26 Effective regulation: Conduct Code and Implementation Agreements

In addition to the legislation review and reform obligations in the Competition Principles Agreement (CPA), there are NCP commitments designed to improve the effectiveness of regulation in the Conduct Code Agreement and the Agreement to Implement the National Competition Policy and Related Reforms (the Implementation Agreement).

Conduct Code obligations

Under the Conduct Code Agreement, the Commonwealth, States and Territories have an ongoing obligation 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 (TPA). Clause 2(1) of the Conduct Code Agreement obliges governments to send written notice of such legislation to the ACCC within 30 days of the legislation being enacted or made.

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

The Conduct Code Agreement also required (under clause 2(3)) governments to have notified the ACCC by 20 July 1998 of all continuing legislation reliant on s51(1) of the TPA.[1] All governments stated, as part of the second tranche NCP assessment, that they had notified the ACCC of relevant legislation. This legislation is listed in the National Competition Council's second tranche report (NCC 1999b, pp. 172–7).

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[1] Three years after the date on which the *Competition Policy Reform Act 1995* received Royal Assent.

Legislation notified to the ACCC (Conduct Code clause 2(1))

Five governments — New South Wales, Queensland, South Australia, the Australian Capital Territory and the Northern Territory — stated as part of this assessment that they notified the ACCC of all new legislation and new provisions in legislation that rely on s51(1). The following notifications have been made since the second tranche NCP assessment.[2]

- **New South Wales**
  - *Olympic Roads and Transport Authority Act 1998*, notified on 8 February 2000
  - *Liquor and Registered Clubs Legislation Further Amendment Act 1999*, notified on 8 February 2000
  - Competition Policy Reform (NSW) Amendment Regulation 2000, notified on 8 February 2000
- **Queensland**
  - *Primary Industries Legislation Amendment Act 1999*, notified on 15 October 1999
  - *Sugar Industry Act 1999*, notified on 11 January 2000
  - Competition Policy Reform (Queensland) Public Passenger Service Authorisations Regulation 2000, notified on 14 August 2000
- **South Australia**
  - *Authorised Betting Operations Act 2000*, notified on 28 March 2001
  - *Barley Marketing Act 1999*, notified in June 2001
- **Australian Capital Territory**
  - *Milk Authority (Amendment) Act 1999*, notified on 26 July 1999
- **Northern Territory**
  - *Year 2000 Information Disclosure Act 1999*, notified on 10 April 2001

[2] Legislation notified in accordance with clause 2(1) of the Conduct Code Agreement prior to June 1999 is listed in the National Competition Council's second tranche NCP assessment report (NCC 1999b, pp. 172–7).

National standards setting obligations

Arising from the NCP Implementation Agreement, all governments have a responsibility to ensure that national standards are set in accordance with the Council of Australian Governments' (CoAG) principles and guidelines and advice from the Commonwealth Office of Regulation Review (ORR) on compliance with these principles and guidelines. The principles and guidelines, endorsed by CoAG in 1995 and updated in 1997, aim to guide good regulatory practice in decisions by Ministerial councils and intergovernmental standards-setting bodies. Bodies that develop voluntary codes and other advisory instruments need to take account of the principles and guidelines where promotion and dissemination of the code or instrument is reasonably expected to be widely interpreted as requiring compliance (CoAG 1997).

CoAG developed the principles and guidelines out of concern that Australia's regulatory system was overly complex, generated undue delay, was inconsistent, imposed unnecessary costs on business and inhibited innovation. The Mutual Recognition Agreement, by highlighting discrepancies in standards among jurisdictions, was also an impetus. Under the agreement, Ministerial councils can be called on to create a standard for any product or to develop nationally uniform criteria for the registration of any occupation.

CoAG's aim for national standards-setting is to 'achieve minimum necessary standards, taking into account economic, environmental, health and safety concerns.' In accordance with this aim, the principles and guidelines:

- set out consistent processes for Ministerial councils and intergovernmental standards-setting bodies to determine whether a set of standards and associated laws and regulations are appropriate; and

- describe, given that regulation is shown to be warranted, the features of good regulation and recommend principles for standards setting and regulatory action.

Where a Ministerial council or intergovernmental standards-setting body proposes to agree to a regulatory action or adopt a standard, it must first certify that a regulatory impact statement (RIS) has been adequately completed and that the results justify 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 (including the administrative costs);
- demonstrate that the regulation is consistent with relevant international standards (or justify any inconsistencies); and
- set a date for review or sunsetting of regulatory instruments (CoAG 1997).

The CoAG principles and guidelines state that the RIS process must be open and public, with advertisements placed in all jurisdictions to give notice of the intention to adopt regulatory measures, advise that the RIS is available on request and invite submissions. The RIS must list the persons who made submissions or were consulted and contain a summary of their views. The Ministerial council or standards-setting body is required to consider views expressed during the consultation process.

The Commonwealth Office of Regulation Review

The Commonwealth ORR has a significant role in the RIS process. Ministerial councils and standards-setting bodies must notify the ORR that a RIS is to be drafted on a relevant topic. The RIS must be sent to the ORR as soon as possible and before it is released for public comment. The ORR assesses the RIS within two weeks and advises the Ministerial council or standards-setting body of its assessment. While not obliged to adopt the advice of the ORR, Ministerial councils and standards-setting bodies must respond to any matters that have not been addressed as recommended by the ORR. The ORR assesses in particular:

- whether the RIS meets requirements;
- whether the type and level of analysis are adequate and commensurate with the potential economic and social impacts of the proposal; and
- whether the RIS has adequately considered alternatives to regulation.

Bodies that set national standards that require a complying RIS are Ministerial councils, and three national entities — the National Occupational Health and Safety Commission, the Australian Building Codes Board and the Electrical Regulatory Authorities Council. The ORR reports to Heads of Government, through the CoAG Committee on Regulatory Reform, on decisions of these bodies that it considers are inconsistent with the CoAG guidelines. The ORR also monitors and reports annually on compliance.

Governments' compliance

The broad NCP obligation on governments is to demonstrate that bodies setting national standards show that a RIS has been conducted in relation to a standard, consistent with the CoAG principles and guidelines. The specification of the standards-setting obligation in the Implementation Agreement infers that the obligation is a collective responsibility on all governments. All are usually involved on Ministerial councils, and all need to ensure that standards set by national bodies involve an appropriate RIS. In considering compliance in this area, the Council took account of the compliance advice provided by the ORR (see Appendix C) as well as representations from governments. The Council based this assessment on compliance evidence over the period July 2000 to May 2001. The Council nominated the July 2000 to May 2001 period recognising that previous NCP assessments did not address the standards-setting obligation and that governments needed sufficient opportunity to ensure their processes accord with the CoAG principles.

The ORR identified 21 matters that should have been subject to the CoAG requirements which reached the decision stage between 1 July 2000 and 31 May 2001. The ORR considered that the CoAG requirements had not been met in six of these matters which, in order of significance, were:

- the new joint food standards code for Australia and New Zealand;
- the labelling of genetically modified foods;
- a national response to passive smoking;
- the national road safety action plan;
- extension of the Consumer Credit Code to include pay day (very short-term) loans; and
- changes to vocational and educational training arrangements (PC 2001a).

Food standards code

The Australia New Zealand Food Standards Council (ANZFSC) decided on 24 November 2000 to adopt a new joint food standards code, including new mandatory percentage labelling of key ingredients for food and mandatory nutritional panels on all food (rather than only food that makes nutritional claims). The ORR stated that it worked with officials of the Australia New Zealand Food Authority (ANZFA) for more than a year in developing RISs on these two matters. The ORR considered, however, that the cost benefit analysis (required as part of the RIS) was inadequate to support the joint code and particularly the proposals for percentage labelling and enhanced nutritional labelling. In particular, the ORR found there was no analysis of the nature and degree of importance of the likely benefits of the proposals, to

demonstrate that they are likely to be greater than the estimated (substantial) costs.

The ANZFSC has agreed to a two-year period commencing from December 2000 for implementing the code to enable industry to minimise their costs. Further, Ministers have set up an intergovernmental taskforce to report on issues such as whether very small businesses should be exempted and on strategies for the practical and lowest cost implementation of the code. The Council understands that the taskforce is to report to the ANZFSC meeting of 31 July 2001.

Labelling of genetically modified foods

On 28 July 2000, the ANZFSC decided to regulate the labelling of genetically modified food and food ingredients, specifically where novel DNA or protein is present and/or where the food has altered characteristics. The ORR reported that this decision did not comply with CoAG's principles and guidelines; in particular because the document that formed the basis for the decision — *Report on the costs of labelling genetically modified foods* prepared in March 2000 for an ANZFSC taskforce — looked only at costs (and did not cost the exemptions granted by the ANZFSC decision). Further, the ORR found no evidence that the ANZFSC taskforce had undertaken any (even qualitative) analysis of the benefits of the decision.

On the day of the ANZFSC decision, the Parliamentary Secretary to the Commonwealth Minister of Health and Aged Care issued a media statement noting, among other things, that the new regulations will impose a financial cost on industry that will be reflected in the cost of food to consumers. The Parliamentary Secretary to the Minister indicated that the Commonwealth intended to talk with stakeholders to assess the impact on costs and export competitiveness as a result of the new labelling regulations (Tambling 2000).

The national response to passive smoking

In November 2000, the Australian Health Ministers' Advisory Council endorsed a set of documents designed to assist the development of new legislation or the review of existing legislation concerning passive smoking. These are not regulatory instruments, rather they are guidelines endorsed by an advisory council of senior Commonwealth and State officials. The ORR argued that the passive smoking guidelines appear to be covered by the CoAG principles and guidelines because they are akin to 'agreements or decisions to be given effect through … administrative directions or other measures which … encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done.' Further, the ORR considered that the guidelines fitted the CoAG description of 'voluntary codes and other advisory instruments' for which the 'promotion and dissemination by

standard-setting bodies or by government could be interpreted as requiring compliance' (CoAG 1997, p. 4).

The ORR reported that, despite it providing early advice to the Commonwealth Department of Health and Aged Care, it had been unable to ensure that CoAG's requirements for the preparation of an adequate RIS were met. The ORR also advised that it understood that no RIS was provided to the advisory council prior to it endorsing the guiding principles and core provisions for regulation of passive smoking.

The ORR judged that the nature and magnitude of the costs and benefits of the regulation of passive smoking could be substantial. It considered that passive smoking regulation is likely to impose costs or losses on a wide range of hotel, club, restaurant and entertainment industries. The ORR also noted that regulation also has ramifications for the structure of venues and the effectiveness of air conditioning systems, and could reduce patronage. It noted also that there would be some benefits because both staff and patrons of hospital and entertainment venues would benefit from a smoke-free environment and there would be reduced long-term health care costs.

The Commonwealth Department of Health and Aged Care disputed that the national response fits the description under the CoAG principles and guidelines of a voluntary code or advisory instrument which could be interpreted as requiring compliance. The department stated that the Ministerial council's endorsement of the national response does not legally bind governments to observe the model. The department noted that each State and Territory is free to develop its own legislative approach and to develop a RIS consistent with its own legislation.

The Northern Territory advised that it is yet to implement any regulations arising from the national approach and that, consistent with the approach outlined by the Commonwealth Department of Health and Aged Care, any regulations the Territory introduces will be subject to its legislation gatekeeping process. The ACT also noted that the intention under the national plan is that governments subject proposed passive smoking legislation to regulatory impact analysis. Tasmania, which introduced legislation in 2001, released a RIS on smoke free public places and workplaces in July 2000. South Australia noted that there had been some analytical regulatory impact work prepared, and that this is available to jurisdictions considering passive smoking regulation. The national response on passive smoking is not relevant to the Commonwealth Government because it does not relate to matters over which the Commonwealth has power to legislate.

The national road safety action plan

On 17 November 2000, the Australian Transport Council released the National Road Safety Action Plan for 2001 and 2002. The plan supports a national strategy aimed at reducing the fatality rate on Australian roads by

40 per cent over the next decade. The plan has been presented as a menu of options from which the States and Territories may select in order to help achieve this target. The ORR noted that, while many of the options are not regulatory, the plan contains some that are regulatory and, if implemented, would not be optional for the States and Territories. Regulatory examples identified by the ORR include:

- amending Australian Design Rules to prohibit speedometers from indicating a speed slower than the true speed;
- amending Australian Design Rules to require sensors and audible signals to encourage the use of seat belts;
- developing a code of conduct for the trucking industry; and
- developing and achieving significant adoption by business and government of a safe fleet policy.

The ORR argued that there is a case to be made that the Australian Transport Council should have complied with the CoAG principles and guidelines before endorsing the program. The ORR found no evidence that any analysis of identified costs and benefits had been undertaken, or conclusions drawn on whether regulation is necessary and, if so, the most efficient regulatory approach. The ORR noted that this matter illustrated a common practice in policy development, whereby a broad strategy is set and then, in a staged process, plans developed and specific measures — some of which are regulatory — introduced. The ORR pointed out that leaving the analysis required by CoAG too late may risk particular options becoming preferred despite (later) evidence favouring more cost-effective alternatives.

While there would be substantial community-wide benefits from a 40 per cent reduction in road fatalities, the range of options for the States and Territories to choose from have vastly different costs. A proper RIS analysis would have helped rank the options as to their cost effectiveness, thereby facilitating the most effective take-up of the options by the States and Territories. The ORR reported that it had not been consulted on the National Road Safety Action Plan. The ORR considered however that there is an opportunity to undertake regulatory impact analysis before governments take tangible action on individual options. Most governments confirmed that they would do this in implementing the national road safety action plan.

Extension of the Consumer Credit Code to include pay day (very short-term) loans

On 8 November 2000, the Ministerial Council on Consumer Affairs agreed to amend the Consumer Credit Code (which had previously not applied to loans of less than 62 days duration) to include pay day lenders. Typical pay day advances have a duration of seven to 21 days and are for relatively small amounts. The Ministerial council's decision was based on a Queensland

Government document *Pay Day Lending — A Report to the Minister for Fair Trading* (Pay Day Lending Review 2000).

Queensland had the responsibility for drafting the proposed changes, with the other States and Territories to replicate the Queensland changes. The Queensland Department of State Development assessed that the changes did not trigger Queensland's RIS requirements. This is because the changes entailed introducing primary legislation. Under Queensland's Statutory Instruments Act, a RIS applies only to the introduction and/or amendment of subordinate legislation. The ORR interprets the CoAG principles and guidelines as requiring justification of any substantial extension to the scope of existing regulation. Consequently, the ORR examined the Queensland document to determine if it contained the essential elements of a RIS. The ORR found that the level of analysis in the document was not adequate. It found that the document failed to identify clearly the costs and benefits to the stakeholders of each of the options, and did not assess the adequacy of the existing body of law (contract law) on the behaviour of pay day lenders.

Changes to vocational and educational training arrangements

On 17 November 2000, the Australian National Training Authority Ministerial Council made several decisions, two of which should have been subjected to the CoAG requirements but for which no RIS was prepared. First, the council agreed that changes were necessary to the existing legislative framework for vocational and educational training, and that they should be implemented by adopting 'model clauses'. Second, it decided to strengthen the Australian Recognition Framework for skills by, for example, introducing auditable standards and by implementing a nationally consistent set of sanctions.

The ORR viewed these changes as part of a continuous improvement process designed to simplify the vocational and educational training system. It did not consider the breach of CoAG's requirements in this case to be substantial. Moreover, it advised that relevant officials, now that they are aware of CoAG's requirements, are to prepare a RIS for the Australian National Training Authority Ministerial Council prior to implementation of the 'model clauses'.

Assessment

The report by the ORR indicated that, in the period July 2000 to May 2001, there was significant noncompliance with the regulation development processes required by the CoAG national standards-setting principles and guidelines (six of 21 decisions did not comply). Nonetheless, the ORR report, and governments' responses to it, indicate that for most of the noncompliant decisions, including the two most significant ones (the food standards code

and the labelling of genetically modified food), there are processes either established or foreshadowed that may improve the cost-effectiveness of relevant regulatory arrangements. The Council considers that addressing the outcomes of the noncompliance in this way will provide greater benefits to Australia than reducing NCP payments in this assessment.

The Council notes comments by the ORR relevant to the identified noncompliance, including that some Ministerial councils may not fully appreciate the wide interpretation given to regulatory matters, and that the turnover of officials in the secretariats of some Ministerial councils could detract from institutional experience. This suggests that future compliance would be encouraged if the Commonwealth State Relations Secretariat reissued the CoAG principles and guidelines to all governments, Ministerial councils and standards-setting bodies, with a reminder of the obligation to apply them.

The Council also considers that compliance would be enhanced if future NCP assessments incorporated consideration of governments' application of the CoAG principles and guidelines. This would involve the ORR reporting annually on compliance by national standards-setting bodies for matters that reach decision stage. Should governments support this approach, given the timing of the future NCP assessments, the ORR's annual compliance report should cover each 12 month period to the end of the March quarter. This would give governments sufficient time to consider the ORR's findings prior to the Council assessing compliance with the principles and guidelines.