
7 Ministerial Councils and national standard-setting bodies

During 1997–98, the Council of Australian Governments announced new procedures for the handling of regulation impact statements prepared by Ministerial Councils and national standard-setting bodies. The Office of Regulation Review now has an explicit role in monitoring compliance.

Overall, with the exception of those bodies with legislative requirements for regulation impact analysis, compliance by Ministerial Councils and national standard-setting bodies was limited.

7.1 COAG guidelines for regulatory action by Ministerial Councils and national standard-setting bodies¹

In 1995, the Council of Australian Governments (COAG) agreed that a Regulation Impact Statement (RIS) must be prepared for all regulatory proposals that are to be considered by Ministerial Councils or national standard-setting bodies. This initiative was intended to close an emerging gap in regulation review processes in Australia. While regulation impact analysis was being embedded in the processes of many jurisdictions up to and around this time, the increase in the role of national regulatory bodies — that is, regulatory bodies with intergovernmental jurisdiction — was resulting in national regulation being implemented at times without detailed scrutiny.

As reported by the Office of Regulation Review (ORR), in *Regulation and its Review 1995–96* and *1996–97*, compliance with COAG regulation requirements has been poor, except for bodies with statutory roles in regulation-making, such as the Australia New Zealand Food Standards Council (ANZFS), Ministerial Council on Road Transport (MCRT) and the National Environment Protection Council (NEPC). The legislation relating to these bodies requires formal impact assessment to be

¹ For more information on Ministerial Councils and national standard-setting bodies, see appendix B of *Regulation and its Review 1995–96* and appendix E of this report.

undertaken prior to the implementation of regulation. While the scope of these assessments differs from COAG regulation impact assessment requirements in important respects, increasingly the COAG requirements are being integrated in the processes for regulation-making. Impact assessment for the abovementioned Councils is undertaken by the Australia New Zealand Food Authority (ANZFA), National Road Transport Commission (NRTC) and the NEPC Service Corporation respectively. In addition, the Ministerial Council on Consumer Affairs (MCCA) uses regulation impact assessment for all new proposals for consumer standards prior to their adoption in State and Territory legislation, building on its earlier ‘justification papers’.

In November 1997, reflecting concerns over poor compliance with its Guidelines, COAG agreed to new procedures for the handling of RISs and monitoring compliance. The new arrangements essentially provide a formal role for the ORR (in consultation with its State and Territory counterparts) in monitoring compliance with the COAG Guidelines by Ministerial Councils and national standard-setting bodies.

7.2 The Office of Regulation Review’s role

The RIS requirements for Ministerial Councils are included in the COAG document *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG Guidelines). Under COAG Guidelines, the ORR has a role in assisting Ministerial Councils and national standard-setting bodies in the preparation of RISs for regulatory proposals.

Under the revised arrangements,² Ministerial Councils and standard-setting bodies are required to give notice to the ORR that a RIS will be drafted on a relevant topic. A draft RIS for a regulatory proposal should be sent to the ORR as soon as practicable and before the RIS is made available for public comment.

The ORR must assess the proposal within two weeks against the requirements set out in the COAG Guidelines and advise the Ministerial Council or standard-setting body of its assessment. National regulatory bodies are not obliged to adopt the advice of the ORR. However, they are required to respond to any outstanding issues which have not been dealt with in the way recommended by the ORR.

The ORR is also required to bring issues to the attention of Heads of Government through the COAG Committee on Regulatory Reform. Specifically, the ORR will

² For more details see appendix E.

report to the COAG committee if, in its opinion, decisions of Ministerial Councils or standard-setting bodies are inconsistent with COAG Guidelines.

On 19 May 1998, the Prime Minister wrote to Premiers and Chief Ministers informing them of the new arrangements for monitoring compliance with the COAG Guidelines. At the same time, a memorandum from the Prime Minister outlining the new arrangements was sent to all members of Ministerial Councils.

7.3 Compliance report

The ORR requested information from the secretariats of all Ministerial Councils and from national standard-setting bodies on all items for consideration during 1997–98 which had regulatory implications, including national standards, codes of practice etc; and whether a RIS was prepared in accordance with the COAG Guidelines.

In interpreting returns and determining overall compliance, the ORR was mindful of the fact that some Councils did not meet or did not consider regulatory proposals during 1997–98. RISs had sometimes been prepared to meet Commonwealth requirements and were not picked up during the Ministerial Council process. Similarly, some States had prepared RISs prior to implementation in their jurisdictions.

Twenty-nine RISs were compiled for regulatory proposals in 1997–98 with the majority done by ANZFSC (6), MCRT (4), Ministerial Council for Corporations (4) and NEPC (3). These bodies also have major RISs under-way. From the information provided, those bodies, together with the MCCA, Australian and New Zealand Minerals and Energy Council, Ministerial Council on Forestry, Fisheries and Aquaculture and the Ministerial Council of Immigration and Multicultural Affairs had a good compliance record for all proposals with regulatory implications.

While this picture might indicate a fair degree of compliance with COAG Guidelines, it belies the fact that many RISs were picked up by the Commonwealth following the introduction of strengthened guidelines for Commonwealth regulation. Thirteen RISs completed were by those bodies with statutory requirements for impact assessment. For only 11 items was the ORR provided with a RIS for comment.

Appendix E lists 44 Ministerial Councils, many of which might have been expected to approach the ORR regarding regulatory proposals, even allowing for a significant number of items being at an early stage of development. In addition, there are Ministerial Councils which failed to comply at all. Consequently, for 1997–98, the ORR judges that overall compliance by Ministerial Councils remains limited.

In relation to national standard-setting bodies, compliance with COAG's RIS requirements appears mixed. Bodies such as ANZFA, the National Occupational Health and Safety Commission and the NRTC are generally responsible for developing proposals for Ministerial Councils and have complied with COAG requirements to prepare RISs. The Australian Building Codes Board prepared a RIS for access to new buildings for people with disabilities, which involved early consultation with the ORR and best practice processes in its development.

It is difficult to ascertain the precise role of particular standard-setting bodies in developing national regulatory proposals for consideration by Ministerial Councils. In many cases the allocation of responsibilities for the preparation of RISs between these bodies and the relevant Department remain unclear. A further issue is that national standard-setting bodies with responsibilities for preparing guidelines and other quasi-regulation may not be aware of the broad scope of COAG RIS requirements. The ORR received no RISs relating to quasi-regulation from national standard-setting bodies during 1997–98.

7.4 Explaining compliance

A variety of explanations for lack of compliance with RIS requirements of COAG by government agencies can be deduced. These are summarised below.

- There remains a general lack of awareness of COAG requirements, with agencies claiming that they were not informed about, nor trained in, the new guidelines. Importantly, there was little awareness that *'where a Ministerial Council or standard-setting body proposes to agree to regulatory action or adopt a standard, it must first certify that the regulatory impact process has been adequately completed'*.³
- RISs are still seen as an additional bureaucratic hurdle at the end of a process rather than a tool for informed decision-making. Hence many agencies were unsure of the appropriate time to commence a RIS and contended that it was too early in the development of a proposal to prepare a RIS as the proposal was subject to change by Ministers. Consequently, RISs are often completed after a decision by Ministers to develop a particular standard or approach, leaving little scope for consideration of viable alternatives.
- Some agencies considered that RISs were not possible for Councils involved in decisions on payments to the States and Territories, since there is substantial negotiation on funding and administrative/regulatory arrangements leading up to

³ See page 10 of COAG guidelines.

agreements. However, a RIS can still be prepared on the regulatory aspects of such proposals and their associated costs and benefits.

- The COAG trigger for a RIS was often interpreted as being confined to business impacts only. In fact, the COAG principles apply to instruments which *'would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done'*.⁴
- Some agencies adopted a narrow, legalistic view of regulation, defining it as those measures likely to be cited in courts or by an administrative body should issues of non-compliance arise, thus overlooking quasi-regulation. Yet the COAG Guidelines apply to *'agreements or decisions to be given effect through principal and delegated legislation, administrative directions or other measures'*.⁵
- Some agencies did not regard their Ministerial Council as having carriage of an issue and therefore did not accept responsibility for preparing RISs. There are overlaps between Ministerial Councils in the development of certain policies such as environment, greenhouse response strategies, food safety issues, gene technology regulation and Aboriginal and Torres Strait Islander Affairs. In addition, some Ministerial Councils refer or report issues to others.
- Some agencies considered that their consultation processes were sufficient to comply with COAG Guidelines.
- Proposals were considered by some agencies as not national in scope, although Ministerial Councils were being asked to endorse a new national standard with the expectation that States would pass legislation to implement the measure. Completing a national RIS would, in most cases, negate the need for duplication of this analysis by individual States. It would also allow early analysis of the costs and benefits of proposals.
- Others agencies argued that their role was purely advisory, rather than of a decision-making nature.
- Finally, regulatory proposals were sometimes agreed hurriedly to meet an urgent requirement, yet no follow-up RISs were completed.

7.5 How to improve compliance

As a result of the Prime Minister's letter of May 1998 and the ORR's explicit role in the 1997–98 COAG monitoring process, awareness of the COAG requirements

⁴ See page 2 of COAG guidelines.

⁵ See page 2 of COAG guidelines.

has already increased. This is evident in the number of new COAG RISs underway and the increase in inquiries seeking the ORR's guidance on possible RISs for 1998–99.

In order for RISs to play a useful role in the decision-making processes of Ministerial Councils and national standard-setting bodies, they need to be prepared early in the policy development process and used as a basis for consultation with key interest groups. For officials involved in the work of some Councils, this will require substantial changes in attitude to the role of regulation impact analysis in policy-making.

Ministerial Councils with charters for pursuing social, environmental and other non-commercial objectives may also be suspicious about the apparent economic focus of regulation impact analysis. However, RISs can be applied to analyse the effectiveness and efficiency of any regulatory regime designed to achieve most goals, including community and social goals, such as public health, worker safety, environmental conservation, consumer protection and equity. Similarly, the secondary impact of regulations on these goals can also be taken into account within the RIS framework. In addition, various methods can be used to estimate 'intangible' or 'subjective' costs and benefits, or to rank alternatives according to their likely net benefits.

The ORR will continue to work actively with key agencies involved in national regulatory proposals to increase awareness of the scope of the COAG Guidelines through its training and advisory roles. In addition, the ORR will work on establishing effective liaison with secretariats of Ministerial Councils, national standard-setting bodies and State regulatory reform units to seek their cooperation in developing early warning systems and commitment to the COAG Guidelines.