

6 National standard setting obligations

The Agreement to Implement the National Competition Policy and Related Reforms (the Implementation Agreement) obliges governments to ensure Ministerial councils and intergovernmental standard-setting bodies set national regulatory standards in accord with principles and guidelines endorsed by the Council of Australian Governments (CoAG). It also obliges governments to seek advice from the independent Commonwealth Office of Regulation Review (ORR) on compliance with these principles and guidelines. The national standard-setting obligation is a collective responsibility of all governments.

The CoAG principles and guidelines aim to promote good regulatory practice in decisions by Ministerial councils and intergovernmental standard-setting bodies. The national standard-setting obligations seek to ensure standards are the minimum necessary, such that they avoid imposing excessive or unnecessary requirements on businesses while accounting for governments' economic, environmental, health and safety concerns. CoAG aims for standards to be subject to a nationally consistent process that assesses their effectiveness in meeting these objectives. 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; and
- describe, for where regulation is warranted, the features of good regulation and recommend principles for setting standards and taking regulatory action.

CoAG's focus on ensuring effective national standard setting via the 1995 National Competition Policy (NCP) program arose from the concerns of major business associations that Australia's regulatory system could undermine the economy's capacity to compete internationally and attract investment. In the mid-1990s, these associations considered Australia's regulatory system to be unnecessarily complex, generating delays, inconsistencies and additional costs for business investment, and inhibiting risk taking. The Mutual Recognition Agreement, by highlighting discrepancies in standards among jurisdictions, was an impetus for the development of national standards. Under the agreement, Ministerial councils can be called on to create a standard for any product or develop nationally uniform criteria for the registration of any occupation.

Principal or delegated legislation, administrative directions or other measures can give effect to the regulatory agreements or decisions of Ministerial councils and national standard-setting bodies. The ORR, governments and standard-setting bodies usually agree on the types of agreement and decision that the CoAG guidelines cover.

Around 40 Ministerial councils and national standard-setting bodies can make national decisions that have a regulatory impact (PC 2002d, p. xiii). Bodies that develop voluntary codes and other advisory instruments need to account for the CoAG principles and guidelines if promotion and dissemination of the code or instrument could be widely interpreted as requiring compliance (CoAG 1997).

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 (including the administrative costs);
- demonstrate that the regulation is consistent with relevant international standards (or justify any inconsistencies); and
- set a review or sunset date for 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 notify 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 intergovernmental standard-setting body is required to consider views expressed during the consultation process. The RIS forms part of the community consultation and helps to inform standard setting.

The Commonwealth Office of Regulation Review

Under the CoAG guidelines, the ORR has a significant role in the RIS process. It advises Ministerial councils and intergovernmental standard-setting bodies on whether a draft RIS is consistent with CoAG principles and guidelines.

Bodies that set national standards that require a complying RIS are:

- Ministerial councils (for example, the Australian Transport Council, the Environment Protection and Heritage Council and the Australia and New Zealand Food Regulation Ministerial Council); and
- national entities (for example, the National Occupational Health and Safety Commission, the Australian Building Codes Board and the Australian Radiation Protection and Nuclear Safety Agency).

The relevant Ministerial council or intergovernmental standard-setting body must notify the ORR that a RIS is to be drafted on a relevant topic. The ORR assesses each RIS at two stages: first, before the RIS is distributed for consultation with parties affected by the proposed regulation; and, second, just before the relevant body makes a decision. The ORR advises the Ministerial council or intergovernmental standard-setting body of its assessment at each stage. Under the CoAG requirements, the analysis in the consultation RIS does not have to be as detailed as in the final RIS, which should reflect information obtained in consultation and more complete consideration. While not obliged to adopt the advice of the ORR, Ministerial councils and intergovernmental standard-setting bodies should respond to any significant matters that have not been addressed as recommended by the ORR.

The ORR assesses a RIS against the following characteristics.

- Whether the RIS guidelines have been followed.
- Whether the type and level of RIS analysis are adequate and commensurate with the potential economic and social impacts of the proposal.
- Whether the RIS adequately considers alternatives to regulation.

The ORR advises the relevant Ministerial council or intergovernmental standard-setting body of each RIS's assessed compliance with RIS requirements. It also reports to Heads of Government (through the CoAG Committee on Regulatory Reform) on significant decisions of Ministerial councils and intergovernmental standard-setting bodies 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 annually advises the National Competition Council on governments' compliance with the national standard-setting obligations. The ORR's advice identifies regulatory proposals that should have been subject to the CoAG guidelines and also proposals for which the RIS did not meet requirements (or for which a RIS was not prepared). The ORR's report to the Council also covers broad planning and strategy decisions that have regulatory implications, along with best practice measures such as 'model' legislation that Ministerial councils and intergovernmental standard-setting bodies sometimes agree on to influence the conduct of regulated entities. The ORR's reports to the Council do not comment on administrative decisions where the regulatory framework is already established. Further, the ORR does not comment on decisions that have an insignificant impact and thus would benefit little from undergoing a RIS process.

In its latest annual report to the Council, the ORR commented that it and decision-makers in governments, Ministerial councils and standard-setting bodies usually, but not always, agree on the types of regulatory decision and agreement covered by the CoAG principles and guidelines. The ORR clarified that the CoAG requirements apply to the following areas (in addition to those areas to which the principles and guidelines clearly apply):

- agreements on regulatory approaches, standards and measures of a quasi-regulatory nature;
- agreements of ad hoc bodies of interjurisdictional Ministers or officials addressing national regulatory issues;
- CoAG decisions on national regulatory problems, where the body proposing the regulation is responsible for compliance with the CoAG principles and guidelines; and
- regulatory decisions that require national implementation, and for which States and Territories will prepare their own RISs (ORR 2003).

The ORR's annual advice underpins the Council's consideration of governments' compliance with the national standard-setting obligation in the Implementation Agreement. For the 2003 NCP assessment, the Council sought ORR advice on governments' compliance over the period 1 April 2002 to 31 March 2003. The ORR thus had time to consult with Ministerial councils and intergovernmental standard-setting bodies on its draft findings before finalising its compliance report for the Council. The ORR's compliance report is replicated in full in appendix B of volume 2.

Governments' compliance with CoAG requirements

The NCP obliges governments to demonstrate that bodies setting national standards have prepared an RIS, consistent with the CoAG principles and guidelines, for a proposed regulatory measure. The specification of the standard-setting obligation in the Implementation Agreement implies that the obligation is a collective responsibility of all governments.

In its 2003 compliance report to the Council, the ORR identified 24 decisions made during the year to 31 March 2003 for which CoAG RIS requirements applied and were met. Table 6.1 lists these cases.

Table 6.1: Regulatory matters where RIS requirements were met, 1 April 2002 to 31 March 2003

| <i>Regulatory matter</i> | <i>Body responsible</i> | <i>Date of decision</i> |
|--|---|-------------------------|
| Ban on human cloning and other 'unacceptable practices', and regulation of the use of excess human embryos for stem cell and related research | Australian Health Ministers Conference. The RIS was prepared for the conference's final consideration of the proposal; this consideration was overtaken by CoAG's decision on the proposal on 5 April 2002. | 5 April 2002 |
| Adoption in the Food Standards Code of a new standard for infant formula | Australia New Zealand Food Standards Council. On 1 July 2002, the Australia and New Zealand Food Regulation Ministerial Council replaced the council. | May 2002 |
| Updating the provisions for residential buildings used to accommodate the aged, to align with the <i>Commonwealth Aged Care Act 1997</i> | Australian Building Codes Board | 1 May 2002 |
| Agreement to manage risks associated with GM crops to agricultural production and trade through industry self-regulation supplemented by government monitoring | Primary Industries Ministerial Council | 2 May 2002 |
| Australian Standard for the Hygienic Rendering of Animal Products | Primary Industries Ministerial Council | 2 May 2002 |
| Model code of practice for the welfare of animals (domestic poultry) | Primary Industries Ministerial Council | 2 May 2002 |
| Track, Civil and Infrastructure Code (volume 4 of the Code of Practice for the Defined Interstate Network) | Australian Transport Council | 6 May 2002 |

(continued)

Table 6.1 continued

| <i>Regulatory matter</i> | <i>Body responsible</i> | <i>Date of decision</i> |
|--|--|---|
| Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields — 3 kHz to 300 GHz | Australian Radiation Protection and Nuclear Safety Agency | 7 May 2002 |
| National Standards for Group Training Companies | Australian National Training Authority Ministerial Council | 24 May 2002 |
| National Standard for Commercial Vessels — Part B: General Requirements | Australian Transport Council/National Marine Safety Authority | Out-of-session decision; process completed by July 2002 |
| National Standard for Commercial Vessels — Part C, Section 5: Engineering | Australian Transport Council /National Marine Safety Authority | Out-of-session decision; process completed by July 2002 |
| National Standard for Commercial Vessels (NSCV) — Part F, subsections 1A and 1B: Category F1 Fast Craft | Australian Transport Council /National Marine Safety Authority | Out-of-session decision; process completed by July 2002 |
| Requirements for labelling statements for certain milk products | Australia and New Zealand Food Regulation Ministerial Council | 30 August 2002 |
| Endorsement of recommendations arising from the NCP review of Radiation Protection Legislation | Australian Health Ministers Conference | 10 October 2002 |
| Model code of practice for the welfare of animals (the farming of ostriches) | Primary Industries Ministerial Council | 10 October 2002 |
| Energy efficiency measures in housing provisions of the Building Code of Australia | Australian Building Codes Board | 1 November 2002 |
| Nationally consistent legislative framework for key aspects of the national vocational education and training (VET) system ('model clauses') | Australian National Training Authority Ministerial Council | 15 November 2002 |
| Permission in the Food Standards Code for the importation of raw milk very hard cooked-curd cheeses | Australia and New Zealand Food Regulation Ministerial Council | 6 December 2002 |
| Requirements for certain warning statements for products containing royal jelly, bee pollen and propolis | Australia and New Zealand Food Regulation Ministerial Council | 9 December 2002 |
| Australian Design Rule for fuel consumption labelling | Australian Transport Council | September 2002 |
| Freight Loading Manual (Component of volume 5 of the Code of Practice for the Defined Interstate Network) | Australian Transport Council | 20 December 2002 |
| Review of Australian Design Rules for vehicle noise | Australian Transport Council | February 2003 |
| Technical review recommendations for the Draft Disability Standards for Accessible Transport | Australian Transport Council | 6 March 2003 |
| Compulsory vaccination of poultry for Newcastle disease | Primary Industries Ministerial Council | 13 March 2003 |

The ORR reports that CoAG's requirements were not met in three cases of regulation in the period 1 April 2002 to 31 March 2003. These three cases are summarised in table 6.2 and then discussed.

Table 6.2: Regulatory matters for which RIS requirements were not met, 1 April 2002 to 31 March 2003

| <i>Regulatory matter</i> | <i>Body responsible</i> | <i>Date of decision</i> |
|--|--|-------------------------|
| Uniform credit code — mandatory comparison of interest rates | Ministerial Council on Consumer Affairs | April 2002 |
| Public liability and the Review of the Law of Negligence | Insurance Ministers | 15 November 2002 |
| National reform of hand gun laws | Australasian Police Ministers Council. The council agreed on the regulatory proposals on 28 November 2002 and CoAG endorsed most in December 2002. | 28 November 2002 |

The Ministerial Council on Consumer Affairs introduced mandatory comparison of interest rates into the Uniform Consumer Credit Code with the royal assent of Queensland template legislation in April 2002. The amendments to the code require credit providers to calculate all of the costs of their loans — including the interest rate and all fees and charges — as a single percentage rate, and include this calculation in the information that they provide to consumers. Consumers can thus compare the full cost of credit products offered by different providers. The ORR advised the Ministerial council in August 2001 that it should follow the CoAG principles and guidelines, but a CoAG RIS was not distributed for consultation or provided to the Ministerial council before the changes to the credit code.

Reflecting concerns about the increased costs of public liability insurance, Commonwealth, State and Territory Ministers held a number of meetings during 2002 and commissioned the Review of the Law of Negligence by Justice Ipp. The Ministerial group accepted the Ipp Report recommendations, some of which involve significant changes to the law of negligence. The recommendations include: limiting the liability of defendants to foreseeable risk; allowing findings of 100 per cent contributory negligence by plaintiffs; and introducing measures to limit damages payments. The Ipp Report did not include a cost–benefit assessment of its proposals, and a RIS was not prepared.

CoAG ministers asked the Australasian Police Ministers Council in October 2002 to develop proposals for a national approach to handgun control measures. The Ministers council put forward 19 measures for CoAG consideration in late November 2002, and CoAG adopted most of these measures in December 2002. The ORR reports that a CoAG RIS was not prepared, while noting the tight timeframe for the development of the proposals.

Compliance rate

In summary, 24 of the 27 decisions by Ministerial councils and intergovernmental standard-setting bodies reported during the year to 31 March 2003 satisfied CoAG requirements. The compliance rate of 89 per cent represented a decline on the 97 per cent rate in the previous year, but an improvement on the 71 per cent compliance rate reported in the ORR's first report to the Council (which covered the 11 months to 31 May 2001). Of the 27 decisions reported over the year to 31 March 2003, the ORR considered six to be more significant than others, based on the magnitude of the problem and the regulatory proposals, and the scope and intensity of the proposals' impacts on the affected parties and the community. Two of these six decisions were made without complying with CoAG requirements: (1) the introduction of mandatory comparison of interest rates and (2) the acceptance of the Ipp recommendations on public liability.

The ORR attributes the decline in compliance in the latest reporting year to the following factors:

- the allocation of decision-making in some cases to ad hoc groups or committees that are not aware of CoAG requirements;
- some Ministerial councils' lack of awareness of the requirements, possibly due to the alternating of the secretariat function between jurisdictions;
- some decision-making bodies not being aware that the CoAG requirements extend beyond legislation to decisions implemented through other means;
- a mistaken belief in some cases that a CoAG RIS is not required if a decision on a broad national approach necessitates a regulatory response at the State or Territory level; and
- deliberate non-compliance with the CoAG requirements.

The ORR notes that several secretariats of Ministerial councils and intergovernmental standard-setting bodies have sought to improve the quality of their adherence to the CoAG requirements. Further, the ORR has continued to provide relevant government officials with training on the requirements.

Assessment

The compliance indicators show that jurisdictions' adherence during 1 April 2002 to 31 March 2003 to CoAG's requirements for preparation of RISs was not of the high standard achieved in the previous year. The Council encourages Ministerial councils and intergovernmental standard-setting bodies to adhere to the CoAG approach to making regulation. A particular

concern is the ORR's view that some decision-makers did not prepare a RIS despite knowing the RIS requirements.

Except when facing deliberate noncompliance, the secretariats of Ministerial councils can help to improve compliance by ensuring Ministers and new officials are regularly briefed on the CoAG principles and guidelines for setting standards and taking regulatory action. Such action would alleviate the adverse impact on institutional memory of the significant rate of turnover of the Ministerial council secretariats.

