

Legislation Impact Assessment Guidelines

December 2016



Tasmania
Explore the possibilities

Table of Contents

Chapter 1 – Introduction 3

Chapter 2 – New and amending primary legislation 5

 Regulatory Reform – A Brief History..... 5

 Guiding Principle 5

 Step by Step Guide for preparing primary legislation 7

Chapter 3 – Preparing subordinate legislation 10

 What is Subordinate Legislation?..... 10

 The *Subordinate Legislation Act 1992*..... 11

 Step by Step Guide for preparing subordinate legislation 13

Appendix 1: Initial Legislation Impact Assessment 17

Appendix 2: Restrictions on Competition and the Public Interest Test 18

Appendix 3: Regulatory Impact Statements.....22

Appendix 4: Exemptions under the Subordinate Legislation Act24

Appendix 5: Proposals for Fee Increases.....25

Chapter I – An Introduction

Purpose of the Guidelines

The Tasmanian Government is committed to ensuring that all new and amending legislation is reviewed so that it does not impose unnecessary restrictions on competition or unnecessary additional regulatory costs on business.

The purpose of these Guidelines is to assist agencies who are responsible for preparing new primary and subordinate legislation, or amending or remaking existing legislation, to ensure that appropriate gatekeeper processes are followed, including the requirements under the *Subordinate Legislation Act 1992*.

The Economic Reform Unit (ERU)

The Economic Reform Unit within the Department of Treasury and Finance is responsible for administering the gatekeeper processes for primary legislation and Treasury's functions under the *Subordinate Legislation Act*.

Agencies are encouraged to liaise with the ERU as early as possible in relation to any proposed legislation. This will:

- ensure that the ERU is aware of issues surrounding the proposed legislation and is satisfied with the manner in which it has been developed;
- enable agencies to obtain a clear indication of the status of the proposed legislation and plan their project timeline accordingly. In most cases, the ERU will be able to give a preliminary indication of whether a Regulatory Impact Statement (RIS) will be required; and
- assist the ERU in minimising the time needed to process the required certificates.

Requirement for Legislation Impact Assessment

All new or amending legislation must be assessed by the ERU for the potential impact it may impose on business and the wider community. This applies to both primary legislation under the gatekeeper processes and subordinate legislation under the *Subordinate Legislation Act*.

These Guidelines are structured to assist agencies to identify the procedure for obtaining the relevant ERU assessments. The process for seeking assessment of new or amending primary legislation is outlined in Chapter 2 and the process for subordinate legislation is detailed in Chapter 3.

Timelines for the Issue of Certificates

It is recommended that agencies allow for a minimum processing time of **10 working days** when requesting assessments from the ERU. The ERU will endeavour to deal with urgent requests in less than 10 working days.

Contacting the ERU

Hard copy requests for assessment of primary and subordinate legislation can be sent to the Department of Treasury and Finance (attention to Economic Reform Unit). However, agencies are strongly encouraged to email assessment requests to the ERU at (economic.reform@treasury.tas.gov.au) so that requests can be actioned in a timely manner.

Chapter 2 - New primary legislation and amendments to existing primary legislation

Regulatory Reform – A Brief History

In April 1995, the Council of Australian Governments agreed to a National Competition Policy (NCP) to provide a national approach to competition policy reform. Amongst the inter-governmental Agreements signed to implement the NCP was the *Competition Principles Agreement* (CPA).

The CPA includes guiding principles to be applied to the review of existing primary legislation and new primary legislation that imposes a restriction on competition.

Under NCP, all legislation that contained restrictions on competition was reviewed and many of these restrictions were subsequently removed, such as the restrictions relating to shop trading hours, the monopoly on conveyance services by legal practitioners and the rules for issuing new taxi licences.

At the same time, there has been increasing focus on the costs that legislation can impose on business, especially small business.

For primary legislation, the gatekeeper processes in Tasmania had been described as the Government's Legislation Review Program (LRP). These processes are now included in the Legislation Impact Assessment Guidelines.

Guiding Principle

The following procedures should be followed by agencies to ensure that new primary legislation, or amendments to existing legislation, complies with the gatekeeper processes even if Cabinet has considered a policy response on a particular issue and given in-principle approval for the drafting of a Bill.

It is assumed that agencies have fully considered all other possible options to achieve the desired objective, including non-regulatory approaches.

Cabinet will not consider proposed new primary legislation unless the relevant ERU endorsements have been obtained and a final report that complies with these guidelines is attached to the Cabinet Minute.

The guiding principle to be applied to proposed new primary legislation or amendments to existing legislation is:

Legislation should not restrict competition or impose a significant impact on business unless it can be demonstrated that:

- a) the benefits to the community as a whole outweigh the costs; and**
- b) the objectives of the legislation can only be achieved by restricting competition or imposing a significant impact on business.**

Equal weight is given to the need to justify any restrictions on competition and any significant impact on business. As a general principle, the greater the restriction or impact on business, particularly small business, the stronger the justification required to support the proposal. The regulatory burden on small business should be minimised to the greatest extent possible and the onus of proof in justifying a restriction on competition or significant impact on business lies with the agency or authority developing the primary legislation.

As explained below, it is generally necessary to prepare a RIS in cases where proposed primary legislation imposes a restriction on competition and a RIS may be required in cases where primary legislation imposes costs on businesses.

The guiding principle does not apply in the case of taxation legislation, although it is still important that taxation legislation does not provide a competitive advantage or disadvantage to some competitors over others in a market. The principle also does not apply where Tasmanian primary legislation is developed or amended to implement national reforms that have already been the subject of a RIS at the national level.

In a limited number of cases, legislation which restricts competition or significantly impacts business involves issues of basic community standards or protection, such as controls in relation to firearms and the availability of pornographic material. Restrictions on competition or impacts on business in these areas are generally justified in terms of the recognised social objectives of the legislation.

Proposed legislation may also involve some curtailment of an individual's basic rights in other areas, designed to meet a broader public interest objective.

In cases where basic community standards or protection are involved, or an individual's basic rights are involved, it may not be appropriate to prepare a RIS because there may be no identifiable economic costs or benefits, or they may be relatively insignificant. Therefore, the guiding principle may not apply in these cases. It is still necessary to confirm this with the ERU to obtain the appropriate certificates. The agency should consider whether a different type of report should be prepared, and made publicly available, that sets out the rationale for the proposal and gives an account of the expected impact of the proposed legislation, including which sectors of the community would be affected.

Step by Step Guide for preparing primary legislation

Step 1: Assess new or amending primary legislation against the guiding principle

The responsible agency must determine whether the proposed legislation will:

- a) restrict competition in any way; or
- b) have a significant negative impact on business, including small business.

To assist agencies with this task, a pro forma “Initial Legislation Impact Assessment” template is included in **Appendix I**. Once completed, this assessment should be sent to the ERU for endorsement.

In some cases, it will be readily apparent that the proposed legislation will not restrict competition or impose a significant negative impact on business, such as a simple amendment to close a legal loophole.

Further, it may be sufficient in some cases for an agency to simply submit a draft Cabinet Minute to ERU for assessment if the draft Minute contains sufficient information to enable the ERU to assess whether the proposal restricts competition or imposes a significant negative impact on business.

Step 2: ERU endorsement of initial impact assessment

No restriction on competition or significant impact on business

If the ERU considers that the proposal will not impose a restriction on competition or have a significant negative impact on business, Treasury will provide the agency with ‘in-principle’ advice to this effect. The agency can then provide the proposal to the relevant Minister together with the Treasury advice for submission to Cabinet.

If Cabinet approves the preparation of legislation, the responsible agency then requests the Office of Parliamentary Counsel (OPC), Department of Premier and Cabinet, to draft the legislation.

Proceed to **Step 4**.

Restriction on competition or significant impact on business

If the responsible agency considers that the proposal will restrict competition in some way or have a significant negative impact on business, the initial impact assessment should provide sufficient information to allow the ERU to determine whether the restriction or impact on business would have a major or minor impact.

Where the restriction or impact is major, a detailed assessment of the costs and benefits is required to establish whether the restriction or impact is in the public benefit. A competition restriction or business impact will be considered major if it has economy-wide implications, or

where it significantly affects a sector of the economy (including consumers). If the competition restriction or business impact is minor, a less detailed assessment is required.

If the ERU considers that the proposed legislation may restrict competition or impact business, in-principle advice to this effect will be provided to the responsible agency. The agency can then submit the proposal to the relevant Minister, along with the ERU advice, for consideration and transmission to Cabinet seeking approval to draft the legislation.

Proceed to **Step 3**.

Step 3: Requirements if legislation will restrict competition or have a minor or major impact on business

Should Cabinet approve the preparation of draft legislation, the responsible agency must prepare a RIS, to be considered for endorsement by the ERU. In most cases, the RIS should be made public, as set out below.

There have been cases where a draft RIS has found that the benefits of the proposal were likely to be less than the costs; that is, the proposal is not in the public interest. In these cases, the agency must still release the RIS unless the Minister decides not to proceed with the legislation. A Cabinet Minute seeking approval to introduce the legislation would include advice that Treasury determined that the RIS did not demonstrate that the benefits exceeded the costs, unless information became available as a result of public consultation that demonstrates to the ERU that the benefits outweigh the costs.

If the ERU assesses the likely restriction on competition and/or impact on business to be minor, public consultation may not be necessary, although it is always encouraged.

The RIS must state whether the restriction on competition or impact on business is in the public interest.

Appendix 2 provides some examples of restrictions on competition and also a checklist of issues which can be used to determine the public benefit of any restriction on competition.

If the ERU assessed the restriction on competition and/or impact on business to be major, a public consultation process is usually required. The RIS will form the basis of public consultation and should assist those with an interest in the legislative proposal to make informed comment. A suggested format for a RIS is provided in **Appendix 3**.

The RIS must:

- explain the objectives of the legislation, the issues surrounding the restriction on competition or business impact, and the benefits and costs that flow from the restriction or impact, including to specified stakeholders (where relevant); and
- clearly identify whether the benefits of the restriction on competition or impacts on business outweigh the costs.

This will require an assessment of the direct and indirect social, economic and environmental costs of the proposed legislation. All costs and benefits must be identified and quantified where possible, using appropriate analytical techniques, such as cost-benefit analysis.

Some costs or benefits cannot be quantified. In such cases, the effect of the restriction on competition or impact on business must be presented in such a way that enables a comparison of the costs and benefits to be undertaken. The comparison of costs and benefits should also extend to alternative approaches, including non-regulatory options that may achieve the policy objective of the proposed legislation.

Once the RIS and public consultation process has been endorsed by the ERU, advertisements should be placed in relevant local newspapers or other publications inviting submissions on the RIS within a specified period of at least 21 days (not including public holidays). The notice should detail the scope of the assessment, provide details of where copies of the RIS may be obtained and invite submissions from interested parties.

If the proposed legislation has a significant impact on a particular group of people, the notice should be published in such a way to ensure that the members of that group understand the purpose and content of the notice. It may also be necessary to write directly to those individuals, groups and organisations that have a particular interest in the issues under consideration.

One key objective of public consultation is to allow stakeholders to comment on the agency's estimates of the costs and benefits of the legislation.

All submissions received through the public consultation process are to be documented and fully considered by the agency. Further consultation with specific parties may be necessary. The RIS should then be revised to take into account the outcomes of the entire consultation process.

Step 4: ERU assessment of final draft legislation

Once the legislation has been finalised, the responsible agency must provide the final Bill to the ERU for final advice. The responsible agency can then seek Cabinet's approval to introduce the legislation into Parliament. If required, the agency must attach the RIS to the final Cabinet Minute and include a summary of feedback received during the public consultation process, as well as whether suggested amendments from this process have been incorporated.

Chapter 3 - Preparing Subordinate Legislation

The following guide should be followed to ensure that subordinate legislation complies with the requirements of the *Subordinate Legislation Act 1992*.

While the procedures under the Subordinate Legislation Act are very similar to those required under the gatekeeper processes for primary legislation, there are differences in the criteria for the review of proposed subordinate legislation. This is because the scope of measures in subordinate legislation is necessarily more restricted than for primary legislation. It is not likely, for example, that subordinate legislation could impose a significant restriction on competition; the head of power for any such measure would have to be in the Principal Act.

Furthermore, primary legislation is subject to greater scrutiny by the Parliament than subordinate legislation; there is far greater capacity for members of Parliament to raise issues, including those identified by stakeholders.

The Subordinate Legislation Act does not specifically require an in-principle assessment to be undertaken before the legislation is drafted, although it is recommended that agencies follow that process to have more certainty regarding the final assessment.

The guide assumes that, before committing to the development of subordinate legislation, agencies have fully considered all other possible approaches to achieve the desired objective, including non-regulatory options.

What is Subordinate Legislation?

Subordinate legislation is a collective term for statutory rules, regulations, ordinances, by-laws and rules that support primary legislation. Primary legislation is usually general in nature, establishing a framework for regulation.

Subordinate legislation made under primary legislation contains the necessary detail to ensure the successful operation of the primary legislation. Authority to prepare subordinate legislation is delegated by the Parliament to an agency (or in rare cases, to another body) in the primary legislation.

In Tasmania, the *Subordinate Legislation Act 1992* defines subordinate legislation as:

- a) *a regulation, rule or by-law that is:*
 - (i) *made by the Governor; or*
 - (ii) *made by a person or body other than the Governor but required by law to be approved, confirmed or consented to by the Governor; or*
- b) *any other instrument of a legislative character that is:*
 - (i) *made under the authority of an Act; and*
 - (ii) *declared by the Treasurer to be subordinate legislation for the purposes of the Act.*

Agencies should also be aware that Ministerial Orders (such as the Pricing Orders issued under the *Economic Regulator Act 2009*) and proclamations are not subordinate legislation for the purposes of the Subordinate Legislation Act.

The Subordinate Legislation Act 1992

The Subordinate Legislation Act outlines the requirements that must be met when subordinate legislation is made in Tasmania. The Act applies to proposed new subordinate legislation, the re-making of existing subordinate legislation and amendments to existing subordinate legislation.

The Act has three key objectives:

- ensuring that subordinate legislation is necessary, effective and efficient and that any cost or burden imposed on the Tasmanian community is justified as being in the public interest;
- ensuring subordinate legislation is periodically reviewed by providing for the automatic repeal of all subordinate legislation after a ten year period; and
- providing the Subordinate Legislation Committee of Parliament information with which to examine the appropriateness of subordinate legislation.

The Act requires the Department of Treasury and Finance to undertake a 'gatekeeper' role in ensuring that the Act's requirements are met.

The key assessment to be made by Treasury is whether the proposed subordinate legislation will impose a significant burden, cost or disadvantage on any sector of the public. In applying this test, the Secretary compares the arrangements that would exist if the new regulations were not made to the arrangements that would arise under the proposed subordinate legislation.

That is:

- proposed new subordinate legislation will be compared with a no regulation or a non-legislative approach;
- for subordinate legislation that is due to be repealed under the Subordinate Legislation Act, a proposal to remake the regulations will be compared with letting the regulations lapse; and
- proposed amendments to existing subordinate legislation will be compared with maintaining the subordinate legislation in its current form.

The Act provides for various certificates to be issued by the Secretary of Treasury upon making an assessment, confirming that the subordinate legislation complies with the various requirements of the Act.

Subordinate legislation that is not considered to impose a significant impact on the community can be made by the agency following receipt of the applicable certificate from the Secretary. However, if subordinate legislation is considered to impose a significant impact, the responsible agency must prepare a Regulatory Impact Statement (RIS), in accordance with requirements set

out in the Act, and undertake a public consultation process to determine whether the subordinate legislation is in the public interest.

A number of exemptions from the requirements of the Subordinate Legislation Act are also available in certain situations, explained in Appendix 4 and Appendix 5.

The Subordinate Legislation Act allows the Secretary to delegate certain tasks, such as the issuing of certificates. Reference to the Secretary in this Guideline includes senior Treasury staff who have the delegated powers. As with the gatekeeper process for primary legislation, requests for assessment of subordinate legislation should be submitted to the Economic Reform Unit (ERU).

Step by Step Guide for preparing subordinate legislation

Step 1: Formulating Regulatory Proposals

Agencies should identify the need to develop new subordinate legislation, amend existing subordinate legislation, or re-make existing subordinate legislation that is due for repeal. When re-making existing subordinate legislation, agencies should ensure that they allow sufficient time for the regulations to be re-made prior to their expiry, including the time needed to prepare and consult on a Regulatory Impact Statement, should one be required.

Once appropriate policy directions are developed and agreed, proposals are to clearly formulate the objectives of the subordinate legislation. If there is any question of the identified objectives overlapping, duplicating, conflicting or being inconsistent with other legislation or Government policy, consult with other agencies as required.

If no significant impact is likely

In a number of cases, it will be readily apparent that the subordinate legislation will not impose a significant burden, cost or disadvantage on any sector of the public. In these instances, agencies should proceed to **Step 2**.

If a significant impact is likely or the impact is uncertain

If subordinate legislation is likely to have a significant impact on the community, or agencies are uncertain of the potential impact, an 'in-principle' assessment should be requested from the ERU. This will give the agency an indication of how the final subordinate legislation is likely to be assessed. The Initial Legislation Impact Assessment template can be used as the basis for the in-principle assessment (see **Appendix 1**).

Agencies should also request an in-principle assessment from the ERU if the subordinate legislation is considered to be eligible for an exemption. **Appendix 4** outlines the exemptions available under the Subordinate Legislation Act.

Once advice of an in-principle assessment is received from the ERU, agencies should proceed to **Step 2**.

Step 2: Drafting Stage

Drafting instructions are sent to the Office of Parliamentary Counsel (OPC) in the Department of Premier and Cabinet.

Once the subordinate legislation has been finalised, the Subordinate Legislation Act requires agencies to obtain advice from the OPC as to whether the proposed subordinate legislation complies with section 7 of the Subordinate Legislation Act.

This advice will relate to whether the proposed subordinate legislation is within the powers and objectives conferred by the relevant Act and will consider such issues as retrospectivity, whether it imposes a tax, fee, fine, imprisonment or other penalty and whether it is clearly expressed.

Agencies should then proceed to **Step 3**.

Step 3: Provide Subordinate Legislation to the ERU

A final draft of the subordinate legislation, together with a copy of the section 7 advice from the OPC, is to be provided to the ERU for final assessment.

If an in-principle assessment has previously been undertaken, and the subordinate legislation has not substantially changed, the ERU will confirm the in-principle assessment with a final assessment.

If subordinate legislation is assessed as significant

The Secretary will issue the applicable certificate to the agency.

Upon receipt of the certificate, proceed to **Step 4** below.

If subordinate legislation is assessed as not significant

The Secretary will issue the applicable certificate to the agency.

Upon receipt of the applicable certificate, proceed to **Step 6** below.

If an exemption is provided

Depending on the nature of the exemption, either the Secretary or the Treasurer will issue the applicable certificate to the agency. If an exemption is required from the Treasurer, the ERU will manage this process. The agency should not provide a request for an exemption directly to the Treasurer.

Upon receipt of the certificate, proceed to **Step 6** below.

Step 4: Preparing a Regulatory Impact Statement

If the subordinate legislation is considered to be significant, a RIS must be prepared. The RIS will form the basis of the mandatory public consultation process required under the Subordinate Legislation Act.

An exemption from the requirement to prepare a RIS is available in very limited circumstances.

A suggested format for a RIS is included in **Appendix 3**.

Once completed, the RIS should be provided to the ERU, together with an outline of the proposed public consultation process, for approval. Treasury will consider the proposed measures to inform stakeholders, and the broader community, of the release of the RIS, taking into consideration the fact that different regulatory proposals may require different forms of public consultation.

The Secretary will determine whether a certificate can be issued to the agency indicating that the RIS and proposed consultation process is in accordance with the Subordinate Legislation Act.

If the Secretary does not approve the proposed RIS and consultation process, the ERU will contact the agency and advise what changes are required before a certificate can be issued.

Upon receipt of the certificate, proceed to **Step 5**.

Step 5: The Public Consultation Process

All comments and submissions received during this process are to be appropriately considered. It may be necessary to change the proposed subordinate legislation to ensure that the outcomes of the consultation process are appropriately reflected in the proposed subordinate legislation.

Agencies should make the ERU aware of any changes that are made to the subordinate legislation or the RIS.

Once the public consultation process is complete, agencies should proceed to **Step 6**.

Step 6: Provide Documentation to Executive Council

Before subordinate legislation is submitted to the Governor-in-Council, the agency must:

- obtain four printed copies of the regulations from OPC;
- prepare an Executive Council Minute and an Explanatory Memorandum;
- arrange for the responsible Minister to sign the original copy of the subordinate legislation, stamp the other three copies, sign the Executive Council Minute and initial the Explanatory Memorandum; and
- deliver to the Executive Council secretariat the Executive Council Minute, the Explanatory Memorandum, the signed original of the proposed subordinate legislation, the three other stamped copies, the advice from the OPC under section 7 and the relevant certificate issued by the Secretary or the Treasurer under the Subordinate Legislation Act.

Following Executive Council approval, the Executive Council secretariat will forward the subordinate legislation to the OPC for filing, numbering and transmission to the printer.

The agency must then arrange, in conjunction with the OPC, for notification of the making of the subordinate legislation in the Gazette and for printed copies of the subordinate legislation to be made available for purchase by the public on the day of gazettal.

Step 7: Subordinate Legislation Committee

Section 9 of the Subordinate Legislation Act requires copies of all relevant documents to be submitted to the Subordinate Legislation Committee within seven days of the notification of the making of the subordinate legislation being published in the Gazette or, where notification of its making is not required, within seven days of the subordinate legislation being made.

Relevant documents include:

- any certificates issued by the Secretary, the Treasurer or the responsible Minister;
- the RIS (if required);
- any written comments and submissions received as a result of any public consultation process undertaken;
- the advice from the OPC under section 7 of the Subordinate Legislation Act; and
- copies of previous regulations if the subordinate legislation being submitted is amending or remaking existing subordinate legislation.

The agency must then liaise with the responsible Minister's office to ensure that, in accordance with section 47(3) of the *Acts Interpretation Act 1931*, the appropriate number of copies of the subordinate legislation are tabled in each House of Parliament. This must be done within the first ten sitting days of the House after either the making of the subordinate legislation or the notification of its making is published in the *Gazette*.

While not mandatory under the Subordinate Legislation Act, it has been agreed that agencies are to provide a Fact Sheet, along with the information above, to the Subordinate Legislation Committee. The Fact Sheet is to provide a summary of the regulations and also include information relating to the consultation undertaken in the preparation of the regulations and the outcome of the consultation.

If a RIS is required, the Fact Sheet should include information as to how stakeholders, and the broader community, were advised that a RIS was released and the outcome of the consultation.

Appendix I: Initial Legislation Impact Assessment

Title of proposed legislation *Insert name of proposed primary or subordinate legislation*

Responsible agency *Insert name of agency preparing draft legislation*

Contact *Name, email address and telephone number of officer responsible for the preparation of this assessment*

Regulatory objective *Describe the regulatory objective of the proposed legislation*

Statement of Legislation Impact *A summary statement which should identify whether the proposed legislation will have any impact on competition or business, particularly any impact on small business, and whether any stakeholder will be significantly affected.*

Is a Regulatory Impact Statement required?

Yes / No *Reason*

Appendix 2: Restrictions on Competition, Impacts on business and the Public Benefit Test

The following restrictions are those that have the most important impact on competition.

Restrictions on market entry

Market entry relates to the processes that an individual or firm needs to undertake to begin trading in a particular market. In most instances there will be commercial barriers to market entry, such as the purchase of suitable plant and equipment, but in many cases there are also legislative barriers. These legislative barriers can include:

- an outright prohibition in regard to a particular business activity;
- a statutory monopoly concerning a business activity that operates either state-wide or in a particular locality;
- licensing or registration requirements for persons or bodies wishing to engage in a particular business activity, which operate on the basis of restricting the number of market participants or limiting participation to those persons or bodies that meet defined standards, hold certain qualifications or are members of particular occupational or professional organisations;
- the allocation of quantitative entitlements, quotas or franchises among participants in particular business activities; or
- the allocation of licences or other authorities that allow the holder access to natural resources (including water, minerals, forests and fisheries) or which create rights, or permit specified activities, denied to non-holders (for example, licences to dispose of waste material in a particular manner).

Contestable markets, where firms are faced with the threat of potential competition, can produce efficiencies commensurate with head-to-head competition. The removal of entry barriers can have an important impact, even if few or no new firms actually enter the market. In this situation, firms that were once isolated from competition realise that, unless they become more competitive, new entrants reacting to market signals may seize opportunities and erode the market share of existing firms.

Restrictions on competitive conduct

Legislation can restrict competitive conduct by firms in the market by restricting ordinarily acceptable forms of competitive behaviour. Such restrictions can include matters such as:

- price controls in relation to goods or services;
- hours of operation;
- size of premises;
- the provision of specified facilities or the use of specific equipment;

- the geographical area of operation;
- permissible advertising;
- business ownership; or
- the type of good or service that can be offered for sale.

Restrictions on product or service Innovation

Legislation can restrict competition by regulating the quality or standard of a product or service, thereby reducing the scope for innovation. Such restrictions can include the requirement for prescribed quality or technical standards to be observed in the production or packaging of a good or the delivery of a service, other than those requirements that apply generally in relation to public or workplace health and safety.

Restrictions on the entry of goods or services

Legislation can restrict the entry of goods and services from interstate or overseas, giving a competitive advantage to local producers. In most cases such restrictions relate to quarantine matters, are scientifically based and are designed to stop the spread of animal or plant pests or diseases. However, in some cases the restrictions have no scientific basis and serve to protect existing businesses from interstate and overseas competition.

Administrative discretion

Legislation can also restrict competition by providing for administrative discretion that has traditionally been exercised to inhibit competition. This discretion can include:

- the favouring of incumbents suppliers;
- preferential purchasing arrangements;
- the issuing of licences;
- making financial assistance (such as direct grants or subsidies or the waiver of various State or Local Government taxes or charges) available if a business is carried on in a certain location;
- treating public and private sector providers differently; or
- setting technical specifications that are only available from a single supplier.

It is necessary to clearly identify and describe all specific legislative restrictions on competition within the legislation under assessment. Where appropriate, individual restrictions should be amalgamated into appropriate groups for review analysis. However, restrictions on competition should not be grouped together if they impact on different markets or if they relate to different forms of restriction.

The impact of regulation on business

Regulation can impose significant additional costs on businesses, including not-for-profit organisations. Unnecessary regulation can reduce productivity and discourage investment, innovation and employment. Furthermore, regulation can favour some businesses in an industry over other businesses. Often, for example, the average cost of regulation is much larger for small businesses, due to their lack of scale economies.

These costs can take a variety of forms. These include:

- the direct costs to businesses and professionals for processes required in legislation such as accreditation procedures, licences, fees and training requirements;
- the resources required to understand new statutory requirements, complete and submit forms and regular reports and to deal with any issues or possible breaches relating to any new requirements;
- delays to businesses relating to investment or the development of new goods or services;
- restrictions on the inputs that businesses may use or the goods or services they may produce;
- output restrictions, such as quotas and size limits in the fishery industry;
- increased output costs due to quality standards imposed by legislation, such as under building standards;
- restrictions on the market for the goods and services provided by businesses;
- a reduction in the size of the market due to a change in demand arising from statutory requirements in other markets or industries;
- restrictions on labour availability, or increased costs, of employment;

Agencies are required to include an assessment of whether the legislation has, or will have, a significant impact on business and the costs and benefits involved. In particular, any impact on small business should be clearly identified.

The Public Benefit Test

The following list of issues, whilst not exhaustive, can be used to assist in determining whether a legislative restriction on competition is in the public benefit, that is, whether the benefits of the restriction outweigh the costs.

Restrictions can be justified if they:

- promote competition in an industry;
- assist economic development (for example, in natural resources through the encouragement of exploration, research and capital investment);
- foster innovation and business efficiency, especially where this results in improved international competitiveness;
- encourage industry rationalisation, resulting in more efficient allocation of resources and lower, or contained, unit production costs;
- expand employment growth or prevent unemployment in efficient industries or particular regions;
- assist efficiency for small businesses (for example, by providing guidance on costing and pricing or marketing initiatives which promote competitiveness);
- improve the quality and safety of goods and services and expand consumer choice;
- supply better information to consumers and business, thereby permitting more informed choices in their dealings at a lower cost;
- address any externalities that affect community welfare, such as noise levels or risks of motor accidents;
- promote equitable dealings in the market;
- promote industry cost savings, resulting in contained or lower prices at all levels of the supply chain;
- encourage the development of import replacements;
- encourage growth in export markets;
- implement desirable community standards with the minimum impact on competition in the marketplace; or
- improve the protection of the environment.

In the assessment of the costs and benefits of new regulation, the public benefit test should also include the costs of the regulation on business, together with any cost savings or any other benefits not included above.

Appendix 3: Regulatory Impact Statements

Where a review or assessment is deemed to be likely to restrict competition, impact business or have a significant negative impact on a sector of the public, the following format should be followed when preparing the required regulatory impact statement. The requirement for public consultation can be determined by the expected significance of the impact.

Objectives of the Legislation

Agencies are required to include a clear statement of the objectives of the legislation and the reasons for them. Care must be taken not to confuse the objectives of the legislation with the strategies for achieving the objectives.

The objectives should:

- be reasonable and appropriate; and
- not be inconsistent with the objectives of other Acts, subordinate legislation and stated Government policies.

Nature of the Restriction on Competition

If relevant, agencies are required to clearly identify the nature of the legislative restrictions on competition. Governments, through legislation, intervene in markets for many reasons and in many ways. At one level, all such intervention affects competition and almost no regulatory activity is neutral in its implications for competition. However, the assessment of legislation that restricts competition is primarily concerned with the restrictions which impact most directly on competition.

Legislated restrictions that have the most impact on competition include:

- restrictions on market entry;
- restrictions on competitive conduct;
- restrictions on product innovation;
- restrictions on the entry of goods and services; and
- administrative discretion that has been used to inhibit competition.

These specific restrictions on competition are explained more fully in Appendix 2 of these Guidelines.

If the legislation has, or will have, a significant impact on competition, agencies are required to include an evaluation of whether the benefits of the restriction outweigh the likely costs. If the benefits outweigh the likely costs, this section should include an evaluation of whether the restriction represents the absolute minimum in the public benefit.

Agencies should include a summary of the dollar costs and benefits of the restriction on competition and the costs and benefits of the impacts on business for each of the identified options. Agencies should identify whether the costs to business are likely to have relatively

larger impacts on any particular businesses, such as smaller businesses. There will need to be a full discussion of those financial and socio-economic impacts that are not able to be quantified in dollar terms.

Alternative Options

Agencies are required to identify all alternative options by which the desired objectives can be achieved, either wholly or substantially, including the option of removing the legislative restriction on competition or impact on business or not proceeding with the proposed legislation. If a legislative approach is recommended, provide an explanation of why this is the most efficient means of achieving the objectives. Consider, also, whether the existing or proposed restrictions are the absolute minimum necessary in the public interest.

Greatest Net Benefit / Least Net Cost Alternative

The RIS is to include an assessment of which of the alternative options involves the greatest net benefit or least net cost to the community.

Statement of Consultation Process

The agency is required to provide Treasury with details of the public consultation process to be undertaken.

Note:

In preparing a Regulatory Impact Statement:

- where costs and benefits are referred to, economic, social and environmental costs and benefits, both direct and indirect, are to be taken into account and given due consideration; and
- costs and benefits must, where possible, be quantified. If this is not possible, the anticipated impacts of the action and of each alternative must be stated and presented in a way that permits a comparison of the costs and benefits.

The ERU is able to provide examples of previous RISs.

Appendix 4: Exemptions under the Subordinate Legislation Act

Subordinate Legislation Act 1992

SCHEDULE 3 – Exempt Matters and Categories

PART 1

- a) Matters involving corrections to existing subordinate legislation.
- b) Matters of a savings or transitional nature.
- c) Matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory.
- d) Matters involving the adoption of international or Australian standards or codes of practice, where an assessment of the costs and benefits has already been made.
- e) Matters of a declaratory, machinery or procedural nature.
- f) Matters involving relations between bodies that are departments within the meaning of the Administrative Arrangements Act 1990.
- g) Matters involving the administrative or financial organisation or the procedures of bodies that are departments within the meaning of the Administrative Arrangements Act 1990.
- h) An order of the Governor under section 11 (5) or 14 (2) of this Act.

PART 2

1. Fees — where the rate of increase of a fee or group of fees does not exceed the rate of increase in the Consumer Price Index since the fee or fees were last fixed.
2. Court procedures — that do not impose fees, but relate to the procedure, practice or costs of a court or of a tribunal exercising judicial or quasi judicial powers.
3. Remade subordinate legislation — that by way of consolidation and without substantive amendment, remake the provisions of earlier subordinate legislation, where —
 - a) the provisions have been in operation at some time in the preceding 12 months; and
 - b) not more than 10 years have elapsed since the making of the earlier subordinate legislation; and
 - c) a regulatory impact statement was prepared in relation to the earlier subordinate legislation.

Appendix 5: Proposals for Fee Increases

Background

Section 6(a) of the Subordinate Legislation Act provides for the following exemption:

" . . . where the rate of increase in a fee or group of fees does not exceed the rate of increase in the Consumer Price Index since the fee or fees were last fixed."

To ensure that all proposals to increase fees are treated consistently and fairly, the ERU has the following policy as to how it will apply the relevant provision of the Subordinate Legislation Act.

Starting Date for Measuring Increases

The term "since the fee or fees were last fixed" will be interpreted as the date on which a particular fee was last increased. This avoids disadvantaging agencies where entire fee schedules are replaced simply to alter one or two of the fees in that schedule.

Determining Index Numbers

The index number to be used is the "all groups index number" for Hobart, published by the Australian Bureau of Statistics in Consumer Price Index, Catalogue No. 6401.0.

Starting index number

Unless otherwise certified by the ERU, the "starting index number" is to be the most recent CPI number that was published prior to the date on which the existing fee commenced.

Ending index number

The "ending index number" will be the most recently published CPI number at the time the proposal is assessed by the ERU.

Maximum allowable increase

The maximum allowable increase in a fee is the percentage difference between the "starting index number" and the "ending index number" as defined above. Any increase above this amount would require assessment by the ERU.

Proposals to Increase Fees

If at any future point, prior to subordinate legislation expiring, the agency wishes to further increase a fee, it should provide the ERU with appropriate documentation which indicates the "ending index number" that was last used. This "ending index number" then automatically becomes the "starting index number" for the next round of fee increases. This is subject to any revision of the index number by the Australian Bureau of Statistics in the meantime.

However, if the agency does not provide any documentation of the "ending index number" that was last used, the new "starting index number" will be determined in exactly the same manner as above - that is, the last CPI number that was published prior to the date on which the new fee commenced.

The new "ending index number" is the most recently published CPI number at the time the new proposal is assessed by the ERU.

Increasing Fees to the Level of Cost Recovery

Current Government policy encourages agencies to adopt full cost recovery for fees and charges and requires that the level of fees be explicitly accountable. Guidelines are available on the Treasury website under 'Budget Guidelines' in the Budget and Financial Home Page (*Costing Fees and Charges - Guidelines for Use by Agencies*).

Agencies may seek an increase in a fee, or group of fees, predicated on the need to achieve cost-recovery. When applying for Treasury certification in such cases, agencies are encouraged to provide any documentation produced in line with Treasury's advice which substantiates the increased level of each fee.

If an agency is required to do a Regulatory Impact Statement (RIS), such documentation can serve as a major input into the RIS. Nevertheless, such documentation substantiating a fee increase will not be a substitute for a RIS, nor be generally accepted as the sole advice necessary to receive a Treasury certificate under the Subordinate Legislation Act.

Availability of CPI data

The Consumer Price Index for a given quarter is released by the Australian Bureau of Statistics near the end of the first month following the end of that quarter. Therefore, should the ERU receive a regulation for assessment say, in mid-April of any year, the ERU would have no choice but to apply the December quarter CPI number of the previous year as the "ending index number" – as the March quarter CPI number would not be available until the end of April.