
1 Compliance with RIS requirements

Rates of compliance with the Commonwealth Government's RIS requirements in 2000-01 were similar in aggregate to those in previous years. Compliance at the decision-making stage was around 80 per cent, and around 90 per cent at the tabling stage. Compliance for Bills at the decision-making stage was lower in 2000-01 than in 1999-2000, whereas compliance for disallowable instruments improved.

This chapter reports compliance with the Commonwealth Government's Regulation Impact Statement (RIS) requirements by type of regulation. Only those proposals that were subsequently made or tabled in each financial year are reported. Thus, the data exclude RISs prepared for the decision-making stage for many other proposals developed in 2000-01, but not made or tabled prior to 30 June 2001.

Also included is a brief overview of compliance with the Council of Australian Governments' (COAG) RIS requirements that apply to Ministerial Councils and standard-setting bodies. Results for individual Commonwealth departments and agencies are provided in chapter 2.

1.1 Assessment of compliance

The Government requires the Office of Regulation Review (ORR) to monitor compliance with the Government's requirements and the Productivity Commission to report annually on the outcome for primary legislation (Bills) and other forms of regulation. When making its assessment of compliance for those proposals that 'triggered' the Commonwealth RIS requirements, the ORR considers whether:

- a RIS was prepared to inform the decision maker (the policy-approval or decision-making stage);
- the analysis contained in a RIS prepared for the decision maker was adequate;
- a RIS was tabled in Parliament or otherwise made public (the tabling or transparency stage); and
- the analysis contained in a RIS at the tabling stage was adequate.

A portfolio, department or agency is considered to be fully compliant with the requirements only if it meets all the requirements listed above (see box 1.1 for more details on the Government's RIS requirements).

Box 1.1 The Commonwealth Government's RIS requirements

A Regulation Impact Statement (RIS) provides a consistent, systematic and transparent process for assessing alternative policy approaches to problems. It includes an assessment of the impacts of the proposed regulation, and alternatives, on different groups and the community as a whole.

The primary role of a RIS is to improve government decision-making processes by ensuring that all relevant information is presented to the decision maker. In addition, after the decision is made, the RIS is tabled in Parliament or may be published elsewhere, providing an open and transparent account of that decision.

Since March 1997, it has been mandatory to prepare a RIS for all reviews of existing regulation, proposed new or amended regulation, quasi-regulation and proposed treaties involving regulation, which will directly or indirectly affect business, or restrict competition. A limited range of exceptions apply (see *A Guide to Regulation* for details).

The RIS requirements apply to all government departments, agencies, statutory authorities and boards that review or make regulations, including agencies or boards with administrative or statutory independence.

A RIS should be developed, in consultation with the ORR, once an administrative decision is made that regulation may be necessary, but before the Government or its delegated official makes its policy decision to regulate. If there are any doubts as to whether or not a regulatory review or proposed regulation qualifies for an exemption/exception from RIS requirements, the matter should be referred to the ORR at the earliest opportunity. It is important to note that it is the ORR — not individual departments, agencies, statutory authorities or boards — that decides whether a RIS should be prepared.

After receiving advice from the ORR that a draft RIS complies with the Government's requirements and contains an adequate level of analysis, it should be attached to the proposals to be considered by the decision maker — Cabinet, the Prime Minister, Minister(s) or board.

A RIS should be tabled with explanatory material. In the case of treaties, a RIS should be prepared when approval to commence negotiations is sought. It should be updated when approval is sought to sign the final text of a treaty, and made public when the treaty is tabled in Parliament. (The Commonwealth Government must table proposed treaty actions in both Houses of Parliament at least 15 sitting days prior to taking binding action.)

Source: A Guide to Regulation.

The ORR uses a number of criteria to determine whether the analysis contained in a RIS is adequate (box 1.2). It has adopted a strategy whereby a relatively low RIS adequacy standard was applied in 1997-98 (the first year in which their preparation was mandatory). This standard has been progressively increased as officials have become more familiar and experienced with the analytical approach required in RISs. This progressive increase in the adequacy standard means that compliance data are not strictly comparable between years. More specifically, the compliance rate reported for 2000-01 would be slightly higher if assessed against the standards of the previous year.

The ORR has also progressively improved its monitoring techniques and has been more active in ensuring that departments and agencies prepare RISs for the decision maker. In 1999-2000, and again in 2000-01, departments and agencies were asked to substantiate any compliance claims that differed from the ORR's records. In contrast, in 1998-99, they were given the benefit of the doubt in cases where compliance records differed.

Trends in compliance

The annual downward trend in the number of new or amended regulations affecting business continued in 2000-01. Of the 1600 Bills, disallowable instruments and other regulations introduced by the Commonwealth Government, only 157 associated regulatory proposals had a more than minor impact on business or restricted competition and therefore required RISs for the decision-making stage (table 1.1). Departments and agencies prepared 129 RISs of an adequate standard, resulting in a compliance rate of 82 per cent, broadly similar to the outcomes for 1998-99 and 1999-2000.

As shown in table 1.1, the total number of RISs required at the decision-making and tabling stages differs within each reporting period. This difference occurs because there is a formal requirement that RISs be tabled with Bills, disallowable instruments and treaties, and that they be of a standard suitable for publication in explanatory material. RISs for other types of regulation — non-disallowable instruments and quasi-regulation — may be tabled or made public in other ways, but are not subject to formal assessment for this purpose by the ORR.

Box 1.2 Adequacy criteria for Regulation Impact Statements (RISs)

1. Is it clearly stated in the RIS what is the fundamental **problem** being addressed? Is a case made for why government action is needed?
2. Is there a clear articulation of the **objectives**, outcomes, goals or targets sought by government action?
3. Is a range of viable **options** assessed including, as appropriate, non-regulatory options?
4. Are the groups in the community likely to be affected identified, and the **impacts** on them specified? There must be explicit assessment of the impact on small businesses, where appropriate. Both costs and benefits for each viable option must be set out, making use of quantitative information where possible.
5. What was the form of **consultation**? Have the views of those consulted been articulated, including substantial disagreements. If no consultation was undertaken, why not?
6. Is there a clear statement as to which is the **preferred option** and why?
7. Is information provided on how the preferred option would be **implemented**, and on the **review** arrangements after it has been in place for some time?

Relevant to all seven criteria (which correspond to the seven sections of a RIS) is an overriding requirement that the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals.

For proposals which maintain or establish restrictions on competition (such as barriers to entry for new businesses or restrictions on the quality of goods and services available), it must be established that:

- the benefits to the community outweigh the costs; and
- the Government's objective can be achieved only by restricting competition;

both of which are requirements under the *Competition Principles Agreement*.

Finally, apart from the seven criteria outlined above, timing and the extent of consultation with the ORR is also taken into consideration when assessing compliance with the Government's RIS requirements.

Source: A Guide to Regulation.

Table 1.1 Total RIS compliance, 1997-98 to 2000-01

	1997-98 ^a	1998-99	1999-00	2000-01
Decision-making stage	137/287 (37%)	204/260 (78%)	169/207 (82%)	129/157 (82%)
Tabling stage ^b	156/234 (65%)	202/228 (89%)	163/179 (91%)	118/133 (89%)

^a Data for 1997-98 differ from that previously published. The differences arise from changes in the methodology used to calculate regulatory activity introduced in 1998-99 (PC 1999a). ^b Compliance for Bills, treaties and disallowable instruments which are subject to formal assessment for this stage by the ORR.

Source: ORR estimates.

In 2000-01, 133 RISs were required at the tabling stage. Of these, six were not prepared. Of the remainder, the ORR assessed 118 as containing an adequate level of analysis, resulting in a compliance rate of 89 per cent — a similar rate to that achieved in 1998-99 and 1999-2000.

Detailed compliance results by type of regulation are provided in table 1.2.

Table 1.2 RIS compliance, by type of regulation, 2000-01

Regulatory proposals introduced via	Decision-making			Tabling		
	prepared	adequate	%	prepared	adequate	%
Primary legislation (Bills)	44/55	40/55	73	56/56	49/56	88
Disallowable instruments	56/66	56/66	85	69/75	67/75	89
Non-disallowable instruments	18/19	18/19	95
Quasi-regulation	13/15	13/15	87
Treaties	2/2	2/2	100	2/2	2/2	100
Total	133/157	129/157	82	127/133^a	118/133^a	89

.. Not applicable. ^a Compliance for Bills, treaties and disallowable instruments subject to formal assessment for this stage by the ORR. Excludes 15 of 18 RISs prepared for regulatory proposals introduced via non-disallowable instruments that were made public and five of 15 RISs prepared for quasi-regulations that were made public in 2000-01.

Source: ORR estimates.

As in previous years, the number of RISs required at the decision-making and tabling stages for primary legislation (Bills) and disallowable instruments varied. These differences occur for two reasons. First, RISs are not mandatory at the decision-making stage for emergency situations — threats to public health and safety — where there is an urgent need for government action. These situations are

rare, and a RIS still needs to be prepared *after* the decision is made. In 2000-01, several emergency airworthiness directives met this exemption. Second, the decision may have occurred prior to the introduction of mandatory RIS requirements in 1997, but tabling occurred after that time. In 2000-01, one proposal was exempt on these grounds.

On occasion, a RIS prepared for a decision may be modified after the decision is made to remove highly sensitive material, to strengthen the impact analysis, or to align it with the draft legislation it will accompany. In some cases, the changes can affect the adequacy of the RIS. The ORR assesses all RISs altered after the decision-making stage on a case-by-case basis. However, a RIS assessed by the ORR as inadequate for tabling may still be tabled without such indication to the reader. To help overcome this shortcoming, and as part of a further evolution of the Commission's role in reporting on regulatory developments, it is proposed that any RIS tabled in Parliament (as part of Explanatory Memoranda or Explanatory Statements) that does not satisfy the Government's requirements be recorded as such on the Commission's website.

Significance of proposals

The ORR has classified each regulatory proposal that requires a RIS in terms of its economic significance or its potential impact. This is intended to:

- provide a better basis on which to apply the 'proportionality rule' that the extent of RIS analysis needs to be commensurate with the magnitude of the problem; and
- facilitate interpretation of compliance data.

The approach used by the ORR to classify regulatory proposals by significance is outlined in box 1.3.

Compliance by significance

Of the 157 proposals that triggered the Commonwealth Government's RIS requirements in 2000-01, 30 (or 19 per cent) were classified as having substantial impact or significance (that is, significance category A or B). Significance categories have been combined to avoid misleading results associated with a small number of proposals in category A.

In 2000-01, the RIS compliance score for significance categories A and B combined was only 60 per cent — 27 percentage points lower than compliance for the less significant categories C and D combined (table 1.3). This result is cause for some

concern — it suggests that departments and agencies may not be concentrating resources on proposals where the potential payoffs from the RIS process are highest.

Box 1.3 Classifying the significance of proposals

A simple approach to classifying the significance of a regulatory proposal is to consider, first, the nature and magnitude of the proposal (and the problem) and second, its impacts on affected parties. The following examples illustrate this approach.

In terms of the nature and magnitude of proposals, a ban on, say, popular or widespread activities or some other significantly anti-competitive proposal would generally be regarded as 'large'. Placing conditions on activities, such as requiring licences or specific standards typically could be regarded as intervention of a 'medium' nature. Examples of less significant 'small' interventions might be periodic reporting requirements for businesses. Specific examples in 2000-01 include the removal of restrictions on the parallel importing of computer software, which was regarded as 'large', and changes to long stay temporary business visa requirements which were considered 'small'.

Impacts can be viewed from an economy-wide perspective, having regard to both their scope and intensity. The ORR classification involves just two categories — broad and narrow.

An increase in the rate of excise on petrol would, for example, be considered quite broad in its impact. On the other hand, a late night curfew on flights into, say, Coolangatta airport would be relatively narrow in terms of its impacts. A third example might be deregulation of the dairy industry. On the supply side, there might be a relatively narrow industry based impact but, on the demand side, there might be a widely dispersed impact on consumers, which could result in the proposal being classified as 'broad'.

While clearly somewhat subjective, this broad approach is employed to categorise proposals into one of four significance categories — A, B, C or D.

Source: ORR.

Table 1.3 Compliance by significance and timeliness, 2000-01
RISs at the decision-making stage

<i>Significance rating</i>	<i>Required</i>	<i>Adequate</i>	<i>Compliance</i>	<i>Average elapsed time</i>
	<i>no.</i>	<i>no.</i>	<i>%</i>	<i>Weeks^a</i>
More significant (A & B)	30	18	60	2
Less significant (C & D)	127	111	87	9.5
Total	157	129	82	

^a From receipt by the ORR of the first draft of the RIS up to when the ORR formally advised on its adequacy at the decision-making stage. These averages exclude a small number of cases where the elapsed time was exceptionally long.

Source: ORR estimates.

Timeliness

The Government has stated that the purpose of its RIS requirements is ‘to ensure that departments and agencies fully consider the costs and benefits of all viable alternatives, with a view to choosing the alternative with the maximum positive impact’ (CoA 1997, p. 66). With that in mind, last year’s report noted that some departments and agencies had been preparing RISs too late for them to make an effective contribution to policy development.

To gather more information on this matter, the ORR has been tracking elapsed times between receipt of the first draft of the RIS in the ORR and when the ORR advises whether the RIS requirements have been met for the decision making stage. As the first draft of a RIS is typically deficient in at least some aspects, it normally triggers an iterative process whereby the ORR provides comments and the responsible department or agency progressively improves the document. The department or agency’s obligation is to present a RIS (cleared as ‘adequate’ by the ORR) to the decision maker when policy approval is sought.

The ORR’s analysis of timeliness suggests that departments and agencies are spending, on average, relatively less time (but not necessarily employing fewer resources) preparing RISs (for the decision-making stage) for proposals of high impact or significance (table 1.3) than those of lower significance. For proposals with high significance, the average elapsed time was around two weeks. This compares with over nine weeks for less significant proposals.

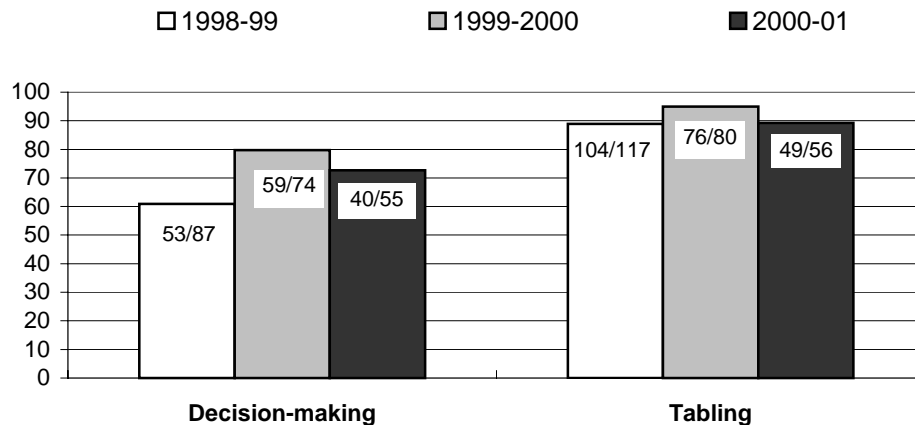
The analysis supports other evidence suggesting that the RIS process could be better integrated into the policy development process of departments and agencies. Achieving better integration of the RIS process is the theme of chapter 3.

1.2 Primary legislation

The Commonwealth Government introduced 148 policy proposals (regulatory and non-regulatory in nature) via 169 Bills into Parliament in 2000-01.¹ Just over 60 per cent of these did not require preparation of a RIS because there was no impact on business or the proposed changes accorded with specified circumstances where a RIS is not required (see *A Guide to Regulation*, pp. A3-A4).

Of the 56 proposals that required RISs, most had a direct impact on business, while some had a significant indirect impact on business or restricted competition. All but one required a RIS at the decision-making stage. Of these, the ORR assessed 73 per cent as containing an adequate level of analysis at the decision-making stage, compared with a compliance rate of 80 per cent at the same stage in 1999-2000 (figure 1.1). As noted above, the ORR continued to increase the adequacy standard in 2000-01, implying that the decline in compliance is likely to be a slight overstatement. Nonetheless, it is significant that some major legislative proposals in 2000-01 were not accompanied by adequate RISs at the decision-making stage (see chapter 2).

Figure 1.1 **RIS compliance for proposals introduced via Bills, 1998-99 to 2000-01**
Per cent



Source: ORR estimates.

Compliance at the tabling stage was 88 per cent in 2000-01 — compared with 89 per cent in 1998-99 and 95 per cent in 1999-2000.

¹ A Bill is a draft of proposed law presented to Parliament and does not become law (an Act) until passed in identical form by both Houses of Parliament and assented to by the Governor-General.

1.3 Disallowable instruments

Disallowable instruments include statutory rules approved by the Governor-General in Federal Executive Council and legislative instruments, made mainly by Ministers or government agencies, which are tabled in Parliament and are subject to review by the Senate Standing Committee on Regulations and Ordinances (SSCRO).

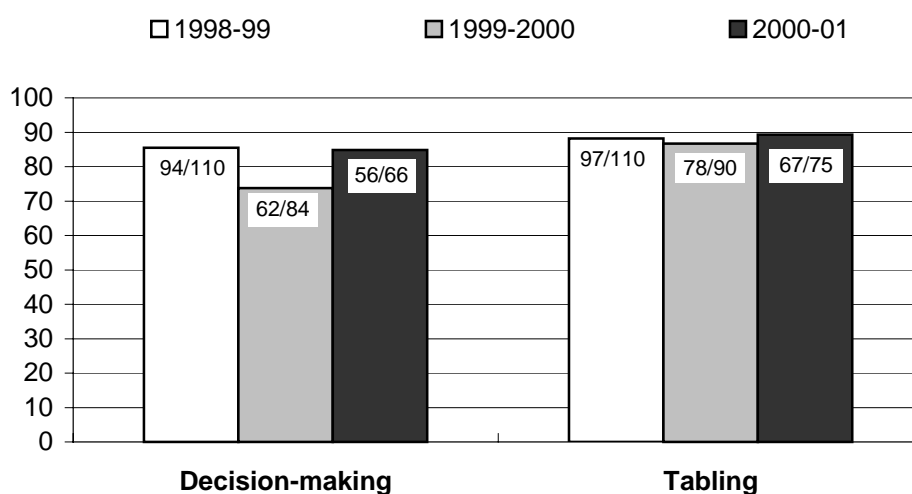
Based on information obtained from SSCRO (2000, 2001) and information reported by departments and agencies, it is estimated that 1438 Commonwealth disallowable instruments were made and tabled in 2000-01. Of these, around 94 per cent either were not likely to have a direct, or a substantial indirect, effect on business and were not likely to restrict competition, or were of a minor or machinery nature and did not substantially alter existing arrangements.

The remaining 75 regulatory proposals (or 6 per cent) made and tabled via disallowable instruments required RISs. This pattern of regulatory activity was similar to previous years, where RISs were required for between 5 and 7 per cent of disallowable instruments made.

Of the 75 proposals requiring a RIS, nine did not require a RIS at the decision-making stage. (Seven of these related to emergency airworthiness directives issued by the Civil Aviation Safety Authority.) Of the 66 proposals that required RISs at the decision-making stage, the ORR assessed 56 to be adequate — a compliance rate of 85 per cent (figure 1.2). This is higher than the 74 per cent compliance rate in the previous year.

Figure 1.2 **RIS compliance for proposals introduced via disallowable instruments, 1998-99 to 2000-01**

Per cent



Source: ORR estimates.

At the tabling stage, 67 of the 75 proposals were assessed as adequate, resulting in a compliance rate of 89 per cent. This compares with 86 per cent compliance in 1999-2000.

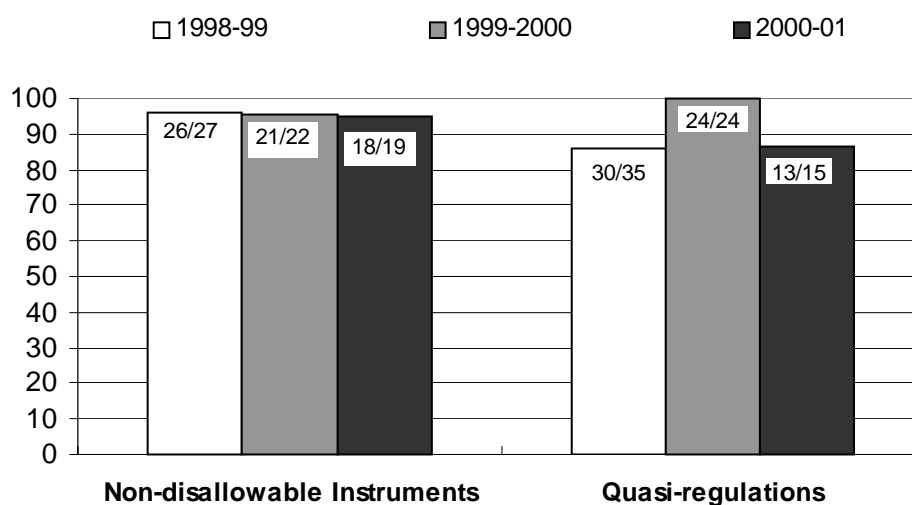
1.4 Non-disallowable instruments and quasi-regulations

Non-disallowable instruments include legislation that is not subject to parliamentary disallowance. These instruments may be gazetted and/or tabled. Quasi-regulation refers to those rules, instruments and standards where government influences businesses to comply, but which do not form part of explicit regulation.

Because it is difficult to verify the making of non-disallowable instruments and quasi-regulations, the ORR relies largely on self-reporting to estimate the number of non-disallowable instruments and quasi-regulations made each year.

In 2000-01, departments and agencies reported 19 regulatory proposals made via non-disallowable instruments that required a RIS at the decision-making stage. One example is the Radiocommunications (Spectrum Licence Limits — 2 GHz Band) Direction No. 2 of 2000, which imposed restrictions on some potential bidders for radio frequency spectrum in the 2GHz band. RISs were prepared, and cleared as adequate by the ORR, for 18 of the 19 required (a compliance rate of 95 per cent) (figure 1.3).

Figure 1.3 **RIS compliance for proposals introduced via non-disallowable instruments and quasi-regulations, 1998-99 to 2000-01**
Per cent



Source: ORR estimates.

Of the 26 quasi-regulations reported to the ORR in 2000-01, 15 required the preparation of a RIS. RISs were prepared, and cleared as adequate by the ORR, for 13 (a compliance rate of 87 per cent). This outcome compares with compliance rates of 86 per cent in 1998-99 and 100 per cent in 1999-2000 (figure 1.3).

Although encouraged by the ORR, there is no formal requirement that RISs prepared for non-disallowable instruments and quasi-regulations be made public. In 2000-01, 85 per cent of RISs relating to non-disallowable instruments were made public (comparable with 1999-2000). However, only one-third of RISs prepared for quasi-regulations were made public (down from 83 per cent in 1998-99 and 88 per cent in 1999-2000).

While anecdotal evidence suggests that quasi-regulatory activity is more widespread than is reported by departments and agencies, there is no systematic way that the ORR can ensure that the Government's RIS requirements have been met for quasi-regulation. Consequently, the ORR proposes to establish, in cooperation with departments and agencies, 'a listing' for quasi-regulation. Appendix A provides more detail.

1.5 Treaties

The ORR does not report comparative figures on treaties because the treaty-making process occurs much less frequently than other forms of regulation and it can be an involved process taking many years. Under the Commonwealth Government's RIS requirements, a RIS should be prepared at three stages of the treaty making process — entry into negotiations, signing and tabling.

Two treaties were tabled in Parliament in 2000-01. In both cases, adequate RISs were prepared, and cleared by the ORR, at each of the three stages (100 per cent compliance).

Considerable effort has been made by the ORR to improve policy officers' awareness of the Government's RIS requirements at the early stage of the treaty-making process. However, in the case of a number of treaties that have not yet been tabled, compliance at the 'entry into negotiations' stage in 2000-01 was poor. Reasons for poor compliance include a lack of understanding by policy officers of the Government's RIS requirements in regard to treaty-making, difficulties in determining when negotiations commence, and the nature of, and uncertainties in, the treaty-making process.

In many instances there is considerable uncertainty early in the treaty-making process. The early RIS should reflect these uncertainties. For example, the early RIS

might include only the *Problem* and *Objectives* associated with the treaty (box 1.3). The RIS can then evolve, in line with the treaty making process, reflecting the content and implications of the treaty as they become clearer.

For some treaties, the early negotiations and discussion stages pre-dated mandatory RIS requirements. Consequently, no RIS was prepared when negotiations commenced. In these cases, the ORR has advised departments that a RIS should be prepared for the next significant decision-making stage — which typically would be well before endorsement (signing). This may be when the matter goes to Cabinet, the Prime Minister or other Minister for approval to proceed with subsequent stages of negotiations.

1.6 National regulation making

National regulatory decisions are made by some 40 Ministerial Councils and a small number of standard-setting bodies. Some of these decisions are implemented by the passage of Commonwealth/State/Territory primary legislation and/or regulations. Others take the form of national regulations and quasi-regulations.

In April 1995, prompted by concerns that standards should be the minimum necessary and not impose excessive requirements on businesses, the Council of Australian Governments (COAG) agreed that regulatory proposals put to Ministerial Councils and standard-setting bodies should be subject to a nationally consistent assessment process. This process was 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 process is the completion of Regulatory Impact Statements (RISs). For purposes of applying these requirements, COAG (1997, p. 4) 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.

The ORR's role in monitoring compliance with the *COAG Principles and Guidelines* is to assess RISs prepared for Ministerial Councils and standard-setting bodies. These RISs are assessed at two stages: before they are distributed for

consultation with parties affected by the regulatory proposal; and before a decision is to be made by the responsible body.² 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 impacts of the proposal; and
- whether alternatives to regulation have been adequately considered.

The ORR is then required to advise the relevant Ministerial Council or standard-setting body of its assessment.

The ORR also reports annually to COAG's Committee on Regulatory Reform on overall compliance with the guidelines.

As with its Commonwealth responsibility, 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 of the policy proposal remains the responsibility of the relevant Ministerial Council.

The issue of satisfying COAG RIS requirements has recently taken on greater significance. The *Agreement to Implement the National Competition Policy and Related Reforms* (COAG 1995) sets down the amounts and conditions of related competition payments from the Commonwealth to the States and Territories. For the Third Tranche of competition payments, to commence in 2001-02, factors to be taken into consideration by the National Competition Council (which makes recommendations to the Treasurer on the level of payments) include advice from the ORR on which decisions were compliant with COAG's regulatory best practice requirements and which were not.

In 2000-01, 25 regulatory decisions made by Ministerial Councils and standard-setting bodies required RISs. Of these, 20 RISs were prepared, and 17 were commented on by the ORR prior to the final decision. Only one of the 17 RISs commented on was considered inadequate. Three RISs, that were not examined by the ORR until after the decision was made, were considered to meet the COAG requirements, giving an overall compliance rate of 76 per cent (table 1.4). This compares with a compliance rate of 68 per cent in 1998-99 and 97 per cent in

² In November 1997, the COAG Guidelines were amended to require Ministerial Councils and standard-setting bodies to provide draft RISs to the ORR for comment before undertaking public consultation (COAG 1997). In December 1999, the Prime Minister wrote to Australian heads of government seeking agreement to amend the Guidelines to clarify that the ORR should also assess the RIS that most closely accords with the version for final decision by the Ministerial Council. Such agreement was subsequently obtained.

1999-2000. Further details are provided in appendix B which reproduces the ORR's report to the National Competition Council.

Table 1.4 COAG RIS compliance for regulatory decisions made by Ministerial Councils and SSBs, 1998-99 to 2000-01^a

	<i>1998-99</i>	<i>1999-00</i>	<i>2000-01</i>
Decision-making stage — all proposals	19/28 (68%)	34/35 (97%)	19/25 (76%)

^a The 2000-01 data do not include decisions of a minor/administrative nature. Of the 25 decisions made in 2000-01, ten were regarded as significant by the ORR. Compliance for these decisions was 60 per cent.

Source: ORR estimates.