arguably as a result, has been undermined by the extensive use of the postponement mechanisms well beyond the purpose for which they were originally designed. Moving to a 10 year cycle would bring consistency with most other Australian jurisdictions and allow review and RIA resources to be better deployed - for example in the conduct of RIA on amending regulation.

- *Recommendation 6:* *Sunsetting should occur on the tenth anniversary of the coming into effect of a regulation, rather than on 1 September each year, as at present.*

The existing system necessarily ensures that the mass of regulatory activity is clustered within several weeks prior to the 1 September sunsetting date and therefore strains the resources of a range of parties to the regulation-making and review processes. Effective quality assurance has, accordingly, suffered. The alternative, of adopting the tenth anniversary of the coming into effect of a regulation as its sunsetting date, would avoid this problem and allow enhanced regulatory quality without posing significant practical problems.

- *Recommendation 7:* *Consideration should be given to making the current trend to including review requirements in major primary legislation more systematic by explicitly including in the Subordinate Legislation Act, or its successor, a requirement that such review clauses are mandatory.*

The recent move to insert review clauses in major primary legislation is an important step toward ensuring that *ex post* performance evaluation is systematically conducted in this area, and thus can achieve many of the benefits associated with sunsetting. The practice could be made more systematic by incorporating a general requirement for such reviews in the Subordinate Legislation Act. This would be a logical corollary of including a requirement for *ex ante* RIA of proposed primary legislation. A legislated review requirement should also incorporate detail as to the minimum essential features of the review process to be conducted.

- *Recommendation 8:* *The "threshold test" to determine when RIA is required to be conducted should be redesigned to ensure RIA is used only where it can contribute to regulatory quality. The use of more effective preliminary analyses and of expert advice from a dedicated regulatory reform body should be considered.*

RIA resources are currently being used in circumstances where there is little possibility of them positively affecting the regulatory outcome. This diverts assessment resources from higher productivity uses and undermines support for RIA. A more realistic and flexible test, able to draw on expert judgement should be implemented. This requires *inter alia* that preliminary assessments, such as those currently required under Schedules 1 & 2 of the Act, should be made available to the regulatory review body before it provides advice as to exemptions. A more flexible methodological requirement is also needed so that regulations that cannot easily quantified can be subject to appropriate forms of RIA to help in informing policy debate.

- *Recommendation 9:* *The exemption from RIA requirements in the case of matters arising under "substantially uniform" legislation should be removed, with exemptions only being available where equivalent RIA have previously been conducted.*

RIA should be applied to all regulation, whether uniform with other jurisdictions or not. While duplication should be avoided, the case for applying RIA exists even where regulation is to be uniform between two or more jurisdictions.

- *Recommendation 10: Specific responsibility for reviewing and approving draft RIA should be allocated to a dedicated Office of Regulatory Reform located in the Cabinet Office.*

While the Parliamentary Regulation Review Committee has taken an active and thorough approach to improving the quality of RIA it has been limited in its effectiveness by the fact that it necessarily becomes involved only after regulation is in force. The experience of numerous OECD countries, as well as other Australian States indicates that there is considerable value in allocating specific responsibilities in this area to a dedicated review body located in the centre of government. Certification of the adequacy of RIA prior to the completion of the regulatory process is essential if a high level of compliance with the provisions of the Subordinate Legislation Act is to be ensured.

- *Recommendation 11: A consultative process should be undertaken regarding the current Regulatory Flexibility amendments with a view to incorporating any additions and changes necessary in the redrafted Subordinate Legislation Act during its development.*

  The recent amendments to the Act were introduced without a specific consultation process being followed and without consultation being conducted with the Regulation Review Committee. Confidence in the adequacy and workability of the arrangements proposed to implement this important initiative may therefore be lacking, particularly as the provisions are silent about a range of important specific matters addressed in models for such a mechanism previously developed in Canada and in Victoria. Conduct of a thorough consultation process prior to redrafting the Act would provide an opportunity to ensure public confidence in the initiative and, given that this is a new area for legislation, would provide additional assurance as to its workability in practice.

8.2.2. Supporting arrangements

- *Recommendation 12: Establish a dedicated Office of Regulation Reform within the Cabinet Office that is dedicated solely to regulatory reform issues, in order to ensure adequate focus, resourcing and accountability.*

  OECD best practices argue that specific responsibilities for regulatory reform should be allocated at political and administrative levels. The above recommendations propose legislative changes to address this issue. They should be supported by a reorganisation within the Cabinet Office that would ensure that regulatory reform was entrusted to a dedicated office accountable specifically and solely for this area. It must also be accorded significantly greater resources than are currently devoted to regulatory reform within the Cabinet Office.

- *Recommendation 13: Establish an ongoing training programme designed to impart in a wide range of policy-makers within the administration an understanding of the purpose of the Subordinate Legislation Act as well as the specific skills required to conduct RIA and related processes.*

  A sufficiently detailed training programme should be established as a permanent part of Government efforts to support and implement the requirements of the Subordinate Legislation Act. This should be integrated as far as possible with the provision of written guidance materials and the provision of positive assistance on RIA and related tasks and should be the responsibility of the proposed Office of Regulation Reform.

- *Recommendation 14:* *Consider the provision of positive assistance in RIA preparation, including the "on-call" availability of specialist analytical resources where necessary to regulators engaged in major RIA.*

  Limited experience exists with this approach, but early feedback from the Netherlands, for example, suggests that this may be an effective and low cost way of responding to concern over the lack of specific RIA expertise in many regulatory agencies, while at the same time forging positive relations with regulatory reform authorities and contributing to the cultural change among regulators that RIA ultimately seeks.

- *Recommendation 15:* *Supplement the provision of RIA guidance material with best practice manuals on closely related regulatory quality issues such as principles of good regulation and the use of regulatory alternatives.*

  Effective RIA guidance material must balance the need to be understood by policy officers with limited technical training with the need to provide detailed guidance sufficient to support high quality RIA. One means of providing broader support for better regulatory quality is to supplement this guidance with other material addressing related topics. Review of NSW RIA indicates that guidance on the characteristics and uses of regulatory alternatives is likely to be particularly useful, while general guidance on regulatory quality, probably to be produced in conjunction with Parliamentary Counsel, would also assist consistency of regulatory approach and overall quality.

- *Recommendation 16:* *Require the regulatory reform body to collect and report on key regulatory reform statistics on a regular basis.*

  OECD's work on reform, including the recent regulatory indicators database, clearly shows evaluation to be a relatively neglected area of reform activity and yet, as a rapidly evolving area of policy, evaluation and feedback are essential to enhancing the benefits of reform. Key statistics on reform, including RIA, should be reported to parliament on a regular basis as an input into future policy-making.

8.2.3. National context

- *Recommendation 17:* *Take positive steps to ensure maximum consistency between RIA, consultation and sunsetting processes at Federal and State levels and including the CoAG guidelines and principles applying to regulation made under national uniformity schemes.*

  As States have adopted RIA and associated scrutiny systems across Australia, a broadly consistent approach has been taken, but important inconsistencies remain. Moreover, the Federal Government's current initiatives represent a significantly different approach in some respects, while the CoAG guidelines covering national uniformity agreements differ again. There are clear benefits in achieving consistency of regulatory quality standards across jurisdictions in terms of favouring convergence of regulatory outcomes, preventing "jurisdiction shopping" and disseminating best practices. Action must be multifaceted and consider institutional as well as legislative issues. The CoAG process offers an obvious forum through which such co-operative efforts can be co-ordinated.

- *Recommendation 18:* *Work toward the evolution of principles, such as the subsidiarity and proportionality principles of the European Union, to guide decisions as to when and how to use national uniformity and regulatory harmonisation approaches.*

  Achieving regulatory harmonisation or uniformity is resource intensive and may tend to impede subsequent updating and reform. Hence, it is important that decisions to move in this direction be based on a clear view of the benefits to be achieved. The European Union has developed principles to

guide the decision as to which issues should be regulated at community wide level and which at national or sub-national levels. Given the current extensive use of national uniformity or harmonisation arrangements in Australia, identification of appropriate principles for the Australian context should be considered. NSW should take a leading role in putting forward this concept for discussion.

- *Recommendation 19:* *Establish procedures for information exchange between jurisdictions*

  Easy dissemination of a range of material related to regulatory quality assurance efforts (such as sunsetting, RIA registers, regulation-making statistics, disallowance statistics) would facilitate learning across jurisdictions, support research efforts and favour evaluation of the performance of the tools used. All of these outputs have the potential to contribute to the dynamic improvement of regulatory quality assurance processes.

Bibliography

"Improving Government Capacity to Produce High Quality Regulation: Draft Country Study of the United States" and *"Improving Government Capacity to Produce High Quality Regulation: Draft Country Study of the Netherlands"*, OECD/PUMA, 1998. [PUMA/REG (98)1 and PUMA/REG (98)2 (Official Documents - restricted availability)]

From Red Tape to Results. NSW Cabinet Office, February 1995.

Future Directions for Regulatory Review in New South Wales, Parliamentary Regulation Review Committee, Report No. 23, November 1993.

Hansard, Legislative Assembly of NSW, 23 September 1998. Mr. Adrian Cruickshank, MP.

The Impact of Mutual Recognition on Regulations in Australia, Dr Steven Rimmer, Industry Commission, 1997.

Improving the Quality of Legislation in Europe Kellerman A., Ciavarrini Azzi G., Jacobs S.H., & Deighton-Smith R. (Eds) Kluwer Law International, The Hague, 1997. Formsma, S. "The Dutch Approach: Carrot and Stick" pp. 213 - 224.

Intergovernmental Agreement Relating to Mutual Recognition, 11 May 1992.

Interpretation Act 1987 (NSW)

Interpretation of Legislation Act. (Victoria).

Legislation for the Staged Review of New South Wales Statutory Rules. Regulation Review Committee, Parliament of New South Wales, July 1989.

Linking Industry Globally, Report of the Committee of Inquiry into Australia's Standards and Conformance Infrastructure. 1995 (the Kean Report)

OECD Regulatory Indicators Database (unpublished to date). Data for March 1998

The OECD Report on Regulatory Reform. OECD, Paris, 1997. See Chapter 2: Regulatory Quality and Public Sector Reform.

Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies. Council of Australian Governments, (revised edition), November 1997.

Recommendations of the Council of the OECD on Improving the Quality of Government Regulation; Including the OECD Reference Checklist for Regulatory Decision-Making, OECD/PUMA, Paris. 1995.

Regulation and its Review, 1996-7. Industry Commission, Annual Report Series. Government of Australia.

Regulation Review Act 1987 (NSW)

Regulatory Efficiency Legislation. Parliament of Victoria, Law Reform Committee. October 1997

Regulatory Impact Analysis: Best Practices in OECD Countries (OECD/PUMA) Paris 1997.

Regulatory Innovation: Regulation for Results NSW Government Green Paper, 1996

Report of the Administrative Review Council on Rule Making by Commonwealth Agencies. Report No. 32., 1992, presented to the Senate Standing Committee on Regulations and Ordinances.

Report on Bill C-62. Parliament of Canada, Joint Standing Committee for the Scrutiny of Regualations, 16 February, 1995.

Report on the Operation of the Regulatory Impact Statement Process in Part Five of the Statutory Instruments Act 1992. Scrutiny of Legislation Committee, Legislative Assembly of Queensland.

Review Clauses in Legislation. Memorandum from Premier Nick Greiner MP. 1992 (unnumbered & undated, but circulated as an attachment to internal Drafting Circular 1992, No.1. Parliamentary Counsel's Office).

Subordinate Legislation Act 1989 (NSW)

Meetings

Meetings with Mr Jim Jefferis, Director, NSW Parliamentary Regulation Review Committee Secretariat, Paris, 9-14 November 1998.

Telephone consultations with Mr J. Booth, Policy Manager, of the Intergovernmental Relations and Regulatory Reform Branch, Cabinet Office, Government of New South Wales, and Mr Mark Duckworth, November 5, 1998.

Telephone consultations with Mr Dennis Murphy, NSW Office of Parliamentary Counsel, 12 November 1998.

Regulatory Impact Statements

Animal Research Regulation 1995

Contaminated Land Management Regulation 1998

Crimes (Detention After Arrest) Regulation 1997

Home Detention Regulation 1997

Necropolis Regulations 1996

Occupational Health and Safety (Asbestos Removal Contractors) Regulation 1994

Pawnbrokers and Secondhand Dealers Regulation 1997

Proposed Contaminated Land Management Regulation 1998

Proposed Waste Minimisation and Management Regulation 1996

Security Industry Regulation 1998

Surveyors (Practice) Regulation 1996

Waste Minimisation and Management Regulation 1996.