ACT Government

Best Practice Guide for Preparing Regulatory Impact Assessments

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Chief Minister, Treasury and Economic Development Directorate

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1. Overview

The regulatory impact assessment (RIA) process is an important feature of the policy development cycle which assists an understanding of the overall costs and benefits of feasible options to address a policy problem and likely implementation issues.

The RIA process can help the Government to achieve its objectives of ensuring good community outcomes through providing a rigorous process for analysing the most feasible (efficient and effective) options available. It minimises the likelihood of unintended impacts on the community, through losses of opportunity or higher than needed costs, in seeking to address a policy problem.

Further, a RIA can helpfully inform policy development by identifying the policy solution that is likely to result in the highest level of benefits for the community. In turn, this can help the economy to grow and make Canberra a better place to live.

To take advantage of the full benefits of the RIA, the assessment should be undertaken early in the policy development process, rather than at the end of that process. The RIA should clearly state the problem and the objective of the regulatory proposal, the best means of achieving that objective, and their likely effects on the community.

The process of understanding where impacts will be experienced by stakeholders, whether it be in the form of a cost or benefit, will assist policy makers and Ministers to understand any implementation challenges that may arise when a proposal is taken to the community, Cabinet, and the Legislative Assembly.

The RIA will also be an important tool in supporting continuous improvements in regulatory quality within the ACT Government. Future work is expected to include reviews of existing legislative schemes and other improvements to the process for developing new or amended laws, across the regulatory lifecycle. The objective is to move towards a Regulatory Quality Framework (RQF) which will include supporting regulators to take a regulatory stewardship approach and make strategic and systematic improvement to their practices.

- The RIA process emphasises a range of considerations early in the lifecycle, together with checkpoints after implementation, to ensure new regulations address identified policy problems.
- Both the RIA process and any future RQF will recognise the importance of collaboration with stakeholders in understanding the impacts of options to be taken forward, together with the workability of the recommended option in practice.

Viewed overall, both the RIA and the RQF are expected to assist in increasing the quality of regulation and regulatory practice in the ACT.

The objective of this manual is to assist ACT Government agencies to present a case for their regulatory proposal with a RIA.

- Chapter 2 outlines what a RIA is, discusses the differences between a RIA and a Regulatory Impact Statement, and clarifies when a RIA should be prepared.
- Chapter 3 provides a step-by-step guide to facilitate the development of the RIA.

- The appendices provide more detailed information on typical examples of market failures (Appendix A), which can lead to a need to regulate, non-regulatory and regulatory options (Appendix B) and on undertaking a cost benefit analysis (Appendix C).

For further advice or assistance on the RIA process or the development of a cost-benefit analysis, please contact the Economic and Regulatory Policy Unit at EconomicandRegulatoryPolicy@act.gov.au. Early contact with the unit is encouraged as this will allow for assistance to be provided promptly, resulting in the efficient usage of resources and good quality outcomes to inform government decisions.

2. Understanding the Regulatory Impact Assessment

2.1 What is a Regulatory Impact Assessment?

A RIA is a policy development tool that facilitates an assessment of the feasible options to achieve a policy goal and helps inform policy decisions. It is prepared during the policy development phase and generally considers whether there is a need for a regulatory intervention (or whether the goal can be achieved through non-regulatory means) and the relative costs and benefits of the feasible options to address the problem.

Regulatory Impact Assessment or Regulatory Impact Statement?

All Australian jurisdictions require a Regulatory Impact Statement (RIS) to be prepared for new regulatory mechanisms that have a significant impact on the community, or parts of the community, and most jurisdictions also require the RIS to be published, including the ACT.

The information that is provided in a RIA to Cabinet, the analysis of what is the problem and the feasible options to address the problem, is also a feature of the RIS that is required to be presented to the Legislative Assembly.

In doing so, the RIA serves to inform the choice of the decision maker (Cabinet) in the policy development phase, while the RIS builds on that information, and informs the Assembly and the community on how the Government arrived at its decision.

While the terms RIA and RIS are often used interchangeably, a RIS contains additional information required by the *Legislation Act 2001* (the Legislation Act):

- to provide a brief assessment of the consistency of the proposed law (i.e. the recommended option) with scrutiny committee principles, as is required for all new legislative proposals. This includes information on how the proposed law interacts with generic law-making principles, such as whether the type of obligation should be made and voted on by the Assembly (through amending primary legislation) rather than made by the Minister (through introducing or amending a regulation, which is a subordinate legislation); and
- further, if the proposed law is inconsistent with the policy objectives of another territory law, the RIS will contain a brief explanation of the relationship with the other law and a brief explanation for the inconsistency.

The RIS is intended for use by the Standing Committee on Justice and Community Safety, which is established to perform a legislative scrutiny role by examining all bills and subordinate legislation presented to the Assembly.

2.2 When should a RIA be prepared?

The ACT Government Cabinet Handbook (Part C) requires a RIA to be brought to Cabinet where a submission seeks policy approval for a regulatory policy option that imposes new obligations that are likely to result in appreciable costs on the community, or part of the community. This means that policy makers should undertake a RIA if implementing the regulatory proposal is expected to result in a more than minor change in the obligation, behaviour or impact for individuals, businesses, or community organisations.

The RIA is prepared at the policy development stage, before a policy direction is chosen. By capturing and weighing the full range of costs and benefits, a RIA is able to help inform the directorate, Minister and Cabinet's consideration of feasible options to address the policy problem.

A RIA is not required in circumstances where an urgent regulatory intervention is required for public safety reasons or to change the sanctions for non-compliance with an existing obligation. Another circumstance where a RIA is not required is if the matter involves adoption of a national or international standard, or an intergovernmental agreement, where an assessment of the benefits and costs has already been done and is relevant to the ACT.

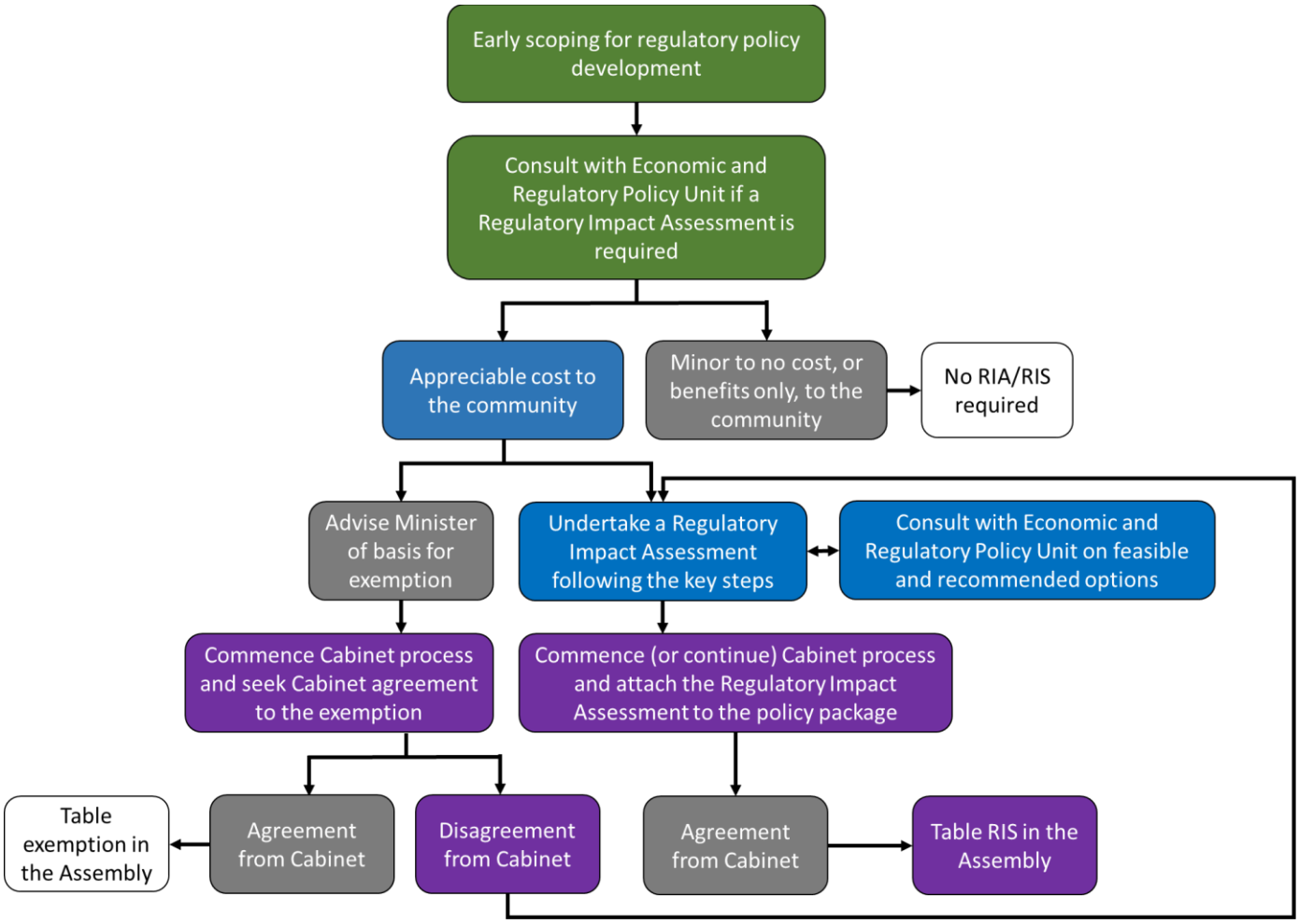
The diagram at Figure 1 shows where the RIA process sits in the policy development and Cabinet process when a problem that potentially requires a regulatory response has been identified.

Under the Legislation Act, a Minister is required to present a RIS to the Legislative Assembly together with the *subordinate law or disallowable instrument* (through which new regulatory mechanisms are introduced) that is likely to impose appreciable costs on the community, or part of the community. If a RIA is not undertaken in such circumstances, a RIS exemption is required to be notified and tabled in the Assembly as a disallowable instrument.

It can be challenging to define 'appreciable cost' and what constitutes 'appreciable' can vary across regulatory proposals. Policy makers are encouraged to think beyond the usual notions of costs as financial measures and consider more intangible or imprecise variables such as public health and the environment.

Refer to *Appendix C – Cost benefit analysis* for further discussion on potential costs of regulation. The Economic and Regulatory Policy Unit can also provide additional guidance and advice on whether a regulatory proposal would incur appreciable costs to the community, or part of the community.

Figure 1: Regulatory reform process



3. Preparing a Regulatory Impact Assessment

This section provides guidance on preparing a RIA. The RIA should provide objective, evidence-based analysis across all feasible options that may help achieve the government's policy goals. The recommended option should be the one that generates the highest net benefit to the community of all feasible options.

There are seven key steps for developing a RIA. The table below shows those steps and the key questions that need to be addressed for each step, noting stakeholder consultation needs to occur throughout the RIA process.

Table 1: Key steps and questions to answer in a Regulatory Impact Assessment

	Steps	Key questions
Consultation with stakeholders	1. Identify the problem	Why is the Government considering action?
	2. State the objectives of government intervention	What outcomes is the Government aiming to achieve?
	3. Identity feasible options	What are the possible different courses of actions that could be taken?
	4. Identify mutual recognition issues	Is there any legislation prepared by other jurisdictions that may meet ACT requirements?
	5. Undertake impact analysis	What are the expected impacts of options?
	6. Recommend an option	What is the preferred option?
	7. Post implementation review of regulations	How will the preferred option be put into place? When will the Government evaluate the effectiveness of the preferred option in meeting the objectives?

3.1 Consultation

Box 1: Questions to consider when undertaking consultation

- Who are the potentially affected groups or individuals of the proposals?
- What are the views of the main affected parties?
- Where consultation was limited or not undertaken what were the reasons

Consultation with stakeholders during a RIA is likely to greatly assist consideration of and advice to Ministers and Cabinet on the likely costs and benefits of the feasible option and any implementation issues. It is also likely, through providing information on how a policy may work in practice, to provide valuable information to decision makers on the impact of a policy on various parts of the community.

In addition, stakeholder consultation can be used to collect data and information that is not obtainable from official sources. This would help inform the costs or benefits for feasible options identified for the regulatory proposal.

Potential stakeholders could include:

- consumer groups;
- businesses and service providers;
- peak representative organisations;
- community support groups;

- community members who may be affected by, or interested in the outcome of the decision; and
- other government agencies.

If you are unable to undertake community consultation, please note this in your advice to Ministers and Cabinet.

The Economic and Regulatory Policy Unit in ACT Treasury can assist you in your scoping of whether a RIA is needed and approaches to identify direct and indirect costs and benefits. The Unit is also able to help you as you draft a RIA prior to its circulation to Cabinet subcommittees and Cabinet and to provide a sounding board on how issues arising through identification of various options can be weighed and presented.

3.2 Identify the problem

Box 2: Questions to consider when identifying the problem

- What is the adverse outcome being experienced, or that will be experienced?
- What are the underlying causes of the problem / why does it occur?
- What is the nature and magnitude of the problem, or harm being addressed?
- What are the consequences of not taking any action?
- What are the potential risks of government action?

A problem well defined is a problem half solved.

Identification of the problem is the starting point for developing any policy proposals. It should be the first issue that is explored in the impact assessment, followed by an analysis of feasible options to address that problem.

The RIA should clearly specify the nature, magnitude and scope of the problem that needs to be addressed to ensure the appropriate action is taken. When identifying the nature and magnitude of the problem, both empirical evidence and perceptions should be considered. This will help the Government to understand whether there is a clear and compelling need to regulate.

As no government action is without direct or indirect costs through shifting resources, the onus is on the agency proposing the action to justify the need for government intervention. Could, for example, the problem be addressed through maximising existing options under current laws and government policies?

However, where the market is not working to produce the best outcome for society – where there is a market failure, or regulatory or institutional settings cannot bring about that change – then regulation may be beneficial. The RIA should identify the nature of the failure and its impacts.

Box 3: Reasons for government intervention

Market failure

While open and unrestricted competition in markets is generally regarded as the most efficient mechanism for allocating resources, the nature of some goods and services prevents markets from attaining optimal economic and social outcomes for the community. The resulting market failure can

indicate the desirability of government intervention. Market failure often arises in the presence of one or more of the following:

- natural monopolies or abuse of market power;
- externalities;
- public goods; and
- information asymmetries.

A brief explanation of each failure is provided at *Appendix A: Types of market failure*.

Regulatory failure

Regulatory failure arises when enforcement and legal frameworks are not delivering the intended outcomes in the community's interest. This type of failure can be attributed to:

- the regulations not being effective in addressing the problem they were seeking to address;
- the regulation having unintended consequences or costs;
- inadequate resources for enforcement; or
- a lack of consistency and equity in the regulation.

Institutional failure

Institutional failure arises when the processes and structures relating to the enforcement of laws do not operate efficiently or effectively. This type of failure is demonstrated particularly through:

- obstacles experienced by consumers relying on the court system;
- inadequate and uncoordinated enforcement effort facilitating unfair competition within industry;
- lack of clarity and consistency in agency roles and responsibilities, resulting in confusion for industry and consumers;
- overlap and duplication of agency responsibility with no co-ordination between agencies; and
- lack of resources or inadequate co-ordination of enforcement in a manner that best makes use of the available resources.

Many regulatory interventions by the ACT Government reflect election commitments, where the Government has publicly committed to one policy approach. In this instance, there is no need to explore the threshold issue of whether government intervention is required. Rather, the RIA can focus on the different costs and benefits of the feasible options to achieve the Government's commitment.

3.3 State the objectives of government intervention

Box 4: Questions to consider when stating the objectives of government intervention

- What outcomes is the Government aiming to achieve?
- Is there a regulation/policy currently in place? Who administers it?

The RIA needs to specify the outcomes, goals or targets sought in relation to the identified problem.

The objective must be clear, concise and as specific as possible. It should be broad enough to allow consideration of all relevant alternative solutions, but not so broad that the range of alternatives becomes too large to assess, or the extent to which the objective has been met becomes too hard to establish.

The objective should allow for an examination of alternative solutions to the underlying problem. Care should be taken to ensure the objective is not specified in such a way that it pre-justifies a preferred solution.

A common error is to confuse the desired outcome of the proposal with the means of obtaining it. For example, an objective of the Government's environmental policy may be to 'reduce plastic pollution'. This objective differs from 'banning single-use plastic products', which is one means of achieving the objective.

The RIA should set out whether the objective needs to be met within a certain period of time. This is likely to impact on the feasible options to achieve the objective.

Lastly, details of existing regulations should be identified, along with relevant government policy, either to establish how existing mechanisms can assist to address the problem, or fall short.

3.4 Identify feasible options

Box 5: Questions to consider when identifying feasible options

- What are the possible different courses of actions that could be taken?
- Which actions are feasible and can help achieve the policy objectives?

A broad range of possible regulatory and non-regulatory options should be explored as part of the policy development process, and the most feasible options that are genuinely able to help achieve the stated objectives should be considered in detail and included in the RIA. Ideally, the RIA should explore and present at least three feasible options to address the problem, with one being a non-regulatory option.

Considering a range of options not only increases the chance of identifying the most appropriate approach to addressing the problem and achieving the objectives, but it also provides great flexibility for the decision-making process.

A common starting point for an option is what mechanisms are being used to address a similar problem in other jurisdictions. This can provide learnings of how the option has fared in practice in its home jurisdiction and whether it might need tailoring in light of the ACT context or not address ACT needs. This filtering and analysis is likely to be particularly important when several jurisdictions have chosen different pathways to address the same underlying policy problem.

Non-regulatory options

Policy makers should consider exploring non-regulatory measures to achieve their policy objectives in the first instance.

If the non-regulatory option achieves the desired outcome it should be preferred for reason that it minimises costs to government and business and in doing so, can bring broader benefits to the community.

Examples of non-regulatory options include:

- maximising existing options, using existing laws, policies of the Government, education and compliance;
- market-based approaches including taxes, subsidies and tradeable property rights;
- voluntary agreements by industry to adopt a standard or program; or
- persuasion.

In many instances, the existing operation of the market leads to calls for new regulation. However, in assessing feasible options to address the issue, it is important to capture market behaviours and incentives that can be reasonably expected if the Government seeks to improve outcomes through a program of enforcement, engagement and compliance.

As an example, a combination of consumer and manufacturer outreach led to a reduction of micro-beads, as used in shampoos and toiletry products, by 99 per cent without regulation.

Further, the ACT Government successfully obtained similar outcomes for motorists and fuel price competition through implementing the FuelCheck price transparency service via an opt-in model for service stations, as jurisdictions who regulated to compel participation of service stations.

- This was achieved through a process of engagement with retailers and consumers to drive take up and relying on market incentives for retailers to provide real time fuel pricing information to their customers.

Should I include the status quo as a feasible option?

The status quo is not a ”do nothing” option. It includes the implementation of all relevant government policies. If this would not address the problem, it should not be included in the impact assessment as feasible option to achieve the policy outcome.

However, it is important to understand the expected level of harm, or benefits from the status quo. It provides the baseline against which you can compare the change from current settings, to what would be expected from feasible options that address the policy problem (please see *What are costs and benefits?* below on how to capture and compare the costs and benefits of various options).

Refer to *Appendix B – Non-regulatory and regulatory options* for further details on the non-regulatory approaches.

Regulatory options

Direct government regulation comprises primary and subordinate legislation. In the ACT, only the introduction of subordinate legislation or disallowable instrument requires the preparation of a RIA.

Prescriptive regulation (or rule-based regulation) is a common form of regulation introduced via subordinate legislation or disallowable instrument. It is highly specific and detailed in the obligations of the regulated parties and measures to regulate. This is compared to principles-based regulation which relies on principles to articulate the outcomes to be achieved by the regulated entities[1].

Direct government regulation should be considered where:

- the problem is high risk, of high impact/significance, for example a major public health and safety issue;

[1] Australian Law Reform Commission 2008, *For Your Information: Australian Privacy Law and Practice (ALRC Report 108)*.

- the government requires the certainty provided by legal sanctions;
- universal application is required (or at least where the coverage of an entire industry sector or more than one industry sector is judged as necessary);
- there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles and no possibility of effective sanctions being applied; and
- existing industry bodies lack adequate coverage of industry participants, are inadequately resourced or do not have a strong regulatory commitment.

Introducing regulation through the Government's legislative process should not be seen as the only regulatory option for the Government. Industry can be motivated to introduce self-regulation with a view to addressing emerging customer issues without the need for the Government to impose higher levels of regulation.

As an example, supermarkets introduced voluntary codes of conduct to address incorrect pricing at the scanner to ensure customers were not overcharged. This in turn was supported by consumer law regulators, who could take action against supermarkets if obligations under the code were not met.

Below is a list of other regulatory options, across which government involvement can vary. Further information on regulatory options can be found at *Appendix B: Non-regulatory and regulatory options*.

- **Self-regulation** – generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement[2].
- **Quasi-regulation** – arrangements where government influences businesses to comply, but which do not form part of explicit government regulation[4].
- **Co-regulation** – situations where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced[4].

Please refer to *Appendix B: Non-regulatory and regulatory options* for further details on potential regulatory approaches.

Filtering options

Options may be infeasible due to certain constraints, and explanation and justification should be provided in the RIA where constraints occur. This is particularly the case when less than three options are ultimately considered feasible. Possible constraints include:

- technological constraint;
- legal limitations of the Government;
- limitation on the timeframe for implementing policy; and
- contradiction with existing government policies.

3.5 Identify mutual recognition issues

Box 6: Questions to consider when identifying mutual recognition issues

- Is there any legislation prepared by other jurisdictions that may meet ACT requirements?

[2] Australian Law Reform Commission 2011, *National Classification Scheme Review (DP 77)*.

- Is the intended regulation overridden by or permanently exempt from existing mutual recognition agreements?

Mutual recognition agreements allow goods and occupational qualifications that are produced or registered in one state or territory to be accepted in other states and territories. For example, a practitioner registered in one jurisdiction is entitled to automatic registration for an equivalent occupation in a second jurisdiction. As such, efficiency gains that allow regulatory consistency between jurisdictions can aid business and consumers. Relevant agreements are the Mutual Recognition Agreement (MRA) between all Australian States and Territories and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) between Australia and New Zealand.

Laws implementing mutual recognition may also override other laws such as those that regulate the manufacture or sale of goods. Examples of laws overridden include requirements relating to production standards, packaging and labelling, and conformance assessment requirements relating to the sale or manufacture of goods.

Hence, before preparing regulatory measures, agencies should examine legislation prepared by other jurisdictions that may meet ACT requirements.

3.6 Undertake impact analysis

Box 7: Questions to consider when undertaking impact analysis

- Who is affected by the problem and who is likely to be affected by the proposed solutions?
- What are the quantified costs and benefits imposed on the affected parties?
- What are the assumptions and data sources used in making these assessments?
- What are the outcomes for each option?

Undertaking a comprehensive assessment of the expected impact of each option is one of the most, if not the most, important step of the RIA process. In general, the degree of detail and depth of analysis should be commensurate with the magnitude of the problem and with the size of the potential impact of the regulatory proposals.

Qualitative and quantitative evidence should be utilised to adequately assess the costs and benefits of each option in order to determine the option that most efficiently and effectively addresses the problem. For transparency, the RIA should report the sources of data used in the analysis, and any assumptions that have been made.

In addition, if the regulatory proposal is likely to restrict competition, the RIA should contain a competition assessment demonstrating that benefits of the restriction outweigh the costs and that the Government objectives can only be achieved by restricting competition.

Who is affected?

It is important to identify who in the ACT is going to be affected by the proposed policy, be it households, businesses, or the broader community. Practically, one should look to understand this by asking – who is going to be better or worse off from the regulatory proposal?

Input from stakeholders is fundamental in identifying the qualitative and quantitative benefits and costs of the regulatory proposal. Accordingly, those affected by the problem and those who will be likely affected by the solution should be identified early in the policy development process.

The impact assessment should summarise the feedback you received from stakeholders and categorise the costs and benefits across categories of stakeholders.

Stakeholders should be classified in terms of how they are affected by each option. Classifications should be as specific as possible to ensure accurate identification of groups and subsequent assessment of costs and benefits, e.g. business can be classified in terms of being large, medium or small.

What are costs and benefits?

All costs and benefits of each option should be clearly identified and assessed to enable the identification of the option with the greatest net benefit to the community. Costs and benefits should be measured against a **base case**, which captures the existing level of impacts – in terms of the costs and benefits – of the continuation of the current settings. This then allows the change in behaviours, through the other options to be understood.

Only additional costs and benefits arising from implementing the proposed options, compared to the base case, should be included in the analysis.

A **benefit** is described as the positive effect or the advantages of a proposal and may include any item that makes a person better off regardless of whether it can be quantified.

A **cost** is described as the negative effect or the disadvantages of a proposal and may include any item that makes a person worse off or that reduces a person's sense of well-being, regardless of whether it can be quantified.

There are a range of costs and benefits that should be considered when assessing the impact of the proposed options. These include costs and benefits in relation to direct financial impact, compliance impact, market and economic impact, and other impacts like environmental and health impacts. Refer to *Appendix C – Cost benefit analysis* for further details.

How to assess costs and benefits?

While there are a range of methods for assessing costs and benefits, the preferred method in the RIA is cost-benefit analysis (CBA), as it allows a systematic evaluation and comparison of the costs and benefits of the options to address the problem. The key principles for undertaking a CBA are:

- impacts should be monetised wherever possible, particularly for highly significant impacts;
- where monetisation is not possible, impacts should be quantified, with examples being lives saved, injuries/accidents avoided, etc;
- where quantification is not possible, impacts should be qualitatively assessed with justification and analysis.

Capturing the expected changes in behaviours and outcomes from each option, and estimating costs and benefits in monetary terms allows easy calculation of net benefits, which in turn allows for direct comparison of the proposed options.

Broader discussion on the implications of the proposed options may be necessary if they appear to result in similar levels of net benefits, so that no one option is clearly superior to the others.

Refer to *Appendix C – Cost benefit analysis* for a simple guide for undertaking a CBA.

3.7 Recommend an option

Box 8: Questions to consider when recommending an option

- What is the preferred option?
- Why is this option recommended over the others?

The process of arriving at a recommendation – and articulating how you got there – is likely to greatly benefit the policy making process for reason that it requires the evaluation of all the information in one go. No new information is required here. Rather, this is where you provide a summary of each option, together with an articulation of why an option is preferred, having regards to the differing impacts – both in terms of benefits and costs and where they are felt in the community, for each of the feasible options.

The recommended option should be the option that yields the greatest net benefit for the community. Where all options result in a net cost, the preferred option should be the one that incurs the least net cost.

Please see Appendix C for further information, including when an option other than one with the highest net benefit might be recommended.

3.8 Post-implementation review of regulations

Box 9: What to consider when reviewing regulation

- When and how will the Government evaluate the effectiveness of the preferred option in meeting the objectives?
- If the option takes the form of regulation, is there a built-in provision to review or revoke the regulation after it has been in place for a certain length of time?

Setting clear objectives for the policy, through articulating what is the problem and how the recommended option addresses it, will help you to evaluate the outcome of the intervention.

Don't set and forget.

After establishing the best option that will address the problem, the final stage in the RIA process is to provide for a post-implementation plan to ensure the scheme remains relevant and addresses the problems as intended.

A post-implementation review (PIR) should be undertaken when the regulatory change is likely to have a substantial or widespread social, environmental or economic impact.

Preparation for the PIR should commence as soon as the policy is agreed, rather than just before when it is due to be completed. The reason for this is to allow for the gathering of necessary data and consultation with stakeholders.

This step of the RIA should specify how the preferred option will be monitored and assessed against achieving its objectives post implementation. Key elements that are worth setting out include:

- key performance indicators or measures of success that you think will be relevant to evaluate the effectiveness of the preferred option with a view to understanding (as an example, what was the change in behaviour/consumer outcome that you expect from the recommended option, such as an expected level of avoided greenhouse gas emissions);
- a data collection strategy, including the methods for obtaining data and frequency of collection;
- the mechanism for complaints/feedback and arrangements for ongoing consultation and complaints/feedback; and
- timing or frequency of evaluation and reporting.

Policy makers can consider inserting a review or sunset clause in new laws to ensure an evaluation will take place. A sunset clause contains the date at which the law expires unless it is renewed. Prior to expiry, the regulation should be reviewed and re-enacted if appropriate. This clause is particularly suited to regulation implemented to address an emergency.

Where no sunset clause is enacted or the sunset period is significantly longer than three years, it is recommended that a PIR of the regulation be conducted after three years of its initial implementation. The PIR should present the key outcomes of the regulation and answer the following questions with a view to establishing whether the law remains fit for purpose, needs modifying, or is no longer required.

- Is there still a problem? Has the problem been reduced in scope?
- Did the intervention work as expected? What was the impact, on who, and why? Have there been any unanticipated outcomes?
- Has the landscape changed after three years, such that a different regulatory response is now appropriate? I.e. is there a need to implement a modified or different regulatory model?
- Is further action still required?

4. Preparing a Regulatory Impact Statement

Box 10: What to include in the RIS to the Assembly

- The RIS combines the RIA you have prepared plus the material needed to meet scrutiny committee principles for the law that is being made.

The legislative requirements for what should be contained in a RIS is set out in section 35 of the Legislation Act. The RIA will meet the need for most of those requirements, being:

- the law that authorises the subordinate law or disallowable instrument to be made, a brief statement of the policy objectives of the proposed law and the reasons for them, of the way the policy objectives will be achieved by the proposed law, why this way of achieving them is reasonable and appropriate, the costs and benefits of implementing the proposed law and a comparison of the costs and benefits of any reasonable alternative way of achieving the policy objective.

However, the RIA is unlikely to contain elements to meet factors relevant to meeting scrutiny committee principles such as:

- a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law, and if the proposed law is inconsistent with the policy objectives of another territory law — the relationship with the other law and an explanation for the inconsistency, and assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency; and
- additional principles around best practice legislative drafting.

You should include a brief explanation of how the proposed law is consistent (or otherwise) with the scrutiny committee principles in the RIS.

Appendix A – Types of market failure

The table below provides definitions and explanations for the broad categories of market failure.[3]

Types	Market failure	Need for government intervention
Public goods	Public goods are typically ones where the supplier cannot exclude others from enjoying the benefits of the good or service once produced and any number of persons may enjoy the benefits of the good or service without reducing the level of benefits for others, e.g. street lighting, a free to air radio program, etc.	To ensure the provision of such goods or services, the government may: • directly provide the good or service – as is the case with defence and community parks; or • create private property rights such as copyright to provide the private sector an incentive to provide the good or service.
Externalities	Externalities arise where an activity, service or good confers spillover benefits or imposes spillover costs on third parties. As the spillover is not borne by the originator, there is little incentive to engage in the activity in the case of a positive externality or decrease the activity in the case of a negative externality.	The Government can reduce the incidence of spillover costs in the case of a negative externality by: • prohibiting the activity outright e.g. drink driving; • imposing a tax or charge on the activity; • imposing minimum safety standards; or • creating tradeable property rights such as the right to develop land within overall zoning constraints. The Government can provide incentives to continue activities with spillover benefits in the case of a positive externality by: • subsidising the activity e.g. Research and Development tax concessions; • requiring the activity to be carried out by law; or • creating private property rights.
Natural monopolies	A natural monopoly occurs when a single business can offer a good or service at a lower cost than its competitors, resulting in practically no competition in the market. It usually happens when there are high infrastructural costs and other barriers to entry. Without government intervention, there is a risk that the business will abuse its market power.	The Government can prevent abuse of market power by: • imposing price controls; or • creating third party rights to negotiate access to natural monopoly facilities where such access is required to permit competition in upstream of downstream markets. However, the availability of substitutes in the market may limit the economic

[3] The NSW Department of Industry's *Market failure guide – A guide to categorising market failures for government development and evaluation* provides a very helpful and detailed guide on recognised market failures which may be of assistance in the making of public policy.

Types	Market failure	Need for government intervention
		inefficiencies associated with natural monopoly. Note that the need for government intervention may be lessened as the existence and extent of natural monopoly changes with changes in production technology or demand.
Information asymmetries	In some markets, sellers have more information about quality of a product than buyers e.g. used cars. This may result in lower quality products driving higher quality products out of the market or consumers being unable to make rational, informed decisions about price and quality of the product they are purchasing.	Governments can ensure that consumers are better informed about the quality of products by: • licensing and thus facilitating the 'signalling' of appropriately qualified suppliers; • imposing minimum safety standards on production; • imposing minimum information requirements; or • encouraging appropriate industry self-regulation.

Appendix B – Non-regulatory and regulatory options

Non-regulatory options

No specific action

The case for government intervention should be assessed to determine whether the benefits outweigh the costs of such action. No action might be the best option should all other government actions generate net costs to the community.

Information and education campaigns

If the problem requiring action is due to information asymmetry in the market, that is, sellers having information that buyers do not, the solutions might be best based on information and education campaigns. For example, publishing the results of a hygiene survey of local restaurants provides a non-regulatory incentive to meet the standards.

Market-based approaches

Below are some of the market-based approaches that can be considered to help achieve policy goals.

- **Taxes and subsides** – Imposing taxes or providing subsidies on the activity requiring regulation can change behaviour. For example, imposing emission fees for pollutants or providing subsidies to purchase of electric vehicles can alter business and consumer behaviours to help achieve climate action targets. This approach can be cost-effective, stimulate innovation and avoids frequent revisions.
- **Tradeable property rights** – Tradeable property rights allow the trading of the rights and obligations created by regulation. Governments have found that the use of licenses and permits to limit business activities when production or consumption must be limited in the public interest is more efficient when the licences and permits are tradeable. Tradeable property rights include pollution permits or take-off and landing rights at crowded airports. The benefits arise from the fact that the market will reallocate ownership of permits to those firms who can use them most efficiently.

Voluntary agreements

This option is particularly appropriate when public and private interests coincide. Examples include non-mandatory codes of conduct, agreements on standards, or information disclosure such as labelling. The benefits of this approach are that it avoids adversarial actions, involve a wide cross-section of the community, and may improve compliance because rules rest on consensus rather than coercion.

Persuasion

Persuasion, through the use of information-based strategies in which government seeks to leverage values of good citizenship, self-preservation or peer pressure, is also an option for achieving a particular end. Persuasion is appropriate when public consensus about the need for authoritarian action is insufficient or when regulation has reached its limits. Examples include programs to discourage drink driving and smoking, or conserve energy.

Regulatory options

Prescriptive regulation

Prescriptive regulation of obligations is a common form of regulation. It is often used as a regulatory tool where there is a high perceived risk or fundamental public interest and achieving compliance is seen as critically important.

Principles-based regulation

Principles-based regulation is a less prescriptive approach and gives discretion to regulated parties on how they can act. It allows maximum flexibility among affected groups as to how they achieve compliance. For example, where there are multiple ways to achieve the outcomes, principles-based regulation may be appropriate to encourage innovation and provide options and opportunities to regulated parties.

Self-regulation

Self-regulation is generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement. It can be seen as an arrangement in which an industry regulates the behaviour of its members.

There are number of co-operative arrangements in which private organisations and government share regulatory authority and oversight. Such an approach can be appropriate where an outside body with a regulatory role has expertise that government lacks. However, while government may provide for a transfer of regulatory power, it remains accountable for the outcome.

Self-regulation should be considered where:

- there is no strong public interest concern, in particular, no major public health and safety concern;
- the problem is a low-risk event, of low impact/significance; and
- the problem can be fixed by the market itself. For example, there may be an incentive for individuals and groups to develop and comply with self- regulatory arrangements (industry survival, market advantage).

The likelihood of self-regulatory industry schemes being successful is increased if there is:

- adequate coverage of industry concerned;
- a viable industry association;
- a cohesive industry with like-minded/motivated participants committed to achieve the goals;
- evidence that voluntary participation can work – effective sanctions and incentives can be applied, with low scope for the benefits being shared by non-participants; and
- a cost advantage from tailor-made solutions and less formal mechanisms such as access to quick complaints handling and redress mechanisms.

Quasi-regulation

Quasi-regulation is the rules and arrangements for which there is a reasonable expectation of compliance, and for which there is some government involvement such as endorsement or funding. Codes of conduct/practice are common forms of this type of regulation and are generally adopted and administered by the industry to which they relate. The advantages of codes are that they can be either voluntary or

mandatory, are industry specific, flexible and can be easily amended. An example of quasi-regulation is compliance innovation.

Quasi-regulation should be considered where:

- there is a public interest in some government involvement in regulatory arrangements and the issue is unlikely to be addressed by self-regulation;
- there is a need for an urgent, interim response to a problem in the short term, while a long-term regulatory solution is being developed;
- government is not convinced of the need to develop or mandate a code for the whole industry;
- there are cost advantages from flexible, tailor made solutions and less formal mechanisms such as access to a speedy, low cost complaints handling and redress mechanisms; and
- there are advantages in the government engaging in a collaborative approach with industry, with industry having substantial ownership of the scheme.

Co-regulation

Co-regulation is where industry develops and administers its own arrangements, but government provides the legislative backing to enable the arrangements to be enforced. It may be the case that legislation sets the government standard but contains provisions that allows the standard to be overridden by an industry code. The following are examples of co-regulation and variations to such regulation.

- **Performance based regulation** – The general principle is that regulations should be expressed in terms of the outcomes they are intended to achieve. The Government may specify the desired outcome and allow private sector innovators to continually develop more effective means of achieving that outcome. Hence the regulation becomes focused on creative problem solving rather than on inputs and policy instruments.
- **Safe harbours** – A 'safe harbour' provision in regulations allows a firm to comply with performance standards by giving the firm the flexibility to, for example, demonstrate either:
  - that their building has an acceptable level of performance; or
  - that it uses specified energy-saving designs (fluorescent lights, insulated walls) that would achieve an equivalent performance.

  This allows some firms to use innovative designs to meet performance standards but also allows smaller, less adventurous firms to ensure compliance using the standard measures.
- **Waiver or variance provisions** – Waivers or variance provisions are very similar to safe harbours and can be applied to a design standard to allow, on a case-by-case basis, a waiver or variance to a firm that can demonstrate equivalent performance. For example, if an innovative design adheres to the same standards to which the conventional design complies, the design would receive a waiver.

Compliance innovation

As monitoring and enforcement is very expensive and difficult to apply, the option of self-enforcement of regulations should be considered first. Combining a compliance program with an information strategy can generate the incentive for self-enforcement. For example, publishing the results of health inspections in city restaurants strengthens the incentives for owners to comply with health standards.

Other considerations

Automatic updating

Regulators should form rules that are robust and that reflect future needs and changes in the environment. For example, changes in the inflation rate and other economic parameters need to be accounted for when indexing tax formulas, calculating benefits formulas, minimum wage, price controls and other monetary controls.

Avoiding 'new source bias'

There is a tendency for regulators to scrutinise any new entrants in an industry to ensure that certain standards are adhered to more strictly than is tolerated by existing products or firms. New source bias is counterproductive. The reasoning behind this 'new source bias' is that it is better to catch unexpected hazards associated with new technologies earlier rather than later. The result is a general presumption in favour of the status quo of conserving the existing technologies, factories and products.

Technological innovation tends to be safer, greener and more energy efficient. Similarly, new factories tend to be cleaner than old ones. Regulators can avoid new source bias by focusing regulatory attention on the greatest risks, not on the easiest or newest targets.

Rewarding good behaviour

Numerous occasions have arisen when regulatory authorities have unintentionally rewarded 'bad' behaviour. Often firms, unable to comply with rules, petition for an exception. Regulators need to keep in mind the negative signal sent to firms that consistently comply with the rules, often at great expense, when competitors are granted relief.

Ideally, regulatory programs should operate so that regulated firms can expect that good behaviour will be rewarded. For example, self-reporting of violations should generally result in a reduction of fines.

Market forces and deregulation

Having concluded that market failure is present, it is important to reconsider whether the proposed regulatory solution is likely to be superior to what the market would do. Ultimately it must be determined whether the absence of government regulation is the cause of the problem or whether existing government regulations are to blame.

Appendix C – Cost benefit analysis

What is a cost benefit analysis?

Cost benefit analysis (CBA) is an evaluation method in impact analysis that estimates the economic, social and environmental effects of a policy proposal. It allows a systematic evaluation and comparison of the costs and benefits across all affected entities over the life of all feasible options within the proposal relative to a base case to evaluate the net impact of the options. The option with the highest net benefits is usually the recommended option.

How to conduct a cost benefit analysis?

Agencies are encouraged to follow the nine substantive steps below to undertake a CBA:

Step	Action
1	Specify the base case and feasible options
2	Identify the affected entities
3	Identify the impacts and select measurement indicators
4	Predict the impacts over the life of the proposal
5	Quantify costs and benefits
6	Obtain present values
7	Assess net benefits
8	Perform sensitivity analysis
9	Assess distributional effects
10	Reach a conclusion

Step 1 – Specify the base case and feasible options

The RIA should explore and present at least three options, with one being a non-regulatory option. Information should be gathered to establish a 'base case', which is what it would look like if no additional government intervention, other than existing government policy measures as well as measures that can be reasonably expected under the current government policy direction, is introduced. The base case should be well-defined, taking into account factors such as pre-existing trends and changes or measures that are likely to occur without an intervention. This allows the other feasible options to be compared to the market operating as per normal, such that benefits of those options are not overestimated.

As an example, the base case for a proposal to prevent new gas connections in the ACT by regulation could capture what level of greenhouse gas emissions could be expected, together with their associated impacts, as shaped by existing market forces and Government educative and incentive schemes. This can then be contrasted to expected outcomes of the regulatory options.

Step 2 – Identify the affected entities

It is important to identify who in the ACT is going to be affected by the proposed policy, be it households, businesses, or the broader community. Practically, one can look to understand this by asking – who is going to be better or worse off from this regulation.

Step 3 – Identify the impacts and select measurement indicators

The full range of impacts, including primary and secondary impacts, of each option should be identified. Only additional costs and benefits arising from implementing those options, relative to the base case, should be included in the analysis.

A benefit is described as the positive/desirable effect or the advantages of a proposal, having regards to economic, social and environmental outcomes, regardless of whether it can be quantified. All benefits attributable to a proposal should be captured in a CBA, including non-market benefits such as travel time savings, reduced emissions, and improved environmental conditions.

A cost is the negative/undesirable effect or the disadvantages of a proposal, regardless of whether it can be quantified.

The table below sets out typical impacts that may arise from a regulatory proposal, including direct financial impact, compliance impact, market and economic impact, and other impacts.

Typical impacts	Costs	Benefits
Direct financial impact	• Regulatory fees, charges, or levies, such as licence fees	• Savings for consumers • Costs savings for businesses
Compliance impact	• Administration cost such as record keeping and obtaining advice on new regulation from professionals • Equipment purchase and maintenance costs • Training costs • Compliance such as health and safety • Higher burden on local industry	• Better standards in product and service level • Better information disclosure • Clarity in operating conditions • Protection for ethical operators • Less unsafe or unethical behaviour
Market and economic impact	• Competition constraints • restricted purchasing opportunities and/or reduced choice • Higher prices for goods and services • Stifling of innovation • Adverse impact on the ability to export • Hand break on the economy	• Increased competition • Higher productivity • Higher mobility of labour • Faster growth in the economy
Other impacts (e.g. health, safety and environmental impacts)	• Environmental damage • Costs and pressure on the public health system	• Reduced emissions, slower global warming, and other avoided damage to climate • Better health outcomes • Fewer accidents • Protection of other public interest issues

The Government is developing an internal value of carbon to assist with the assessment of emissions impact of Government policy proposals. The value of carbon is expected to be applicable consistently across all existing decision-making framework within the Government, including the RIA. This work is expected to be completed in 2024. In the interim, please contact the Economic and Regulatory Policy Unit at EconomicandRegulatoryPolicy@act.gov.au for the latest advice on the value of carbon and the associated quantification method.

The selected indicators for measuring the impacts should be linked closely to the impact and well supported by data from reliable sources. Ease of quantification is also an important consideration when choosing indicators. As an example, for a proposal that reduces the risks of a hazard, its positive impact could be measured in terms of a reduced number of accidents, and the benefit from accidents avoided could be quantified.

Step 4 – Predict the impacts over the life of the proposal

If a proposal has an effective life, impacts should be measured and quantified over the life of the proposal. If the effective life of the proposal is not explicitly specified, the period over which impacts should be measured and quantified needs to be reasonably long to capture all the potential costs and benefits.

Prediction of impacts should have regard to general economic conditions and other influences. In general, the CBA should not assume that the net benefits are the same for every year of the life of the proposal. For example, the energy bill savings from switching from a gas appliance to an electric appliance can vary every year over the life of the appliance if electricity prices are expected to fall and gas prices are expected to rise over this period. Further, how will the market react in practice to the proposed change?

- The degree to which potential savings are retained is a live issue in many regulatory options. It may be necessary to have regard to the "rebound effect" in understanding whether potential energy savings, and emissions reductions will be fully realised if energy usage is increased following an improvement to energy efficiency in the form of fuel efficiency standards, insulation etc.

Estimating costs and benefits beyond a certain time period can pose great uncertainties. In this case, it is important to undertake an assessment of the uncertainties associated with the predictions, including the expected values and variability of the predicted cost and benefit flows, taking into consideration the upside and downside risks.

As part of the assessment, reasonable assumptions should be made and reflected in the CBA, accompanied by clear explanations and justifications of the assumptions underlying the predictions.

Step 5 – Quantify costs and benefits

Quantifying costs and benefits should be in a standard unit of measurement and are usually measured in dollar terms. This step is to assign a dollar value to gains and losses of the proposal for all affected entities, which is known as monetisation.

Willingness to pay is one commonly used method to monetise costs and benefits. It estimates how much, in dollar terms, the affected entities (e.g. individuals and businesses) are willing to pay to obtain or avoid a change to them. The value could be positive or negative depending on whether the change make them better or worse off.

Market prices of goods and services are good indicators for willingness to pay. However, if a market does not exist for that good or service, values can be derived from substitute products in other markets. If this is

not possible, a large cross-section of consumers can be surveyed as if they were in a hypothetical market as part of the consultation process.

However, it can be challenging to monetise or quantify impacts sometimes. Non-market benefits such as reduced travel time or environmental amenity are typical examples of impacts that are hard to value in dollar terms. In such instances, a detailed qualitative analysis is considered appropriate. This analysis should be well-supported by evidence and data to enhance the transparency of the CBA and assist decision makers in choosing the best option.

The Cost Benefit Analysis guidelines developed by the Australian Government's Office of Impact Analysis (OIA)[4] provides a range of techniques dealing with costs and benefits that are difficult to value.

Step 6 – Obtain present values

There is a need to discount future cash flows into present value as impacts of different options can occur over different time periods. Applying a discount rate to future effects allows them to be valued in today's dollars. These amounts are known as the 'present values' of future streams of costs and benefits.

Discounting reflects the view that people prefer consumption today to future consumption, or that a dollar invested today is able to produce a return and contributes to greater consumption in the future.

The rate used to convert future values into present values is known as the discount rate. The OIA suggests a central discount rate of 7 per cent be used to calculate present values of costs and benefits for a central case, and 3 per cent and 10 per cent for sensitivity testing. A higher discount rate can usually help test the robustness of benefits accrued over time, given a higher discount rate reduces the present value of the benefits, while having no effect on the initial costs involved in the proposal. A lower discount rate has a similar effect as it increases the present value of the costs, while having no effect on the initial benefits. Despite the rates suggested by the OIA, different sets of discount rate can be used if considered more appropriate for the proposal.

The formula for the present value of benefits is:

$$\mathrm{PV(B)} = \sum_{t=0}^{n} \frac{B_t}{(1+r)^t}$$

where B_t represents benefits in year t; r represents the discount rate; t represents the year; and n represents the number of years over which the future impacts are expected to occur (with the current year being year 0).

The present value for costs is calculated similarly, by replacing benefits with costs in the formula above.

Below is a simple example to illustrate how to use calculate present values.

Consider an option that will require a business to install new electric appliance of space heating. The cost of the appliance is $5 million to install and will operate for the 3 years. Ongoing operational and maintenance costs to the business are $1 million a year (in constant prices). The benefits from reduced energy costs are estimated at $3 million a year (in constant prices). The discount rate is 7 per cent.

[4] Office of Impact Analysis 2023, *Cost Benefit Analysis*.

The benefits and costs can be outlined in a table like the following:

	Year 0	Year 1	Year 2	Year 3
Benefits (B_t) ($million)	0	3	3	3
Costs (C_t) ($million)	5	1	1	1

The present values (in millions of dollars) for benefits and costs are:

$$\mathrm{PV(B)} = \sum_{t=0}^{n} \frac{B_t}{(1+r)^t} = \frac{0}{(1+7\%)^0} + \frac{3}{(1+7\%)^1} + \frac{3}{(1+7\%)^2} + \frac{3}{(1+7\%)^3} = 0 + 2.80 + 2.62 + 2.45 = 7.87$$

$$\mathrm{PV(C)} = \sum_{t=0}^{n} \frac{C_t}{(1+r)^t} = \frac{5}{(1+7\%)^0} + \frac{1}{(1+7\%)^1} + \frac{1}{(1+7\%)^2} + \frac{1}{(1+7\%)^3} = 5 + 0.93 + 0.87 + 0.82 = 7.62$$

Step 7 – Assess net benefits

The key results of a CBA are the Net Present Value (NPV) and Benefit-Cost Ratio (BCR).

The NPV of an option equals the present value of benefits and the present value of costs:

NPV = PV(B) – PV(C)

Subject to a consideration of constraints, a cost benefit analysis will support a proposal if the NPV is equal to, or greater than zero.

The BCR of an option is the ratio of the present value of benefits to the present value of costs:

BCR = PV(B)/PV(C)

Similarly, a cost benefit analysis supports a proposal if the BCR is equal to, or greater than 1.

Step 8 – Perform sensitivity analysis

As there is often a range of reasonable assumptions that could be used in an impact assessment, a sensitivity analysis can be used to account for uncertainty in the assumptions. Sensitivity analysis assesses the robustness of the overall costs and benefits of the proposal to plausible changes in different variables. It tests whether the uncertainty over the value of certain variables matters and identifies critical assumptions.

Common approaches to sensitivity analysis include the following.

- **Worst/best case analysis**, which involves altering some critical assumptions to generate possible best and worst case scenarios. The worst case scenario can be established by substituting the most pessimistic estimates for each variable simultaneously and see how much the net present value is affected. Similar analysis should be undertaken to investigate how the net present value is affected by the most optimistic estimates.
- **Partial sensitivity analysis**, which assesses how risky the proposal is: that is, which variables have the most influence on the NPV. This can be established by changing each variable independently while

holding all other variables constant. It should be used for the most important or uncertain variables, such as estimates of compliance costs, forecasts of benefits and the discount rate.

If the NPV does not change from a net benefit to a net cost (or vice versa) after considering the range of scenarios, there can be confidence in the robustness of the costs and benefits of the proposal.

Step 9 – Assess distributional effects

The distributional effects of a proposal should also be considered when evaluating a regulatory proposal. Although there may be a net benefit arising from regulation, it may be the case that a small group reaps all the benefits while the costs are borne by a larger group or borne by those who do not benefit at all. Distributional analysis may be qualitative or ideally supported by quantitative findings where data allows. An analysis of these effects will assist the Government to choose among the options.

Step 10 – Reach a conclusion

The last step is to summarise the results of the CBA. The recommended option should be the one with the highest NPV (or net benefit) and BCR. However, in some circumstances, an alternative option may be recommended, and reasons need to be provided. For example, an option with a lower NPV or BCR may be recommended in the case where:

- there is high confidence that the qualitative benefits of the option will enable the option to benefit the community more than the option with the highest NPV or BCR;
- the option is less sensitive to plausible variations in the sensitivity analysis, in particular to the downside risks; or
- a staged approach that option with lower net benefit to the one with higher net benefit.

Appendix D – Useful resources

Scrutiny committee principles: ACT Legislative Assembly

Two-page fact sheet for RIA: Fact Sheet - Regulatory Impact Assessment in the ACT

Legislative framework for a RIS: Legislation Act 2001

Examples for RIA/RIS:

- Plastic Reduction Bill 2020 – Regulatory Impact Statement
- Minimum standards for residential rental properties – Regulatory Impact Statement
- No New Gas Connections – Regulatory Impact Assessment