
1 Best practice processes for regulation

This chapter describes the Commonwealth Government's best practice requirements for regulation making and review and similar processes that apply when Ministerial Councils and national standard-setting bodies develop new national standards and regulation. It also outlines the ORR's role in overseeing these activities.

Government regulation can deliver important benefits to the community, but poor quality regulation can do so at a high cost. Effective and efficient regulation is an essential element of good government. Achieving well considered cost-effective regulation that does not impose unnecessary costs depends on the quality of the decision-making processes.

A range of requirements for regulation making and review are imposed by Australian governments to improve the quality of regulations and reduce the regulatory burden. This chapter reports on best practice processes at the Commonwealth and national levels, namely:

- the Commonwealth's Regulation Impact Statement (RIS) requirements for new or amended regulation (section 1.1);
- reviews of existing regulation under the Commonwealth's Legislation Review Schedule and complementary review processes (section 1.2);
- Commonwealth regulatory performance monitoring and accountability initiatives (section 1.3); and
- the Council of Australian Governments' Principles and Guidelines (COAG Guidelines) that apply when Ministerial Councils and national standard-setting bodies develop new national standards and regulation (section 1.4).

An essential element of these best practice processes is regulatory impact analysis. This helps to ensure that all important impacts are known when decisions are made. By making the development and review of regulation more systematic and transparent, impact analysis helps to reduce the regulatory burden and ensure that new regulations are fully justified and effective.

The Office of Regulation Review's role in promoting compliance with regulation review requirements is discussed in the final section of the chapter.

1.1 Commonwealth RIS requirements for new or amended regulation

Background

Regulation impact statement (RIS) requirements are designed to contribute to better regulations by providing a consistent, systematic and transparent process to assess alternative approaches where government intervention may be warranted. A RIS assists decision making by ensuring that all relevant information is presented in a logical standardised framework. After a decision is made, the RIS usually becomes a public and transparent account of the factors underlying the decision.

Regulation impact analysis calls for an economy-wide perspective in identifying who benefits from the regulations and who incurs the costs. If implemented appropriately, impact analysis can provide assurance that the solution adopted not only provides a net benefit to the community, but minimises any associated negative side effects on competition, prices, compliance costs, consumer choice, environmental amenity and other community goals.

RISs are used extensively by State and Territory governments as well as the Commonwealth. Regulatory impact analysis is also increasingly being employed by Organisation for Economic Co-operation and Development (OECD) member countries to reform regulation-making processes. Recent developments in regulation review in selected OECD countries are reported in appendix E.

The Commonwealth Government has required a RIS for all Cabinet proposals affecting business since 1986, but in recent years the scope of the requirement has widened and the ORR's gatekeeper role has been strengthened. Importantly, the incentives for compliance and sanctions associated with non-compliance have increased.

In 1996, the Government established a Small Business Deregulation Task Force (the task force) aimed at reducing the paper and compliance burden on small business. Its report, *Time for Business*, suggested improvements to regulatory processes. In the Government's response, *More Time for Business*, the Prime Minister accepted many of the recommendations and clarified the requirements for Commonwealth regulation makers. The Commonwealth RIS requirements were subsequently consolidated in *A Guide to Regulation* (the Guide) which was endorsed by the Government in September 1997. The second edition of the Guide — published in December 1998 — incorporates the Government's decisions about quasi-regulation and regulatory best practice (see box 1.1).

In recognition of the importance of best practice processes and the Government's commitment to improving the regulatory culture, the Assistant Treasurer now has formal responsibility for promoting compliance with RIS requirements and regulatory best practice more generally.

Scope of the RIS requirements

The preparation of a RIS is mandatory for all reviews of existing regulation, proposed new regulation and proposed treaties which will directly affect business, or which will have a significant indirect effect on business, or which will restrict competition. Regulation 'affects' business where it imposes a cost *or* confers a benefit on business. There are a limited number of exceptions to the requirement to prepare a RIS (see the Guide).

The Guide defines regulation broadly as including:

... any laws or other government 'rules' which influence the way people behave. It is not limited to primary or delegated legislation; it also includes 'quasi-regulation'... (ORR 1998, p. A1).

Box 1.1 describes quasi-regulation and outlines some practical considerations relevant to the application of the RIS requirements to this type of regulation.

A RIS has seven key elements, which set out:

- the problem or circumstances which give rise to the need for action;
- the desired objective(s);
- the options (regulatory and non-regulatory) that may constitute viable means for achieving the desired objective(s);
- an assessment of the impact (costs and benefits) on consumers, business, government and the community of each option;¹
- a consultation statement (the process and results of consultation);
- a recommended option; and
- a strategy to implement (including consideration of appropriate enforcement mechanisms) and review the preferred option.

¹ RISs must also assess the impact of regulatory options on small business paperwork and compliance costs.

Box 1.1 **Quasi-regulation**

A Commonwealth interdepartmental committee was established in July 1997 to inquire into quasi-regulation. The Government accepted the recommendations contained in the Committee's *Grey-Letter Law Report* to strengthen the scrutiny and assessment of quasi-regulation and to make such regulation more effective, transparent and accessible.

Quasi-regulation is defined in the Guide as 'a wide range of rules or arrangements where governments influence business to comply, but which do not form part of explicit government regulation' (ORR 1998, p. A3). Some broad categories of quasi-regulation are:

- codes of practice where the Government has a *major* role in the creation, promotion or administration of the code, for example where:
 - there is legislative underpinning for the code (such as reserve powers); or
 - the Government takes an active part in promoting compliance with the code or penalising non-compliance;
- codes, standards, guidelines or the like where the Government establishes *significant* sanctions for non-compliance, for example by:
 - limiting government business to complying firms; or
 - making grants or approvals conditional on compliance; and
- codes, standards or similar documents that are referenced in legislation without compliance being mandatory.

Government involvement in non-mandatory arrangements is wide and varied. The 'incentive' for business to comply varies from case to case. In practical terms, what matters is whether there is a 'reasonable' expectation of compliance by business.

When is a RIS required for quasi-regulation?

The need for a RIS depends upon the significance of the proposal and whether 'approval' is required for government involvement. Where the Government's involvement in voluntary arrangements is 'light handed' — for example, it merely assists industry or facilitates the development of a code of conduct — it would often be part of the 'normal' activities of a department or agency and not likely to require Ministerial (or other) approval. On the other hand, if the Government initiates the code and/or it takes a principal role in development, monitoring or enforcement (including making it a condition of other 'benefits'), it is more likely to require policy approval and, hence, a RIS.

A modified RIS process applies to taxation measures. The taxation RIS is only required to examine administrative options for ensuring compliance and the costs and benefits of each alternative (see ORR 1998, pp. B9–13).

If a regulatory proposal restricts competition, the RIS must address additional issues in the context of the cost-benefit assessment in order to satisfy clause 5(1) of the *Competition Principles Agreement* (CPA) (see section 1.2).

As noted above, the preparation of a RIS is mandatory for all treaties involving regulation which directly affects business, has a significant indirect effect on business, or restricts competition. A RIS is required before the formal policy decision to pursue treaty negotiations, again prior to Australia signing a treaty and, finally, when the treaty is tabled in the Parliament with the National Interest Analysis. At each stage, the RIS is revised to reflect analysis relevant to that stage in the process. The RIS requirement is not necessarily limited to treaties which require changes or additions to domestic legislation. It may also include treaties which otherwise involve regulation (see PC 1998, ch. 6).

RIS requirements apply to any regulatory proposal affecting business, not just those considered by Cabinet (for example, regulation stemming from Ministerial correspondence and agreement, independent boards, and meetings of Ministerial Councils). Where legislative or regulatory action does not require policy approval external to the portfolio — for example quasi-regulation and some non-disallowable delegated legislation agreed by a Minister — the relevant Minister is required to advise the Prime Minister of his/her intention to implement the proposal, attaching a draft RIS to the correspondence.

At what stage should a RIS be prepared?

To maximise the benefit from the process, a RIS should be prepared by officials well before a regulatory proposal (including amendments to existing regulation) is put to the decision maker.

In some cases it will not be possible to satisfy the consultation element of the RIS. For example, consultation may be inappropriate in the context of budget measures or for certain proposals going to Cabinet. In these cases, consultation should occur before implementation — preferably before the relevant instrument is drafted.

For reviews of existing regulation, the terms of reference should reflect the key elements of the RIS, with any reports and reviews using a RIS framework. Incorporating the RIS framework at an early stage, facilitates subsequent preparation of a RIS prior to a policy decision being made.

Making the RIS public

In general, RISs should be prepared for at least two stages in the regulation-making process. As outlined above, the initial draft RIS is prepared to inform the decision maker and is the most critical and potentially influential. The RIS is not generally made public at this stage. The second RIS may be the same as the one considered by the decision maker or a refinement. Its purpose is to make transparent to the public and Parliament, the basis for choosing a particular regulatory approach.

When a RIS is required for regulatory proposals that receive parliamentary scrutiny, it must be tabled in Parliament with the explanatory document for the regulation — the explanatory memorandum (for primary legislation) and the explanatory statement (for disallowable legislative instruments). As Parliament decides on the passage of a Bill or whether or not to disallow delegated legislation, the final RIS can to some extent be viewed as performing the twin roles of transparency and informing parliamentary consideration of proposed legislation.

RISs for non-disallowable instruments that are tabled, should accompany the explanatory statement, where one has been prepared.² If an explanatory statement is not prepared, the ORR encourages departments and agencies to place RISs on their website and in any other medium that will provide the stakeholders, interested parties and the public with information on the regulation.

A cost-effective process

Integrating impact analysis into the decision-making process can help clarify the nature and magnitude of the problem, and the range of alternative regulatory and non-regulatory responses, as well as enforcement mechanisms. This facilitates development of regulations that are appropriately targeted and do not impose unnecessary costs.

Some regulatory agencies have questioned the cost-effectiveness of preparing a RIS, particularly where quantitative information is difficult or costly to obtain or where existing processes already incorporate RIS elements. These concerns are addressed below.

² The Table Offices of the House of Representatives and the Senate encourage the preparation of an explanatory statement for non-disallowable instruments. Departments and agencies should contact the Table Offices if they are unsure of the requirement to prepare an explanatory statement.

Analysis commensurate with impacts

There is misunderstanding within some agencies about the commitment of time and resources typically necessary to prepare a RIS. Often, perceptions about the scale of the task exceed what would actually be involved. The degree of detail and depth of analysis in the RIS should be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals.

Furthermore, the precision of calculations is not necessarily the most important contribution to better decisions. Critical examination of the problem at hand and the role for government is an inexpensive element of the RIS process, but can often be sufficient to prevent poorly conceived and ultimately costly regulatory proposals from proceeding.

Integration with other impact assessment processes

The ORR works closely with agencies to ensure that the RIS process is as streamlined as possible and avoids duplicating other practices designed to inform decision making.

Where agencies have existing processes for consultation and impact analysis, the ORR has provided advice on the extent to which they satisfy RIS requirements. In this context, the ORR has commenced discussions with several agencies on how existing processes can be modified to satisfy both the RIS and other internal procedural requirements. For example, the Department of Agriculture, Fisheries and Forestry and the ORR are examining how the Department's '12 Principles' process for assessing certain primary industry levies can be best integrated with the RIS requirements.

Consideration of wider options

Government regulation will not always be the most suitable response to a problem. A number of alternatives are available, including self-regulation, any of which might be the most effective and efficient approach. To help assess the most appropriate regulatory or non-regulatory response, the Government endorsed a checklist, which was included in the second edition of the Guide (ORR 1998, pp. D4–5).

When agencies were less familiar with the RIS requirements, the ORR routinely suggested to officials a wider set of options for inclusion in RISs. With experience and more recently the benefit of the checklist, agencies are tending to cast the net

wider and are considering self-regulation or other options involving minimal government intervention.

The cost-effectiveness of the process will be most apparent where the preparation of a RIS results in a change to the regulatory approach on the basis of the analysis undertaken. The costs of preparing a RIS are likely to be small compared to the economic impact of inappropriate or poorly designed regulation.

Improved consultation and awareness

The RIS process has clearly facilitated improved consultation with stakeholders, resulting in greater understanding of the issues, and the design of better options and implementation arrangements. Improved consultation not only underpins better decision making, it can also result in greater commitment by the stakeholders to the outcome.

If there is a transparent framework that industry knows the Government must address, then there is an objective basis on which to engage with the agency. It is notable that some agencies routinely release a draft RIS for public comment prior to a regulatory decision. A number of issues papers for reviews and review reports have also adopted the RIS framework, either explicitly or implicitly. The feedback obtained from stakeholders can be critical to the analysis.

A comprehensive RIS may help stakeholders to understand and to accept, the Government's regulatory decision. In one case, a business noted that it did not like a regulatory decision, but indicated that if the proposal had 'passed' the RIS requirements then it 'would accept the umpire's decision'.

There are signs that RISs tabled with explanatory memoranda have better informed both the Parliament and the community about legislative proposals.³ There is also evidence that RISs have been an important tool for informing other interested Government departments. In a number of instances departments have made reference and/or use of the information in the RIS when preparing their briefings or coordination comments.

More information on the ORR's role in relation to the Commonwealth RIS requirements is provided in section 1.5 and appendix A.

³ For example, a number of newspaper articles have quoted compliance cost estimates contained in a RIS. Similarly, the former Chairman of the Senate Standing Committee on Regulations and Ordinances, has stated that RISs have assisted the Committee in its examination of legislation (see appendix A).

1.2 Review and reform of existing legislation

1998-99 was the third year of the national four-year program of review of existing legislation agreed to in 1995 by COAG as part of the *Competition Principles Agreement* (CPA). Under the CPA, all Australian governments made a commitment to review and, in the absence of offsetting public benefits, reform legislation that restricts competition, by the end of 2000.

Clauses 5(1) and 5(9) of the CPA, set out the required analytical approach to reviews (see box 1.2).

Box 1.2 CPA guiding principle

Clause 5(1) of the Agreement specifies:

The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.

Further, clause 5(9) states:

Without limiting the terms of reference for reviews, a review *should*:

- (a) clarify the objectives of the legislation;
- (b) identify the nature of the restriction on competition;
- (c) analyse the likely effect of the restriction on competition and on the economy generally;
- (d) assess and balance the costs and benefits of the restriction; and
- (e) consider alternative means for achieving the same result including non-legislative approaches.

Source: COAG 1995a.

The CPA review guidelines have much in common with the criteria set out in the Commonwealth's RIS guidelines. If clause 5(9) is fully addressed in the review, any subsequent RIS requirements for regulatory change can usually be met.

The CPA (clause 1(3)) provides for the examination of a broad range of factors for determining the public interest — including social, environmental and regional issues — as part of legislation review processes. Thus, while competitive and economic impacts are the prime triggers for reviews, clause 1(3) ensures that they are not the only determinants of the recommendations.

The inclusion of this clause or the ‘public interest test’ in the CPA aims to reflect the view of governments that:

... competition policy is not about maximising competition per se, but about using competition to improve the community’s living standards and employment opportunities. (NCC 1996, p. 4)

While governments are not bound by the findings and recommendations of reviews, the National Competition Council (NCC) has sought justification in cases where pro-competition proposals have not been accepted.

Commonwealth’s Legislation Review Schedule

The Commonwealth’s legislation review program is broader than required by the CPA. In addition to legislation which potentially restricts competition, it includes legislation that may impose costs or confer benefits on business. Chapter 4 provides an update of the status of reviews for 1998-99 and the terms of reference cleared by the ORR. The complete review schedule, including a brief description of the potential impact of the legislation, is included in appendix C.

In announcing the Legislation Review Schedule (Treasurer 1996), the Commonwealth indicated that reviews:

- be approached according to ‘the guiding principle’ (clause 5(1));
- include an assessment of the impact on small business and report on ways to reduce the compliance and paperwork burden associated with the legislation; and
- include public consultations with those affected by the legislation.

The Commonwealth legislation review program does not preclude early action to reform or repeal legislation in accordance with announced Government policies or as other opportunities arise.

The Minister for Financial Services and Regulation is responsible for National Competition Policy matters, including consideration of any requests for variations to the Commonwealth’s Legislation Review Schedule, such as changes to the timing or scope of reviews.

National reviews

Jurisdictions can agree to national reviews where the review issue has a national dimension. Any jurisdiction can propose a national review. National reviews can also be carried out or coordinated by a single jurisdiction on behalf of all the

sponsoring jurisdictions, or jointly by two or more jurisdictions. Not every jurisdiction needs to have an interest in a review for it to be considered a national review.

The requirement to review a particular piece of legislation listed in a jurisdiction's legislation review schedule is taken to have been met if that legislation review becomes part of a national review.

Where particular regulations have impacts only within a jurisdiction, but are similar in nature to those operating in other jurisdictions, governments have sometimes been able to cooperate and make use of review findings from other States and Territories.

1.3 Commonwealth regulatory performance monitoring and accountability initiatives

An important aspect of the Commonwealth's regulatory best practice environment is the transparency and accountability associated with annual reporting of regulatory activity and the extent of compliance with RIS requirements. The Prime Minister's Statement, *More Time for Business*, gave the Productivity Commission, incorporating the ORR, this reporting task (see section 1.5).

The Commonwealth Government has implemented or recently announced its intention to introduce other measures designed to improve the quality of regulation and/or reduce the regulatory compliance burden imposed on business, especially small businesses. Two of the more important initiatives that should further enhance scrutiny and consultation processes are regulatory performance indicators (RPIs) and annual regulatory plans.

Regulatory performance indicators

In *More Time for Business*, the Prime Minister announced that all Commonwealth departments and agencies would develop performance indicators relating to their regulatory activities. The Office of Small Business (OSB) in the Department of Employment, Workplace Relations and Small Business worked with Commonwealth bodies with responsibility for regulation to develop a set of nine RPIs (see appendix A, table A.1). The RPIs seek to measure how effectively agencies have met the following six key objectives for regulators endorsed by the Government:

- to ensure that all new or revised regulation confers a net benefit on the community;

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- to achieve essential regulatory objectives without unduly restricting business in the way in which these objectives are achieved;
 - to ensure that regulatory decision-making processes are transparent and lead to fair outcomes;
 - to ensure that information and details on regulation and how to comply with it are accessible and understood by business;
 - to create a predictable regulatory environment so business can make decisions with some surety of the future environment; and
 - to ensure that consultation processes are accessible and responsive to business and the community.

In August 1998, the Government announced that all departments and agencies with responsibility for regulating business will monitor the nine RPIs and the OSB will report annually on performance against the RPIs. These reports will be based on information to be provided by the ORR and departments and agencies, where practicable collated at the portfolio level. The first report will be made in the second half of 1999, and will relate to the 1998-99 financial year.

RPIs will be an important adjunct to the RIS requirements and other measures aimed at improving regulation. They will provide information on the effectiveness with which agencies are implementing regulation reform measures and will allow benchmarking of agency performance. The ORR is responsible for monitoring agency performance in relation to three of the indicators and providing details to the OSB (see appendix A, table A.1).

Regulatory plans

The Government's 1998 election policy document, *A Small Business Agenda for the New Millennium*, stated that all Government departments and agencies would be required to prepare annual regulatory plans.

Regulatory plans will provide business and the community with ready access to information about past and planned changes to Commonwealth regulation, and will make it easier for businesses to take part in the development of regulation that affects them. The plans will also help to improve the way in which regulators approach the task of developing and administering regulation, encourage strategic planning of regulatory activity and make it easier for agencies to monitor relevant developments in other areas of government.

In March 1999, the Department of Employment, Workplace Relations and Small Business released *Regulatory Developments: 1998 and 1999*. The publication was prepared by the Department and its portfolio agencies as a pilot project to assist in the implementation of the Government's policy. The first whole-of-government plan, coordinated by OSB, is expected to be published in June 2000.

1.4 COAG principles and guidelines

In 1995, COAG agreed that a RIS must be prepared for all regulatory proposals that are to be considered by Ministerial Councils or national standard-setting bodies. The RIS requirements 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).

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, the operation of the *Mutual Recognition Agreement* and the increasing role of national regulatory bodies — those with intergovernmental jurisdiction — resulted in national regulation being implemented at times without detailed scrutiny.

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 (see section 1.5).

The COAG Guidelines apply to agreements or decisions given effect through primary and delegated legislation, administrative directions or other measures which, when implemented, would encourage or force businesses or individuals to pursue their interests in ways they may not otherwise have done. The development of voluntary codes and advisory instruments must also take account of the COAG Guidelines where there is a reasonable expectation that their promotion and/or dissemination by standard-setting bodies or by government could be interpreted as requiring compliance, thus elevating their status to quasi-regulation (see box 1.1). The only exceptions to the application of the RIS requirement noted in the COAG Guidelines document are for purchasing policy or industry assistance schemes.⁴

⁴ If a Ministerial Council decides that the situation requiring a regulatory response is an emergency, the Prime Minister may waive the need for a RIS to be prepared before the regulation comes into effect. However, the Ministerial Council is expected to prepare a RIS within 12 months of agreeing to the regulation.

Although there are minor differences between the structure and headings recommended for the COAG RIS and the seven elements of the Commonwealth RIS, the scope, form and level of analysis required are similar. A RIS prepared to satisfy the requirements of one process would also address the requirements of the other.

The most significant difference between the COAG and Commonwealth RIS requirements is the broader trigger for a COAG RIS, involving impact on business *or individuals*. Accordingly, it potentially covers a wider range of regulatory activity than the Commonwealth RIS requirements, where the trigger is only impact on business.

Independent of the COAG regulation impact assessment requirements, the legislation for certain bodies with statutory roles in regulation making — such as the Australia New Zealand Food Standards Council, the Australian Transport Council and the National Environment Protection Council — requires formal impact assessment to be undertaken prior to the implementation of regulation. The scope of these assessments differs from COAG requirements in important respects — for example, they are generally less stringent in relation to the assessment of the costs and benefits of alternatives. Impact assessment for the above mentioned Councils is undertaken by the Australia New Zealand Food Authority, the National Road Transport Commission and the National Environment Protection Council Service Corporation, respectively. The ORR is working with these agencies to agree on streamlined processes that reduce duplication.

1.5 Role of the ORR

The ORR's main role is to promote processes that, from an economy-wide perspective, lead to effective and efficient legislation and regulations. The role and functions of the Office are set out in the ORR's charter, which is provided in appendix A. The appendix also outlines the ORR's main activities in 1998-99, with reference to each function specified in the charter.

The rest of this chapter briefly discusses the ORR's role in relation to the Commonwealth and national best practice regulatory processes outlined above.

Commonwealth RIS requirements for new or amended regulation

A key function of the ORR is to liaise with departments and agencies to facilitate compliance with the Government's requirements for regulation impact analysis.

Departments, agencies and statutory authorities considering regulation that may impact on business are required to consult the ORR as early as possible in the policy development process. The ORR provides detailed comments on draft impact assessments. It advises the relevant decision maker and, as necessary, the Assistant Treasurer, on whether the RIS complies with the Government's requirements and contains an adequate level of analysis.

Where regulation or treaties are proposed in Cabinet submissions, the ORR is required to report to Cabinet in its coordination comments on compliance with the RIS requirements. In all other cases, the ORR's advice on compliance with RIS requirements and the adequacy of analysis will be included in the material provided to the Prime Minister, Minister or other decision maker.

In certain cases where departments and agencies are not adequately meeting the Government's requirements, or where the ORR anticipates lodging a 'negative' coordination comment on a Cabinet submission proposing regulation, it may advise the Assistant Treasurer. The Assistant Treasurer can draw the matter to the attention of the responsible Minister. In some cases, the Assistant Treasurer may suggest the withdrawal of a regulatory proposal. If the proposal is to be considered by Cabinet, the Prime Minister can co-opt the Assistant Treasurer to assist the relevant Cabinet discussion. An absent or inadequate final RIS may also attract adverse parliamentary or public comment once it is tabled or otherwise made available to the public. In addition, the Productivity Commission and the OSB are required to report publicly on compliance with RIS requirements (see below).

The ORR provides guidance and training to officials on best practice regulation making and the features of a RIS (see appendix A).

Review and reform of existing legislation

In relation to reviews under the Commonwealth Legislation Review Schedule, the ORR's role is to provide guidance to departments and regulatory agencies on appropriate terms of reference and the composition of review bodies (see chapter 4).

Before a review commences, the ORR advises the responsible portfolio Minister(s) and the Treasurer as to whether terms of reference meet the requirements of the CPA and the Commonwealth's legislation review requirements.

Officials responsible for reviews should consult early with the ORR on the terms of reference — preferably at least three months prior to the expected commencement of the review. To assist departments, the ORR has developed template terms of

reference (see appendix A). Officials are also encouraged to consult the ORR on the structure and composition of review bodies.

Where Commonwealth legislation is involved, the ORR also provides comment on the terms of reference for national reviews.

The ORR does not have a formal role in relation to Commonwealth reviews of regulation not covered by the Legislation Review Schedule, but the Office endeavours to inform bodies responsible for such reviews of the need to reflect the key elements of a RIS in terms of reference. Structuring terms of reference in such a way makes the subsequent preparation of a RIS, for any regulatory proposal arising from the review, an easier task.

Commonwealth regulatory performance monitoring and accountability initiatives

The Productivity Commission must report annually on compliance with the Commonwealth Government's RIS requirements. In particular, the report must include:

... the number of Bills introduced into Parliament and the number of treaties and legislative instruments made during the relevant financial year for which a regulation impact statement was required. The report will also note how many Bills were accompanied by a regulation impact statement. In addition, the [Productivity] Commission will continue to comment in its annual report on the Government's overall performance in regulation setting and review (Prime Minister 1997, pp. 69–70).

Regulation and its Review 1998-99 is one of a series of publications associated with the Productivity Commission's annual report and meets this requirement. This year, for the first time, disaggregated compliance information has been reported at the departmental and agency level (see appendix B).

The ORR also provides information to the OSB for its annual report on the performance of departments and regulatory agencies against the RPIs discussed earlier.

In addition, the ORR monitors and reports on the status of the Commonwealth's legislation review program (see chapter 4 and appendix C).

COAG Guidelines

Consistent with the COAG Guidelines, the ORR provides advice and assistance to Ministerial Councils and national standard-setting bodies on the preparation of RISs for regulatory proposals. The ORR also monitors compliance with the requirements of the COAG Guidelines.

Ministerial Councils and national standard-setting bodies are required to notify 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 national standard-setting body of its assessment. In particular, the ORR assesses:

- whether the RIS guidelines have been followed;
- whether the type and level of analysis are adequate and commensurate with the potential economic and social impact of the proposal; and
- whether alternatives to regulation have been adequately considered.

It is a requirement, however, that the national regulatory bodies certify that the regulatory impact assessment process has been adequately completed. While not obliged to adopt the advice of the ORR, Ministerial Councils and national standard-setting bodies 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 reports to the COAG committee if, in its opinion, decisions of Ministerial Councils or national standard-setting bodies are inconsistent with the COAG Guidelines.

The Ministerial Council or national standard-setting body may consult further with the ORR as the RIS is developed. Upon completion, a final version of the RIS should be sent to the ORR. The Ministerial Council or national standard-setting body has the option of proceeding to public consultation or it may await the final comments of the ORR prior to public release of the RIS. Both ORR comments and any responses made by Ministerial Councils and national standard-setting bodies should be available to State, Territory and Commonwealth Cabinets.

While it is intended that the impact assessment prepared to comply with the COAG requirements would avoid the need for duplication by also satisfying RIS requirements in relevant State or Territory legislation (and indeed Commonwealth

RIS requirements), it is a matter for each jurisdiction to determine whether any further impact assessment is required.