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* (Cwlth) within 30 days of the legislation being enacted or made.

Section 51(1) of the Trade Practices Act (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 lists 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 2004 NCP assessment, only one government has advised the ACCC that it has enacted legislation relying on s51(1) of the TPA.

On 14 October 2004, the Western Australian Government notified the ACCC that the Electricity Industry (Wholesale Electricity Market) Regulations 2004 were gazetted on 30 September 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.

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 on 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.

In June 2004, COAG made changes to its principles and guidelines and also to protocols for the operation of ministerial councils (see box 5.1).

Box 5.1: Changes to principles and guidelines of the Council of Australian Governments

The following changes were made to enhance the application of the principles of good regulatory practice by COAG, ministerial councils, intergovernmental standard setting bodies and bodies established by government to deal with national regulatory issues and problems.

- It is clarified that the guidelines apply to COAG, as well as to ministerial councils and national standard setting bodies and bodies preparing advice to ministerial councils/standard setting bodies.
- Minor or machinery regulatory matters and 'brainstorming' by ministers are exempt from regulation impact statements (RIS) requirements.
- For multi-staged decision making, follow-up RISs for regulation implementing the original decision will not generally be required.
- The National Competition Principles Agreement is explicitly acknowledged.
- The importance of early consultation with the Office of Regulation Review (ORR) and forward notice of the preparation of a RIS is noted.
- Where a trans-Tasman issue is involved, the ORR is to refer the draft RIS for consultation to the ORR's counterpart in the New Zealand Government.
- It is clarified that the final RIS for the decision makers is to be provided to the ORR for assessment.
- Provision is made for genuine regulatory emergencies, with the ORR able to 'post assess', within 12 months, the briefing material prepared for the decision makers.
- The independent role of the ORR is clarified, including a reference that the ORR not comment on the merits of regulatory proposals or support any particular jurisdiction.

Changes to the principles and guidelines also relate to the content of RISs:

- The principles of the Trans-Tasman Mutual Recognition Arrangement must be adequately considered.
- A RIS should consider the impact on business and on the broader community.
- Requirements to document compliance costs and small business impacts are more robust.

Source: appendix A.

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 2004 to 31 March 2005 is reproduced in appendix A. It revealed that:

- an adequate consultation RIS was prepared for 83 per cent of matters, slightly above the 82 per cent compliance rate achieved in the previous reporting period
- of the 24 decisions by ministerial councils and national standard setting bodies, compliance with COAG's requirements was 88 per cent—the same as the rate achieved in the previous reporting period, but lower than the 96 per cent achieved in the 12 months to 31 March 2002.

Of the 24 decisions reported over the year to 31 March 2005, the ORR considered six to be more significant than others, based on the nature and magnitude of the problem and the regulatory proposals for addressing it, and on the scope and intensity of the proposals' impacts on the affected parties and the community:

1. the decision by the Australian Building Codes Board to amend the Building Code of Australia to introduce construction standards aimed at reducing residential amenity problems caused by the transmission of sound between units in multi-unit dwellings

2. the decision by the Ministerial Council on Energy to revise minimum energy performance standards for three-phase electric motors

3. the decision by the Ministerial Council on Energy to introduce new performance standards for commercial refrigeration cabinets

4. the decision by the National Occupational Health and Safety Commission to amend the national exposure standard for crystalline silica in the workplace

5. the agreement by COAG to the National Water Initiative

6. the agreement by COAG to the national regulation of ammonium nitrate.

The ORR reported that RISs for all but the last decision complied with COAG's requirements at the consultation and decision making stages. (The National Water Initiative had qualified compliance at consultation.) For the national regulation of ammonium nitrate, the COAG requirements were met at the decision making stage but not the consultation stage. In sum, the compliance results for the six matters of 'greater significance' were 83 per cent at consultation and 100 per cent at decision making.

The ORR's report also provided compliance statistics for the period 2000–01 to 2004–05. It noted that the main reasons for noncompliance include:

- poor understanding of COAG's requirements and the scope of their application

- poor understanding of the regulatory impacts of national decision making

- a lack of contact with the ORR before consultation on regulatory proposals and also before decision making

- a lack of follow-up on ORR advice.

The Council encourages ministerial councils and intergovernmental standard setting bodies to adhere to the COAG approach in making all regulations. COAG's strengthening and clarification of the principles and guidelines (box 5.1) will likely encourage improved decision making processes.