# Chapter 2. The Regulatory Impact System: Promise and performance

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## Introduction

The aim of this chapter is to provide an assessment of the performance of the Commonwealth government's Regulation Impact Statement (RIS) system, a system first introduced in 1986 but modified and strengthened in 1996 as part of a move to further improve the quality of new and modified regulation and, hopefully, minimise adverse impacts on business and economic performance. It argues that, while its proponents were keen to see its effective implementation in all departments and agencies — proposing that, as part of the broader process of regulatory reform, it would lead to an improved quality of regulation — actual practice showed that the performance of the RIS system was limited. It resulted in some improvements in the processes for making regulation, however, the quality of the resulting regulatory content and the analysis supporting that content improved little, if at all. It is further argued that this limited performance can be explained by a number of factors, especially the varying levels of ministerial and head of department/agency commitment to the system; a sometimes less than adequate integration of RIS with existing policy development processes; and, varying standards of regulatory analysis, particularly as regards cost/benefit assessments. The chapter is divided into three major sections: the first provides a brief, descriptive outline of the RIS system as modified in the mid-1990s; the second examines the performance of RIS from 1986-1997; the third examines its performance following reforms implemented during the period from 1998-2006 but prior to further modifications to the system introduced in late 2006.

## The RIS system in the Australian Government

RIS is both a document and, most importantly, the documented result of a mandated process and approach to policy analysis intended to improve the quality of policy-making in the Australian Federal Government in relation to the regulation of business. At the heart of the process, as described by the Commonwealth's then Office of Regulatory Review (the ORR), were seven key elements that, when successfully completed, it was hoped would provide the decision-maker with the information needed to make an informed decision and better quality regulation. The seven key elements constituted a simple, rational, process-based model of policy-making familiar to all policy analysts, laying out the major tasks that were to be undertaken at each stage of the process, as follows:

- a description of the problem or issues which give rise to the need for action and broad goal of the proposed regulation;
- a specification of the desired objective(s);
- a description of the options (regulatory and/or non-regulatory), expressed as a regulatory form or type, that may constitute a viable means for achieving the desired objective(s);
- an assessment of the impact of each option on consumers, business, government and the community — including costs and benefits — noting particularly the impacts on competition, small business and trade;
- a consultation statement detailing who was consulted — with a summary of views from the main affected parties — or specific reasons why consultation was inappropriate;
- a recommended option, with an explanation of why it was selected and others were not; and
- a detailed strategy for the implementation and review of the preferred option (Office of Regulation Review 1998: A2).

The introduction of the RIS system predated the NCP reviews. In 1996-97 RIS was modified and became mandatory for all reviews of existing regulation, proposed new or amended regulation as well as proposed treaties involving regulation that would: directly affect business; have a significant indirect effect on business; or, restrict competition (Head and McCoy 1991; Office of Regulation Review 1998). The RIS system complemented the NCP reviews of existing regulation by focusing on future regulation. Its remit applied to all primary legislation, subordinate legislation and quasi-regulation — the latter referring to the wide range of rules or arrangements where governments influence businesses to comply but which do not form part of explicit government regulation (for example, industry codes of practice, guidance notes, industry-government agreements and accreditation schemes) (Office of Regulation Review 1998: A2-3).

The RIS did not apply to state, territory or local government in the Australian federal system, except insofar as any one or more of them were a party to a regulation developed on an intergovernmental basis within the Council of Australian Governments (COAG), although all bar one of the state and territory jurisdictions have RIS-type systems of their own. An RIS system is also applied by COAG, being largely identical with the federal RIS. In addition, RIS does not apply to tax regulation (although a modified type of RIS is used in this regard) and it is not applied in a number of relatively minor areas (Office of Regulation Review 1998: A4).

With regard to the relevant, mandated stages of RIS:

- departments, agencies and statutory authorities considering regulation that might impact on business were required to consult the ORR (now renamed

the Office of Best Practice Regulation) at an early stage in the policy development process — the ORR had the authority to decide, in normal circumstances, whether or not an RIS was required;
- departments and agencies were required to consult with the ORR when developing terms of reference for reviews of existing legislation or regulations that impact on business;
- all RISs were to be developed in consultation with the ORR;
- draft RISs were to be sent to the ORR for comment and advice;
- the ORR was to advise departments and agencies whether or not a draft RIS complied with the government's requirements and, importantly, whether or not they contained an adequate level of analysis;
- the ORR was to receive all cabinet submissions proposing regulation or treaties and report to cabinet on both compliance with the RIS process and on whether or not the level of analysis was adequate;
- the Productivity Commission was to report annually on departmental and agency performance with regard to the completed RIS, both as to process and as to the quality of analysis provided in support of the proposed regulation;
- the Office of Small Business (the OSB), from 1999, also was required to publish a set of regulation performance indicators (RPIs) for departments and agencies — assisted by the ORR — and comment on regulation impacting on small business (Office of Regulation Review 1998:A10-14).

While the RIS process was and remains mandatory, the ORR's judgement as to the adequacy of an RIS process or analysis did not invalidate — or necessarily lead to the rejection of — a proposed regulation. That responsibility remained with the decision-maker involved, notably the Prime Minister and the Cabinet (Office of Regulation Review 1998: A12).

## Regulatory performance and RIS: 1986-1997 a case of infant neglect?

RIS was introduced in 1986 as a new policy-making process coordinated by a new Business Regulation Review Unit (BRRU) (Head and McCoy 1991: 158). As noted in Head and McCoy, by the early 1990s, while it is difficult to assess the impact of the new system in any kind of detail, its impact, along with that of BRRU, seems to have been negligible (Head and McCoy 1991: 163). Indeed, insofar as the departments and agencies responsible for making and implementing regulation were concerned, there was no new system. Rather, at best, BRRU had encouraged departments and agencies to view the development of new or amended regulation with regard to business somewhat more critically, in line with the government's principle of the minimum of effective regulation (Industry Commission 1993: 272). In turn, BRRU provided advice to cabinet with regard

to the regulations related to business that were submitted to it, advice that seems to have had little impact (Head and McCoy 1991: 163–4).

A number of factors account for RIS's lack of success at this stage. RIS was imposed upon departments and agencies by successive governments, eagerly supported by peak business associations and, increasingly, the government's own Productivity Commission. The departments were not enthusiastic about the imposition, with its implication that their existing policy development systems were inadequate. In addition, there was some feeling that the system had an ideological, rather than a regulation improvement purpose, aimed at freeing markets from regulatory control without convincing justification for the reform (Head and McCoy 1991). Also, RIS represented, at least in its earlier years, an increased workload and, if it was to be accommodated in the fashion desired by executive government, a degree of change to established processes and practices. Such organisational changes, welcome or not, take time to implement.

In 1988, a performance audit report of BRRU by the Commonwealth Auditor-General tended to confirm the above views but without reference to its ideological status, noting that it was not achieving its stated objective of comprehensively reviewing all targeted government regulation, or advising government on all new regulatory proposals, largely because of insufficient resources (BRRU had only six staff, plus a varying number of business executives seconded to it for short periods at this time), the lack of a comprehensive information base as to what regulations existed and the failure of some departments to provide the required RIS (Auditor General 1989). As a later publication noted of the period: 'ministers and regulatory departments/agencies routinely eschewed preparation of RISs' (Argy, Johnson 2003: 22). The Auditor-General's report and recommendations — perhaps combined with a desire to avoid business criticism of the lack of effectiveness of BRRU in progressing the review of business regulation — led to its 1990 transfer to an independent statutory authority, the Industry Commission, where it was given a new title, the Office of Regulation Review (Head and McCoy 1991:159).

Despite being brought under the authority of the Industry Commission, it soon became apparent that the ORR was continuing to have difficulty in achieving its objectives, as indicated by an external review conducted in 1993 (Industry Commission 1993b). The review noted that while the ORR had a useful role and had developed an effective framework for assessing the impact of regulation, there were several major constraints on its effectiveness, including deficiencies in the existing policy and procedural framework. As a result, it was:

- only able to comment on a small proportion of the total volume of new and amended business regulation introduced each year;
- consulted too late in the process to have a significant impact on the proposed regulation;

- constrained by the propensity of other government objectives to take priority over regulation review objectives; and
- devoting too many resources to its cabinet role (advice with regard to RISs that came to cabinet), relative to its other functions (Office of Regulation Review 1993: 271-2).

Thus, the review found that, in general, the ORR's formal responsibilities exceeded its capabilities and recommended that there be:

- a re-weighting of its work priorities to place greater emphasis on its educative and research role, with a more focused and selective approach to its cabinet role;
- measures introduced to increase awareness and understanding of regulation review policies within the bureaucracy; and
- measures to raise the public profile of the ORR and regulation review policy (Office of Regulation Review 1993: 272).

These conclusions indicated real limitations on the ability of the ORR to evaluate and comment on RISs and its ability to provide: (1) departments with advice aimed at improving regulation; or, (2) the cabinet with appropriate, timely advice as to the adequacy of submitted RIS in terms of either process or the quality and content of the proposed regulation. The reason was simple: the ORR did not have the resources to achieve these aims. In turn, this suggests that either successive governments had underestimated the resources necessary for the task, assuming that they were aware that this was the case, or they were not sufficiently concerned to increase resources to an appropriate level. In other words the necessary political and executive level commitment to, and support of, RIS, had not been forthcoming. It implied, also, that there had been little improvement in the quality of regulation-making in departments and agencies for — given that it was the ORR's role to promote such improvement and that it had not been able to do so to any great extent — then it was unlikely that they had improved their performance on pre-RIS times.

There is no systematic, quantitative empirical data on the performance of RIS for the 1986-96 period. However, some clues can be gained by looking at performance levels for the period 1996-97 — a period in which major changes to RIS were being put in place but were not yet fully operative and so were likely to have been similar to performance levels for the 1986-96 era. The data suggests that performance was very limited, with compliance with RIS being very low. Out of 121 Bills, for example, that required the preparation of a RIS for consideration by cabinet, departments provided the ORR with a RIS in only 13 cases (10.7%). This very low level of compliance with process at a time when greater political commitment to the reform of business regulation and RIS in particular, was being strongly expounded by the new government of Prime

Minister John Howard is surprising. As the ORR noted with regard to the pre-1996 period, 'there was little commitment to the process and a lack of any effective sanctions' (Office of Regulation Review 1997: 44).

In summary, much of the period from 1986 to 1997 had been a slow and somewhat painful period of birth and infancy for the RIS system, with widespread non-compliance with the process and little discernible impact on the quality and extent of new or amended regulation regarding business. A lack of political commitment and a lack of head of department and agency support resulted in policy development processes remaining largely unchanged with an under-resourced ORR often unable to discharge its advisory functions. However, at the end of this period, the political and public commitment of the new Howard Government together with the expanded coverage and authority given to RIS and other associated developments, suggested that the future might be more promising.

## RIS performance 1998-2006: improving, but could do better?

In the period 1995-97 the RIS system was reformed as part of a broader set of reforms that commenced under the ALP government of Prime Minister Paul Keating but reached fruition in the first two years of the first Howard government. In summary, the major reforms were:

- the expansion of the ORR and an emphasis that RIS was mandatory;
- that RISs were to be tabled as part of the explanatory documents when proposals for legislative change were put before Parliament;
- that the Assistant Treasurer, although not a cabinet minister, be responsible for regulatory best practice, as a visible sign of a greater political commitment to regulatory reform;
- that the ORR was to report to cabinet on compliance with RIS requirements for specific regulatory proposals;
- the Productivity Commission was to report annually, in public reports, on overall departmental and agency compliance with RIS requirements, as regards both process and analytical quality, commencing in 1997–98 (Office of Regulation Review 1997; Productivity Commission 1998; Howard 1997); and
- the reforms were largely in line with the review and analyses produced for the first Howard government by the Productivity Commission and, especially, the *Bell Report*, that had investigated the impact of regulation on small business (Productivity Commission 1996; *Bell Report* 1996).

While the Productivity Commission and the ORR might have been happy with most of the general intent and recommendations of the *Bell Report* and the government's response to the report, the decision to establish a separate Office

of Small Business (the OSB), with new regulatory review and reporting responsibilities, must have been of some concern. The OSB was to be consulted for all cabinet submissions that might have an impact on small business, including regulations of all types and to develop and report annually on a system of nine regulation performance indicators (RPIs). The departments and agencies would monitor and provide the OSB with the data related to their own performance, with the OSB reporting annually on their performance against the RPIs, with the first report to be made in 1999 (Productivity Commission 1999:12). RPIs were seen as an important adjunct to the RIS system, providing information on the effectiveness with which agencies were implementing regulation reform measures and enabling benchmarking of agency performance. In a somewhat clumsy arrangement, however, the ORR was to be responsible for collecting and monitoring agency performance in relation to three of the RPIs and for providing those details to the OSB (Productivity Commission 1999: 12). The situation was made even more awkward in 1998, for Prime Minister Howard committed his second government to the introduction of a system of annual regulatory plans for all departments and agencies in his 'A Small Business Agenda for the New Millennium', again to be reported on by the OSB, without the direct involvement of the ORR. The regulatory plans were to provide business and the community with timely access to information about past and planned changes to Commonwealth regulation, with the aim of making it easier for businesses to take part in the development of regulation.

In the first two years of the reformed RIS system (1996-97) compliance with RIS was, however, far lower than the average for the 1999-2006 period. As the Productivity Commission put it, these two years were a learning period for all concerned and it was expected that the level of compliance would improve (Productivity Commission 1999: xviii). It would have been more informative to have noted that there had been a learning period of at least 12 years, from 1986, not two years, with little systematic data on performance in the earlier period being collected. This little matter aside, the major reasons identified for the poor performance in these two years were, in summary: a lack of awareness of the requirements of the new system; varying degrees of understanding of and priority accorded to, the new system; a lack of resources for the ORR; and a slow process of cultural and organisation change resulting in a lack of integration of RIS into departmental policy processes (Productivity Commission 1998; and 1999).

In some cases, especially in regulatory agencies associated with COAG but also in some sections of major departments, communication of the new, reformed status and requirements of RIS simply had not percolated through to those with responsibility for making or amending regulation. Uncertainty about the coverage of RIS persisted even where communication had been effective, particularly in relation to subordinate legislation, quasi-regulation and treaties — to which it now applied (Productivity Commission 1998: xviii-xix). This lack of awareness

and understanding applied particularly in COAG and the ORR noted that agencies associated with COAG claimed that they were not informed about, nor trained in, the new guidelines (Productivity Commission 1998: 70).

Rather embarrassingly for the new government, it was also apparent that several ministers' offices were not aware that the RIS requirements applied to them and, given the lack of awareness and understanding of what the reformed RIS now involved, it is not surprising that there were also examples of differences of opinion between the ORR staff and departmental staff as to how to interpret the RIS Guide (Productivity Commission 1998: xix). On a more positive note, for the relatively few RIS that were submitted in the 1996-97 period, the ORR felt that the level of analysis was adequate in 92% of cases (Office of Regulation Review 1997: 44).

What then, was the performance of this new, reformed RIS after the initial learning period? In terms of volume, as indicated in Table 2.1, in the period from 1999-2000 to 2004-05, a total of 11,545 Bills and Disallowable instruments were introduced, with the ORR receiving 4,832 new RIS queries with regard to this total, of which it advised that 1,085 (9.4%), required an RIS. The relatively small proportion of Bills and instruments subject to RIS was because most of the latter involved minor amendments to existing regulation that did not require the preparation of an RIS (Productivity Commission 2005: 79).

**Table 2.1 Australian Government regulatory and RIS activities, 1999-2000**

| | 1999-2000 | 2000-01 | 2001-02 | 2002-03 | 2003-04 | 2004-05 |
|---|---|---|---|---|---|---|
| Total number of regulations introduced | 1991 | 1607 | 1918 | 1789 | 1688 | 2552 |
| Queries for which the ORR advised an RIS was required | 266 | 171 | 175 | 132 | 174 | 167 |
| % RIS of total no. of regulations | 13.3 | 10.6 | 9.1 | 7.3 | 10.3 | 6.5 |

(See Productivity Commission 2005: 78, for further details)

In aggregate, the extent to which the RISs submitted by departments and agencies were regarded as *adequate*, using the measures developed by the ORR, is indicated in Table 2.2, below, for RIS at both the decision-making stage of the regulation-making process and the Parliamentary tabling stage (see Productivity Commission 2000, chapter three, for a description of how the measure is calculated). On average, 84% of the RISs at the decision-making stage were regarded as adequate, rising to 92% for the parliamentary tabling stage — the higher rate for the latter being, perhaps, a function of the greater risk of causing embarrassment for the minister, the government and the department if an inadequate RIS was provided for parliamentary and public scrutiny. The lower rate of adequacy for RIS developed at the decision-making stage was of concern, as it suggested that at least 16% of decisions on proposed new, or amended regulation, were made on the basis of inadequate information, at least as judged by the ORR.

However, what also becomes evident is that the overall levels of RIS performance indicated in Table 2.2 for the crucial, decision-making stage, concealed marked variations in regulation performance. In particular, the levels of compliance achieved for more *significant*, new or modified regulation was substantially lower than the overall average for all regulation, even though it might be expected that departments would be most careful in the adequacy of their analysis for more significant regulation. The average level of compliance for the 2000-05 period for more significant regulation, for example, was only 68%, compared to 87% for less significant regulation. It also fluctuated considerably from year to year, ranging from a low of 46% for more significant regulation in 2002-03, after some four years of experience with the new system, to a high of 94% a year later. There was less but still considerable fluctuation for less significant regulation, from a high of 92% in 2003-04.

**Table 2.2 RIS compliance, 1999-2000 to 2004-05**

| Decision-making stage | 1999-2000 | 2000-01 | 2001-02 | 2002-03 | 2003-04 | 2004-05 |
|---|---|---|---|---|---|---|
| No. of RIS required | 169 | 129 | 128 | 113 | 105 | 68 |
| No. of RIS judged adequate | 207 | 157 | 145 | 139 | 114 | 85 |
| % | 82 | 82 | 88 | 81 | 92 | 80 |
| Parlt. tabling stage | | | | | | |
| No. of RIS required | 163 | 118 | 116 | 113 | 82 | 59 |
| No. of RIS judged adequate | 179 | 133 | 123 | 119 | 86 | 66 |
| % | 91 | 89 | 94 | 95 | 95 | 89 |

(See Productivity Commission 2005: 15, for further details)

There is a similar variation in performance when RIS are broken down into primary legislation (Bills), legislative instruments (largely subordinate legislation), non-legislative instruments, quasi-regulation (largely codes of conduct and target requirements) and RIS prepared for treaties. With regard to primary legislation the adequacy of performance fell from 80% in 1999-2000, to 76% in 2004-05, suggesting that RIS performance was not improving, even if it was not getting substantially worse, a disappointing result after eight years of operation for the new RIS system. The RIS performance for treaties, while involving only small numbers per annum and those treaties for which negotiations had commenced before the new RIS system came into effect, was very poor. As might be expected, the variation in aggregate RIS performance is mirrored in variation by department and agency. While the total number of RIS for each of the 19 departments and agencies whose proposals required an RIS is relatively small, only 10 departments and agencies were fully compliant at the decision-making stage in 2004-05 — a sharp drop from 2003-04. Nine departments or agencies were not compliant in whole or in part and the nine failed to develop, in total, some 14 RIS, with three of those that they did prepare having an inadequate level of analysis (Productivity Commission 2005: 31).

With regard to RISs prepared for COAG, performance was poorer, with the average for the period being 76%, nearly 10% lower than that for the decision-making stage for non-COAG RIS (Productivity Commission 2005: 66). There was also considerable variance in the performance by Ministerial Council and National Standard Setting Bodies within COAG (Productivity Commission 2005: 66-7). Despite this variable performance there was a substantial average increase in *process* performance over the whole of the period 1996-2006 but it was an increase that had largely peaked by the beginning of the 2000s, following the rapid increase in 1998-2000 and the quality of *content* of RISs improved more slowly.

What factors help explain this variable and sometimes disappointing RIS performance, even if the very poor performance in the learning period, 1996-98, is not included? In drawing upon the sources available four broad factors seem to have been of most importance. They are:

- RIS system design factors and poor communication of expectations;
- varying degrees of failure to integrate RIS into traditional departmental and agency policy development processes;
- limitations in analytical expertise; and
- varying levels of political commitment and support (Banks 2006a: chapter seven).

Deficiencies in the design of the RIS system itself have become apparent over time and were highlighted in the recent *Banks Report*, which found, in assessing both RIS and departmental policy development processes, that the requirements for good regulatory process had generally not been well discharged, agreeing with business groups that this had been a major contributor to the problems identified with specific regulations (Banks 2006a: v). One of the major limitations was the relative lack of initial emphasis in the RIS process on the need for at least adequate consultation with business in designing regulations, leading, it could be argued, to poorer quality regulation. A survey undertaken by the Australian Public Service Commission, for example, found that only 25% of regulatory agencies had engaged with the public when developing regulations, a surprisingly low proportion (Australian Public Service Commission 2005: 56). While it does not necessarily follow that limited or no consultation will result in poorer quality regulatory proposals, it is certainly possible and, where they do occur, will tend to alienate the businesses upon which regulation impacts. There is, of course, something of a dilemma with regard to increased consultation, for, if the RIS and the ORR called, as they did, for greater and more effective consultation, then it might also increase the danger of regulatory 'capture', by business interests.

A second limitation was the ineffectiveness of the system of regulatory performance indicators (RPI) introduced in 1998 and managed by the Office of

Small Business. The RPI were introduced in order to provide information for decision-makers as to departmental, process-based performance with regard to business regulation (Carroll 2007). However, in practice they had little or no impact on departments, with few departments or agencies using them — at least not explicitly or in published sources — as a means of identifying the causes of poor performance or for improving on existing performance. In this regard it is interesting to note that the recent *Banks Report* on the performance of the existing RIS system made no specific mention, positive or negative, of the existing system of RPI. Similarly, while the government agreed to all of the recommendations of the *Banks Report* with regard to the need for better performance indicators it made no specific reference to the existing system of RPI, either positive or negative. The failure, in both cases, to provide an assessment of the RPI implies that they were regarded as relatively ineffective, or not well known, or both — a view supported by most of those interviewed by the author in a range of government departments and agencies. Indeed, it proved difficult to locate persons within departments who were aware of the existence of RPI. Those that were aware indicated, for the most part, that the RPI had been of restricted value and were rarely used by departments in considering their performance. Yet, the information was available, if not used, suggesting that there was a considerable reluctance by ministers and senior officials in line departments and the Cabinet Office to take firm action to improve performance.

A frequently noted cause of poor RIS performance by the Productivity Commission, in both its annual reviews of regulation and by its chair and other senior staff, was a continuing failure on the part of some departments and agencies to fully integrate the RIS system with their established policy development processes (see, for example, Productivity Commission 2005: xx, 25). The result, too often, was that staff tended to regard RIS as merely an 'add on' to established departmental procedures, producing the necessary RIS documentation too late in the decision-making process to have any influence, after the proposed regulatory approach had already been determined. There were a number of reasons for this lack of integration:

- a continuing lack of belief in the RIS system and its value by at least some ministers and senior public servants, resulting in a less than full commitment to support its integration and a lack of effort and enthusiasm by those responsible for undertaking RIS within departments; and
- the continuing lack of experience in the application of RIS by public servants.

In the case of any one department only a limited number of RIS are required per annum and those that are conducted are allocated, very often, to different staff in different divisions within the same department, often to those with responsibility for the regulatory area in question. Hence, unless the department has only the one centrally-located policy development unit with staff serving

with the unit for several years (which is normally not the case) then it is unlikely that any one individual or group of individuals gains expertise in with RIS, even over a period of years, a phenomenon noted by ORR staff.

One of the key causes of poor quality regulatory proposals has been varying and often inadequate levels of analysis by departments and agencies, especially of the costs and benefits of the regulatory options identified in their RIS. This has been of continuing concern to the ORR and the Productivity Commission, with, for example, recent examples of inadequate analysis including a department not clearly identifying the problem the proposed regulation was supposed to address, another not containing a summary of views received from stakeholders and the community, nor any discussion of how these views had been considered and another not providing any quantification of regulatory compliance costs (Productivity Commission 2005: 26). Where RIS were prepared but failed the ORR adequacy test, an inadequate analysis of costs, benefits and impacts on business, small and large, was typically the case (Productivity Commission 2005: 26). Productivity Commission concerns about poor levels of analysis led its chair, Gary Banks, to assert that 10% of tabled RIS did not even consider compliance costs and only 20% made an attempt at quantifying them (Banks 2005: 10). Similarly, a study of Victorian State government RIS and a small sample of COAG RIS in 2001 found that those conducted on behalf of the state government were clearly superior on all 10 of the criteria used in the study to those conducted for COAG (Deighton-Smith 2006).

As noted above, political support for RIS varied in extent and intensity over time. The primary reason for the variation is not hard to find, occurring, in particular, where ministers are faced, for example, with an RIS assessment that judges their new or modified regulatory proposal as not adequate. In such situations they face a quasi-conflict of interest situation: on the one hand committed under the doctrine of collective cabinet responsibility to support cabinet's formal support for RIS and the ORR's assessments of adequacy but, on the other hand, faced with a failed regulatory proposal if the RIS evaluation is negative. Moreover, the staff of ministerial offices, the heads of departments and senior public servants are well aware of this situation. Whatever their personal feelings on the matter, it would be a very brave person who resisted the wishes of a minister by advising that a favoured regulation was not to be recommended and pursued, following an averse RIS assessment from the ORR.

Similarly, when judging an RIS to be inadequate, it is difficult — but not impossible — for the ORR and Productivity Commission staff, even at the most senior levels, to gain the agreement of the department involved of the need to improve the RIS in question. It is even more difficult to persuade them to amend or withdraw a RIS, especially where it has been presented to the ORR at the very last minute and cabinet awaits its submission (Productivity Commission 2005:

82). In recognising this situation, it is rare for the ORR to pursue the matter to the ministerial level. Instead, its staff elect to work more informally with departmental and ministerial office staff in an attempt to amend proposed regulations identified as less than adequate. In this they have had some success. In 2004-05, for example, the ORR was successful in 10 of 71 RIS cases, in persuading departments to modify the preferred regulatory option contained in their RIS (Productivity Commission 2005: 83). However, as RIS have the status of cabinet submissions they are not, at least at the final, submission stage, released for more public scrutiny, so little or no public pressure can be brought to bear by this means on RIS that the ORR regard as inadequate (Productivity Commission 2005: 81).

## Conclusion

In essence, the RIS was and continues to be a major attempt to improve the quality of regulation with regard to business. As noted above, in practice its performance has been variable and limited. Departments and agencies have improved, if to varying extents, their performance with regard to meeting RIS *process* requirements but they have been less successful with regard to improving the *content* of new and amended regulation.

Finally, it has to be remembered that any system for policy-making in a democracy, inevitably and continuously, will be subject to competing political forces, from those desiring change for the benefits they hope it will bring, to those who resist change, for fear the benefits that they currently receive will diminish or be eliminated. Policy-making — whether or not it is referred to as regulation-making — is an intensely political process and occurs in an arena in which regulation-making is determined as much by the relative power of the participants as by process and the quality of regulatory content. Efforts to promote a greater degree of rationality, such as RIS, are to be welcomed for any improvements in content and process performance they might bring but they are not immune from the exercise of power in the policy process. This is the central problem faced by RIS and its adherents. It is the reason that popularly elected ministers will always vary in their degree of support for such a system, for they are players in that process, acutely sensitive to its demands and constraints. If they are not, they do not remain as ministers for any length of time.

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