Appendix B Commonwealth Office of Regulation Review: report on compliance with national standard setting

This appendix contains the Commonwealth Office of Regulation Review's *Report to the National Competition Council on the setting of national standards and regulatory action: 1 April 2002 — 31 March 2003*. The Office of Regulation Review provided this report to the Council on 19 June 2003.

The Office of Regulation Review works closely with Ministerial councils and other standard-setting bodies, advising them on applying COAG principles and guidelines for setting standards and regulations. The office advises these bodies on the adequacy of their regulatory impact statements before they are circulated to affected parties, and again before the final standard-setting decisions are made. The office's involvement with the Ministerial councils and standard-setting bodies informs the preparation of its report to the Council.

Prior to providing its report to the Council, the office circulated a draft report to Ministerial councils and other national standard setting bodies for comment. The office also provided the draft report to the Department of the Prime Minister and Cabinet, competition policy units and regulatory review units in the Commonwealth, States and Territories. This consultation process assists the final report's accuracy and its appraisal of the regulatory impact analysis process undertaken before a decision is made on each new national standard or regulation.

The Office of Regulation Review's report to the Council is discussed in chapter 6 of volume 1.

1. Background to the Office of Regulation Review's (ORR's) report

1.1 Council of Australian Governments requirements

In April 1995, the Council of Australian Governments (COAG) agreed to apply a nationally consistent assessment process to proposals of a regulatory nature considered by Ministerial Councils and national standard-setting bodies (NSSBs). The agreement arose from concerns about the negative impacts of regulations and standards on business and the community. The agreed assessment process is set out in the COAG *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG 1997 as amended).

The major element of the assessment process is the preparation of Regulatory Impact Statements (RISs). A RIS considers and documents alternative approaches to resolve identified problems, and assesses the impacts of each option on different groups and the community as a whole.

A COAG RIS needs to be prepared for proposals having a national dimension which, when implemented by jurisdictions, would result in regulatory impacts. It is used as part of community consultation and as an aid to the decision making bodies.

1.2 The role of the Office of Regulation Review (ORR)

The Office of Regulation Review (ORR) advises decision makers on the application of the COAG *Principles and Guidelines* and monitors and reports on compliance with these requirements. This includes assessing RISs prepared for Ministerial Councils and NSSBs. The ORR assesses the RISs at two stages: before they are distributed for consultation and again just prior to a decision being made. At each stage it advises the decision making body of its assessment. The ORR's assessment considers:

- whether the 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.

The COAG *Principles and Guidelines* state that 'public consultation is an important part of any regulatory development process' and a COAG RIS is required for consultation. However, the COAG requirements make it clear that the depth of analysis in the consultation RIS need not be as great as in the final document for decision makers. In contrast, the final RIS should reflect the additional information and views collected from those consulted, and provide a more complete analysis.

In assessing whether the COAG requirements have been met, the ORR has taken into account the requirement for an adequate RIS at both the consultation and final decision stages in its overall assessment of compliance.

Another role for the ORR in relation to Ministerial Councils and NSSBs stems from the COAG *Agreement to Implement the National Competition Policy and Related Reforms* (COAG 1995). This requires that, when considering the conditions and amounts of competition payments from the Commonwealth to the States and Territories, the NCC take account of advice from the ORR on compliance with the COAG *Principles and Guidelines*.

This report addresses this obligation for the period 1 April 2002 – 31 March 2003. It is the third report by the ORR to the NCC dealing with regulation making by Ministerial Councils and NSSBs.

2. The focus and scope of the ORR's report

In its reports to the NCC, the ORR excludes two categories of decisions made by Ministerial Councils or national standard-setting bodies, because a COAG RIS is considered not to be necessary. The first category involves decisions which have a low significance in terms of the scope and magnitude of community impacts and, as a consequence, the RIS process would add little additional value. The second category comprises decisions that are more of an administrative than of a regulatory nature. These decisions are essentially about applying an existing regulatory framework to a new set of circumstances without consideration of other regulatory options.

In most of the remaining cases, there is general consensus between the ORR and the relevant decision makers on the types of regulatory decisions and agreements covered — and not covered — by the COAG *Principles and Guidelines*. Furthermore, there is usually agreement regarding how the COAG RIS requirements should be applied. However, the application of the COAG requirements is not always clear cut. Some explanation of these complex areas, and their relevance to the ORR's report, is provided below.

2.1 Scope of decisions covered by the COAG requirements

The COAG *Principles and Guidelines* cover regulatory decisions that ' … would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done' (COAG P&Gs, p. 4). While noting that Ministerial Councils and other regulatory bodies commonly reach agreement on standards or main elements of a regulatory approach which are then given force through principal or subordinate legislation, COAG went further by defining regulation to include:

> … *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.* (COAG P&Gs, p. 4)

As such, the scope of decisions covered by COAG's requirements is wide, and includes agreements on regulatory approaches, standards and measures of a quasi-regulatory nature.

2.2 Decision making groups covered by the COAG requirements

The COAG *Principles and Guidelines* state that they 'apply to decisions of Ministerial Councils and inter-governmental standard-setting bodies, however they are constituted, and include bodies established statutorily or administratively by government to deal with national regulatory problems' (COAG P&Gs, p. 4).

On occasion ad hoc bodies of Commonwealth, state and territory Ministers (and sometimes delegated senior officials) — rather than standing Councils of Ministers or national standard-setting bodies — are established to address and resolve regulatory issues considered to have a national dimension. These ad hoc bodies can be tasked with making decisions that will result in significant regulatory impacts.

In view of COAG's broad definition of what constitutes an inter-governmental body for the purposes of the COAG requirements, the ORR has advised such bodies of the need to comply with the COAG *Principles and Guidelines*.

Further, from time to time COAG itself makes decisions dealing with national regulatory problems. While COAG is not bound by the *COAG Principles and Guidelines*, it would expect, when considering regulatory proposals put to it for endorsement, that its requirements for good regulatory practice have been met. Accordingly, the responsibility for compliance with the COAG requirements rests with the body putting the regulatory proposals to COAG.

2.3 Decisions leading to possible duplication of RIS processes

In relation to decisions requiring national implementation, the subsequent development of legislation in each jurisdiction may require the development of state or territory specific RISs to meet the RIS requirements of individual jurisdictions. This raises the question as to whether the preparation of a COAG RIS is duplicative and therefore unwarranted.

The COAG *Principles and Guidelines* do not include an exemption from the COAG RIS requirements in such situations. As stated in the ORR's second report to the NCC, preparation of an adequate COAG RIS provides a solid analytical base with a nationwide perspective for (what might be described as) the overarching decision taken by the inter-governmental body and, if required, for the later preparation of a more focused RIS at the state or territory level. Moreover, a COAG RIS can guide the legislative reforms undertaken in each jurisdiction from a carefully analysed starting point. It is also the case that states and territories may, where applicable, forgo their own RIS requirements if an adequate COAG RIS has been prepared.

3. Matters for which COAG's requirements were met

Table B.1 documents the 24 decisions made during the period 1 April 2002 – 31 March 2003 where the COAG RIS requirements apply and were met. This table includes a brief description of the regulatory measure, the decision making body and the date of the decision.

Table B.1: Cases where COAG RIS requirements were met

Measure	Body responsible	Date of decision
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 (AHMC)[1]	5 April 2002
Adoption in the Food Standards Code of a new standard for infant formula	Australia New Zealand Food Standards Council (ANZFSC)[2]	May 2002
Update the provisions for residential buildings used for the accommodation of the aged to align with the Commonwealth Aged Care Act 1997	Australian Building Codes Board (ABCB)	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 (PIMC)	2 May 2002
Australian Standard for the Hygienic Rendering of Animal Products	PIMC	2 May 2002
Model code of practice for the welfare of animals (domestic poultry)	PIMC	2 May 2002
Track, Civil and Infrastructure Code (Volume 4 of the Code of Practice for the Defined Interstate Network)	Australian Transport Council (ATC)	6 May 2002
Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields - 3kHz to 300GHz	Australian Radiation Protection and Nuclear Safety Agency (ARPANSA)	7 May 2002
National Standards for Group Training Companies	Australian National Training Authority (ANTA) Ministerial Council	24 May 2002
National Standard for Commercial Vessels - Part B General Requirements	ATC/National Marine Safety Authority	Out-of-session decision; process completed by July 2002
National Standard for Commercial Vessels - Part C Section 5 (Engineering)	ATC/National Marine Safety Authority	Out-of-session decision; process completed by July 2002
National Standard for Commercial Vessels (NSCV) - Part F Subsection 1A and 1B - Category F1 Fast Craft	ATC/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 (ANZFRMC)	30 August 2002
Endorsement of recommendations arising from the NCP review of Radiation Protection Legislation	AHMC	10 October 2002
Model code of practice for the welfare of animals (the farming of ostriches)	PIMC	10 October 2002

(*continued*)

Table B.1 continued

Energy efficiency measures in housing provisions of the Code	ABCB	1 November 2002
Nationally consistent legislative framework for key aspects of the national vocational education & training (VET) system ('model clauses')	ANTA Ministerial Council	15 November 2002
Permission in the Food Standards Code for the importation of raw milk very hard cooked-curd cheeses	ANZFRMC	6 December 2002
Requirements for certain warning statements for products containing royal jelly, bee pollen and propolis	ANZFRMC	9 December 2002
Australian Design Rule for fuel consumption labelling	ATC	September 2002
Freight Loading Manual (Component of Volume 5 of the Code of Practice for the Defined Interstate Network)	ATC	20 December 2002
Review of Australian Design Rules for vehicle noise	ATC	February 2003
Technical Review Recommendations for the Draft Disability Standards for Accessible Transport	ATC	6 March 2003
Compulsory vaccination of poultry for Newcastle disease	PIMC	13 March 2003

1. The RIS was prepared for final consideration of the proposal by the Australian Health Ministers' Conference. This was overtaken by COAG's decision on the proposal on 5 April 2002.

2. On 1 July 2002 the Australia New Zealand Food Standards Council was replaced by the Australia and New Zealand Food Regulation Ministerial Council.

4. Matters for which COAG's requirements were not met

Table B.2 indicates that, during the period 1 April 2002 – 31 March 2003, the COAG RIS requirements were not met in 3 cases. It also includes a brief description of the regulatory measure, the decision making body and the date of the decision. Commentary on the individual decisions, including the reasons why the decisions are considered to be non-compliant, is provided below the table.

Table B.2: Cases where COAG RIS requirements were not met

Measure	Body responsible	Date of decision
Uniform consumer 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[1]	28 November 2002

1. The regulatory proposals were agreed by the Australasian Police Ministers' Council on 28 November 2002 and most were endorsed by COAG on 6 December 2002.

Commentary on non-compliant decisions

Uniform consumer credit code - mandatory comparison of interest rates

In April 2002, under the auspices of the Ministerial Council on Consumer Affairs (MCCA), mandatory comparison rates amendments were adopted into the Uniform Consumer Credit Code (UCCC).[1] The amendments introduced two key concepts: any advertisement that includes an interest rate must also include the comparison rate[2]; and a schedule of comparison rates must be displayed and made available to consumers. The amendments also prescribe the precise content and manner in which the comparison rate can be calculated and displayed.

1 *Consumer Credit Code (Queensland) Amendment Act 2002.*

2 The comparison rate is a method of reducing the total cost of a loan, including interest and all fees and charges, to a single percentage rate.

In August 2001, the ORR advised the MCCA and the COAG Committee on Regulatory Reform (CRR) — prior to the Council's decision — that the COAG *Principles and Guidelines* should be followed and a RIS should be prepared. The ORR confirmed its advice in September 2001. This advice reflected on the NCP Review of the Consumer Credit Code which stated, on page 105, that:

> *If there is to be mandatory disclosure, it should be directed at key information that consumers are likely to use. Further research is required to ascertain what information the consumer actually finds useful and also to determine the best method of delivering that information to the consumer.*

While an extensive amount of preparatory work was undertaken in the development of the proposal, no COAG RIS on the mandatory comparison rates issue was distributed for consultation, nor was one presented to the MCCA.

Public liability and the Review of the Law of Negligence

Insurance Ministers held a number of meetings on public liability and public liability insurance during 2002. The Ministerial group progressing reforms in this area comprises relevant Commonwealth, state and territory Ministers and the President/senior Vice President of the Australian Local Government Association. It has been described by COAG senior Ministers as a Commonwealth-State group of Ministers and COAG senior Ministers have endorsed outcomes from its meetings.

During 2002, the group released a number of communiqués citing discussion or agreement on regulatory approaches in the area and the Commonwealth Minister, as chair, issued a number of press releases along the same lines. For example, the Ministers announced in their Communiqué of 27 March 2002 that:

> *Many of the issues are complex and cross-jurisdictional, requiring collective action from governments and industry in the immediate and long term.*

Decisions from this Ministerial group include the acceptance of key recommendations from the Review of the Law of Negligence (the Ipp Report). Its recommendations covered:

- limiting the liability of defendants to only foreseeable, not insignificant, risk;
- allowing findings of 100 per cent contributory negligence by plaintiffs;
- increasing public authority defences to damages claims and limiting claims for mental harm;

- abolishing or limiting legal costs orders for low level damages awards, caps on damages payouts and thresholds to remove small claims from courts; and

- amendments to the *Trade Practices Act 1974* (Cwth) to protect community groups and risky sporting enterprises, as well as preventing the circumvention of national negligence reforms.

The Ministers' Joint Communiqué of 15 November 2002 stated that:

> *Ministers agreed on a package of reforms implementing key recommendations of the Ipp Report. They agreed that the key Ipp recommendations that go to establishing liability should be implemented on a nationally consistent basis and each jurisdiction agreed to introduce the necessary legislation as a matter of priority.*

While the Ipp Report provided a range of options for reform, it did not provide a cost/benefit assessment of its proposals. The RIS requirements were not followed as no RIS was prepared. Accordingly, the policy development process for this agreement was not consistent with the COAG guidelines.

National reform of hand gun laws

In October 2002, the Australasian Police Ministers Council (APMC) was asked by COAG senior Ministers to develop detailed proposals for a national approach to handgun control measures. On 5 November 2002, the APMC reached broad agreement to progress further measures to restrict the availability and use of handguns. Following the consideration of proposals by a Senior Officers' Group, the APMC, at a special meeting on firearms on 28 November 2002, agreed to put forward 19 resolutions for consideration by COAG. On 6 December 2002, these measures were discussed and, in the main, endorsed by COAG.

The proposals developed and considered by the APMC were varied and extensive and included a ban on the importation, sale and ownership of certain sporting hand guns; graduated access to hand guns and minimum participation rates for sporting club members; reporting requirements for sporting clubs concerning members' behaviour and expulsion; and the inclusion of historical gun collectors in the hand gun ban, accreditation and reporting requirements.

The proposals put forward by the APMC for COAG endorsement affect both businesses and individuals. Under the COAG guidelines, the assessment and development by the APMC of the handgun reform proposals should have been the subject of a COAG RIS. The ORR notes the tight timeframe within which the proposals were developed.

5. Compliance in cases of emergency

National regulatory decisions are occasionally made as an urgent matter, for example, when there is a significant and imminent risk to public health and safety. Such cases are rare. They are specifically recognised in the COAG *Principles and Guidelines*, which allows an exemption from the RIS process in an emergency. The exemption must be formally requested from the Prime Minister, and a RIS must be prepared within twelve months of the regulation being made, to ensure that the regulation is justified on the basis of a fully considered analysis. The exemption does not apply where those responsible for meeting the COAG requirements have left the preparation of a RIS until late in the process of developing the proposal.

In July 2001, the predecessor of the Australia and New Zealand Food Regulation Ministerial Council — the Australia New Zealand Food Standards Council — decided to adopt into the *Food Standards Code* provisions relating to bovine spongiform encephalopathy (BSE). This decision was taken as an emergency measure, and was reported in the ORR's second report to the NCC. A RIS has subsequently been prepared which justifies the approach taken.

6. Trends in compliance with COAG RIS requirements

Of the 27 decisions reported during the year to 31 March 2003 (the ORR's third report to the NCC), compliance with COAG's requirements was 89 per cent. This compares unfavourably to the compliance rate for decisions made during the previous reporting period of 97 per cent (the ORR's second report to the NCC). However, it is considerably better than the compliance rate of 71 per cent for the ORR's first report to the NCC covering the period 1 July 2000 – 31 May 2001.

As discussed in the ORR's second report to the NCC, an important consideration in measuring compliance — and changes in compliance over time — is the degree of significance of the decisions made in each period. The ORR has classified each regulatory proposal that requires a RIS as of greater or lesser significance. The criteria for classification are based on:

- the nature and magnitude of the problem and the regulatory proposals for addressing it; and

- the scope and intensity of the proposal's impact on affected parties and the community.

Classifying decisions in this way is intended to provide a better basis on which to apply the 'proportionality rule' that the extent of RIS analysis should be commensurate with the magnitude of the problem.

Of the 27 regulatory decisions reported here, 6 were assessed by the ORR as of greater significance according to these criteria. They are as follows:

- COAG's decision to ban human cloning and other defined 'unacceptable practices', and to regulate the use of stem cell and related research on excess embryos created by assisted reproductive technology;

- the decision by the Australian Transport Council to adopt a Code of Practice for the Defined Interstate Rail Network (Volume 4) setting out nationally consistent principles, recommendations and requirements for the management of Australia's 8000 kilometres of standard gauge rail track and associated civil and electrical infrastructure to reduce inefficiencies and improve transit times;

- ARPANSA's decision to adopt a radiation protection standard for maximum exposure levels to radiofrequency (RF) fields — 3kHz to 300 GHz — to address risks to human health from public and occupational exposure to RF radiation in the telecommunications and radiocommunications industries and various industries that use RF heating and welding;

- the decision by the Primary Industries Ministerial Council that the risks to agricultural production and sustainability of farming systems, and risks to trade in differentiated agrifood products, posed by genetically modified (GM) crops be managed through industry self-regulation supplemented by government monitoring;

- the decision by the Ministerial Council on Consumer Affairs to adopt into the Consumer Credit Code the mandatory requirement for comparison of interest rates; and

- the decisions by the Insurance Ministers on public liability and professional indemnity insurance, responding to the Review of the Law of Negligence (Ipp Report). These propose to substantially alter the operation of the common law throughout all Australian jurisdictions.

The RISs for the first four of these decisions were compliant with COAG's requirements and contained a level of analysis commensurate with the significance and impact of the proposal. For the remaining two decisions, the COAG *Principles and Guidelines* were not followed.

In summary, the compliance result for matters of 'greater significance' for the year to 31 March 2003 is therefore 67 per cent. In contrast, compliance for matters of significance was 100 per cent in the period covered by the ORR's second report to the NCC and 56 per cent for the ORR's first report to the NCC.

Table B.3 summarises compliance results over the periods covered by the three reports.

Table B.3: COAG RIS compliance for regulatory decisions made by Ministerial Councils and NSSBs, 2000-01 to 2002-03[3]

	2000-01	2001-02	2002-03
All proposals	15/21 (71%)	23/24 (96%)	24/27 (89%)
Significant regulatory proposals	5/9 (56%)	6/6 (100%)	4/6 (67%)

7. Compliance issues

The lack of a sustained upwards trend in compliance with COAG's RIS requirements is likely to be due to a number of factors.

First, the allocation of decision making power to ad hoc groups or committees would appear to involve a risk that these decision making processes do not follow best practice, because such groups are not aware of COAG's requirements. The lack of a well-defined secretariat providing support for these ad hoc groups or committees, and an imbued sense of urgency, makes this matter difficult to address.

It also appears that some established Ministerial Councils are not aware of COAG's requirements, even though they have been in place for a considerable period of time. The secretariat function for some Councils alternates among participating jurisdictions and knowledge of the requirements can be lost in the transfer of responsibility. In limited instances, lack of awareness may be due primarily to the creation of new Councils to replace existing Councils.

A third factor is a lack of awareness of the wide scope of regulation covered by the requirements. A number of decision making bodies are not aware that the requirements extend beyond decisions implemented via legislation to include decisions implemented through other means, and to decisions with an indirect regulatory impact on business through the impact on the community as a whole.

[3] Data for 2000-01 relate to 1 July 2000 - 31 May 2001. Data for 2001-02 relate to 1 April 2001 - 31 March 2002. Data for 2002-03 relate to 1 April 2002 - 31 March 2003. Therefore, there is some overlap between the reporting period for the first two reports. However, all decisions covered in both reports (including one on a significant matter) were compliant with COAG's requirements. Therefore, this modest overlap is not seen as significant for the purposes of comparing compliance between the first two periods.

A fourth factor appears to be a mistaken belief held at either the Ministerial or secretariat level that a COAG RIS is not required where decisions are taken on a broad national approach, requiring a regulatory response at the state and territory jurisdictional level.

These factors do not explain all cases of non–compliance reported in this third report to the NCC. Fundamentally, it remains the case that in some instances the RIS requirements have been known and understood, but decisions were still taken without regard to the requirements.

8. Improving compliance

There is clearly a need for improved awareness of the scope of the COAG RIS requirements, the required level of analysis and the role of the ORR. Several secretariats have addressed this during the reporting period.

One case is the agreement between Foods Standards Australia New Zealand (FSANZ) and the ORR to a Protocol to apply to the COAG requirements. This Protocol sets out the obligations of FSANZ and the ORR in respect of the application of the requirements to the work of FSANZ. This allows for a greater focus on regulatory matters of significance, and ensures timely contact between the ORR and FSANZ as regulatory proposals are being developed. The Protocol is expected to improve the quality of regulatory impact assessment over time.

Another case is of a new Council — the Gene Technology Ministerial Council — that has sought to embed the COAG requirements for regulatory impact assessment in its own standard operating procedures for regulatory decision making. In doing this, the Secretariat to the Council drew on the experience of the Australian Health Ministers' Conference that had previously adopted similar procedural arrangements.

Furthermore, in the year to 31 March 2003 the ORR provided training in COAG RIS requirements to approximately 50 relevant government officials.

There may be scope moving forward to increase the use of such arrangements and training, where they enhance and strengthen compliance with the COAG RIS requirements.