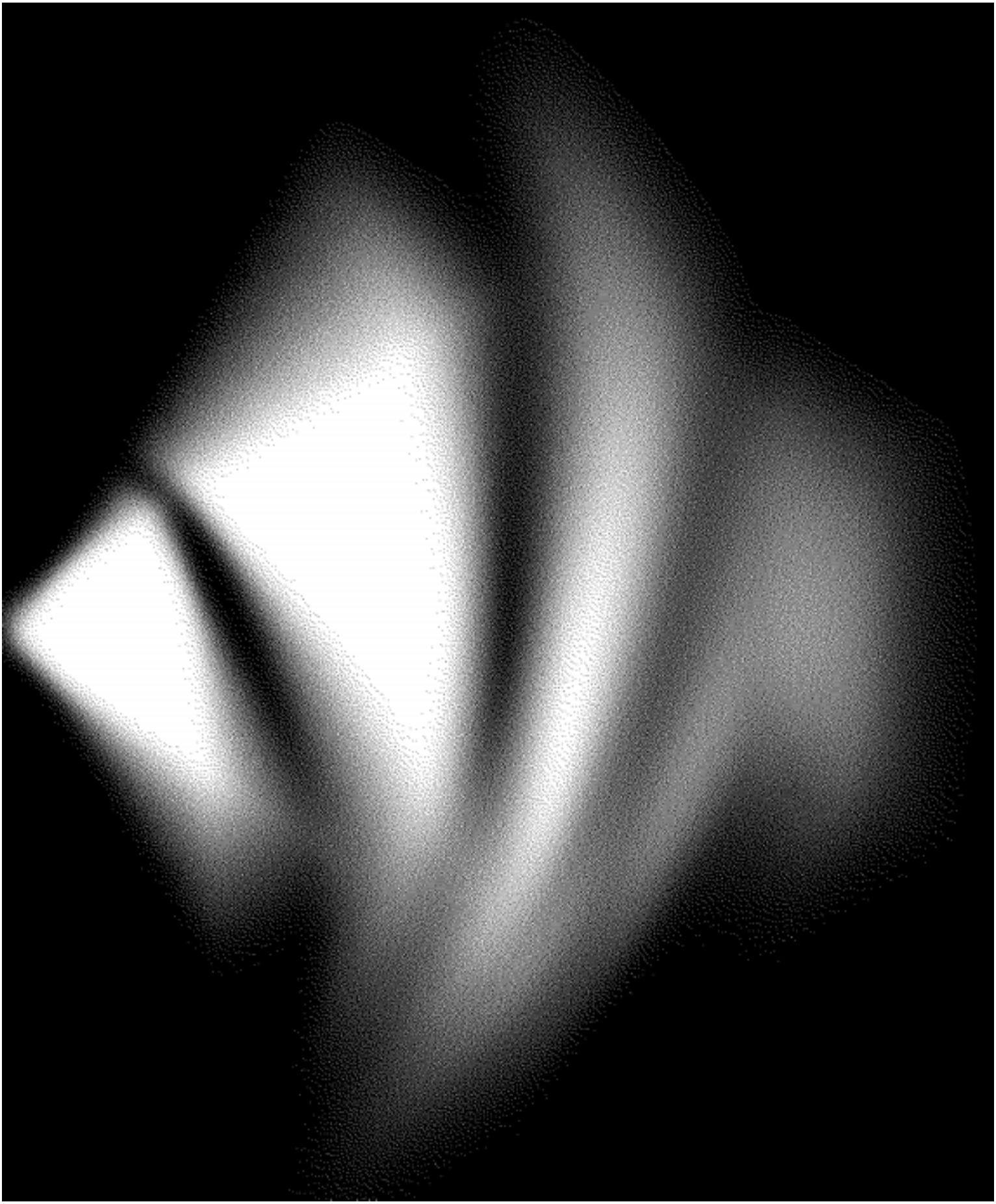
PRODUCTIVITY COMMISSION



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The Productivity Commission

The Productivity Commission is the Commonwealth's principal review and advisory body on microeconomic reform. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the well-being of the community as a whole.

Information on the Productivity Commission, its publications and its current work program can be found on the World Wide Web at http://www.pc.gov.au or by contacting Media and Publications on (03) 9653 2244.

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Foreword

Governments use regulations to achieve a variety of worthwhile social and economic objectives. It is important, however, that the goals sought through regulation are clearly identified and that they are achieved in the most effective and efficient manner. Otherwise, the competitiveness of business and the productivity of the economy may be impaired, and community living standards diminished.

The Prime Minister, in *More Time for Business* (1997), outlined the Government's initiatives for regulation making and review. They expanded on earlier requirements to prepare Regulation Impact Statements (RIS) and cover most of the processes by which laws and regulations are developed. As well, the Council of Australian Governments has put in place two programs: to review existing legislation which restricts competition; and to ensure that Ministerial Councils and other national standard-setting bodies fully assess their regulatory proposals.

The Office of Regulation Review (ORR), within the Productivity Commission, has a central role in securing the implementation of these initiatives. The ORR is required to help ensure that all departments, agencies and national standard-setting bodies fulfil the requirements for new and amended regulations by providing guidance and training, as well as advising on the adequacy of RISs. It is also required to vet the terms of reference of the reviews of existing Commonwealth legislation.

The Government has asked the Productivity Commission to report annually on compliance with these regulation review initiatives. This is the first such report and forms part of the Productivity Commission's annual report series of publications for 1997–98.

The Commission is grateful for the cooperation of Commonwealth departments and agencies in providing information about their regulatory activity throughout the year.

Gary Banks
Chairman

Abbreviations[1]

ABA	Australian Broadcasting Authority
ACCC	Australian Competition and Consumer Commission
ACM	Alternative Compliance Mechanism
ACT	Australian Capital Territory
ACTBC	Australian Capital Territory Business Channel
AMSA	Australian Maritime Safety Authority
ANZFA	Australia New Zealand Food Authority
ANZFSC	Australia New Zealand Food Standards Council
ANTA	Australian National Training Authority
ASIC	Australian Securities and Investment Commission
AQIS	Australian Quarantine and Inspection Service
ATO	Australian Taxation Office
BIA	Business Impact Assessment
BLIS	Business Licence Information System
CASA	Civil Aviation Safety Authority
COAG	Council of Australian Governments
COAG Guidelines	*Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*
CPA	Competition Principles Agreement
DARTI	Department of Asian Relations, Trade and Industry (Northern Territory)
DFAT	Department of Foreign Affairs and Trade

1 Since the focus is on compliance in 1997–98, this report largely refers to the departments and their responsibilities as they were then, rather than to the changes in names and responsibilities which took effect late in 1998.

DISB	Department of Industries and Small Business (Northern Territory)
DIST	Department of Industry, Science and Tourism
DOCA	Department of Communications and the Arts
DPIE	Department of Primary Industries and Energy
IC	Industry Commission
LEAP	Livestock Export Accreditation Program
MCCA	Ministerial Council on Consumer Affairs
MCRT	Ministerial Council on Road Transport
NCA	National Crime Authority
NCC	National Competition Council
NEPC	National Environment Protection Council
NIA	National Impact Analysis
NOHSC	National Occupational Health and Safety Commission
NPRM	Notice of Prior Rule Making
NRA	National Registration Authority for Agricultural and Veterinary Chemicals
NRTC	National Road Transport Commission
OECD	Organisation for Economic Cooperation and Development
ORR	Office of Regulation Review
PC	Productivity Commission
PM&C	Department of the Prime Minister and Cabinet
RAS	Rural Adjustment Scheme
RIS	Regulation Impact Statement
RRU	Regulation Review Unit (Tasmania)
SBDC	Small Business Development Corporation (Western Australia)
SSCRO	Senate Standing Committee on Regulations and Ordinances
ToR	Terms of Reference
TPA	*Trade Practices Act 1974*

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?

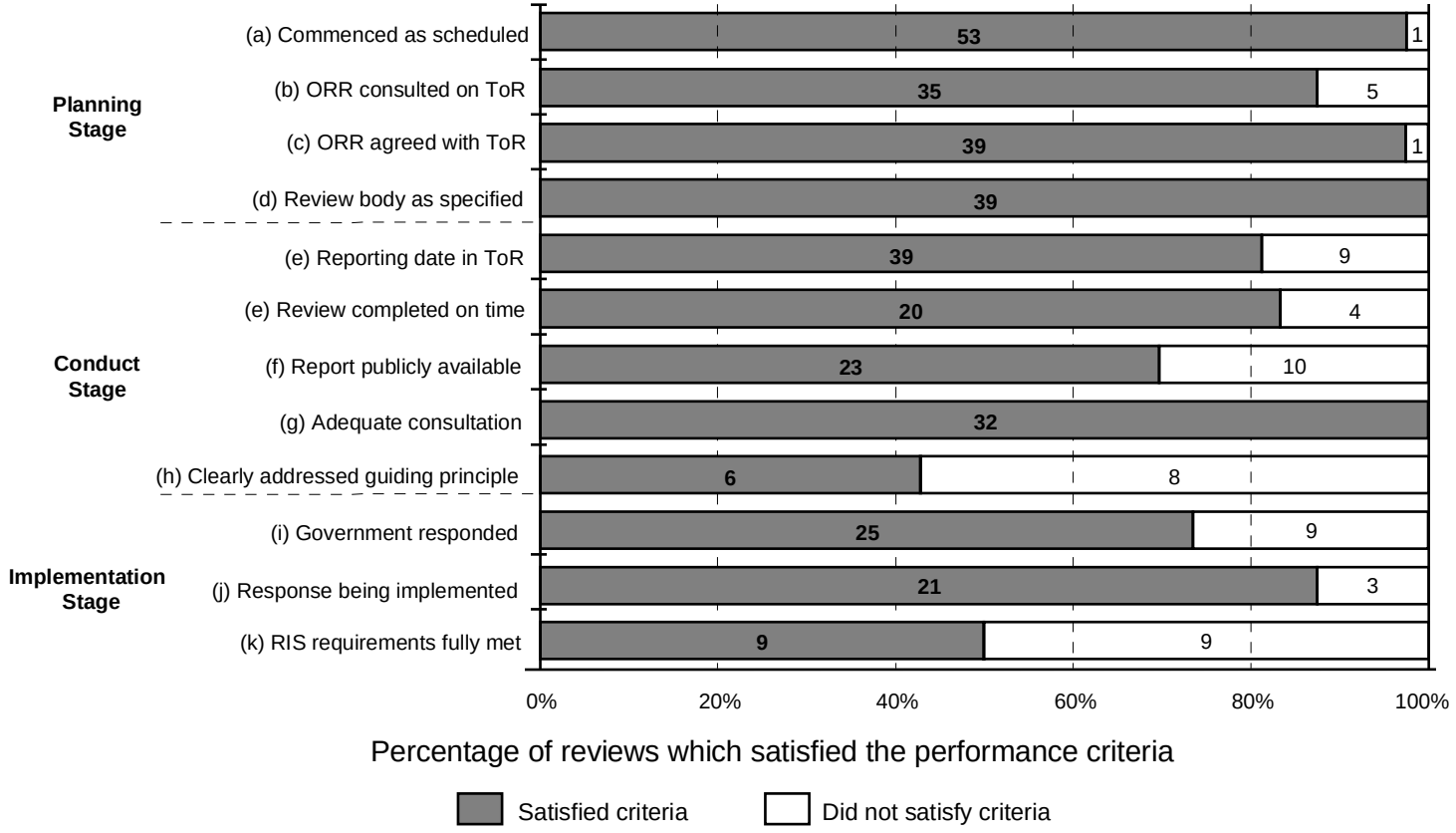
Stage III - Implementing reforms

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 is 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:

- 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.

PART I

THE STOCK OF REGULATION

1 Progress in review and reform of existing legislation

A national program of review and reform of existing legislation which potentially restricts competition commenced in 1996. Under the terms of the Competition Principles Agreement it is required to be completed by 31 December 2000.

This chapter reports on the status of Commonwealth reviews. In addition, it examines how well these reviews have complied with various obligations and requirements, such as those concerning terms of reference, the content of reports, publication, consultation and reform efforts.

While compliance can be improved further, the process requirements have generally been met. There are, however, grounds for questioning whether the program can be completed in time.

1.1 Obligations and requirements for reviews

1997–98 was the second year of a national four–year program of review of existing legislation. The Commonwealth's review program covers legislation which potentially restricts competition or which imposes costs or confers benefits on business. *Regulation and its Review 1996–97* detailed the origins of the review program, preparation of the Commonwealth's Legislation Review Schedule and progress in 1996–97. Details of progress during 1997–98 are provided in this chapter, together with suggestions for improvement in the remaining two years of the program.

The Commonwealth's obligations under the Competition Principles Agreement

One element of the Competition Principles Agreement (COAG 1995a) was a commitment by all Australian governments to review and, where appropriate, reform any existing legislation that restricts competition, by 31 December 2000.

While each government has discretion over what is reviewed, the review bodies, and the timing of reforms, the Agreement contains clear obligations for the analytical approach to reviews. Clause 5(1) of the Competition Principles 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.

These requirements largely reflect the issues addressed in a Commonwealth Regulation Impact Statement (RIS) (see chapter 2). Consequently, if clause 5(9) is fully addressed in the review, any subsequent RIS requirements for regulatory change can usually be met.

While governments are not bound by the findings and recommendations of reviews, the National Competition Council (NCC) has sought justification in cases where pro-competitive review recommendations were not supported.

The Commonwealth Legislation Review Schedule

In accordance with its obligations under the Competition Principles Agreement, the Commonwealth Government announced its review timetable on 28 June 1996 (Treasurer 1996). It comprised 98 reviews, 13 of which were already under way. The program of review not only included legislation which potentially restricts competition, but was expanded to include legislation which may impose costs or

confer benefits on business. The full schedule is in appendix A, including a brief description of the potential impact of the legislation and the status of the review.[1]

In announcing the Legislation Review Schedule, the Commonwealth outlined a number of requirements for reviews. Apart from the timing and coverage of the program, each review is required:

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

In addition, the Government decided that:

- terms of reference should note the processes for responding to the review's recommendations; and
- any amendment to the schedule must be agreed by the Prime Minister, the Treasurer and the Minister(s) responsible for the relevant legislation.

The Office of Regulation Review's role

The ORR's role is to advise Ministers as to whether terms of reference meet the requirements of the Competition Principles Agreement and the Commonwealth's Legislation Review requirements. To that end, officials responsible for reviews:

- should consult early with the ORR on the terms of reference — the ORR has suggested to portfolios that consultation commence at least three months before the scheduled commencement of reviews; and
- are encouraged to consult the ORR on the structure and composition of review bodies.

The ORR also developed template terms of reference (see box 1.1) which can be adapted by departments to fit the specific requirements of each review.

[1] Appendix A lists the full title of each piece of legislation to be reviewed. The items are numbered (1 through 98) according to the original schedule. In this chapter, a shorthand title is sometimes adopted when referring to specific legislation listed for review. The review number is included in parentheses to facilitate cross referencing to appendices A and B.

Box 1.1 **The template terms of reference**

1. The [legislation], and associated regulations, are referred to the [Review Body] for evaluation and report by [date]. The [Review Body] is to focus on those parts of the legislation which restrict competition, or which impose costs or confer benefits on business.
2. The [Review Body] is to report on the appropriate arrangements for regulation, if any, taking into account the following:
   (a) legislation/regulation which restricts competition should be retained only if the benefits to the community as a whole outweigh the costs; and if the objectives of the legislation/regulation can be achieved only by restricting competition. Alternative approaches which may not restrict competition include quasi-regulation and self-regulation.
   (b) in assessing the matters in (a), regard should be had, where relevant, to effects on the environment, welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business including small business, and efficient resource allocation.
   (c) the need to promote consistency between regulatory regimes and efficient regulatory administration, through improved coordination to eliminate unnecessary duplication.
   (d) there should be explicit assessment of the suitability and impact of any standards referenced in the legislation, and justification of their retention if they remain as referenced standards.
   (e) compliance costs and the paper work burden on small business should be reduced where feasible.
3. In making assessments in relation to the matters in (2), the [Review Body] is to have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement. The report of the [Review Body] should:
   (a) identify the nature and magnitude of the social, environmental or other economic problem(s) that the [legislation] seeks to address.
   (b) clarify the objectives of the [legislation].
   (c) identify whether, and to what extent, the [legislation] restricts competition.
   (d) identify relevant alternatives to the [legislation], including non-legislative approaches.
   (e) analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of [legislation] and alternatives identified in (d).
   (f) identify the different groups likely to be affected by the [legislation] and alternatives.
   (g) list the individuals and groups consulted during the review and outline their views, or reasons why consultation was inappropriate.

(Continued on next page)

Box 1.2 **(continued)**

(h) determine a preferred option for regulation, if any, in light of objectives set out in (2).

(i) examine mechanisms for increasing the overall efficiency, including minimising the compliance costs and paper burden on small business, of the [legislation] and, where it differs, the preferred option.

4. In undertaking the review, the [Review Body] is to advertise nationally, consult with key interest groups and affected parties, and publish a report.

5. In undertaking the review and preparing its report and associated recommendations, the [Review Body] is to note the Government's intention to announce its responses to the recommendations, after obtaining advice from [the Secretary/Minister] and, where appropriate, after consideration by Cabinet.

1.2 The status of reviews

This section provides an overview of progress against the schedule as announced by the Treasurer on 28 June 1996. Section 1.3 provides an assessment of how the reviews have performed against a number of indicators.

Of the 98 reviews on the *original* schedule:

- 13 were under way when the program was announced on 28 June 1996;
- 26 were to commence in 1996–97;
- 28 were to commence in 1997–98;
- 21 were to commence in 1998–99; and
- the remaining 10 were to commence in 1999–2000.

There have been a number of variations to the 67 reviews originally scheduled to begin by 30 June 1998:[2]

- 5 reviews have been removed from the schedule (#17, #22, #52, #53, and #55) — see appendix A for the reasons;

[2] Variations to reviews originally scheduled in 1998–99 and 1999–2000 are noted in appendix A. Reviews may also be added to the schedule — for example, the Government is considering including the *Disability Discrimination Act 1992* for review in 1999–2000. This Act aims to remove discrimination against persons on the grounds of disability. However, there is considerable uncertainty about how business should comply with the Act. Furthermore, there are concerns about the potential costs of compliance and about which groups in the community should bear those costs.

- 10 reviews have been deferred beyond 1997–98 (#41, #42, #43, #47, #49, #60, #63, #65, #66, #67); and
- 2 reviews have been brought forward from beyond 1997–98 (#75, #77).

After accounting for these changes, there were 54 reviews which should have commenced by 30 June 1998. Figure 1.1 provides an overview of progress, which is discussed below.

Reviews completed

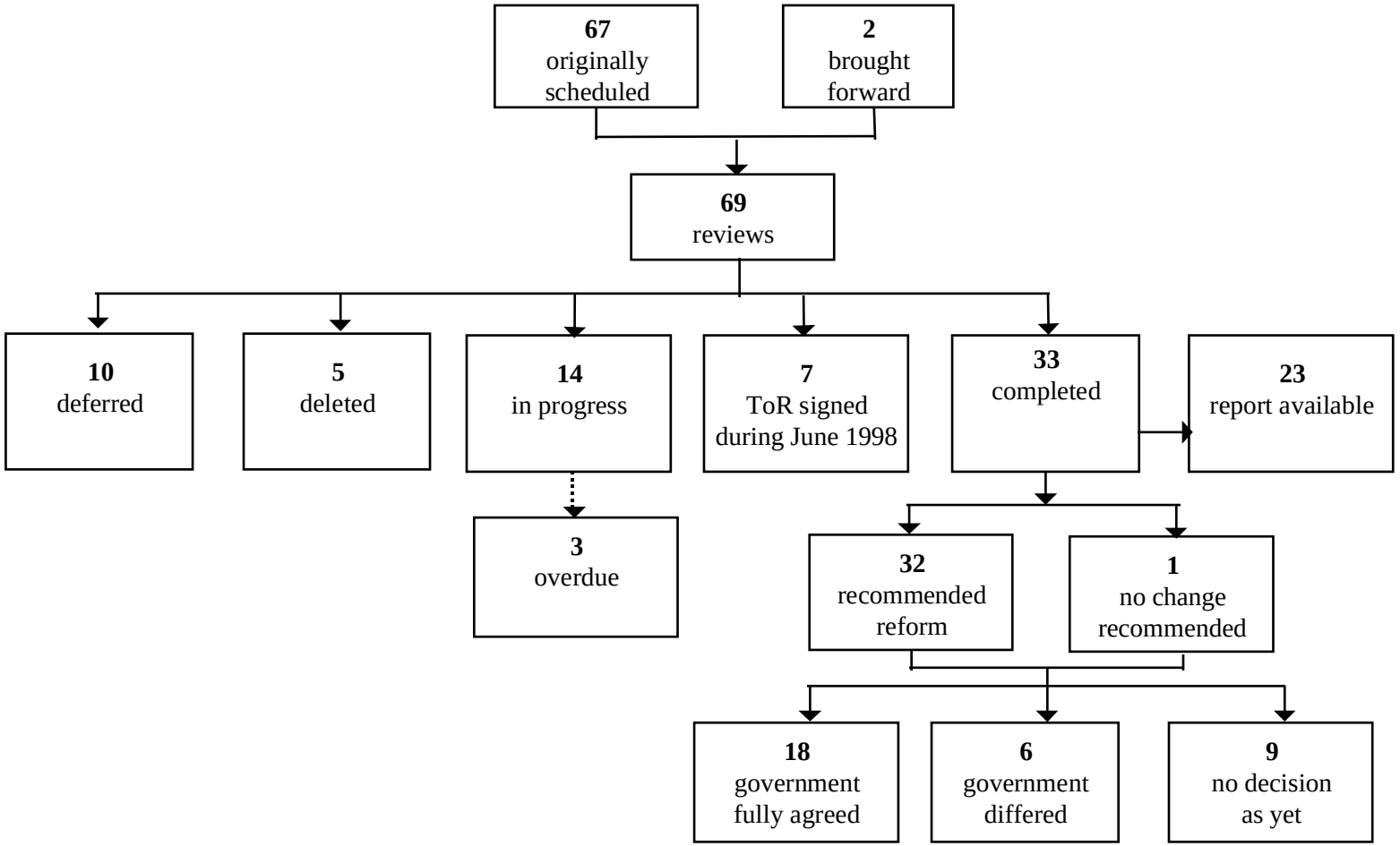
As at 30 June 1998, of the 54 reviews expected to have begun, 33 reviews (or 61 per cent) had been completed (see the status column in appendix A).

Reviews in progress at 30 June 1998

Of the 14 reviews in progress at 30 June 1998, three will be completed somewhat later than originally planned:

- the review report of the *Tradesmen's Rights Regulation Act 1946* (#25) was due by 31 October 1997; however, the review did not commence until December 1997. An interim report was circulated to major stakeholders for comment in September 1998. A final report is due to be submitted to the Minister in November 1998 for consideration by government;
- the review of the *Pooled Development Funds Act 1992* (#29) was due to be completed by 30 June 1997, but was postponed because of the Government's consideration of tax reform during 1997–98. The review taskforce is expected to report to the Minister for Industry, Science and Resources and the Treasurer after October 1998; and
- the review of the *Mutual Recognition Act 1992* (#45) was commenced in October 1997 by the COAG Committee on Regulatory Reform, but the March 1998 reporting date was extended to 30 June 1998. The final report was not available by October 1998.

Figure 1.1 **Summary of review status as at 30 June 1998**



Terms of reference not settled until June 1998

For seven reviews, their terms of reference were only settled late in the financial year and, for some of these, no other steps had been taken to progress them further by 30 June 1998. Comments on these seven reviews follow.

- The review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (#33) was originally scheduled to commence in 1996–97. However, there were a number of changes to the proposed conduct of the review. During 1997 it was proposed that it be subsumed within a major review of the Act to be undertaken during 1997–98. However, the Minister for Aboriginal and Torres Strait Islander Affairs decided that the CPA review of the Act would be conducted separately from the major review. Terms of reference for a review of Part IV of the Act, addressing the CPA requirements, were drafted and expressions of interest for tenders for the consultant were advertised in June 1998. The review was to commence once the consultant had been appointed.
- The review of the registration provisions of the *Bankruptcy Act 1966 and Bankruptcy Rules* (#40) will be undertaken by a consultant over a five month period.
- The review of the *Customs Act 1901 (Sections 154–161L)* (#50) is to be undertaken by a taskforce of officials and is to report by 20 February 1999. The legislation deals with valuation of imported goods.
- The Primary Industries Levies Acts and related Collection Acts (#54) will be reviewed by a committee of officials and is to report by 31 December 1998.
- The review of the *National Residue Survey Administration Act 1992* and related Acts (#57) will be conducted by a committee of officials and is to report by 30 November 1998.
- A committee of officials will review the *Pig Industry Act 1986* and related Acts (#58) and is to report by 31 January 1999.
- The review of the *Agricultural and Veterinary Chemicals Act 1994* (#77) will be covered by the National Review of Agricultural and Veterinary Chemicals Legislation, which is to be undertaken in accordance with the Victorian Government's *Timetable for the Review and Reform of Legislation that Restricts Competition* (Department of Premier and Cabinet 1996).

1.3 Performance indicators for review and reform of existing legislation

Together, the obligations under the Competition Principles Agreement, the Commonwealth's requirements for the Legislation Review Schedule and the RIS requirements provide 'benchmarks' against which to assess legislation review and reform performance. Based on these requirements, the ORR has developed 11 performance indicators, covering the three stages of planning the review, conducting the review and implementing reforms (see box 1.2). These performance indicators are a mixture of process requirements and timing issues.

The objective of the assessment is not to identify specific reviews as exhibiting elements of less than ideal performance. Rather, it is about drawing lessons for the future. By clarifying the obligations and requirements for review and reform, including what constitutes best practice or good performance, future reviews are likely to be more effective, providing a better basis for reform decisions.

Figure 1.2 summarises some broad results — details for each review are presented in appendix B. In summary:

- Performance was good for those processes concerned with *planning* for reviews, such as consulting early with the ORR and adopting the type of review body decided by the Government.
- Performance for the *conduct* stage was more varied — for example, while adequate consultation (indicator (g)) was exhibited in all cases, fewer than 50 per cent of review reports, where relevant, explicitly referred to elements of the guiding principle of the Competition Principles Agreement in the executive summary (indicator (h)).
- The performance indicators for the reform stage show that steady progress is being made in announcing and *implementing* reforms. Inevitably, there will usually be a certain amount of 'unfinished business' at any one point of time, because of the lag involved in preparing regulatory change and obtaining approval for change.
- Full compliance with the RIS requirements, for regulatory change consequent upon a review (indicator (k)), was achieved in 50 per cent of cases.

The results for each indicator are discussed in more detail below.

Box 1.3 **Performance indicators for review and reform of existing legislation**

Stage I – Planning the reviews

(a) Did the review commence 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?

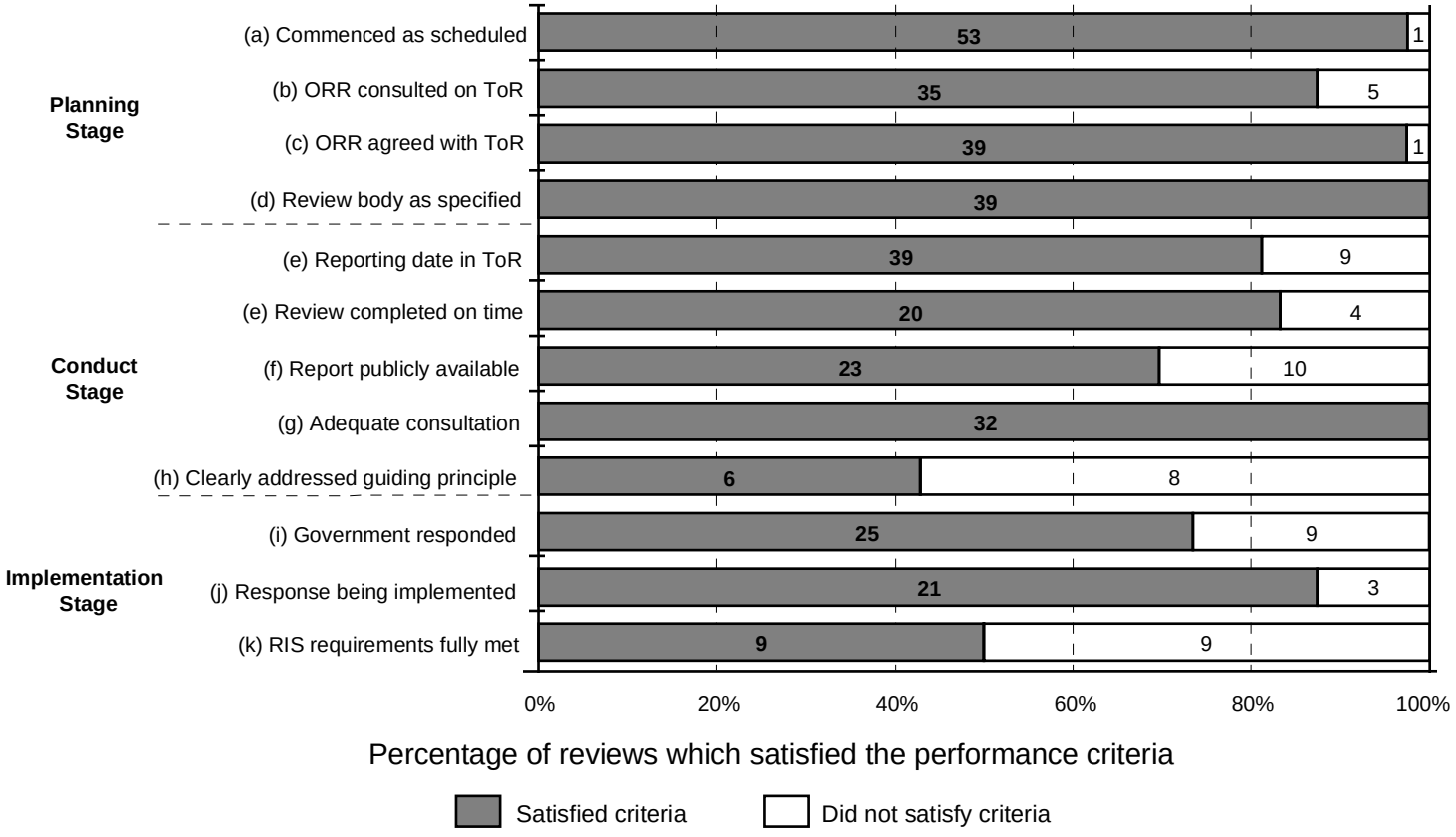
Stage III – Implementing reforms

(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 1.2 **Summary of legislation review performance**



Note: The number of observations is 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).

(a) Did the review commence 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?

One discipline on with the program is the requirement to obtain approval from the Prime Minister, Treasurer and responsible Minister(s) for variations to the timing and scope of reviews. Approved variations to the original schedule have included:

- deletion of five reviews and deferral of 10 reviews, in some cases because the legislation has become redundant or new arrangements have been implemented and it is sensible to postpone the review;
- the combining of reviews for reasons of greater efficiency and effectiveness; for example, two reviews dealing with Migration Agents legislation (#23 and #24) were combined into a single review, as were the reviews of International Air Services Agreements (#34) and the *International Air Services Commission Act 1992* (#61); and
- two reviews where the Commonwealth's obligations are being met via national reviews — the *Australia New Zealand Food Authority Act 1991* (#75a) and the *Agricultural and Veterinary Chemicals Act 1994* (#77).

There has been only one case where a review did not commence as originally scheduled without the appropriate approval having been sought.

Some practices, however, can be improved. Based on the experience of the first two years, there appeared to have been scope for approval to be sought earlier, when it was clear that a variation would be desirable or necessary. There also appeared to have been scope for approved variations to have been made public sooner.

There is some evidence of an increasing trend towards reviews being started later in the financial year (see box 1.3). If this trend continues, particularly for those reviews scheduled for 1999–2000, it will prove difficult to complete the review program and implement reforms before 31 December 2000.

Box 1.4 **Indications that reviews are starting later in the financial year.**

In 1996–97, six reviews (of 19) began in the first quarter (July–August–September), and the average commencement date was 6–7 months into the year.

In 1997–98, only one review (of 13) began in the first quarter and the average start-date was over 9 months into the year. Seven reviews did not have terms of reference settled until June 1998.

Of the revised list of 27 reviews scheduled to commence in 1998–99 — refer appendix A — none had started by end-September 1998.

(b) Was the ORR consulted at least 3 months before the scheduled commencement?

The Government requires the ORR to advise the Treasurer and the responsible Minister on the draft terms of reference. A minimum of three months prior to the expected commencement has been encouraged as an appropriate period of consultation.

The suggested three month consultation period was observed in most cases and proved to be sufficient time to resolve any concerns with terms of reference. Although consultation occurred less than three months prior to planned commencement in four cases, satisfactory terms of reference were developed. The three month consultation period has contributed to good outcomes and will continue to be encouraged.

(c) Did the ORR agree that the terms of reference met the Competition Principles Agreement and Commonwealth's review requirements?

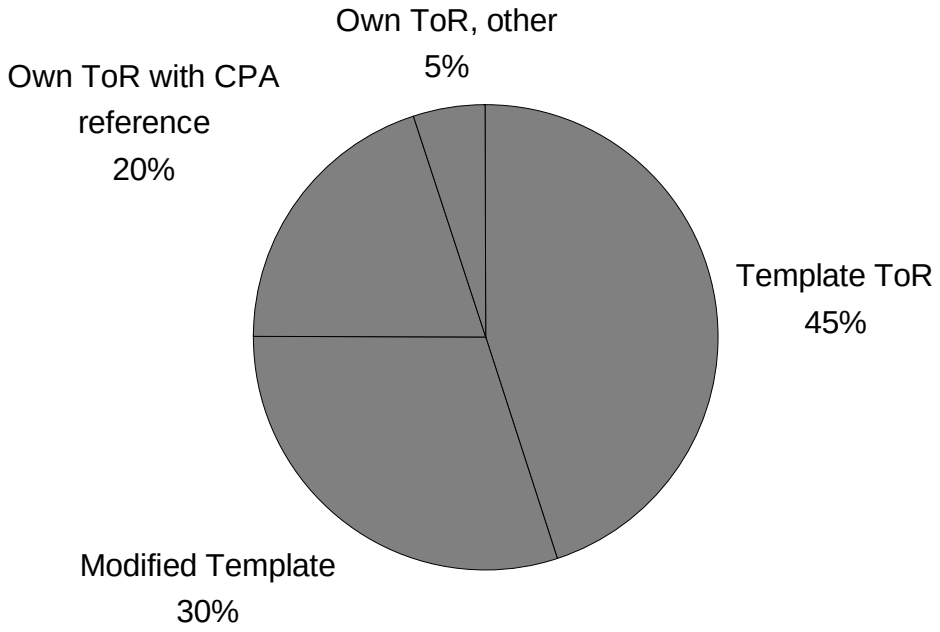
The ORR advised that the draft terms of reference met the requirements in all cases except one — there are no terms of reference for the review of Foreign Investment Policy (#39).

For the ORR to agree, the terms of reference must:

- recognise the guiding principle under the CPA; and
- have an analytical framework centred around cost-benefit analysis, such as provided by the RIS guidelines or clause 5(9) of the CPA.

While the template terms of reference is only a guide, it was used as the basis for agreed terms of reference in about 75 per cent of cases (see figure 1.3).

Figure 1.1 **Use of the template as an agreed terms of reference**



(d) Was the review body as specified by the Government?

In announcing the Legislation Review Schedule, the Government stated:

> the priority and importance of the legislation identified on the schedule varies. Accordingly, the method of reviewing the legislation will take account of its significance and the likely benefits of reform (Treasurer 1996, p. 2).

The Government identified eight types of review body, but did not make public the type of review body provisionally indicated for each review. The extent to which the eight different types have been used to date is shown in box 1.4.

The membership of a review body or reference group/steering committee is integral to whether the review and its conduct conforms to the Government's requirement. While the ORR does not formally clear the membership of a review committee, departments are encouraged to discuss the committee's make-up. For example, consideration needs to be given to whether the review committee includes appropriate representation from major stakeholders other than producers, such as consumers, and whether the technical and analytical challenges of the review require a specialist not aligned with the stakeholder groups.

As indicated in figure 1.2, compliance with the review body requirement was met in all cases.

Box 1.5 **The types of review bodies for reviews conducted between 30 June 1996 and 30 June 1998**

The numbers for the different types of review bodies were:

- five by an independent committee specifically appointed for the review;
- two by the National Competition Council;
- four by the Industry Commission (now part of the Productivity Commission);
- eleven by a taskforce of seconded officials, with a reference group of independent members in some cases;
- two by private consultants;
- none by Commonwealth research bureaus (for example, the Australian Bureau of Agriculture and Resource Economics, and the Bureau of Transport Economics);*****
- twelve by a committee of officials from key government agencies (with public submissions sought from interested parties); and
- one by a committee of officials drawn from within the department responsible for the legislation.

In addition, two reviews became part of national reviews.

***** Officials from the research bureaus have been represented on some review bodies and/or reference groups.

(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?

Thirty-three reviews have been completed, with conduct of reviews taking from three to 18 months.

Departments are encouraged to include reporting dates in the draft terms of reference. This was done for around 80 per cent of reviews. Of those which are now completed, almost 85 per cent met due date — or the amended date where an extension was sought. The 'over-runs' (and extensions) were generally no more than a few months.

If an extension is required, departments are encouraged to seek approval from the Treasurer or, to at least, notify the Treasurer of the responsible Minister's approval.

While it is not clear from the statistics alone whether inclusion of a reporting date acted as a discipline on reviews — for example, those without reporting dates may have better met departments' internal timeliness — there are benefits to stakeholders from explicit reporting dates, and consideration should continue to be given to the inclusion of a reporting date in the terms of reference.

(f) Has the report been made publicly available? If so, how long after completion?

Review reports should be made publicly available — that is, they should at least be provided to interested parties and their availability should be made known. Reports from 23 reviews (of the 33 completed) are now publicly available.

The length of time between completion of a report and when it became publicly available ranged from a few days to nine months. Most of the reports from reviews conducted by the Industry Commission, the National Competition Council and independent committees were released within one month of completion.

While it may be desirable in some cases to delay release of the report until the government response is prepared, this need not be the case. For example, the report of the review of *Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993 and Regulations* (#18) was released by the Minister for Foreign Affairs on 23 July 1997, who indicated that a response could be expected within three months.

(g) Is there evidence of appropriate consultation opportunities?

What constitutes appropriate consultation? The NCC has commented:

> reviews ... should be conducted in an independent, open and transparent way, against clear terms of reference, and in a manner that allows interested parties to participate (NCC 1997, p. 74).

There are many ways in which a review can provide opportunities for stakeholders to participate — for example, through meetings, open hearings and the opportunity to make submissions. What is appropriate or cost effective will vary among reviews.

One threshold indicator is whether a review was advertised nationally, since making it widely known that a review is being conducted is a precursor to providing the opportunity to participate. All reviews were advertised nationally except for the review of *Foreign Investment Policy* (#39).

Of the publicly available reports examined by the ORR, all adequately detailed the consultation process, usually quite comprehensively.

While there is no legislation review requirement to prepare a draft report, some terms of reference do specify preparation and release of a draft report and for at least eight reviews draft reports were issued. These reviews were generally of greater significance, as reflected in the choice of review body, such as independent

committees. For at least 14 other reviews, background or issues papers were released and for some of these reviews there may subsequently be a draft report.

(h) Did the report contain a conclusion with respect to the guiding principle of the CPA?

Reviews of regulation which potentially restrict competition are to be approached according to the guiding principle of the CPA. That is, a review report should make a clear statement (ideally in the executive summary) as to whether the regulation:

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

Not all of the Commonwealth regulations listed for review potentially restrict competition. Of those that do, no completed report could be said to have explicitly addressed the guiding principle in the executive summary in the manner outlined above. However, at least six reports did state clearly in the executive summary whether or not the regulation(s) restrict competition, but without addressing the remaining elements. In a further eight cases, it is relatively easy to identify discussion in the body of the report about costs and benefits and competition impacts.

(i) Has the Government responded? If so, how long after release of the report? Were the review recommendations accepted?

The Government has announced a response to 24 of the completed reviews.[3] In 18 cases the Government agreed fully with the review findings. In the other six cases the Government differed on major recommendations, choosing instead an alternative reform option. For example:

- in response to the reviews of the *Customs Tariff Act 1955 (Automotive Industry Arrangements)* (#26) and the *Customs Tariff Act 1995 (Textiles, Clothing and Footwear Arrangements)* (#27), the Government announced a slower pace of reduction in tariffs than the majority recommendation(s) of the reviews; and
- in the case of the review of the *Australian Postal Corporation Act 1989* (#15), while the NCC recommended that the bulk, pre-sorted business letter mail be

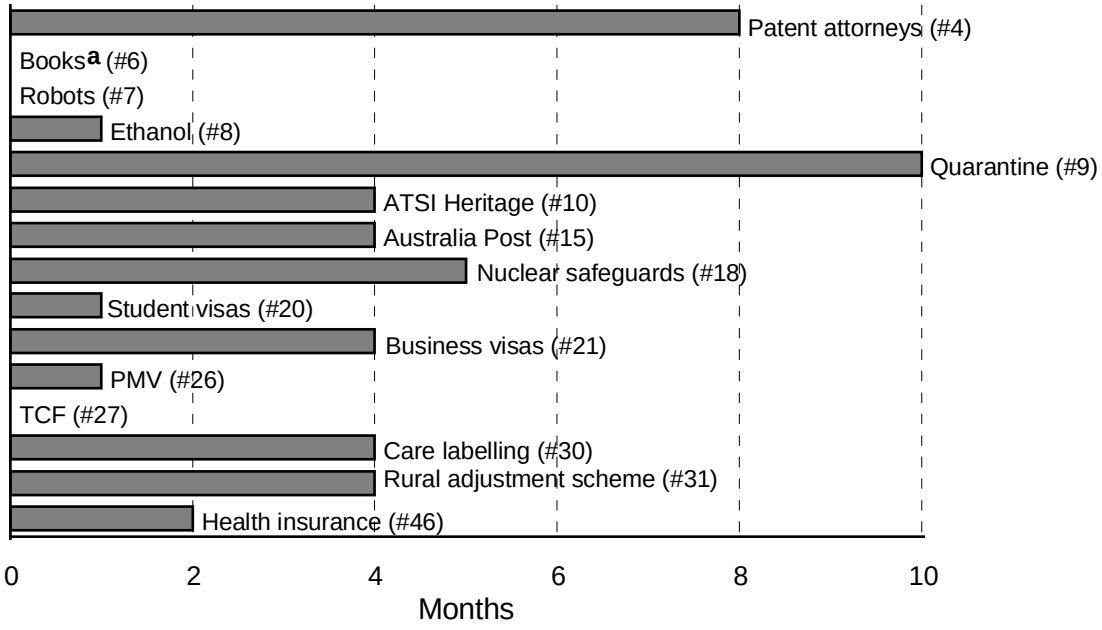
[3] In addition, reforms have been announced (and implemented) in respect of two reviews still in-progress (#5 and #28).

fully opened to competition, the Government decided to extend competition to only approximately eight per cent of this market.

The timing of the Government's response is an important performance measure in light of the year 2000 deadline. In most cases, the Government's response has been within five months of completion of a report (see figure 1.4). Note, however, that the Government may make an initial response (perhaps on the major review findings) followed by subsequent decisions on other matters addressed in the review. For example, the Government's tariff decision in response to the review of Passenger Motor Vehicle arrangements (#26) was announced within one month of completion of the review, while the decision to establish the Automotive Competitiveness and Investment Scheme was announced 10 months later. In some cases, the Government has responded to a review's major findings, with some minor matters remaining to be addressed or announced.

The terms of reference for at least 15 reviews specified that a government response would be made within a certain period — ranging from three to six months. No clear pattern emerged as to whether such a clause provided added discipline on progress with reform efforts. In some cases the response to the review was not forthcoming by the date indicated, but equally there were reviews in which the Government responded within a few months, despite no response period having been specified in the terms of reference. Nonetheless, it is important that the question of whether a response period should be specified in the terms of reference, should at least be considered.

Figure 1.2 **Passage of time between completion of review and announcement of Government's initial response to review findings**



a The Government made its decision on the book bounty after the Industry Commission had released its draft report, but two months before it completed its final report.

Clearly, any delay in the response beyond that indicated in the terms of reference does not necessarily imply poor performance or non-compliance. Reform decisions by government on a single issue are taken in the wider context of other issues which may impinge upon the sector, and the general priorities of government. There remains, however, the overriding CPA obligation to complete appropriate reforms by 31 December 2000.

(j) Where the Government has announced regulatory reforms, have the reforms been fully implemented? If so, how long after announcement?

Since commencement of the Legislation Review program, the Government has fully implemented its announced reforms in 14 cases.

In a further eight cases, reforms are progressing — for example: where part of a package of announced reforms has been implemented; where legislation has been tabled, but not passed; and/or where the implementation date has yet to take effect, but will do so before 31 December 2000.

Clearly, time is required to prepare regulatory changes and obtain approval for change, most commonly by Parliament. The time from the Government's announcement to full implementation has ranged from about six months to two years.

While regulatory reforms may not become fully effective until some time after the passage of legislation — for example, due to delayed commencement dates or

phasing-in arrangements — such lags need not imply poor reform performance, as adjustment arrangements or transition periods may be an important aspect of the implementation strategy. In such cases, it is important the reform timetable be made public.

In sum, in some instances the implementation stage may be a more time-consuming element than the review stage.

(k) Where appropriate, was there full compliance with the RIS requirements?

The Commonwealth's RIS requirements, announced by the Prime Minister in his statement *More Time For Business,* apply when the Government proposes regulatory change following a review, if such changes impact on business.

Although reviews are to use a cost-benefit framework similar to that embedded in the RIS framework, the RIS requirement does not necessarily represent duplication, for four reasons:

- the RIS is prepared by the Government as a transparency mechanism in its decision-making, whereas the review report is prepared by the review body, which may be independent of the Government;
- review reports often contain quite detailed analysis while the preparation of a RIS streamlines the presentation of this material, particularly as it uses a standard format;
- the RIS may deal with only one, or a subset, of the recommendations of the review; and
- there may be options additional to those recommended or analysed by the review which can be addressed by the RIS.

Chapter 2 explains in detail what full compliance with the RIS requirements entails. According to criterion (k), full compliance was achieved in 50 per cent of cases where regulations were made following reviews on the Legislation Review Schedule. Non-compliance involved failure to prepare a RIS for the decision-making stage and/or failure to prepare an adequate RIS. This performance is somewhat disappointing because a review report could be expected to provide a ready basis for the RIS.

1.4 Improving compliance with review requirements

Is the program on track?

The Legislation Review program is ambitious.

To complete the *review* element on time remains a challenging task as some slippage is evident — by 30 June 1998 about 35 per cent of reviews had been completed, but nearly half of the time allocated for *both review and reform* had elapsed. Further, this result includes 12 reviews which were already underway when the program was announced.

There are around 40 reviews yet to be commenced. The deferred reviews — which include some of high priority — must now be accommodated in the remaining years, along with those originally scheduled.

Even if the review element is completed on time, full implementation of all appropriate *reforms* may not be achievable by 31 December 2000. Significant time can be required for due consideration of review recommendations and the preparation (and passage) of regulatory changes. In addition, where phasing or transitional arrangements are involved, full implementation of reforms may not be achieved until quite a while after completion of a review. Thus, priority should continue to be given to legislation which (widely) restricts competition or imposes significant costs on business.

Some observations about timing

For the 14 cases thus far, the complete process from preparing terms of reference through to fully implementing the reforms has taken from about ten months to three years. Typically, the time to complete each step has been:

- settlement of terms of reference and other preparation [3 months];
- conduct of review [6–9 months];
- government response after completion [2–4 months]; and
- full implementation of announced reforms [6–12 months].

Timing, however, should not take precedence over quality. It is important that the reviews are not rushed for the sake of completion. It is more important that good quality reviews are conducted and useful reports produced. Establishing sound terms of reference, choosing appropriate review bodies, fully addressing the guiding

principle of the CPA and conducting appropriate consultation are all important to good outcomes.

There may be good reasons for some delays. For example, limited departmental resources or the availability of appropriate committee members may dictate a late start and/or the review being conducted over a longer period than might be ideal. In some cases, 'over-runs' on reviews may be beyond the control of good planning.

However, there is scope for timing to be improved, notably by consultation with the ORR on the terms of reference earlier in each financial year — for about 50 per cent of reviews, consultation has not begun until the second half of the financial year.

Some observations about review and reform processes

Drawing on the experience of some 60 reviews, areas where performance was good were:

- consultation with the ORR on the terms of reference generally occurred at least three months prior to the scheduled commencement of reviews — notwithstanding the concern about the increasing trend towards consultation occurring in the second half of the financial year;
- terms of reference were agreed in all but one case;
- the type of review body suggested by the Government was adopted, or up-graded, in all cases; and
- consultation appears to have been of a very high standard — all reviews were advertised nationally, review reports listed consultation details and many draft reports and other papers were issued during the conduct of reviews.

Areas where performance could be better include:

- ensuring that the report of any review of legislation with the potential to restrict competition addresses the guiding principle of the CPA in an explicit way, ideally in the executive summary;
- making the review report publicly available as soon as practicable after the conclusion of each review, including giving consideration to releasing the report even when a government response is not yet available, in which case it could be indicated when a response may be forthcoming;
- seeking approvals for variations to the schedule — deletions and deferrals — at an early stage, from the Prime Minister and Treasurer, and announcing promptly the variation when approved; and
- fully complying with the RIS requirements where regulatory changes result from the review.

PART II

THE FLOW OF REGULATION

2 Commonwealth requirements for new and amended regulation

This chapter outlines the Commonwealth Government's Regulation Impact Statement requirements that apply to new and amended regulation, and the Productivity Commission's task of reporting on compliance with these requirements. Indicators developed to measure compliance in 1997–98 are also outlined.

2.1 Commonwealth Regulation Impact Statement requirements

Although the types of regulation covered have varied, the requirement to prepare a Regulation Impact Statement (RIS) has been in the Commonwealth domain for over a decade. For example, the preparation of a RIS has been required for all Cabinet proposals affecting business since 1986. Since its origin, the basic elements of a RIS have remained unchanged. However, in recent years the scope of the requirements and the sanctions imposed on those who do not comply have increased.

In 1996, the Government established a Small Business Deregulation Task Force (the task force) aimed at reducing the paper and compliance burden of 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 of the task force and clarified the requirements of Commonwealth regulation makers.

As a result, the Commonwealth RIS requirements were consolidated in *A Guide to Regulation* (the Guide) which was endorsed by the Government in September 1997. The RIS requirements contained within the Guide are summarised briefly below.

The Guide defines regulation broadly as including:

> any law or other government 'rules' which influence the way people behave. It is not limited to primary or delegated legislation; it also includes quasi-regulation (such as codes of conduct or advisory instruments or notes etc) where there is reasonable expectation by governments of compliance. (Office of Regulation Review 1997, p. A1)

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. It is important to note that regulation 'affects' business where it imposes a cost or confers a benefit on business.

Preparation of a RIS is not mandatory for regulation that:

- is not likely to have a direct, or a substantial indirect, effect on business and is not likely to restrict competition;
- is of a minor or machinery nature and does not substantially alter existing arrangements;
- involves a specific Government purchase;
- is required in the interest of national security;
- is primary legislation or a legislative instrument which merely meets an obligation of the Commonwealth under an international agreement by repeating or adopting the terms of all or part of an instrument for which the agreement provides;
- is a legislative instrument of the type specified in subparagraph 28(1)(a)(iv), (vi), (vii) or (viii) of the Legislative Instruments Bill 1996 — these instruments include those that give effect to specific Budget decisions, incorporate certain foreign airworthiness directives, application order proposals made under section 111A of the Corporations Law of the Australian Capital Territory, and those that provide solely for the commencement of all or part of enabling legislation;
- is a regulation of a state or self-governing territory that applies in a non-self governing territory; or
- gives effect to a specific election commitment.

The role of a RIS is to assist decision making by ensuring that all relevant information is presented to the decision maker in a logical standardised framework. In addition, after the decision is made, the RIS can become a public and transparent account of that decision making.

To fulfil these roles, a RIS should identify:

- 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 impact (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.

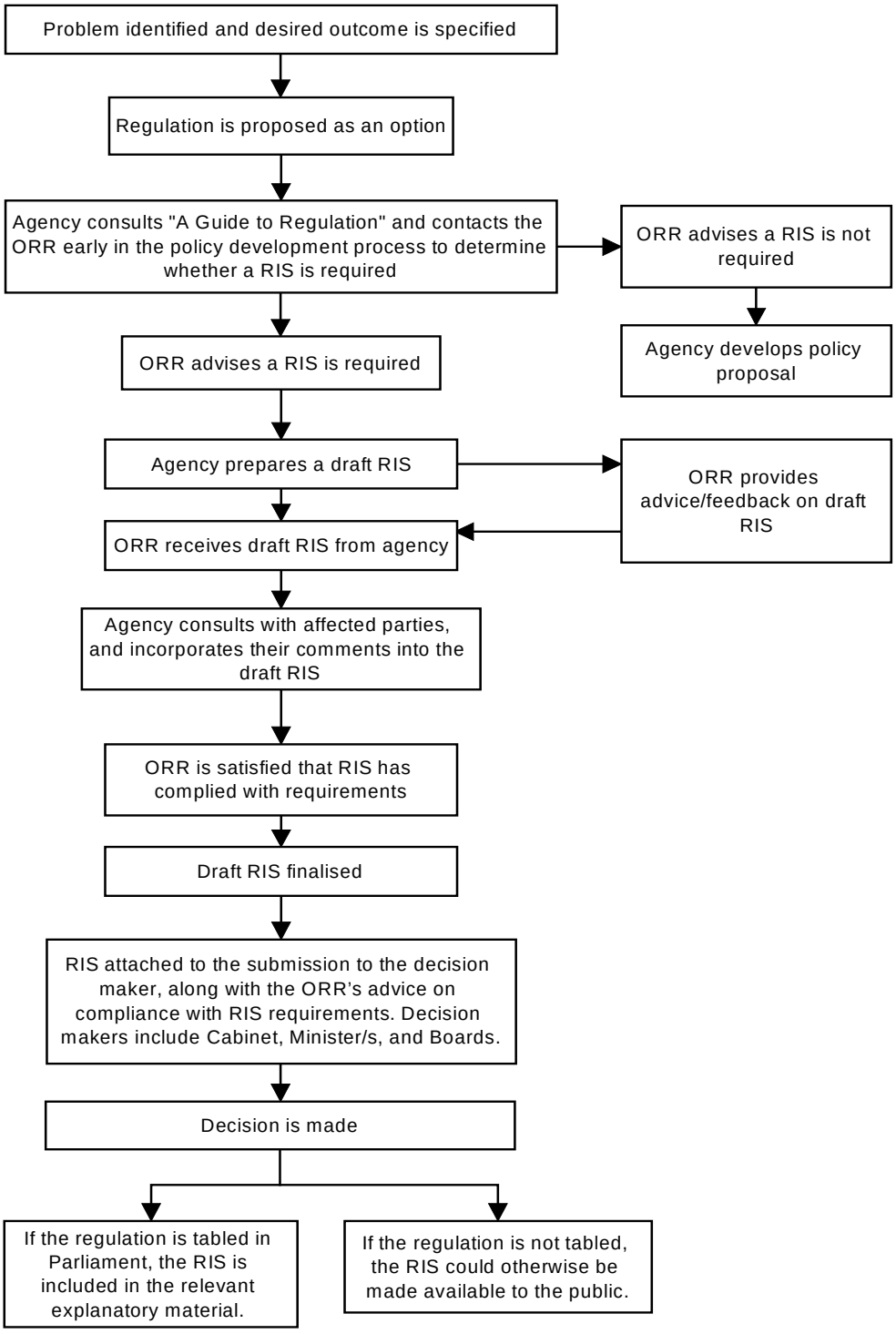
Figure 2.1 illustrates how the RIS requirements fit into the policy development process.

The Assistant Treasurer has formal responsibility for promoting compliance with RIS requirements.

If a RIS is inadequate or absent, and the ORR anticipates preparing a negative comment, the Assistant Treasurer can draw the matter to the attention of the responsible Minister and/or the Prime Minister. In some cases the Assistant Treasurer may suggest the withdrawal of the regulatory proposal. Where 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 is required to report publicly on compliance with RIS requirements.

Figure 2.1 **Integrating RIS requirements within the policy making process**



2.2 The Productivity Commission to report on compliance

The Prime Minister's Statement *More Time for Business* gave the Commission the task of reporting annually on compliance with the Commonwealth Government's RIS requirements, starting in 1997–98. In particular, this 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 1997–98 is part of the series of publications making up the Productivity Commission's Annual Report and meets this requirement.

In this first year of formal reporting, the Commonwealth's overall performance against RIS requirements is assessed. For future reports, consideration will be given to providing disaggregated 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 performances of individual portfolios against specific (measurable) indicators of sound regulatory practice.

The methodology used in this year's report on compliance with RIS requirements is summarised in box 2.1 below.

Box 2.1 **Methodology — where did the compliance figures come from?**

Under the Prime Minister's Statement *More Time for Business* (p. 70), Commonwealth Departments and agencies were required to assist in reporting on compliance with RIS requirements by providing the Office of Regulation Review with relevant information.

The ORR sent letters to Commonwealth Departments and some regulatory agencies over 1997–98 requesting:

- a list of all regulations made (including Bills, subordinate legislation, quasi-regulation, treaties, national standards and the decisions of Ministerial Councils) and a brief description of each; and
- in each case, whether a RIS was prepared for the decision maker and tabled in Parliament.

The ORR then decided on the basis of the information provided by Departments and agencies whether the preparation of a RIS was required, and evaluated the performance of each Department or agency against the RIS requirements.

2.3 Compliance indicators

A set of indicators was developed to measure the Commonwealth's compliance with RIS requirements.

1. Was the 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?

For the 1997–98 compliance report, consultation with the ORR was assessed as occurring at 'an early stage in the policy development process' if it took place before the policy decision was made. If the ORR is consulted early, and a RIS is prepared before the decision to regulate is made, the analysis can add significant value to the decision making process.

In some cases during 1997–98 the ORR was consulted sufficiently early in the policy development process so that the relevant department was able to use a draft RIS as a consultation document. The department was then well placed to provide an adequate RIS to the decision maker by refining the consultation document, streamlining the documentation required.

Chapters 3 to 6 assess the information provided on Bills, subordinate regulation, quasi-regulation, and treaties against the RIS requirements.

3 Bills introduced into Parliament

Compliance with Regulation Impact Statement requirements for Bills introduced into Parliament during 1997–98 was mixed. A Regulation Impact Statement was tabled in most cases where required, and generally the level of analysis was adequate. However, the requirement to provide a Regulation Impact Statement to the decision maker was complied with in only about a third of cases.

3.1 Regulatory activity in Bills

Based on the information provided by departments and agencies, 184 Bills were introduced into Parliament by the Government in 1997–98 (see figure 3.1 below). Of these, 80 did not require a Regulation Impact Statement (RIS) because they were excepted from the RIS process, or did not impact on business or restrict competition. Of the 104 Bills that required the preparation of a RIS, 81 had a direct impact on business; eight had a substantial indirect impact on business; and 15 restricted competition.

Figure 3.1 **Bills introduced into Parliament in 1997–98**

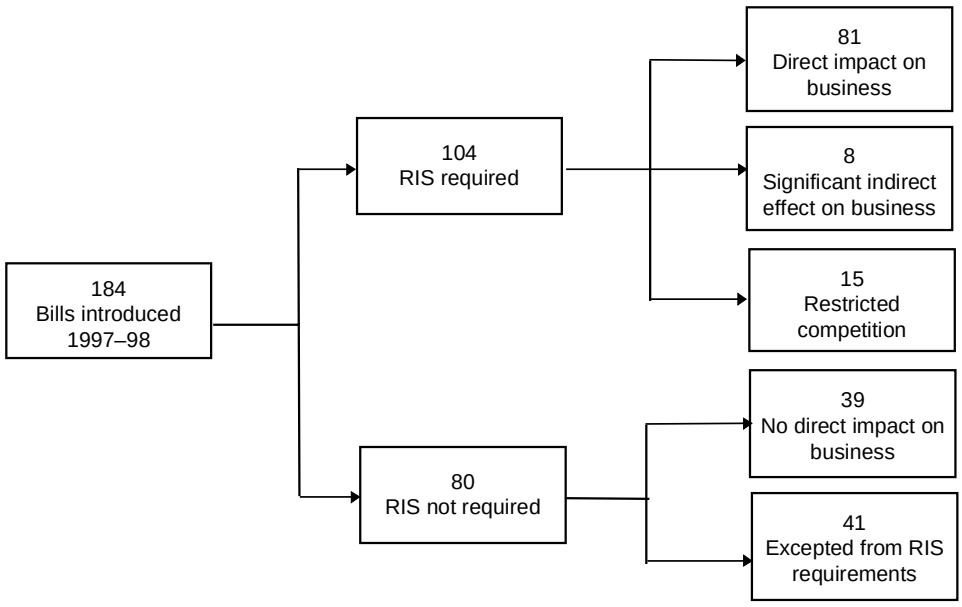


Table 3.1 **Selected Commonwealth legislation having an effect on business, 1997–98**

Legislation	*Features*	*Effect on Business*
Migration Legislation Amendment (Migration Agents) Bill 1997	Implements a regime that requires the registration of migration agents	Restricts competition
Ballast Water Research and Development Funding Levy Bill 1997	Enables a research and development levy to be collected from certain ships arriving in Australian ports	Direct impact
Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 1997	Implements choice of superannuation fund arrangements for Commonwealth civilian employees	Significant indirect impact
Trade Practices (Fair Trading) Amendment Bill 1997	Allows for industry codes of practice to be prescribed and enforced and prohibits unconscionable conduct in relation to certain small business transactions.	Direct impact
Customs Tariff Amendment Bill (No. 6) 1997	Freezes post-2000 tariff rates for passenger motor vehicles and textiles, clothes and footwear from 1 July 2000 until 2004. Rates are to be reduced from 1 January 2005.	Restricts competition

Table 3.1 above provides some examples of those Bills that had an impact on business or restricted competition.

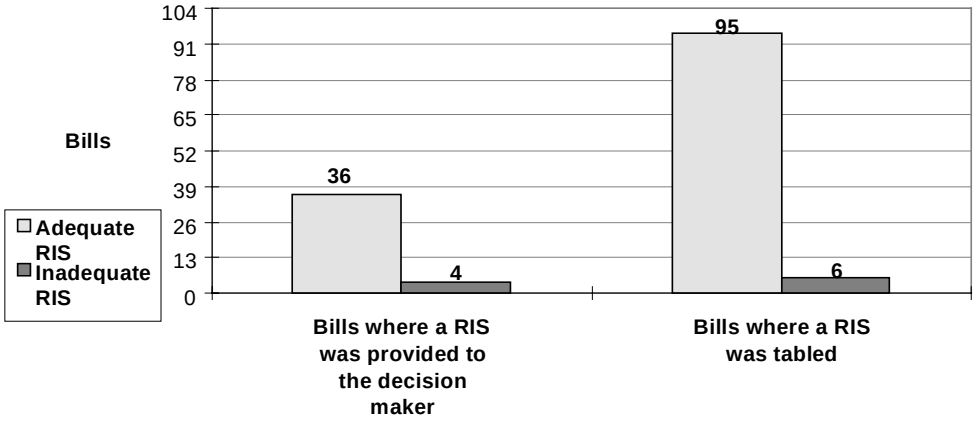
3.2 Compliance with indicators for Bills introduced

To determine the level of compliance with RIS requirements for Bills introduced into Parliament in 1997–98, the relevant procedures were assessed against the compliance indicators developed in chapter 2. The results are summarised below.

The Office of Regulation Review (ORR) was consulted before the decision to regulate had been made, for 69 out of a total of 184 Bills. In some of these cases, the ORR advised that the preparation of a RIS was not required.

Of the 104 Bills that required the preparation of a RIS in 1997–98, for only about one-third was a RIS prepared for the decision maker. When tabled in Parliament, almost all were accompanied by a RIS, as shown in figure 3.2. This suggests that most RISs were prepared to explain a decision that had already been made.

Figure 3.2 **Bills introduced in 1997–98 for which a RIS was prepared**



There needs to be more emphasis on integrating the RIS into the early stages of decision making.

Figure 3.2 also reveals that the level of analysis in RISs prepared was generally adequate.

Box 3.1 provides an example of compliance with RIS requirements for a Bill introduced during 1997–98.

Box 3.1 **An example of compliance with RIS requirements**

The *Migration Legislation Amendment (Migration Agents) Bill 1997* followed the RIS principles from an early stage in the development process. In late 1995, the ORR cleared the terms of reference for the national competition policy review of the *Migration Act 1958 (Migration Agents and Immigration Assistance)*, the *Migration Agents Registration (Application) Levy Act 1992* and the *Migration Agents Registration (Renewal) Levy Act 1992*. The review was completed in March 1997.

The Department of Immigration and Multicultural Affairs (DIMA) was able to prepare a RIS suitable for consideration by a decision maker based on the analysis contained within the report. The ORR cleared the RIS as containing an adequate level of analysis.

The RIS was then provided to the Government to inform their decision making. The Government decided to move the migration advice industry towards statutory self-regulation. The *Migration Legislation Amendment (Migration Agents) Bill 1997* was tabled in Parliament as part of the legislative package effecting this decision. The RIS was also tabled in Parliament as part of the explanatory memorandum of that Bill.

3.3 Explaining compliance for Bills

Compliance with RIS requirements for Bills introduced during 1997–98 has been mixed.

Relatively poor compliance with the requirement to prepare a RIS for the decision maker is likely to be a result of many factors, including the following.

- Some agencies were aware of RIS requirements, yet avoided contacting the ORR or chose not to comply. Most Commonwealth departments have limited resources and the RIS process was sometimes seen as unhelpful and as another layer of bureaucracy for regulation makers.

  This perception underscores the importance of consulting the ORR early in the policy development process. If the main elements of a RIS are reflected in the early drafts of documents prepared for decision making, this avoids duplication and costly redrafting. At this early point, the analytical framework of the RIS can add real value to decision making by focussing drafters and stakeholders on key issues.

- Responsible officers were sometimes unaware of RIS requirements, indicating inadequate enforcement of the relevant Government decision.

  As a result, some agencies did not realise that the RIS requirements applied to all layers of regulation, nor that a RIS was intended to be prepared early in the policy development process and provided to the decision maker. Agencies were not always aware that even if the proposal has obvious net benefits and/or industry support, the proposal may still require a RIS.

- The ORR's resource base constrained its educational and enforcement activities. The ORR was required to assess all Commonwealth regulatory proposals brought to its attention. In doing this, the ORR advised officials within 20 portfolios and 64 agencies attached to these portfolios, as well as over 40 Ministerial Councils. Appendix D summarises the resources and main activities of the ORR during 1997–98.

- Limited differences of opinion occurred between departments and the ORR in applying the RIS requirements. Although the ORR relies mainly on information provided by departments, the role of advising whether a RIS is required — or adequate — falls ultimately to the ORR.

However, where a RIS *was* prepared for the decision maker, most agencies recognised its capacity to assist decision making.

In contrast to the poor compliance with the requirement to prepare a RIS for the decision maker, the requirement to table a RIS in Parliament was complied with in almost all cases.

The possibility of adverse Parliamentary and public comment on an absent or inadequate RIS contributed to a high level of compliance with this requirement. In addition, the bureaucratic processes required for tabling Bills in Parliament specifically incorporate the RIS requirements. When bidding for Parliamentary time, departments identified whether they had contacted the ORR and whether a RIS had been prepared for each proposed Bill. The ORR was provided with a copy of these legislative bids and was able to contact agencies that had not yet complied with RIS requirements.

Generally, where a RIS was prepared — either for the decision maker or for tabling — the level of analysis was adequate. This reflected the practice of refining successive drafts of a RIS between the ORR and the relevant department.

3.4 Improving compliance for Bills

Departments and agencies have a pivotal role in increasing compliance with RIS requirements. Some initiatives which could improve future compliance are listed below.

- Early policy development should be targetted as the point at which officers contact the ORR.
- All relevant officers should have sufficient understanding of RIS requirements, especially in policy making and legal areas. A knowledge of RIS requirements could form part of the selection criteria for such placements.
- A coordinated internal approach within departments and agencies is likely to improve compliance, as well as making reporting on compliance easier. A particular individual, section, branch or division could be given the specific responsibility to ensure compliance with RIS requirements within the department. This approach has been followed with some success in the Civil Aviation Safety Authority.

The ORR can also assist in improving agency compliance. In 1997–98, the ORR achieved compliance with RIS requirements through a number of mechanisms, from encouragement and education through to the use of sanctions and the Assistant Treasurer's involvement. In addition to these ongoing activities, the ORR could focus its training on problem areas.

To provide the ORR and other stakeholders with early notice of proposals, plans of proposed regulatory activity would assist. 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 the future.

Compliance with RIS requirements may also be improved by the increased use of 'gatekeeper' roles. A gatekeeper role was played, to a limited extent, by the Department of the Prime Minister and Cabinet over 1997–98. In these cases, agencies approaching that department for policy approval were told to contact the ORR and prepare a RIS if necessary before receipt of the proposal would be acknowledged.

4 Subordinate Legislation

Overall, departments and agencies prepared Regulation Impact Statements for less than half of the subordinate legislation which affected business or restricted competition, based on the compliance reports for legislation made in 1997–98. These reports under-state the amount of subordinate legislation made, as evidenced by the subordinate legislation that was tabled in the Senate for the same period.

4.1 What is subordinate legislation?

Subordinate legislation is that vast amount of legislation that comprises all rules or instruments which have the force of law and which have been made by an authority to which Parliament has delegated part of its legislative power. Such authorities include Ministers, agencies and officials.

Subordinate legislation may take many forms:

- statutory rules approved by the Governor-General in Council and disallowable instruments that are mainly made by Ministers or government agencies — these are tabled in Parliament and are subject to review by the Senate Standing Committee on Regulations and Ordinances (SSCRO); and
- other subordinate legislation that is not subject to parliamentary scrutiny and is not, therefore, disallowable — these instruments can be gazetted and/or tabled or neither tabled nor gazetted.

In recent years, the Commonwealth Government has focused on improving the quality of subordinate legislation. This follows concerns expressed by the Administrative Review Council about the variability of the quality of subordinate legislation in its 1992 report *Rule Making by Commonwealth Agencies.* The *Legislative Instruments Bill 1994* was introduced as a result of that report. Revisions to this Bill led to the introduction of the *Legislative Instruments Bill 1996*. Consistent with this approach, the Prime Minister, in 1997 announced new requirements for the preparation of Regulation Impact Statement (RISs) for 'black

letter' law in his statement *More Time for Business* (p. 66):

> Building on the regulation making framework set out in the Legislative Instruments Bill 1996, the Government will require a RIS for regulation (ie. primary and legislative instruments) and treaties involving regulation which directly affects business or which has a significant indirect effect on business or which restricts competition.

A Guide to Regulation[1] (the Guide) was prepared following the Prime Minister's Statement and was endorsed by the Government in September 1997. The Guide requires RISs to be prepared for "any law or other government rules which influence the way people behave" (p. A1), where those laws or rules have a direct or a substantial indirect effect on business or where they restrict competition. The preparation of RISs will continue under the authority of the Government, until the *Legislative Instruments Bill 1996* is passed by Parliament, after which new arrangements will apply to subordinate legislation.

One of the biggest challenges faced by the ORR in applying the RIS process to subordinate legislation is the absence of a comprehensive means to monitor all categories of the legislation, and the reluctance of some departments and agencies to accept that RIS requirements apply to all forms of subordinate legislation. Subordinate legislation includes a broad range of regulation such as determinations, directions, declarations, notices and plans. It may also include codes and guidelines where these are specifically provided for under the principal legislation. Whereas primary legislation may be identified through the legislation bid process, there is no such process that may be applied to subordinate regulation. The only monitor that exists for subordinate legislation is the Delegated Legislation Monitor that catalogues statutory rules and disallowable instruments after they have been made and tabled. While this is a helpful reference, its purpose is not to identify likely policy decisions involving regulation before they are made.

The application of the RIS process to subordinate legislation that is not disallowable is particularly difficult, due to: uncertainties in identifying and tracking this type of regulation; and uncertainties over whether the instrument is regulatory or administrative — only instruments that are of a regulatory character may be subject to the RIS requirements.[2]

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1 *A Guide to Regulation* sets out the Government's current regulation impact statement requirements.

2 The Guide's test of regulatory character ("any law or other government 'rules' which influence the way people behave"), is generally consistent with the test of 'legislative character' set out in the *Legislative Instruments Bill 1996* to determine whether or not an instrument is a legislative instrument.

On the latter point, departments and agencies are more inclined to argue that many of these types of instruments are not 'regulation'. Unfortunately, the class of instrument used to invoke a particular action, is not necessarily definitive in determining whether the action is regulatory or administrative in nature. Rather it must be decided whether the instrument determines the content of the law or simply applies the law.

The ORR should be consulted, where there is any doubt as to whether a RIS is required for a particular instrument including as to whether the instrument is regulatory or administrative.

4.2 Regulation Impact Statement requirements and subordinate legislation

The status of regulation — that is whether it is primary, subordinate (disallowable or non-disallowable) or quasi-regulation (see Chapter 5) — does not affect the analysis that should be undertaken in the RIS. The level of analysis contained within the RIS should be commensurate with the impact of the proposal. Subordinate legislation often prescribes the detailed operation of the more general provisions contained in an Act, and it may therefore impose significant compliance costs on business and other stakeholders.

A RIS prepared for statutory rules and disallowable instruments (after being attached to advice going to a decision maker) forms an attachment to the Explanatory Statement, which is tabled in Parliament. RISs for non-disallowable instruments that are tabled, should accompany the Explanatory Statement, where one has been prepared.[3] Where an Explanatory Statement is not prepared, the ORR encourages departments and agencies to place RISs on their website and in any other medium that they consider would provide the stakeholders, interested parties and the public with information on the regulation.

4.3 Regulatory activity in subordinate legislation

Subordinate legislation represents the largest sector of 'black letter' law. In 1995–96, there were 1 900 individual pieces of regulation that were subject to

[3] The Table Offices of the House of Representatives and the Senate encourage the preparation of Explanatory Statements for non-disallowable instruments. Departments and agencies should contact the Table Offices where they are unsure of the requirement to prepare an Explanatory Statement.

Table 4.1 **Subordinate legislation considered by the Senate Standing Committee on Regulations and Ordinances**

Year	*Statutory rules*	*Disallowable instruments excluding statutory rules*	*Total subordinate legislation subject to Parliamentary scrutiny*
1990–91	484	1 161	1 645
1991–92	531	1 031	1 562
1992–93	408	1 244	1 652
1993–94	490	1 313	1 803
1994–95	419	1 668	2 087
1995–96	398	1 502	1 900
1996–97	395	1 396	1 791
1997–98	454	1 434	1 888

Source: Annual Reports of the Senate Standing Committee on Regulations and Ordinances

Parliamentary scrutiny. This decreased to 1 791 in 1996–97. In 1997–98, there were a total of 1 888 pieces of subordinate legislation tabled and considered by SSCRO. In addition to this volume of disallowable legislation, subordinate legislation includes non-disallowable instruments that are not subject to parliamentary scrutiny. As mentioned above, records are not readily available on the number of non-disallowable instruments made each year. Non-disallowable instruments may include decisions by Boards or delegates, with the type or class of instrument used to embody these decisions varying considerably.

Based on the information supplied by SSCRO, it is clear that the returns from departments and agencies (reporting that 1 230 instruments were made in 1997–98) significantly underestimated the amount of subordinate legislation actually made. Further, as SSCRO does not record non-disallowable instruments, the amount of subordinate legislation actually made would have been significantly higher than the 1 888 instruments. The ORR will be encouraging departments and agencies to report comprehensively across all categories of subordinate legislation.

4.4 Compliance for subordinate legislation

An examination of the compliance reports by departments and agencies reveals that RISs were prepared for 12 per cent (156 instruments) of all subordinate legislation made in 1997–98. Further analysis of these reports suggests that RISs should have been prepared in 28 per cent of cases (338 instruments), resulting in a compliance ratio of only 46 per cent for the subordinate legislation identified by departments and agencies as having been made in 1997–98. Box 4.1 contains examples of subordinate legislation for which RISs were prepared.

Box 4.1 **Selected subordinate legislation having an effect on business, 1997–98**

Telecommunications Numbering Plan 1997

This Numbering Plan provides a framework for ensuring that telephone and other service numbers are used so as to make the most efficient use of this 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 Plan was tabled in Parliament as a disallowable instrument.

Telecommunications (Service Provider — Identity Checks for Pre-Paid Mobile Services) Determination 1997

This Determination enables pre-paid digital mobile services to be offered in a manner that minimises the adverse impacts, mainly the inability to identify the caller, of anonymous mobile services on law enforcement and national security. This is achieved by requiring customer information to be provided in the case of all pre-paid mobile services and authentication of that information for a sub-set of services where payment is made by cash or cheque. The Determination was tabled in Parliament as a disallowable instrument.

Carriage of Goods by Sea Regulations 1998

These Regulations implement changes to marine cargo liability by making amendments to the application of international liability rules known as the Hague Rules. These amendments improve the protection provided to Australian shippers in the event of loss, damage or delay to their sea cargoes. The amendments are compatible with cargo liability arrangements existing in Australia's major trading partners and minimise the cost to the mostly overseas-owned shipping companies by retaining a Hague Rules basis for Australia's liability regime as envisaged in the *Carriage of Goods by Sea Amendment Act 1997*.

National Environment Protection Measure for the National Pollutant Inventory 1998

The Measure, developed by the National Environment Protection Council, provides for the collection of a broad base of information on emissions and the dissemination of this information to all sectors of the community in an accessible and understandable form, in order to assist policy formulation, inform communities and facilitate waste minimisation and cleaner production programmes for industry, government and the community. Facilities using more than a specified amount of chemicals listed in the Measure must report these emissions. The information will be collected on a uniform, comprehensive and consistent basis across Australia. The State and Territory Governments will collect these figures from industry, along with estimates from non-industry sources and facilities using less than the threshold amounts. The information will then be made widely available by the Commonwealth. The Measure, Impact Statement, Summary Response Document and RIS were tabled in the Commonwealth Parliament as a disallowable instrument and passed.

Figure 4.1 shows that Departments and agencies regarded subordinate legislation as either having no impact on business or not restricting competition in 22 per cent of cases (276 instruments) and that 57 per cent of subordinate legislation (685 instruments) was excepted under the Guide. The most common reason for excepting regulation from RIS requirements was that the matters were minor or machinery in nature. Departments and agencies also cited reasons for not preparing RISs which are not included as grounds for exception under the Guide. As shown in figure 4.1, invalid reasons for not preparing RISs accounted for 9 per cent (113 instruments) of the total subordinate legislation reported to have been made.

The ORR takes an economy-wide perspective when considering the likely impacts of regulation, and consequently its assessment may differ to that made by departments and agencies. As shown in figure 4.2, the ORR considered that a higher proportion of the reported subordinate legislation was likely to affect business or restrict competition (28 per cent — 338 instruments), than departments and agencies which assessed the amount as 12 per cent (156 instruments) as shown in Figure 4.1. Conversely, the ORR assessed only 18 per cent of regulation (216 instruments) as not affecting business or restricting competition — this compared to assessments made by departments and agencies of 22 per cent (276 instruments). It is significant that the ORR considered that eight per cent of the reported regulation (93 instruments) restricted competition, whereas departments and agencies believed that only two per cent of regulation (28 instruments) had this effect.

Figure 4.1 **Application by departments and agencies of RIS requirements to reported subordinate legislation, 1997–98**

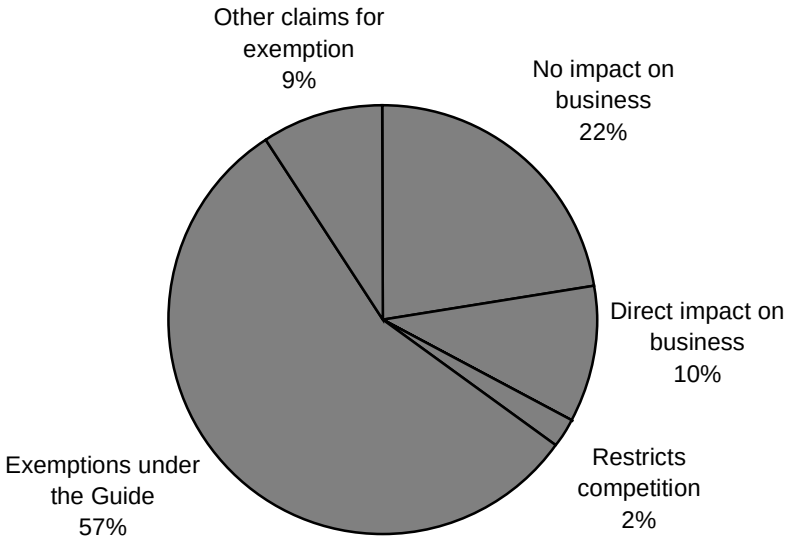
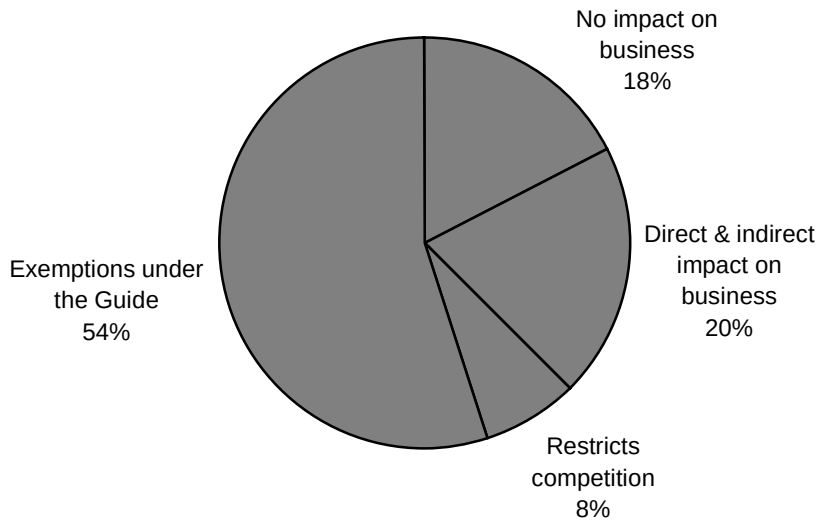


Figure 4.2 **Examination by the ORR of RIS requirements for reported subordinate legislation, 1997–98**



Further, in the ORR's assessment, only 54 per cent (676 instruments) of the subordinate legislation met the exception criteria, whereas departments and agencies excepted a total of 66 per cent (798 instruments) of their subordinate legislation from the requirement to prepare RISs. The compliance reports also show that certain departments and agencies consistently failed to consult on the requirement to prepare a RIS for proposed subordinate legislation. Box 4.2 provides examples of some reasons, authority for which is not included within the Guide, given by departments and agencies for not preparing RISs.

These observations highlight the importance of consultation between the ORR and departments and agencies in determining whether a RIS is required. Clearly, there have been many instances where a department or agency has not contacted the ORR because it considered a regulatory matter to be excepted, for example considering it to be 'minor or machinery' in nature. However, the Government has stipulated that it is the role of the ORR to determine whether a regulation is excepted and, on this basis, departments and agencies should contact the ORR to ascertain whether a RIS is required on proposed regulation.

Box 4.2 **Reasons given for not preparing RISs for subordinate legislation**

Some reasons given by departments and agencies for excepting their own subordinate legislation from the RIS requirements include:

- enabling Bill did not require a RIS, therefore a RIS is unnecessary for subordinate legislation made under it;
- a National Interest Analysis (for treaties) was prepared;
- consultation had already been undertaken on proposed regulatory action;
- obligations under an international agreement had been met, a RIS was consequently not prepared;
- a RIS was not prepared on regulation which imposed levies, because the Government's levies principles had been satisfied;
- a RIS on regulation setting fees was not prepared because the cost recovery policy was in accordance with Government policy;
- the regulation was implemented at the request of industry; and
- the regulation imposes a benefit on industry.

None of these reasons is sufficient to except the regulation from the preparation of a RIS.

The ORR has sought the cooperation of departments and agencies in developing regulatory best practices for subordinate legislation. Some departments and agencies already have processes in place that involve the dissemination of comprehensive discussion papers to interested parties and which are often publicly available. To minimise duplication of effort and to maximise effect, the ORR reached agreement with certain departments and agencies on the application of the RIS framework.

The Australian Broadcasting Authority (ABA) and the ORR have agreed that the pre-RIS practice of releasing formal discussion papers for Licence Area Plans should continue, with the discussion paper being formulated to address the seven sections of the RIS. Following consultation and formal analysis by the ABA of the responses elicited from that consultation, the ABA prepares a RIS for its Board, which draws heavily on the discussion paper and subsequent consultation. This arrangement enables the RIS requirements to be met whilst minimising changes to processes that already follow best practice policy making. Likewise, the Civil Aviation Safety Authority (CASA) has adapted its Notice of Proposed Rule Making (NPRM), prepared for consultation on proposed regulation, to address the RIS requirements. As with the ABA, CASA undertakes a formal analysis of the responses to the NPRM, and a RIS is subsequently prepared. Consistent with this approach, the Impact Statements prepared by the National Environment Protection

Council essentially contain the same seven elements as required in a RIS — albeit using slightly different terminology and structure.

The Department of Transport and Regional Development also used a RIS as a consultation document for its Aviation Security Identification Card Scheme. The consultation document containing the RIS included other relevant information, such as the bodies proposed to issue aviation security identification cards, details of the administrative rules on the operation of the scheme and legislation relevant to the scheme.

In determining when and how far to pursue regulatory best practices for subordinate legislation, the ORR had regard to its charter. The ORR's charter, amongst other things, requires it to advise the Government, Commonwealth departments and agencies on appropriate quality control mechanisms for the development of regulatory proposals and to examine RISs and advise on their adequacy. The ORR's charter also requires it to concentrate its efforts where they will have the most effect. Consequently, the ORR found that in this first year, it was of greater importance to ensure departments and agencies adhered to regulatory best practices in relation to primary legislation and to pursue subordinate legislation as appropriate.

Compliance by departments and agencies with the requirement to prepare RISs has been affected by the vast amount of subordinate legislation made (and therefore potentially subject to the RIS process), difficulties in discerning whether a proposal is regulatory (subject to the RIS requirements) or administrative (not subject) and the ability of departments and agencies to apply the RIS process to the full range of legislation. The ORR will continue to seek the support of departments and agencies in ensuring that regulatory best practices are met for subordinate legislation. In particular, it will promote the importance of departments and agencies identifying all subordinate legislation for which they are responsible and consulting on new regulatory proposals to be made under this legislation.

In summary, during 1997–98, the ORR has sought to apply the RIS processes to subordinate legislation in a manner commensurate with the impact of the regulation. It has encouraged departments and agencies to prepare RISs for regulation that directly or indirectly affects business or restricts competition, limiting exemptions to those recognised under the Guide. However, the response from departments and agencies indicates that the RIS requirements have not been fully integrated into the policy and legislation processes for subordinate legislation. Further, the response to the ORR's requests for compliance information suggests that some departments and agencies need to establish more formal systems for the central tracking of their own subordinate legislation. The establishment of these systems will assist departments

and agencies to identify more easily and accurately the subordinate legislation, to report on compliance and monitor the amount of legislation made and its likely effect.

5 Quasi-regulation

The Government has signalled a desire to move away from prescriptive legislation and enforcement towards less formal regulation and industry-based self-regulatory schemes. This development has focussed attention on alternative forms of regulation such as quasi-regulation.

This chapter reports on the work of an inter-departmental committee which examined the nature and extent of quasi-regulation in the Commonwealth's domain. It also reports on recent Government decisions to improve the scrutiny and transparency of quasi-regulation.

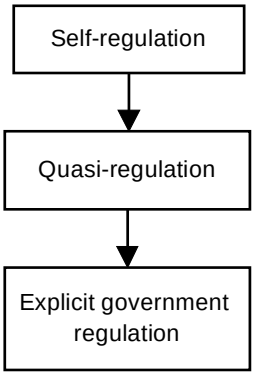
The lack of awareness by government officials of what constitutes quasi-regulation and its likely impacts, and the lack of formal mechanisms for its scrutiny and announcement, has resulted in poor compliance with Regulation Impact Statement requirements. Improving the scrutiny and quality of new quasi-regulation in 1998–99 will prove challenging.

5.1 What is quasi-regulation?

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.

On a spectrum of regulation, quasi-regulation lies between self-regulation where industry, individuals, companies or groups formulate and enforce their own rules and formal legislation or 'black-letter law' where government formulates and enforces legislation (see figure 5.1).

Figure 5.1 **A simplified spectrum of regulation**



Some examples of quasi-regulation include industry codes of practice, guidance notes, standards, industry-government agreements, and national accreditation schemes (see box 5.1).

Importantly, the boundaries between these three principal forms of regulation are indistinct. For example, government involvement in self-regulatory voluntary schemes — through funding or participation of officials in their development — may create an expectation by businesses that they must comply. In some cases, threats of legislation precipitate the development of industry-based schemes. Guidance notes may have the appearance of voluntary guidelines, but may be a prerequisite for obtaining government funds or avoiding penalties.

Explicit provisions in legislation may grant substantial discretion to Ministers or government officials in making decisions. Such decisions may be based on guidelines or standards developed by government officials or industry groups, which are not referenced in legislation but become the accepted standard. The legal status of these documents is not always clear. Such documents are sometimes used by government agencies in actions against businesses, or alternatively used by business in defence against actions. If Parliament writes into law the ability for industry codes to be made mandatory (known as 'legislative underpinning' of codes), then their character becomes that of black-letter law.

Box 5.1 **Examples of quasi-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 Finance and Administration and the Minister for Workplace Relations and Small Business in September 1997. It sets out standards for ethical behaviour in business practices, 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.

Human Rights and Equal Opportunity Commission Advisory Notes on Access to Premises

The Commonwealth's *Disability Discrimination Act 1992* is aimed at eliminating, as far as practicable, discrimination against persons on the grounds of disability. In particular, section 23 of the Act makes it unlawful to discriminate against persons with a disability, or their associates, in relation to access, and use of, premises that the public, or a section of the public, is entitled or allowed to enter or use. Failure to comply with this provision can be defended on a case by case basis. To assist building owners and managers meet their obligations under the Act, the Human Rights and Equal Opportunity Commission has produced advisory notes on access to premises.

Australia New Zealand Food Authority (ANZFA) Code of Good Manufacturing Practice for the production of gluten-free and low gluten foods

Due to the incidence of certain medical conditions relating to gluten intolerance, the Australian Food Standards Code contains definitions of gluten-free and low gluten food. The Food Standards Code also contains conditions for claims and other labelling requirements. In order to provide guidance on the minimum requirements for the production of foods described as 'gluten-free' or 'low gluten', a Code of Good Manufacturing Practice was prepared by the Australian food industry, health professionals, consumer organisations and the Australia New Zealand Food Authority in consulation with State and Territory food authorities. The Code is not mandatory and is intended for use in industry self-regulation.

5.2 The Government's approach to quasi-regulation

In response to concerns raised by small business about inadequate review and scrutiny of quasi-regulation in Australia, the Prime Minister, in *More Time for Business*, announced that a Commonwealth inter-departmental committee would be established, chaired by the Office of Regulation Review (ORR), to inquire into quasi-regulation.

Specifically the committee was asked to report on:

- the characteristics and extent of quasi-regulation;
- the circumstances in which quasi-regulation is a viable alternative to government regulation;
- essential features of successful quasi-regulation;
- processes for monitoring and reviewing quasi-regulation to ensure that it is current, effective and efficient;
- the referencing of voluntary standards in regulation; and
- appropriate criteria for the prescribing of voluntary and mandatory codes under the *Trade Practices Act 1974* (TPA).

The committee's report was presented to the Assistant Treasurer on 19 December 1997. The committee drew on information gained from meetings with a cross-section of business, consumer and government agencies and a number of detailed case studies to construct a picture of quasi-regulation in Australia. The committee found that quasi-regulation is used extensively in Australia and there is a perception that the stock of quasi-regulation is growing. For example, a consultant for AusIndustry (Stenning and Associates), in an initial scoping study, found over 30 000 codes, standards and specifications covering all levels of government.

The main findings from the committee's report included:

- governments are often inconsistent in their choice of regulatory forms and there is often a lack of government justification and risk assessment for quasi-regulation;
- quasi-regulation gives much discretion to regulators and, because of its convenience and lack of scrutiny, is sometimes used as 'backdoor regulation';
- what starts out as self-regulation can gain the imprimatur of government agencies and subsequently be lifted into legislation, depicted by some as 'regulatory creep';

- quasi-regulation may be pitched at best practice standards rather than minimum effective regulation, imposing a significantly higher compliance burden on business;
- small business often lacks the resources and expertise to operate successfully under performance-based regulation and fears greater litigation from such arrangements, preferring the certainty offered by prescriptive regulation;
- confusion exists about the status and enforceability of many quasi-regulatory arrangements, as quasi-regulation is often less accessible than Acts of Parliament — some businesses choose to ignore quasi-regulation because they judge that full compliance is impossible or impractical; and
- quasi-regulation can result in a shifting of costs to industry because of the substantial resources involved in developing and administering industry-based schemes.

In spite of the above concerns, quasi-regulation can offer advantages over more formal legislation in many circumstances, because it allows greater collaboration between government, industry and consumers. It also allows the development of more flexible, innovative arrangements.

On 27 May 1998, the Government accepted the principal recommendations of the inter-departmental committee on quasi-regulation. These recommendations included mechanisms for strengthening scrutiny and assessment processes, improving the use of standards in regulation and making regulation more effective and accessible. The Government's decisions will be embodied in a revised edition of *A Guide to Regulation*. Importantly, the Guide will provide better guidance on choosing between different regulatory forms. It also will set out the criteria that industry and consumer codes must meet before being prescribed under the TPA.

Other developments in quasi-regulation during 1997–98 included the release in March 1998 of the Minister for Customs and Consumer Affairs' *Codes of Conduct Policy Framework* and a report on quasi-regulation to Small Business Ministers by a working group of Commonwealth, State and Territory officials. In July 1998, the National Small Business Summit considered the latter report and agreed that jurisdictions should take steps to ensure appropriate scrutiny and review of significant quasi-regulation, and to ensure that quasi-regulation is used appropriately and made accessible to the public.

5.3 Regulatory activity in quasi-regulation

Reporting of new quasi-regulation and compliance with Regulation Impact Statement (RIS) requirements in 1997–98 by agencies was poor. The ORR is aware that more regulations were announced than were reported. For example, some regulatory agencies put out policy statements, notices and protocols on a weekly or monthly basis. Two RISs were prepared out of the total of 30 examples of quasi-regulation reported. Only eight of these thirty were assessed by the ORR as clearly falling under an exception from the RIS requirements.

The main feature of quasi-regulation is the lack of a consistent analytical framework for its development, and the lack of scrutiny and accountability in its use. The absence of formal mechanisms for approving and announcing quasi-regulation makes the task of monitoring and reporting difficult. In addition, once the ORR becomes aware of new quasi-regulation, determining regulatory impact is not always straightforward. Many guidelines or policy statements are released for the purpose of providing additional detail on how to comply with existing black letter law. Detailed consideration of such guidelines is necessary in order to determine whether they are merely explaining the law, or adding to it, thus imposing additional burdens on business. In addition, the extent of government involvement or endorsement is not always clear.

Examples of quasi-regulation reported during 1997–98 are included in box 5.1.

The phenomenon of 'regulatory creep', in which previously voluntary arrangements become mandatory requirements, was also observed throughout the year (see box 5.2).

Another significant development was the passing of amendments to the TPA to allow the prescription of industry codes as either voluntary or mandatory. The franchising sector was the first to be covered by the new provisions (see box 5.3).

Box 5.2 Codes of practice relating to welfare of livestock

A number of codes of practice relating to the transport of livestock have been developed through the Agriculture and Resource Management Council of Australia and New Zealand. Under current arrangements, responsibility for domestic animal welfare and livestock production matters rests with individual State and Territory governments. The legislative treatment of the codes of practice varies widely between States and Territories. In some States, codes are incorporated into legislation and are directly enforceable, while in others, the codes have been further developed as State Codes and have varying legal force, either as a guide for the courts, or as a legal defence. In Western Australia and Queensland, the codes are not referred to at all in animal legislation.

A number of livestock industries have developed industry based quality assurance programs which incorporate the animal welfare codes of practice as the appropriate animal welfare standard.

In June 1997, the Minister for Primary Industry launched a Livestock Export Accreditation Program (LEAP) — a quality assurance program applying to exporters of live sheep, goats and cattle and incorporating animal welfare standards. LEAP drew heavily on existing codes of practice for animal welfare and was developed by industry, in consultation with government agencies and animal welfare groups. The Minister announced that the Government would support industry self-regulation by providing 'co-regulatory underpinning'. This entailed making LEAP a condition for obtaining and continuing to hold livestock export licences under the *Australian Meat and Live-stock Industry Act 1997.*

Box 5.3 The new Franchising Code of Conduct

A voluntary Franchising Code of Conduct was introduced in 1993. The voluntary code was administered by the Franchising Code Administration Council, an independent company which was jointly funded by the Government and industry. The code addressed disclosure between franchisors and franchisees, broad industry conduct issues and provided an alternative dispute resolution process. However, the level of disputation within the industry remained high during the period of the voluntary code. The code ceased to operate in December 1996 when the administering body was unable to resolve a number of funding and policy issues.

In September 1997, the Government, in its response to a report by the House of Representatives Standing Committee on Industry, Science and Technology (*Finding a Balance: Towards Fair Trading*) announced proposed amendments to the *Trade Practices Act 1974* (TPA) to allow the prescription of industry codes as either voluntary or mandatory. The Government indicated its intention to prescribe the Franchising Code of Conduct as mandatory under the TPA. The Franchising Policy Council was appointed by the Government to provide advice on a new Franchising Code of Conduct for the industry which came into effect in July 1998. Following the report of the inter-departmental committee on Quasi-regulation, the Minister for Customs and Consumer Affairs released a guide to prescribing future codes under the TPA.

5.4 Compliance for quasi-regulation

As reported above, compliance with RIS requirements for quasi-regulation was poor. The ORR was consulted on only five proposals prior to their announcement. Only two RISs were prepared during 1997–98. In both cases, the ORR was consulted at an early stage in the policy development process and the RISs were judged by the ORR to be of an adequate standard.

5.5 Explaining compliance for quasi-regulation

In addition to reasons given in relation to Bills and subordinate regulation, poor compliance may have the following causes:

- departments and agencies are unaware of what constitutes quasi-regulation;
- quasi-regulation is subject to no formal mechanisms for scrutiny or announcement (there are few early warning mechanisms) — often it is made available to key interest groups before other departments or the general public;
- much quasi-regulation is made by agencies to meet urgent demands in the administration of their legislation;
- Ministerial announcements supporting self-regulatory arrangements are driven by public events and not scrutinised by Cabinet or Parliament;
- existing voluntary standards and codes may get lifted into legislation without thorough assessment of their appropriateness as mandatory regulation; and
- sections of industry may have an incentive to lobby for favourable quasi-regulatory arrangements at the expense of other members or potential new entrants.

5.6 Improving compliance for quasi-regulation

Improving compliance with RIS requirements for quasi-regulation in 1998–99 is a challenging task. The Guide will be updated to provide further detail on quasi-regulation and will also include the Government's recent decisions to improve scrutiny of and access to new regulation. This, together with additional training, should increase awareness of the RIS requirements for quasi-regulation.

Awareness is already increasing. Many government agencies participated in the consultations for the inter-departmental committee report on quasi-regulation. Subsequently, a number of agencies approached the ORR seeking guidance on what

constitutes quasi-regulation. The ORR will continue to work with these and other key agencies responsible for quasi-regulation to establish similar processes.

Through improved information systems, including the internet, the ORR is in a stronger position to track the development and announcement of new quasi-regulation and whether it is made available to industry in a timely manner. Increasingly, the Consumer Affairs Division (now under the Department of the Treasury), and the Australian Competition & Consumer Commission are being consulted on proposals for industry codes of conduct. The ORR will work closely with these agencies to increase awareness of quasi-regulation amongst officials of other portfolios. A major task in 1998–99 is to work with other regulatory agencies to establish early warning mechanisms and open consultation processes to allow adequate assessment of alternatives to black-letter law.

6 Treaties

Departments and agencies prepared Regulation Impact Statements for less than half of the treaties which affected business or restricted competition in 1997–98. In the latter half of the year, the Office of Regulation Review, with the assistance of some departments, developed an early warning system which should result in increased compliance in 1998–99.

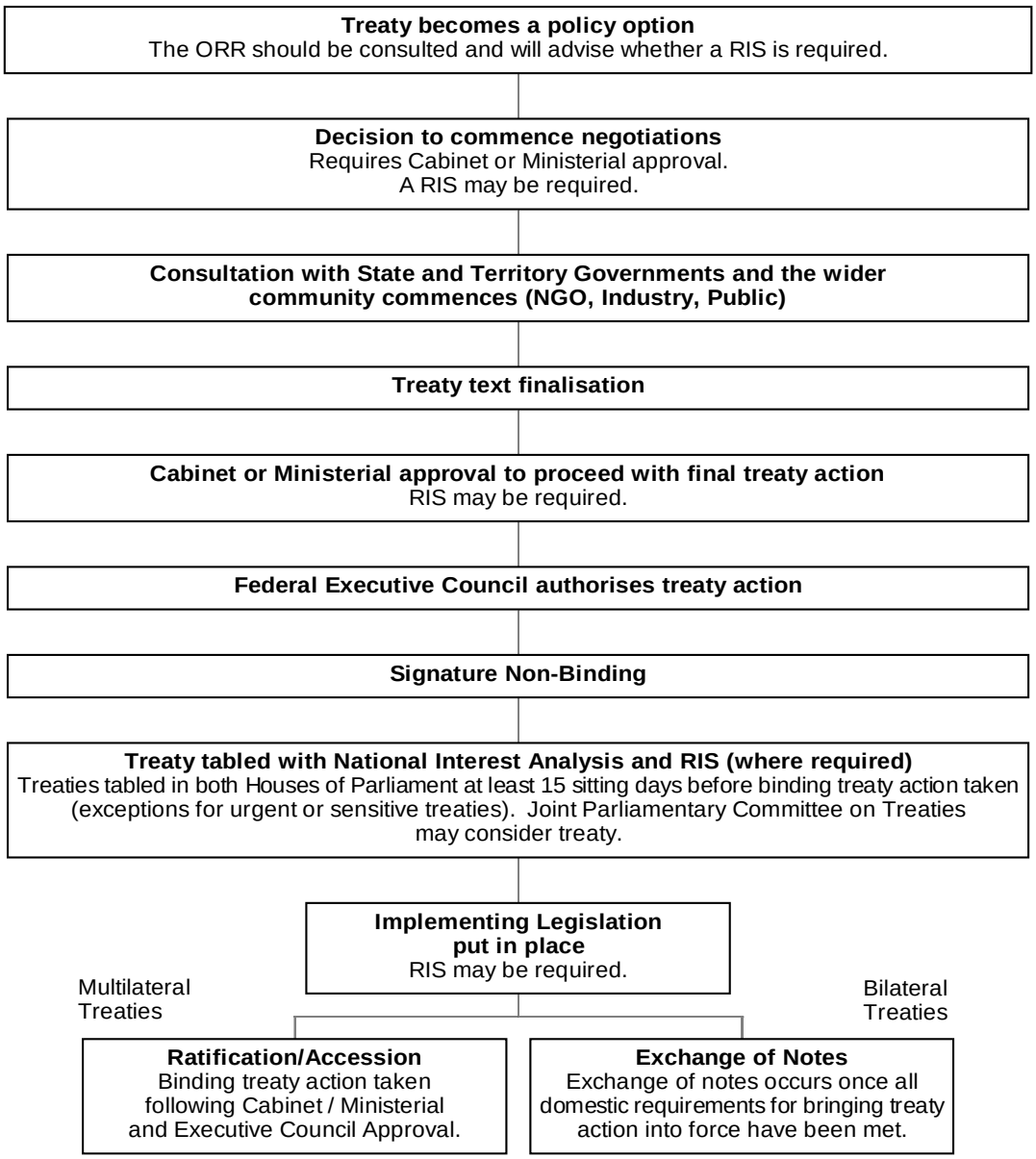
6.1 What are treaties and how are they made?

A treaty is a written agreement between two or more parties which is governed by international law and is intended to create legal relations. The parties must have 'international personality', which means that they must be recognised by the international community as having the capacity to enter into international relations. Such parties include countries, principalities, emirates and kingdoms. However, in some cases international organisations, such as the United Nations, may also be parties to treaties.

A treaty may take the form of a charter, convention, covenant, protocol, agreement, pact or exchange of letters. They can be bilateral or multilateral.

In May 1996, the Government announced changes to the treaty-making process. The reforms, which include the introduction of National Impact Analyses (NIAs), provide for more effective consultation and increased public and Parliamentary scrutiny. Figure 6.1 illustrates how the Regulation Impact Statement (RIS) requirements fit into the treaty making process.

Figure 6.1 **The treaty making process**



A treaty usually sets out the procedures which must be fulfilled to bring it into force. Signature may be sufficient in some cases, but if the State party must take legislative action to fulfil its obligations under the treaty, ratification is usually required.

If the further step of ratification is required, signature alone is insufficient to bind a country to implement the treaty under international law. Signature, however, indicates a commitment by the signing party that it supports the principles of the treaty and will refrain from action which would defeat its object and purpose.

Where a treaty is signed but not yet ratified, there is an obligation on the part of the signatory country to proceed to ratification in good faith. It is Australia's policy to adhere to this duty of good faith: Australia will not sign a treaty which it does not intend to ratify.

Ratification is the final step which binds a country under international law to implement the terms of the treaty. Ratification is separate from the putting in place of domestic legislation. It usually occurs after the necessary changes to domestic law have been made. Accession describes the situation where a country was not originally a signatory to the treaty but subsequently accepts its provisions.

6.2 How do the Regulation Impact Statement requirements apply to treaties?

The preparation of a Regulation Impact Statement (RIS) is mandatory for all treaties involving regulation which will directly affect business, which will have a significant indirect effect on business, or which will restrict competition. Regulation is defined very broadly to include any law or other government 'rules' which influence the way people behave. 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 box 6.1).

Both the RIS and the NIA are made public. The RIS aids the decision-making process by analysing all feasible options and their potential impacts. The NIA was introduced as part of a package of treaty-making reforms to ensure that State and Territory governments and the Parliament are involved effectively in and informed of the treaty-making process.[1] Hence, there are significant differences in their roles. In addition, the process of preparing a NIA would normally commence much later than the preparation of a RIS. If required, a RIS should be prepared at the very beginning of the process — that is, at the time of the decision to commence negotiations — and as such is an integral part of the policy development process.

There are three points in the development of a treaty at which RISs are required. At each stage, the RIS should be revised to reflect analysis relevant to that stage in the process. The stages are:

1. **decision to commence negotiations**: a draft RIS, focussing on the problems being addressed and the objectives of the potential negotiations, should

[1] The NIA was also introduced to address the "democratic deficit" in the way treaty-making was carried out in the past (Minister for Foreign Affairs 1996).

accompany the Cabinet Submission or the letter to Prime Minister when approval is sought to enter treaty negotiations;

2. **endorsement of the treaty**: a RIS, giving greater emphasis to the impacts on different groups within Australia, should accompany the Cabinet Submission or letter to the Prime Minister when approval is sought to sign the final text of the treaty;

3. **Parliamentary scrutiny**: a RIS should accompany the NIA when the treaty is tabled in Parliament.

A RIS is also required for domestic legislative changes resulting from a treaty, except where the domestic legislation repeats or adopts the terms of all or part of an instrument for which the treaty provides.

However, in those cases where the RIS for the treaty addresses the same problems and issues as would the RIS for the domestic legislation, but the domestic legislation does not repeat or adopt the terms of the treaty verbatim, then only one RIS need be prepared. That is, the RIS prepared for the treaty can be referred to in the Explanatory Memorandum for the domestic legislation.[2]

Box 6.1 **Treaties which do not require changes or additions to domestic legislation**

A RIS should be prepared if a treaty involving regulation is likely to have a direct or substantially indirect impact on business, or restrict competition. The RIS requirements are not limited to treaties which require changes to domestic legislation. They may include treaties that otherwise 'involve' regulation.

Two examples demonstrate the point. Bilateral Film Co-Production Treaties do not alter any existing legislation. Existing domestic legislation defines an official film "co-production" as a joint film production between Australia and a country that has ratified a Bilateral Film Co-Production Treaty with Australia. Once Australia and another country ratify an agreement, "official co-productions" become eligible to apply for funding from the Australian Film Finance Corporation and the Australian Film Commission, and tax concessions on private investment. Hence, the treaty 'involves' regulation and has a direct impact on business. Such treaties require the preparation of a RIS.

Alternatively, there are many co-operative treaties which are generally statements of principle about improving relations between two countries. For example, Trade and Economic Relations Agreements are often statements of principle about improving relations and an agreement to meet occasionally to further mutual understanding and cooperation. They do not create, change or otherwise involve regulation. Such co-operative agreements do not normally require a RIS.

2 Where the tabling of the enabling domestic legislation precedes the tabling of the treaty text, then reference to the RIS prepared for the legislation may be made in the NIA.

6.3 Regulatory activities in treaties

During 1997–98, 47 treaties were tabled in the Commonwealth Parliament. Of these, 33 (or 70 per cent) did not require a RIS since they did not affect business or were subject to the limited exceptions from the requirement to prepare a RIS. The remaining 14 treaties — 30 per cent of the total — affected business, and therefore required the preparation of a RIS.

Of the 14 treaties that required a RIS, 12 had a *direct* impact on business, and two had a significant *indirect* impact on business. These figures are summarised in figure 6.2 below.

Table 6.1 provides a list of examples of treaties that have an effect on business.

In five cases the RIS was prepared for tabling. In only one case was it prepared for the decision maker. However, this was understandable given that decisions to enter into treaties, were often made a number of years earlier when RIS requirements were not as extensive. Uncertainty also existed about the stages in the treaty-making process at which RISs are now required. All of the RISs prepared were cleared by the Office of Regulation Review (ORR) as containing an adequate level of analysis.

Figure 6.2 **Regulatory activities in treaties**

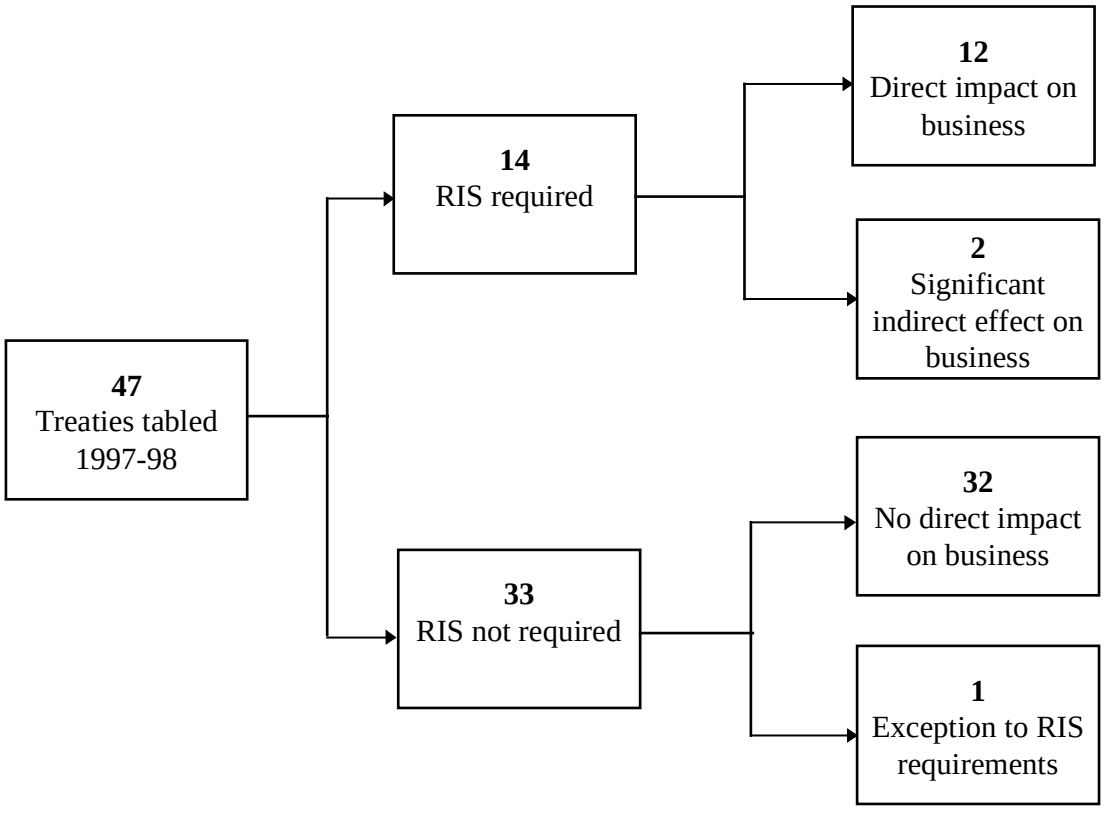


Table 6.1 **Selected treaties having an effect on business, 1997–98**

Treaty	*Features*	*Effect on business*
Agreement on Mutual Recognition in relation to Conformity Assessment, Certificates and Markings between Australia and the European Community	Enables testing, inspection and certification of products intended for sale in the other party's territory to be undertaken in the country of origin. Has the potential to reduce the costs associated with and the time required for certification of products for export	Direct
International Telecommunications Union Final Acts of the World Radio Communications Conference: Partial Revision of the Radio Regulations of 5 December 1979	Makes additional radio-frequency spectrum available for mobile satellite services and opens additional spectrum for high frequency broadcasting	Direct
Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter	Alters the existing regime regulating the dumping of wastes and other matter from one which states what may not be dumped in the marine environment to one which defines what is permitted to be dumped	Direct
Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries	Finalisation of the seabed boundaries will allow the release of additional areas for petroleum exploration	Significant Indirect

Table 6.2 **Assessment of the processes used for 1997–98 treaties against compliance measures**

Compliance measures	*Number of treaties*	*As a percentage of treaties that require a RIS*
For how many treaties was the first RIS prepared when policy approval was given for the negotiations to commence?	0	
For how many treaties was the first RIS prepared when policy approval was sought for the final text of the treaty?	1	7
For how many treaties was the first RIS prepared for tabling (either of treaty text or domestic legislation) in Parliament?	5	36
For how many treaties was the first RIS prepared after tabling had occurred?	0	
For how many treaties was a negative comment made?	0	
For how many treaties did the RIS prepared finally reach an adequate standard?	6	43
For how many treaties was a RIS included in the explanatory material tabled in Parliament?	2	14

6.4 Explaining compliance for treaties

Several factors, in addition to those outlined above, have contributed to the level of compliance with RIS requirements for treaties. Given that NIAs share some of the attributes of RISs, the ORR at first monitored the existing NIA processes in order to assess whether they met the RIS requirements. After a period of observation it was decided that they did not, primarily because the fundamental roles of NIAs and RISs differ. In early 1998, the ORR met with the Treaties Secretariat to clarify RIS processes for treaties and the first RISs were tabled with treaty action on 30 June 1998.

6.5 Improving compliance for treaties

The ORR currently liaises with both the Treaties Secretariat in the Department of Foreign Affairs and Trade (DFAT) and the Department of the Prime Minister and Cabinet (International Division) in order to identify upcoming treaty action. This early warning system in conjunction with increased awareness of RIS requirements, should result in increased compliance in 1998–99.

In addition, the Treaties Secretariat advises Departments on the need to consult with the ORR about RIS requirements for tabling. This information is to be included in the DFAT treaty document *Negotiation, Conclusion and Implementation of Treaties*.

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 bodies[1]

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 (ANZFSC), 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.

APPENDICES

A Commonwealth Legislation Review Schedule — status of reviews as at 30 June 1998[1]

Reviews under way when the Commonwealth's program was announced in June 1996

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
1	Communications and the Arts	*Protection of Movable Cultural Heritage Act 1986*	Can restrict competition and affect some businesses by preventing export of items having cultural significance.	Review completed.
2	Employment, Education, Training and Youth Affairs	*Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*	Regulates provision of educational services, restricting competition and possibly adding to costs.	Review completed.
3	Industrial Relations	*Industrial Relations Act 1988*	Impact on business of inflexible framework for negotiating wages and conditions.	Legislation replaced by the Workplace Relations Act 1996.
4	Industry, Science and Tourism	*Patents Act 1990*, ss. 198–202 (Patent Attorney registration)	Gives patent attorneys exclusive rights.	Review completed in June 1996. Report released.
5	Industry, Science and Tourism	Commerce (Imports) Regulations and Customs Prohibited Imports Regulations	Ongoing rationalisation of customs regulations.	Review in progress.
6	Industry, Science and Tourism	*Bounty (Books) Act 1986*	Assists Australian production via payment of bounty.	Review completed in October 1996. Report released in August 1997.

1 Reviews are numbered as they appeared in the original schedule. Reviews subsequently brought forward are listed in the year in which they commenced (see 46, 75a).

Reviews under way when the Commonwealth's program was announced in June 1996

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
7	Industry, Science and Tourism	*Bounty (Machine Tools & Robots) Act 1985*	Assists Australian production via payment of bounty.	Review completed in July 1996. Report released in August 1997.
8	Industry, Science and Tourism	*Bounty (Fuel Ethanol) Act 1994*	Assists Australian production via payment of bounty.	Review completed in July 1996. Report released August 1997.
9	Primary Industries and Energy	*Quarantine Act 1908*	Quarantine restrictions have potential to reduce competition from imports.	Review completed in October 1996. Report released in December 1996.
10	Prime Minister and Cabinet	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*	May prevent a sacred object or significant area from being sold, exploited or developed.	Review completed in August 1996. Report released.
11	Treasury	Comprehensive review of the regulatory framework of the financial system	Competition and costs affected by a regulatory framework which does not reflect rapid changes in the industry.	Review completed. Report released on 9 April 1997.
12	Treasury	*Census & Statistics Act 1905*	Imposes administrative costs on businesses, particularly small businesses.	Review was subsumed into the work of the Small Business Deregulation Task Force.
13	Treasury	*Corporations Act 1989*	Complexity of the law and high compliance costs are the focus of the Corporations Law Simplification Task Force.	Review subsumed into the Corporate Law Economic Reform Program.

Reviews scheduled to commence in 1996–97

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
14	Attorney-General's	*International Arbitration Act 1974*	Assists businesses in settling international contractual disputes.	Review completed in June 1997. Report released in March 1998.
15	Communi-cations and the Arts	*Australian Postal Corporation Act 1989*	Competition is restricted in delivery of standard letters.	Review completed and report released in February 1998
16	Communi-cations and the Arts	*Radiocommunications Act 1992* and related Acts	Has the potential to slow introduction of new technologies and restrict competitive supply of services.	Review in progress.
17	Employment, Education, Training and Youth Affairs	*Employment Services Act 1994* (case management issues)	Imposes requirements on businesses undertaking case management.	Review delisted because of reforms to the delivery of employment services.
18	Foreign Affairs and Trade	*Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993* and regulations	Imposes charges on uranium producers.	Review completed and report released in June 1997.
19	Health and Family Services	*Quarantine Act 1908*, in relation to human quarantine	Restricts import of biological materials that pose risk of disease.	Review completed. Review not publicly released.
46	Health and Family Services[2]	*National Health Act 1953* (Part 6 & Schedule 1) & *Health Insurance Act 1973* (Part 3)	Restrict the market in private health insurance.	Review completed in February 1997. Report released in April 1997.
20	Immigration and Multicultural Affairs	*Migration Act 1958* — sub-classes 560, 562, 563 student visas	Can affect the institutions and businesses which service foreign students studying in Australia.	Review completed.
21	Immigration and Multicultural Affairs	*Migration Act 1958* — sub-classes 120 and 121 (business visas)	Affects the ability of Australian businesses to obtain suitably qualified staff from abroad.	Review completed. Report released in March 1997.
22	Immigration and Multicultural Affairs	*Migration Act 1958* — sub-classes 676 & 686 tourist visas	Can deter potential tourists, thereby putting the Australian tourism industry at a disadvantage.	Review delisted following revised visitor arrangements.
23	Immigration and Multicultural Affairs	*Migration Act 1958*, Pt 3 (Migration Agents and Immigration Assistance) & related regulations	Requires the registration of those perons who intend to provide immigration assistance and advice.	Review combined with #24.

[2] This review was scheduled to commence in 1997–98, but was brought forward and included in the Industry Commission's inquiry into private health insurance.

Reviews scheduled to commence in 1996–97

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
24	Immigration and Multicultural Affairs	*Migration Agents Registration (Application) Levy Act 1992* and *Migration Agents Registration (Renewal) Levy Act 1992*	Requires the registration of those persons who intend to provide immigration assistance and advice.	Review completed in March 1997. Report released in August 1997.
25	Industrial Relations	*Tradesmen's Rights Regulation Act 1946*	Assesses individuals' foreign trade qualifications, and determines whether they may practice that trade in Australia.	Review in progress.
26	Industry, Science and Tourism	*Customs Tariff Act 1995* - Automotive Industry Arrangements (with a view to determining the arrangements to apply post-2000)	Restricts competition via tariff on imports.	Review completed. Report released in May 1997.
27	Industry, Science and Tourism	*Customs Tariff Act 1995* - Textiles Clothing and Footwear Arrangements (with a view to determining the arrangements to apply post-2000)	Restricts competition via tariff on imports.	Review completed and report published in September 1997.
28	Industry, Science and Tourism	*Duty Drawback (Customs Regulations 129 to 136B)* and *TEXCO (Tariff Export Concession Scheme) - Customs Tariff Act 1995*, Schedule 4 Item 21 Treatment Code 421	Provide reimbursement or exemption from duty for goods imported but subsequently re-exported.	Review in progress.
29	Industry, Science and Tourism	*Pooled Development Funds Act 1992*	Gives concessional tax treatment to those who make patient equity capital available to small and medium enterprises.	Review in progress.
30	Industry, Science and Tourism	Trade Practices (Consumer Product Information Standards) (Care for clothing and other textile products labelling) Regulations	Imposes minor costs on businesses which must provide consumer information.	Review completed in June 1997. Report released in October 1997.
31	Primary Industries and Energy	*Rural Adjustment Act 1992* and States and Northern Territory Grants (Rural Adjustment) Acts	Makes available benefits to eligible farmers for a range of purposes.	Review completed. Report released in May 1997.

Reviews scheduled to commence in 1996–97

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	Status of Reviews as at 30 June 1998
32	Primary Industries and Energy	*Income Equalisation Deposits (Interest Adjustment) Act 1984* and *Loan (Income Equalisation Deposits) Act 1976*	Provide risk management options for farm businesses.	Review completed. Report not publicly released.
33	Prime Minister and Cabinet	*Aboriginal Land Rights (Northern Territory) Act 1976*	Regulates and restricts mining and other commercial use.	ToR drafted.
34	Transport and Regional Development	International Air Service Agreements	Guarantee access for Australian designated carriers, but contain restrictions on international airline routes and/or capacity.	Review in progress. Draft report released June 1998. Final report delivered to Government on 11 September 1998.
35	Work Place Relations and Small Business	*Shipping Registration Act 1981*	Imposes a "one-off" registration fee. Provides benefits such as proof of ownership.	Review completed. Executive Summary available.
36	Transport and Regional Development	*National Road Transport Commission Act 1991* and related Acts	Establishes a national regulatory scheme for heavy (freight) road vehicles, with an associated charging regime.	Review completed. Report not publicly released.
37	Work Place Relations and Small Business	*Australian Maritime Safety Authority (AMSA) Act 1990*	Licensing and safety functions both cost and benefit shipping.	Review completed, but not publicly released.
38	Treasury	*Bills of Exchange Act 1909*	May prevent adoption of electronic transactions and record keeping.	Review in progress.
39	Treasury	Review of Foreign Investment Policy, including associated regulation	May restrict foreign investment.	Review in progress. Completion of review was delayed pending the outcome of negotiations for the Multilateral Agreement on Investment.

Reviews scheduled to commence in 1997–98

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
40	Attorney-General's	The trustee registration provisions of the *Bankruptcy Act 1966* and Bankruptcy Rules	Impose compliance costs on businesses.	ToR finalised. Consultancy proposals called for.
41	Communications and the Arts	*Broadcasting Services Act 1992*, *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*, *Radio Licence Fees Act 1964* and *Television Licence Fees Act 1964*	Substantially affect the structure of, and conduct within, the broadcasting industry.	Deferred until 1998–99.
42	Communications and the Arts	Review of market based reforms and activities currently undertaken by the Spectrum Management Agency.	Review to examine and evaluate the method and effectiveness of market based reforms in the allocation of spectrum.	Deferred until 1998–99.
43	Defence	*Defence Housing Authority Act 1987*	Provides a monopoly in provision of housing to Defence personnel.	Deferred.
44	Employment, Education, Training and Youth Affairs	*Higher Education Funding Act 1988* plus include: *Vocational Education & Training Funding Act 1992* and any other regulation with similar effects to the *Higher Education Funding Act 1988*	Restrict private sector entry and competition in higher education.	Review subserved into comprehensive review of Higher Education Funding and Policy (West Committee). Report published April 1997.
45	Employment, Education, Training and Youth Affairs and Industry, Science and Tourism	*Mutual Recognition Act 1992*	Review to focus on any impediments to mobility of occupations and sale of goods throughout Australia.	Review in progress.
47	Health and Family Services	*Environmental Protection (Nuclear Codes) Act 1978*	Controls nuclear activities for environmental and health/safety reasons.	Deferred.
48	Industrial Relations	*Affirmative Action (Equal Employment Opportunity for Women) Act 1986*	Non-compliant businesses may be ineligible for government contracts or for some forms of industry assistance.	Review completed. Report not publicly released.

49	Industry, Science and Tourism	*Anti-dumping Authority Act 1988* and *Customs Act 1901* Pt XVB and *Customs Tariff (Anti-dumping) Act 1975*	Restricts certain imports.	Deferred until 1999 in light of new arrangements announced on 24 February 1998.

Reviews scheduled to commence in 1997–98

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
50	Industry, Science and Tourism	*Customs Act 1901* Sections 154–161L	Cover valuation of imported goods which affects amount of duty to be paid.	ToR finalised. To report on 20 February 1999.
51	Industry, Science and Tourism	Trade Practices (Consumer Product Information Standards)(Cosmetics) Regulations	Impose minor costs on businesses which must provide consumer information.	Review completed in June 1998. Report released 23 July 1998.
52	Industry, Science and Tourism	*Petroleum Retail Marketing Sites Act 1980*	Restricts the number of retail sites a major oil company may directly control.	Delisted. Government has announced repeal of Act
53	Industry, Science and Tourism	*Petroleum Retail Marketing Franchise Act 1980*	Sets minimum contractual terms and conditions between franchised service station operators and the major oil companies.	Delisted. Government has announced repeal of Act
54	Primary Industries and Energy	Primary Industries Levies Acts and related Collection Acts	Impose costs via levies and their collection. Yield benefits from, for example, research and development.	ToR finalised. To report 31 December 1998.
55	Primary Industries and Energy	*Wool International Act 1993*	Imposes a levy on production to fund disposal and marketing of wool.	Delisted. The Act will be redundant following sell down of the wool stockpile.
56	Primary Industries and Energy	*Imported Food Control Act 1992* and regulations	Imposes conditions and restrictions on importers of food.	Review in progress.
57	Primary Industries and Energy	*National Residue Survey Administration Act 1992* and related Acts	Imposes a charge to fund collection of data which are used to address residue problems in food.	ToR finalised. To report 30 November 1998.
75a	Health and Family Services[3]	*Australia New Zealand Food Authority Act 1991*	Extensive regulation, not limited to health and safety objectives, add to industry costs.	Review completed in June 1998.

[3] A national review of food regulation is to be conducted in 1997–98, incorporating the Commonwealth review of the *Australia New Zealand Food Authority Act 1991*, which was

58	Primary Industries and Energy	*Pig Industry Act 1986* and related Acts	Levy funding used to promote pork consumption.	ToR finalised. To report 31 January 1999.

Reviews scheduled to commence in 1997–98

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
59	Primary Industries and Energy	*Torres Strait Fisheries Act 1984* and related Acts	Fisheries management has the potential to restrict competition.	Review in progress.
77	Primary Industries and Energy[4,5]	*Agricultural and Veterinary Chemicals Act 1994*	Recovers costs from chemical industry of regulating sale of agricultural and veterinary chemicals.	ToR finalised. To report November 1998.
60	Primary Industries and Energy	*Export Control (Unprocessed Wood) Regulations under the Export Control Act 1982*	Restricts woodchip exports whilst achieving environmental objectives.	Review deferred until 1998–99.
61	Transport and Regional Development	*International Air Services Commission Act 1992*	Aims to promote competitive outcomes in the allocation of Australia's capacity entitlements, but imposes compliance costs and possible delays on Australian carriers.	Review combined with #34.
62	Transport and Regional Development	*Motor Vehicle Standards Act 1989*	Adds to motor vehicle costs whilst maintaining safety standards.	Review in progress.

initially scheduled for 1998–99. The Food Standards Code is still scheduled for review in 1998–99.

4 A national review of agricultural and veterinary chemicals will incorporate the Commonwealth review of the *Agricultural and Veterinary Chemicals Act 1994*, which was initially scheduled for 1998–99.

5 A separate follow-up review of the Pricing of Farm Chemicals remains to be undertaken.

63	Treasury	Superannuation acts including: *Occupational Superannuation Standards Regulations Applications Act 1992, Superannuation (Financial Assistance Funding) Levy Act 1993, Superannuation Entities (Taxation) Act 1987, Superannuation Industry (Supervision) Act 1993, Superannuation (Resolution of Complaints) Act 1993* and *Superannuation Supervisory Levy Act 1991*	Impose substantial compliance costs on the superannuation industry and restrict competition.	Review deferred until 1998–99.
64	Treasury	s 51(2) & s 51(3) exemption provisions of the *Trade Practices Act 1974*	Exempt specific activities from generally applied competition laws.	Review in progress. To report by 5 March 1999.
65	Treasury	*General Insurance Supervisory Levy Act 1989*	Imposes a levy to recover administrative costs of regulating the industry.	Review deferred until 1998–99.

Reviews scheduled to commence in 1997–98

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1998*
66	Treasury	*Insurance (Agents and Brokers) Act 1984*	Adds to industry costs, but protects consumers.	Review deferred until 1998–99.
67	Treasury	*Life Insurance Supervisory Levy Act 1989*	Imposes a levy to recover administrative costs of regulating the industry.	Review deferred until 1998–99.

Reviews scheduled to commence in 1998–99

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*
68	Finance and Administrative Services	Land Acquisition Acts: *Land Acquisition Act 1989* & regulations; *Land Acquisitions (Defence) Act 1968;* and *Land Acquisition (Northern Territory Pastoral Leases) Act 1981*	Have the potential to affect business via uncertainty associated with the Government having power to resume land for certain public requirements.
69	Attorney-General's	*Financial Transactions Reports Act 1988* and regulations	Impose substantial costs on financial institutions.
70	Attorney-General's	*Proceeds of Crime Act 1987* and regulations	May have indirect consequences for businesses.

71	Attorney-General's and Industry, Science and Tourism	Intellectual property protection legislation (*Designs Act 1906, Patents Act 1990, Trade Marks Act 1995, Copyright Act 1968,* and possibly include the *Circuit Layouts Act 1989*)	Uncertainties and other costs result from anomalies and overlap in this legislation. Rapid development of information industries requires review of the regulatory framework.
72	Defence	*Defence Force (Home Loans Assistance) Act 1990*	Provides a bank with a 15–year exclusive franchise to offer home loans to military personnel.
73	Environment, Sport and Territories	*World Heritage Properties Conservation Act 1983*	Limits activities permitted in or of properties subject to World Heritage listing or nomination. Has potential to restrict trade.
74	Environment, Sport and Territories	*Hazardous Waste (Regulation of Imports & Exports) Act 1989, Hazardous Waste (Regulation of Imports & Exports) Amendment Bill 1995* and also related regulations	Has potential to restrict trade.
75b	Health and Family Services	Food Standards Code	Extensive regulation, not limited to health and safety objectives, add to industry costs.

Reviews scheduled to commence in 1998–99

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*
76	Industry, Science and Tourism	*Export Finance and Insurance Corporation Act 1991* and *Export Finance and Insurance Corporation (Transitional Provisions and Consequential Amendments) Act 1991*	Provides financial and insurance support to exporters, particularly where market provision of such support is inadequate.
78	Primary Industries and Energy	Dairy Industry Legislation	Intervenes in the fresh and manufactured milk markets.
79	Primary Industries and Energy	Fisheries Legislation	May restrict fishing activities.
80	Primary Industries and Energy	Dried Vine Fruits Legislation	Provides statutory export marketing arrangements for dried vine fruits.
81	Primary Industries and Energy[6]	*Prawn Boat Levy Act 1995*	Imposes a levy and requires record keeping and data provision.

6 This review is to be delisted. Imposition of levies under the Act have ceased and the Act will be repealed.

82	Primary Industries and Energy	*Export Control Act 1982* (fish, grains, dairy, processed foods etc)	Imposes conditions and restrictions on exporters.
83	Primary Industries and Energy	Export controls under reg 11 of the Customs Act (Prohibited exports - nuclear materials)	Increase exporter costs.
84	Workplace Relations and Small Business	Part X of *Trade Practices Act 1974* (shipping lines)	Sanctions cooperative pricing arrangements in international shipping which could increase costs to users.
85	Workplace Relations and Small Business	*Navigation Act 1912*[7]	Restricts ability of foreign ships to operate between Australian ports.
86	Treasury	*Financial Corporations Act 1974*	Imposes costs by requiring provision of information.
87	Treasury	*Prices Surveillance Act 1983*	Affects ability to increase prices for specified goods and services.
88	Veterans' Affairs	Treatment Principles (under section 90 of the *Veterans' Entitlement Act 1986* (VEA)) and Repatriation Private Patient Principles (under section 90A of the VEA)	Impose additional administrative costs on providers of services. Preference is given to use of public facilities, thereby restricting ability of private providers to compete.

[7] The original schedule included the *Coasting Trade Provisions of the Navigation Act 1912* (Part VI). The Prime Minister agreed to a request by the Minister for Workplace Relations and Small Business to widen the review to encompass the entire Act, not just Part IV.

Reviews which were to commence in 1999–2000

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*
89	Defence	*Defence Act 1903* (Army and Air Force Canteen Services Regulations)	Restricts commercial businesses from offering bar facilities, for example at Army and Air Force bases.
90	Environment, Sport and Territories	*Ozone Protection Act 1989* and *Ozone Protection (Amendment) Act 1995*	There may be scope for reducing costs to Australian industry and consumers of meeting these environmental objectives.
91	Health and Family Services	*Home and Community Care Act 1985*	Excludes businesses from providing certain care services.
92	Primary Industries and Energy	*Petroleum (Submerged Lands) Act 1967*	Controls access to petroleum resources; imposes fees.
93	Primary Industries and Energy	*Wheat Marketing Act 1989*	Gives a monopoly to the Australian Wheat Board over sale of wheat on the export market.
94	Prime Minister and Cabinet	*Native Title Act 1993* and regulations	Creates uncertainty as to security of title. Adds to costs of access to land.
95	Treasury	Part IIIA (access regime) of the Trade Practices Act (including exemptions)	Enables access to services, thereby enhancing competition.
96	Treasury	Part 6 (access provisions) of the *Moomba–Sydney Pipeline System Sale Act 1994*	Enables access to services, thereby enhancing competition.
97	Treasury	2D exemptions (local government activities) of the Trade Practices Act	Exempts specific activities from generally applied competition law.
98	Treasury	Fees charged under the Trade Practices Act	Imposes costs on business.

B Performance indicators for review and reform of existing legislation

This appendix contains the performance assessment data for each review. The broad performance trends and interpretation are discussed in chapter 1.

Together, the Competition Principles Agreement, the Commonwealth's announcement of the Legislation Review Schedule, and the RIS requirements provide 'benchmarks' against which to assess legislation review performance.

Based on these requirements, the ORR has developed the following 11 performance indicators, covering the three stages of planning the review, conducting the review and implementing reforms:

Stage I - Planning the reviews

(a) Did the review commence 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 whether 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?

Table B.1 records much of this information. Each cell indicates an answer in the affirmative or negative, to the qurestion posed in the column heading. To overcome problems with having to make a strict choice between "yes" and "no" a convention of ticks and crosses were used so as to permit partial answers.

Care should be taken when interpreting the results. For example, an answer in the negative does not always imply poor regulatory performance or non-compliance with requirements and obligations. For example, questions (i) and (j) ask whether the government has responded to a review report or whether announced reforms have been fully implemented. These actions inevitably involve some lag after completion of a review and therefore the questions will be answered in the negative for some reviews. Clearly, this need not represent poor performance or non-compliance. Chapter 1 discusses these performance indicators, including their interpretation. Finally, it should be noted that the answers will be 'upgraded' over time, in some cases.

The objective of the exercise was not to identify reviews where regulatory best practice was not achieved. Rather, it was to identify broad trends so as to draw lessons for the future (see chapter 1, section 1.4).

Table B.1 **Performance indicators for Reviews**[1]

	Review Preparation				
Review	*(a) Did the review commence as scheduled or was a variation approved?*	*(b) Was the ORR consulted at least 3 months prior to start?*	*(c) Did the ORR agree on the ToR as meeting CPA and LRS?*	*(d) Was the review body as specified (or better)?*	*(e)(i) Was a reporting date or period included in the ToR?*
Pre 1996–97					
1. Movable Cultural Heritage	na	na	na	na	
2. Overseas Students Education	na	na	na	na	×
3. Industrial Relations	overtaken by Workplace Relations Act 1996				
4. Patent Attorneys	na	na	na	na	×
5. Prohibited Imports	na	na	na	na	
6. Books Bounty	na	na	na	na	✓
7. Tools & Robots Bounty	na	na	na	na	✓
8. Fuel Ethanol Bounty	na	na	na	na	×
9. Quarantine Act	na	na	na	na	✓
10. A&TS Heritage Protection	na	na	na	na	✓
11. Financial Systems	na	na	na	na	✓
12. Census and statistics	subsumed into the Small Business Deregulation Task Force				✓
13. Corporations Act	subsumed into the Corporate Law Economic Reform Program				×

1 Each cell records the answer to the column heading. It does not necessarily indicate good or poor performance. The table should be read in conjunction with the discussion in Chapter 1 regarding the requirements for reviews and what represents regulatory best practice. Importantly, some answers will change (be upgraded) over time eg columns (i) and (j). The symbols used generally have the following interpretation:

- ✓ Question answered in the affirmative
- (✓) Question not able to be (fully) answered in the affirmative, but the outcome generally satisfied the requirements
- (×) Question answered in the affirmative to a very limited extent and/or the outcome largely failed to satisfy the requirements
- × Question answered in the negative

na = not applicable

no entry = data not available

Conduct of Review				Reform Progress		
(e) (ii) Was the review completed on time or approval sought for an extension?	*(f) Has the report been made publicly available?*	*(g) Is there evidence of adequate consultation?*	*(h) Did the report address the Guiding Principle explicitly?*	*(i) If completed, is a Government response public?*	*(j) Has the Government response been fully implemented?*	*(k) Were the RIS requirements fully met?*
	×	✓	na	×	na	na
na	✓	✓	na	✓	✓	(✓)
				✓	✓	
na	✓	✓	na	✓	✓	✓
	na	na	na	(✓)	(✓)	
✓	✓	✓	na	✓	✓	
✓	✓	✓	na	✓	✓	
na	✓	✓	na	✓	✓	na
✓	✓	✓	na	✓	✓	na
✓	✓	✓	na	✓	(✓)	(✓)
✓	✓	✓	✓	✓	(✓)	✓
✓	✓	✓	na	✓	✓	na
na	✓	✓	na	✓	✓	✓

Table B.1 **(continued)**

	Review Preparation				
Review	*(a) Did the review commence as scheduled or was a variation approved?*	*(b) Was the ORR consulted at least 3 months prior to start?*	*(c) Did the ORR agree on the ToR as meeting CPA and LRS?*	*(d) Was the review body as specified (or better)?*	*(e)(i) Was a reporting date or period included in the ToR?*
1996–97					
14. International Arbitration	✓	✓	✓	✓	✓
15. Postal Services	✓	✓	✓	✓	✓
16. Radiocommunications	✓	✓	✓	✓	✓
17. Employment Services	delisted - overtaken by reforms to employment services				
18. Nuclear Safeguards charge	✓	✓	✓	✓	✓
19. Quarantine (Human)	×	✓	✓	✓	✓
20. Migration (Students)	✓	✓	✓	✓	×
21. Migration (Business)	✓	(✓)	✓	✓	×
22. Migration (Tourists)	delisted - following revised visitor arrangements				
23. Migration Agents	✓		✓	✓	×
24. Migration Agents Levy	combined with #23.				
25. Tradesman Rights	✓	✓	✓	✓	✓
26. Tariffs - Motor Vehicles	✓	✓	✓	✓	✓
27. Tariffs - Textile, Clothing and Footwear	✓	✓	✓	✓	✓
28. Duty Drawback	✓	✓	✓	✓	✓
29. Pooled Development Funds	✓	✓	✓	✓	✓
30. Clothes Labelling	✓	✓	✓	✓	✓

Conduct of Review				Reform Progress		
(e) (ii) Was the review completed on time or approval sought for an extension?	*(f) Has the report been made publicly available?*	*(g) Is there evidence of adequate consultation?*	*(h) Did the report address the Guiding Principle explicitly?*	*(i) If completed, is a Government response public?*	*(j) Has the Government response been fully implemented?*	*(k) Were the RIS requirements fully met?*
✓	✓	✓	✓	×	na	na
✓	✓	✓	✓	✓	×	✓
in-progress	na	na	na	na	na	na
✓	✓	✓	(✓)	✓	(✓)	na
✓	×	✓	✓	×	na	na
na	×	✓	na	✓	(✓)	✓
na	✓	✓	na	✓	✓	✓
na	✓	✓	(✓)	✓	✓	✓
overdue	na	✓	na	na	na	na
✓	✓	✓	(✓)	✓	(✓)	(×)
✓	✓	✓	(✓)	✓	(✓)	(×)
overdue	na	na	na	(✓)*	(×)	(×)
overdue	na	na	na	na	na	na
✓	✓	✓		✓	✓	(×)

Table B.1 **(continued)**

	Review Preparation				
Review	*(a) Did the review commence as scheduled or was a variation approved?*	*(b) Was the ORR consulted at least 3 months prior to start?*	*(c) Did the ORR agree on the ToR as meeting CPA and LRS?*	*(d) Was the review body as specified (or better)?*	*(e)(i) Was a reporting date or period included in the ToR?*
1996–97 (continued)					
31. Rural Adjustment	✓	(×)	✓	✓	×
32. Income Equalisation Deposits	✓	(×)	✓	✓	✓
33. Aboriginal Land Rights	(✓)	✓	✓	✓	✓
34. Air Services Agreements	✓	✓	✓	✓	✓
35. Shipping Registration	✓	✓	✓	✓	✓
36. National Road Transport Commission	✓	(✓)	✓	✓	✓
37. Australian Maritime Safety Authority	✓	✓	✓	✓	✓
38. Bills of Exchange	✓	✓	✓	✓	✓
39. Foreign Investment Policy		×	×		
1997–98					
40. Bankruptcy rules	(✓)	✓	✓	✓	✓
41. Broadcasting	deferred to 1998–99				
42. Spectrum allocation	deferred to 1998–99				
43. Defence Housing	✓	(×)	✓	✓	✓
44. Higher Education	✓	✓	✓	✓	✓
45. Mutual Recognition	✓	✓	✓	✓	✓
46. National Health & Health Insurance	✓	✓	✓	✓	✓

Conduct of Review				Reform Progress		
(e) (ii) Was the review completed on time or approval sought for an extension?	*(f) Has the report been made publicly available?*	*(g) Is there evidence of adequate consultation?*	*(h) Did the report address the Guiding Principle explicitly?*	*(i) If completed, is a Government response public?*	*(j) Has the Government response been fully implemented?*	*(k) Were the RIS requirements fully met?*
na	✓	✓	na	✓	(✓)	(×)
✓	×	✓	na	✓	(✓)	(✓)
not begun	na	na	na	na	na	na
in-progress	draft	na	na	na	na	na
×	(✓)	✓	(×)	×	na	✓
✓	×	✓	(✓)	×	na	na
✓	×	✓	(✓)	×	na	na
subsequently deferred 1 year						
			na	na	na	na
na	na	na	na	na	na	na
not begun - likely to be deferred						
✓	✓	✓	✓	×	na	na
over-due	na	na	na	na	na	na
✓	✓	✓	✓	✓	✓	(×)

Table B.1 **(continued)**

	Review Preparation				
Review	*(a) Did the review commence as scheduled or was a variation approved?*	*(b) Was the ORR consulted at least 3 months prior to start?*	*(c) Did the ORR agree on the ToR as meeting CPA and LRS?*	*(d) Was the review body as specified (or better)?*	*(e)(i) Was a reporting date or period included in the ToR?*
1997–98 (continued)					
47. Nuclear Codes	not begun - likely to be deleted				
48. Equal Employment	✓	✓	✓	(✓)	×
49. Anti-Dumping	deferred to 1999				
50. Customs (Valuation)	(✓)	✓	✓	✓	✓
51. Trade Practices (Cosmetics)	✓	(×)	✓	✓	✓
52. Petroleum (Retail Sites)	delisted - Government has announced repeal of Act				
53. Petroleum (Franchise)	delisted - Government has announced repeal of Act				
54. Primary Industries Levies	(✓)	✓	✓	✓	✓
55. Wool International	delisted - redundant following sell down of wool stockpile				
56. Imported Food	✓	✓	✓	✓	✓
57. National Residue Survey	(✓)	✓	✓	✓	✓
58. Pig Industry	(✓)	✓	✓	✓	✓
59. Torres Strait Fisheries	✓	✓	✓	✓	✓
60. Export Wood	deferred to 1998–99				
61. International Air Services Commission	combined with #34				
62. Motor Vehicles Standards	✓	✓	✓	✓	×
63. Superannuation Acts	deferred to 1998–99				

Conduct of Review				Reform Progress		
(e) (ii) Was the review completed on time or approval sought for an extension?	*(f) Has the report been made publicly available?*	*(g) Is there evidence of adequate consultation?*	*(h) Did the report address the Guiding Principle explicitly?*	*(i) If completed, is a Government response public?*	*(j) Has the Government response been fully implemented?*	*(k) Were the RIS requirements fully met?*
na	✗	✓	na	✗	na	na
in-progress	na	na	na	na	na	na
✓	✓	✓	(✓)	✓	(✗)	✓
in-progress	na	na	na	na	na	na
in-progress	na	na	na	na	na	na
in-progress	na	na	na	na	na	na
in-progress	na	na	na	na	na	na
in-progress	na	na	na	na	na	na
na	na	na	na	na	na	na

Table B.1 **(continued)**

	Review Preparation				
Review	*(a) Did the review commence as scheduled or was a variation approved?*	*(b) Was the ORR consulted at least 3 months prior to start?*	*(c) Did the ORR agree on the ToR as meeting CPA and LRS?*	*(d) Was the review body as specified (or better)?*	*(e)(i) Was a reporting date or period included in the ToR?*
1997–98 (continued)					
64. Trade Practices (Exemptions)	✓	✓	✓	✓	✓
65. General Insurance Levy	deferred to 1998–99				
66. Insurance Agents	deferred to 1998–99				
67. Life Insurance Levy	deferred to 1998–99				
From 1998–99					
75a. National Food Authority	✓	✓	✓	✓	✓
77. Ag. + Vet. Chemicals	(✓)	✓	✓	✓	✓

Conduct of Review				Reform Progress		
(e) (ii) Was the review completed on time or approval sought for an extension?	*(f) Has the report been made publicly available?*	*(g) Is there evidence of adequate consultation?*	*(h) Did the report address the Guiding Principle explicitly?*	*(i) If completed, is a Government response public?*	*(j) Has the Government response been fully implemented?*	*(k) Were the RIS requirements fully met?*
in-progress	na	na	na	na	na	na
✓	×	✓	na	×	na	na
in-progress	na	na	na	na	na	na

C Regulation review in the States and Territories

This appendix outlines existing mechanisms and developments in regulation review in the States and Territories over 1997–98.

New South Wales

Responsibility for streamlining and simplifying NSW's regulatory environment rests with the Inter-Governmental and Regulatory Reform Branch of the NSW Cabinet Office.

Existing mechanisms for regulation review

Review mechanisms which operate in NSW include the following.

Regulatory Impact Statement requirements — The *Subordinate Legislation Act 1989* requires the preparation of a Regulatory Impact Statement (RIS) for all new principal statutory rules. The RIS must include a statement of objectives, an identification of options by which those objectives can be achieved, an assessment of the costs and benefits of options and a consultation statement. The RIS, along with written comments and submissions received, is forwarded to the Regulation Review Committee of the New South Wales Parliament within 14 days of a statutory rule being published in the Gazette.

Staged repeal of statutory rules — Section 10 of the *Subordinate Legislation Act 1989* provides for the automatic repeal of statutory rules after five years.

Best practice guidelines — The NSW Government issues 'best practice' guidelines with which all agencies must comply when proposing regulatory measures. The guidelines are contained in the publication *From Red Tape to Results*. The guidelines prompt regulators to regulate ends not means and use commercial incentives rather than command and control rules.

Cabinet submissions — All Cabinet minutes which propose new regulatory controls must demonstrate that the 'best practice' approach has been applied in assessing the regulatory impact of the proposal.

Regulatory plans and reports — In order to assist with the co-ordination and integration of regulatory proposals across government, Ministers are required to provide to the Premier an annual 'regulatory plan' for each department and agency within their portfolio. The plan briefly describes the regulatory proposals to be considered in the forthcoming financial year, including any anticipated reform of the existing stock of regulation administered by the department or agency. Reports on achievements in regulatory reform over the previous 12 months are also required.

Developments in regulation review

The Regulation Review Committee of the Parliament of New South Wales is undertaking, in co-operation with the scrutiny committees of the Commonwealth and the other states and territories, an evaluation of cost-benefit and sunset provisions and other relevant options for the effective scrutiny of regulations. The Regulation Review Committee intends to report to the NSW Parliament on whether NSW regulatory controls, in their current form, provide the best means of monitoring the impact and growth of regulation. As part of that review process, the Regulation Review Committee released a report (*Some aspects of International Regulatory Programs and Practice)* in May 1998 which outlines international regulatory practices.

In order to bring about improvements in the standard of RISs prepared under the *Subordinate Legislation Act 1989* the Regulation Review Committee recommended that they be tabled in Parliament. The proposal was implemented by way of a Premier's Memorandum dated 2 June 1998.

Victoria

The Victorian Office of Regulation Reform, which is located within the Department of State Development, provides assistance to both government and industry in the development of efficient regulation. It undertakes this by conducting industry sector reviews, specific regulation reviews and providing advice and assistance with national competition policy legislative reviews and RISs.

Existing mechanisms for regulation review

Specific Victorian review mechanisms are listed below.

RIS requirements for new subordinate legislation — RIS requirements apply to all subordinate legislation[1] which imposes an 'appreciable'[2] economic or social burden on a sector of the public.

Cabinet requirements for proposed legislation — The Victorian Cabinet Handbook requires that all Cabinet Submissions justify the use of legislation as the most appropriate means of implementing the proposal, including consideration of whether the policy can be implemented by non-legislative means. Where the proposal may have a major impact, submissions are required to identify the costs and benefits for both the Government and the community.

Sunset clauses — Under the *Subordinate Legislation Act 1994* all regulations are automatically revoked after 10 years to ensure that regulation is still appropriate to the needs of society.

Regulation Alert — This annual publication allows business and the general public to know in advance those regulations due to sunset and includes details of many new regulations proposed for the coming financial year.

Developments in regulation review

The *Subordinate Legislation Act 1994* requires that independent advice be sought to confirm that RISs adequately meet the requirements contained in section 10(1) of the Act. The Victorian Office of Regulation Reform has extensive experience in this area, providing independent assessment as to the adequacy of RISs on a fee for service basis. However, it is the Victorian Office of Regulation Reform's intention to concentrate on other areas of regulation reform in the future. It is anticipated that the Office of Regulation Reform will move to a research and benchmarking role with a focus on industry sector reviews. The certification of RISs will, in the main, be left to independent consultants.

In October 1997, the Victorian Law Reform Committee released its report *Regulatory Efficiency Legislation*. The report recommended the enactment of legislation to permit businesses to obtain approval for Alternative Compliance

[1] This is required under the *Subordinate Legislation Act 1994*.

[2] The guidelines published under section 26 of the Act discuss the question of defining what constitutes an appreciable burden.

Mechanisms (ACMs) which would allow them to meet the objectives of regulatory regimes in a more efficient manner than provided for under prescriptive regulations.

The Victorian Government noted the Committee's model for the operation of ACMs. The scheme for ACMs will apply to regulations that impose regulatory burdens on business. Industry bodies will be encouraged to develop ACMs on behalf of their members.

The Government accepted the Committee's recommendation for a review of the Victorian RIS process to be conducted by the Victorian Parliament's Scrutiny of Acts and Regulations Committee.

Queensland

The Business Regulation Reform Unit is part of the Department of State Development; it undertakes research into regulation reform issues, oversees compliance of Queensland government departments with the RIS requirements of the Queensland *Statutory Instruments Act 1992*, provides training to agencies in areas relating to regulation review and develops policy and provides advice on improving the regulatory environment.

Existing mechanisms for regulation review

Specific regulatory review mechanisms which operate in Queensland are listed below.

The Statutory Instruments Act 1992 — This Act was amended in 1995 to require the preparation of a RIS for all new subordinate legislation which is likely to impose an 'appreciable' cost[3] on business and the community in general. Section 4 of the Act provides that a RIS must include a statement of objectives, options for achieving the objectives, a cost-benefit analysis of each option and details of how the preferred option will be implemented.

RIS Guidelines — Released in 1995, the guidelines facilitate compliance with the Statutory Instruments Act in regard to RIS requirements and encourage the adoption of 'best practice' with respect to regulatory issues.

[3] The Dictionary to the Act defines costs to include burdens and disadvantages and direct and indirect economic, environmental and social costs.

Staged automatic expiry of subordinate legislation — In order to reduce the regulatory burden and ensure that subordinate legislation is relevant to current economic and social circumstances, subordinate legislation automatically expires on the 10th anniversary of the day of its entry into force.

Developments in regulation review

The Red Tape Reduction Task Force was formed in late 1996 to remove unnecessary 'red tape' affecting business and address concerns about the negative effects of regulatory burdens on business in Queensland. A major initiative of the Task Force is 'Smart Licence', a one-stop-shop for business licence needs. This initiative, which is estimated to save small business $37 million annually, makes the most common licences available from one location. Through 'Smart Licence' the government extended the term of more than 100 business licences at no extra cost to business, reduced the nominal number of licences required by business by nearly 50 per cent and streamlined paperwork — businesses now need complete only one application form in applying for the most common licences.

In May 1998, the then Department of Tourism, Small Business and Industry released a *Red Tape Reduction Stocktake* which is the first in a series of annual stocktakes designed to establish a benchmark to measure progress made by Government agencies in reducing red tape for business. It is estimated that the initiatives identified to date by the Government, including Smart Licence, will save Queensland business over $77 million.

The RIS guidelines introduced in 1995 encouraged risk assessment, but did not specify any particular methodology. A new set of guidelines (*Principles and Guidelines for Regulatory Risk Identification, Analysis and Evaluation for Regulated Activities in the Queensland Public Sector*) was released in 1997. The Guidelines introduce a consistent approach to risk assessment and advocate the use of *Australian New Zealand Standard 4360:1995 – Risk Management.*

South Australia

Regulation reform in South Australia is the primary responsibility of the Microeconomic Reform Branch located in the Cabinet Office of the Department of Premier and Cabinet. Regulation reform which focuses on small business is the primary responsibility of the Department of Industry and Trade.

Existing mechanisms for regulation review

Review mechanisms which operate in South Australia include the following.

10 year sunset program — In 1987, South Australia introduced automatic or sunset clauses in existing and in all new subordinate regulations (*Subordinate Legislation Act 1978* Part 3A). Since then agencies have reviewed all their existing regulations, updating those for which a need remains and allowing others to lapse. All updated and new regulations now have a 10 year sunset clause. In addition all by-laws made under the *Local Government Act 1934* sunset after seven years.

Parliamentary scrutiny — Regulations made by the South Australian Government and by-laws made under the *Local Government Act 1934* are subject to scrutiny and possible disallowance by the Legislative Review Committee.

Cabinet requirements for proposed regulations — It is required that all Cabinet submissions justify the use of legislation as the most appropriate means of implementing the proposal, including consideration of whether the policy can be implemented by non-legislative means. Where the proposal may have a major impact, submissions are required to identify the costs and benefits for both the Government and the community.

Consultation requirements — It is required that for all Cabinet Submissions, relevant Ministers are responsible for ensuring that their agencies consult with those who are likely to be affected.

Developments in regulation review

The South Australian Business Licence Information System (BLIS) commenced in 1992. Local Government licences were added in 1997, and the fully integrated Commonwealth, State and Local Government BLIS was officially launched in October 1997. It is anticipated that BLIS licences and forms will be accessible via the internet before the end of 1998 through the Business Channel project which is being managed by the Business Centre in the Department of Industry and Trade.

Codes of practice referenced in South Australian legislation are in the process of being added to the national Business Information Service.

Western Australia

Responsibility for regulation reform and review is spread across several Western Australian departments and agencies including the Department of the Treasury, the Department of the Premier and Cabinet, and the Small Business Development Corporation (SBDC).

Existing mechanisms for regulation review

Review initiatives in Western Australia are outlined below.

Regulation Review Panel — The SBDC's Regulation Review Panel was established to identify onerous or unnecessary red tape for small business in Western Australia. The Panel includes industry and business representatives and has played a role in achieving improvements on behalf of small business, including simplifying reporting requirements and reducing administrative and licensing requirements.

Red tape forums — These forums were introduced in 1996 by the SBDC to assist business operators present their concerns to government over business regulation and compliance. To date forums have been held on regulation in the tourism and food industries and on local government and employee relations regulations. Forums are also conducted in regional areas in order to identify the 'red tape' concerns of regional small business.

Business impact requirements and explanatory memoranda — Subordinate legislation going to the Parliament or the Joint Standing Committee on Delegated Legislation requires an explanatory memorandum outlining the law's purpose, justification and the consultation undertaken. Departments are also required to consider the impact on small business of legislative proposals put to Cabinet.

Developments in regulation review

The Western Australian Department of Treasury commissioned a project to assess the various regulation review initiatives (other than reviews of existing legislation to meet national competition obligations) being undertaken by the Commonwealth, NSW, Queensland, Victorian, South Australian and Tasmanian Governments and make a recommendation on whether the Western Australian Government should further invest in the development of a systematic regulation review process.

The SBDC is undertaking a major project to collect, standardise and include on its BLIS database Local Government licensing and regulations. This service will

complete the one-stop concept for compliance and is expected to generate savings for small business throughout the State.

Tasmania

The Regulation Review Unit (RRU) is located within the Department of Treasury and Finance and is responsible for administering Tasmania's regulation review system, which is comprised of two elements, namely the *Subordinate Legislation Act 1992* and the Legislation Review Program.

These two review mechanisms share a common objective — to ensure that the State's legislative and regulatory framework does not unnecessarily impede or restrict overall economic activity. The Legislation Review Program principally covers primary legislation, while the Subordinate Legislation Act, as its name suggests, covers new subordinate legislation and has sunsetting arrangements for existing subordinate legislation.

Existing mechanisms for regulation review

The Subordinate Legislation Act 1992

The key review mechanisms contained in the *Subordinate Legislation Act 1992* are listed below.

RIS requirements — The Act requires that a RIS be prepared for all new subordinate legislation imposing a significant cost, burden or disadvantage upon any sector of the public. In these circumstances a RIS is submitted to the RRU for consideration and endorsement by the Secretary of the Department of Treasury and Finance prior to being released for public consultation for a mandatory 21 day period. Following this process, the proposed subordinate legislation is submitted to the Governor for approval.

Staged Repeal — The Subordinate Legislation Act established a timetable for the staged automatic repeal of all existing legislation and provides for all subordinate legislation made on or after the commencement of the Act (13 March 1995) to be automatically repealed on its tenth anniversary.

Guidelines for the making of subordinate legislation — These guidelines require regulators to consider alternative options for achieving the Government's objectives and to estimate the impact of the proposed subordinate legislation on competition.

The Legislation Review Program

The Legislation Review Program was introduced in 1996 and meets Tasmania's obligations under the Competition Principles Agreement of National Competition Policy. The Legislation Review Program outlines both a timetable for the review of all existing legislation that imposes a restriction on competition and a process to ensure that all new legislative proposals that restrict competition or significantly impact on business are properly justified in the public benefit.

Assessment of new legislation — All new primary legislation is assessed by the RRU. Where it is considered that proposed legislation contains a major restriction on competition (that is, where a restriction has economy-wide implications or significantly affects a sector of the economy) a RIS must be prepared, and public consultation undertaken.

Reviews of existing legislation — Some 240 Acts have been scheduled for review in terms of their restrictions on competition. Where it is considered by the RRU that existing legislation contains major restrictions on competition, review bodies are required by their terms of reference to prepare a RIS in relation to those restrictions and conduct a mandatory public consultation process. The RIS will help identify whether the benefits to the public of the restriction outweigh the costs. Where a restriction on competition is considered to be minor, review bodies will only be required to complete a brief assessment of the costs and benefits of the restriction. While public consultation is encouraged, it is not mandatory for minor reviews. In conducting reviews of legislation, it is a requirement that any subordinate legislation that accompanies the primary legislation in focus must also be considered.

Developments in regulation review

Following its appointment in September 1998, the new State Government has made it clear that cutting small business red tape is a priority.

Australian Capital Territory

The Competition Policy and Business Support units in the Chief Minister's Department undertake the implementation of the Australian Capital Territory (ACT) Government's regulation reform strategy. These areas have responsibility for furthering best practice in regulation reform, examining and assessing all regulatory proposals and developing regulatory guidelines.

Existing mechanisms for regulation review

ACT review mechanisms include the following.

Regulatory needs analysis process — Agencies proposing regulatory measures or reviewing existing regulation are required to undertake a Regulatory Needs Analysis. The process is aimed at assessing whether a regulatory approach to managing the issue is the best, or only, solution, and how the approach can be designed to minimise costs and maximise benefits.

Business impact assessment process — The ACT Government has determined that Business Impact Assessments (BIAs) are to be a mandatory component of any proposal to develop or introduce new regulatory measures or to amend existing regulation which impacts on business or restricts competition. The requirements apply to primary legislation, subordinate legislation as well as other government actions used to control or influence the conduct of certain activities. BIAs are intended to focus attention on the likely impact that a regulatory measure, or its design, could have on business. BIAs are appended to Cabinet Submissions.

Staged review of existing regulations — The ACT Government has made a commitment under national competition policy to review all legislation with the aim of removing, where appropriate, legislative provisions which restrict competition. Concurrently, the ACT Government is reviewing legislation to remove any unnecessary regulations and to reduce red tape.

Publication of agency regulatory plans — Publishing regulatory plans provides the ACT Government and the community with advance notice of proposals for new regulations and regulatory reform initiatives. The regulatory plans outline how agencies intend to achieve regulatory reform throughout the year. To improve consultation processes, plans also list discussion papers on regulatory issues scheduled for release during the year and consultation proposed to be undertaken by agencies.

Developments in regulation review

In 1995, the ACT Government commissioned the Red Tape Task Force to investigate the dual problems of red tape and excessive regulation. The Government has now implemented the Task Force's recommendations.

ACT BLIS, a joint ACT and Commonwealth Government Initiative, was launched on 27 November 1997. ACT BLIS is a one-stop-shop licence information and lodgment service for business. Through BLIS, business can access information on

ACT and Commonwealth Government licences, permits, registrations and codes of practice.

In its 1997–98 Budget, the ACT government gave a commitment to the development of an ACT Business Channel (ACTBC) that will provide both an operator and internet-based information service on business programs. ACTBC will provide an entry point for business wishing to deal with the ACT Government and will be linked to the Commonwealth Government's Business Entry Point. Business will be able to receive information about other government programs and, eventually, to undertake a number of transactions with government agencies. A commitment was also made for the stage two development of ACT BLIS that will see BLIS move onto the internet.

The ACT Government is also undertaking a joint initiative project with the Commonwealth Government to streamline the licence and approvals process in the tourism and hospitality industry in the ACT with the objective of deleting unnecessary controls. Where controls are considered necessary, a streamlined approval process will be developed.

Northern Territory

In 1997–98, the Business Services Group of the Department of Asian Relations, Trade and Industry (DARTI) performed a regulation review role within the Northern Territory.

Existing mechanisms for regulation review

Regulatory review mechanisms which operate in the Northern Territory are listed below.

Explanatory Memorandum — Any proposed regulation and its accompanying explanatory memorandum are scrutinised by DARTI. Regulations which are complex or those which have wide ranging impacts on government and non-government agencies are referred to the Co-ordination Committee, which includes the chief executive officers of all departments and government agencies, for consideration.

Consultation processes — DARTI, working together with the Cabinet Office of the Department of the Chief Minister, ensures that when prospective regulations are being sponsored by an agency there is wide consultation with business and the

relevant industry bodies. This aims to ensure that the impact of the proposed regulation on business is, where possible, minimised.

Developments in regulation review

As at 19 October 1998, DARTI became two departments, with the business support functions being incorporated into the Department of Industries and Small Business (DISB). The other department is the Department of Asian Relations and Trade.

The new DISB will also take on various functions from agencies which provide services or regulatory functions to industry. The new department will incorporate functions relating to:

- work health;
- liquor regulations;
- gaming regulations;
- consumer affairs and fair trading;
- business registration;
- weights and measures;
- agents licensing and responsibility for auctioneers; and
- tourism development.

There are also plans to establish an advisory group, consisting of private sector and government agency representatives, to advise and assist in overseeing the Northern Territory Government's regulation review and reform activities. This will be subject to endorsement in line with the new departmental arrangements.

D The activities of the Office of Regulation Review

This appendix details the range of activities undertaken by the Office of Regulation Review in 1997–98.

The Office of Regulation Review (ORR) is located in the Productivity Commission. It has a staff of 12–15, mostly senior officers with economic policy training and experience and a few with legal training and experience. The ORR has an annual salary budget of some $850,000 and a non-salary budget of around $50,000.

The Government in 1997 directed that the ORR issue a charter outlining its role and functions. The charter is set out in box D.1. In this appendix the ORR's activities are described with reference to each function specified in the charter.

Advise on quality control for regulation making and review

These activities can be characterised as the development and implementation of general guidelines or frameworks designed to achieve more effective and efficient legislation and regulations. Specific activities of this nature undertaken in 1997–98 included:

- continuing guidance to departments and regulatory agencies on appropriate terms of reference, and the make up of review bodies, for the four-year review program (98 reviews in total) of existing Commonwealth legislation — this program forms part of the Government's commitment under the Competition Principles Agreement (see chapter 1);
- the publication in October 1997, and subsequent wide dissemination, of *A Guide to Regulation*, which is a reference document on good regulatory practice for those developing and assessing policy options; and
- the chairing of a Commonwealth interdepartmental committee which investigated and reported on quasi-regulation, such as codes of practice and some uses of standards — the Government has accepted the principal recommendations of the committee's report (see chapter 5).

Box D.1 **Charter of the Office of Regulation Review**

The role of the ORR is to promote the Commonwealth Government's objective of effective and efficient legislation and regulations, and to do so from an economy-wide perspective. Its functions are to:

- advise the Government, Commonwealth departments and regulatory agencies on appropriate quality control mechanisms for the development of regulatory proposals and for the review of existing regulations;
- examine RISs prepared by departments and agencies and advise on whether they meet the Government's requirements and whether they provide an adequate level of analysis;
- provide training and guidance to officials to assist them in meeting the requirements to justify regulatory proposals;
- report annually on compliance with the Government's guidelines, and on regulatory reform developments more generally;
- provide advice to Ministerial Councils and national standard setting bodies on COAG guidelines which apply when such bodies make regulations;
- lodge submissions and publish reports on regulatory issues having significant economic implications; and
- monitor regulatory reform developments in the States and Territories, and in other countries, in order to assess their relevance to the Commonwealth.

These functions are ranked in order of the Government's priorities, and the ORR must concentrate its limited resources where they will have most effect.

While maintaining an economy-wide perspective, the ORR is to focus its efforts on regulations which restrict competition or which affect (directly or indirectly) businesses. The ORR is to ensure that particular effects on small businesses of proposed new and amended legislation and regulations are made explicit, and that full consideration is given to the Government's objective of minimising the paperwork and regulatory burden on small business.

The ORR (together with the Treasury) is to advise the Assistant Treasurer in his role as the Minister responsible for regulatory best practice.

Advise on regulatory impact analysis

A key function of the ORR is liaising with departments and agencies on the Government's specific requirements for regulation impact analysis, and on how to comply with these requirements. The ORR also provides detailed comments on draft impact assessments by agencies.

The Government announced in March 1997 that the preparation of RISs was mandatory for all primary legislation, legislative instruments and treaties involving regulation which directly affects business, or which has a significant indirect effect on business, or which restricts competition (Prime Minister 1997, p. 66).

The ORR started immediately to put into effect this policy, but it did not gain full momentum until details of implementation were endorsed by the Government in September 1997 and published in October 1997 in *A Guide to Regulation*.

Overall, during 1997–98, the ORR gave advice on some 350 regulatory issues of which around 80 concerned amendments to taxation arrangements. This report provides information on the extent of compliance with the Government's requirements in 1997–98.

In undertaking this role the ORR made particular efforts to ensure that it provided rapid and constructive feedback, both orally and in writing. Those occasions when it was not able to offer a standard of service which met agencies' expectations were typically cases when the preparation of a RIS had been commenced too late in the policy process.

Provide training and guidance to officials

The ORR provides advice to officials as particular issues arise, thereby building their capacity to institute quality processes for the development and review of regulatory proposals. However, more general training and guidance has the potential to considerably improve that capacity.

Therefore, over 1997–98 the ORR provided briefings to departments and agencies, explaining the reasons for the Government's requirements and the features of a RIS. Over the course of the year such presentations were made to some 650 Commonwealth officials and around 1 600 copies of *A Guide to Regulation* were distributed.

Report on compliance and on regulatory reform developments

There are two main strands to the requirement to report on compliance. Firstly the ORR monitors and reports on the progress and outcomes of the Commonwealth's Legislation Review Program (see chapter 1). Secondly, the Government directed the Productivity Commission to report annually, commencing in 1997–98, on compliance with the Commonwealth's mandatory RIS requirements for new and

amended regulation. These reports constitute the body of this document, *Regulation and its Review 1997–98.*

Advise Ministerial Councils and national standard-setting bodies on good regulation making

In April 1995, COAG endorsed a set of principles and guidelines for national standard setting and regulatory action which is undertaken by Commonwealth/State Ministerial Councils and by inter-governmental standard-setting bodies.

In November 1997, COAG made some minor amendments to those principles and guidelines and included an appendix which sets out the role that the ORR has in such processes. In essence, the ORR's role is to provide advice and assistance in the preparation of RISs by these bodies, to receive final RISs, and to report to the Commonwealth/State Committee on Regulatory Reform in cases where decisions are not consistent with the COAG guidelines.

In May 1998, the Prime Minister wrote to all Commonwealth Ministers, drawing their attention to these requirements; a corresponding memorandum was sent to all Ministerial Council secretariats.

In addition, the ORR wrote to all secretariats and national regulatory bodies enquiring as to their adherence to the guidelines during 1997–98. See chapter 7 of this report for details.

Prepare reports and submissions on regulatory issues

Apart from last year's annual report (*Regulation and its Review 1996–97*), the two main publications in 1997–98 were:

A Guide to Regulation

- released in October 1997 after receiving endorsement by the Government;
- it describes best practice processes for developing and amending legislation and regulation, and is designed to assist government regulators to cut 'red tape', make regulations easier to understand and reduce compliance costs.

Some lessons from the use of environmental quasi-regulation in North America

– a staff working paper which analysed the operation of various environmental schemes in Canada and the USA that are intended to replace traditional command and control regulation.

Monitor regulation reform developments around Australia and internationally

Developments in regulation reform are ongoing, both in Australia and overseas. The ORR maintains contact with regulatory reform agencies in all States and Territories, and actively participates in the OECD's work of monitoring and promoting regulatory reform in its member countries.

In March 1998, the ORR organised and hosted a one-day meeting, in Brisbane, of regulatory reform officials from all the States and Territories, and from New Zealand. Such meetings allow officials to learn about successes (and failures) in other jurisdictions which can be helpful in designing reform programs. A brief summary of developments in the States and Territories forms Appendix C of this report.

Collaboration with State and Territory officials occurs in several other ways. For example, in 1997–98, ORR staff participated in:

- meetings of the Commonwealth/State Committee on Regulatory Reform (a COAG committee of officials);
- meetings of the Commonwealth/State review committee which examined and reported on the operation of mutual recognition within Australia;
- meetings of a Commonwealth/State working group which examined and reported on quasi-regulation; and
- meetings of a Commonwealth/State working group developing performance indicators for regulatory reform.

With regard to developments overseas, a senior member of the ORR represented Australia at OECD meetings on regulatory reform in December 1997 and in June 1998. At the latter meeting, Australia played the role of 'lead reviewer' in an assessment of regulatory reform developments in the Netherlands. Also, during the year, Australia has participated in an OECD-wide survey of small businesses, to gauge their compliance costs in meeting taxation, environmental and employment regulatory requirements. This was a collaborative project undertaken by the Office of Small Business and the Australian Chamber of Commerce and Industry, which the ORR helped to implement.

In March 1998, a senior officer of the ORR spoke at an international conference in Manchester, on invitation from the UK Cabinet Office, about Australia's experiences in regulatory reform. That led to a subsequent visit to Australia, hosted by the ORR, of a delegation from Denmark with the purpose of learning from Australia's experience.

A delegation from the Netherlands had also visited earlier in 1998 to study regulatory reforms in Australia. Other overseas representatives who visited with particular interests in the ORR's role and in regulatory reform were the New Zealand Minister for Industry and Commerce, and the Economic Counsellor from the Embassy of Korea.

E The Office of Regulation Review's role in monitoring compliance with COAG regulatory guidelines

This appendix explains the role of the Commonwealth Office of Regulation Review (ORR) in the handling of Regulation Impact Statements (RISs) and monitoring compliance with the Council of Australian Governments' (COAG) *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG Guidelines) which was re-endorsed by COAG in November 1997. It also provides a comprehensive list of current Ministerial Councils and their objectives and functions (see table E.1).

The ORR provides advice and assistance on the preparation of RISs prepared by Ministerial Councils and national standard-setting bodies and monitors the compliance with the requirements of the COAG Guidelines. The process to be followed is detailed in paragraphs one through nine below as outlined in the COAG Guidelines.

1. When developing regulatory proposals, Ministerial Councils or standard-setting bodies should give forward notice to the ORR that a RIS will be drafted on a relevant topic.
2. A draft RIS for a regulatory proposal should be sent for advice to the ORR by the Ministerial Council or standard-setting body as soon as practicable and before the RIS is made available for public comment.
3. The ORR will assess the RIS within two weeks. The main focus of this assessment will be whether the RIS meets the requirements set out in the COAG Guidelines. In particular, the ORR will assess:
   - 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.

   The ORR will advise the Ministerial Council or standard-setting body of its assessment. That advice may or may not be adopted by the Ministerial Council or standard-setting body.
4. The Ministerial Council or standard-setting body may consult further with the ORR as the RIS is developed.

5. Upon completion, a final version of the RIS should be sent to the ORR. The Ministerial Council or 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.
6. Following a decision by the Ministerial Council or standard-setting body to proceed with a regulatory course of action, the decision making body should respond to any issues that have not been dealt with in the way recommended by the ORR.
7. Both ORR comments and any responses made by Ministerial Councils and standard-setting bodies should be available to State, Territory and Commonwealth Cabinets.
8. The ORR is to report to the Commonwealth-State Committee on Regulatory Reform if in its opinion, decisions of Ministerial Councils or standard-setting bodies are inconsistent with COAG Guidelines. The Committee on Regulatory Reform will in turn advise COAG concerning major issues.
9. A Ministerial Council may decide that the situation requiring a regulatory response is an emergency. In these cases, a RIS need not be prepared before the regulation comes into effect. However, the Chair of the Ministerial Council must write to the Prime Minister before making the regulation:
   - seeking agreement to waive the need for a RIS; and
   - explaining why the situation was an emergency and why no transitional measures were available.

   If the situation was an emergency, the Ministerial Council would be expected to prepare a RIS within twelve months of making the regulation.

The ORR does not have any power over decisions made by Ministerial Councils and standard setting bodies. The Office can only assist and advise as to whether a RIS is consistent with the COAG Guidelines. However, the attention of Heads of Government can be drawn to regulatory proposals for which RISs are seriously inadequate (COAG 1995b (Amended 1997), pp. 13–14).

Table E.1 **Summary of Ministerial Councils: 1997–98**

Ministerial Council	*Objectives/function*
Heads of Government Councils	
1. Council of Australian Governments	Provide for cooperation and consultation among governments on reforms to achieve an integrated, efficient national economy and a single national market — such as the adoption of the National Competition Policy. The Council also provides for consultation on major 'whole-of-government' issues arising from other Ministerial Councils.
2. Treaties Council	Consider treaties, and other international instruments, of particular sensitivity and importance to the States and Territories with the aim of ensuring the best outcome for Australia in both the negotiation and implementation of international treaties.
3. Premiers' Conference	Discuss matters of common interest to the Commonwealth, States and Territories, with a focus on inter-governmental financial relations (including the distribution of general revenue grants among the States and Territories).
4. Australian Loan Council	Coordinate the borrowings of the Commonwealth and State governments to ensure that overall public sector borrowing in Australia is consistent with a sustainable fiscal strategy. Recent emphasis has been placed on arrangements for credible budgetary processes and facilitating financial market scrutiny of public sector finances through uniform and comprehensive reporting.
Policy Ministerial Councils	
5. Agriculture and Resources Management Council of Australia and New Zealand	Develop integrated and sustainable agricultural, land, water and waste management policies, strategies and practices to enhance the efficiency, effectiveness, safety, and quality of these resources. Develop strategies for regional and rural economic and community development related to agricultural and water-based industries.
6. Australian and New Zealand Environment and Conservation Council	Facilitate coordination and consultation between governments on national and international environment and conservation issues.

Ministerial Council		*Objectives/function*
Policy Ministerial Councils		
7.	Australian and New Zealand Minerals and Energy Council	Promote the welfare and sustainable development of mineral and energy resources by, among other things, progressing changes to legislation and policy frameworks (including improving coordination and, where appropriate, consistency of policy regimes across jurisdictions), encouraging investment, and providing an opportunity for information exchange.
8.	Australian Procurement and Construction Ministerial Council (formerly Construction Industry Ministerial Council)	Enhance the way government services are delivered, advise governments and provide leadership on procurement and asset management.
9.	Australian Transport Council	Assist the coordination and integration of all transport and road policy issues at the national level.
10.	Commonwealth/State Ministers' Conference on the Status of Women	Coordinate and develop policies which affect the status of women, especially those policies which cross Commonwealth/State and Territory borders, and to refer agreed issues or strategies to other Ministerial groupings.
11.	Cultural Ministers' Council	Exchange views on issues affecting cultural activities in Australia and New Zealand and encourage cooperative effort to provide cultural benefits for citizens of both countries. This includes commissioning studies and providing advocacy and financial support for cultural activities.
12.	Gaming Ministers' Conferences	Exchange information on, and promote uniform regulation of, the gaming industry between State and Territory governments.
13.	Health and Community Services Ministerial Council	Promote a consistent and coordinated national approach to community services and health policy development and implementation. Provide a plenary forum (for (a), (b) and (c) directly below) for Ministers responsible for health or community services.

Ministerial Council		*Objectives/function*
Policy Ministerial Councils		
	(a) Australian Health Ministers' Conference	Provide consultation on matters of mutual interest concerning health policy, services and programs, in order to promote consistent and coordinated national health policy. The Council also considers matters submitted to it by the Australian Health Ministers' Advisory Council.
	(b) Community Services Ministers' Conference	Promote a consistent and coordinated national approach to social welfare policy development and implementation.
	(c) Australia New Zealand Food Standards Council	Oversee the implementation and operation of uniform food standards in Australia and New Zealand and in particular to consider recommendations made to it by the Australian New Zealand Food Authority on new food standards or variations to existing standards.
14.	Heritage Ministers' Meeting	Consider matters pertaining to the conservation of Australia's cultural heritage places.
15.	Housing Ministers' Conference	Facilitate formal liaison between the Commonwealth, States and Territories on major issues concerning housing policies and programs, and to manage research into housing matters of concern to Ministers.
16.	Industry Technology and Regional Development Council	Promote a national, consistent and coordinated approach to the development of industry, technology, regional development, in particular encouraging the restructuring and increased international competitiveness of industry.
17.	Labour Ministers' Conference (also known as the Ministerial Council of Commonwealth, State and Territory Ministers for Labour)	Discuss workplace relations issues of mutual interest and make recommendations to Commonwealth, State and Territory governments.
18.	Local Government Ministers' Conference	Share information on Commonwealth, State, Territory and local government initiatives, and to sponsor projects which advance local government reform and best practice.
19.	Ministerial Council of Aboriginal and Torres Strait Islander Affairs	Discuss Aboriginal and Torres Strait Islander issues of mutual interest and consider reports on relevant Commonwealth, State, Territory and local government activity.

Ministerial Council	*Objectives/function*
Policy Ministerial Councils	
20. Ministerial Council on the Administration of Justice	This council is the amalgamation of three Ministerial Councils: (a), (b) and (c), listed directly below. However, due to statutory constraints and some limited overlap of functions, meetings are still held for each constituent part (as described below).
(a) Australasian Police Ministers' Council	Promote a coordinated national response to law enforcement and to maximise the efficient use of police resources. In particular, the Council advances the professionalism of policing and raises awareness and understanding in the community of critical national issues and measures to address them.
(b) Intergovernmental Committee on the National Crime Authority	Monitor the work of the National Crime Authority (NCA), receive NCA reports and transmit to all Australian governments, and consider matters put forward for NCA investigation. The Committee also advises the Commonwealth Minister where the Commonwealth proposes to refer a matter to the NCA under s.13 of the National Crime Authority Act, and recommends persons for office of the NCA.
(c) Corrective Services Ministers' Conference	Consider and deal with problems relating to both prison and community based correction issues, including prison management and illegal use of drugs in custody. The Conference also considers alternatives to imprisonment.
21. Ministerial Council of Attorneys-General	Provide a plenary forum for the following three Councils.
(a) Standing Committee of Attorneys-General	Achieve uniform or harmonised legislation or other action relating to the Attorney-General portfolio wherever appropriate. The Committee also oversees the national classification scheme for film, video and print, as well as provides a forum for discussion on issues of mutual interest.
(b) Ministerial Council for Corporations	Consider legislative proposals relating to the 'national companies and securities scheme'. It also assists in the appointment of members of the Australian Securities and Investment Commission, the Corporations and Securities Panel, and the Companies and Securities Advisory Committee and its Legal Sub-committee.

Ministerial Council		*Objectives/function*
Policy Ministerial Councils		
	(c) Ministerial Council on Financial Institutions	General oversight of the Financial Institutions Legislation and exercise of discretionary functions under it; approval of amending legislation to bring other State based financial institutions under the Financial Institutions Scheme; general oversight of Australian Financial Institutions Commission and recommendations on appointments to its board; and recommendations for appointments to the Australian Financial Institutions Appeals Tribunal.
22.	Ministerial Council on the Australian National Training Authority.	Oversee the functions, objectives, priorities, budget, membership and operation of the Australian National Training Authority (ANTA), covering such issues as vocational education and training and national strategic plans on training policy. The Council also provides advice to the Commonwealth Minister on growth funding requirements and the resolving of disputes between ANTA and State training agencies.
23.	Ministerial Council on Consumer Affairs	Discuss consumer affairs issues of mutual interest and, where possible, develop a uniform approach including uniform legislation, and agree on matters of national priority.
24.	Ministerial Council on Drug Strategy	Oversee and coordinate Commonwealth and State and Territory action on the National Drug Strategy and other drug related issues.
25.	Ministerial Council for Education, Employment, Training and Youth Affairs	Coordinate strategic policy, share information and agree on shared objectives relating to youth policies and programs; all levels of education; and employment links with education and training.
26.	Ministerial Council on Forestry, Fisheries and Aquaculture	Promote effective management and coordinate research of Australian forests, fisheries and aquaculture, and advance the development of industries based on them. Facilitate consultation and coordination between Commonwealth, State, Territory and New Zealand governments, especially on matters having interstate, national or international implications.
27.	Ministerial Council of Immigration and Multicultural Affairs	Facilitate consultation and the development of appropriate strategies on immigration and multiculturalism.

Ministerial Council		*Objectives/function*
Policy Ministerial Councils		
28.	National Anti-Crime Strategy Lead Ministers	A group of Lead Ministers, either the Attorney-General or the Police Minister from each jurisdiction, pursue objectives of identifying principles for crime prevention, develop strategic approaches, identify best practices, exchange information and undertake joint projects.
29.	National Environment Protection Council	Ensure equivalent protection from air, water, noise and soil pollution wherever Australians live, and that variations in major environmental protection measures between jurisdictions do not distort business decisions and fragment markets. To achieve this, the Council may make national environmental protection standards (which are mandatory), guidelines, goals and associated protocols. The Council also monitors and reports on the implementation and effectiveness of any such measure.
30.	Online Council	Provide leadership to all areas of government, industry and the community in promoting and facilitating electronic communications and service delivery, and provide a forum for Commonwealth, State and Territory Government Ministers and local government to consider and reach a national strategic approach.
31.	Planning Ministers' Conference	Promote an integrated approach to urban and regional planning between State and Territory governments which covers regulatory, microeconomic, environmental and social issues.
32.	Racing Ministers' Conferences	Coordinate responses on issues of national significance relating to the regulation and development of the racing industry.
33.	Sport and Recreation Ministers' Council	Coordinate the development of recreation and sport. Provide a forum for consultation and cooperation between the Commonwealth, State and Territory governments.
34.	Tourism Ministers' Council	Facilitate consultation and policy coordination of between the Commonwealth, State and Territory governments and the New Zealand government on tourism.

Ministerial Council		*Objectives/function*
Other Ministerial Fora		
35.	Australian Fossil Mammal Sites Ministerial Council	Coordinate policy between the Commonwealth, Queensland and South Australian governments on Australian Fossil Mammal Sites World Heritage property matters.
36.	Fraser Island Ministerial Council	Coordinate policy and funding for the management of the Fraser Island World Heritage property between Commonwealth and Queensland governments.
37.	Great Barrier Reef Ministerial Council	Coordinate policy between the Commonwealth and Queensland governments on the Great Barrier Reef.
38.	Ministerial Council on the Development of Albury-Wodonga	Supervise the development of the Albury-Wodonga Development Project and the programs of the Albury-Wodonga Development Corporation.
39.	Murray-Darling Basin Ministerial Council	Promote and coordinate planning and management for the equitable, efficient and sustainable use of the land, water and environmental resources of the Murray-Darling Basin.
40.	New South Wales Heritage Properties Ministerial Council	Coordinate policy between the Commonwealth and NSW Governments on the three NSW World Heritage Properties (Lord Howe Island, Wilandra Lakes Region and the Central Eastern Rainforest Reserves), and provide advice and make recommendations to both Governments on managment, expenditure and scientific studies.
41.	Northern Territory World Heritage Ministerial Council	Coordinate policy between the Northern Territory and Commonwealth governments on existing and potential Northern Territory World Heritage properties; serve as a forum between the Kakadu and Uluru Boards of Management and both governments on national park management and community development matters. Provide advice and make recommendations on potential World Heritage sites.
42.	Shark Bay Ministerial Council	Coordinate policy between Commonwealth and Western Australian governments and approve the Shark Bay World Heritage Property strategic plan.

Ministerial Council	*Objectives/function*
Other Ministerial Fora	
43. Tasmanian World Heritage Area Ministerial Council	Discuss policy, management and financial matters relating to the Tasmanian World Heritage Area.
44. Wet Tropics Ministerial Council	Coordinate policy and funding for the Wet Tropics management between the Commonwealth and Queensland governments, including the approval of management plans, Wet Tropics Management Authority (WTMA) annual reports, annual budgets and other programs for implementing management plans, and the recommendation of financial appropriations from the Commonwealth and Queensland governments. It also nominates members to the WTMA.

References

Administrative Review Council 1992, *Rule Making by Commonwealth Agencies*, Report to the Attorney-General, Report No. 35, AGPS, Canberra, 26 March.

Australia/New Zealand Standard *Risk Management AS/NZS 4360:1995*, Published jointly by Standards Australia, Homebush, NSW and Standards New Zealand, Wellington, NZ.

COAG (Council of Australian Governments) 1995a, *Competition Principles Agreement*, April.

—— 1995b, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, April (amended November 1997)

Department of Foreign Affairs and Trade 1998, *Negotiation, Conclusion and Implementation of Treaties*.

Department of Premier and Cabinet (Vic) 1996, *Victorian Government Timetable for Review of Legislative Restrictions on Competition*, Melbourne, June.

Department of Tourism, Small Business and Industry (Qld) 1998, *Red Tape Reduction Stocktake*, May.

—— 1997, *Principles and Guidelines for Regulatory Risk Identification, Analysis and Evaluation for Regulated Activities in the Queensland Public Sector*.

IC (Industry Commission) 1996, *Regulation and its Review 1995–96*, AGPS, Canberra.

—— 1997, *Regulation and its Review 1996–97*, AGPS, Canberra.

Law Reform Committee 1997, *Regulatory Efficiency Legislation*, Parliament of Victoria, October.

Minister for Customs and Consumer Affairs 1998, *Codes of Conduct Policy Framework*, Released by the Minister for Customs and Consumer Affairs, the Hon. Warren Truss MP, March.

Minister for Foreign Affairs 1996, *Reform of the Treaty-Making Process*, Statement by the Minister for Foreign Affairs, the Hon. A Downer MP, 2 May.

NCC (National Competition Council) 1997, *Annual Report 1996–97*, AGPS, Canberra.

ORR (Office of Regulation Review) 1997, *Some lessons from the use of environmental quasi-regulation in North America*, Staff working paper.

—— 1997, *A Guide to Regulation*, September.

Prime Minister 1997, *More Time for Business*, Statement by the Prime Minister, the Hon. John Howard MP, 24 March, AGPS, Canberra.

Regulation Review Committee 1998, *Some aspects of International Regulatory Pragrams and Practice*, Report No 14/51, Parliament of New South Wales, Sydney, May.

Regulatory Review Unit (NSW) 1995, *From Red Tape to Results*, Cabinet Office NSW, February.

Senate Standing Committee on Regulations and Ordinances, *Annual Report* (various), The Senate.

Small Business Deregulation Task Force 1996, *Time for Business*, November.

Treasurer 1996, *Commonwealth Legislation Review Schedule*, Press Release, no.40, 28 June.