

# 5 The Conduct Code and Implementation Agreements

## Conduct Code Agreement

In addition to obligations in the Competition Principles Agreement (CPA), National Competition Policy (NCP) commitments aim to improve the effectiveness of regulation in the Conduct Code Agreement. Clause 2(1) of the Conduct Code Agreement requires all governments to notify the Australian Competition and Consumer Commission (ACCC) of legislation or provisions in legislation that rely on s51(1) of the *Trade Practices Act 1974* (the TPA) within 30 days of the legislation being enacted or made.

Section 51(1) of the TPA provides that conduct that would be an offence under the Act's restrictive trade practices provisions may be permitted if authorised under a federal, state or territory Act. As such, legislation that is relevant to clause 2(1) of the Conduct Code Agreement is new legislation restricting competition, so it needs to satisfy the tests in clause 5 of the CPA.

Each of the National Competition Council's NCP assessment reports list the legislation relevant to clause 2(1) that governments enacted since the previous assessment, along with the date of notification to the ACCC. Since the 2003 NCP assessment was prepared, several governments have enacted legislation relying on s51(1) of the TPA.

### Australian Government

- Payment Systems (Regulation) Regulations 2003, notified prior to 1 July 2003 (the date of commencement of the Regulations)

### New South Wales

- *Wine Grapes Marketing Board (Reconstitution) Act 2003*, notified on 30 June 2004
- *Marketing of Primary Products Amendment (Rice Marketing) Act 2003*, notified on 30 June 2004

- *Industrial Relations Amendment (Public Vehicle and Carriers) Act 2003*, notified on 30 June 2004

#### Victoria

- *Health Legislation (Further Amendment) Act 2003*, notified on 9 July 2004
- *Outworkers (Improved Protection) Act 2003*, notified on 9 July 2004

#### Queensland

- *Sugar Industry Reform Act 2004*, notified in late September 2004

#### Western Australia

- *Electricity Industry Act 2004* — Electricity Industry (Wholesale Electricity) Regulations 2004, notified on 14 October 2004

#### South Australia

- *Chicken Meat Industry Act 2003*, notified on 12 August 2003

#### The ACT

- The ACCC reported that the ACT's *Health Amendment Act 2003* had introduced an exception to the TPA in the *Health Act 1993*, but the ACT did not notify the ACCC of the exception

#### Northern Territory

- *Consumer Affairs and Fair Trading Amendment Act 2004*, notified on 15 April 2004.

## Implementation Agreement

The Agreement to Implement the National Competition Policy and Related Reforms (the Implementation Agreement) sets conditions for the provision of third tranche NCP payments. Among other matters, it obliges governments to ensure Ministerial councils and intergovernmental standard-setting bodies set national regulatory standards in accord with principles and conditions endorsed by the Council of Australian Governments (CoAG). It also obliges Ministerial councils, national standard-setting bodies and governments to

seek advice from the Australian Government's independent Office of Regulation Review (ORR) on compliance with these principles and guidelines. The national standard-setting obligation is a collective responsibility of all governments.

Accordingly, CoAG's principles and guidelines:

- set out a consistent process for Ministerial councils and intergovernmental standard-setting bodies to determine whether associated laws and regulations are appropriate
- describe, where regulation is warranted, the features of good regulation and recommend principles for setting standards and regulations.

If a Ministerial council or intergovernmental standard-setting body proposes to agree to a regulatory action or adopt a standard, then it must first certify that a regulatory impact statement (RIS) has been completed and that the RIS analysis justifies adoption of the regulatory measure. The RIS must:

- demonstrate the need for the regulation
- detail the objectives of the measures proposed
- outline the alternative approaches considered (including nonregulatory options) and explain why they were not adopted
- document which groups benefit from regulation and which groups pay the direct and indirect costs of implementation
- demonstrate that the benefits of regulation outweigh the costs
- demonstrate that the regulation is consistent with relevant international standards (or justify any inconsistencies)
- set a review or sunset date for regulatory instruments (CoAG 1997).

The RIS process must be open and public. The RIS forms part of the community consultation and helps to inform standard setting. The ORR advises Ministerial councils and standard-setting bodies whether a draft RIS is consistent with CoAG principles and guidelines. It also reports to Heads of Government (through the CoAG Committee on Regulatory Reform) on Ministerial councils' and intergovernmental standard-setting bodies' significant decisions that it considers are inconsistent with the CoAG guidelines. In addition, it reports to the CoAG Committee on Regulatory Reform annually on overall compliance with the regulatory practice guidelines.

The ORR reports annually to the Council on the adherence of Ministerial councils and national standard-setting bodies to the standard-setting obligation. The ORR's report for the period 1 April 2003 to 31 March 2004 is reproduced in appendix A. It reveals that 30 of the 34 decisions by Ministerial councils and intergovernmental standard-setting bodies reported during the

year to 31 March 2004 satisfied CoAG requirements. The compliance rate of 88 per cent was similar to the 89 per cent rate in the previous year, but lower than the 96 per cent achieved in the 12 months to 31 March 2002.

Of the 34 decisions reported over the year to 31 March 2004, the ORR considered seven to be more significant than others, based on the nature and magnitude of the problem and the regulatory proposals for addressing it, and the scope and intensity of the proposals' impacts on the affected parties and the community. Three of these seven decisions did not comply with CoAG's RIS requirements:

- the endorsement by the Environment Protection and Heritage Council of the Australian Retailers' Association's code of practice for the management of plastic bags
- the agreement by the Ministerial Meeting on Insurance Issues on a national model for proportionate liability
- the endorsement by the Standing Committee of Attorneys-General of model provisions for consistent regulation across jurisdictions of the legal profession.

The ORR reported that the following factors have contributed to noncompliance.

- Some Ministerial councils and national standard-setting bodies have not understood the analytical requirements of a CoAG RIS or have not incorporated CoAG's regulatory best practice into their operating protocols.
- The allocation of decision-making power to ad hoc groups risks those groups not following best practice because they are not fully aware of CoAG's requirements. However, some instances of noncompliance involve Ministerial councils or standard-setting bodies that have made other decisions (during the same period) that met CoAG's requirements.
- Some decisions to regulate have been made in stages.

The rate of jurisdictions' adherence to CoAG's requirements for preparing RISs has not improved over the most recent 12-month period. The Council is concerned that some decision-makers did not prepare a RIS despite apparently knowing CoAG's requirements, as indicated by their adherence to the requirements when making other regulatory decisions. The Council encourages Ministerial councils and intergovernmental standard-setting bodies to adhere to the CoAG approach in making all regulations.