
Summary

Purpose of this report

This report documents compliance by Commonwealth departments and regulatory agencies with the Government's requirements for regulation making and review. These requirements are not an end in themselves. They are intended to lead ultimately to regulatory action that is well informed and best serves the community.

There are three major strands to regulation review at the Commonwealth and national levels. These comprise:

- the Commonwealth Legislation Review Program, under which existing legislation which restricts competition or has a major impact on business is being reviewed;
- the Commonwealth's regulation review requirements for the flow of new or amended regulation; and
- the Council of Australian Governments' (COAG) requirement that new national standards and regulatory action be subject to scrutiny.

Commonwealth Legislation Review Program

The Commonwealth Legislation Review Program is being conducted in accordance with the Competition Principles Agreement, under which all Australian jurisdictions agreed to review legislation which potentially restricts competition. The guiding principle of these reviews is that legislation should not restrict competition unless it can be demonstrated that:

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

Jurisdictions have agreed to conduct reviews and implement any required reforms over four years, ending in the year 2000. The Commonwealth's program includes

almost 100 pieces of primary legislation which restrict competition or impose costs or confer benefits on business. Clearly, the program is ambitious.

Performance indicators

Eleven indicators were developed to assess the Commonwealth's compliance with the requirements for the reviews scheduled to have commenced no later than 30 June 1998 (see box 1). The indicators cover three major stages: planning reviews; conducting reviews; and implementing reforms.

Performance was consistently good for those indicators concerned with the initial planning stage of the review process (see figure 1). For example, nearly all reviews commenced as scheduled or had variations approved, and all were conducted by a suitable type of review body, as specified by the Government. However, after reviews commenced, performance against the indicators varied. Adequate consultation was undertaken in all cases and almost all relevant reviews addressed elements of the guiding principle — which is intended to ensure that any restrictions on competition are fully justified — even though less than half reported on this explicitly in their summaries. In the third stage, many of the reforms announced by the Government have been fully implemented.

An issue that warrants attention is whether it will be feasible for this ambitious review and reform program to be completed by the year 2000. Some slippage in timing is evident — by 30 June 1998 about one-third of reviews had been completed, but nearly half of the time allocated for the program of both *review and reform* had elapsed. Tempering concerns about slippage, however, are trade-offs between quality and timing. The skills and resources needed to review and reform legislation properly may not always be readily available. Given the far-reaching consequences of some legislation subject to review, there are compelling reasons why the quality of review and reform efforts should take precedence over timeliness.

Box 1 **Performance indicators for the Commonwealth's Legislative Review Program**

Stage I - Planning the reviews

- a) Did the review proceed as scheduled? If not, was approval sought from the Prime Minister, the Treasurer and the responsible Minister and have reasons for the variation been publicly stated? Did reviews commence late in the financial year?
- b) Was the ORR consulted at least 3 months before the scheduled commencement?
- c) Did the ORR agree that the terms of reference met the requirements of the Competition Principles Agreement and the Commonwealth's review requirements?
- d) Was the review body as specified by the Government?

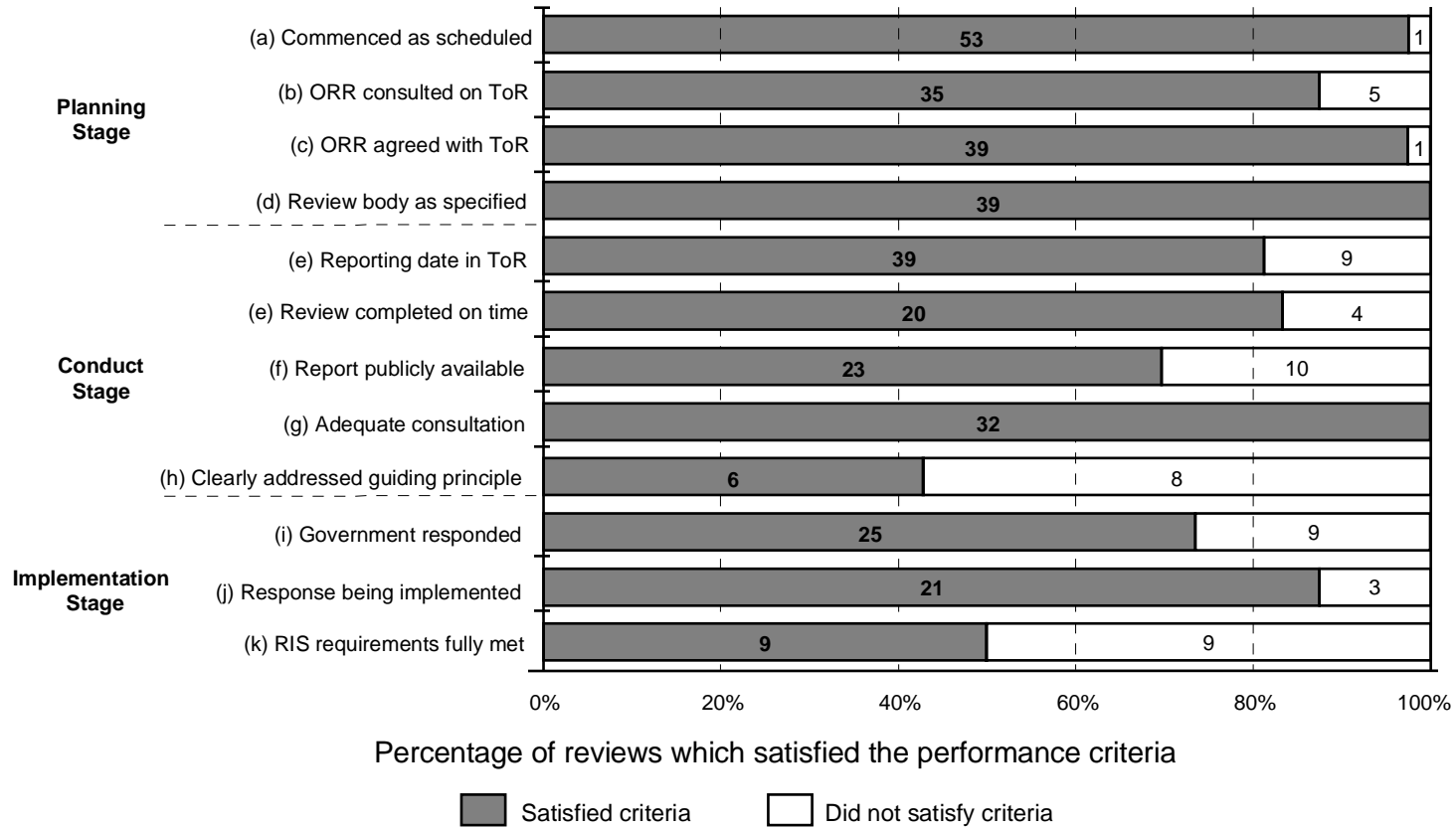
Stage II - Conducting the reviews

- e) Has the review been completed? Was a reporting date included in the terms of reference? If so, was the review completed accordingly? Where appropriate, was approval sought for an extension?
- f) Has the report been made publicly available? If so, how long after completion of the review?
- g) Is there evidence of appropriate consultation opportunities?
- h) Did the report contain a conclusion with respect to the guiding principle of the CPA?

Stage III - Implementing reforms

- i) Has the Government responded? If so, how long after release of the report? Were the review recommendations accepted?
- j) Where the Government has announced regulatory reforms, have the reforms been fully implemented? If so, how long after the announcement?
- k) Where appropriate, was there full compliance with Regulation Impact Statement requirements?

Figure 1 Summary of legislation review performance



Note: The number of observations in each indicator are shown in the relevant area of each bar. The total number of observations is not the same for each indicator because the indicator may not be applicable and because data were not available in some cases (see Appendix B).

Commonwealth Regulation Impact Statement requirements

Commonwealth Regulation Impact Statement (RIS) requirements are outlined in *A Guide to Regulation*. A RIS must be prepared for all new or amended regulations that directly or indirectly affect business, or restrict competition. A RIS should be prepared early in the policy development process, and should set out:

- the problem or issues which give rise to the need for action;
- the desired objective(s);
- the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s);
- an assessment of the impacts (costs and benefits) on consumers, business, government and the community of each option;
- a consultation statement;
- a recommended option; and
- a strategy to implement and review the preferred option.

Although the Commonwealth RIS requirements have been in place since the late 1980s, they were given new impetus in 1997 as part of the Government's response to the recommendations of the Small Business Deregulation Task Force. In particular, the Prime Minister announced that RISs were:

mandatory for all Commonwealth legislation or regulation that has the potential to affect business. The costs and benefits of regulation will be weighed up carefully to ensure that the putative benefits are not outweighed by excessive economic and financial costs, including the compliance burden on business (1997 p. vi).

The Productivity Commission was asked to report on compliance with these RIS requirements, commencing in 1997–98.

Box 2 **Some Commonwealth regulations reported for 1997-98**

Migration Legislation Amendment (Migration Agents) Bill 1997

The Migration Legislation Amendment (Migration Agents) Bill 1997 is part of a legislative package which implements an enhanced regime that requires the registration of migration agents. This legislation aims to protect consumers. It allows consumers to make a more informed choice about the quality of the migration advice they purchase, and to help ensure that consumers are not exploited by unscrupulous operators. In doing so, it delegates the power to register and sanction agents to an industry body.

Telecommunications Numbering Plan 1997

This Numbering Plan was developed and administered by the Australian Communications Authority, and implemented through subordinate regulation. It provides a framework for ensuring that telephone and other service numbers are utilised in a manner that makes the most efficient use of their value as a limited resource. The Plan sets out certain rules and procedures for the management of numbers and provides existing and new telecommunications operators with equitable access to the quantities and types of numbers they require to offer services. The Plan allows for some industry self-regulation.

The National Code of Practice for the Construction Industry

This code was written by the Australian Procurement and Construction Council in consultation with the Departments of Labour Advisory Committee and released by the Minister for Workplace Relations and Small Business in August 1997. It sets out standards for ethical behaviour, industrial relations and occupational health and safety for participants in the construction industry. Sanctions for breaches include partial or total exclusion from government work, publication of details of the breach or reference of the breach to other relevant authorities. In endorsing the Code, the Commonwealth, State and Territory Governments indicated that they were using their position as major clients of business to encourage changes in industry production processes to raise productivity, and other actions that will help develop an industry which achieves internationally competitive standards.

This code is quasi-regulatory. Quasi-regulation is defined as the range of rules, instruments and standards whereby government influences business to comply, but which do not form part of explicit government regulation.

Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters

This treaty defines what is permitted to be dumped in the marine environment.

Commonwealth regulatory activity

As reported by departments and agencies, during 1997-98:

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- 184 Bills were introduced into Parliament;
 - 1 230 pieces of subordinate legislation were made;
 - 30 pieces of quasi-regulation (such as codes of practice) were made; and
 - 47 treaties were tabled.

Due to problems with identifying, classifying and monitoring subordinate and quasi-regulation, the numbers reported for these regulations are likely to underestimate significantly the number actually made.

Regulations reported for 1997–98 covered a broad range of issues. Examples are provided in box 2.

Assessing compliance

The following indicators were used to assess Commonwealth compliance with RIS requirements.

1. Was the Office of Regulation Review (ORR) consulted at an early stage in the policy development process (as required by the Government)?
2. Was a RIS prepared for the decision maker? If so, was this RIS of an adequate standard?
3. Was a RIS tabled in Parliament or otherwise provided to the public? If so, was this RIS of an adequate standard?

Not surprisingly, compliance varied across the different forms of regulation.

Compliance was highest for Bills introduced into Parliament. One hundred and four Bills required the preparation and tabling of a RIS, and this requirement was met in 97 per cent of cases. Compared with the previous year, this was a marked improvement. However, most were prepared *after* the decision to enact legislation had already been made — for only 38 per cent of Bills was the requirement met that a formal RIS be included in documentation given to the decision-maker.

For subordinate legislation, 338 such instruments required the preparation of a RIS. The requirement was met for a little less than half (46 per cent) of these instruments. Subordinate legislation can take many forms and there is no comprehensive identification and monitoring system. This is reflected in the large discrepancy between the amount of subordinate legislation subject to Parliamentary scrutiny (1 888) and the total amount reported to the Office of Regulation Review (1 230) by departments and agencies.

Of the 14 treaties tabled that required the preparation of a RIS, six complied. Although a RIS was prepared for the decision making stage in only one of these cases, this reflected the long lead times in developing treaties. Decisions to enter into treaties were often made a number of years earlier, at a time when RIS requirements were not as extensive. Uncertainty also existed about the stages in the treaty-making process at which RISs were required. All of the RISs that were prepared were of an adequate standard.

Compliance was poor for quasi-regulation. In particular, over 1997–98, the ORR was consulted on only five quasi-regulatory proposals prior to their announcement and only two RISs were developed. This reflected lack of awareness about what criteria triggered the RIS requirement. In addition, much more quasi-regulation was announced than the 30 cases reported to the ORR. For example, some regulatory agencies put out policy statements, notices and protocols on a weekly or monthly basis.

Some aspects of performance were consistent across the various forms of regulation. Importantly, where the ORR was contacted early in the development of a government initiative which was likely to involve regulation, compliance was generally better. In those cases, most RISs were also cleared by the ORR as containing an adequate level of analysis.

Explaining compliance

There are various reasons for the mixed compliance record. The significant achievements in compliance this year can be attributed to the following factors:

- the integration of RIS requirements into the tabling processes for Bills and other existing procedures within agencies;
- the ability to use the RIS as a public document for communicating sound decision-making practices to the public;
- the ‘gatekeeper’ role played by central policy departments in alerting departments and agencies to the RIS requirements, when policy approval was sought or at the tabling stage;
- the information and advice given by the ORR to officials on the RIS requirements in general, and the specific advice on each RIS prepared; and
- the wish by regulation makers to avoid sanctions for non-compliance.

Where regulation makers did not comply adequately with RIS requirements, this was often because they were not fully aware of their obligations. In turn, this was typically because the departmental mechanisms for disseminating Government

decisions to policy officers had not operated effectively. Even where officials were cognisant of the new RIS requirements, they were often unaware of how widely they applied — particularly for subordinate legislation, quasi-regulation and treaties. The ORR worked throughout 1997–98 to address this situation.

Other factors explaining failure to comply include:

- departments having to apply limited resources to maximum effect and meet tight deadlines so that the RIS process received a low priority;
- Ministers' offices not always being aware that the RIS requirements applied to them as well as to departments;
- the cultural change needed within departments to integrate fully the RIS principles into regulation making may take some time; and
- differences of opinion between some departments and agencies and the ORR on matters of interpreting the Guide.

Improving compliance

Compliance is expected to improve in 1998–99, as familiarity with RIS requirements increases, building towards full compliance in the future. Departments and agencies can play a key role in increasing compliance by:

- continuing to formally integrate RIS requirements into existing policy/regulatory development processes;
- targeting early policy development as the time when officers should commence the RIS process so that it can add value at the decision making stage;
- ensuring all relevant officers understand RIS requirements, especially in policy making and legal areas — for example, a knowledge of the requirements could form part of the selection criteria for such placements; and
- allocating to a particular individual, or functional area, specific responsibility for ensuring compliance within the department or agency — this centralised approach could also assist in organising training, and reporting on regulatory activity, within the department or agency.

As well as such actions by departments and agencies, there are two general mechanisms that could improve compliance.

Firstly, the publications of plans of proposed Commonwealth departmental regulatory activity would provide stakeholders with an opportunity to have an input in their formulation. The Department of Employment, Workplace Relations and Small Business is to conduct a pilot project to develop a model for regulatory plans

which could be adopted by other departments and agencies in future. Such plans would also provide an additional mechanism to help ensure that RIS requirements are integrated, at an early stage, in the policy development process.

Secondly, increased use of ‘gatekeeper’ roles by central policy departments would provide increased support for the RIS processes and could play a valuable role in improving compliance.

For its part, the ORR will continue with its central role of assisting departments and agencies to improve their compliance through a range of activities including advising and training officials. (See appendix D for a summary of the ORR’s activities over 1997–98).

COAG Regulation Impact Statement requirements

COAG’s requirements for regulation makers are outlined in *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*. These requirements state that RISs should be prepared for any national standard or regulatory action by Ministerial Councils and standard setting bodies that has an impact on businesses *or individuals*. Hence, a wider range of regulatory activity triggers the COAG RIS requirements, than for a Commonwealth RIS (which is triggered only by an impact on business).

In November 1997, COAG re-endorsed these guidelines and clarified the role of the ORR in advising on, and assisting with, the preparation of RISs. Among other things, the ORR was given the explicit role of monitoring compliance.

There are some 44 Ministerial Councils, covering a wide range of regulatory activity (see appendix E). It would appear from the agendas of these Councils that a number of their proposals would have regulatory impacts and hence should have involved the preparation of a RIS. Yet, in 1997–98, overall compliance by Ministerial Councils remained low. While some Councils performed well, many did not comply at all.

Twenty-nine RISs were completed, however, in only 11 cases was the ORR provided with a RIS for comment, even though doing so is a requirement laid down by COAG.

Many of the factors which explain compliance with Commonwealth RIS requirements are also relevant in this area. Indeed, the major reason behind limited compliance with both Commonwealth and COAG requirements was a lack of

awareness of RIS obligations, and the incorrect application of related guidelines. In particular, in many cases:

- COAG RISs were not incorporated sufficiently early in the policy development process; and
- regulation was defined in an overly narrow and legalistic fashion.

Two specific problems in complying with the COAG requirements were that:

- some agencies claimed they should not be responsible for preparing RISs where the regulatory activity fell under the auspices of several Ministerial Councils; and
- the COAG trigger was (wrongly) interpreted as being confined to business impacts only.

Compliance by Ministerial Councils and national standard-setting bodies is likely to increase as familiarity with RIS requirements grows. The ORR is continuing to work with Ministerial Council secretariats and key agencies responsible for developing regulatory proposals, in order to increase awareness of the COAG requirements. The ORR is also seeking to establish early warning systems, so that the RIS requirements are incorporated as early as possible in policy development processes.

Future reporting on compliance

The Government has directed the Productivity Commission to report annually on compliance with various regulatory review and reform requirements. This is the first such report.

For future reports, consideration will be given to providing disaggregated compliance information at the departmental and agency level. This would be consistent with the Government's decision that the Office of Small Business will publish information on the performance of individual portfolios against specific (measurable) indicators of sound regulatory practice.