

# Appendix B Commonwealth Office of Regulation Review: report on compliance with national standard setting

This appendix contains the Commonwealth Office of Regulation Review's *Report to the National Competition Council on the setting of national standards and regulatory action: 1 April 2001 — 31 March 2002*. The Office of Regulation Review provided this report to the Council on 6 June 2002.

The Office of Regulation Review works closely with Ministerial councils and other standard-setting bodies, advising them on applying COAG principles and guidelines for setting standards and regulations. The office advises these bodies on the adequacy of their proposed regulatory impact statements before they are circulated to affected parties, and again before the final standard-setting decisions are made. The office's involvement with the Ministerial councils and standard-setting bodies informs the preparation of its report to the Council.

Prior to providing its report to the Council, the office circulated a draft report to relevant Ministerial councils and other national standard setting bodies for comment. The office also provided the draft report to the Department of Prime Minister and Cabinet and competition policy units in the Commonwealth, States and Territories. This consultation process assists the final report's accuracy and its appraisal of the regulatory impact analysis process undertaken before a decision is made on each new national standard or regulation.

The Office of Regulation Review's report to the Council is discussed in chapter 15.

# **1 The COAG Principles and Guidelines and the advisory and reporting role of the Office of Regulation Review**

## **1.1 COAG's Principles and Guidelines**

In April 1995 the Council of Australian Governments (COAG) agreed that regulatory proposals considered by Ministerial Councils and national standard-setting bodies should be subject to a nationally consistent assessment process. This agreement was prompted by the objective that regulations or standards employed by governments be the minimum necessary to achieve agreed outcomes and not impose excessive or unnecessary requirements on business. The agreed assessment process was set out in the COAG Agreement *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG 1997 as amended).

The major element of the assessment process is the completion of Regulatory Impact Statements (RISs). A RIS provides a structured approach to regulation making which aims to achieve better quality regulation. It does this by considering and documenting alternative approaches to resolve identified problems. A RIS assesses the impacts of each option on different groups and the community as a whole. RISs are used as part of community consultation and are considered by decision making bodies.

For purposes of applying these requirements, COAG (1997, p. 4) defined regulation broadly as including:

*... the broad range of legally enforceable instruments which impose mandatory requirements upon business and the community as well as those voluntary codes and advisory instruments ... for which there is a reasonable expectation of widespread compliance.*

## **1.2 The role of the Office of Regulation Review (ORR)**

The role of the Office of Regulation Review (ORR) is to advise decision makers on application of the COAG *Principles and Guidelines* and monitor and report on compliance with these requirements. This includes assessing RISs prepared for these intergovernmental bodies. The ORR assesses the RISs at two stages: before they are distributed for consultation with parties affected

by the proposed regulation and again just prior to a decision being made by the responsible body. The ORR is required by the COAG Guidelines to assess:

- whether the Regulatory Impact Statement Guidelines have been followed;
- whether the type and level of analysis is adequate and commensurate with the potential economic and social impact of the proposal; and
- whether alternatives to regulation have been adequately considered.

The ORR must advise the relevant Ministerial Council or standard setting body of its assessment.

This is the second ORR report to the NCC dealing with regulation making by Ministerial Councils and national standard setting bodies. The first ORR report to the NCC covered the period 1 July 2000 to 31 May 2001. For this second ORR report to the NCC the reporting period has been modified to cover the period 1 April 2001 to 31 March 2002.

This change in the reporting period was made to allow adequate time for RIS compliance data to be collected by the ORR and provided in draft form — for information and comment — to the following organisations:

- relevant Ministerial Councils and national standard setting bodies;
- the Department of Prime Minister and Cabinet;
- competition policy units in each jurisdiction; and
- New Zealand Ministry of Economic Development (section 1.3 only).

### **1.3 Emerging 'strategic' issues for consideration**

Overall, the COAG RIS requirements appear to be working reasonably well in meeting the objective of ensuring that decision making forums — and the community — are provided with quality information documenting the policy development process. Ministerial Councils and national standard setting bodies now have a high level of awareness about COAG's RIS requirements. As a consequence, RISs are playing an increasing role in informing decisions about regulations made by these forums.

One issue which has arisen — especially over the last year — is the role of New Zealand.

The COAG *Principles and Guidelines* represent best practice in regulatory decision making as agreed by the nine Australian jurisdictions. Increasingly, regulatory review and reform by such decision making forums is being undertaken in cooperation with New Zealand. Therefore, New Zealand

participation in these decision making processes is an emerging strategic issue.

The RIS processes in each country are broadly comparable. In addition, New Zealand is already part of the formal decision making process in relation to those areas of regulation covered by the Trans-Tasman Mutual Recognition Arrangement (TTMRA). Under the TTMRA reviews of regulation must have regard to the COAG Principles and Guidelines.

However, there are questions about how COAG RISs can best include the impacts on New Zealand (including consultation with New Zealand stakeholders) and how best to meet the technical requirements for regulatory impact assessment which are employed in each country. Where this issue arises the ORR seeks to address these matters on a case-by-case basis, including considering the merits of Australia and New Zealand taking a consistent approach to impact assessment, particularly where the same or similar regulations are considered.

Nevertheless, there is scope for both countries to further harmonise regulation making processes, including the application of RISs. The TTMRA will be reviewed in 2003. This review provides the opportunity to consider how decision making process are working and explore scope for reforms to such processes.

## **2 Reporting to the NCC: the scope and focus of the ORR's reports**

COAG's Guidelines apply to agreements or decisions by Ministerial Councils and national standard-setting bodies which will have a regulatory impact. The agreements and decisions made by these forums may be given effect in a variety of ways. These include principal or delegated legislation, administrative decision or other measures. Voluntary codes and other advisory instruments are also included, where there is a reasonable expectation by businesses or individuals that they should comply. In most cases, there is general consensus between the ORR and these decision makers on which types of agreements and decisions are covered — and are not covered — by COAG RIS requirements.

In its first report to the NCC — covering the period 1 July 2000 to 31 May 2001 — the ORR excluded two types of decisions. The first category involves decisions of an administrative rather than a regulatory nature. These decisions are essentially about the application and administration of regulation for which the broader regulatory framework has already been established and there are consequently no regulatory options. The second category of decisions excluded were those which have a low significance in terms of the scope and magnitude of impacts, to which the RIS process would

add little additional value. In both of these cases the ORR advises that a COAG RIS is not necessary.

Over the last year there has been dialogue between the ORR, Ministerial Councils and national standard setting bodies about the scope of COAG's RIS requirements. Issues covered in these discussions included the following:

## **2.1 Do the COAG Guidelines apply to broad decisions, plans or strategies?**

The development of broad plans and strategies may represent the first part of a staged process of policy development which is then followed by the development of specific measures, some of which are regulatory.

The ORR's interpretation of COAG's *Principles and Guidelines* is that RIS analysis should be undertaken early in the policy development process. Indeed, the COAG Guidelines require that a number of fundamental threshold questions be addressed in a RIS, such as:

- what is the problem that needs addressing?
- is there market failure?
- can this market failure be addressed without recourse to government regulation?
- what are the costs, risks or benefits of maintaining the status quo? (COAG 1997, p. 5).

Accordingly, the ORR has advised Ministerial Councils and national standard setting bodies that the COAG *Principles and Guidelines* apply to decisions on broad plans and strategies which may have regulatory implications, as well as to the more specific regulatory measures which may be developed at a later stage.

## **2.2 Do the COAG Guidelines apply to 'best practice' regulatory measures?**

In some cases Ministerial Councils and national standard setting bodies agree on regulatory measures which establish 'best practice' requirements. This can include model legislative provisions which aim to influence the conduct and behaviour of regulated organisations or individuals. The ORR has advised that COAG's requirements apply to such best practice measures if there is an expectation of compliance and if such requirements generate regulatory impacts.

## **2.3 Possible duplication of RIS processes**

In relation to instruments for national implementation, the view has been put to the ORR that the subsequent development of legislation in each jurisdiction will itself be subject to individual RISs, so a COAG RIS should not be required.

The ORR has taken the contrary view. The preparation of a COAG RIS can provide a solid analytical base with a nationwide perspective for the later preparation of more focused RISs by each jurisdiction. Moreover, a COAG RIS can serve to guide legislative reforms in each jurisdiction from a carefully analysed starting point. It is also the case that states and territories may forgo their own RIS requirements where applicable if an adequate COAG RIS has been prepared.

## **3. Compliance with the COAG RIS requirements**

This second report to the NCC covers decisions made in the period 1 April 2001 – 31 March 2002. The ORR has identified twenty four matters that were subject to the COAG RIS requirements. Of these, the RIS requirements appear to have been met in all but one case.

Table B.1 documents the twenty three cases where the COAG RIS requirements apply and were met. This table includes a brief description of the regulatory measure, decision making body and date of decision.

**Table B.1:** Cases where COAG RIS requirements were met

<i>Measure</i>	<i>Body responsible</i>	<i>Date of decision</i>
1. National Code of Practice for the Defined Interstate Rail Network Vol 1-3	Australian Transport Council (ATC)	25 May 2001
2. National Standard for Commercial Vessels — Part D, Crew Competencies	ATC	25 May 2001
3. Annual adjustment procedure for heavy vehicle charges	ATC	25 May 2001
4. Policy framework for performance based standards for heavy vehicle regulations	ATC	25 May 2001
5. Amendment to Building Code of Australia 1996 to increase the number of toilet pans for female patrons of certain theatres/cinemas	Australia Building Codes Board (ABCB)	15 June 2001
6. In-Service Diesel Vehicle NEPM	National Environment Protection Council	29 June 2001
7. National Approach to Firewood Collection	Australian and New Zealand Environment and Conservation Council	29 June 2001
8. Amendment of ADR 80 Emission Controls for Heavy Vehicles	ATC	Out-of session decision process completed by 30 June 2001
9. Minimum energy performance standards for air conditioners	Australian and New Zealand Minerals and Energy Council (ANZMEC)	Out-of-session decision process completed by mid-July 2001
10. Minimum energy performance standards for electric motors	ANZMEC	Out-of-session decision process completed by mid-July 2001
11. Approval of Joint Australia/New Zealand Standard addressing Brake Systems for Passenger Cars	ATC	6 July 2001
12. Adoption of provisions relating to BSE into the Food Standards Code	Australia New Zealand Food Standards Council (ANZFSC)	20 July 2001
13. Amend the Food Standards Code to permit the production in Australia of formulated caffeinated beverages	ANZFSC	31 July 2001
14. Temperature Compensation of Petroleum Fuels	Ministerial Council on Consumer Affairs	13 August 2001
15. Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption	Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ)	17 August 2001
16. Permission for the irradiation of herbs, spices, seeds and herbal infusions	ANZFSC	13 September 2001
17. Phase out of use of Chrysotile Asbestos in Australia	National Occupational Health and Safety Commission	21 September 2001

*(continued)*

**Table B.1** continued

<i>Measure</i>	<i>Body responsible</i>	<i>Date of decision</i>
18. Code of Practice for the Safe Transport of Radioactive Material	Australian Radiation Protection and Nuclear Safety Agency	24 September 2001
19. Requirements to update signage for people with disabilities including requirements for braille and tactile signs	ABCB	1 October 2001
20. Automatic Annual Adjustment of Heavy Vehicle Registration Charges	ATC	8 January 2002
21. Implementation plan for Overweight Containers Strategy	Austrroads	Out-of-session decision process completed by 28 February 2002
22. Revised Minimum Energy Performance Standards for Refrigerators and Freezers	Ministerial Council on Energy <sup>1</sup>	Out-of session decision completed during March 2002
23. Minimum Energy Performance Standards for Lighting Ballasts	Ministerial Council on Energy	Out-of session decision completed during March 2002

### **3.1 Case where COAG RIS requirements were not met**

In only one case – the prohibition of the sale of level 2 18+ recordings to minors — were the COAG RIS requirements not met.

The Commonwealth, State and Territory Censorship Ministers met on 8 March 2002. The Office of Film and Literature Classification (OFLC) provides the secretariat for the Censorship Ministers' meetings. At this meeting it was decided to ask the Australian Record Industry Association (ARIA) to amend their Industry Code of Practice for labelling CDs and tapes that contain explicit lyrics. The amendment request was to prohibit the sale of Level 2 18+ recordings to minors. The Level 2 18+ is currently an advisory warning label designed to assist buyers (and their parents) when they purchase recordings.

This proposal had not been included on the agenda of the meeting and consequently was not an option or recommendation in the papers provided by the OFLC to the Ministers. Hence, a RIS had not been prepared to help inform this decision.

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<sup>1</sup> The Ministerial Council on Energy was formed following COAG's meeting of June 2001, and subsumes the energy component of ANZMEC.



## 4. Trends in compliance with COAG RIS requirements

Recent trends in COAG RIS compliance have generally been positive, both in terms of the level of compliance and improvements in compliance over time. As just noted, of the twenty four regulatory decisions made for the year ended 31 March 2002, only one was non-compliant with COAG's RIS requirements. This translates to a compliance rate for this reporting period of 96 per cent.

In contrast, for decisions covered by the ORR's first report to the NCC, covering the period 1 July 2000 — 31 May 2001, the compliance rate was 71 per cent, with six out of the twenty one regulatory decisions made during the reporting period assessed as non-compliant.<sup>2</sup>

An important consideration in measuring compliance — and changes in compliance over time — is the degree of significance of the decisions made in each period. The ORR has classified each regulatory proposal that requires a RIS as of greater or lesser significance. This classification is based on:

- the nature and magnitude of the problem and the regulatory proposals for addressing it; and
- the scope and intensity of the proposal's impact on affected parties and the community.

This classification is intended to provide a better basis on which to apply the 'proportionality rule' that the extent of RIS analysis should be commensurate with the magnitude of the problem.

Of the twenty four regulatory decisions reported here, six were assessed by the ORR as of greater significance according to these criteria. They are as follows:

- two decisions by the Australian Transport Council (ATC) — to adopt a policy framework for performance based standards for heavy vehicle regulations, and to amend Australian Design Rule 80 in relation to emission controls for heavy vehicles;
- the decision by the Ministerial Council on Consumer Affairs to require temperature compensation for petrol and diesel fuel loaded at refineries and terminals across Australia, which is expected to promote competition in the industry;

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<sup>2</sup> While there is some overlap between the reporting period for these reports, only four decisions (including one on a significant matter) are covered by both reports. All decisions covered in both reports were compliant with COAG's requirements. Therefore, this modest overlap is not significant for the purposes of comparing compliance between the two periods.

- ARPANSA's decision to adopt an updated Code of Practice for the Safe Transport of Radioactive Material, which impacts on the mining, medical and scientific industries; and
- the decision by the Ministerial Council on Energy to revise Minimum Energy Performance Standards for Refrigerators and Freezers which, by reducing the required electricity consumption, is expected to generate a net benefit of between \$300 million and \$400 million over the period to 2015.

The RISs for these five decisions were compliant with COAG's requirements and contained a level of analysis commensurate with the significance and impact of the proposal. In addition, the decision by the Australia New Zealand Food Standards Council to adopt into the *Food Standards Code* provisions relating to bovine spongiform encephalopathy (BSE) was a significant matter, which was decided as an emergency issue. While emergency decisions are exempt from COAG's requirement for a RIS to inform the decision, the preparation of a RIS is required after the decision. A RIS is currently being prepared.

In summary, the compliance result for matters of 'greater significance' for this reporting period is therefore 100 per cent. In contrast, the ORR's first report to the NCC (for 1 July 2000 — 31 May 2001) included nine matters of greater significance, of which four were non-compliant, giving a compliance rate for such matters of 56 per cent.

These comparisons of compliance results for the first and second reporting periods suggest that compliance by Ministerial Councils and national standard-setting bodies with COAG's RIS requirements has improved significantly in the year to March 2002.

## **5. Follow-up on matters for which COAG requirements were not met during the first reporting period**

The ORR's first report to the NCC, covering the period 1 July 2000 — 31 May 2001, identified six matters for which the COAG RIS requirements were not met. The ORR's report also noted that, for most of these, there were processes either established or foreshadowed that may lead to an improvement. The NCC has requested that the ORR consider the outcomes of these processes.

In November 2000 the Australia New Zealand Food Standards Council (ANZFS) decided to adopt the joint Food Standards Code. In this case a RIS was prepared for this significant proposal, but it did not demonstrate net benefits. As part of this decision, Ministers recommended that an intergovernmental task force be established to report on issues such as

whether very small businesses should be exempted and on strategies for practical and low cost implementation of the Code. The ORR understands that the ANZFSC has considered these issues and decided not to exempt small businesses from the requirements of the new Code.

In July 2000 ANZFSC decided to regulate the labelling of genetically modified food and food ingredients. The decision was to take effect from 7 December 2001. In this case the RIS did not meet the COAG requirements. The ORR's first report to the NCC noted that the Commonwealth Minister had indicated – at the time of the decision – that the Commonwealth would be consulting further with stakeholders to assess the impact on costs and export competitiveness. The ORR understands that there have not been any specific discussions in this regard. However, since the decision Ministers have agreed to a transitional arrangement. The labelling provisions that would otherwise apply from December 2001 will not apply to those foods manufactured and packaged before 7 December 2001. These products will be allowed to remain on supermarket shelves and other food outlets until sold, but cannot remain for sale beyond December 2002. The ORR considers that this measure is likely to result in a reduction in the transitional costs on business of implementing the new labelling requirement.

The November 2000 decision by the Australian Transport Council (ATC) to adopt the National Road Safety Action Plan contained a number of regulatory options, none of which were subject to RIS analysis. The ORR noted in its first report to the NCC that there remains the opportunity to undertake impact analysis before tangible action is taken on individual options listed in the Plan. While no further decisions have been made over the last year dealing with specific measures in the Plan, the ORR notes that the ATC has been compliant with COAG's requirements in relation to other regulatory decisions made during the period covered by the second report.

In November 2000, the Australian National Training Authority Ministerial Council made several regulatory decisions. One was to adopt 'model clauses' for the legislative framework for vocational and educational training. The other was to strengthen the Australian Recognition Framework for skills by, for example, introducing auditable standards and by implementing a nationally consistent set of sanctions. A RIS was not prepared for these decisions. The ORR's first report to the NCC noted that the Council had undertaken to prepare a RIS prior to implementation of the model clauses. Preparation of this RIS is currently under way.