Legislative Council

Environment and Planning Legislation Committee

Report No. 2
November 2013

Inquiry into the Regulatory Impact Statement Process

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Chair's Foreword

On behalf of the Environment and Planning Legislation Committee I am pleased to present this report on the Inquiry into the Regulatory Impact Statement Process.

Victoria's continued prosperity depends in part on the quality of its regulatory environment. Regulatory impact analysis contributes to this by preventing burdensome regulation and promoting investment. It also supports sound decision-making by testing alternative regulatory approaches and requiring public consultation.

The Committee found that the Victorian system of regulatory impact analysis is highly regarded in Australia, scoring well against leading practice benchmarks. Regulatory impact statements prepared by Victorian departments are more comprehensive and display a higher level of analytical rigour than comparable documents from other jurisdictions.

Notwithstanding, there are ways the system can be improved, with the Committee making 13 recommendations focusing on achievable, practical steps.

I thank all those who wrote to the Committee or gave evidence at hearings and briefings. In particular the Committee appreciated the ability to hear from witnesses in Canberra, which was made possible with the assistance of the ACT Legislative Assembly.

Finally, I would like to thank my fellow Committee Members for the professional manner in which the Committee was able to conduct the Inquiry and deliver this important work.

Hon. Richard Dalla-Riva, MLC
Chair

Findings

FINDING 1

Victoria's regulatory impact analysis system is well regarded, however there are opportunities for improvement.

[Page 17]

FINDING 2

While it is difficult to establish definitively, the benefits of regulatory impact analysis outweigh the costs.

[Page 30]

FINDING 3

Consultants have a role in regulatory impact analysis in relation to assisting departments with technical aspects of the process. However, ideally departments should endeavour to develop their own in-house skills.

[Page 30]

Recommendations

The role of the Victorian Competition and Efficiency Commission

RECOMMENDATION 1

That the Victorian Auditor-General conduct bi-annual evaluations of the Victorian Competition and Efficiency Commission's assessments of RISs and BIAs.

[Page 17]

RECOMMENDATION 2

That the Victorian Competition and Efficiency Commission be established as a fully independent body reporting to the Parliament.

[Page 17]

Improving the *Victorian Guide to Regulation*

RECOMMENDATION 4

That responsibility for the *Victorian Guide to Regulation* be transferred from the Department of Treasury and Finance to the Victorian Competition and Efficiency Commission.

[Page 34]

RECOMMENDATION 9

That the Victorian Competition and Efficiency Commission prepare a user-friendly abridged version of the *Victorian Guide to Regulation* for use by departments as a supplement to the full version of the *Guide*.

[Page 44]

RECOMMENDATION 6

That the Government expedite its planned updating of the *Victorian Guide to Regulation* to address the concerns of local government.

[Page 38]

Consultation and transparency

RECOMMENDATION 5

That the statutory consultation period for a RIS be extended to a minimum of 45 days, with a minimum of 60 days for complex regulatory proposals, to allow stakeholders time to prepare considered responses.

[Page 36]

RECOMMENDATION 3

That each RIS is required to have a plain language executive summary and glossary.

[Page 34]

RECOMMENDATION 7

That departments be required to:

- update RISs to reflect the results of consultation
- advise stakeholders of the publication of the updated RIS and the Victorian Competition and Efficiency Commission's assessment letter.

[Page 43]

RECOMMENDATION 8

That the Victorian Government investigate introducing a two-stage RIS process for complex proposals.

[Page 43]

RECOMMENDATION 11

That the BIA process be made more effective and transparent by:

- making the threshold for BIAs the same as the threshold for RISs
- requiring BIAs – and their relevant Victorian Competition and Efficiency Commission assessment letters – to be tabled in Parliament at the second reading stage of a Bill
- replacing the term 'business impact assessment' with a more accurate term such as 'legislative impact assessment'.

[Page 50]

Building greater capacity for regulatory impact analysis in the public service

RECOMMENDATION 10

That in order to build the capacity of departments to undertake regulatory impact analysis, the Victorian Competition and Efficiency Commission should:

- increase the number of training courses offered to departments and ensure that cost-benefit analysis and other key skills are covered
- investigate the costs and benefits of an outposting program, with an initial focus on departments with the greatest regulatory impact analysis workload.

[Page 47]

Other matters

RECOMMENDATION 12

That the discount rate currently recommended for use in RISs and BIAs be reviewed.

[Page 56]

RECOMMENDATION 13

That the Minister for Planning, in consultation with the Victorian Competition and Efficiency Commission, amend Ministerial Direction 11 (Strategic Assessment of Amendments) to require a cost-benefit analysis for significant changes to planning schemes.

[Page 60]

Acronyms

BIA	Business Impact Assessment
COAG	Council of Australian Governments
Cth	Commonwealth
DBI	Department of Business and Innovation
DHS	Department of Human Services
DoH	Department of Health
DoJ	Department of Justice
DoT	Department of Transport
DPC	Department of Premier and Cabinet
DPCD	Department of Planning and Community Development
DPI	Department of Primary Industries
DSE	Department of Sustainability and Environment
DTF	Department of Treasury and Finance
ESV	Energy Safe Victoria
MAV	Municipal Association of Victoria
MBA	Master Builders Association
OECD	Organisation for Economic Cooperation and Development
OBPR	Office of Best Practice Regulation
PEA	*Planning and Environment Act 1987* (Vic)
PIR	Post Implementation Review
RIA	Regulatory Impact Analysis
RIS	Regulatory Impact Statement
SARC	Scrutiny of Acts and Regulations Committee
SLA	*Subordinate Legislation Act 1994* (Vic)
TOR	Terms of Reference
VCEC	Victorian Competition and Efficiency Commission
VPP	Victoria Planning Provisions
VPS	Victorian Public Service

Chapter One: Introduction

1.1 Overall perception of regulatory impact analysis in Victoria

Victoria's regulatory impact analysis (RIA) system – which assesses the likely consequences of proposed regulation and legislation – is highly regarded domestically and internationally. The Committee received evidence characterising the system as the 'gold standard'[1] and the 'Rolls Royce model'.[2] In 2010 the Business Council of Australia rated Victoria's regulatory framework and RIA system as the best in Australia.[3] More recently, a Productivity Commission benchmarking report painted Victoria in a similarly positive light, finding that the Victorian RIA framework either partially or fully met 11 of 14 Organisation for Economic Cooperation and Development (OECD) and Council of Australian Governments (COAG) best practice RIA principles.[4]

The weight of evidence put to the Committee suggests that the Victorian system is working well. However, there remain opportunities for improvement. The regulatory impact statement (RIS) process is perceived to be 'complex, time consuming and costly.'[5] There is a view that the Victorian RIS model is 'one size fits all',[6] working well for significant proposals but often demanding a disproportionate level of analysis. Furthermore, while RISs are in part intended as public consultation documents, their accessibility to a broad audience can be limited by their length and style.[7]

In 2012-13, 77 percent of Victorian RISs and business impact assessments (BIAs) were prepared either partly or wholly by consultants.[8] Elsewhere in Australia government departments do this work.[9] Access Economics suggests that Victorian government

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1 T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 4.

2 P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2012, 14.

3 BCA, *2010 Scorecard of Red Tape Reform,* 2010, 8, www.bca.com.au/DisplayFile.aspx?FileID=686.

4 Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 5.

5 DPCD, *Written Submission No.9*, 9 Apr 2013.

6 T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 6; S.Argy, Productivity Commission, *Transcript of Evidence*, 20 Jun 2013, 63.

7 R.Deighton-Smith, Jaguar Consulting, *Transcript of Evidence*, 8 May 2013, 22.

8 Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

9 J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 75.

departments lack the capacity, resources, interest or incentives to embrace RIA as a core part of their work.[10] The Victorian requirements for RIA are lengthy, some steps (such as cost-benefit analysis or data collection) are technical and consultants may produce documents of a higher standard. Outsourcing may be cheaper, although it is not cost-free for departments. On the other hand, RIA is essentially a 'good policy development' task that should be within the capability of departments to complete (at least in part).[11]

Victoria currently operates a single stage RIS process, which involves publishing a discussion RIS for public consultation. There are other possible models. A two-stage process (used by the Commonwealth Government and COAG) adds a further step requiring the RIS to be updated to inform the policy decision and then republished. The potential for additional costs may be offset by increased accountability and transparency in the decision making process.

The Victorian RIA process is overseen by the Victorian Competition and Efficiency Commission (VCEC). VCEC assists departments with RIA processes and is responsible for quality assessment and compliance monitoring. Its performance of these roles is well regarded,[12] however leading practice suggests that assessment of RIA by oversight bodies should be regularly evaluated by an independent third party.[13]

1.2 Background to the Inquiry

This is the second report of the Environment and Planning Legislation Committee for the 57th Parliament.

The functions of the Environment and Planning Committee are set out in the Legislative Council Standing Orders. The Committee will 'inquire into and report on any proposal,

[10] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 30.

[11] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 72.

[12] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 25.

[13] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 265.

matter or thing concerned with arts, coordination of government, environment, and planning the use, development and protection of land.'[14]

The Standing Orders also state that legislation committees may 'inquire into, hold public hearings, consider and report on Bills or draft Bills referred to them by the Legislative Council, annual reports, estimates of expenditure or other documents laid before the Legislative Council in accordance with an Act, provided these are relevant to their functions.'[15]

On 8 February 2011, in accordance with the Legislative Council's Standing Orders, the following Members were appointed to the Environment and Planning Legislation Committee:

- Mr Andrew Elsbury (Liberal)
- Mrs Jan Kronberg (Liberal)
- Mr Craig Ondarchie (Liberal)
- Ms Sue Pennicuik (The Australian Greens)
- Mrs Inga Peulich (Liberal)
- Mr Johan Scheffer (ALP)
- Mr Brian Tee (ALP)
- Ms Gayle Tierney (ALP).

On 28 November 2012, Mr Tee advised that Mr Shaun Leane (ALP) would act as his substitute for the Committee's inquiry into the regulatory impact statement process.

On 16 April 2013, the Legislative Council discharged Mrs Peulich from the Committee and appointed the Hon. Richard Dalla-Riva in her place. At its meeting on 17 April 2013, the Hon. Richard Dalla-Riva was elected Chair of the Committee.

[14] Legislative Council of Victoria, *Standing Orders,* 2010, 23.02(2).
[15] Legislative Council of Victoria, *Standing Orders,* 2010, 23.02(4)(b).

1.2.1 Terms of Reference

On 13 November 2012, the Legislative Council agreed to the following motion:

With reference to the Department of Planning and Community Development's Report, 2011-12, and a commitment to cut red tape in planning, this House requires the Environment and Planning Legislation Committee to inquire into, consider and report on reform of the application of the Regulatory Impact Statement (RIS) process and in particular:

(1) Regulatory Impact Assessment models;

(2) Business Impact Assessment models;

(3) possible legislative reform;

(4) economic modelling and methodology application including:

(a) discount rates; and

(b) consultant costs;

(5) regulatory impacts of the RIS process; and

(6) the annual cost to government of RIS processes;

and the Committee is required to present its final report no later than 29 November 2013.[16]

1.2.2 Inquiry process

The Terms of Reference were advertised in *The Age* and *The Australian Financial Review* on Monday 4 February 2013 and further publicised through Twitter and the Committee's website. The Committee also wrote to numerous individuals, organisations and government bodies advising of the Inquiry and inviting written submissions.

The Committee received a total of ten written submissions (see Appendix A). The Committee held public hearings over four days, receiving evidence from nine organisations and government bodies in total (see Appendix B). The Committee also received briefings from the Department of Treasury and Finance (DTF), VCEC and other witnesses (see Appendix C).

[16] Legislative Council of Victoria, *Minutes of the Proceedings*, 13 Nov 2012, 546.

1.3 Context of the Inquiry

This Inquiry follows a number of related inquiries and studies undertaken over the last two to three years. These have dealt in detail with many of the aspects mentioned in the Committee's Terms of Reference. The reports of VCEC (2011) and the Productivity Commission (2012) are particularly relevant and are discussed further below. An independent review of the Commonwealth Government's RIA system, conducted by David Borthwick and Robert Milliner (2012), also covers related themes. The Committee was grateful to have the opportunity to discuss that review with Mr Borthwick during the course of the Inquiry.

Former Committees of the Victorian Parliament have also investigated RIA. In September 2002 the Scrutiny of Acts and Regulations Committee (SARC) tabled its report on the *Inquiry into the Subordinate Legislation Act 1994*, which made several recommendations for improving the RIA processes. Prior to this, the Law Reform Committee's 1997 report on regulatory efficiency legislation looked at Australian and overseas RIA models in terms of their ability to reduce the burden of regulatory compliance on business.

These reports provided a valuable source of information for the Committee's investigation. The Committee has sought to bring some of the information up to date. In some cases, the evidence received in this Inquiry reaffirms conclusions reached by other reports. Equally, this report examines other issues and presents new information which has not received attention previously.

1.3.1 Victorian Competition and Efficiency Commission Inquiry

In 2010 the then Victorian Treasurer Mr John Lenders directed VCEC to conduct an inquiry into Victoria's regulatory framework to identify areas that were unnecessarily burdensome and propose ways to reform the regulatory system. VCEC consulted widely for the inquiry, receiving 46 written submissions, commissioning background papers and holding roundtables with stakeholders.

The final report *Strengthening Foundations for the Next Decade: An Inquiry into Victoria's regulatory framework* was published in April 2011 and contained 42 recommendations to

improve and strengthen Victoria's regulatory management system. Seventeen of the 42 recommendations directly related to impact assessment.

As part of the inquiry, VCEC commissioned Access Economics to undertake an independent review of the effectiveness of the RIS process in Victoria. This report (December 2010) concluded that the RIS process was working well and was highly regarded by stakeholders.[17] However, a number of opportunities to improve were identified, including:

- greater emphasis on the policy development component of the RIS process
- earlier and more effective consultation
- training, technical guidance and assistance
- more detailed consideration of non-regulatory options
- more flexible methods of quantification
- the approach to ex-post evaluations.[18]

1.3.2 Government response

The Victorian Government responded to the VCEC report in March 2012. Of the 17 recommendations made by VCEC that related directly to improving the impact assessment system:

- six were supported
- five were supported 'in part'
- three were 'under review'
- two were supported 'in principle'
- one was not supported.[19]

On 12 June 2013 the Committee sought an update from DTF on the progress of the three recommendations which had been 'under review' and one of the recommendations which had been supported 'in part'.[20] The Committee was informed that the review was ongoing.[21]

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[17] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria,* 23 Dec 2010.

[18] *Ibid*, 5.

[19] DTF, *Victorian Government response to the Victorian Competition and Efficiency Commission's Final Report*, Mar 2012.

[20] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, Recommendation 3.12.

[21] M.Johnstone, DTF, *Transcript of Evidence*, 12 Jun 2013, 49.

1.3.3 Productivity Commission report

In February 2012, the then Commonwealth Assistant Treasurer, Senator Mark Arbib, directed the Productivity Commission to undertake a study to benchmark the efficiency and quality of RIA processes across all Australian jurisdictions. The Productivity Commission's report compared RIA systems around Australia and benchmarked these against OECD guidelines. In summary, the Productivity Commission found that RIA processes across Australia were broadly consistent with OECD and COAG best practice principles.

Victoria's RIA performance rated highly, with 11 of the 14 benchmarks reviewed either fully or partially implemented. The three areas that Victoria has not fully implemented are:

- operating a two-stage RIS process (which involves preliminary consultation document followed by an updated RIS)
- publishing BIAs
- requiring Post Implementation Reviews (PIRs) for all exempt and non-compliant proposals.[22]

Two-stage RIS processes and the publishing of BIAs are discussed by the Committee in this report. The third issue mentioned above, PIRs, did not feature in evidence provided through submissions and public hearings.

1.4 Structure of the report

Chapter Two provides a brief outline of the Victorian RIS and BIA processes and describes the different roles of the various organisations and bodies involved.

The extent to which RIA is undertaken in Victoria is explored in Chapter Three. The number of RISs and BIAs prepared each year is identified and compared to the number of regulations and Bills introduced. RIA activity by departments is examined. This chapter concludes by discussing some of the identified benefits and costs that are thought to arise from RIA in Victoria.

Chapter Four discusses opportunities to improve Victoria's current RIA framework. In particular, public engagement in the RIS process is examined, including the feasibility of

[22] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 288.

introducing a two-stage RIS model. This chapter then looks at measures to assist departments; the transparency of the BIA process; methodological issues, such as cost-benefit analysis and discount rates; and whether the planning system's current exemption from the RIS requirements is appropriate.

Chapter Two: Overview of Victoria's framework

2.1 Why consider the impact of regulation?

Governments impose regulation in the form of rules or principles to influence behaviour and achieve financial, environmental, infrastructure and social policy objectives. Regulation has costs: for business, the not-for-profit sector, government sector organisations and the community as a whole. If regulation is inappropriate (unwarranted or unduly burdensome) the costs may outweigh its benefits and impede business growth or disadvantage sections of the community.[23]

In essence, regulatory impact analysis (RIA) is a tool to assist Ministers to determine the costs and benefits of regulatory decisions. It aims to make the likely consequences of decisions transparent at the time at which a decision is made. It should ensure that all practical options for addressing a policy problem have been considered and the preferred option delivers the highest level of net benefit. Ideally, an effective RIA regime will also enhance government accountability by genuinely engaging the public and making the reasons for decisions clear.[24]

An underlying benefit of RIA is the rigour it demands of proposals for government intervention: 'the most important contributor to the quality of government decisions is not the precision of calculations but the action of asking the right questions, understanding real world impacts and exploring assumptions.'[25] Or, as the Productivity Commission recently put it: 'RIA processes are less about giving a single answer, and more about framing problems, scoping solutions and uncovering unintended consequences.'[26]

In this report, the term "regulations" (or "subordinate legislation") includes (but is not limited to) statutory rules, court rules, orders-in-council and codes of practice. It is to be distinguished from "primary legislation", which refers to the Acts passed by Parliament itself.

[23] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 1.

[24] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 32

[25] S.Jacobs, 'Regulatory Impact Assessment and the Economic Transition to Markets', *Public Money & Management*, 2004, 24 (5), 287.

[26] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 236.

"Legislative instruments", which have come under the scope of Victoria's RIA regime since 2011, are also a form of regulation. These are defined as instruments made under an Act or statutory rule that are 'of a legislative character, apart from statutory rules and certain other instruments'.[27] In Victoria the Parliament delegates the power to make regulations to the executive and to departments, statutory authorities and agencies.[28] Regulations may contain a "sunset clause" requiring them to be revoked or remade approximately every ten years. These provisions are a way of ensuring regulation is reviewed regularly and operating optimally.

In Victoria two different methods are used for analysing the impact of proposed regulations and primary legislation. Regulations proceed through the regulatory impact statement (RIS) process. Primary legislation – in the form of Bills – goes through the business impact assessment (BIA) process. This chapter outlines the main features of the two processes. The chapter also discusses some of the key institutions involved in RIA.

2.2 Regulatory impact statements

A RIS is a document that sets out a policy problem and the impacts of possible regulatory and non-regulatory options which would allow the government to meet its policy goals.[29] The audience for a RIS is government decision-makers as well as the broader community.

The *Victorian Guide to Regulation* provides guidance for public servants preparing a RIS. It is published by the Department of Treasury and Finance and was last revised in August 2011. The *Guide* states that the objectives of a RIS are to ensure:

- regulation is only implemented where there is a justified need
- only the most efficient forms of regulation are adopted
- there is an adequate level of public consultation in the development of regulatory measures.[30]

Legislative backing for the RIS process is found in the *Subordinate Legislation Act 1994* (Vic) (SLA). Amendments to the SLA made in 2010 (effective July 2011) brought legislative

[27] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, xviii.
[28] SARC, *Annual Review 2011*, 2011, 1.
[29] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 31.
[30] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 45.

instruments into the scope of the RIS regime for the first time.[31] Where a statutory rule or a legislative instrument is proposed the responsible Minister must ensure that a RIS is prepared (s.7(1)),[32] or issue an exemption certificate in accordance with criteria set out in s.8.[33] The Premier can also issue an exemption certificate under s.9.[34]

Section 10 of the SLA stipulates what a RIS must contain.[35] Consultation requirements, including the need for the RIS to be advertised and for submissions to be taken, are set down in s.11.[36]

In 2012-13, 88 percent of regulations made in Victoria did not go through the RIS process, as they met one of the grounds for exemption set out in the SLA.[37] In particular, a proposed rule/legislative instrument is exempt if it is 'not likely to impose a significant economic or social burden on a sector of the public' (s.10).[38] The test for what is to be considered a 'significant burden' is found in the 'Premier's Guidelines' developed under s.26 of the SLA, where it states that any quantifiable cost greater than $500,000 per year compared with the base case is likely to constitute a significant burden.[39] The Committee notes that while the Premier's Guidelines contain further information qualifying this threshold, it is generally used as a rule of thumb for determining if a RIS is needed.

2.3 Business impact assessments

In most respects, RISs and BIAs are similar. Like a RIS, a BIA is a document designed to encourage better decision making, although the focus of a BIA is on proposed legislation (that is, Bills). The format is also similar: BIAs step the decision maker through a detailed analysis of the costs and benefits of a proposal.

[31] The Act defines a legislative instrument as 'an instrument made under an Act or statutory rule that is of a legislative character' and lists various instruments or types of instruments which do not meet the definition.

[32] S.12E for legislative instruments.

[33] S.12F for legislative instruments.

[34] S.12G for legislative instruments.

[35] S.12H for legislative instruments.

[36] S.12I for legislative instruments.

[37] Correspondence from VCEC, 24 May 2013 & 9 Oct 2013. Note that this figure does not include legislative instruments.

[38] S.12E for legislative instruments.

[39] *Subordinate Legislation Act 1994 Guidelines*, para 228.

There are important differences, however (see Table 2.1 below). BIAs do not have legislative backing; the *Victorian Guide to Regulation* is the authority on what they are to contain and the process to be followed. The threshold for a BIA is also different from a RIS: a BIA is required where a Bill has 'potentially significant effects for business and/or competition'.[40] In addition, BIAs are not consultation documents; they are not released to the public but remain confidential to Cabinet and Ministers. Section 4.4 discusses evidence received on BIAs.

TABLE 2.1 Comparison of BIA and RIS features

	BIA	**RIS**
Used to analyse impact of…	New or amending primary legislation (Bills)	Subordinate legislation: 'regulations' or legislative instruments, whether new or replacing sunsetting regulations
Source of authority	*Victorian Guide to Regulation* (Aug 2011). No legislative backing	*Subordinate Legislation Act 1994* (Vic)
Triggered when…	Proposal has potential significant effects for business or competition	Proposal has significant economic or social impact on a sector of the public
Who decides if triggered?	Responsible Minister	Responsible Minister
To be prepared by…	Department/agency/consultant	Department/agency/consultant
And submitted to…	VCEC – advises Cabinet on the BIA's adequacy	VCEC – advises Department on the RIS's adequacy. Minister certifies that the RIS complies with the Act and Guidelines
Analysis required	Similar to RIS, including explicit assessment of impact on small business	ss.10 & 12H of the Act
Reviewed by Scrutiny of Acts and Regulations Committee (SARC)?	No	Yes – SARC can recommend statutory rule be disallowed or amended
Publically released?	If agreed by the Premier, Treasurer and responsible Minister. In practice, has never occurred	Yes – must be released for minimum of 28 days for public comment
Exemptions	• If a COAG/national RIS has been prepared (under certain conditions) • Premier – where there are exceptional circumstances	Set out in the Act: ss.8 & 9 for statutory rules, and ss.12F & 12G for legislative instruments

Source: Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 34.

[40] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 37.

2.4 Roles and responsibilities

2.4.1 Departments and agencies

The department or agency proposing a regulatory measure will make an assessment of whether a RIS or a BIA is required, although ultimately the decision is made by the responsible Minister. If a RIS or BIA is required, the department or agency has responsibility for preparing the document and undertaking stakeholder consultation. The final document is then submitted to the Victorian Competition and Efficiency Commission (VCEC) for independent advice and assessment as required under s.10(3) of the SLA.[41]

In practice, in around 80 percent of cases at least some part of the RIS or BIA is contracted out by the department or agency to a consultant (see chart 3.6).[42] The consultant may be asked to complete all of the required analysis or a discrete part, such as data collection, consultation or cost-benefit analysis. Further discussion of consultants is at section 3.3.

2.4.2 Ministers

Ministers make decisions on policy issues, ideally using the information generated by RIA on potential options and likely impacts.[43] Under the SLA, a Minister responsible for a proposed new regulation or legislative instrument also has various procedural obligations. The Minister is responsible for:

- determining whether a RIS is required (ss.10 & 12E)
- certifying an exemption from the RIS process (if applicable) (ss.8(1) & 12F(1))[44] – the Premier may also issue an exemption certificate where special circumstances apply (ss.9 & 12G)
- obtaining independent advice (from VCEC) on the RIS (s.10(3))
- certifying that the RIS complies with the SLA and the guidelines and that it adequately assesses the likely impact of the proposal (ss.10(4) and 12H(4))
- publicly advertising the RIS (s.11(1))

[41] S.12H(3) for legislative instruments.

[42] Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

[43] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 86.

[44] The *Victorian Guide to Regulation* points out that the Act does not *require* a Minister to issue an exemption certificate; even where an exemption criteria is met he or she may still decide to proceed with a RIS.

- ensuring that all comments and submissions on the RIS are considered (s.11(3))
- ensuring that a notice advising of the Minister's decision on the proposal is published (s.12(1))
- ensuring that the RIS and/or related documents and certificates are provided to the Scrutiny of Acts and Regulations Committee (SARC) (ss.15A & 16C).

2.4.3 Victorian Competition and Efficiency Commission

VCEC was established in 2004 by an order of the Governor in Council acting under the *State Owned Enterprises Act 1992* (Vic).[45] VCEC is a state body supported by a secretariat located within the Department of Treasury and Finance (DTF) and reporting to the Treasurer. The establishing Order sets out VCEC's key role in the RIS and BIA processes:

> The Commission will review the quality of business impact assessments and regulatory impact statements having regard to relevant guidelines issued from time to time by the Government, and provide comment on these assessments and statements to the Department of the Minister responsible for the proposed legislation.

In practice VCEC has a dual function in regards to BIAs and RISs. First, it guides departments and agencies through the RIS and BIA process and assists officers to specify options and pursue solutions that yield the highest net benefit for the whole Victorian community.[46] From the Committee's observations, VCEC will offer a considerable amount of assistance throughout the RIS/BIA drafting if requested. VCEC also offers training in the RIS/BIA process throughout the year (see section 4.3).[47]

Second, VCEC acts as the oversight body in the process. It provides the final independent assessment of whether the analysis in the RIS or BIA complies with the *Victorian Guide to Regulation* and adequately meets the requirements of a RIS under the SLA, and whether (in the case of a RIS) the document facilitates genuine and informed public consultation on the merits of a regulatory proposal. It is very rare for VCEC to assess a RIS as inadequate.[48]

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45 State Owned Enterprises (State Body — Victorian Competition and Efficiency Commission) Order 2004. As a body established by Order, VCEC's role can be amended by government without reference to the Parliament.

46 VCEC, *Annual Report 2011-12*, 2012, 24. VCEC's other main functions are to undertake inquiries referred to it by government and to operate the state's Competitive Neutrality Unit.

47 VCEC, *Annual Report 2011-12*, 2012, 57.

48 Note that there is no sanction where a RIS is assessed as 'inadequate' by VCEC; the proposed regulations can still proceed.

The Committee received evidence on the question of where regulatory oversight bodies such as VCEC should be located within government. For example, a submission from Regulatory Impact Solutions suggested that VCEC either be re-established as a 'genuine independent statutory body' or, alternatively, that a new body be formed which would combine the functions of VCEC and the Essential Services Commission.[49]

The Productivity Commission discussed regulatory oversight bodies in some detail in its recent inquiry report. There are advantages for the oversight body in being attached to a central department within government (as VCEC is attached to DTF), chiefly that it adds credibility and authority to the body's work. The Office of Best Practice Regulation (OBPR) is an example of such a body. It is located within the Commonwealth Department of Finance and Deregulation,[50] however rather than resting on a statutory basis its independence stems from undertakings from the (former) Minister:

> Our independence comes in a more administrative sense, so it comes from the minister, and the minister has made statements to the Senate that we make our decisions independent of her, her office and of the executive of our department, so that is where our power for independence comes from. In terms of the operation of the system, I think the key thing is being within the Finance and Deregulation portfolio. We get a lot more vision over what is going on, including the cabinet policy process.[51]

On the other hand, the Productivity Commission found that oversight bodies with a greater degree of independence are likely to operate with more objectivity and transparency in implementing RIA requirements.[52] The Commission recommended that consideration be given to making oversight bodies report directly to Parliament, rather than to the executive branch of government. This would increase the accountability of RIA processes by insulating the oversight body from government political pressure; provide Parliament with a source of independent analysis and advice on regulatory matters, thereby 'improving the quality of parliamentary debate and enhancing decision making'; and motivate all participants (agencies, oversight bodies and ministers) to exercise their responsibilities in a rigorous manner.[53]

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[49] Regulatory Impact Solutions, *Written Submission No.3*, 8 Mar 2013, 2. Note: unlike VCEC, the ESC is established under its own Act – *Essential Services Commission Act 2001 (Vic)*.

[50] On 18 September 2013 the Australian Government issued its Administrative Arrangements Order which immediately transferred portfolio responsibility for OBPR from the Department of Finance and Deregulation to the Department of Prime Minister and Cabinet. See: ris.finance.gov.au/2013/09/20/machinery-of-government-changes-september-2013/

[51] J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 71.

[52] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 273.

[53] *Ibid*, 271.

The Committee agrees the concept of locating the regulatory oversight body within the legislature has merit and could be an option for Victoria as the RIA system continues to develop. Similarly, the suggestion to merge VCEC with another statutory authority may have the advantage of reducing costs. Queensland has recently moved to locate its VCEC-equivalent body – the Queensland Office of Best Practice Regulation – within the Queensland Competition Authority, which has statutory independence.

However, from the evidence received at hearings and in submissions the Committee found there is confidence in VCEC’s performance as an independent assessor and advisor in the RIA process. In answer to a question from the Chair of the Committee seeking views on VCEC’s independence and location within government, the Chair of VCEC, Mr Matthew Butlin, replied:

> If I may confine my remarks only to the question of independence versus placement within a line organisation, there are clearly a number of different models that exist and have existed. The VCEC model is modelled very closely on the Productivity Commission model as it existed in 2003 and 2004, at which time OBPR was part of the Productivity Commission. There are other models, including the Queensland Competition Authority, we believe — I think I am right, but I may be incorrect on that point —the general feedback we have is that stakeholders value the fact that VCEC is perceived as being independent and that the independent scrutiny is considered useful.[54]

Satisfaction measures reported in VCEC’s annual reports provide confirmation of these remarks.[55] Based on the evidence received, the Committee considers that the current institutional arrangements remain fit for purpose. Moreover, there are other measures which could more immediately improve the accountability of the overall process.

Greater scrutiny of VCEC’s oversight of the RIA processes is one such possible measure. The OECD has recommended that the assessment of RIA by oversight bodies should be regularly evaluated by an independent third party.[56] Similarly, the Productivity Commission has suggested that audit offices could be involved in the evaluation.[57] New Zealand provides a useful example of evaluation of an RIA regime. On its website the New Zealand Treasury has published five evaluation reports carried out by consultants since 2007, with the most recent

54 M.Butlin, VCEC, *Transcript of Evidence*, 12 Jun 2013, 51.

55 VCEC, *Annual Report 2011-12*, 2012, 57.

56 OECD, *Recommendation of the Council on Regulatory Policy and Governance*, Paris, 2012, 13.

57 Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 265-266.

in July 2013.[58] The reports involve a detailed consideration of a large number of RISs and an assessment of quality and compliance, as well as commentary on the RIA process itself.

FINDING 1

Victoria's regulatory impact analysis system is well regarded, however there are opportunities for improvement.

RECOMMENDATION 1

That the Victorian Auditor-General conduct bi-annual evaluations of the Victorian Competition and Efficiency Commission's assessments of RISs and BIAs.

RECOMMENDATION 2

That the Victorian Competition and Efficiency Commission be established as a fully independent body reporting to the Parliament.

2.4.4 Scrutiny of Acts and Regulations Committee

SARC is a joint investigatory Committee of the Victorian Parliament. Its functions are set out in s.17 of the *Parliamentary Committees Act 2003* (Vic). SARC reviews all regulations and legislative instruments against criteria set out in s.21 of the SLA and can recommend to each House of Parliament that a regulation or legislative instrument be disallowed or amended if any of these criteria is not met.

Section 21 of the SLA also sets out SARC's role in the RIS system. When a RIS has been prepared for a regulation or legislative instrument, SARC (through its Regulation Review Subcommittee) will be provided with copies of the RIS, statutory rule or legislative instrument, VCEC's assessment letter and a copy of all comments and submissions. SARC has no role in assessing BIAs.

SARC's Regulation Review Subcommittee reviews and assesses these documents to determine whether:

- all appropriate certificates have been received by the Subcommittee
- consultation is adequate and in particular whether appropriate organisations and individuals have been consulted

[58] See: www.treasury.govt.nz/publications/guidance/regulatory/riareview

- certificates are dated and signed by the responsible Minister, and contain all the required information
- the RIS is adequate and in particular whether it properly explains the nature and extent of the problem to be dealt with by the proposal; the extent to which alternatives have been considered and the appropriateness of those alternatives; the cost and benefits of the proposal and whether the benefits outweigh the costs.

If a regulation or legislative instrument is exempted from the RIS process, the Subcommittee examines further procedural requirements, such as whether:

- it is correctly exempted or whether it should have been made with a RIS
- it is exempted under the appropriate category in the SLA
- the exemption or exception certificate is signed and dated by the responsible Minister and contains reasons for granting the exemption
- the regulation or legislative instrument expires within twelve months.

Chapter Three: Operation of regulatory impact analysis in Victoria

Victoria's economy is built on its regulatory framework rather than, as in other jurisdictions, the endowment of mineral assets.[59] To ensure continuing investment and development in the state, an optimal regulatory and legislative environment needs to be maintained. Victoria's economic position therefore could be impacted by the quality of its RIA processes.

Between 2007-08 and 2012-13 14 percent of Victoria's regulatory activity underwent a regulatory impact statement (RIS) and approximately nine percent of legislation underwent a business impact assessment (BIA).[60] This chapter provides background information on the number of RISs and BIAs undertaken in Victoria each year. It also discusses the annual cost to government of this activity and some of the benefits that are thought to arise. The use and cost of consultants in the Victorian regulatory impact analysis (RIA) process is also examined.

3.1 Extent of regulatory impact analysis

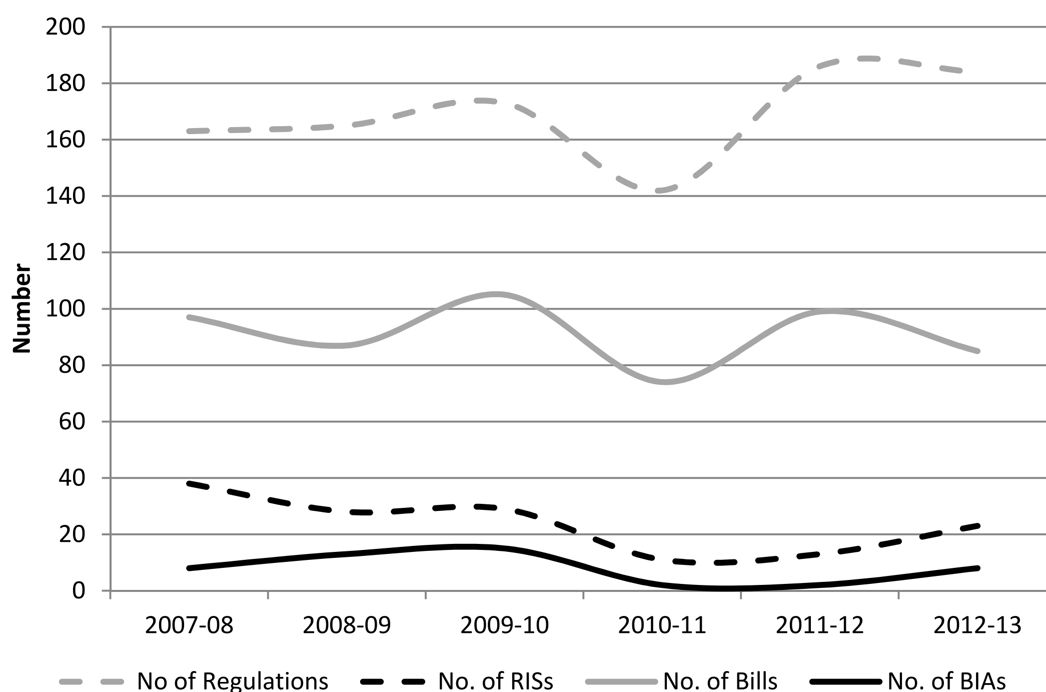
Between 2007-08 and 2012-13 some 1013 regulations were made and 547 Bills were introduced (an average of 169 statutory rules and 91 Bills per year).[61] Over the same period, 142 RISs and 48 BIAs were undertaken – an average of 24 RISs and 8 BIAs per year. Chart 3.1 (below) illustrates that the RIS and BIA process applies to only a small percentage of regulations and Bills.

[59] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, XXIV.

[60] Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

[61] Data on regulatory activity sourced from SARC Annual Reports. Note that this refers to statutory rules only. Data on Bills sourced from Legislative Assembly and Legislative Council.

CHART 3.1: Number of Regulations-RISs and Bills-BIAs, 2007-08 to 2012-13



Source: Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

In Chart 3.1 the number of regulations and Bills are both fairly stable over the period. This stability (for regulations) can be attributed in part to the fact that regulations sunset after 10 years, meaning that each year a percentage of regulations are required to be remade.

Chart 3.1 also shows a slight decline of both RISs and BIAs between 2007-08 and 2012-13. The volume of this activity will be influenced by a range of factors, including the government's legislative program, electoral cycles, the volume of sunsetting regulations, judgements by Ministers as to whether proposals meet the RIS or BIA thresholds, and changes in the nature of those thresholds. A new threshold for RISs was introduced on 1 January 2011 with RISs now only required for proposals imposing 'significant' economic or social burden.[62]

In 2012-13, 12 percent of Victorian regulations were subject to a RIS and nine percent of Bills were subject to a BIA. As a point of comparison, the Productivity Commission noted that most Australian jurisdictions prepare a RIS for only around one to three percent of all

[62] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 51.

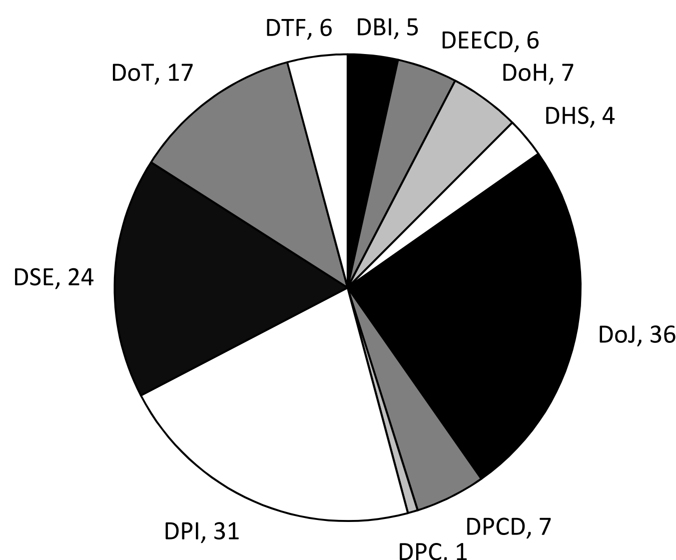
regulation (in this case, Bills and statutory rules combined).[63] Victoria is therefore subjecting a greater proportion of statutory rules and Bills to review than other Australian jurisdictions. The Productivity Commission went on to observe that:

> …this low proportion of regulation analysed is not necessarily a problem since the vast majority of regulation is considered to be of relatively minor impact. Targeting effort and resources to those regulations where impacts are most significant and where the prospects are best for improving regulatory outcomes promotes RIA efficiency.[64]

3.1.1 Regulatory impact analysis across departments

RIA activity is not spread evenly across government departments (see Chart 3.2 below). Between 2007 and 2013 three quarters of all RISs and BIAs were undertaken by four departments (Justice (36), Primary Industries (29), Sustainability and Environment (24) and Transport (17)).[65] It is notable that some departments (and their portfolio agencies) conduct RISs or BIAs very infrequently – the Department of Premier and Cabinet, for example, submitted just one RIS/BIA over this period. Officers in departments where RIA is less common are likely to have limited familiarity with the requirements for preparing a RIS or BIA.

CHART 3.2: Total RISs and BIAs by Department 2008 to 2013



Source: Correspondence from VCEC, 24 May 2013 & 9 Oct 2013..

63 Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 10.

64 *Ibid*.

65 On 1 July 2013 DPI and DSE became Department of Environment and Primary Industries, and DPCD and DoT became Department of Transport, Planning and Local Infrastructure.

3.2 Benefits of regulatory impact analysis

The principal benefits attributed to RIA include better informed decision making, public input into the decision making process (leading to ownership of the end product and greater adherence), and improved regulations/laws.[66] More directly, the Victorian Competition and Efficiency Commission (VCEC) notes that regulatory proposals may be improved in the following ways:

- the requirement/proposal is withdrawn, meaning compliance is no longer required
- the number of entities affected is reduced
- the number of requirements applying to entities is reduced.[67]

However there is little concrete evidence for the effectiveness of RIA in improving decision making or the quality of regulation and legislation.[68] This is partly due to methodological reasons. It is difficult to establish what decision would have been made in the absence of an impact assessment, and there is unlikely to be a clear causal link between conducting an impact assessment and an improved regulatory or legislative outcome. Some proposals may be withdrawn while the RIA process is underway.[69] The Committee received a practical example of this in evidence from Mr Tim Harding, of Tim Harding and Associates:

> … there is evidence that shows that RISs save more money than they cost. They save a lot of money. We would also like to confirm the fact that there have been many occasions where we have given advice to the department that this proposal will not pass a cost-benefit analysis. We recommend that you drop it right now. In all cases, I cannot remember one case that they have not dropped it. That has prevented a proposal going ahead from the department that would not pass a cost-benefit analysis. When that happens we say, 'Well, that's the RIS process working where departments are being advised to drop a proposal that won't work in terms of cost benefit.'[70]

The Productivity Commission suggests there is a need for data collection which would help to build the evidentiary base for the performance of RIA.[71] The Committee notes that VCEC has been one of the more active Australian oversight bodies in their efforts to collect and report on information about the performance of RIA. In correspondence with the Committee, VCEC pointed to specific case studies that showed regulations being changed

66 DPCD, *Written Submission No.*9, 9 Apr 2013, 1.

67 S.Abusah & C.Pingiaro, *Cost-effectiveness of regulatory impact assessment in Victoria*, Feb 2011, 7.

68 Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 77; OECD, 'Regulatory Impact Analysis: A Tool for Policy Coherence', 2009, 18.

69 C.Kirkpatrick & D.Parker (ed), *Regulatory Impact Assessment: Towards Better Regulation?,* 2007, 9.

70 T.Harding, *Transcript of Evidence,* 17 April 2013, 3.

71 Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 335.

and savings being made as a result of the RIA process.[72] In these case studies the analysis resulted in a different option being pursued as it was demonstrated it would produce greater benefits.

In a 2011 paper, VCEC attempted to calculate the costs and benefits generated by Victoria's RIA system. It estimated that over the 10 year life of regulations made between 2005-06 to 2009-10, there were savings of $902 million. This figure refers to a reduction in the gross regulatory costs on the sector affected by the regulation.[73] It was calculated that for every dollar incurred by the key parties in the RIA process, gross savings of between $28 and $56 were made.[74]

3.3 Costs of regulatory impact analysis

A number of benefits have been attributed to RIA, however these benefits come at a cost. Between 2005-06 and 2009-10 VCEC estimates that RIA in Victoria cost $16.1 million.[75] Based on these calculations the savings generated by Victoria's RIA process exceed the cost of operating it.

> In some cases it can be expensive; most cases, not very expensive. On balance the benefits of doing RISs outweigh the costs ….[76]

The monetary and time costs of participating in the RIA process are key considerations that may determine whether departments fully embrace the RIA process and whether stakeholders engage with it.[77] The following section examines the annual cost of RIA (TOR 6) and the cost of consultants (TOR 4b).

3.3.1 Cost to government

The Committee received data from VCEC in relation to the cost to government of the RIA system (see Charts 3.3 and 3.4 below). Chart 3.3 shows that the total cost fluctuated over the period 2008-09 to 2012-13, generally in line with the number of RISs and BIAs

72 Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

73 S.Abusah & C.Pingiaro, *Cost-effectiveness of regulatory impact assessment in Victoria*, Feb 2011, 10.

74 *Ibid*, 15.

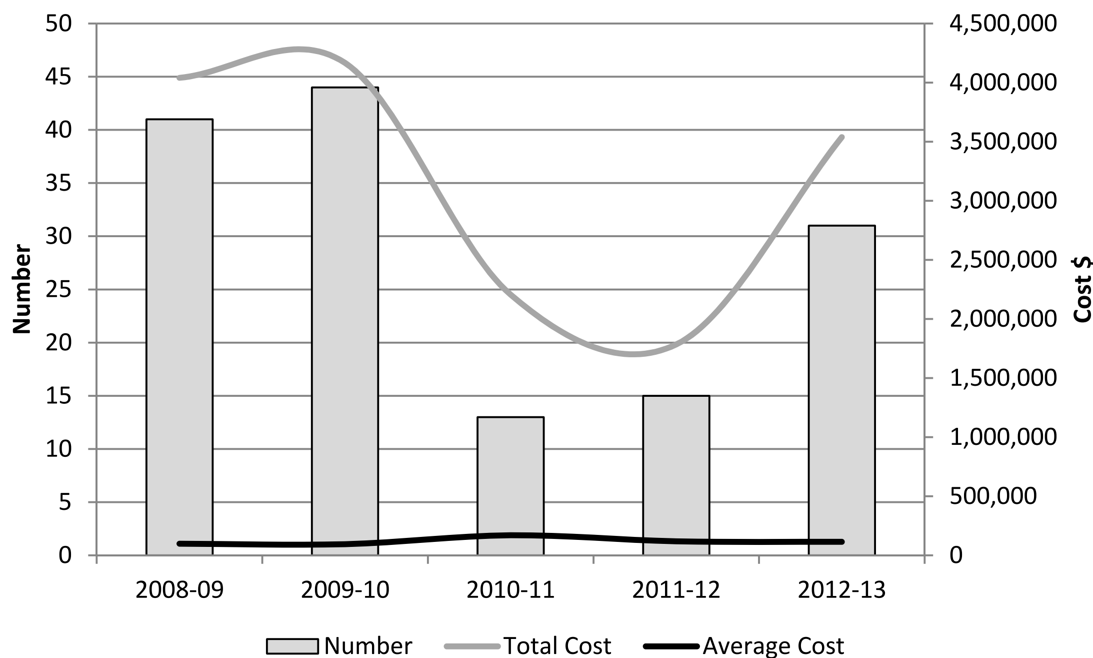
75 *Ibid*, 14.

76 T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 6.

77 Manningham City Council, *Written Submission No.2*, 18 Feb 2013, 1.

undertaken. The average cost of the total RIA process (including VCEC assessment costs) per RIS/BIA has remained relatively stable at around $109,000.[78]

CHART 3.3: Cost of RIS/BIA



Source: Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

BOX 3.1: The cost of RIA to agencies: example of Energy Safe Victoria

Energy Safe Victoria (ESV) is responsible for the safety and technical regulation of electricity, gas and pipelines in Victoria. ESV operates under four Acts of Parliament: *Energy Safe Victoria Act 2005*, *Electricity Safety Act 1998*, *Gas Safety Act 1997*, and *Pipelines Act 2005*.

ESV is a small entity. In its submission, it advised that any costs it incurs when preparing a RIS/BIA must be recovered from stakeholders in the fees and levies it imposes.

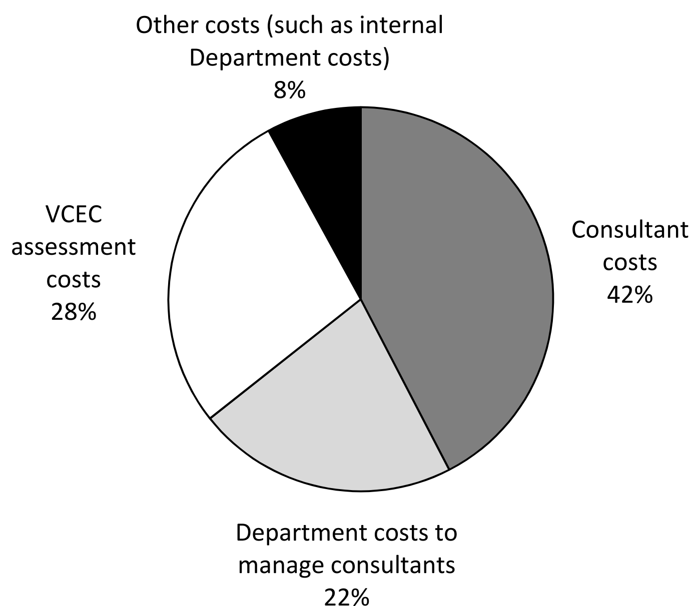
> The cost of the current RIS process to ESV is significant. Since July 2009, ESV has spent approximately $300,000 in consultancy fees for the preparation of six RISs and two Business Impact Assessments (BIAs). In addition, ESV's internal costs in responding to the VCEC's memos during the assessment process are estimated to have been between $20,000 and $40,000. This brings the total costs borne by ESV for the eight documents to be between $320,000 and $340,000. … This is a significant impost on a small agency which is funded by fees and levies imposed directly on its stakeholders, an impost that itself represents a potential burden. ESV does not receive any funding from consolidated revenue.

While the end user may incur costs in the form of increased fees or levies to cover the RIS/BIA, a small change in regulations may also generate sufficient savings over time justifying this increase. Departments and agencies therefore may not only require technical assistance to undertake RIA, but may also require financial assistance.

78 This includes cost of consultants and managing them (where used), VCEC assessment costs and other department costs.

Chart 3.4 (below) apportions the costs of the RIA process between 2008 and 2013. Over two-thirds of RIA expenditure during this period related to consultants. Approximately a quarter of RIA expenditure was incurred by VCEC to assess RISs and BIAs. (This expenditure only relates to VCEC's Regulation Review Team and not to any of its other functions.)

CHART 3.4: RIS/BIA costs 2008-13



Source: Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

Table 3.1 below provides an overview of the various cost components of a RIS/BIA in cases where a consultant is used. The average cost per consultant is consistent with evidence received by the Committee,[79] however when other costs are included the total cost of analysing the impact of a regulation or Bill is significantly higher.

TABLE 3.1: Breakdown of consultant and related costs (2008-09 to 2012-13)

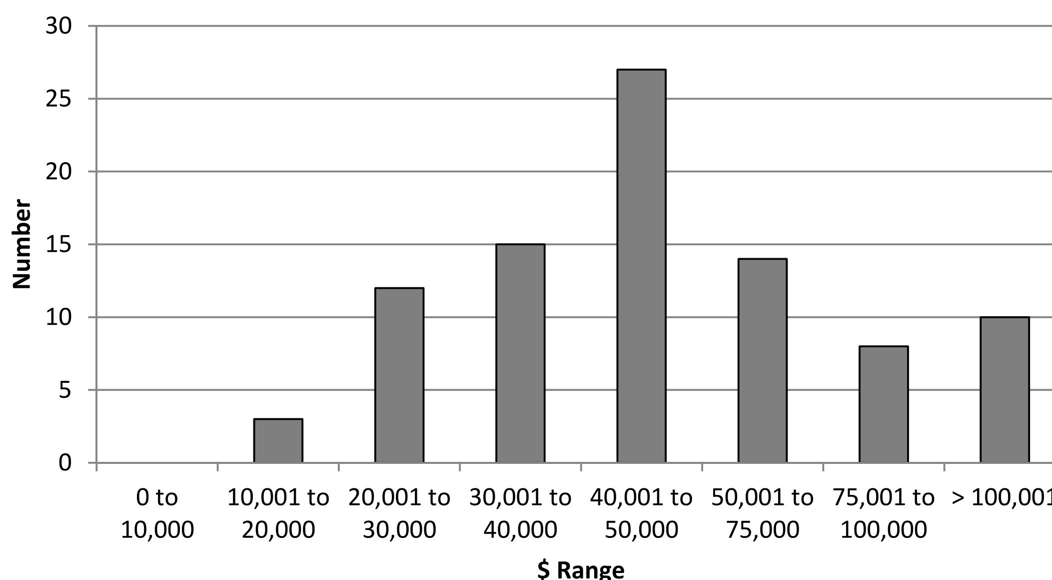
Average cost of consultants per RIS/BIA	$ 54,676
Average cost of consultants plus cost of managing consultancy per RIS/BIA	$ 82,995
Average total cost per RIS/BIA (Consultants, managing consultancy and VCEC assessment costs)	$ 100,591
Average total cost of RIA per RIS/BIA (Consultants, managing consultancy, VCEC assessment and other costs)	$ 109,279

Source: Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

[79] Regulatory Impact Solutions estimated that the average cost for a consultant to produce a Victorian RIS is around $40-50,000. Regulatory Impact Solutions, *Written Submission No.*3, 8 Mar 2013, 2.

As shown above (in table 3.1) the average cost per RIS/BIA using a consultant is approximately $55,000. However, VCEC figures also show that around 11 percent of RISs/BIAs completed with the assistance of consultants cost in excess of $100,001 (see chart 3.5 below).[80]

Chart 3.5: Number and cost of RISs/BIAs completed using consultants (2008-09 to 2012-13)



Source: Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

There are differing views and no clear evidence on whether outsourcing RIA work, rather than doing it 'in-house', saves money for departments. In evidence to the Committee, Regulatory Impact Solutions suggested that it would be more cost effective for a consultant to prepare RISs than for each department to employ one or more dedicated officers to undertake this work. An officer at the VPS6 level, costing approximately $200,000 per annum with on-costs,[81] would need to complete at least four to five RISs per year to "break even".[82] Clearly some departments could not justify the cost of a dedicated officer to prepare RISs, but it may be economical for departments with a large RIS workload.

The Productivity Commission noted that (in 2010-11) the median cost of RIA was approximately $37,000 higher for departments using consultants (compared to doing the work in-house). One respondent to the Productivity Commission's survey noted:

[80] Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

[81] P.Phillips, Regulatory Impact Solutions, *Transcripts of Evidence*, 17 Apr 2013, 14.

[82] Regulatory Impact Solutions, *Written Submission No.*3, 8 Mar 2013, 2.

> From the tender process, a typical RIS on a major topic would cost around $100,000 with some tenders at $120,000 and $150,000. In-house cost of a similar RIS would be $75,000.[83]

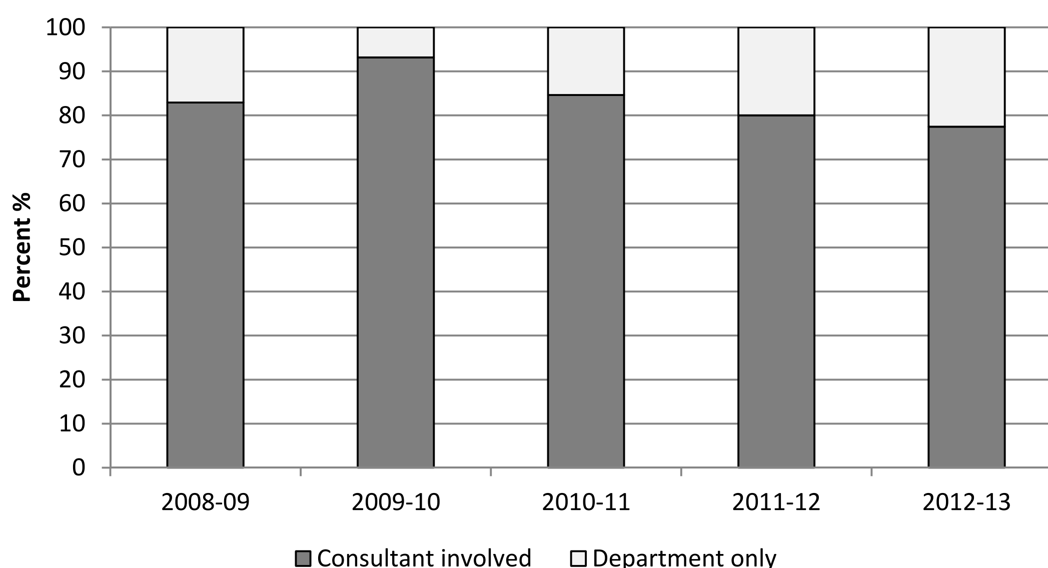
The Committee also heard from one government department that consultants were sometimes unable to complete the work to the rigorous standards required by the RIA process without additional investment of time and other resources by the department:

> In terms of our experience with consultants we have found generally that we struggle to find really capable consultants who can undertake this work. Usually it involves the department doing a considerable amount of hand-holding to guide the consultant through the process of developing the RIS, and that is often because they have limited exposure to the policy settings in which the regulations they are seeking to assess are being framed.[84]

3.3.2 Use of consultants

As noted in Chapter Two, departments generally purchase external assistance when they lack the skills or time to meet the RIA requirements. Chart 3.6 (below) shows that 85 percent of RISs and BIAs undertaken between 2008-09 and 2012-13 were either partially or wholly completed by consultants. This has increased over time. It was suggested to the Committee that in the 1990s, 80 percent of RISs and BIAs were prepared by government departments, with the remaining 20 percent prepared by consultants.[85]

CHART 3.6: Use of consultants for RISs/BIAs



Source: Correspondence from VCEC, 24 May 2013 & 9 Oct 2013.

[83] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 89.

[84] J.Ginivan, DPCD, *Transcript of Evidence*, 12 Jun 2013, 40.

[85] Regulatory Impact Solutions, *Written Submission No.*3, 8 Mar 2013, 3.

On the information available, it appears that consultants are also used more often in Victoria than in other jurisdictions. Consultants are not widely used in Western Australia,[86] and OBPR advised that only 20-30 percent of RISs/BIAs were prepared by consultants at the Commonwealth and COAG level.

> We do not have a high use of consultants in our RISs. I think last time we looked, it was more like 20 to 30 percent done by consultants primarily, and most of those would be in the COAG space where there is a secretariat. There might not be much of a secretariat to a ministerial council, but they have a budget, if you like, and so they have to use consultants; they literally do not have the public servants.[87]

At the Commonwealth level, departmental staff undertake the majority of work associated with the RIA process. The use of consultants is discouraged, other than for technical aspects, and the OBPR particularly recommends that departments not contract out the consultation part of the RIS process.[88] It was also suggested to the Committee that there are no significant differences between the Victorian and Commonwealth/COAG RIA requirements.[89]

BOX 3.2: Office of Best Practice Regulation: Tips for using consultants

- Keep in mind that using a consultant to prepare a RIS may not allow skills, expertise and experience to accrue to the agency. Where an agency is likely to need to prepare additional regulation impact statements in the future, it may be preferable to develop the necessary skills in-house.
- If using a consultant, the agency should ensure that there is enough time to complete the RIS. The OBPR does not deal directly with consultants, nor will the OBPR manage consultants on the agency's behalf. Managing a consultant could turn out to be more time-consuming than writing the RIS yourself.
- Without modification, consultant reports are rarely adequate as regulation impact statements. Unless the consultancy contract explicitly includes the RIS as a final deliverable, agencies should not expect that a consultant's report will be adequate.
- If using a consultant to assist with just one section of the RIS (for example, the cost–benefit analysis or managing the consultation process), an agency will most commonly write that section itself and refer to the consultant's report. The full report is then attached as an appendix to the RIS.

Source: Commonwealth of Australia, *Best Practice Regulation Handbook,* July 2013, 77-78.

86 R.Bell, Productivity Commission, *Transcript of Evidence*, 20 Jun 2013, 61.
87 J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 75.
88 *Ibid*.
89 T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 3.

What has brought about this change in the use of consultants in Victoria over such a short period of time? Several reasons have been put forward:

- the level of analysis and quantification required for RISs (and BIAs) is increasing,[90] in line with VCEC's aim to continuously improve the quality of RISs[91]
- a lack of relevant skills in the public service[92]
- insufficient departmental resources[93]
- high staff turnover[94]
- a tendency for RISs to be seen as merely a compliance exercise (rather than 'core work')[95]
- a lack of interest in the regulatory process ('policy work is seen as more interesting').[96]

The Committee also observed that there are a number of consultants operating in the Victorian market who are highly knowledgeable of the RIS and BIA requirements and aware of emerging practice in the wider RIA field. This makes outsourcing the work more attractive for departments. However, the Committee formed the view that it would be preferable for a greater proportion of RIA to be done by departments in-house. RIA is intended to be part of the policy-making process. VCEC notes that the skills needed to prepare a RIS or BIA are essentially no different from the core skills of policy advisors.[97] Similarly, in their review of the Commonwealth's RIA system, Borthwick and Milliner argued that, contrary to claims of insufficient resources and expertise, departments should be able to undertake most of the RIA task themselves.

> It is evident that too many agencies claim that they lack the skills and resources to undertake analysis required by a RIS. If so, this seems to the Review extraordinary. The 7 elements required of a RIS should hardly be onerous to an agency which should know its business. … Of course, consultants have their place, but agencies should have the expertise themselves - or be able to access it with proper planning - to define the problem and analyse the options.

[90] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2012, 14; J.Ginivan, DPCD, *Transcript of Evidence*, 12 Jun 2013, 43.

[91] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 32.

[92] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2012, 14.

[93] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 30.

[94] *Ibid*.

[95] *Ibid*.

[96] *Ibid*.

[97] VCEC, *Annual Report 2012-13,* Sept 2013, 53.

> Admissions to the contrary- if they have any validity- do not reflect well on the state of regulatory policy capability of agencies.[98]

FINDING 2

While it is difficult to establish definitively, the benefits of regulatory impact analysis outweigh the costs.

FINDING 3

Consultants have a role in regulatory impact analysis in relation to assisting departments with technical aspects of the process. However, ideally departments should endeavour to develop their own in-house skills.

[98] D.Borthwick & R.Milliner, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*, 20 Apr 2012, 53.

Chapter Four: Opportunities to improve the process

Victoria's regulatory impact analysis (RIA) processes are generally considered to be sound. However, during the course of the Inquiry the Committee heard suggestions for possible improvement. Three main areas stood out in the evidence received: engagement with the public and local government; assistance for departments and agencies to fully embrace RIA and integrate RIA processes into policy development; and greater transparency in the business impact assessment (BIA) process.

4.1 Strengthening public engagement

Public engagement is a mandatory part of the regulatory impact statement (RIS) process. Effective consultation and engagement with stakeholders can lead to better outcomes. It can also lead to greater public understanding and acceptance of these outcomes.[99] This section examines two key areas of RIA engagement: the accessibility of RISs and the consultation process.

4.1.1 Improving the accessibility of regulatory impact statements

RISs are aimed at two audiences: stakeholders whose views need to be sought and the decision maker. At times these two objectives may contradict each other. A decision maker for example, may require technical information and detailed analysis. Access Economics noted that:

> … the standard of some RIS documents in Victoria can prevent effective stakeholder engagement. The preparation of RIS documents can become overly academic, with too little emphasis on the consultation element. RIS documents are poor consultation instruments when they are written in a very technical style. [100]

Several witnesses confirmed that RISs become an obstacle to consultation when they are too technical.[101]

[99] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 209.

[100] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 43.

[101] MAV, *Written Submission No.10*, 2; P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2013, 13.

> The question was raised whether RISs are overly-technical. I would say almost all are; … They are unreadable often, and complying with the Victorian Guide to Regulation, overly technical and very user unfriendly and not accessible.[102]

VCEC noted the problem of overly technical and inaccessible RISs in its recent review of Victoria's regulatory framework.[103] Complex or technical information should be communicated in a way that can be easily understood. The Office of Best Practice Regulation (OBPR) advised the Committee that when they review RISs they seek to balance the technical data required by the decision maker against ensuring the language in the RIS is understandable by stakeholders.

> … one of the key things we look to do in trying to make the RIS adequate is to have accessibility for both decision makers and stakeholders. One of the key things we emphasise to people, especially more technical regulators, is that they need to write in such a way that the ordinary person in the street can actually read this document and understand it. If we cannot understand—and generally sometimes you cannot—then we will often send it back and say, 'Yes, okay, technically you've explained this concept well, but you haven't explained it to a wider audience.[104]

VCEC also noted that long RISs are less likely to be read by most people.[105] In its 2012-13 Annual Report, VCEC noted that the average length of RISs went from 35 pages in 2004-05 to 74 pages in 2012-13.[106] Over this same period the length of executive summaries has also increased from two to nine pages.[107] (VCEC also noted that this coincided with an increase in the analysis contained in RISs.[108]) In contrast the Productivity Commission found that the average length of RISs it reviewed (from all Australian jurisdictions) was 54 pages.[109] Concerns about RIS length and complexity were expressed to the Committee by Dr Matthew Butlin, Chair, VCEC:

> I am concerned that the RIS documents that go out to consultation with the public are as long as they are, and I think the answer in part is to be looking at a summation or a distillation of the issues. However, on the one hand, to oversimplify at the expense of the rigour of the first part that I was talking about I think presents a very important risk of losing some of the big benefits of the RIS process.[110]

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[102] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2013, 13.

[103] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 73.

[104] J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 78.

[105] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 72.

[106] VCEC, *Annual Report 2012-13,* Sept 2013, 11.

[107] *Ibid*.

[108] *Ibid*.

[109] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 369.

[110] M.Butlin, VCEC, *Transcript of Evidence*, 12 Jun 2013, 50.

In evidence to the Committee, Mr Rex Deighton-Smith acknowledged that at times RISs are overly technical documents, but noted that a level of detail was necessary to ensure that the decision maker had access to all relevant information:

> Regulating agencies frequently argue that, particularly as a result of the combined action of the VCEC (or its equivalent) and the relevant guidelines, RIS are frequently too technical in nature and beyond the ability of key stakeholders to understand and engage with appropriately. This argument has merit in the specific sense. However, it is essential that the RIS provide a full analysis of the regulatory proposal in order to support decision-making. Hence, the scope to simplify the analysis is limited.[111]

RIA is therefore about balancing the need to provide sufficient information to the decision maker against being accessible to stakeholders. One possible solution to this problem would be to require a clearly written executive summary for each RIS.[112] This document could provide an overview of the issues for stakeholders, essentially acting as a discussion paper. The full RIS would still be prepared for the decision maker and any stakeholders who wanted to review the technical information.

> … whether we could put out a 20-pager maximum, a sort of front end of the RIS and have all of the back technical material posted on the web, independently assessed by the VCEC, so all the rigour is lying behind the 20-pager.[113]

VCEC expressed support for this idea in its 2012-13 Annual Report:

> Ensuring that the RIS has a clear and concise summary, which provides a high-level overview of the analysis, would help. Moving analytical detail and background data to appendices would also assist, as would publishing these as separate 'appendices' documents, to shorten the main body of the RIS.[114]

In its 2011 review of RIA in Victoria, VCEC proposed amending the *Victorian Guide to Regulation* to require that RISs and business impact assessments (BIAs) are accessible 'to a broad and non-technical audience' and to require the preparation of executive summaries for each RIS or BIA.[115] Unlike the Commonwealth OBPR, VCEC is unable to effect these changes itself as it is not responsible for setting and updating the RIA guidelines. The Committee notes that the Government response of March 2012 indicated it supported the

[111] R.Deighton-Smith, *Written Statement*, 8 May 2013, 5.

[112] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2013, 13; R.Deighton-Smith, Jaguar Consulting, *Transcript of Evidence*, 8 May 2013, 23.

[113] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2013, 13.

[114] VCEC, *Annual Report 2012-13,* Sept 2013, 11.

[115] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 74.

recommendation 'in part'[116] and the Committee is aware that work on revising the *Guide* is ongoing.

RECOMMENDATION 3

That each RIS is required to have a plain language executive summary and glossary.

RECOMMENDATION 4

That responsibility for the *Victorian Guide to Regulation* be transferred from the Department of Treasury and Finance to the Victorian Competition and Efficiency Commission.

4.1.2 Consultation

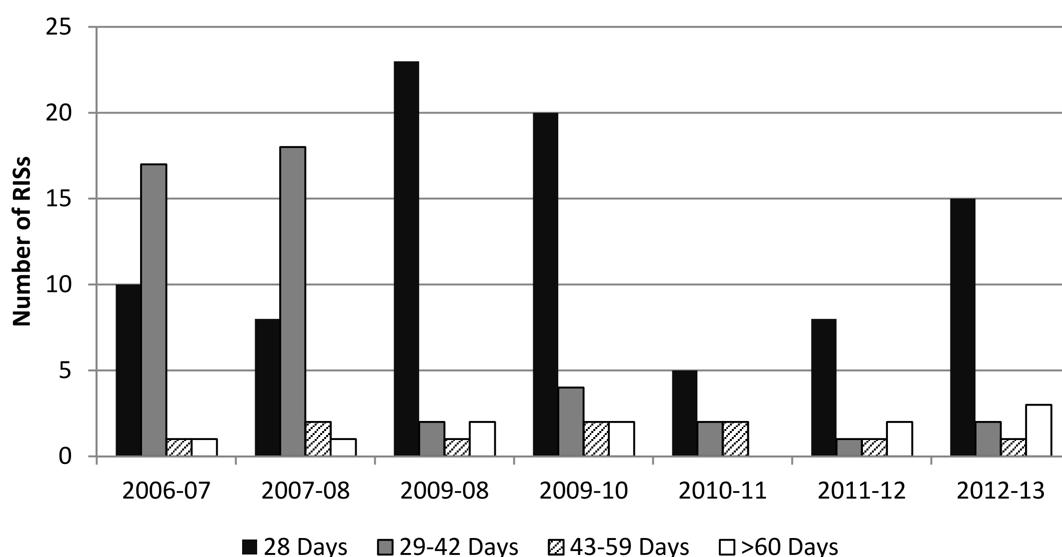
The consultation process is designed to gauge support for the different options put forward in the RIS. A number of factors can influence the quality of the consultation process, such as the accessibility of the RIS document and the length of time available for stakeholders to contribute. In Victoria, the statutory minimum period for consultation is 28 days,[117] however since 2005 the Victorian Government has recommended 60 days.[118] Chart 4.1 (below) shows that in 2012-13, 71 percent of RISs were released for the minimum of 28 days consultation. This outcome is not unique to this period; the trend since 2008-09 has seen the majority of RISs released for the minimum period with only seven percent of RISs meeting the recommended 60 days best practice.

[116] DTF, *Victorian Government response to the Victorian Competition and Efficiency Commission's Final Report*, Mar 2012, 14.

[117] *Subordinate Legislation Act 1994* (Vic), s. 11(2)(d).

[118] VCEC, *Annual Report 2012-13*, 2013, 9.

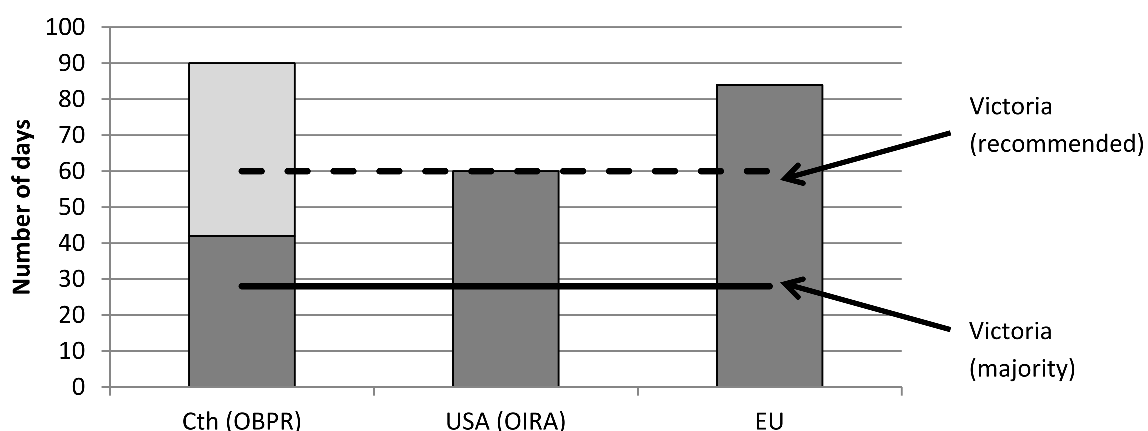
CHART 4.1: RIS consultation periods 2006-07 to 2012-13



Source: VCEC, *Annual Report 2012-13*, 2013, 9.

Victoria's RIS statutory consultation period is shorter than in other jurisdictions. Chart 4.2 (below) illustrates that the consultation periods for the Commonwealth, USA and the European Union are all generally longer than in Victoria.[119] OBPR for example advises federal government agencies that 6 to 12 weeks is appropriate for effective consultation, depending on the significance of the proposal.[120]

CHART 4.2: Comparison of consultation periods



Extracted from: Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 220.

[119] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 220.

[120] Office of Best Practice Regulation, *Guidance Note – Consultation and the RIS Process*, Jul 2013.

Concerns were raised with the Committee regarding the length of time allowed for consultation.[121] The Master Builders Association stressed the need for businesses, the not-for-profit sector and community groups to have the opportunity to question RIS findings prior to final decisions being made.[122]

In its 2012-13 Annual Report, VCEC noted that after reviewing a sample of RISs there was 'a link between the length of the public consultation period and the level of public engagement.'[123] It also noted that 'where larger numbers of submissions are received in response to a RIS, the probability of the process being amended is substantially higher.'[124] These findings support the argument for increasing the minimum consultation period.

VCEC's position has shifted in relation to this issue. Previously it considered that the minimum consultation period of 28 days was suitable in cases where stakeholders are familiar with a proposal.[125] However in its 2012-13 Annual Report it acknowledged that public consultation could be improved, and mandating a 60 day consultation period may allow stakeholders more time to respond to a RIS. It did caution however that such a requirement may be costly and may not represent a proportionate approach in all cases.[126]

RECOMMENDATION 5

That the statutory consultation period for a RIS be extended to a minimum of 45 days, with a minimum of 60 days for complex regulatory proposals, to allow stakeholders time to prepare considered responses.

4.1.3 Local Government

Local governments are not required to undertake RIA for local laws. The SLA specifically exempts laws made under the *Local Government Act 1989* (Vic) and any other instrument made by a Council under that Act or any other Act.[127] There are guidelines for the making of

[121] MAV, *Written Submission No.10*, 1; MBA, *Written Submission No.7*, 1.

[122] MBA, *Written Submission No.7*, 1.

[123] VCEC, *Annual Report 2012-13*, 10.

[124] *Ibid*, 13.

[125] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 38.

[126] VCEC, Annual Report 2012-13, p 14.

[127] *Subordinate Legislation Act 1989* (Vic.), s.3.

local laws by Councils and these include an impact assessment step, however the guidelines are voluntary.[128]

In its submission, the MAV emphasised the need for state government departments to consult on proposed regulations and legislation. Local governments are often required to comply with, administer or enforce regulations and legislation made at the state government level. The MAV gave the example of the Electricity Safety (Electric Line Clearance) Regulations 2010 and stated that these new regulations were made without any assessment of compliance with existing regulations or any 'understanding of the costs of compliance to local government.'[129]

The MAV also noted that changes to legislation sometimes imposed significant new or additional demands on Councils and were made without a 'proper and thorough' cost-benefit analysis being tested with Councils themselves. The MAV gave the examples of the restricted breed provisions of the *Domestic Animals Act 1994* (Vic), hazard tree requirements in the *Electricity Safety Act 1998* (Vic) and increases to the landfill levy under the *Environment Protection Act 1970* (Vic).[130] Further discussion of the requirements of a BIA for new or amended legislation can be found at section 4.4.

The *Victorian Guide to Regulation* acknowledges the need for departments to consider how the proposed regulation/legislation will affect local government. Departments preparing RISs and BIAs are explicitly directed to consider the impact of the proposal on local government, including:

- the resources required for the efficient administration and enforcement of the regulation
- how those resources will be funded
- the training and assistance which will be made available to local governments
- whether local governments can efficiently administer and enforce the regulation
- how the responsible state minister will account for local government performance

[128] DPCD, *Guidelines for Local Laws Manual*, 2010. The Community Impact Statement is intended as a less onerous RIS type process.

[129] MAV, *Written Submission No.7*, 3.

[130] *Ibid*, 4.

- an appropriate mechanism to publish the agreed resourcing, funding, training and performance monitoring arrangements.[131]

The Committee is aware that issues regarding consultation with local government were the subject of recommendations made by VCEC in an inquiry report published August 2010[132] and responded to by the Government in August 2012.[133] In summary, VCEC suggested updates to the *Guide* which would have the effect of specifying how and when departments should consult with local government during the preparation of new regulations/legislation and accompanying RISs or BIAs. Proposals were also expected to include an assessment of the resourcing impact on local government.

In its response supporting the recommendations, the Victorian Government stated that it would re-write the *Guide* to specifically address situations where local government is expected to administer or enforce State legislation. The Committee notes that the *Guide* was last updated in August 2011.

RECOMMENDATION 6

That the Government expedite its planned updating of the *Victorian Guide to Regulation* to address the concerns of local government.

4.2 Two-stage regulatory impact statement model

According to the Productivity Commission, leading RIA practice incorporates a two-stage RIS process.[134] Two-stage RISs are considered to provide greater transparency and opportunities for consultation.[135] This section contrasts the two-stage RIS process against Victoria's existing single stage RIS.

Single and two-stage RIS processes are very similar (see figure 4.1 below). In essence the two-stage process updates the draft RIS to reflect the results of public consultation. In single

[131] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 68

[132] VCEC, *Local Government for a Better Victoria: Inquiry into Streamlining Local Government Regulation*, Aug 2010.

[133] DTF, *Victorian Government Response to the Victorian Competition and Efficiency Commission's Final Report*, Aug 2012.

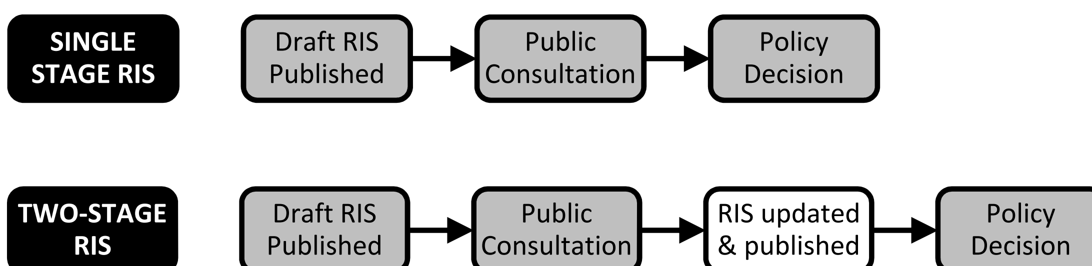
[134] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 26.

[135] *Ibid*, 209.

stage RIS models consultation informs the policy decision but the RIS is not updated and republished. The similarity between these two processes was confirmed by consultants Tim Harding and Associates.

> They are not huge differences that I am aware of, except that the COAG process is a two-stage process. The Victorian RIS process ends when the RIS is released for public consultation; whereas the COAG process has a first stage where a consultation RIS is prepared, like in Victoria, and the second stage is the decision RIS which is a revised RIS taking into account the public submissions. In some ways that is better than the Victorian process. It costs more.[136]

FIGURE 4.1: Overview of Single and Two-Stage RISs



In a two-stage RIS process, the main difference between the “draft” (or “consultation”) RIS and “updated” (or “decision maker’s”) RIS is that the draft RIS aims to facilitate and focus discussion between the department/agency and affected parties by identifying the problem and some possible options to resolve it. Ideally, stakeholder responses will provide additional data and analytical insights to enable a higher standard of analysis to be developed as part of the updated RIS.[137] The updated RIS determines whether any action is required and if so what this might consist of.[138] It also enables the public to see how their input may have led to a revised regulatory outcome.

Recent reviews by both the Productivity Commission and Borthwick and Milliner expressed support for a two-stage RIS system, with the former considering it to be best practice. Access Economics also found support for the system among Victorian government departments and the business community.[139] The Council of Australian Governments (COAG), Western

[136] T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 3.

[137] R.Deighton-Smith, *Written Statement*, 8 May 2013, 3.

[138] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 170.

[139] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 39; D.Borthwick & R.Milliner, *Independent Review of the Australian Government’s Regulatory*

Australia and Queensland operate two-stage RIS processes. During the course of this Inquiry the Commonwealth Government, in response to the Borthwick and Milliner review, also moved from a single stage RIS process to a two-stage RIS process (effective 8 July 2013).[140] Appendix D provides detail on this system.

Benefits associated with the operation of a two-stage RIS process include:

- early integration of the RIS process into policy development
- earlier stakeholder engagement with the RIS process
- scope to demonstrate consideration of stakeholder views
- enhanced transparency through publication of both a consultation and final RIS.[141]

Two-stage RIS processes may also have a number of disadvantages, including:

- extended consultation may unnecessarily delay the regulatory process[142]
- may not be cost-effective for smaller proposals[143]
- may be more costly than a single stage RIS and may not result in a different outcome[144]
- rather than allowing effective stakeholder engagement, early consultation may lead to Ministers being lobbied when regulations involve politically sensitive issues.[145]

The enhanced consultation and transparency afforded by a two-stage RIS process needs to be offset against the potential for increased time and cost. This is especially pertinent for proposals which have relatively small or minor impacts.

> Two-stage RIS processes—we were talking about thresholds before—they may be a good idea for the very high threshold RISs. Out of some 20 or 25 RISs per annum, there might be three or four that might justify a two-stage RIS. I would not be in favour of mandating that for all RISs…[146]

Impact Analysis Process, 20 Apr 2012, 73; Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 208.

[140] OBPR, *Transition Arrangements for the Best Practice Regulation Handbook*, Jul 2013.

[141] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 15.

[142] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 69.

[143] *Ibid*.

[144] T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 9.

[145] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 39.

[146] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2013, 12.

If Victoria were to adopt a two-stage RIS framework, or other model, VCEC could play a role in advising departments on a case-by-case basis as to whether a two-stage RIS is required and the level of consultation and analysis suitable for the proposal. As Figure 4.1 illustrates, essentially there is only one step different between a single stage RIS and a two-stage RIS. This step could be mandated via legislation or by amending existing guidelines.

4.2.1 Victorian Competition and Efficiency Commission view

VCEC has expressed qualified support for a two-stage RIS process on a number of occasions.[147] Rather than imposing a formal two-stage RIS process, VCEC considers that the same advantages could be realised by amending the existing system. The obligations for preliminary consultation could be expanded and departments would be free to issue a preliminary RIS.[148]

> … rather than mandating a two-stage process for all RISs, the Commission favours amending the existing requirement in the Premier's Guidelines (section 5(c)) and the VGR (section 4.3.4), to encourage genuine discussion of options, rather than consultation on a pre-determined choice.[149]

This view was supported by OBPR in evidence to the Committee:

> The purpose of a two-stage RIS process is essentially to get better consultation, so I think you can have a successful RIS process without it being two-stage, … one of the drivers of the move to a two-stage RIS process is to give business more confidence that appropriate consultation is going to be undertaken, so it is not to say that it was not happening sufficiently but it gives stakeholders a bit more confidence, I think.[150]

In its review of Victoria's regulatory system VCEC recommended amending guidelines to require:

- a preliminary consultation document for proposals with a large or complex impact
- preliminary consultation with stakeholders
- the RIS include discussion of any additional options proposed by stakeholders, and why they were assessed as not feasible
- the adequacy of the preliminary assessment and consultation document be assessed as part of the RIS process.[151]

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[147] M.Butlin, VCEC, *Transcript of Evidence*, 12 Jun 2013, 55; VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 70.

[148] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 70.

[149] *Ibid*.

[150] J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 78.

[151] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 71.

The Committee notes that the Government supported part of this recommendation. Preliminary consultation with stakeholders, the preparation of a discussion document and acknowledging preliminary consultation within the RIS were all supported. The Government did not however support a separate assessment of the adequacy of preliminary consultation.[152]

4.2.2 Productivity Commission view

The Productivity Commission considered that two-stage RIS models improved transparency of the RIA process by giving stakeholders the opportunity to see how their input influenced the final outcome.[153]

The Commission recognised that adopting a two-stage RIS process would increase the time and cost of the process. In order to 'reduce procedural length, complexity and potentially costs of a two stage RIS', the Commission suggested:

- removing the need for adequacy assessments for consultation RISs
- consultation RISs could initially be limited to proposals with the largest potential impacts[154]
- that consultation RISs focus on the first three steps of the RIS process – identifying the problem, objectives and options – but all steps should be undertaken by the department and they would contain a lower level of analysis than in the final RIS.[155]

The Commission further considered that the outcomes of consultation should be reflected in the final RIS.[156] It noted that:

> … whilst Victoria, New South Wales and Tasmania all undertake a consultation RIS they do not update the RIS to reflect the outcomes from the consultation process. As a consequence, the RIS that is provided to the decision maker in these jurisdictions may contain analysis that is inconsistent with the final regulatory proposal.[157]

[152] DTF, *Victorian Government response to the Victorian Competition and Efficiency Commission's Final Report*, Mar 2012, 14.

[153] R.Bell, Productivity Commission, *Transcript of Evidence*, 20 Jun 2013, 59; Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 211.

[154] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 205.

[155] *Ibid*, 206.

[156] *Ibid*, 209.

[157] *Ibid*, 209.

The key consideration for Victoria is updating the RIS to incorporate the results of this consultation, which would ensure that the analysis in the RIS is not inconsistent with the final policy decision.

Regardless of whether Victoria adopts a formal or informal two-stage RIS process, the Committee considers the RIS should be updated to reflect the consultation, especially for proposals which impose a significant impact or burden.

RECOMMENDATION 7

That departments be required to:

- update RISs to reflect the results of consultation
- advise stakeholders of the publication of the updated RIS and the Victorian Competition and Efficiency Commission's assessment letter.

RECOMMENDATION 8

That the Victorian Government investigate introducing a two-stage RIS process for complex proposals.

4.3 Assisting departments and agencies

A recurring theme in the evidence presented to the Committee was that those responsible for RISs and BIAs – that is, departments and agencies – required more assistance to understand and embrace the RIA processes. This section examines some ways that assistance might be provided, such as by modifying the RIA guidelines and providing training and support to prepare and complete a RIS.

4.3.1 The *Victorian Guide to Regulation*

The *Victorian Guide to Regulation* provides guidance on the development of regulation and the preparation of RISs and BIAs.[158] The *Guide* is currently over 100 pages, with another 114 pages of appendices. This has grown in length from around 20 pages in the 1990s,[159] providing more explanation but also reflecting additional requirements departments must

[158] M.Johnstone, DTF, *Transcript of Evidence*, 12 Jun 2013, 50.

[159] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2013, 14.

undertake as part of the RIS and BIA processes. Reviewing these guidelines may streamline the RIA processes and result in RISs that are more useful as consultation documents.

RISs are generally required for regulations every 10 years (as regulations sunset after this period). As discussed in section 3.1, RIA activity is not spread evenly across all departments. Infrequent RIS preparation combined with staff turnover may mean departmental staff are not familiar with the detail in the *Guide*. Additionally, the length of this document may make the process appear daunting:

> One of the difficulties faced by people who are attempting to do RISs is that they may only do one in their whole career in the public service. There are some areas which do RISs a lot of the time, so if you are in that situation where you are doing one for the first time, confronting a document like the *Victorian Guide to Regulation* … can be daunting, …[160]

The Productivity Commission noted that some jurisdictions had abridged versions of their RIA guidelines. These versions were used by departmental staff to write and prepare a RIS. The full version of the guide was used in relation to technical matters, usually by consultants:

> Some jurisdictions had similarly or less detailed guidelines but they tended to have a summary version that allowed people in departments to basically access the RIA guidelines in a little bit of an easier way, whereas the consultants could refer to the more detailed one for doing a cost-benefit analysis or something. … each time someone comes to do a RIS they have to immerse themselves in these complex requirements, so the simpler they are, the easier. That would help them.[161]

This concept could be applied to make the *Victorian Guide to Regulation* more accessible for departmental officers. The abridged version could act as a reference point with further information available in the full version.

RECOMMENDATION 9

That the Victorian Competition and Efficiency Commission prepare a user-friendly abridged version of the *Victorian Guide to Regulation* for use by departments as a supplement to the full version of the *Guide*.

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[160] M.Johnstone, DTF, *Transcript of Evidence*, 12 Jun 2013, 52.

[161] R.Bell, Productivity Commission, *Transcript of Evidence*, 20 Jun 2013, 63.

4.3.2 Support for departments

Certifying that a RIS or BIA meets the requirements of the *Subordinate Legislation Act 1994* (Vic) (SLA) and/or the *Victorian Guide to Regulation* is only a small part of VCEC's role. VCEC provides support and advice to departments throughout the process in relation to the adequacy of analysis in a RIS or BIA.[162] The Committee was informed that the Department of Treasury and Finance (DTF) also plays a role:

> …We are not extensively consulted by departments, but quite frequently we get queries like, 'Should we do a RIS for this? If we are going to do a RIS, what are the things we need to think about?'. Generally speaking we will refer people to the advice that is available, but we are very willing to work closely with them. When we get those kinds of approaches, we also encourage people to talk early on with VCEC as well, because VCEC is in a position to also provide a whole lot of quality advice based upon their previous experience. They review and assess RISs all the time and therefore have built up significant expertise to be able to advise departments early on in the process …[163]

VCEC runs training workshops for departmental officers to acquire the skills necessary to prepare a RIS or BIA. It is also an opportunity for departmental officers to meet VCEC staff. The workshops, generally a one day session, are run several times a year. Access Economics reported that this training received positive feedback from participants,[164] although workshops focusing directly on cost-benefit analysis were viewed less favourably.[165] In 2010 Access Economics found that despite the quality of VCEC's training, departments considered it insufficient to prepare them for the full RIS process and a supplementary approach would be for VCEC to 'facilitate up-skilling of economic expertise in departments.'[166] This was supported at a public hearing by Mr Roderick Campbell:

> So I guess my recommendation would be to encourage departments that are likely to have to prepare a regulatory impact statement to ensure that their staff have adequate time to review it and … that they have a bit of economics training, not that they necessarily have a PhD in economics or anything, but I think a recommendation that some more staff were trained in some of these skills would be of assistance.[167]

The OBPR offers Commonwealth departmental staff RIA training monthly and cost-benefit analysis training every quarter.[168] This regular training aims to ensure that departmental

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[162] VCEC, *Annual Report 2011-12*, 2012, 18.

[163] M.Johnstone, DTF, *Transcript of Evidence*, 12 Jun 2013, 52.

[164] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 25.

[165] *Ibid*, 27.

[166] *Ibid*.

[167] R. Campbell, Economists at Large, *Transcript of Evidence*, 8 May 2013, 34.

[168] D.Porter, OBPR, *Transcript of Evidence*, 20 Jun 2013, 73.

officers at the Commonwealth level possess the skills required to prepare RISs. In their recent review, Borthwick and Milliner (2012) recommended that even more training could be offered by OBPR, especially on technical elements such as cost-benefit analysis.[169]

OBPR also assists departmental staff throughout the RIA process by seconding RIA experts to departments. This outposting model operates on a cost recovery basis,[170] and the assistance to the department can vary depending on the requirements of the department, the complexity of the proposal and the demands on OBPR's resources.[171]

> The outposting model is where we agree to supply an officer or officers to the ministerial council or to the agency on a cost recovery basis and they work with the agency, essentially embedded in the agency, to get the document to the required standard, or just work with the agency on the requirements. … A lot of our outpostings are to do with large projects that are difficult. [172]

Under this program an officer is assigned to a department or agency to assist with the RIS process and undertake a range of tasks, such as:

- developing an outline of the RIS and providing instructions for its preparation
- coordinating agency-wide input into the RIS
- writing the RIS by drawing on best practice consultation processes already undertaken.[173]

OBPR advised the Committee this model was designed to improve the culture and skills in departments that prepare a significant number of RISs.[174] However, there are no guarantees that skills will be passed on to departmental officers and there is a risk that the outposted officer is indistinguishable from a consultant. In their review of the Commonwealth RIA process, Borthwick and Milliner expressed some concerns with the outposting model:

> The Review has mixed views about this outsourcing. On the one hand it reflects OBPR engaging with agencies early and a desire to contribute to RIS quality; on the other hand, it is sometimes drawing OBPR officers too far into what should be core business for agencies, becoming a substitute for agencies considering these issues and accepting responsibility for the RIS process.[175]

169 D.Borthwick & R.Milliner, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*, 20 Apr 2012, 53.

170 J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 73. The charges for these services were around $940 to $1400 per day in 2012, depending on the nature of the service provided (Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 96.)

171 Office of Best Practice outposting initiative http://ris.finance.gov.au/2011/12/16/office-of-best-practice-regulation-outposting-initiative/.

172 J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 73.

173 Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 95.

174 J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 73.

175 D.Borthwick & R.Milliner, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*, 20 Apr 2012, 53.

Borthwick and Milliner maintained that the 'elements required of a RIS should hardly be onerous to an agency which should know its business.'[176]

The Committee received evidence that there had been proposals in the past for a similar model in Victoria.[177] If such a practice were adopted in Victoria the outposting team could be based out of either VCEC or DTF.[178] Such a model was given conditional support by DTF.[179] The Committee considers that the outposting model is worth further investigation to ascertain if it will transfer skills to departmental staff, and determine how such a model would operate and be funded.

The Committee is also aware that VCEC has previously recommended the establishment of a 'community of practice' to share knowledge among departments on impact assessment and policy development. This recommendation was supported in-principle by the government in its March 2012 response, and the Committee encourages ongoing work in this direction.

RECOMMENDATION 10

That in order to build the capacity of departments to undertake regulatory impact analysis, the Victorian Competition and Efficiency Commission should:

- increase the number of training courses offered to departments and ensure that cost-benefit analysis and other key skills are covered
- investigate the costs and benefits of an outposting program, with an initial focus on departments with the greatest regulatory impact analysis workload.

4.3.3 Is the current process overly onerous?

Witnesses to this Inquiry suggested that the level of analysis required by the RIS process (and by VCEC) can at times be disproportionate to the significance of the proposal. This was described to the Committee as using a 'Rolls Royce for every problem' when 'a Morris Minor might be okay'[180]—adding to the time and expense of the RIS process and resulting in excessively complex documents.

[176] *Ibid*, 53.
[177] P.Phillips, Regulatory Impact Solutions, *Transcript of Evidence*, 17 Apr 2013, 14.
[178] J.Ginivan, DPCD, *Transcript of Evidence*, 12 Jun 2013, 41.
[179] M.Johnstone, DTF, *Transcript of Evidence*, 12 Jun 2013, 52.
[180] T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 6.

> …we would suggest that costs would be saved by both departments and the VCEC more closely adhering to the principle of analysis commensurate with impact. Quite often we feel that unnecessary costs are incurred by requiring a lot of data and a lot of detail about a low-impact proposal. This may be suitable for a high-impact proposal that is going to cost millions of dollars but it may not be suitable for a low impact proposal that is only going to cost less than, say, $1 million over 10 years.[181]

Similarly, in its submission, Energy Safe Victoria stated:

> One of the key principles of regulatory design is that any regulation must be effective and proportional. The current RIS process should also be examined against this test given the significant costs it imposes on government and agencies and the relatively low level of engagement it generates with stakeholders and the public.[182]

The Productivity Commission also commented on this issue at a public hearing:

> … the analysis in the RIS should be commensurate with the significance of the impact, so, whilst extensive quantification may be appropriate for some proposals with more significant impacts, perhaps there are some parts of the Victorian guide that may not be relevant for every RIS that needs to be done.[183]

An associated criticism heard by the Committee related to the importance placed on quantifying the costs and benefits of various options in the RIS. Access Economics reported that 'Victoria is the most quantitatively oriented jurisdiction in Australia'[184] and most stakeholders criticised the current "one-size-fits-all" approach to cost-benefit analysis. In 2012-13, 83 percent of Victorian RISs quantified some of the predicted benefits, and all quantified some of the predicted costs.[185] Quantification of benefits can be particularly challenging. Energy Safe Victoria stated that the RIS process was 'particularly problematic when proponents are under pressure to assign dollar values to benefits which are inherently not amenable to such quantification (e.g. some social, safety, environmental or amenity benefits).'[186]

Access Economics reported similar feedback from stakeholders[187] and VCEC's recent inquiry report demonstrated it too is aware of the concerns. VCEC noted that 'neither the SLA nor the *Guide* explains how much effort to devote to particular RISs/BIAs'. According to VCEC, 'the amount of effort devoted to individual RISs and BIAs is usually negotiated between the

[181] *Ibid*, 2.

[182] Energy Safe Victoria, *Written Submission No.5*, 5.

[183] S.Argy, Productivity Commission, *Transcript of Evidence*, 20 Jun 2013, 63.

[184] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 32.

[185] VCEC, *Annual Report 2012-13*, September 2013, 49-50.

[186] Energy Safe Victoria, *Written Submission No.5*, 1.

[187] Access Economics, *Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria*, 23 Dec 2010, 40

proponent and the Commission.'[188] The Committee notes that VCEC's recommendation on this (recommendation 3.3) was supported in the Government response, with the Government stating its commitment to releasing 'detailed guidance on best practice regulatory design.'[189]

4.4 Improving business impact assessments

Terms of Reference (2) asked the Committee to report on BIA models. The purpose of the BIA process is to identify and understand the impacts of proposed legislation on business and/or competition. The following section discusses two key issues relating to BIAs considered by the Committee during the Inquiry: firstly, the threshold or 'trigger' for a BIA to be required, and secondly, the transparency of the BIA process.

4.4.1 The threshold test ('trigger')

According to the *Victorian Guide to Regulation*, a BIA is triggered where a legislative proposal (in the form of a Bill) has potentially significant effects for business and/or competition in Victoria.[190] A BIA would therefore not be required where a Bill has economic, environmental or social burdens on parties other than businesses.[191] Equally, a Bill affecting public schools and hospitals, not-for-profit organisations, individuals and the community more broadly, would not be subject to a BIA.[192] By contrast, the RIS threshold is significantly wider. A RIS is triggered where a regulatory proposal imposes a significant economic or social burden on a sector of the public.[193]

The Committee notes that the steps involved in the BIA and RIS processes are very similar (see section 2.3). It further notes that in VCEC's 2011 report on the Victorian regulatory framework the Commission recommended changing the BIA threshold to bring it into line with the RIS threshold and amending the name 'BIA' to reflect such a change ('legislative

[188] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 51.

[189] DTF, *Victorian Government response to the Victorian Competition and Efficiency Commission's Final Report*, Mar 2012, 10.

[190] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 33.

[191] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 75.

[192] *Ibid*.

[193] *Subordinate Legislation Act 1994* (Vic), s8(1)(a).

impact assessment' was suggested).[194] VCEC argued that having different RIS and BIA thresholds is anomalous, particularly given that the impacts of primary legislation are often more far-reaching than regulations and not subject to the same regime of periodic sunsetting and review.[195] The Committee received similar evidence:

> The BIA model, aside for some small differences, is practically identical to the RIS model. However, there is one major flaw. The emphasis on 'business' is far too narrow. Impacts on the community and individuals as well as the environment should also be assessed in legislative proposals. This approach was recently adopted in Queensland.[196]

The Government's response to VCEC (issued April 2012) was that the recommendations would be reviewed. At a public hearing on 12 June 2013 DTF officers were asked about the progress of that review and informed the Committee that DTF was 'coordinating a process with the Department of Premier and Cabinet and other departments' and that 'at this point the government has not made a decision on whether it will change any particular current settings….'[197] The Committee believes the case has been made adequately by VCEC and recommends that the proposed changes to the BIA process proceed without further delay.

RECOMMENDATION 11

That the BIA process be made more effective and transparent by:

- making the threshold for BIAs the same as the threshold for RISs
- requiring BIAs – and their relevant Victorian Competition and Efficiency Commission assessment letters – to be tabled in Parliament at the second reading stage of a Bill
- replacing the term 'business impact assessment' with a more accurate term such as 'legislative impact assessment'.

[194] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 77.
[195] *Ibid*.
[196] Regulatory Impact Solutions, *Written Submission No.3,* 8 Mar 2013.
[197] M.Johnstone, DTF, *Transcript of Evidence*, 12 Jun 2013, 49.

4.4.2 Transparency

In comparison to the RIS process, aspects of the BIA process lack transparency. This includes:

- BIAs themselves – approval has never been granted for the public release of a BIA,[198] (publication requires the agreement of the Treasurer, the Premier and the responsible Minister)
- Consultation requirements – there are no formal consultation requirements (such as minimum time periods) for BIAs
- Adequacy – VCEC does not disclose its assessment letters for BIAs, nor does it report which BIAs were found to be inadequate
- Exemptions – there is very little information explaining the grounds on which exemptions are to be granted and it is not known how often Bills are granted an exemption.[199] It is therefore impossible to assess the extent of compliance with the BIA guidelines in the *Guide*.

Greater transparency in government policy processes can motivate agencies, regulatory oversight bodies and ministers to comply with agreed RIA processes.[200] The Productivity Commission found that in this aspect of its RIA system Victoria is at odds with other jurisdictions and falls behind best practice. The Commonwealth Government, New South Wales, South Australia and Western Australia are among those jurisdictions which publish, or have the facility to publish, impact assessments for legislative proposals.[201] In New Zealand all impact assessment are published on Treasury's website and are included with the explanatory memoranda for Bills introduced into Parliament.[202]

As publication of the BIA is theoretically possible in Victoria, it is likely that the current practice has become reinforced over time by decisions of successive governments, as the following debate recorded in Hansard suggests:

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[198] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 77; R.Deighton-Smith, Jaguar Consulting, *Transcript of Evidence*, 8 May 2013, 22.

[199] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 76.

[200] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 197.

[201] Australian Government, *Best Practice Regulation Handbook,* Jun 2010, 20: 'Where a regulation is tabled in parliament, the RIS prepared at the decision making stage must be included in the explanatory memorandum (for primary legislation)…'

[202] www.treasury.govt.nz/publications/informationreleases/ris.

Ms PULFORD (Western Victoria) -- Will the government be releasing any regulatory or business impact statement that has been prepared for this bill?

Hon. M. J. GUY (Minister for Planning) -- No. That is the current government's practice and was the previous government's practice.

Ms PULFORD (Western Victoria) -- Has the government undertaken any evaluation of the impact of this charge on inflation and/or employment?

Hon. M. J. GUY (Minister for Planning) -- There is a normal Business Impact Assessment which details a lower impact than was the case under the freight infrastructure charge of the previous government.

Ms PULFORD (Western Victoria) -- And the government will not be making that publicly available; is that correct?

Hon. M. J. GUY (Minister for Planning) -- That is correct, as per the precedent set by the previous government. [203]

The reason for the different treatment of BIAs compared to RISs is given in the *Victorian Guide to Regulation*: 'in the case of BIAs, the analysis informs Cabinet deliberations and, as such, the information included in a BIA must be treated as confidential to Government.'[204] The BIA and the letter of assessment from VCEC accompany the cabinet submission and therefore attract cabinet-in-confidence status.

In New South Wales, current practice is to confine any confidential advice to the cabinet submission and to then release the impact analysis publically.[205] This approach was recommended for Victoria by the Productivity Commission.[206] Notwithstanding this, there will always be circumstances in which the publication of a BIA could be justifiably withheld on public interest grounds or where it may undermine the intent of the proposed legislation.

In discussions with stakeholders and other witnesses, the Committee heard several arguments in favour of making BIAs publically available.[207] The Business Council of Australia has noted that publication of the BIA would enable stakeholders to 'analyse the costs and benefits or the options available for implementation of policy…'.[208] There is also the potential for the BIA to inform debate on a Bill in Parliament. According to the Productivity Commission, '…RIA processes should not only better inform executive government

[203] Legislative Council of Victoria, *Parliamentary Debates*, 28 Feb 2012, 959.

[204] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 33.

[205] In New South Wales the equivalent document to a BIA is a Better Regulation Statement.

[206] R.Bell, Productivity Commission, *Transcript of Evidence*, 20 Jun 2013, 62.

[207] For example, Regulatory Impact Solutions, Written Submission No.*3*, 8 Mar 2013*,* 2.

[208] Business Council of Australia, Submission to VCEC inquiry into Victoria's regulatory framework, 20 October 2010, www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/Submission19-BCA/$File/Submission%2019%20-%20BCA.pdf.

decisions; they should also better inform the decisions of Australian parliaments.'[209] Mr Rex Deighton-Smith from Jaguar Consulting suggested in evidence at a public hearing:

> … that if the cabinet has agreed, the parties have agreed and the cabinet has taken the next step and introduced a bill, it is subjecting itself, obviously, to the whole process of parliamentary debate, in which it will justify in detail the legislative steps it is proposing to take. If it is doing that, it seems to me that it ought to — — It is a shorthand — it saves time, it puts everyone on the same page and it informs people better so that the quality of debate, hopefully, is improved — to just put that additional information which provides a lot of the background as to why the government is proposing to do this onto the floor of the Parliament.[210]

A potential concern with tabling a BIA with a Bill is that it would then be clear where the government had decided to pursue a direction contrary to the BIA. In their report, Borthwick and Milliner (2010) argued this should not be a deterrent: 'governments should be capable of explaining the reasons for their decisions and why other options were not pursued … If this seemingly low hurdle is an obstacle, it begs the question whether there is, in fact, a 'real' government commitment to take ownership of RIA.'[211]

The Committee notes that the 2011 VCEC report on the Victorian regulatory framework recommended publishing BIAs, to which the government responded stating that the recommendation would be reviewed. In June 2013 the Committee was informed by DTF that the review was ongoing.[212]

4.5 Methodological issues

4.5.1 Cost-benefit analysis and discount rates

The SLA requires that a RIS must include 'an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives.'[213] The *Victorian Guide to Regulation* requires a similar step for BIAs. This assessment is the 'central analytical component of the RIS and BIA' and provides evidence that the 'benefits outweigh the costs, and helps identify which of the options is likely to

[209] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Nov 2012, 236.

[210] R.Deighton-Smith, Jaguar Consulting, *Transcript of Evidence*, 8 May 2013, 27.

[211] D.Borthwick & R.Milliner, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*, 20 Apr 2012, 50.

[212] M.Johnstone, DTF, *Transcript of Evidence*, 12 Jun 2013, 49.

[213] *Subordinate Legislation Act 1994* (Vic), s.10(d). S.12H(e) applies similarly to legislative instruments.

provide the greatest net benefit to society as a whole.'[214] Cost-benefit analysis is often the preferred technique, but multi-criteria analysis and cost effectiveness analysis can also be used where appropriate.

Cost-benefit analysis involves expressing all relevant costs and benefits of a regulatory proposal in monetary terms. The costs and benefits of regulations do not arise immediately but are typically spread out over time. The *Victorian Guide to Regulation* advises that in preparing a cost-benefit analysis, departments should discount the stream of likely future costs and benefits using a "discount rate". Discounting allows impacts to be valued in today's dollars, which, in turn, can be used to compare the costs and benefits of different options on a consistent basis.[215] The choice of discount rate can make a difference, especially when costs and benefits accrue at different times and over long periods.[216]

The *Victorian Guide to Regulation* directs that the "opportunity cost of capital" approach be applied to determine the correct discount rate. This is based on the rationale that there is an opportunity cost associated with regulation in terms of foregone benefits from other investments.[217] Accordingly, the *Guide* recommends that departments use a real risk free discount rate of 3.5 percent for assessing the costs and benefits of regulations and for estimating net present values in a RIS or BIA.[218] Sensitivity analyses are not required but can be applied if necessary.[219] VCEC is also willing to discuss alternative discount rates with departments.

In considering the topic of discount rates the Committee has noted a number of points. Firstly, the discount rate recommended for use in Victorian RISs and BIAs is at the lower end of the range (compared to the other jurisdictions – see Figure 4.2 below). The Committee received evidence stating that this was 'very appropriate', 'reasonable',[220] and that the

[214] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 77.

[215] *Ibid*, 82.

[216] M.Harrison, *Valuing the Future: the social discount rate in cost-benefit analysis*, Visiting Researcher Paper, Productivity Commission, Apr 2010, ix.

[217] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, Appendix C, 19.

[218] VCEC, *Discounting costs and benefits in Regulatory Impact Statements and Business Impact Assessments*, Guidance Note, 2007, 1. 'Real' values subtract inflation.

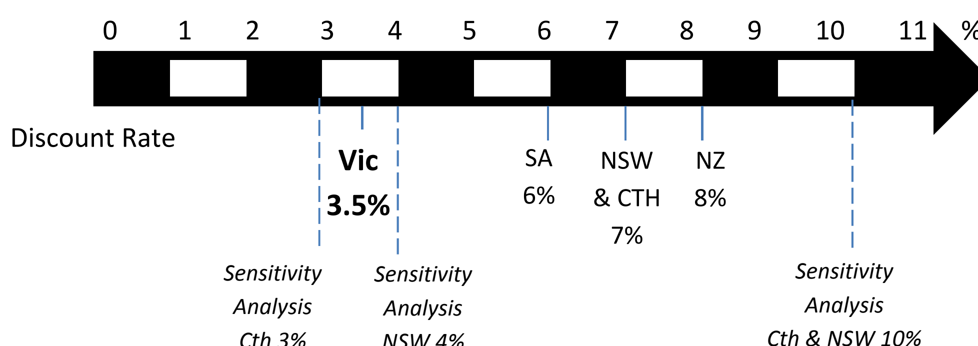
[219] Victorian Government, *Victorian Guide to Regulation Appendices*, Aug 2011, 20. In practice, sensitivity analysis using different discount rates is uncommon. Only one RIS published in 2012-13 conducted sensitivity analysis of different rates.

[220] Regulatory Impact Solutions, Written Submission No.*3*, 8 Mar 2013, 2.

state's overall approach to discounting was to be preferred to that of the Commonwealth.[221] However Mr Rex Deighton-Smith from Jaguar Consulting suggested at a public hearing that in his opinion:

> …there are very strong arguments that say a rate of 3.5 per cent is far too low. I have done research for the OECD which shows that of the 10 countries we looked at, the rates ranged from 3 to 10 per cent, but most of them were up around that 7 or 8 per cent mark. Personally, having gone through a lot of the conceptual literature, I am convinced that is the kind of rate we should be using, and that, if we did so, we would improve the credibility of our impact assessments with business, who ask the question, 'Where can I get money for 3.5 per cent? I can't, and yet it is my money I have to spend in order to comply with your regulations, so what relevance does this 3.5 per cent have to me?'.[222]

FIGURE 4.2 Discount Rate Spectrum



Secondly, as suggested above, there is considerable debate in the literature as to the most appropriate discount rate: 'those [who are] looking for guidance on the choice of a discount rate could find justification for a rate at or near zero, as high as 20% and any and all values in between.'[223] According to VCEC, what matters is using a *consistent* discount rate, as this allows the total costs and benefits of different regulatory proposals to be compared and helps to prioritise regulatory action.[224] Similarly, Mr Jason McNamara, Executive Director of the OBPR, stated in evidence to the Committee that in some regards debate about the correct rate is academic:[225]

> I think it is fair to say that our view of the world is that there is no right answer for a discount rate and it could vary, but what I was finding when I entered this job was that we spent an enormous amount of time debating with agencies what the appropriate discount rate was, and that was completely unproductive. So what we do is to say, 'You must do seven per cent as your central case'—or eight—'and then you do sensitivity analysis of, say, three to 11.' That allows a range and it allows you to say, 'Well, in this case we think three is going to be more appropriate because of all these factors,' but I think it is completely academic.

[221] G.Rivers, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 4.

[222] R.Deighton-Smith, Jaguar Consulting, *Transcript of Evidence*, 8 May 2013, 23.

[223] M.Harrison, *Valuing the Future: the social discount rate in cost-benefit analysis*, Visiting Researcher Paper, Productivity Commission, Apr 2010.

[224] VCEC briefing to Committee, 12 Dec 2012.

[225] J.McNamara, OBPR, *Transcript of Evidence*, 20 Jun 2013, 78.

> Given the error margin in cost-benefit analysis, we found it quite unproductive to say in each cost-benefit analysis we will change the discount rate. One of the tensions we found was that people were changing the discount rate to try and get their cost-benefit analysis up, if you like—to get a bigger number in their particular case—and that just was not productive. So we have been quite clear, and it does work…[226]

Finally, the Committee considers that the advice in the explanatory material provided to departments on discounting could be clarified. The *Victorian Guide to Regulation* refers to a government circular – 'Current Rates Advice' – which dates to 2005.[227] Evidence put to the Committee by Mr Deighton-Smith suggested there were inconsistencies in Treasury's reference point for determining the recommended discount rate, to the effect that a real discount rate of closer to 1.5 percent could be assumed, in contradiction to the 3.5 percent advised by DTF, VCEC and the supporting material.[228]

In regards to discounting, the OECD recommends that 'where a specific rate or rates are cited, it is necessary to ensure that these are reviewed regularly and revised as necessary' but 'frequent variation of advice on discount rates should not be required.'[229] The Committee is not in a position to advocate for a particular discount rate. However it would be timely for DTF and VCEC to clarify the advice given to departments on discounting and to review whether the current recommended rate of 3.5 percent remains appropriate in light of the information received by the Committee.

RECOMMENDATION 12

That the discount rate currently recommended for use in RISs and BIAs be reviewed.

4.5.2 Sunsetting regulation

In Victoria, regulations automatically 'sunset' (expire) after ten years. Over half of all RISs prepared are for sunsetting regulations.[230] The *Victorian Guide to Regulation* sets out particular requirements which apply to RISs for proposed replacement regulations. This includes the requirement that a cost-benefit analysis is undertaken against a situation where

[226] *Ibid*.

[227] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 83; Victorian Government, *Victorian Guide to Regulation Appendices*, Aug 2011, 19.

[228] R.Deighton-Smith, *Written Statement*, 8 May 2013, 6.

[229] OECD, 'Regulatory Impact Analysis: A Tool for Policy Coherence', 2009, 39.

[230] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011, 144.

no regulations exist (the base case). Such a comparison is 'essential to ensure that the policy development process considers the full impact on society, in terms of costs and benefits, of the regulatory proposal and other viable options.'[231]

The *Guide* notes that quantifying the extent of the problem in the (hypothetical) unregulated situation may be difficult, particularly where the regulations have been in place for some time. The Committee received a submission from a consultant noting that, when preparing a RIS for sunsetting regulations, departments and agencies occasionally asked for the costs and benefits of new regulations to be compared against the *existing* regulations, as well as the unregulated base case. This additional step adds to the work required and the cost of the consultancy (and ultimately the cost of RIA to government).[232]

A submission from Energy Safe Victoria (ESV) argued that, in some circumstances, such as where regulations relate to safety regimes and are long-standing, assessing the 'no regulation' base case is 'exceedingly difficult if not impossible.'[233] In these instances, re-justifying the regulations when they sunset is seen as excessive and ESV considered that the public and the government's interest would be better served by an independent and holistic ex-post review of the regulatory regime.[234]

4.6 The planning system: exemptions from regulatory impact analysis

The *Subordinate Legislation Act 1994* (Vic) specifically exempts two key elements of the planning framework from requiring a RIS: planning schemes (and amendments to planning schemes) and the Victoria Planning Provisions (VPP).[235] A planning scheme is a statutory document containing the rules for the use and development of land in each local government area.[236] The VPP is a set of standard, state-wide planning provisions prepared by the Minister for Planning under s.4A of the *Planning and Environment Act* 1987 (PEA). It

[231] Victorian Government, *Victorian Guide to Regulation*, Aug 2011, 52.

[232] T.Harding, Tim Harding and Associates, *Transcript of Evidence*, 17 Apr 2013, 2.

[233] Energy Safe Victoria, *Written Submission No.5*, 2.

[234] *Ibid*.

[235] *Subordinate Legislation Act 1994* (Vic), s.3 1(d) & (e).

[236] K.Richardson & B.Merner, *An Introduction to Victoria's Planning System: A Guide for Members of Parliament,* Victorian Parliamentary Library Research Service, Apr 2013, 18.

ensures planning schemes are consistent across Victoria and that the construction and layout of every planning scheme is the same.[237]

While these aspects of the planning system are exempt, RISs are sometimes required and prepared for regulatory changes relating to developing land in Victoria – for example, proposed new building regulations or subdivision fees.

The main reason given for the exemptions is that the PEA has its own requirements for consultation and analysis. The Department of Premier and Cabinet has argued that the PEA sets out 'comprehensive analytical and public scrutiny processes' and subjecting planning amendments to further review in the form of a RIS would be 'cumbersome'.[238]

In April 2011 VCEC recommended that the SLA be amended to require a RIS for planning scheme amendments where a 'significant regional or state-wide impact was expected'.[239] In March 2012 the government response 'supported in principle' VCEC's recommendation, stating that 'the government will investigate whether the [SLA] should be amended or an alternative method implemented...' [240]

The Committee did not receive information from DTF on the progress of this investigation. Nevertheless the Committee has noted a number of points raised in submissions and other evidence. Firstly, a number of reforms to improve planning schemes and the process for amending planning schemes have taken place since the VCEC report, including:

- Amending the PEA to require all planning scheme amendments to be approved by the Minister
- Introducing a Ministerial Direction that sets times for completing statutory steps in the process
- Reforming the development contributions system so that it is simpler to amend planning schemes to introduce or vary development levies

[237] *Ibid*, 13.

[238] DPC, *Subordinate Legislation Amendment Bill Discussion Paper,* 2009, 20.

[239] VCEC, *Strengthening Foundations for the Next Decade*, Apr 2011.

[240] DTF, *Victorian Government response to the Victorian Competition and Efficiency Commission's Final Report*, Mar 2012.

- Reviewing and simplifying the range of zones available to manage urban growth; this is expected to lead to fewer planning scheme amendments to rezone land.[241]

Secondly, of the numerous planning scheme amendments made each year a large proportion are minor in nature and, as VCEC has noted, would not benefit from application of a RIS process.

Thirdly, as discussed by DPCD, the PEA requires planning scheme amendments to undergo a range of assessments. In preparing a planning scheme amendment, a planning authority may take into account any environmental, economic and social effects of the proposal.[242] Amendments must comply with the VPP and state planning policy and demonstrate compliance with relevant written directions issued by the Minister. Significant amendments are usually exhibited and assessed by an independent planning panel and the public is able to make submissions and attend hearings of the panel. Every approved planning scheme amendment is laid before both Houses of Parliament and may be revoked by either.

On this point Mr John Ginivan, Acting Executive Director of State Planning, Building Systems and Strategy, in the Department of Planning and Community Development, informed the Committee at a public hearing:

> …our department's view is that the RIS process should not apply to amendments to planning schemes as it is unnecessary. We say that because our view is that the planning scheme amendment process is already a rigorous process; it has numerous checks and balances in it. In many cases matters that find their way into the planning system are a result of other public policy processes that have occurred, usually involving extensive engagement, consultation and assessment of merit. It is at the end of that process that they are then implemented into the state planning policy framework. It seems superfluous to then even contemplate doing another assessment of merit when you have already done it the first time. Our view is that if the amendment process needs to be strengthened or improved, that should occur through the existing mechanisms in the *Planning and Environment Act*.[243]

The Committee considers that the discipline of the RIS process and its rigorous examination of costs and benefits can improve policy making in all areas, including the planning system. However, the Committee agrees that subjecting planning scheme amendments to the RIS process would to some extent duplicate the existing assessment and consultation

[241] DPCD, *Written Submission No.9*, 9 Apr 2013, 2-3.

[242] *Planning and Environment Act 1987* (Vic), s.12(2).

[243] J.Ginivan, DPCD, *Transcript of Evidence*, 12 Jun 2013, 40.

requirements of the PEA and has the potential to add unnecessary delay. The Committee supports the suggestion put by Mornington Peninsula Shire Council in a submission:

> Whilst not convinced that … greater guidance and monitoring for Amendments should be done by applying the Regulatory Impact Statement process to them it is considered that there is opportunity within the P&E Act for reform based on similar principles to achieve greater consistency and quality of strategic assessments and explanatory reports. As a first step this could be done through quick reform of Ministerial Directions and Practice Notes.[244]

RECOMMENDATION 13

That the Minister for Planning, in consultation with the Victorian Competition and Efficiency Commission, amend Ministerial Direction 11 (Strategic Assessment of Amendments) to require a cost-benefit analysis for significant changes to planning schemes.

[244] Mornington Peninsula Shire Council, *Written Submission No.1*, 18 Feb 2013.

Appendix A – Submissions

1. Mornington Peninsula Shire Council
2. Manningham City Council
3. Regulatory Impact Solutions Limited
4. Tim Harding & Associates
5. Energy Safe Victoria
6. Economists at Large
7. Master Builders Association of Victoria
8. Ms Leonie Kelleher, OAM
9. Department of Planning and Community Development
10. Municipal Association of Victoria

Appendix B – Witnesses at Public Hearings

Wednesday 17 April 2013

Regulatory Impact Solutions

Mr Peter Phillips, Director

Tim Harding & Associates

Mr Tim Harding, Principal

Dr George Rivers, Economist

Wednesday 8 May 2013

Economists at Large

Mr Roderick Campbell, Economist

Jaguar Consulting

Mr Rex Deighton-Smith

Wednesday 12 June 2013

Department of Planning and Community Development

Mr John Ginivan, Acting Executive Director, State Planning, Building Systems and Strategy

Department of Treasury and Finance

Mr Mark Johnstone, Acting Deputy Secretary, Economic

Mr Anthony Rossiter, Senior Economist

Victorian Competition and Efficiency Commission

Dr Matthew Butlin, Chair

Mr Andrew Walker, Assistant Director

Thursday 20 June 2013 (Canberra)

Productivity Commission

Ms Rosalyn Bell, Assistant Commissioner

Mr Steven Argy, Inquiry Research Manager

Office of Best Practice Regulation

Mr Jason McNamara, Executive Director

Mr Darrell Porter, Deputy Executive Director

Mr Adrian Chippindale, Director, Policy Unit

Appendix C – Witnesses at Briefings

Wednesday 12 December 2012

Department of Treasury and Finance

Mr Brendan Flynn, Deputy Secretary

Mr Sam Abusah, Assistant Director – Markets, Regulation and Resources

Victorian Competition and Efficiency Commission

Dr Matthew Butlin, Chair

Mr Andrew Walker, Assistant Director

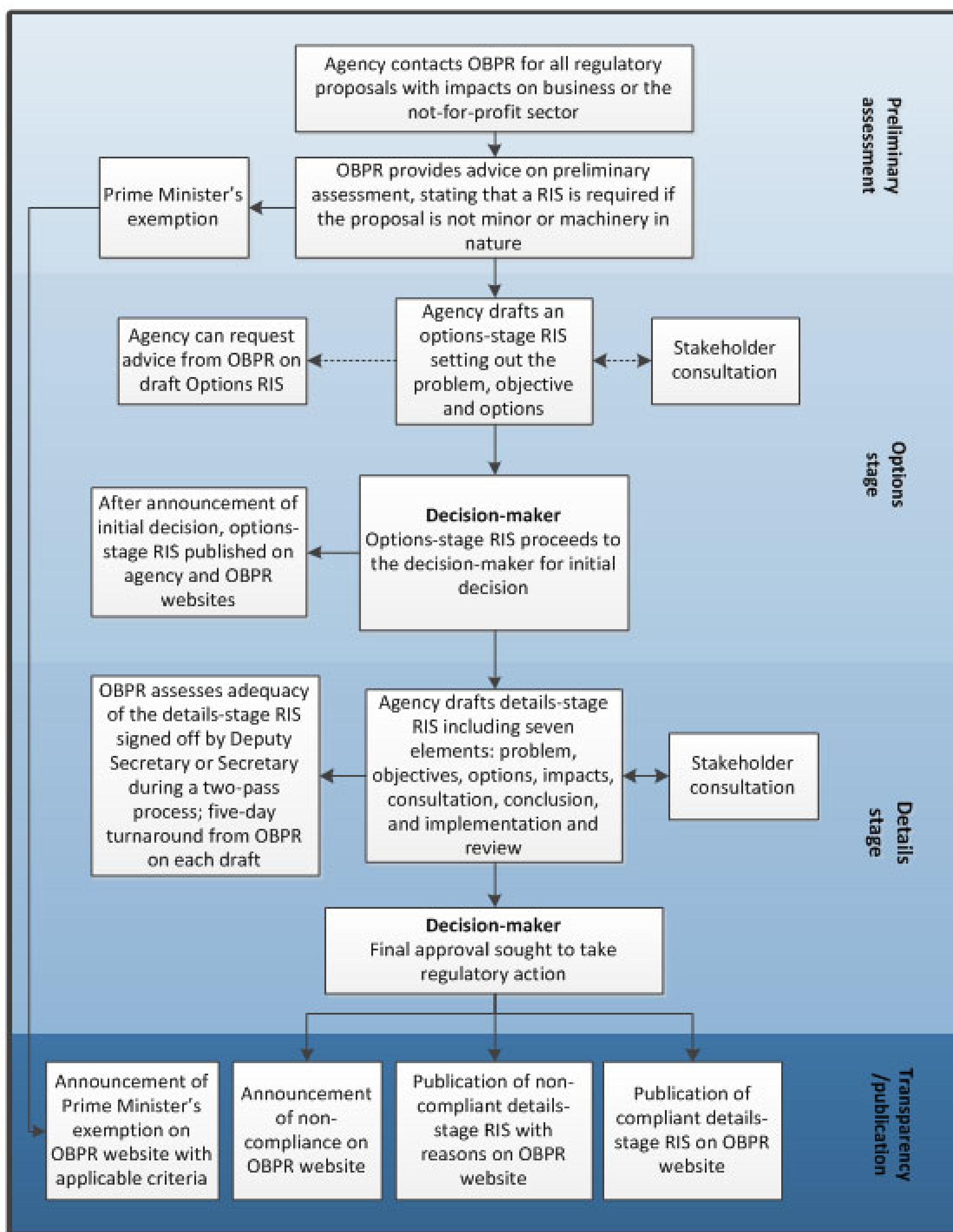
Thursday 20 June 2013 (Canberra)

The Centre for International Economics

Mr Brent Borrell, Managing Director

Mr David Borthwick, AO PSM

Appendix D – Commonwealth two-stage RIS process



Source: www.finance.gov.au/obpr/proposal/handbook/Content/02-government-regulatory-impact-analysis.html, accessed 16 August 2013 at 10.20 a.m.