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## 2 Compliance with RIS requirements

**In 2002-03, compliance by Australian Government departments and agencies with the Regulation Impact Statement (RIS) requirements was lower at the decision-making stage than in previous years, but was marginally higher at the tabling stage. Compliance at the decision-making stage for the 13 proposals assessed as 'significant' was also noticeably lower in 2002-03 than in the previous year.**

Regulations affecting business and the community can take various forms. These include primary legislation (Acts of Parliament) and subordinate legislation (disallowable and non-disallowable instruments) where the Parliament has delegated regulation making powers to a Minister, board or organisation. They can also include quasi-regulation. This refers to a range of rules, codes, instruments and standards which governments use to influence business behaviour, but do not form part of explicit government regulation. International treaties can also be a form of regulation if they impact on business and generate expectations that businesses will comply with treaty provisions.

In accordance with the Government's requirements (box 2.1), RISs are required for regulatory proposals that have a direct or significant indirect effect on business or restrict competition. The Government's RIS requirements do not focus on the form a regulation takes (for example, an Act, statutory rule or mandatory standard), but on the intention to regulate and the likely impacts of proposed regulations. A regulatory proposal may be introduced via a single legislative instrument or may be introduced via a package of instruments.

Similarly, the number of RISs required at the decision-making stage reflects the policy development process. Usually a single RIS is required. However, where there are several major incremental decision-making points during the policy development process, RISs should be prepared for each.

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### Box 2.1 Australian 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 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 Office of Regulation Review (ORR), once an administrative decision is made that regulation may be necessary, but before the Government or its delegated official makes a 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 Australian Government must table proposed treaty actions in both Houses of Parliament at least 15 sitting days prior to taking binding action.)

*Source:* NCC (1997), ORR (1998).

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## 2.1 Assessment of compliance

When assessing and reporting on compliance with the Government's RIS requirements, the ORR considers whether:

- a RIS was prepared to inform the decision maker at the policy approval stage and the analysis contained in the RIS was adequate; and
- a RIS was tabled in the Parliament or otherwise made public and the analysis was adequate.<sup>1</sup>

A department or agency is considered to be fully compliant with the Government's requirements only if it meets these conditions. The ORR uses a number of criteria to determine whether the analysis contained in a RIS is adequate (box 2.2). 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). Since 1998-99, this standard has been increased slightly each year as officials have become more familiar and experienced with the analytical approach required in RISs.

RIS compliance is reported in *Regulation and its Review* when the legislative instrument(s) implementing a regulatory proposal are tabled in Parliament (in the case of Bills and treaties), or are made (in the case of disallowable and non-disallowable instruments and quasi-regulations). Hence, the data reported here do not include regulatory proposals decided by the Government in 2002-03, but not introduced into the Parliament or made into law within that period.

### Aggregate compliance in 2002-03

In 2002-03, 139 RISs were required at the decision-making stage. Of these, 120 were prepared and 113 were assessed as adequate by the ORR (a compliance rate of 81 per cent). This compares with compliance rates of 82 per cent in 1999-2000, 83 per cent in 2000-01, and 88 per cent in 2001-02 (table 2.1). As in previous years, failure to prepare a RIS accounted for the majority (nearly three-quarters) of non-compliance. Trends in RIS compliance are discussed in chapter 4.

At the tabling stage, 119 RISs were required, 117 were prepared and 113 were assessed as adequate by the ORR (a compliance rate of 95 per cent). Unlike previous reporting periods, most non-compliance (two-thirds) at the tabling stage was due to the inadequacy of prepared RISs.

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<sup>1</sup> In accordance with the Government's RIS guidelines, RISs for proposals introduced via a Bill, disallowable instrument, or treaty must be tabled in Parliament with the enabling instrument. While there is no formal requirement for RISs for proposals introduced by other forms of instrument to be made public, the ORR encourages departments and agencies to do so.

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## Box 2.2 Adequacy criteria for Regulation Impact Statements (RISs)

The Government has endorsed the following criteria which are employed by the ORR to assess whether each RIS meets the Government's regulatory best practice requirements.

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* (NCC 1997).

The ORR also takes into account recent Government requirements for RISs to include an assessment of ecologically sustainable development (ESD), small business and international trade impacts and where appropriate, cost recovery issues.

*Source:* ORR (1998).

Differences in the total number of RISs required at the decision-making and tabling stages may occur for a variety of reasons. First, there is a formal requirement that RISs be tabled with Bills, disallowable instruments and treaties. However, RISs for

other types of regulation — non-disallowable instruments and quasi-regulation — may be made public, but are not subject to formal assessment by the ORR. Second, more than one RIS may be required at the decision-making stage if there are discrete and significant decision points in the policy development process. Third, differences will occur if a RIS is not required for the decision-making stage, but a RIS is prepared for publication.<sup>2</sup>

**Table 2.1 RIS compliance, 1998-99 to 2002-03**

	1998-99	1999-00	2000-01	2001-02	2002-03
Decision-making stage	203/260 (78%)	169/207 (82%)	132/160 (83%)	130/147 (88%)	113/139 (81%)
Tabling stage <sup>a</sup>	202/228 (89%)	163/179 (91%)	118/133 (89%)	116/123 (94%)	113/119 (95%)

<sup>a</sup> Compliance for regulatory proposals introduced via Bills, treaties and disallowable instruments (that are subject to formal assessment by the ORR).

Source: ORR estimates.

## Significance

The ORR classifies the significance of each regulatory proposal according to:

- the nature and magnitude of the problem and proposal; and
- the scope (broad or narrow) and scale (level or degree) of impacts on affected parties and the community.

While facilitating interpretation of compliance data, categorising regulatory proposals according to their significance and impact also provides a better basis on which to apply the ‘proportionality rule’ — that is, the extent of RIS analysis needs to be commensurate with the magnitude of the problem and with the size and potential impacts of the proposal<sup>3</sup>.

Of the 139 proposals that triggered the Australian Government’s RIS requirements in 2002-03, the ORR identified 13 proposals as having a significant impact on business and/or the community (table 2.2).

<sup>2</sup> A RIS may not be required at the decision-making stage because the decision occurred before the requirements became mandatory or because the regulation is in response to an emergency situation such as a sudden and severe threat to public health and safety.

<sup>3</sup> The approach used in classifying the significance of proposals is discussed in *Regulation and its Review 2000-01* (PC 2001a, p. 7).

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Compliance at the decision-making stage for these more significant proposals was 46 per cent (70 per cent in 2001-02). For less significant proposals, compliance was 85 per cent (90 per cent in 2001-02). Although a number of factors can affect compliance, the difference in RIS compliance between significant and less significant proposals (and the fact that it appears to be growing) suggests that some departments and agencies have yet to adopt effective strategies to integrate the Government's RIS requirements into their policy development processes. (More information on significant proposals is provided in chapter 3.)

## **Timeliness**

It was the Government's intention that the analytical framework underpinning a RIS should be used throughout the policy development process (*A Guide to Regulation*, p. A5). Consequently, departments and agencies are encouraged to integrate the RIS process into their policy development process and consult with the ORR at an early stage. Where departments and agencies consult early with the ORR and prepare a RIS, in most cases the RIS meets an adequate standard.

A relatively long time period between the ORR receiving the first draft of a RIS and when it advises whether the RIS requirements have been met at the decision-making stage can indicate that departments and agencies have undertaken a considered and full assessment of the likely impacts of a regulatory proposal. By contrast, where departments and agencies prepare RISs late in the policy development process, it may be less likely that a RIS will make an effective contribution to policy development.

For more significant regulatory proposals in 2002-03, the average elapsed time between draft RISs being first provided to the ORR and the provision of ORR advice about the adequacy of the RIS at the decision-making stage was 5.4 weeks (table 2.2). This was an increase from an average elapsed time of 2.9 weeks for more significant regulatory proposals in 2001-02. For less significant regulatory proposals in 2002-03, the average elapsed time was 6.8 weeks (up from 5.3 weeks in 2001-02).

While these data indicate that departments and agencies have, in general, been contacting the ORR earlier in the policy development process, the difference in compliance rates for significant and less significant proposals is an ongoing area of concern.

**Table 2.2 Compliance by significance and timeliness, 2002-03**

<i>Significance rating</i>	<i>Required</i>	<i>Prepared</i>	<i>Adequate</i>	<i>Compliance</i>	<i>Average elapsed time</i>
	<i>no.</i>	<i>no.</i>	<i>no.</i>	<i>%</i>	<i>weeks<sup>a</sup></i>
More significant	13	9	6	46	5.4
Less significant	126	111	107	85	6.8
<b>Total</b>	<b>139</b>	<b>120</b>	<b>113</b>	<b>81</b>	<b>6.6</b>

<sup>a</sup> Time 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 very small number of exceptional cases where external factors resulted in an exceptionally long time period (that is, several months or years).

Source: ORR estimates.

### **Multiple decision stages**

In accordance with the Government's RIS requirements, RISs are required at the decision-making stage for proposals that impact on business. In some (generally significant) cases, there may be more than one decision-making stage. For example, the Government may consider a range of regulatory options to deal with an identified problem. Having made a decision on whether and how it wishes to intervene, it then separately considers implementation options. In 2002-03, three proposals followed a multi-stage decision-making process. Of the six RISs required at the various decision-making stages, three were prepared. Of these, only one was assessed as adequate.

### **Proposals that restrict competition**

Restrictions on competition can impose substantial costs through higher prices, reduced choice and impediments to innovation and efficiency. Reflecting these costs — and to meet the requirements of the *Competition Principles Agreement* — where a proposal affects business by restricting competition, the RIS should demonstrate that the benefits of restricting competition outweigh the costs, and that the benefits can only be achieved by restricting competition (NCC 1997).

In 2002-03, there were only two significant proposals that restricted competition. An adequate RIS was not prepared for either proposal. (In the previous year, one of three significant proposals was accompanied by an adequate RIS.) Compliance for less significant proposals that restrict competition was markedly higher than in the previous year (table 2.3).

**Table 2.3 Compliance for proposals that restrict competition at the decision-making stage, 1999-2000 to 2002-03**

<i>Significance rating</i>	<i>1999-00</i>	<i>2000-01</i>	<i>2001-02</i>	<i>2002-03</i>
More significant	5/6 (83%)	2/7 (29%)	1/3 (33%)	0/2 (0%)
Less significant	3/9 (33%)	-	7/9 (78%)	18/20 (90%)
<b>Total</b>	<b>8/15</b> <b>(53%)</b>	<b>2/7</b> <b>(29%)</b>	<b>8/12</b> <b>(67%)</b>	<b>18/22</b> <b>(82%)</b>

Source: ORR estimates.

## 2.2 Compliance by type of regulation

To obtain a better understanding of the possible reasons for non-compliance, the ORR also examines RIS compliance data by type of regulation (table 2.4).

**Table 2.4 RIS compliance, by type of regulation, 2002-03**

<i>Type of regulation</i>	<i>Decision-making</i>			<i>Tabling</i>		
	<i>prepared</i>	<i>adequate</i>		<i>prepared</i>	<i>adequate</i>	
	<i>ratio</i>	<i>ratio</i>	<i>%</i>	<i>ratio</i>	<i>ratio</i>	<i>%</i>
Primary legislation (Bills)	41/52	35/52	67	54/54	50/54	93
Disallowable instruments	54/61	54/61	89	60/62	60/62	97
Non-disallowable instruments	12/13	12/13	92	..	..	..
Quasi-regulation	9/9	9/9	100	..	..	..
Treaties	4/4	3/4	75	3/3	3/3	100
<b>Total</b>	<b>120/139</b>	<b>113/139</b>	<b>81</b>	<b>117/119<sup>a</sup></b>	<b>113/119<sup>a</sup></b>	<b>95</b>

.. Not applicable. <sup>a</sup> Aggregate compliance for Bills, treaties and disallowable instruments subject to formal assessment at this stage by the ORR.

Source: ORR estimates.

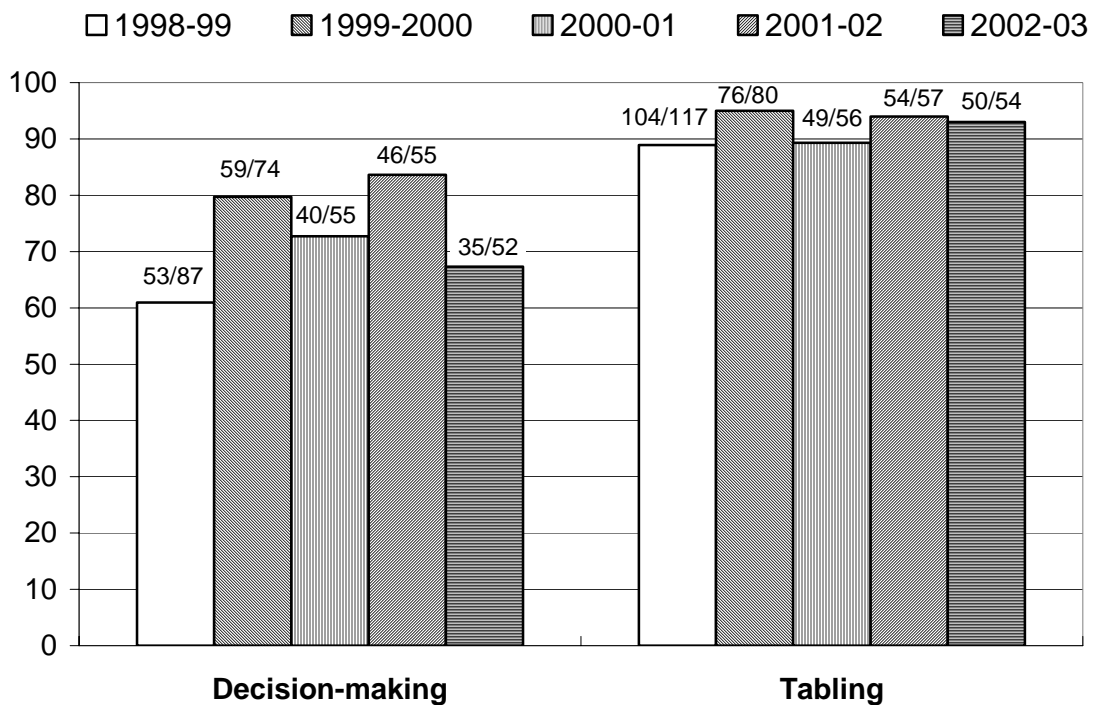
### Primary legislation

There were 52 RISs required at the decision-making stage for proposals introduced by primary legislation (37 per cent of all RISs required). Of these, only 41 RISs were prepared and 35 were assessed as adequate (a compliance rate of 67 per cent). This represents a considerable drop in compliance compared with 2001-02. Of the

eight RISs required for significant proposals introduced via Bills in 2002-03, only four adequate RISs were prepared at the decision-making stage (see chapter 3). At the tabling stage, 54 RISs were required.<sup>4</sup> All were prepared, of which 50 (93 per cent) were assessed as adequate (figure 2.1).

The difference between compliance at the decision-making and tabling stages for proposals introduced via Bills, especially for significant proposals, may suggest that, after five years, some Government departments still regard the RIS process as an ‘add-on’.

Figure 2.1 **RIS compliance, Bills, 1998-99 to 2002-03**  
Per cent



Source: ORR estimates.

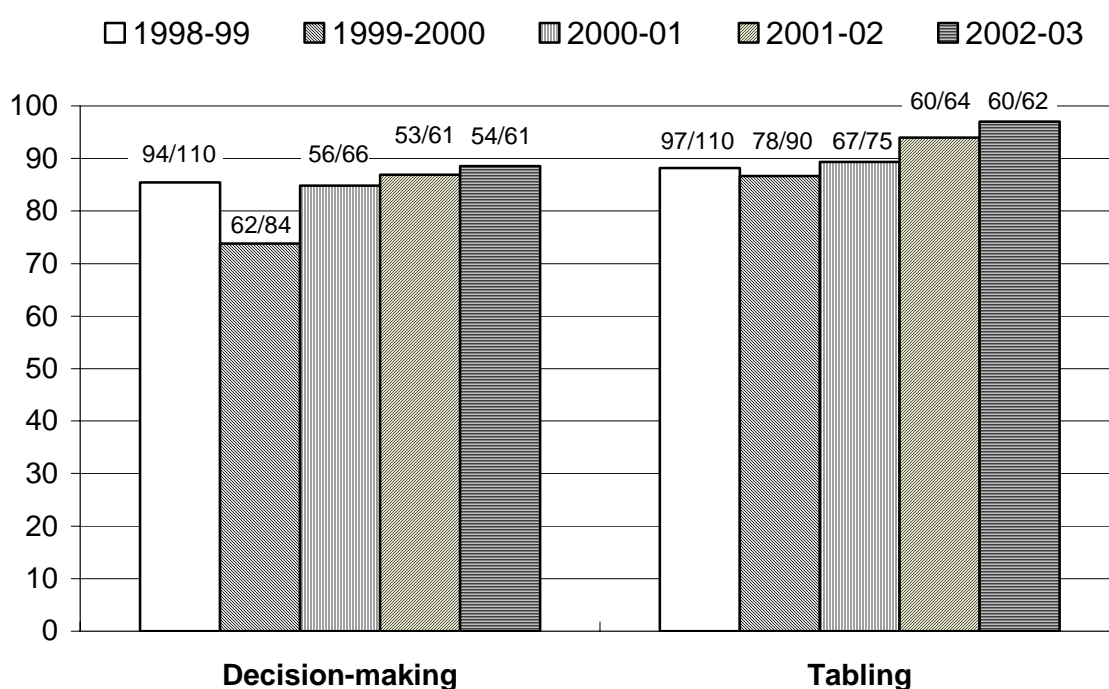
### Disallowable instruments

Disallowable instruments are subordinate legislative instruments that are subject to review by the Senate Standing Committee on Regulations and Ordinances and disallowance by the Parliament.

<sup>4</sup> Two decisions were made before the RIS requirements became mandatory.

In 2002-03, RISs were required for approximately 4 per cent of proposals introduced by disallowable instruments. (In previous years, the proportion has varied between 4 and 7 per cent.) Of the 61 RISs required at the decision-making stage (44 per cent of all RISs required), 54 were prepared and all were assessed as adequate (resulting in a compliance rate of 89 per cent — comparable with 2001-02) (figure 2.2). At the tabling stage, 62 RISs were required, 60 were prepared, and all were assessed as adequate (a compliance rate of 97 per cent).

**Figure 2.2 RIS compliance, disallowable instruments, 1998-99 to 2002-03**  
Per cent



Source: ORR estimates.

### Non-disallowable instruments and quasi-regulations

Non-disallowable instruments include all forms of delegated legislation that are not subject to Parliamentary disallowance. In most cases, there is no requirement that these instruments be 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. Non-disallowable instruments accounted for only 9 per cent, and quasi-regulations only 4 per cent, of RISs required in 2002-03.

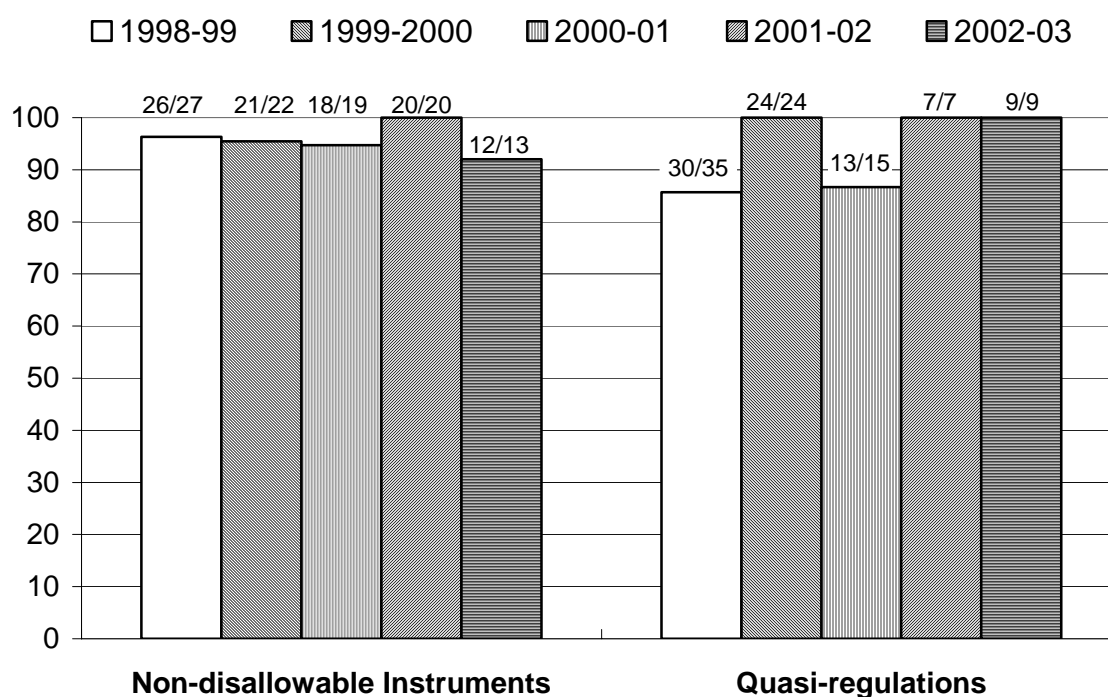
In 2002-03, departments and agencies reported 13 proposals made via non-disallowable instruments that required a RIS at the decision-making stage. In

12 cases RISs were prepared and cleared as adequate by the ORR, resulting in a compliance rate of 92 per cent (figure 2.3).

As in 2001-02, departments and agencies were fully compliant with the Government's RIS requirements for the nine quasi-regulations that required a RIS (figure 2.3).

**Figure 2.3 RIS compliance, non-disallowable instruments and quasi-regulations, 1998-99 to 2002-03**

Per cent



Source: ORR estimates.

## Treaties

Under the Australian Government's RIS requirements, a RIS should be prepared at three stages of the treaty making process — before the formal policy decision to pursue treaty negotiations, prior to Australia signing a treaty and, finally, when the treaty is tabled in Parliament. Other countries also require RISs or a RIS-type analysis of the domestic impacts of treaties (see appendix E).

The RIS prepared for a treaty is an evolving document. Before the decision to pursue negotiations, the emphasis is on identifying the need for international action, the Government's objectives, options and the broad impacts of those options. Where negotiations extend over a long period of time, and the Government is asked to

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make significant decisions before particular negotiation rounds, RISs may be prepared identifying the options and examining the impacts of those options. The RIS prepared for entry and RISs prepared for subsequent significant decisions on the negotiating position form the basis for the RIS prepared prior to signing, at which stage the economy-wide and sectoral impacts of the negotiated treaty text are fleshed out. As with RISs for other forms of regulation, the RIS for signing may contain in-confidence material. In these circumstances, the material is removed prior to tabling in Parliament.

In 2002-03, three treaties that required RISs were tabled in Parliament. Of these, one required a RIS at each of the three stages. The RIS prepared before the decision to pursue negotiations was assessed as inadequate. RISs prepared before signing and for tabling were assessed as adequate.

In the other two cases, adequate RISs were prepared at signing and at tabling. RISs were not required at the earlier stages as the decisions to enter into negotiations occurred before the Government's RIS requirements became mandatory.

## 2.3 National regulation making

Where there is agreement between jurisdictions, national regulatory decisions are made by Ministerial Councils and a small number of national standard-setting bodies. Some of these decisions are implemented by the passage of Australian Government or State/Territory primary legislation and/or regulations. Other decisions are implemented through national regulations or coordinated regulation making by several jurisdictions.

At the request of the Council of Australian Governments (COAG), the ORR has a role in monitoring and reporting on compliance with RISs prepared for Ministerial Councils and standard-setting bodies. These COAG RISs are assessed at two stages: before they are distributed for consultation with parties affected by the regulatory proposal; and before a decision is made by the responsible body.<sup>5</sup> The ORR is required by COAG to assess:

- whether the COAG *Principles and Guidelines* have been followed;

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<sup>5</sup> In November 1997, the COAG *Principles and Guidelines* were amended to require Ministerial Councils and national 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.

- whether the type and level of analysis in the COAG RIS 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 national standard-setting body of its assessment.

The ORR also reports to COAG's Committee on Regulatory Reform and to the National Competition Council on compliance with the COAG Guidelines (see appendix A).

As with Australian Government RISs, it is not the ORR's role to advise on policy aspects of options under consideration, but rather to determine if the guidelines have been followed, the level of analysis is adequate and commensurate with the impacts, and whether alternatives to regulation have been adequately considered. The assessment of the merits of the policy proposal remains the responsibility of the relevant Ministerial Council or standard-setting body.

COAG RIS compliance is reported for the period 1 April to 31 March. Between 1 April 2002 and 31 March 2003, 27 regulatory decisions made by Ministerial Councils and national standard-setting bodies required preparation of a COAG RIS (table 2.5). Adequate RISs were prepared at the decision-making stage for 24 (a compliance rate of 89 per cent). The ORR identified six decisions as having a significant impact on business or the community. In four cases, adequate RISs were prepared (a compliance rate for significant proposals of 67 per cent). Further details are provided in appendix A.

**Table 2.5 COAG RIS compliance, regulatory decisions made by Ministerial Councils and national standard-setting bodies, 2000-01 to 2002-03<sup>a</sup>**

<i>Decision-making stage</i>	<i>2000-01</i>	<i>2001-02</i>	<i>2002-03</i>
All proposals	15/21 (71%)	23/24 (97%)	24/27 (89%)
Significant proposals	5/9 (56%)	6/6 (100%)	4/6 (67%)

<sup>a</sup> Data for 2000-01 relate to the period 1 July 2000 to 31 May 2001. Data for 2001-02 and 2002-03 relate to the period 1 April to 31 March. There is, therefore, some overlap between the reporting periods for the first two reports. However, for each decision included in both reports, Ministerial Councils were compliant with COAG's requirements.

Source: ORR estimates.