Regulatory Impact Analysis: promise and reality

Professor Peter Carroll

University of Tasmania

School of Accounting and Corporate Governance

A paper presented to the ECPR/CRI 'Frontiers of Regulation. Assessing Scholarly Debates and Policy Challenges', conference,

University of Bath, September 7th-8th 2006.

Contact addresses:

Email: Peter.Carroll@utas.edu.au

Fax: 61 3 6226 2170

Tel: 61 3 6226 2092

Regulatory Impact Analysis: promise and reality

Abstract

The Australian national government was one of the first OECD nations to adopt a process of RIA, in the shape of its regulatory impacts statement (RIS), process, adopted over twenty years ago, in 1985. Yet, despite over twenty years of development, in 2005 the Prime Minister felt compelled to establish the Regulation Taskforce on reducing the Regulatory Burden on Business. In its 2006 Report 'Rethinking Regulation', the Taskforce identified some '100 reforms to existing regulation', that were needed and another fifty to be investigated in further depth. It laid the blame for the sharp increase in the regulatory burden on an increasingly risk averse society and a 'regulation first, ask questions later', culture within government departments and agencies. At the very least the findings of the Report imply that the RIS process and the regulatory review system in which it was embedded had been a failure. The aim of this paper is to assess the development and role of the RIS process in order to identify the performance of that process, the environment within which it has operated and the compliance record of the departments and agencies subject to RIS. It argues that its performance can be explained, in particular, by the varying levels of ministerial commitment to the process, variable degrees of commitment from departments and agencies, several of which did not integrate the needs of RIS with their standard policy development processes, inadequate cost/benefit assessments and inadequate consultation with stakeholders.

Introduction

The aim of this paper is to provide an assessment of the developing performance of the Commonwealth Government's Regulation Impact Statement (RIS) system in the context of the Banks Report (2006a). It argues that its 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 analysis, particularly as regards cost/benefit assessments. The paper is divided into three major sections: the first provides a brief, descriptive outline of the current RIS system; the second examines the performance of RIS 1986-1997; the third examines its performance, following a period of reform, in the period 1998-2006.

The RIS system in Australian federal government

RIS is both a document and, most importantly, the result of a mandated process and approaches to policy analysis intended to improve the quality of policy making in the Australian federal government in relation to the regulation of business. The process commences with the production of annual regulatory plans by departments and agencies, in which they specify new or modified regulation to be introduced in the year ahead. Next, at the heart of the process, as described by the Commonwealth's Office of Regulatory Review (ORR), are seven key elements that, when successfully completed, should provide the decision maker with the information needed to make an informed decision. The seven key elements constitute a simple, rational, process-based model of policy making that is familiar to all policy analysts, laying out the major tasks 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 viable means for achieving the desired objective(s);
- An assessment of the impact, including costs and benefits, on consumers, business, government and the community of each option, with each impacted group identified, noting 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).

Finally, not only RIS, but the performance of government in relation to other regulatory developments, is noted in annual Regulation Performance Indicators (RPI).

In general, RIS is mandatory for all reviews of existing regulation, proposed new or amended regulation, and proposed treaties involving regulation which will directly affect business, have a significant indirect effect on business, or restrict competition. This includes primary legislation and subordinate legislation, and also quasi-regulation, the latter referring to a 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 Commonwealth RIS does not apply to state, territory or local government in the Australian federal system, except in so far as any one or more of them are a party to a regulation developed on an intergovernmental basis within the Council of Australian Governments (COAG), although most have RIS-type systems of their own. A RIS system is 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).

In regard to the relevant, mandated stages of RIS,

- Departments, agencies and statutory authorities considering regulation that may impact on business are required to consult the ORR at an early stage in the policy development process. It is ORR that has the authority to decide, in normal circumstances, whether or not a RIS is required.
- Departments and agencies are required to consult with the ORR when developing terms of reference for reviews of existing legislation or regulations that impact on business.
- All RISs are to be developed in consultation with the ORR.
- Draft RISs are to be sent to the ORR for comment and advice.
- ORR advises departments and agencies when a draft RIS complies with the Government's requirements and, importantly, whether or not they contain an adequate level of analysis.
- ORR receives all Cabinet submissions proposing regulation or treaties and report to Cabinet on compliance with the RIS process and on whether or not the level of analysis is adequate.
- The Productivity Commission reports annually on departmental and agency performance in regard to RIS, both as to process and as to quality of analysis.
- The Office of Small Business (OSB), from 1999, has also published a set of regulation performance indicators (RPIs), for departments and agencies, assisted by ORR, and comments on regulation impacting on small business (Office of Regulation Review 1998, A10-14)

While the RIS process is mandatory, ORR's judgement as to the adequacy of a RIS process or analysis does not invalidate, or necessarily lead to the rejection of a

proposed regulation. That responsibility resides with the decision maker involved, notably Cabinet and the Prime Minister (Office of Regulation Review 1998, A12).

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

The Australian Cabinet required that, from 1986, regulators would have to prepare regulation impact statements for all new legislative proposals that would have an impact on business, a process that would be coordinated by a new Business Regulation Review Unit (BRRU), (Head, 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, McCoy 1991, 163). Indeed, in so far as the departments and agencies responsible for making and implementing regulation were concerned, there was no new system. Rather, at best, BRRU had encouraged them to view the development of new or amended regulation in 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 in regard to the regulations related to business that were submitted to it, advice that seems to have had little impact (Head, McCoy 1991, 163-4).

A number of factors account for RIS's lack of success at this stage. One, at the heart of the system is the departments and agencies that make and implement Commonwealth policy. The RIS system was imposed upon those departments and agencies by successive governments, on the advice of business and, increasingly, the 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 democratic control without convincing justification for the reform (Head, 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, at least a degree of change to established processes and practices. Such organisational changes welcome or not, take time to implement.

In 1988, an efficiency audit report of BRRU by the Auditor-General tended to confirm these 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 (it had only six staff, plus a varying number of business executives seconded to it for short periods), 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 (ORR), (Head, McCoy 1991, 159).

Despite its relocation, it soon became apparent that ORR was having difficulty in achieving its objectives, as indicated by an external review conducted in 1993 (Industry Commission 1993b). The review noted that while 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.
- Devoting too many resources to its Cabinet role (advice in 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, 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;
- Measures to raise the public profile of the ORR and regulation review policy (Office of Regulation Review 1993, 272).

These conclusions indicated the ability of ORR to evaluate and comment on RIS and, hence, its ability to provide departments with advice aimed at improving regulation, or Cabinet with appropriate, timely advice as to the adequacy of submitted RIS, as regards process or quality of content, was very limited. The reason was simple, ORR did not have the resources. In turn, this suggests that either successive governments had underestimated the resources necessary for the task, or that, assuming that they were aware that this was the case, that they were not sufficiently concerned to persuade them to increase resources to an appropriate level. In other words the necessary political and high level, head of department or agency, 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 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 empirical data on the performance of RIS 1986-96. Some clues can be gained by looking at performance levels for the period 1996-7, a period in which major changes to RIS were being put in place, but were not yet fully operative, so were similar to the pre-change era. In this period compliance with RIS was very low. Out of 121 Bills that required the preparation of a RIS for Cabinet consideration, for example, departments provided ORR with a RIS in only 13 cases (10.7%). This was a very low level of compliance with process, let alone as regards the quality of analysis, 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. It suggests that compliance with RIS before this 1996-7 period might have been even lower. As ORR noted in regard to the pre-1996 period, and despite the 1986 Cabinet decision,

> While that requirement had been in place for many years, 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, partly as a consequence, a lack of head of department and agency support resulted in policy development processes remaining largely unchanged, with an under-resourced BRRU/ORR often unable to discharge its advisory functions. However, at the end of this period, particularly in 1996-7, the political and public commitment of the new, Howard government, the expanded coverage and authority given to RIS, together with a number of associated developments, suggested that the future would 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 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 ORR to report to Cabinet on compliance with RIS requirements for specific regulatory proposals;
- The Productivity Commission 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).

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 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 (OSB), with new regulatory review and reporting responsibilities, must have been of some concern. 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 the RPIs, with the OSB reporting annually

on 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, ORR was to be responsible for 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. 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.

A Learning period: 1996-97

As noted above, in the first two years of the reformed RIS system, 1996-7, compliance was far lower than the average for the 1999-2006 period. As the Productivity Commission put it,

> The past two years have been a learning experience for all concerned — Ministers and their advisers, Government departments and agencies, and the ORR itself. During 1998-99, some solid gains were made, but there are still areas where improvements can be made. By maintaining the focus on achieving good regulatory outcomes through informed decision making and

> transparency it is expected that compliance will continue to improve (Productivity Commission 1999, xviii).

It would have been more precise to have noted that there had been a learning period of at least twelve 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 as responsible for the poor performance in these two years, in summary, were a lack of awareness, understanding and priority, a lack of resources for ORR, plus a slow process of cultural and organisation change resulting in a lack of integration of RIS into organisational policy processes (Productivity Commission 1998, 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. Even where communication had been effective, there was uncertainty as to the coverage of RIS, particularly for subordinate legislation, quasi-regulation and treaties, to all of which it now applied (Productivity Commission 1998, xviii-xix). The lack of awareness and understanding applied particularly in COAG, and ORR noted that agencies associated with COAG claimed that they were not informed about, nor trained in, the new guidelines, and were unaware of the new requirement that

> …where a Ministerial Council or standard-setting body proposes to agree to regulatory action or adopt a standard, it must first certify that the regulatory impact process has been adequately completed (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 the office and, given the lack of awareness and understanding of what RIS now involved, it is not surprising that there were also examples of differences of opinion between 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 1996-7 period, ORR felt that the level of analysis was adequate in 92 per cent of cases (Office of Regulation Review 1997, 44).

The Learning period is over: 1998-2006

What then, was the performance of this new, reformed RIS after the initial learning period? In terms of volume, as indicated in Table 1, in the period from 1999-2000 to 2004-5, a total of 11,545 Bills and Disallowable instruments were introduced, with ORR receiving 4,832 new RIS queries in 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 were 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 1 Australian Government regulatory and RIS activities, 1999-2000 to 2004-05

	1999-2000	*2000-01*	*2001-02*	*2002-03*	*2003-04*	*2004-05*
	no.	*no.*	*no.*	*no.*	*no.*	*no.*
Regulations introduced						
Bills	159	169	207	174	150	172
Disallowable instruments	1832	1438	1711	1615	1538	2380
Total introduced	**1991**	**1607**	**1918**	**1789**	**1688**	**2552**
RIS workload						
Total number of new RIS queries received by the ORR	826	740	709	861	845	851
- of which, the ORR advised a RIS was required	266	171	175	132	174	167
Proposals finalised in 2004-05 [a]						
RISs required	207	157	145	139	114	85
RISs prepared	180	133	130	120	109	71

[a] Proposals at the decision-making stage which were tabled or made in the reporting period — for some of these proposals the ORR was contacted in an earlier reporting period.

Source: Productivity Commission 2005: 78.

In aggregate, the extent to which the RIS submitted by departments and agencies were regarded as *adequate*, using the measures developed by ORR, is indicated in Table 2, 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 RIS at the decision making stage were regarded as adequate, rising to 92% for the Parliamentary tabling stage, the higher rate for the latter being 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 consumption. 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 ORR.

However, what also becomes evident is that the overall levels of RIS performance indicated in Table 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 significantly lower than the overall average, even though it might be expected that departments would be most careful in the adequacy of their analysis for more important regulation, as indicated in Table 3 (the measures used to determine greater or lesser significance are described in Productivity Commission 2000, 42-3). The average for the 2000-2005 period for more significant regulation 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 2002-3, 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 2003-4, to a low, a year later, of 80%.

Table 2 RIS compliance, 1999-2000 to 2004-05

	1999-00	*2000-01*	*2001-02*	*2002-03*	*2003-04*	*2004-05*
Decision-making stage [a]	169/207	129/157	128/145	113/139	105/114	68/85
	(82%)	*(82%)*	*(88%)*	*(81%)*	*(92%)*	*(80%)*
Tabling stage [a, b]	163/179	118/133	116/123	113/119	82/86	59/66
	(91%)	*(89%)*	*(94%)*	*(95%)*	*(95%)*	*(89%)*

[a] The first figure records adequate RISs; the second figure records RISs required. [b] Compliance for regulatory proposals introduced via Bills, legislative instruments and treaties (which are subject to formal assessment by the ORR).

Source: Productivity Commission 2005: 15.

Table 4 shows a similar variation in performance when the 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. In regard to primary legislation the adequacy of performance fell from 80% in 1999-2000, to 76% in 2004-5, 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, as indicated in Figure 1, for 2004-5. The variations in performance, though evident each year, do not always involve the same department or agency.

Table 3 Compliance at the decision-making stage by significance, 2000-01 to 2004-05

Significance rating	*2000-01*	*2001-02*	*2002-03*	*2003-04*	*2004-05*
More significant	18/30 *(60%)*	7/10 *(70%)*	6/13 *(46%)*	17/18 (94%)	2/3 (67%)
Less significant	111/127 (87%)	121/135 *(90%)*	107/126 *(85%)*	88/96 *(92%)*	66/82 (80%)
Total	**129/157 *(82.2%)***	**128/145 *(88.3%)***	**113/139 *(81.3%)***	**105/114 (92.1%)**	**68/85 (80.0%)**

Source: Productivity Commission 2005: xvii.

While the total number of RIS for each of the 19 departments and agencies whose proposals required a RIS is small, only 10 departments and agencies were fully compliant at the decision-making stage, a sharp drop from 2003-4, as indicated in Figure 1. Nine were not compliant, in whole or in part, and the nine failed to develop, in total, some 14 RIS, with three of the RIS that they did prepare having an inadequate level of analysis (Productivity Commission 2005, 31).

Table 4 RIS compliance, by type of regulation, 2004-05

	Decision-making			*Tabling* [a]		
	prepared	*adequate*		*prepared*	*adequate*	
	ratio	*ratio*	*%*	*ratio*	*ratio*	*%*
Primary legislation (Bills)	13/17	13/17	76	18/18	18/18	100
Legislative Instruments [b]	45/52	43/52	83	41/45	38/45	84
Non-legislative instruments	4/4	3/4	75	..	..	..
Quasi-regulation	7/8	7/8	88	..	..	..
Treaties [c]	2/4	2/4	50	3/3	3/3	100
Total	**71/85**	**68/85**	**80**	**62/66**	**59/66**	**89**

.. Not applicable. Tabling is not a formal requirement. [a] RIS compliance for the tabling of Bills, treaties and disallowable instruments is subject to formal assessment by the ORR. [b] Includes instruments back-captured (or likely to be back-captured) as legislative instruments under section 36 of the *Legislative Instruments Act ! 2003.* [c] During the treaty-making process, RISs are required at three stages — before entry into negotiations, before signature of the final treaty text and before ratification. The first two stages have been aligned with the decision-making stage. The ratification stage has been aligned with the tabling stage. In one case, a RIS was not required at entry into negotiations.

In regard to COAG RIS, as shown by Table 5, performance was poorer, with the average for the period, 76%, for RIS with full and qualified compliance, nearly 10% lower than that for the decision making stage. 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 RIS improved more slowly.

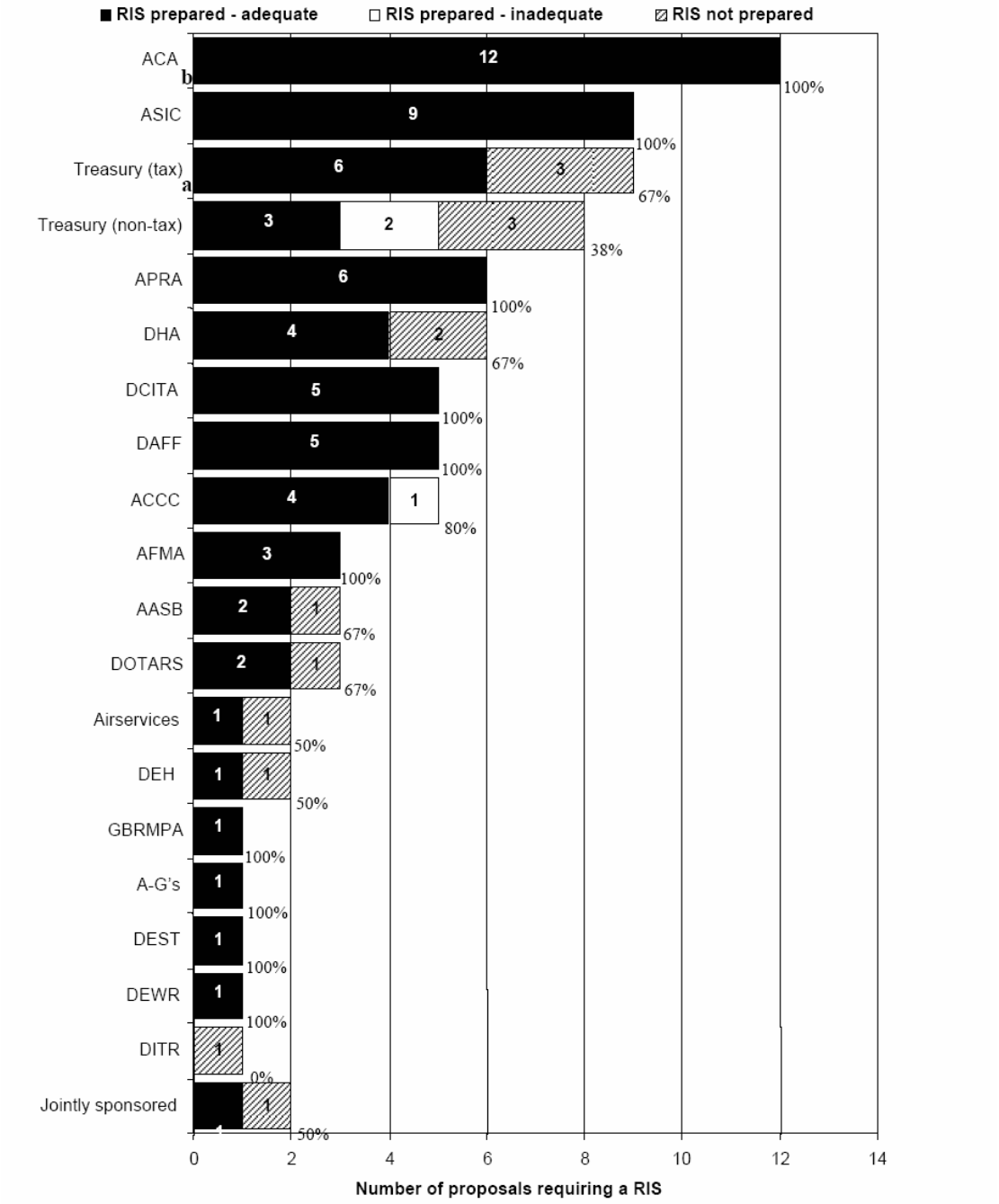
Table 5 COAG RIS compliance for regulatory decisions made by Ministerial Councils and National Standard Setting Bodies 2000-01 to 2004-05a

	2000-01	*2001-02*	*2002-03*	*2003-04*	*2004-05*
Compliance (qualified and full) at the consultation stage	*n/a*	*n/a*	*n/a*	*28/34* ***82%***	*20/24* ***83%***
Compliance (qualified and full) at the decision-making stage	*15/21* ***71%***	*23/24* ***96%***	*24/27* ***89%***	*30/34* ***88%***	*21/24* ***88%***
Compliance (qualified and full) for significant regulatory proposals					
Consultation stage	*n/a*	*n/a*	*n/a*	*4/7* ***57%***	*5/6* ***83%***
Decision-making stage	*5/9* ***56%***	*6/6* ***100%***	*4/6* ***67%***	*4/7* ***57%***	*6/6* ***100%***

n/a – Not available. [a] Data for 2000-01 relate to the period 1 July 2000 to 31 May 2001. For subsequent years, data relate to the period 1 April to 31 March, in line with a change in the reporting period as requested by the NCC. In relation to assessments for 2003-04, matters where RIS requirements were reported as partially met were treated as compliant for purposes of consistency with reporting in previous reporting periods.

Source: Productivity Commission 2005: 66.

Figure 1 Compliance with RIS requirements at the decision-making stage, 2004-05



a When the Government's RIS requirements became mandatory, the Government introduced a modified RIS process for tax proposals. Compliance by the Department of the Treasury is accordingly reported for both tax RISs and non-tax RISs. b On 1 July 2005, the Australian Communications Authority and the Australian Broadcasting Authority were merged to become the Australian Communications and Media Authority.

Source: Productivity Commission 2005: 32.

What factors help explain this variable and sometimes disappointing RIS performance, even if the very poor performance in the learning period is not included?

In drawing upon the sources available five broad factors seem to have been of most importance, although one, the notion of a risk-averse society, is debatable. They are:

- Pressures arising from a risk-averse society.
- RIS system design factors.
- Varying degrees of failure to integrate RIS into traditional departmental and agency policy development processes.
- Limitations as to analytical expertise.
- Varying levels of political commitment and support (Banks 2006a, chapter seven).

A risk averse society

The Banks Report (hereinafter 'the Report'), in drawing upon largely the views of the business community, suggests that a fundamental cause of what it regards as the unreasonable growth and cost of often inappropriate regulation, is a risk-averse society, following earlier, pre-Report comments by Gary Banks, and noting in support of this fairly dramatic claim, similar views in regard to British society expressed by Prime Minister Tony Blair, (Banks 2005: 4, 2006a, 14). When combined with other inadequacies, notably in the RIS system, as noted below, it felt the result was a persistent, growing public demand for regulation, particularly regulation that distributes risk and its costs, from smaller groups to society at large. In turn, the restricted ability of governments to resist the demand for regulation results in an increasing cost burden for business, reducing its competitiveness in a global economy. Whatever strength this view has, it is markedly lessened by the Report's failure to explain how such an increasingly risk-averse society could have permitted and

accepted the major series of regulatory reforms in the microeconomic area that characterised Australian governments at federal and state level during the later 1980s, 1990s and the earlier part of the 2000s, in precisely the same period as social risk-averseness, allegedly, was growing (Banks 2006a, i). This is not to deny that there may well have been a rise in the extent and type of regulation in recent decades, but this is as likely to have arisen because of established, if variable, patterns of interest group pressure (including from business), as it has been from a change in the risk tolerance of Australian society.

RIS system design factors

Deficiencies in the design of the RIS system itself have also become apparent over time and were highlighted in the Banks Report (some of which are noted above), which found, in assessing both RIS and departmental policy development processes, that

> On the evidence available to it, the Taskforce considers that the above requirements for good regulatory process have generally not been well discharged. It concurs with business groups that this has been a major contributor to the problems identified with specific regulations. (Banks 2006a, v)

The Report went on to note that the submissions it had received from business expressed strong support for the RIS system, but that it needed strengthening, a view that the Taskforce endorsed in recommending that the standard of analysis considered acceptable for a regulation impact statement should be increased for the regulation in question to be approved, that it should be made harder for a regulatory proposal to

proceed to a decision if the government's requirements for good process had not been adequately discharged, and that several basic elements of the system needed substantial strengthening (Banks 2006a, vi).

The Report expressed serious concern in a number of areas, including inadequacies in consultation with business, noting, in particular, a survey undertaken by the Australian Public Service Commission that found that only twenty five per cent of regulatory agencies had engaged with the public when developing regulations (Australian Public Service Commission 2005, 56, as noted in Banks 2006a, 152). Not unreasonably, it was felt that less than adequate consultation would tend to result in poorer quality regulation. Hence, it was recommended that the government develop:

- a 'whole of government policy on consultation, with detailed principles to be followed by all departments and agencies.
- For major, proposed regulation, the preparation and release of an initial 'green paper', to all relevant parties, followed by successive 'exposure', drafts to test out options with business interests.
- A business consultation website that would automatically notify, on a voluntary basis, registered businesses and government agencies of new developments (Banks 2006, 154).

The authors of the Report seem not to have appreciated the irony of calling for greater and more effective consultation, that is, in enabling more effective participation in government, at the same time as it was suggesting that existing practices had resulted, in part, in too much inappropriate regulation from a risk averse society. It seems to have been felt that business groups were not so risk averse, that their greater

participation would lead to greater business influence and, hence, an increase in better quality regulation, but a decrease in the total volume. A cynic might feel otherwise.

The Report also indicated a further RIS weakness in its recommendation for the introduction of a wider range of more valuable, regulation performance indicators as administered by the OSB (Banks 2006a, 162-3). A number of senior government sources have indicated that the existing RPI are of little value. They focus largely on the identification of regulation success, rather than failure, a use handy for publicity purposes but of little value in helping to identify weaknesses in regulatory process or content. Moreover, in practice they have been rarely used for problem identification or comparative, benchmarking purposes by departments. In addition, the RPI, which had not been welcomed by departments, were, for the most part, related to the making of regulation rather than its implementation, in line with the focus of RIS, so were of little or no value for evaluating implementation performance, a fundamental weakness given that implementation of existing regulation is by far the major activity of most departments and agencies. Indeed, RPIs are not required at all where a department has not submitted a RIS in any one year. Further, other than the placing of the annual results of the RPI on the OSB website, as reported by the departments, there was little auditing of either the RPI process or the accuracy of reported performance results. Hence, it is not surprising that the Banks Report recommended that a better range of RPIs be developed for annual reporting, and that where a department or agency lacked a system for internally reviewing regulatory decisions such systems should be established, and that there should be provision for merit review of any administrative decisions that could significantly affect individual or business interests, following the USA's example (Banks 2006a, 163).

The integration of RIS with departmental policy development processes

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). A number of causative factors are involved. One, a continuing lack of belief in the RIS system and its value by at least some ministers and senior public servants, resulting in less than a full commitment to support and fully integrate RIS and, thus, hardly surprisingly, a lack of effort and enthusiasm by those responsible for undertaking RIS within departments. Two, 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, usually 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, even over a period of years, any one individual or group of individuals, gains expertise in with RIS, a phenomenon noted by ORR staff.

This varying lack of integration of RIS into departmental systems is identified as an area of major concern in the Banks Report, which urges the adoption of six basic principles for good regulation and a series of twenty eight recommendations that, if

agreed to and adopted, it felt would help to ensure a more thorough integration of the RIS process throughout the Commonwealth government (Banks 2006a, chapter seven). The Report laid particular stress on its recommendation 7.9, that proposed regulations that did not meet the RIS requirements should not be allowed to proceed to Cabinet, or other decision makers, other than in exceptional circumstances, with a specific Cabinet minister allocated responsibility for overseeing regulatory processes (Banks 2006a, 156-7). Somewhat surprisingly, this recommendation was in general agreed to by the Government in its Interim Response to the Report, although the Response noted that the 'existing', RIS system was consistent with the recommendation (and other, related recommendations), and that it would be considered in full in the final response, perhaps suggesting that the recommendation might not result in concrete action (Australian Government 2006, 22-3).

Lack of analytical expertise

Inadequate analysis by departments and agencies, especially of the costs and benefits of the regulatory options identified in the RIS, has continued to be of major concern, with, for example, recent examples including one department not clearly identifying the problem the proposed regulation was 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 RISs were prepared but failed the ORR's 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 make the following claim in 2005

> In 2004, only 20 per cent of tabled RISs involved an attempt at quantifying compliance costs. Another 70 per cent gave some consideration to compliance cost implications, without seeking to measure them. In the remaining 10 per cent, compliance costs were not even considered. Given indicative estimates of the potential magnitude of compliance costs, this looms as a major deficiency in regulation-making in Australia — and an area where we are behind a number of other OECD countries (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 ten of the criteria used in the study to those conducted for COAG (Deighton-Smith 2006).

The lack of analytical capacity and expertise, especially in regard to cost benefit analysis and risk assessment, was identified by the Banks Report. It argued that improvements in this area were one of three key areas where reform was most needed as part of a concerted effort to identify and contain the compliance costs to business of increasing regulation, especially for small business, with recommendation 7.4 asking the government to consider broadening ORR's training and advisory role to include providing technical assistance on cost benefit analysis (Banks 2006a, 148-50). The Government's Interim Response agreed to the recommendations in this area and promised a fuller consideration of them in its final response (Australian Government 2006, 22-3). While the appropriate use of cost-benefit analysis can be of value, it is

unfortunate that neither the Banks Report, nor earlier Productivity Commission annual reports, note the limitations of the technique (see, for example, Self 1977).

Varying, sometimes inadequate, levels of political and high level administrative support

Political support for RIS varies in extent and intensity over time, a phenomenon not unique to RIS. Variations in intensity of support occur when ministers are faced, for example, with either the potential for an inadequate ORR assessment from the RIS process in regard to new or modified regulation that they favour, or an actual, inadequate assessment. In essence, they face a conflict of interest situation, on the one hand committed under the doctrine of collective, Cabinet responsibility to support Cabinet's formal support for RIS, but on the other hand facing the prospect of a failed regulatory proposal if the RIS evaluation is negative. Moreover, the staff of ministerial offices and the heads of department 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 ORR.

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

(Productivity Commission 2005, 82). In recognising this situation, it is rare for ORR to pursue the matter to the ministerial level, its staff working more informally with departmental and ministerial office staff in an attempt to amend proposed regulations that it identifies as less than adequate, where they have had some success. In 2004-5, for example, ORR was successful in ten of seventy one RIS cases, in getting the preferred regulatory option contained in the RIS modified in some fashion (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 on RIS that ORR regard as inadequate (Productivity Commission 2005, 81).

The Banks Report recommended, in part to help deal with the issue of varying ministerial support, that the Minister responsible for RIS be elevated to Cabinet rank, that proposed regulations with 'material business impacts', not be permitted to proceed to Cabinet or any other decision maker unless they have complied with the Government's RIS requirements, other than in exceptional circumstances, and that the extent of discretion to interpret regulation by public servants be reduced by ministers being more specific in terms of regulatory objectives, especially in their second reading speeches in Parliament (Banks 2006a, 157-161). In its Interim Response to the Banks Report, the Government accepted the need for greater precision by ministers in regard to regulatory objectives, but, indicative of the more sensitive nature of the other recommendations, made no interim response to them (Australian Government, 2006, 24). At the time of writing the final response to the Banks Report had not been released.

Conclusion

In essence, the RIS was, and continues to be, an attempt to improve the quality of policy in regard to business. As noted above, its success has been variable, with departments and agencies improving their performance in regard to meeting RIS *process* requirements, but being less successful in regard to the *content* of new and amended policy. It might have been more successful if it had been applied to all areas of public policy, rather than only policy regarding business. This would have reduced, if not entirely avoided, the negative impression that RIS had ideological objectives, leading to suspicions, however unfounded, that ORR's judgements on RIS adequacy were not entirely objective, but based on whether or not a proposed regulation reduced the burden on business, regardless of other socio-cultural impacts. Indeed, in most respects, a RIS type system could and should be instituted for all areas of public policy, for its emphasis on rational, efficient and effective policy making, with a full consideration of costs and benefits, as well as compliance burdens, is hardly unreasonable. Moreover, if applied government-wide, it would reduce, if not eliminate, the dual policy making systems existing in some departments and agencies, one being the 'normal', system, the other being RIS, with the latter a relatively minor appendage.

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 wishing 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, 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.

References

Australian Government, 2006. 'Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business Interim Response', as at 28 June 2006, at http://www.pm.gov.au/news/media_releases/media_Release1869.html

AIG, 2004. 'Compliance Costs Time and Money', Australian Industry Group, as at 12 June, 2006, at http://www.aigroup.asn.au/aigroup/pdf/economics/surveys_and_reports/economics_reports_compliance_Oct4.pdf

Argy, S, Johnson, M, 2003. 'Mechanisms for improving the Quality of Regulations: Australia in an international context', Productivity Commission Staff Working Paper, July.

Auditor-General, 1989. 'Reports on audits to 31 December 1988', Auditor-General's Office, AGPS.

Banks, G, 2001. 'Challenges for Australia in Regulatory Reform', as at 14 June 2006, http://www.pc.gov.au/speeches/cs20010710/index.html

_____, 2003a. 'Reducing the business costs of regulation', March, Productivity Commission, as at 12 June 2006, at http://www.pc.gov.au/speeches/cs20030320/index.html

_____, 2003b. 'The good, the bad and the ugly: economic perspectives on regulation in Australia', 2 October, Productivity Commission, as at 12 June 2006, at http://www.pc.gov.au/speeches/cs20031002/index.html

_____, 2004. 'NCP and beyond: an agenda for national reform', 6 December, Productivity Commission, as at 12 June 2006, at http://www.pc.gov.au/speeches/cs20041206/index.html

_____, 2005. 'Regulation-making in Australia: is it broke? How do we fix it? 7 July, Productivity Commission, as at 12 June, 2006, at http://www.pc.gov.au/speeches/cs20050707/index.html

_____, 2006a. 'Rethinking Regulation', January, as at 12 June 2006, at http://www.regulationtaskforce.gov.au/index.html

_____, 2006b. 'Reducing the Regulatory Burden: the way forward', 17 May, Productivity Commission, as at 12 June, 2006, at http://www.pc.gov.au/speeches/cs20060517/index.html

BCA, 2005a. 'Locking in or Losing Prosperity – Australia's Choice', Business Council of Australia, as at 12 June 2006, at http://www.bca.com.au/content.asp?newsID=99077

BCA, 2005b. 'Business Regulation Action Plan For Future Prosperity', Business Council of Australia, as at 28 June 2006, at http://www.bca.com.au/content.asp?newsID=99099

Bell, 1996. 'Time for Business', the Report of the Small Business Deregulation Task Force, as at 11 June 2006, at http://www.daf.gov.au/reports/time_for_business.pdf

Brennan, G. 2004, 'The Political Economy of Regulation: A Prolegomenon' in G. Eusepi and F. Schneider (eds) 2004, *Changing Institutions in the European Union: A Public Choice Perspective*, Edward Elgar Publishing, Cheltenham, pp. 72-94.

Deighton-Smith, R, 2006. A personal communication with the author, by Deighton-Smith, the consultant who undertook the study for the Victorian government.

Head, B, McCoy, E, (eds), 1991. 'Deregulation or Better Regulation?', Macmillan, South Melbourne.

Howard, J, 1997. 'More Time for Business', statement by Prime Minister Howard, as at 11 June 2006, at

http://www.industry.gov.au/content/itrinternet/cmscontent.cfm?ObjectID=25D8598E-CFE8-47EA-BC45A29D63948869

Industry Commission, 1993a. 'Developments in Regulation and its Review, 1992/3', Industry Commission, AGPS, as at 12 June 2006, at http://www.pc.gov.au/orr/reports/annrpt/reglnrev9293/index.html

_____, 1993b. 'Review of the Office of Regulation Review', Industry Commission, AGPS.

_____, 1994. 'Annual Report 1993/4', Industry Commission, AGPS.

_____, 1995. 'Annual Report 1994/5', Industry Commission, AGPS.

_____, 1996. 'Annual Report 1995/6', Industry Commission, AGPS.

_____, 1997. 'Regulation and its Review: 1996-97', Industry Commission, AGPS.

OECD, 2001. 'Businesses' Views on Red Tape: Administrative and Regulatory Burdens on Small and Medium-Sized Enterprises', OECD, Paris.

Office of Regulation Review, 1993. 'Regulation and its Review, 1992-1993', Industry Commission, Canberrra.

Office of Regulation Review, 1997. 'Regulation and its Review, 1996-1997', Industry Commission, Canberra.

Office of Regulation Review 1998, *A Guide to Regulation (second edition)*.

Productivity Commission, 1996. 'Stock take of progress in microeconomic reform', June, AGPS, Canberra.

Productivity Commission, 1998. 'Regulation and its Review 1997-98', AusInfo, Canberra.

Productivity Commission, 1999. 'Regulation and its Review 1998-99', AusInfo, Canberra.

Productivity Commission 2000. 'Regulation and its Review 1999-2000', AusInfo, Canberra.

Productivity Commission 2001. 'Regulation and its Review 2000-01', AusInfo, Canberra.

Productivity Commission 2002. 'Regulation and its Review 2001-02', Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2003. 'Regulation and its Review 2002-03', Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2004. ‘Regulation and its Review 2003-04’, Annual Report Series, Productivity Commission, Canberra.

Productivity Commission 2005. ‘Regulation and its Review 2004-05’, Annual Report Series, Productivity Commission, Canberra.

Self, P, 1977. ‘Econocrats and the Policy Process: the politics and philosophy of cost-benefit analysis’, Westview Press.