Report to the National Competition Council on the setting of national standards during the period 1 July 2000 – 31 May 2001

Office of Regulation Review
Productivity Commission
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1. Background

In April 1995, Australian governments entered into several agreements allied to competition policy and reform. The amounts and conditions of related competition payments from the Commonwealth to the States and Territories were set down in the 'Agreement to Implement the National Competition Policy and Related Reforms'. For the Third Tranche of competition payments, to commence in 2001-02, factors to be taken into consideration by the NCC are to include advice from the Office of Regulation Review on compliance with COAG's *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-setting Bodies*.

This report to the NCC provides such advice.

2. The COAG *Principles and Guidelines* and the advisory and monitoring role of the Office of Regulation Review

Commonwealth-State/Territory coordination takes place through some 40 Ministerial Councils and a few national standard setting bodies. Agreements made by them are commonly implemented by laws and regulations. In April 1995, prompted by concerns that standards should be the minimum necessary and not impose excessive requirements on businesses, COAG agreed that proposals put to Ministerial Councils and standard-setting bodies should be subject to a nationally consistent assessment process, as set out in *Principles and Guidelines*. The major element of the process is the completion of Regulation Impact Statements (RISs). For purposes of applying these requirements, COAG took a very wide view of regulation as "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." (p. 4)

The principal responsibility of the Office of Regulation Review (ORR), which is part of the Productivity Commission, is to provide advice and assistance to officials in the preparation of RISs for Commonwealth regulatory proposals that affect businesses. Around 200 Commonwealth RISs were prepared and made public in 1999-2000. The ORR also monitors and reports on compliance with the Commonwealth requirements. It plays a similar role in relation to RISs that must be prepared for Ministerial Councils and standard setting bodies, including monitoring compliance with COAG's *Principles and Guidelines*. The ORR assesses these RISs

at two stages: before they are distributed for consultation with parties affected by the proposed regulation and again at the time a decision is to be made by the responsible body. The ORR must 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;

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

It is not the ORR's role to advise on policy aspects of options under consideration, but rather to advise on the assessment of the benefits and costs of these options; and to determine if the analysis is adequate. The assessment remains the responsibility of the relevant Ministerial Council. There is a requirement that the "Council or body should provide a statement certifying that the assessment process has been adequately undertaken and that the results justify the adoption of the regulatory measure" (*Principles and Guidelines* p. 12).

Allied to the ORR's role, the NCC has asked it to report what matters failed to meet COAG's *Principles and Guidelines* during the period 1 July 2000 – 31 May 2001, and what matters did comply. Because it is not appropriate to assess the question of compliance until a decision by the responsible body has been made, this report covers only those matters that reached the decision stage during that period. Matters that are of a minor nature or that are essentially about the application and administration of regulation have been excluded from this report. The information in this report will assist the NCC in assessing the possible ramifications of the failures to comply.

As will be evident in this report, the ORR occasionally learns only after the event of decisions made by Ministerial Councils that should have been subject to COAG's *Principles and Guidelines.* From the ORR's perspective, there appear to be two principal reasons for this. Firstly, some Ministerial Councils may not appreciate the wide interpretation (see above) given to regulatory matters, indicating that COAG's *Principles and Guidelines* should be applied to decisions on broad plans and strategies having regulatory implications, as well to decisions on guidelines and codes of practice. There is a related mis-perception that RISs need only be prepared later when specific regulatory instruments are developed. Secondly, the rapid turnover of officials working in secretariats for some Ministerial Councils could detract from having sufficient "institutional memory" to know about and apply COAG's *Principles and Guidelines*.

3. Matters for which COAG requirements were not met

The ORR has identified twenty one matters that should have been subject to the COAG requirements (and reached the decision stage) between 1 July 2000 and 31 May 2001. Of these, the requirements appear not to have been met for six. Ranked in an indicative order of their importance, those six are:

- 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.

3.1 Food Standards Code

On 24 November 2000 a Ministerial Council, the Australia New Zealand Food Standards Council (ANZFSC), decided to adopt a new joint food standards code, including new mandatory percentage labelling of key ingredients for food. Ministers also agreed to extend existing mandatory nutritional panels to all foods, rather than just those that make nutritional claims.

The ORR had worked with officials at the Australia New Zealand Food Authority (ANZFA) for more than a year to develop RISs on these two issues — percentage labelling and enhanced nutrition labelling. ANZFA also drew on work undertaken very late in the policy development process by Allen Consulting on the costs of the two proposals; there was no complementary analysis of the nature and degree of importance of the likely benefits.

While there was a fairly wide range of estimates as to the potential costs, they clearly are substantial. At the low end, ANZFA contended that the implementation costs of percentage labelling and more extensive nutritional labelling would be of the order of $118 million, with annual ongoing compliance costs of some $33 million. At the high end, the Australian Food and Grocery Council claimed that a KPMG report indicated implementation costs of up to $400 million and ongoing annual costs of $55 million. The benefits are likely to be mainly in the form of better information for consumers and in improved public health. While it should be acknowledged that measuring such benefits may be difficult, COAG's *Principles and Guidelines* clearly require that there must be sufficient analysis (which may be

qualitative) of the benefits to demonstrate that they are likely to be greater than the estimated costs. No such analysis was undertaken. Indeed, as to the effectiveness of nutrition labelling in improving public health, there appears to be no reduction in diet related illness in the Australian community despite existing voluntary labelling on 50-70 per cent of food products.

In the ORR's assessment, the overall cost/benefit analysis was inadequate to support the joint code, and these two proposals in particular. On 15 November 2000, just before the Ministerial Council's decision, the ORR formally advised the relevant COAG officials' group — the Committee on Regulatory Reform — that the RIS did not contain adequate analysis. ANZFA officials were advised of this action.

The NCC's attention is drawn to the fact that on the day that the Council adopted, by a majority, the new food standards code, the responsible Commonwealth Minister (the Parliamentary Secretary for the Minister for Health and Aged Care) issued a media release stating that:

- "New percentage labelling requirements … would impose an unjustified cost on industry, especially small manufacturers, and not provide useful information for consumers …"

and

- "the adoption of nutrition information panels on all packaged food and the listing of allergens, gives useful information which has an impact on public health and safety".

The NCC should also be aware that ANZFSC agreed to a two-year implementation period to enable industry to minimise their costs. Further, Ministers set up an inter-governmental task force to report on issues such as whether very small businesses should be exempted and on strategies for practical and lowest cost implementation of the code. The report of that taskforce was to have been completed by March 2001.

3.2 Labelling of genetically modified foods

On 28 July 2000, 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. ANZFA has advised the ORR that the basis of this decision was a document *Report on the costs of labelling genetically modified foods*, prepared in March 2000 by the consultant KPMG for an intergovernmental taskforce established by the Ministerial Council (ANZFSC).

However, the ORR had examined that document and advised Commonwealth decision makers on 17 May 2000 that the KPMG document did not meet the Commonwealth's requirements for making regulation; accordingly, it did not meet the (similar) COAG requirements either.

It is difficult to gauge the magnitude of the impacts of this measure. On the cost side, the specific exemptions granted by the Council's decision had not been costed by KPMG. A further complication is that the existence of exemptions typically adds to the administrative and compliance costs of any regulatory arrangement. Costs will depend also on the type of compliance regime that is implemented. However, available estimates in excess of $100 million for implementation and $30 million annually in ongoing costs suggest substantial impacts.

There will be benefits in the provision of additional information to consumers, which may be difficult to quantify. Nevertheless, there was an onus on the Ministerial Council to demonstrate that the potential benefits of its decision are likely to be at least commensurate with the costs. As the KPMG report looked only at costs, and there is no evidence of any (even qualitative) analysis of the benefits having been prepared by the taskforce for ANZFSC, the ORR concludes that COAG's *Principles and Guidelines* were not satisfied.

On the day of the ANZFSC decision, the relevant Commonwealth Minister (the Parliamentary Secretary for the Minister of Health and Aged Care) issued a press release with the following comments.

- "I am disappointed that the decision today will require industry to test and determine whether DNA is present in the areas of highly refined ingredients, processing aides, food additives and flavourings.
- The Commonwealth's position would have allowed blanket exemptions whilst still delivering world's best practice information to consumers.
- The new regulations will impose a financial cost on industry and this will be reflected in the cost of food to consumers.
- The Commonwealth will now be talking with stakeholders to assess the impact on costs and export competitiveness as a result of the new labelling regulations."

3.3 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. But they are guidelines endorsed by an advisory council of senior Commonwealth and State officials, and they do appear to be covered by the COAG

Principles and Guidelines. This is because the passive smoking guidelines 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, they seem to fit 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" (*Principles and Guidelines*, p. 4).

The ORR advised the Commonwealth Department of Health and Aged Care during the early stages of the preparation of a RIS. However, the ORR failed in its subsequent attempts between April and August 2000 to ensure that COAG's requirements for the preparation of an adequate RIS were met. Furthermore, the ORR understands that no RIS was provided to the Advisory Council when it endorsed the guiding principles and core provisions for regulation of passive smoking. The ORR formally reported on these developments to the COAG Committee of Regulatory Reform on 13 February 2001.

As to the nature and magnitude of the costs and the benefits of the regulation of passive smoking, the ORR judges that both could be substantial. Such regulation is likely to impose costs or losses on a wide range of hotel, club, restaurant and entertainment industries. It has ramifications for the structure of venues and the effectiveness of air conditioning systems, and it could reduce patronage. On the other hand, both staff and patrons would benefit from a smoke-free environment and there would be reduced long-term health care costs. It is proposals with such substantial costs and benefits that the RIS process is intended to guide.

3.4 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 is in support of a national strategy to reduce the fatality rate on Australian roads by 40 per cent over the next decade. It has been presented as a menu of options from which the States and Territories may select in order to help achieve this target. While many of the options are not regulatory, the Plan contains some that clearly are regulatory and, if implemented, would not be optional for the States and Territories. Regulatory examples 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.

It might be argued that the Plan is very broad in scope and therefore not amenable to the RIS process of assessment, but a case can be made that ATC should have abided by COAG's *Principles and Guidelines* before endorsing such a program.[1] In particular, there is no evidence that analysis was "applied to the identified costs and benefits and a conclusion drawn on whether regulation is necessary and what is the most efficient regulatory approach" (*Principles and Guidelines* p. 5).

There can be little doubt about the substantial community-wide benefits of a 40 per cent reduction in road fatalities. Yet the wide 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 a more effective take-up of the options among the States and Territories.

The ORR was not consulted on this plan, and learned of it well after the ATC meeting.[2] Nevertheless, there remains the opportunity to undertake impact analysis before tangible action is taken on individual options.

3.5 Pay Day Lending and the Consumer Credit Code

On 8 November 2000, the Ministerial Council on Consumer Affairs agreed to amend the Consumer Credit Code to include Pay Day Lenders. The Consumer Credit Code had previously not applied to loans of less than 62 days duration. Typical pay day advances have a duration of 7 to 21 days and are for relatively small amounts. The Council's decision was based on a Queensland Government document *Pay Day Lending — A Report to the Minister for Fair Trading*.

Queensland had the responsibility for drafting the proposed changes before the other States and Territories replicated the changes. The Queensland Department of

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[1] This example illustrates a common practice in policy development of first setting a broad strategy and then, in a staged process, developing plans and introducing specific measures, some of which are regulatory. If the analysis required by COAG is left too late, there is a risk of particular options having become preferred, despite evidence favouring more cost-effective alternatives.

[2] A view that strategic plans should be excluded from COAG's requirements (see Section 2) appears to have resulted in another, more recent, example where the ORR was not consulted. When the ATC met on 25 May 2001, it endorsed an emissions abatement package for urban transport. The ORR did not obtain any information on this matter until 31 May 2001, allowing insufficient time before completion of this report to assess whether there are regulatory implications that would have required preparation of a RIS for the ATC.

State Development assessed that the proposed changes did not trigger Queensland's RIS requirements, apparently because they were regarded as closing a loophole in the Code. In contrast, the ORR interprets the COAG *Principles and Guidelines* as requiring justification of any substantial extension to the scope of existing regulation.

When the ORR became aware that the decision had been made without a RIS having been prepared, it examined the report to determine if it contained the essential elements of a RIS. The level of analysis in the document was found not to be adequate — it fails to clearly identify the costs and benefits to the stakeholders of each of the options considered. The report also fails to assess the adequacy of the existing body of law (contract law) on the behaviour of pay day lenders.

3.6 Vocational and educational training

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. Firstly, 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'. Secondly, it was decided to strengthen the Australian Recognition Framework for skills by, for example, introducing auditable standards and by implementing a nationally consistent set of sanctions.

Following examination of these issues, the ORR reports that they should be viewed as part of a continuous improvement process designed to simplify the VET system, thus reducing compliance costs, and are not substantial in terms of failing to meet COAG's requirements.

Now that the relevant officials are aware of COAG's requirements, a RIS is to be prepared for the Council prior to implementation of the 'model clauses'.

4. Cases of qualified compliance with COAG requirements

Determining whether or not the COAG requirements have been met is not always clear cut. In order to give the NCC a clear picture of factors the ORR takes into account, two such cases are described in this section: a national standard for the storage and handling of dangerous goods, and a voluntary industry code of conduct for inbound tourism operators.

4.1 Dangerous Goods

On 1 December 2000, the Workplace Relations Ministers' Council agreed on a national standard for storage and handling of dangerous goods. A quite detailed RIS had been developed, in consultation with the ORR, prior to that time. The RIS suggested that costs of the standard are likely to be of the order of $200 million, and benefits expected also to be around $200 million.

The ORR advised that the COAG requirements had been met, but pointed out that whether a net benefit results from the standard depends heavily on achieving a 50 per cent reduction over 10 years in the number of adverse events with dangerous goods, in stark contrast with the failure of current regulations to reduce such events.

These qualifications were provided in the secretariat's briefing for the Ministerial Council and thus presumably would have been taken into account in the decision. This is a good example of what the COAG *Principles and Guidelines* are intended to achieve — that those setting national standards have before them a soundly based assessment of the likely impacts of the proposal.

4.2 Inbound tourism operators

On 26 July 2000, the Tourism Ministers' Council decided to write to the Inbound Tourism Operators' Association, giving strong support for the development and introduction of a voluntary industry code of conduct. This was in response to concerns that some packages for foreign tourists to Australia may involve excessive or secret commissions, misleading representations of travel components or quality of accommodation, and low service quality. As explained earlier, such endorsement of a voluntary industry code of practice is intended to be covered by the COAG *Principles and Guidelines*.

In this case, no RIS was prepared. However, the Council's decision was informed by a report that was commissioned by a consultant — the Centre for International Economics. When the ORR became aware of the Council's decision, it examined the consultant's report and assessed that it included the essential elements required in a RIS. While COAG's requirements would have been more properly met had the ORR been given the opportunity to make such an assessment prior to decision, it is apparent that the Council was provided with a sound basis for its decision.

5. Compliant regulatory matters

The following matters that were subject to COAG *Principles and Guidelines* and reached the decision stage during 1 July 2000 – 31 May 2001, satisfied the requirements.

Measure	Body responsible	Date of decision
1. New administrative arrangements for food regulation	COAG	3 November 2000
2. Uniform food legislation	COAG	3 November 2000
3. Australian Design Standard to mandate the fitting of engine immobilisers	Australian Transport Council (ATC)	29 December 2000
4. National Code of Practice for the Defined Interstate Rail Network Vol 1-3	ATC	25 May 2001
5. National Standard for Commercial Vessels — Part D, Crew Competencies	ATC	25 May 2001
6. National compliance and enforcement regulatory scheme for heavy vehicle mass, dimension and load restraint.	ATC	1 November 2000
7. Annual adjustment procedure for heavy vehicle charges	ATC	25 May 2001
8. Policy framework for performance based standards for heavy vehicle regulations	ATC	25 May 2001
9. Response to the national review of petroleum (submerged lands) legislation	Australia New Zealand Minerals and Energy Council (ANZMEC)	25 August 2000
Minimum energy performance standards for 10. air conditioners; and 11. electric motors.	ANZMEC	Out-of-session decision process almost complete by end-May 2001
12. Model code of practice for the welfare of animals — livestock (including poultry) at slaughtering establishments	Agriculture and Resources Management Council of Australia and New Zealand	Out-of-session decision endorsed 18 August 2000
13. Food safety standards - food safety practices and general requirements - food premises and equipment	ANZFSC	28 July 2000