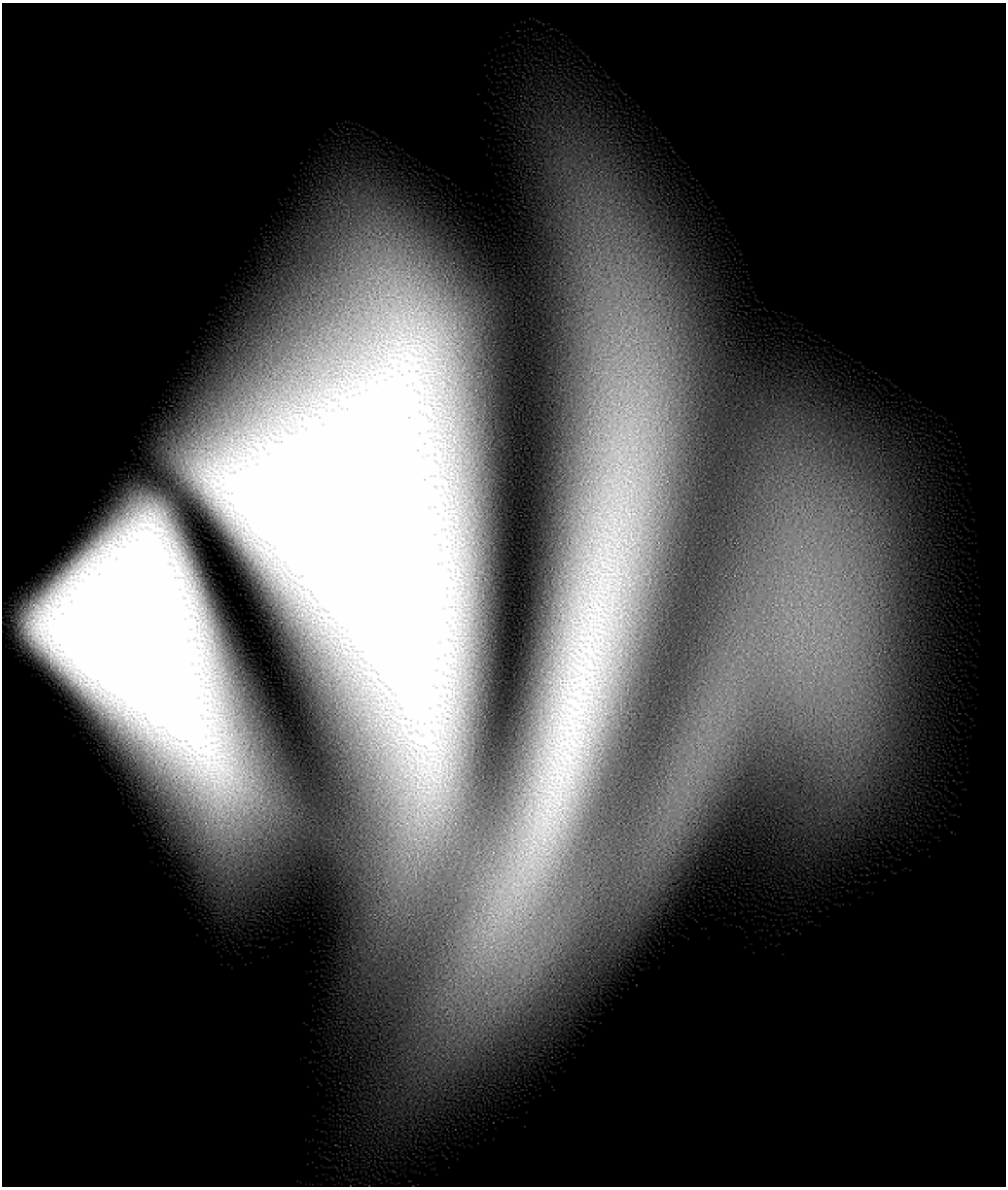
PRODUCTIVITY COMMISSION



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The Productivity Commission

The Productivity Commission, an independent Commonwealth agency, is the Government's principal review and advisory body on microeconomic policy and regulation. 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 wellbeing 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 www.pc.gov.au or by contacting Media and Publications on (03) 9653 2244.

Foreword

The Productivity Commission is required to report annually on compliance by Commonwealth departments and agencies with the Government's Regulation Impact Statement requirements. The Commission also reports on two Council of Australian Government programs: reviews of existing Commonwealth legislation which restricts competition; and proposals being considered by Ministerial Councils and national standard-setting bodies. These processes aim to achieve best practice regulatory outcomes.

This is the second such report. It forms part of the Productivity Commission's annual report series of publications for 1998-99.

The Commission's Office of Regulation Review provides training and advice to all departments and agencies on the best practice requirements, and monitors compliance. In this edition of *Regulation and its Review*, the Commission provides for the first time data on the compliance of individual agencies as well as aggregate data.

The Commission is grateful for the cooperation of Commonwealth departments and agencies, and Ministerial Councils, in providing information to the ORR on their regulatory activity throughout the year.

Gary Banks
Chairman

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Abbreviations

ABA	Australian Broadcasting Authority
ACA	Australian Communications Authority
ACS	Australian Customs Service
AFFA	Agriculture Fisheries and Forestry-Australia
AG's	Attorney-General's Department
AMSA	Australian Maritime Safety Authority
AQIS	Australian Quarantine and Inspection Service
ATO	Australian Taxation Office
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
DE&H	Department of Environment and Heritage
DETYA	Department of Education, Training and Youth Affairs
DEWRSB	Department of Employment, Workplace Relations and Small Business
DFAT	Department of Foreign Affairs and Trade
DHAC	Department of Health and Aged Care
DIMA	Department of Immigration and Multicultural Affairs
DISR	Department of Industry, Science and Resources
DoCITA	Department of Communications, Information Technology and the Arts
DoFA	Department of Finance and Administration
DTRS	Department of Transport and Regional Services
IC	Industry Commission
NCC	National Competition Council

NEPC	National Environment Protection Council
NRTC	National Road Transport Commission
OECD	Organisation for Economic Cooperation and Development
ORR	Office of Regulation Review
OSB	Office of Small Business
PC	Productivity Commission
PM&C	Department of the Prime Minister and Cabinet
RIS	Regulation Impact Statement
RPIs	Regulatory Performance Indicators
SSCRO	Senate Standing Committee on Regulations and Ordinances
ToR	Terms of Reference

Overview

Over the past year, the Commission's Office of Regulation Review (ORR) has endeavoured to build on the progress made by agencies in implementing the Government's best practice regulatory processes. Whereas in the previous year, the emphasis had been on explaining the processes and how they were to be undertaken, in 1998-99 there was a stronger focus on achieving the Government's objectives. This was facilitated by increasing knowledge within departments and agencies about the processes, and growing recognition of their value. As a result, even though the hurdles have been raised on the Regulation Impact Statement (RIS) requirements, overall there was an improvement in compliance in 1998-99.

Best practice regulatory processes

In recognition of the benefits to the community of good regulation, best practice processes are in place.

The Commonwealth Government's best practice requirements for regulation making and review have been put in place in recognition of the potential costs of inappropriate regulation and the benefits to the community of good regulation. Similar processes have been adopted by the Council of Australian Governments (COAG). The processes (outlined in chapter 1) include:

- RIS requirements, as set out in *A Guide to Regulation* (the Guide);
- reviews of existing regulation on the Legislation Review Schedule, as part of the Government's obligations under the *Competition Principles Agreement* (CPA) and complementary review processes;
- (the Government's August 1998 decision that) all departments and agencies with responsibility for regulating business will monitor nine regulatory performance indicators and report to the Office of Small Business; and

- requirements set out in the COAG *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG Guidelines).

Following a 1998 initiative, all departments and agencies are now required to prepare annual regulatory plans.

They provide aids to informed decision making.

These processes are essential aids to informed decision making. They also make regulatory decisions more transparent to the Parliament and the community. Key aspects of the RIS process are summarised below.

What is a RIS?

A RIS provides a consistent, systematic and transparent process for assessing alternative policy approaches to problems. It includes assessment of the impacts of the proposed regulation, and alternatives, on different groups and the community as a whole.

When does the RIS process apply?

- *All* reviews of existing regulation, proposed new or amending regulation and proposed treaties involving regulation which will directly or indirectly affect business, or restrict competition. Limited exceptions apply (see the Guide).

To whom do the RIS requirements apply?

- *All* government departments, agencies, statutory authorities and boards that review or make regulations, including agencies or boards with administrative or statutory independence.

What are the 'milestones'?

- A RIS should be prepared once an administrative decision is made that regulation may be necessary, but before a policy decision involving regulation is made by the Government or its delegated officials.
- A RIS should be attached to all proposals to be considered by the decision maker.
- A RIS should be tabled with explanatory statements/memoranda or (in the case of non-disallowable instruments and quasi-regulation) made public in some other way — for example, on a website.

The ORR's role in overseeing these processes includes:

- liaising with departments and agencies on the Government's requirements for regulation impact analysis and advising on how to comply with them;
- reporting annually on compliance with the RIS requirements and monitoring agency performance in relation to three of the nine regulatory performance indicators for the Office of Small Business;
- providing guidance to departments and regulatory agencies on appropriate terms of reference for reviews under the Commonwealth Legislation Review Schedule; and
- monitoring compliance with the COAG Guidelines.

Details of the ORR's role and activities are provided in chapter 1 and appendix A.

Compliance with RIS requirements

There has been an overall improvement in compliance, but…

Some methodological changes have been made to the reporting framework in 1998-99, precluding precise comparisons with the previous year. Nevertheless, the aggregate data indicates an overall improvement in compliance (see chapter 2).

Primary legislation

there is clear room for improvement at the decision-making stage for primary legislation.

The first methodological change was the reporting of primary legislation by the number of proposals rather than by the number of Bills. The new measure reflects more accurately the quantum of regulation. When looking at primary legislation, one area where there is clear room for improvement is in the preparation of RISs for decision making. While compliance at the tabling ('transparency') stage for primary legislation was 89 per cent, compliance at the decision-making stage was only 61 per cent.

Aggregate RIS compliance, 1998-99

Type of Regulation	*Decision maker*		*Parliamentary tabling*	
	RIS required	*Adequate RIS prepared*	*RIS required*	*Adequate RIS prepared*
Primary legislation	87	53 (61%)	117	104 (89%)
Disallowable instruments	110	94 (85%)	110	97 (88%)
Non-disallowable instruments[a]	27	26 (96%)	na	na
Quasi-regulation[a]	35	30 (86%)	na	na

a Based entirely on self-reporting by departments and agencies. **na** Not applicable.

Delegated Legislation

Compliance is better for disallowable instruments and…

The second change made this year was to report separately on disallowable and non-disallowable delegated instruments. At 85 per cent, the compliance ratio for *disallowable* instruments at the decision-making stage was considerably higher than for primary legislation. Compliance for tabling was 88 per cent. Of some interest when looking at the disallowable instruments was the small number that required a RIS — 110 out of 1590 that were reported during 1998-99. Notwithstanding their relatively small number, many of these instruments can impose significant impacts.

also appears to have improved for non-disallowable and quasi-regulation.

For reporting on *non-disallowable* instruments and *quasi-regulations*, the Commission has relied entirely on reports to the ORR from departments and agencies. Compliance was 96 and 86 per cent, respectively. While it is not possible to ascertain whether all such regulation has been accurately reported, there was a significant increase in the number of RISs prepared and assessed as adequate compared with 1997-98.

Portfolios and agencies

Some departments are performing particularly well.

The third methodological change was the reporting of disaggregated data by portfolios, and where possible, agencies (see appendix B). The departments of

Communications, Information Technology and the Arts; and Health and Aged Care had relatively high compliance rates in both the primary legislation and disallowable instruments categories; while the Australian Taxation Office achieved good results for primary legislation. These results were notable given the relatively high numbers of proposals involved. Treasury, Environment and Heritage, and the Attorney-General's departments also performed well in the primary legislation category.

National regulation making

The ORR is seeing more RISs from Ministerial Councils and national standard-setting bodies.

Reporting on the performance of Ministerial Councils and national standard-setting bodies in meeting the requirements of the COAG Guidelines revealed considerable overlap (see chapter 2). More specifically, RISs prepared for national standard-setting bodies were nearly always also considered by Ministerial Councils. Out of 24 RISs considered by Ministerial Councils, the ORR commented on 19 — a significant increase on the previous year — and all were assessed as adequate. It appears that there were an additional 12 matters considered by Ministerial Councils that may have required a RIS. As some of these bodies become more aware of the COAG Guidelines, compliance should continue to improve.

Improving compliance

Awareness and expertise are increasing.

Improved compliance reflects a number of factors (see chapter 3). For example, greater familiarity with the RIS process has improved the level of expertise in agencies. The Government's ongoing commitment and promotion of the process is another key element, along with the 'hands on' experience gained by agencies in undertaking the process.

Feedback from a number of agencies suggests that they value the RIS process as a tool for developing proposals and informing decision making. This recognition is important — it means that agencies are likely to have a greater

commitment to the process than if it were seen simply as a procedural requirement.

But there is more to do in explaining requirements at the decision-making stage.

There is still work to be done. In some areas regulation makers are not fully aware of, or have misunderstandings about, the requirements. For instance, some agencies still appear unaware of the need to start preparing a RIS *early* in the policy development process. This is critical to its value in informing the decision maker. Last minute proposals can rarely address fully all of the requirements.

In some cases, proposals going to Cabinet have not been accompanied by RISs, in the mistaken belief that, as long as the responsible Minister has seen a RIS, the requirements have been met. In such instances, where the Cabinet is the decision maker and a waiver has not previously been granted, failure to attach a RIS has resulted in non-compliance being reported.

A RIS should be made public.

A RIS should be included with explanatory memoranda and explanatory statements for primary legislation and disallowable instruments. For non-disallowable instruments and quasi-regulation, it is desirable that RISs also be made public by, for example, inclusion with the gazettal notice or placement on a website.

The ORR will be targeting compliance at the decision-making stage for primary legislation.

The ORR will continue to provide training to agencies to increase awareness and knowledge of the process. Special attention will be paid to improving compliance at the decision-making stage for primary legislation, so that it accords with the high level of compliance that has been achieved at the tabling stage.

This report also examines some of the mechanisms for achieving greater integration of the RIS process within agencies. In particular, regulatory plans are seen as playing a useful role, including by improving contact between agencies and the ORR in the early stages of policy development.

In addition, there are a number of bodies which play key 'gatekeeping' roles in reminding agencies of the RIS requirements. They include: the Cabinet Secretariat and the International Division in the Department of Prime Minister

and Cabinet; the Treaties Secretariat in the Department of Foreign Affairs and Trade; the Office of Legislative Drafting in the Attorney-General's Department; and the Federal Executive Council Secretariat. Gatekeeper procedures should be further enhanced when the new Cabinet Handbook incorporating the revised RIS requirements is completed.

Analysis should be commensurate with impacts.

The level and quality of analysis in a RIS needs to be commensurate with the impact of the proposal. This applies irrespective of the type of regulation — primary, delegated (disallowable or non-disallowable) or quasi-regulation. It has proved difficult, however, for the ORR to monitor non-disallowable and quasi-regulation (see chapter 3). This problem could be alleviated by the establishment of more formal systems within agencies to track the full range of regulation for which they are responsible. Passage of the Legislative Instruments Bill would also go some way toward addressing this problem.

Commonwealth legislation reviews

While not all scheduled reviews commenced as scheduled…

After revisions to the Legislation Review Schedule, 16 reviews were to have commenced by 30 June 1999 (see chapter 4 and appendix C). Of these, eight reviews commenced as scheduled. The terms of reference for each review were cleared by the ORR.

For clearance, terms of reference must:

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

the ORR cleared all terms of reference for those that did.

Although not a requirement, the terms of reference for all eight reviews specified reporting dates. Most also included processes for a response by Government.

The ORR does not have a formal role in approving the composition of review bodies, though it is often asked for advice. For the most part, reviews undertaken in 1998-99 were consistent with the eight modalities identified in the

Legislation Review Schedule. Some agencies have experienced difficulties in setting up independent review bodies as required, particularly given the scope of the reviews and the number being undertaken.

Review bodies need to be seen to be independent.

One issue which has arisen is the appropriateness of industry and other stakeholder groups being represented on review bodies. While this may offer some advantages, it can also affect perceptions about the impartiality of such reviews and the validity of their findings. In general, if direct representation by industry or other groups is considered desirable, a preferable approach would be to include them on a reference group.

In conclusion …

The focus on good regulatory outcomes needs to be maintained.

The past two years have been a learning experience for all concerned — Ministers and their advisers, Government departments and agencies, and the ORR itself. During 1998-99, some solid gains were made, but there are still areas where improvements can be made. By maintaining the focus on achieving good regulatory outcomes through informed decision making and transparency it is expected that compliance will continue to improve.

For the ORR's part, it will be making a greater effort through training and the dissemination of information, to achieve earlier consultation during the policy development process, improved compliance at the decision-making stage for primary legislation, and better reporting mechanisms for non-disallowable instruments and quasi-regulation.

1 Best practice processes for regulation

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

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

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

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

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

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

1.1 Commonwealth RIS requirements for new or amended regulation

Background

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

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

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

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

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

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

Scope of the RIS requirements

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

The Guide defines regulation broadly as including:

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

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

A RIS has seven key elements, which set out:

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

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

Box 1.1 **Quasi-regulation**

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

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

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

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

When is a RIS required for quasi-regulation?

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

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

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

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

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

At what stage should a RIS be prepared?

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

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

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

Making the RIS public

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

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

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

A cost-effective process

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

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

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

Analysis commensurate with impacts

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

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

Integration with other impact assessment processes

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

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

Consideration of wider options

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

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

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

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

Improved consultation and awareness

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

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

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

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

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

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

1.2 Review and reform of existing legislation

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

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

Box 1.2 **CPA guiding principle**

Clause 5(1) of the Agreement specifies:

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

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation can only be achieved by restricting competition.

Further, clause 5(9) states:

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

(a) clarify the objectives of the legislation;

(b) identify the nature of the restriction on competition;

(c) analyse the likely effect of the restriction on competition and on the economy generally;

(d) assess and balance the costs and benefits of the restriction; and

(e) consider alternative means for achieving the same result including non-legislative approaches.

Source: COAG 1995a.

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

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

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

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

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

Commonwealth's Legislation Review Schedule

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

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

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

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

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

National reviews

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

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

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

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

1.3 Commonwealth regulatory performance monitoring and accountability initiatives

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

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

Regulatory performance indicators

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

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

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

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

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

Regulatory plans

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

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

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

1.4 COAG principles and guidelines

In 1995, COAG agreed that a RIS must be prepared for all regulatory proposals that are to be considered by Ministerial Councils or national standard-setting bodies. The RIS requirements are included in the COAG document *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG Guidelines).

This initiative was intended to close an emerging gap in regulation review processes in Australia. While regulation impact analysis was being embedded in the processes of many jurisdictions, the operation of the *Mutual Recognition Agreement* and the increasing role of national regulatory bodies — those with intergovernmental jurisdiction — resulted in national regulation being implemented at times without detailed scrutiny.

In November 1997, reflecting concerns over poor compliance with its Guidelines, COAG agreed to new procedures for the handling of RISs and monitoring compliance. The new arrangements essentially provide a formal role for the ORR (in consultation with its State and Territory counterparts) in monitoring compliance with the COAG Guidelines (see section 1.5).

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

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

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

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

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

1.5 Role of the ORR

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

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

Commonwealth RIS requirements for new or amended regulation

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

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

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

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

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

Review and reform of existing legislation

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

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

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

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

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

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

Commonwealth regulatory performance monitoring and accountability initiatives

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

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

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

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

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

COAG Guidelines

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

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

The ORR must assess the proposal within two weeks against the requirements set out in the COAG Guidelines and advise the Ministerial Council or national standard-setting body of its assessment. In particular, the ORR assesses:

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

It is a requirement, however, that the national regulatory bodies certify that the regulatory impact assessment process has been adequately completed. While not obliged to adopt the advice of the ORR, Ministerial Councils and national standard-setting bodies are required to respond to any outstanding issues which have not been dealt with in the way recommended by the ORR. The ORR is also required to bring issues to the attention of Heads of Government through the COAG Committee on Regulatory Reform. Specifically, the ORR reports to the COAG committee if, in its opinion, decisions of Ministerial Councils or national standard-setting bodies are inconsistent with the COAG Guidelines.

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

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

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

o

2 Compliance with RIS requirements

Overall, there was an improvement in compliance with the Commonwealth Government's RIS requirements in 1998-99. However, there is considerable scope for improvement at the decision-making stage for primary legislation.

In 1998-99 117 proposals introduced via primary legislation required a RIS. Of these, 98 per cent were accompanied by a RIS when tabled and 89 per cent (of those requiring a RIS) contained an adequate level of analysis. Of the 117 proposals introduced, 87 required a RIS at the decision-making (or policy approval) stage. An adequate RIS was prepared for 61 per cent of these proposals.

Of the 1590 disallowable delegated instruments made and reported to the ORR in 1998-99, RISs were required for 110. An adequate RIS was prepared for 85 per cent at the decision-making stage and for 88 per cent at the tabling stage.

For those non-disallowable instruments and quasi-regulations reported, compliance with the RIS requirements at the decision-making stage was 96 per cent and 86 per cent, respectively.

2.1 Introduction

As noted in chapter 1, the primary role of a RIS is to improve government decision-making processes by ensuring that all relevant information is presented to the decision maker using a logical standardised framework. In addition, after the decision is made, the RIS can become a public and transparent account of that decision making.

In the case of regulatory proposals introduced via Bills and for disallowable delegated legislation, RISs are tabled in Parliament as part of an explanatory memorandum or explanatory statement, respectively. In the case of treaties, a RIS is prepared when approval to commence negotiations is sought. It is updated when approval is sought to sign the final text of a treaty, and is made public when the

treaty is tabled in Parliament.[1] RISs for proposals introduced via non-disallowable delegated legislation and quasi-regulations should also be publicly available.

Changes in methodology

There have been three changes to the methodology used by the ORR this year in assessing compliance.

The first involved primary legislation. Whereas in 1997-98 the ORR assessed compliance on the basis of the number of Bills introduced (requiring a RIS), for 1998-99, assessment has been made on the number of proposals of a regulatory nature that were introduced via Bills. This change was made to reflect more accurately the quantum of regulation. Many Bills include a number of regulatory proposals, which under the previous methodology would have been counted as only one. This meant that the compliance reports for some departments would provide a distorted picture of their level of regulatory activity relative to other departments.

The second change related to the reporting of compliance for delegated regulation, which this year has been disaggregated into disallowable and non-disallowable instruments. For disallowable instruments, information published by the Senate Standing Committee on Regulations and Ordinances (SSCRO) allowed the ORR to verify compliance information reported by agencies (SSCRO 1998, 1999). The absence of equivalent information on non-disallowable instruments (and quasi-regulation) has made it necessary for the ORR to rely entirely on departments' self-reporting for these forms of regulation.

The third change involved reporting compliance on a portfolio, department and (where possible) agency basis, consistent with the requirements arising out of *More Time for Business* (see chapter 1). Appendix B provides a disaggregated assessment of compliance for proposals introduced via Bills and disallowable instruments.

Due to these changes, the compliance figures for 1998-99 have not been directly compared with those for 1997-98. To the extent that data can be compared, an overall improvement in compliance is apparent.

[1] The Commonwealth Government must table proposed treaty actions in both Houses of Parliament at least 15 sitting days prior to taking binding action.

Assessing compliance

When making its assessment of compliance with the Commonwealth RIS requirements, the ORR considers whether:

- a proposal 'triggered' the RIS requirements;
- a RIS was prepared to inform the decision maker (the decision-making stage);
- the analysis contained in a RIS prepared for the decision maker was adequate;
- a RIS was tabled in Parliament or otherwise made public (the transparency stage); and
- the analysis contained in a RIS tabled or otherwise made public was adequate.

In order for a portfolio, department or agency to be considered fully compliant with the requirements, a RIS must be prepared for the decision maker, cleared as adequate by the ORR before policy approval is sought, and be subsequently tabled in Parliament or otherwise made public. If a RIS is inadequate at the decision-making stage, a department or agency has some scope to modify the RIS to improve the standard of analysis before tabling it or making it public.

Generally speaking, a RIS that is considered adequate at the decision-making stage will be adequate for public release. On a few occasions, departments and agencies have removed information from a RIS between the decision-making and tabling stages, and the analysis in the tabled RIS was inadequate. Very occasionally, material will be removed from the RIS being tabled due to its sensitivity (for example, it might be commercial-in-confidence). The ORR considers each RIS altered under these circumstances on a case-by-case basis.

The ORR's more limited role in assessing and advising on the adequacy of COAG RISs prepared by or on behalf of Ministerial Councils and national standard-setting bodies is described in chapter 1. When assessing compliance with COAG RIS requirements, the ORR considers whether:

- a decision made by a Ministerial Council or national standard-setting body 'triggered' the COAG RIS requirements;
- a COAG RIS was prepared; and
- the COAG RIS was assessed by the ORR before it was made available for public comment.

In the following sections, the ORR reports on the level of regulatory activity in 1998-99 and the extent to which departments and agencies complied with the Commonwealth RIS requirements for regulatory decisions introduced via Bills, delegated instruments, quasi-regulations and treaties, respectively. The chapter

concludes with an assessment of compliance by Ministerial Councils and national standard-setting bodies with the COAG RIS requirements.

2.2 Primary legislation

Regulatory activity in Bills

The Commonwealth Government introduced 263 Bills into Parliament in 1998-99. Of these, 261 Bills were assessed and included 360 policy proposals (regulatory and non-regulatory in nature). Of these:

- 140 proposals were exempt from the RIS process, having no impact on business; and
- 103 proposals impacted on business, but proposed changes that satisfied one of the several minor exceptions to the RIS process (see ORR 1998, pp. A3–4).

This left 117 proposals that required a RIS (see figure 2.1), of which 93 had a direct impact on business, eight had a significant indirect impact on business and 16 restricted competition (see figure 2.2).

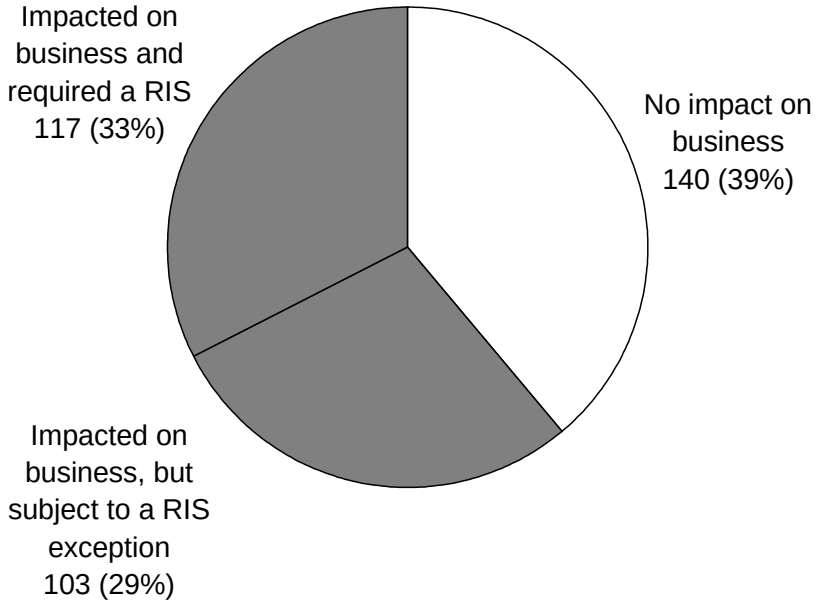
Assessing compliance

In 1998-99, out of the 117 proposals, the RIS requirements were waived for the decision-making stage for 30, leaving 87 proposals that required a RIS. RISs were prepared for 62 proposals (71 per cent), of which 53 contained an adequate level of analysis (that is 61 per cent of proposals requiring a RIS) (see figure 2.3).

The departments of Communications, Information Technology and the Arts; Environment and Heritage; Health and Aged Care; the Treasury; and the Attorney-General's Department all achieved high levels of compliance for proposals introduced via Bills (see appendix B for more details).

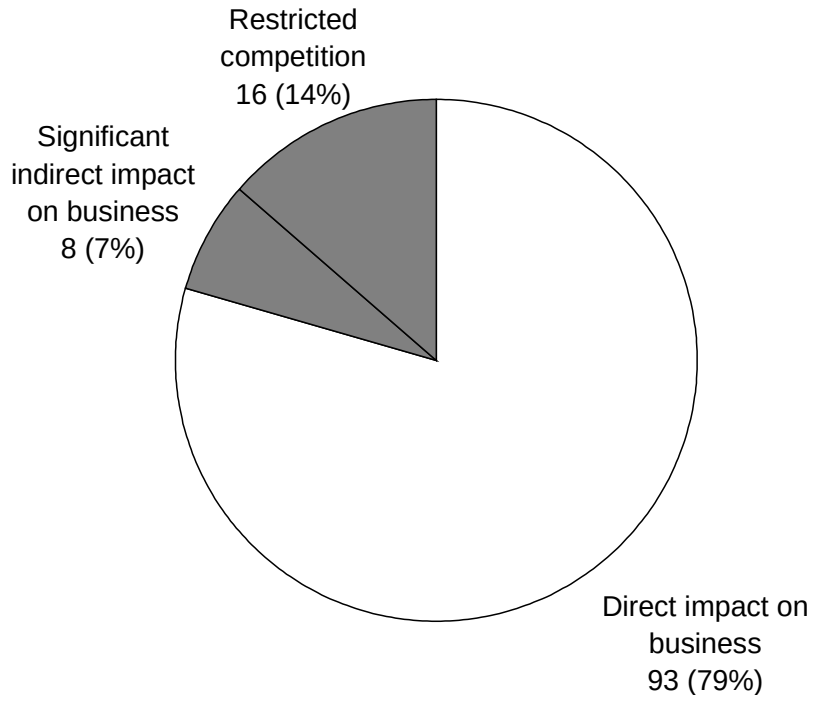
A secondary purpose of the RIS process is to provide Parliament and the community with greater information about the reasons underlying the Government's proposed actions. Compliance with the RIS requirements at the tabling (transparency) stage during 1998-99 was significantly better than at the decision-making stage. Of the 117 proposals that triggered the RIS requirements, 115 (98 per cent) were accompanied by a RIS when tabled in Parliament. In 104 cases (89 per cent of total proposals requiring a RIS), the ORR was satisfied with the level of analysis.

Figure 2.1 **Policy proposals introduced into Parliament via Bills, 1998-99**



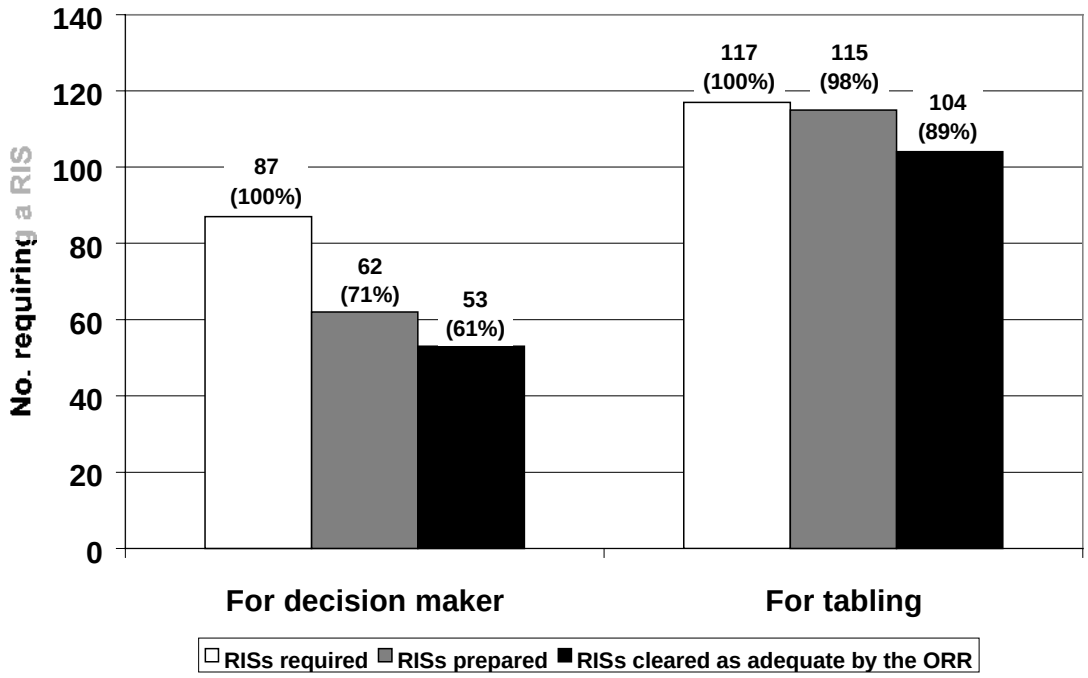
Source: ORR estimates.

Figure 2.2 **Proposals requiring a RIS, introduced into Parliament via Bills, 1998-99**



Source: ORR estimates.

Figure 2.3 **RIS compliance for proposals introduced via Bills, 1998-99**



Source: ORR estimates.

2.3 Delegated legislation

Delegated legislation comprises all rules or instruments that have the force of law and that have been made by an authority to which Parliament has delegated part of its legislative power. It may take the form of:

- statutory rules approved by the Governor-General in Federal Executive 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 SSCRO; and
- other delegated legislation that is not subject to parliamentary scrutiny and is therefore not disallowable — these instruments may or may not be gazetted and/or tabled.

The former are referred to in this report as 'disallowable instruments', while the latter are referred to as 'non-disallowable instruments'.

Delegated instruments made in 1998-99

Disallowable instruments

According to the *Delegated Legislation Monitor*, 1620 disallowable instruments were made and tabled in 1998-99 (SSCRO 1998, 1999). Departments and agencies reported 1590 instruments. The ORR has not assessed compliance for the 30 instruments not reported. Of the instruments reported:

- 683 had no impact on business; and
- 797 impacted on business but were subject to a RIS exception.[2]

This left only 110 that required a RIS — of which 94 had a direct impact on business and 16 restricted competition.

Non-disallowable instruments

Departments and agencies reported 143 non-disallowable instruments made during the reporting period. These included decisions by boards or delegates, with the type or class of instrument used varying considerably. Of these instruments 27 triggered the RIS requirements, with 12 having had a direct impact on business and 15 restricting competition.

Assessing compliance

Disallowable instruments

Compliance with the Commonwealth RIS requirements for proposals introduced via disallowable instruments in 1998-99 was good. As shown in figure 2.4, a RIS was prepared for the decision maker in 98 cases (89 per cent) where one was needed. The ORR assessed 94 RISs (85 per cent) as containing an adequate level of analysis.

Compliance at the tabling stage was also good, with RISs being prepared for 102 proposals (93 per cent). In 97 cases (88 per cent), the ORR was satisfied with the level of analysis in the tabled RIS. Three agencies and two departments were fully compliant with the Commonwealth RIS requirements for disallowable instruments — the Civil Aviation Safety Authority, the Australian Broadcasting

[2] The most common exceptions for disallowable instruments included certain airworthiness directives, which are excluded from consultation under the Legislative Instruments Bill 1996 (491 instruments) and those instruments that were minor or machinery in nature and did not substantially alter existing arrangements (290 instruments).

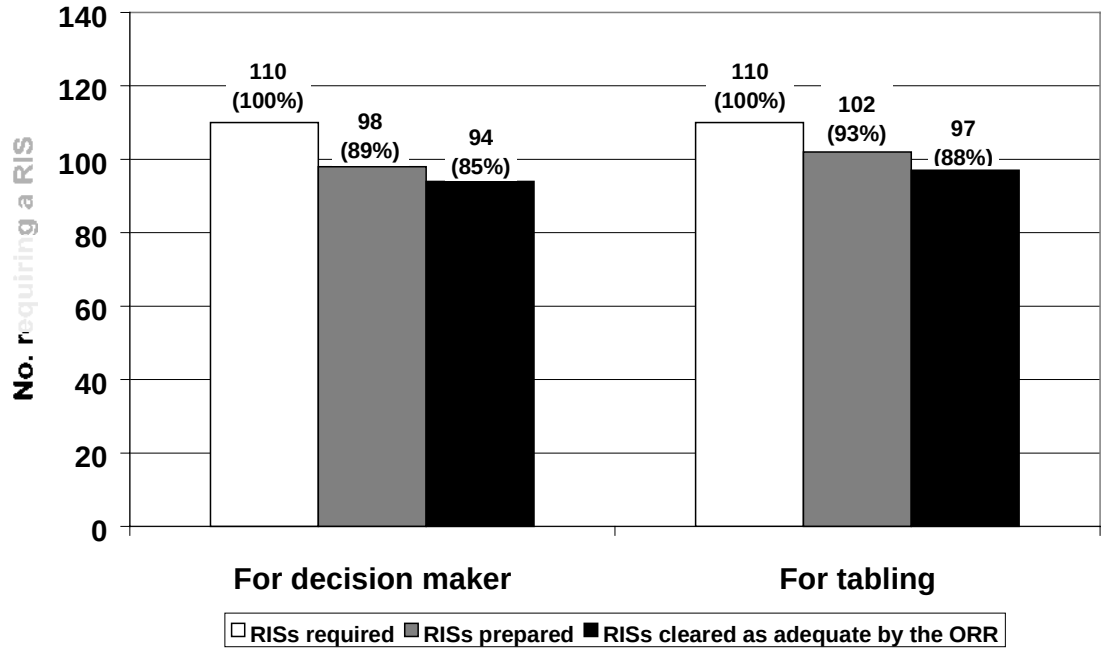
Authority, the Australian Communications Authority, the Department of Health and Aged Care and the Department of Immigration and Multicultural Affairs (see appendix B).

Non-disallowable instruments

Compliance with the Government's RIS requirements for proposals introduced via non-disallowable instruments also appears to be good. Based on the number of non-disallowable instruments reported by departments and agencies to the ORR in 1998-99, departments and agencies prepared adequate RISs for 26 (out of 27) proposals that triggered the RIS requirements. However, as noted in section 2.1, the ORR is unable to verify the total number of non-disallowable instruments made, and whether, in all cases, a RIS was seen by the decision maker.

While there is no obligation on departments and agencies to publicise RISs for non-disallowable instruments, the ORR encourages them to do so, consistent with the objectives of the Government's best practice processes. The ORR notes that some agencies now place RISs on their web-sites. Others use monthly activity bulletins to advise their clients when RISs have been prepared, and how to obtain copies.

Figure 2.4 **RIS compliance for disallowable instruments, 1998-99**



Source: ORR estimates.

2.4 Quasi-regulation

Table 2.1 summarises the number of quasi-regulations reported to the ORR for 1998-99 by departments and agencies and the RIS compliance results. A comparison with 1997-98 is included.

There has been a significant increase in the number of quasi-regulations reported to the ORR, from 30 in 1997-98 to 79 in 1998-99. Most of the increase relates to policy statements reported by the Australian Securities and Investments Commission.

Table 2.1 **RIS compliance for quasi-regulation**

	1997-98	*1998-99*
Number of quasi-regulations reported	30	79
Number requiring a RIS[a]	22	35
RISs prepared for decision maker	2	30
RISs published	2	29
RISs which contained an adequate level of analysis	2	30

[a] After exceptions to the RIS requirements have been taken into account.

Source: ORR estimates.

Compliance with the RIS requirements improved markedly — from 9 per cent in 1997-98 (when only two RISs were prepared) to 86 per cent in 1998-99 (when 30 RISs were prepared, 29 being published). Importantly, all RISs prepared in 1998-99 were considered to contain an adequate level of analysis.

Notwithstanding the significant improvement in 1998-99, the likelihood of under-reporting of quasi-regulatory activity remains. *Regulation and its Review 1997-98* noted that some regulatory agencies issued policy statements, notices and protocols on a regular basis, some of which are likely to be of a quasi-regulatory nature. While there may continue to be some underreporting, it is clear that awareness and compliance with the RIS requirements for quasi-regulation is increasing.

2.5 Treaties

Based on the information provided by departments and agencies, 16 treaties were tabled in the Commonwealth Parliament during 1998-99. Of these, only one required a RIS. A RIS was prepared, and cleared by the ORR as containing an adequate level of analysis.

There are a number of other international agreements that have less than 'treaty' status. These agreements (for example, memoranda of understanding) are not tabled in Parliament, and hence are not reported to the ORR for inclusion in its annual compliance report.

2.6 National regulation making

Ministerial Councils and national standard-setting bodies have been required since 1995 to undertake regulatory impact assessment in cases where their decisions could affect the activities of businesses or individuals. In November 1997, the COAG Guidelines were amended to require Ministerial Councils and national standard-setting bodies to provide draft RISs to the ORR for comment, before undertaking public consultation.

Since 1995, compliance with the COAG RIS requirements has generally been highest for bodies with statutory roles in regulation making. These bodies include the Australian New Zealand Food Standards Council, the Australian Transport Council and the National Environment Protection Council. The legislation establishing these bodies requires formal impact assessment to be undertaken prior to the implementation of regulation.

Assessing compliance

In 1998-99, 24 RISs were prepared for decisions by Ministerial Councils. Two of these were prepared after the decision was made — in one case this followed an emergency decision. However, based on the information reported to the ORR, at least four other decisions would have required a RIS and eight other matters may have required a RIS (potentially a total of 36). Actual compliance by Ministerial Councils would therefore lie between 67 and 86 per cent, depending on whether the consideration of these other eight matters should have been informed by a RIS.

Of the 24 RISs prepared for Ministerial Councils, the ORR commented on 19 and assessed each as containing an adequate level of analysis (see table 2.2).

National standard-setting bodies reported to the ORR that they prepared 23 RISs in 1998-99. Of these, 22 were prepared for decisions made by Ministerial Councils and are included in table 2.2. In the remaining case, a RIS was prepared and commented on by the ORR, in full compliance with COAG Guidelines.

Table 2.2 **Performance of Ministerial Councils, 1997-98 and 1998-99**

	1997-98[a]	*1998-99*
Decisions which potentially required a RIS	na	36
RISs prepared	29	24[b]
RISs commented on by the ORR	11	19

a Data are from *Regulation and its Review 1997-98*. **b** At least four other decisions would have required a RIS and eight other matters may have required a RIS. **na** Data not available.

Source: ORR estimates.

The question remains as to whether compliance for national regulators is improving over time. Comparative data for 1997-98 are limited, as table 2.2 indicates. What is clear is that, for Ministerial Councils, the ORR commented on a significantly higher proportion of RISs in 1998-99 than in 1997-98 (79 per cent compared to 38 per cent). This appears to have been due, in part, to COAG's decision of November 1997 to strengthen the ORR's role.

Regulation and its Review 1997-98 noted that almost half of the RISs prepared for Ministerial Councils were for councils with a statutory requirement for impact assessment. This is true to an even greater extent in 1998-99, with 22 of the 24 RISs prepared over the year being required for decisions by the Australian New Zealand Food Standards Council and the Australian Transport Council.

Two other Councils and one standard-setting body with no statutory requirements for impact assessment also prepared RISs during the year — these were the Australian and New Zealand Minerals and Energy Council, the Agriculture and Resource Management Council of Australia and New Zealand and the Australian Building Codes Board.

Simple comparisons between one year and the next of the total number of RISs prepared do not necessarily reflect the overall trend in compliance by Ministerial Councils and national standard-setting bodies. In 1998-99, some 'good performers' made more decisions than usual, and others made less than usual. A further aspect is the nature of the decision — some have a greater impact than others do. Importantly, there was a high level of compliance for a number of matters that had substantial impacts and/or dealt with contentious issues for which there was a high degree of public interest.

3 Improving compliance

Greater familiarity with the RIS process has improved the level of expertise in agencies and increased compliance overall. Compliance needs to be further improved at the critical decision-making stage, for measures introduced via Bills. Integration of the RIS framework into the initial stages of policy development will lead to more informed decision making and, ultimately, better regulatory outcomes.

As noted in chapter 2 and appendix B, compliance with RIS requirements in 1998-99 has been mixed. Although there has generally been a significant improvement on the previous year, compliance at the critical decision-making stage (for primary legislation) is still relatively low.

This chapter discusses some of the actions taken within agencies and by the ORR that have contributed to the improvements in compliance in 1998-99. Some suggestions are also made for how to further improve compliance. The discussion focuses on the following broad issues:

- awareness of requirements;
- compliance at the decision-making stage;
- integration of the RIS;
- consequences of non-compliance;
- gatekeeper procedures;
- quality of analysis; and
- tracking regulatory activity.

3.1 Awareness of requirements

Greater awareness and understanding, within departments, agencies and national regulation-making bodies, of the RIS requirements is likely to have been one of the more important factors explaining improved compliance. This improved familiarity stems from:

- the Government's ongoing commitment to (and promotion of) the process;

- agencies' experience in preparing RISs;
- education and training provided by the ORR;
- the wide dissemination of *A Guide to Regulation* (the Guide) and the COAG Guidelines; and
- indirectly, the ORR's monitoring and reporting of compliance.

Feedback from agencies indicates increasing acceptance of the process and recognition of the value of the RIS as a tool for informing decision making and for public transparency. As agencies have become accustomed to the process, they are reportedly finding that it helps in crystallising ideas and in identifying options. This is likely to have contributed to improved compliance and better outcomes.

Practical 'hands-on' experience is often the most effective method of raising awareness and improving compliance. Once an official (or work area) has prepared a RIS, there appears to be an increased likelihood of compliance for future proposals. In work areas that regularly prepare RISs, there is the opportunity for colleagues who are more familiar with the nature of the impact analysis required to provide guidance to staff preparing a RIS for the first time. This is also contributing to better quality analysis, including of the wider flow-on effects of regulation.

The ORR too is benefiting from experience in implementing the processes. As its knowledge and expertise has increased, the ORR has sought to clarify its advice to agencies (see appendix A) to ensure its decisions are consistent and equitable, as well as transparent.

Despite significant advances overall in awareness and understanding of RIS requirements, an element of non compliance can be explained by agencies still having inadequate or incomplete knowledge of the RIS requirements and their obligations. Some officials and ministerial advisers are still not fully aware of the scope of the RIS requirements, particularly in relation to non-disallowable delegated legislation, quasi-regulation and treaties. Two other questions about which there have been some misunderstanding or confusion are:

- *What constitutes compliance at the decision-making stage?*
  - Where a Minister is responsible for a regulatory policy decision, the RIS must be available to *inform the decision*. Some agencies in their compliance reports have suggested that requirements are met as long as the Minister has seen the RIS — even if this occurred after the decision was taken.
  - Where Cabinet is the ultimate decision maker, the RIS must be available for its consideration along with the ORR's coordination comments. Clearance of

the RIS by the Minister submitting the proposal is not sufficient to satisfy requirements at the decision-making stage.

- *Who has authority to waive the RIS requirements?*
  - Some agencies have incorrectly assumed that the ORR has the discretion to waive the RIS requirements. The RIS process has been endorsed by the Government and the Guide states that only the Prime Minister or Cabinet can waive the requirements. The ORR does, however, advise on whether proposals meet the criteria for the limited exceptions set out in the Guide (ORR 1998, pp. A3–4).

The ORR will continue to offer training to raise awareness of the nature and scope of the requirements. In addition, the ORR will provide greater assistance to those departments and agencies that have reported poor performance, particularly those where the level of compliance at the decision-making stage is low.

The ORR will also seek to improve agencies' compliance by maintaining regular contact with them and by developing a better understanding of their regulatory activities.

The COAG Guidelines have their fullest impact when they are included in procedures and protocols for Ministerial Councils. The Ministerial Council on Drug Strategy has already moved in this direction, as has the Health and Community Services Ministerial Council. Another way of instituting change is for impact assessment using the COAG framework to be included in legislative requirements for Councils or their advising bodies.

The COAG Guidelines can have a further effect by acting as the basis for more customised guidelines. This is beginning to occur, for example, Guidelines for the Review of Professional Regulation have been developed to complement and support the COAG Guidelines.

3.2 Compliance at the decision-making stage

The primary purpose of a RIS is to better inform decision makers of the benefits and costs of proposed regulation and why it is favoured over alternative options. Despite significant progress, there is clear room for improvement in the performance of some departments and agencies in preparing RISs (for primary legislation) in time for Cabinet or ministerial decision making.

Some agencies did not realise that a RIS should be prepared early in the policy development process or, as noted above, misunderstood the requirement to provide

it to the decision maker. Other agencies cited resource constraints and tight deadlines as a reason for non-compliance. More often the explanation lay in too low a priority being assigned to the preparation of a RIS. While agencies sometimes underestimated the scale of analysis required, in other cases, they perceived the scale of the task and the extent of analysis to be greater than actually required.

Departments and agencies should not, however, be held wholly responsible for poor compliance. In some cases they were not involved in the development of the proposal and became aware of it only after a decision had effectively been made. This made it difficult to prepare a RIS for the tabling stage, as agencies may not have known whether other options were considered, what consultation (if any) took place, and what level of cost benefit analysis was undertaken.

It is important that compliance be improved at the decision-making stage. The ORR will continue to encourage regulators to integrate impact analysis into their decision-making processes. Integrating the RIS approach from the time problems are identified and proposals are first being formulated, instead of late in the process, would promote earlier consideration of a greater variety of solutions, whether regulatory or non-regulatory.

Departmental and agency heads could also take greater responsibility for ensuring that RISs are prepared before policy approval is sought. Ultimately, however, it is up to Cabinet and Ministers to ensure that they see an adequate RIS when approached for policy approval.

3.3 Better integration of the RIS

Adoption of a more centralised and coordinated approach within departments and agencies is an important mechanism for achieving greater integration of the RIS process. Many departments and agencies now have a central contact or functional area with specific responsibility for providing information on RIS compliance and liaison with the ORR on compliance matters. Some have expanded the role of the central contact to include coordination of RIS training and advising on when the ORR needs to be consulted. The roles of the individuals or functional areas could in most cases be expanded to encompass other aspects of RIS compliance and the coordination of regulatory activity more generally. Box 3.1 highlights features of the centralised internal RIS compliance processes used by the Australian Taxation Office and the Civil Aviation Safety Authority.

Box 3.1 **RIS compliance — a coordinated approach**

Australian Taxation Office (ATO)

The ATO has integrated the tax RIS requirements into its existing processes and has systematically promoted awareness of the RIS requirements. Corporate responsibility for RIS compliance is coordinated through the 'central' legislation area. This is particularly important in the context of tax policy where the Treasury is involved in its development, but the ATO usually has prime responsibility for its implementation.

After the Government's announcement of the mandatory RIS requirements, the ATO, in consultation with the ORR, developed its own guidelines to assist staff in the preparation of a RIS. These guidelines have been widely distributed through the ATO. The RIS requirements, including consultation with the ORR, have been incorporated into the ATO 'checklist' of procedures which officers need to follow when involved in development of legislation. Guidance material and pro-forma are also available to staff in electronic form. The ATO incorporates training modules on the RIS requirements into its suite of training sessions.

The ATO's compliance record is good and the adequacy of their tax RISs has shown steady improvement since 1997.

Civil Aviation Safety Authority (CASA)

CASA is a statutory authority responsible for the safety regulation of civil aviation. CASA is currently undertaking a comprehensive internal review of its safety regulations to improve the delivery of CASA's safety functions through development and adoption of aviation 'world best practice' safety standards.

CASA's regulatory review program has incorporated the Commonwealth's RIS requirements into its formal consultation processes. The review program is centrally managed and coordinated. As soon as each regulatory review project is initiated, the central coordinator briefs the project staff on the RIS requirements and provides them with copies of the official Guide and CASA's summary guide, as well as other useful reference material. Practical assistance and training is provided as required. The coordinator also facilitates consultation between the ORR and CASA staff and is responsible for administrative matters, such as maintaining records and preparing RIS compliance reports in conjunction with the CASA Office of Legal Counsel.

The centrally managed and coordinated approach to regulation review and reform is an important contributor to CASA's improved compliance performance.

Sources: ATO 1998; information provided by CASA.

The introduction of regulatory plans across portfolios next financial year should enable departments to better integrate the preparation of RISs into the policy development process (regulatory plans were discussed in chapter 1). The pilot plan prepared by the Department of Employment, Workplace Relations and Small Business provided the ORR with a comprehensive picture of the portfolio's proposed regulatory activity and assisted the Department with its compliance

reporting. The introduction of regulatory plans is especially important in improving contact between agencies and the ORR in the early stages of policy development and has the potential to significantly improve compliance in future years. The publication of plans of proposed Commonwealth departmental regulatory activity will also provide stakeholders with a greater opportunity to have an input into policy formulation.

Departments and agencies are also becoming more pro-active in relation to RIS training for their staff. In 1998-99, some departments and agencies began integrating RIS training into their forward work plans. Closer liaison with the ORR has enabled training to be better targeted to the agency's particular needs. In certain agencies, a critical mass of expertise now exists and basic training in the RIS requirements forms part of in-house training in policy-making processes.

3.4 Consequences of non-compliance

This year's *Regulation and its Review* reports disaggregated compliance information for the first time. Departments and agencies were informed prior to publication of last year's report that their individual performance in complying with the RIS requirements would be reported from 1998-99 onwards. While agencies have put varying degrees of effort into demonstrating their commitment to the Government's process, they have generally been determined to improve their compliance record.

The publication annually, from 1998-99, of regulatory performance indicators by the Office of Small Business (see chapter 1) will also bring greater transparency to compliance reporting.

The Assistant Treasurer has also played an important role in promoting compliance, intervening where issues of particular significance have arisen. This intervention has ranged from encouraging the relevant Minister to direct his/her department to prepare a RIS (or to improve the analysis in a RIS) to recommending to the Prime Minister or Cabinet that a proposal be withdrawn.

With respect to proposals being considered by Cabinet, departments that do not comply fully with best practice requirements can attract a negative coordination comment from the ORR. For more important issues, negative coordination comments are specifically drawn to the attention of the Assistant Treasurer's office.

3.5 Gatekeeper procedures

The 'gatekeeper' role played by central policy departments can contribute to improved compliance by alerting departments and agencies to the RIS requirements either when policy approval is sought or at the tabling stage.

In relation to submissions and memoranda for Cabinet consideration, the Cabinet Secretariat of the Department of the Prime Minister and Cabinet performs a minor gatekeeper role. The Secretariat advises agencies of the requirement to contact the ORR and prepare a RIS if necessary.

The *Cabinet Handbook* also refers to the RIS requirements, but has not been updated since 1994. It is in the process of being redrafted to reflect the latest procedures and conditions applying to RISs — in particular, that the RIS requirements apply to all legislation and regulation having an *impact* on business or restricting competition, not just business regulation; and that only Cabinet or the Prime Minister, not the ORR, can waive the RIS requirements. One consequence of the Handbook not being up-to-date has been that some Cabinet Liaison Officers have failed to circulate relevant draft Cabinet submissions to the ORR. In a number of these cases this has resulted in non-compliance with the RIS requirements at the decision-making stage (although a RIS was generally prepared for tabling). The consequence is that Cabinet would not have benefited from being informed by the information and analysis contained in a RIS.

For primary legislation, the processes required for the tabling of Bills and explanatory memoranda in Parliament, specifically incorporate the RIS requirements. When departments submit legislation bids to the Department of the Prime Minister and Cabinet, they must indicate for each proposed Bill whether a RIS will be required and whether the ORR was consulted. The ORR is provided with a copy of these legislation bids and is able to contact agencies, where necessary, to remind them of the need to comply with the RIS requirements. These processes have been a major factor contributing to the good compliance result for primary legislation at the tabling stage (see chapter 2 and appendix B).

To identify upcoming treaty action, the ORR liaises with both the Treaties Secretariat in the Department of Foreign Affairs and Trade and the International Division of the Department of the Prime Minister and Cabinet. The Treaties Secretariat advises departments of the need to consult with the ORR about RIS requirements which may arise throughout the treaty-making process and particularly as they may relate to tabling of treaty action in Parliament. Such information is also included in documentation the Department of Foreign Affairs and Trade provides for the treaty-making process.

The Department of the Prime Minister and Cabinet has initiated measures that are likely to further improve compliance for delegated legislation. It has agreed, with the Office of Legislative Drafting in the Attorney-General's Department and with its own Executive Secretariat, on ways to ensure that two key stages in the development and making of regulation are linked to the RIS process.

As part of the arrangements, when the Office of Legislative Drafting receives drafting instructions it reminds departments and agencies of the requirement to prepare a RIS for delegated legislation affecting business or restricting competition. While this check in procedures will not directly improve compliance at the decision-making stage, it will allow for the preparation of a RIS for the tabling stage, and perhaps for discussions on draft legislation preceding its formal making and tabling.

The Federal Executive Council Secretariat also reminds departments and agencies that RISs are required when it receives documentation, related to proposals for delegated legislation, for presentation to the Governor-General. Again, this is at the concluding stage of the decision-making and drafting process, and is designed to ensure that RISs are available for tabling and parliamentary scrutiny for statutory rules and disallowable instruments. Nevertheless, it may assist in improving awareness of RIS requirements for these categories of delegated legislation and, over the longer term, should have a positive impact on compliance at the decision-making stage.

In addition to reminding departments and agencies of the RIS requirements in relation to individual legislation and regulations, the Office of Legislative Drafting and the Federal Executive Council Secretariat are moving to update their handbooks to include the RIS requirements.

3.6 Quality of analysis

In order to comply with the RIS requirements, a RIS must not only be prepared, it must contain an adequate standard of analysis. Improvements in the quality of RISs can be attributed to greater experience within agencies and a better understanding of requirements, which in turn stems partly from interaction with the ORR.

Growing familiarity with the RIS requirements has enabled the ORR to gradually raise the hurdle in terms of the minimum acceptable standard of analysis. While a relatively lenient approach was appropriate when the requirements were new, it has been necessary to raise the standard over time to ensure the Government's objectives for the RIS process are more fully met. The ORR will continue to advise agencies on how to improve the quality of their analysis, with particular focus on

progressively achieving greater quantification of costs and benefits and adoption of best practice regulatory design principles (see appendix A).

RISs that failed the adequacy test for tabling often did so because of the level of analysis or because there was a failure to consider feasible options. If the main elements of a RIS are reflected in the early drafts of documents prepared for decision making, compliance at the tabling stage becomes relatively straightforward.

3.7 Tracking regulatory activity

The ORR's charter requires it to concentrate its efforts where they will have most effect. In 1998-99, the ORR continued to assign highest priority to ensuring departments and agencies adhered to regulatory best practice in relation to primary legislation. Compliance is pursued in relation to other regulation subject to resource constraints. The ORR has not been able to monitor comprehensively all regulatory activity, particularly non-disallowable delegated legislation and quasi-regulation.

The type of regulation — whether it is primary, delegated or quasi-regulation — does not in itself affect the level of analysis that should be undertaken. The level of analysis in the RIS should be commensurate with the impact of the proposal. Delegated legislation, for example, often prescribes the detailed operation of the more general provisions contained in an Act, and it may have a significant impact on business and other stakeholders.

The absence of a comprehensive means of monitoring non-disallowable delegated legislation and quasi-regulation is one of the biggest challenges for the ORR in applying the RIS process. These types of regulation are not subject to parliamentary scrutiny. With no external benchmark against which to measure the level of this type of regulatory activity, the ORR has not been able to gauge the extent of any underreporting by agencies. The establishment within agencies of more formal systems for the centralised tracking of the full range of regulation for which they are responsible, would enable a much clearer picture to be drawn of total regulatory activity and the level of compliance with RIS requirements. This, in turn, should lead to greater transparency and public involvement in the regulation development process.

4 Commonwealth legislation reviews

Allowing for variations made to the Commonwealth's Legislation Review Schedule, the ORR cleared terms of reference for eight of the 16 reviews which were to commence in 1998-99, the third year of the national four-year program of legislation review.

Those terms of reference cleared by the ORR largely met relevant *Competition Principles Agreement* and Commonwealth legislation review requirements.

Chapter 1 discussed the Commonwealth's legislation review obligations under the *Competition Principles Agreement* (CPA). This chapter discusses the status of reviews scheduled to commence in 1998-99 and the ORR's role in clearing terms of reference and providing advice on the composition of review bodies. A detailed list of all reviews on the Commonwealth Schedule and their status is contained in appendix C.

4.1 Status of reviews

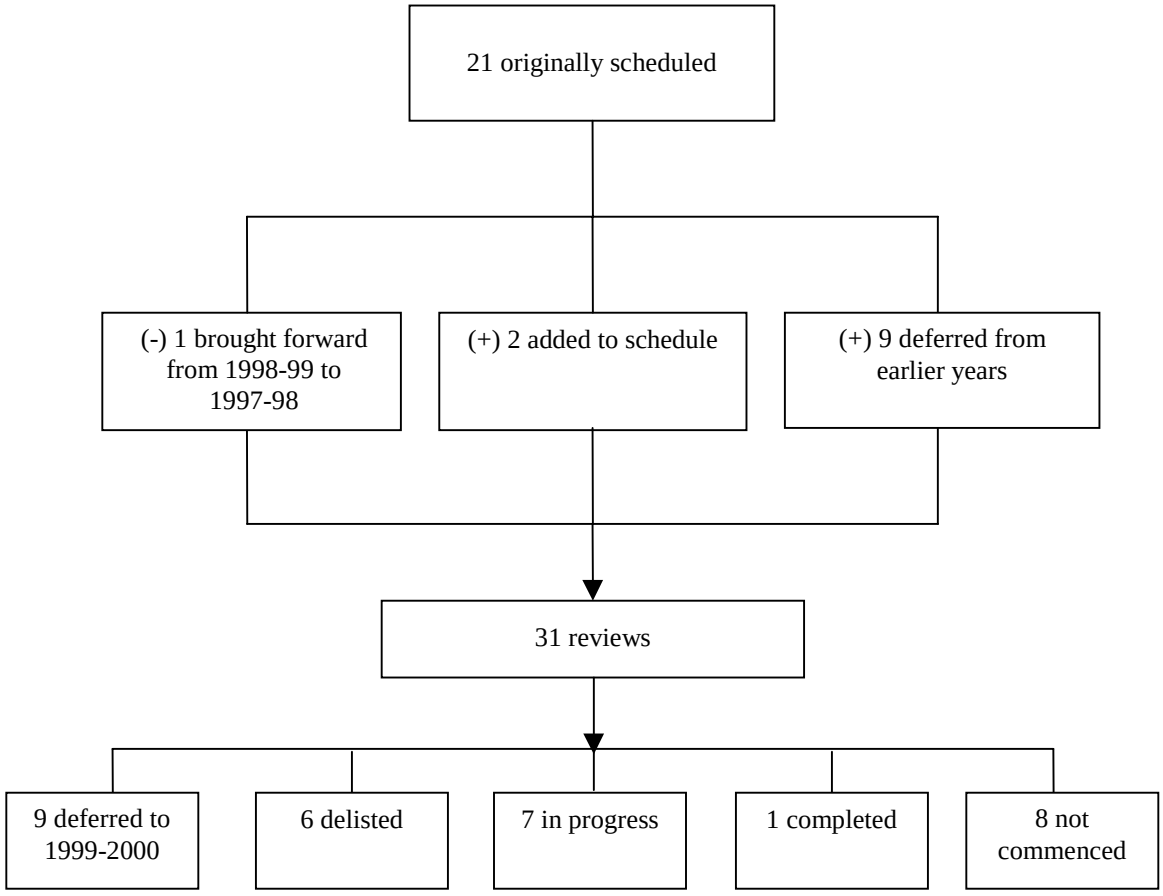
1998-99 was the third year of the national four-year program of review of existing legislation under the CPA.[1] While some 21 reviews were originally scheduled to commence during the year, a number of approved variations were made to the schedule. Figure 4.1 below provides an overview of the status of reviews.

After accounting for the variations to the Schedule, there were 16 reviews which should have commenced by 30 June 1999. The ORR cleared eight terms of reference.[2]

1 *Regulation and its Review 1996-97* (IC 1997) detailed the origins of the review program and preparation of the Commonwealth's Legislation Review Schedule.

2 The ORR also cleared terms of reference for an additional review of a significant part of the *Migration Act 1958*. That review has not been included in this chapter as it is a continuation of a CPA review of the *Migration Act 1958* completed in 1997.

Figure 4.1 **Status of 1998-99 reviews**



As illustrated in figure 4.1, the other eight reviews did not commence as scheduled and the appropriate approval, for varying the Schedule, had not been sought before 30 June 1999. A number of circumstances contributed to this, including:

- following the election in 1998, there were a number of changes to portfolios and their responsibilities and it was not always clear to departments that they had inherited CPA review obligations;
- in a couple of cases, departments have conducted internal reviews of the relevant legislation and are in the process of determining whether these reviews will satisfy CPA requirements;
- other reforms implemented by the Government have had a bearing on some legislation on the Commonwealth's Schedule and departments are assessing the feasibility of delisting or deferring those reviews;

- there is still some lack of understanding of the Government's requirements and the processes which have been put in place for CPA reviews; and
- some agencies do not see the reviews as a priority, either in terms of their functions or allocation of resources.

Notwithstanding these explanations, in a number of cases departments could have consulted earlier to determine whether a review was still required and, in other cases, departments have simply underestimated the time needed to obtain approval to amend the schedule.

4.2 Clearance of terms of reference

The Government requires the ORR to advise the Minister for Financial Services and Regulation and the responsible portfolio Minister on the draft terms of reference for legislation reviews.

The suggested minimum three month consultation period was observed for six of the eight reviews and proved in those cases to be sufficient time to resolve any concerns with terms of reference. While consultation occurred less than three months prior to planned commencement in two cases, satisfactory terms of reference were developed. The three month consultation period has contributed to good outcomes and will continue to be encouraged. (see appendix C, table C.2.)

Adequacy of terms of reference

The ORR advised that the draft terms of reference largely met the requirements for all eight reviews. The terms of reference must:

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

In most cases the ORR's template terms of reference was used. Where the template was not used or where the guiding principle was not specifically recognised, the terms of reference noted that the CPA requirements would need to be met.

Other desirable features in terms of reference include, the intention to publish a report, reporting dates for review bodies and processes for a response by government.

A reporting date was included in the terms of reference for all eight reviews in 1998-99, while five of the eight reviews' terms of reference included a government response process.

As part of the legislation review process, it was the Government's intention that reports be made publicly available. To facilitate this, the ORR encouraged departments to note in the terms of reference the intention to publish a report. All eight terms of reference for reviews in 1998-99 complied.

4.3 Composition of review bodies

While the ORR does not have a formal clearance role on the composition of review bodies it is often consulted by departments.

In setting up the Legislation Review Schedule, the Government identified eight types of review body (modalities), ranging from an independent committee for major reviews to an intradepartmental committee for very minor reviews. The Government acknowledged that it would not be cost effective to expect the same standard of review for all legislation.

The Commonwealth has agreed that the legislation reviews should be conducted in public and allow for consultation. The appropriate level of consultation will vary according to the significance of the review. For major reviews of legislation, extensive external consultation will be warranted. Trade-offs must also be made in relation to quantitative versus qualitative assessments and the time allocated for the review.

For 1998-99 reviews, the review body was in most cases as specified by the Government. However, one issue which has been gaining prominence, is the appropriateness of having industry and other stakeholder groups represented on review committees.

While it is appropriate that regulatory agencies participate in reviews (for example, by providing information), with the exception of very minor matters, they should not review their own legislation unless provision is made for some independent external scrutiny or oversight — for example, by regulatory review units.

Reviews conducted in-house by departments are likely to have certain advantages for less significant reviews. Departments have the most detailed knowledge of the regulations they administer and internal reviews may be able to be conducted in a short time frame and at low cost. In addition, recommendations are more likely to have support. Conversely, there are serious risks that internal reviews will not be

conducted with the same impartiality, openness and transparency as independent reviews.

Industry groups potentially affected by a review must have an opportunity to present their views, but caution should be exercised when considering direct industry representation on review bodies. The National Competition Council (NCC) expressed the following concerns in its 1997-98 annual report:

> Because there is almost inevitably conflict between some views, independence is particularly important in engendering confidence that all information and views presented to a panel are objectively considered. … The Council considers that the best means of incorporating input from industry representatives is through submissions and providing information to review panels. Ideally, however, so that reviews are objective and aimed at genuine reform opportunities, the Council considers that there should not be industry representation on review panels themselves. (NCC 1998, pp. 98–9)

If, nevertheless, industry is represented on a committee of review, there is an argument for appointing other 'interest' groups to maintain balance. However, experience suggests that committees with a wide range of interests represented can have difficulty in presenting a unanimous report with rigorous analysis of the relevant issues and recommendations for significant reform.

For such reasons, when representation by industry or other groups is considered desirable, it would be preferable to have their interests represented on a 'reference group' rather than on the review committee. This group could assist the review committee, but it would not be directly responsible for recommendations to the Government.

A Role and activities of the ORR

The Office of Regulation Review is located within the Productivity Commission. The ORR reports to the Chairman of the Commission, who guides its work program and acts as spokesperson. The Office has significant autonomy, with its activities being quite separate from the other activities of the Commission.

The ORR's charter, which outlines the role and functions of the Office, is provided in box A.1.

Box A.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, and the Minister for Financial Services and Regulation with respect to legislation review matters.

The ORR's main role is to promote processes that, from an economy-wide perspective, lead to effective and efficient legislation and regulations. The ORR's main activities in 1998-99, with reference to each function specified in the charter, are outlined in this appendix.

A.1 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. Activities of this nature undertaken in 1998-99 included:

- ORR's continuing role in providing advice to agencies in relation to the Commonwealth's legislation review program;
- meeting with the Senate Standing Committee on Regulations and Ordinances;
- advising the Assistant Treasurer;
- liaison with key departments with regulatory management roles;
- providing assistance to Treasury in relation to the Self-regulation Taskforce; and
- the publication of the second edition of *A Guide to Regulation* (the Guide).

Legislation reviews

In relation to reviews under the Commonwealth Legislation Review Schedule, the ORR's role is to provide guidance to departments and regulatory agencies on appropriate terms of reference, and the composition of review bodies (see chapters 1 and 4).

To assist departments to meet the Government's requirements, the ORR has developed template terms of reference, which it provides to departments in the early development phases for their reviews (see box A.2). The template draws together the various elements of the *Competition Principles Agreement* (CPA) and reflects the Government's broader review requirements. These template terms of reference have been structured to provide an analytical framework for the reviews. They are based on the cost-benefit analysis underlying RISs, which is fundamental to the best practice approach to regulatory review and reform. Departments have been encouraged to adapt the template to fit the specific requirements of matters subject to review.

Box A.2 **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; and
   (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 next page)

Box A.2 **(continued)**

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

(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.

Meeting with Senate Committee

In March 1999, the Chairman of the Productivity Commission and senior officials from the ORR met with the Senate Standing Committee on Regulations and Ordinances (SSCRO). The meeting was convened to exchange information and to improve mutual understanding of the role and functions of each body. SSCRO scrutinises delegated legislation to ensure compliance with high standards of personal rights and parliamentary propriety. In reporting to the Senate on the meeting, the then Chairman of SSCRO, Senator Bill O'Chee, commented on the value of the best practice regulatory processes and in particular the benefits of RISs. He stated:

> The Committee has found the RIS to be of considerable assistance in its scrutiny of legislative instruments … [and to] have enhanced the ability of the Committee to carry out its functions.
>
> The Committee has found RIS[s] to be particularly useful because they are more detailed and thorough than Explanatory Statements in their background information … problems are often set out with admirable frankness not usually seen in Explanatory Statements (Senate, Australia 1999, p. 6276).

Advising the Assistant Treasurer

The Assistant Treasurer has responsibility for regulatory performance including the promotion of compliance with the Governments' best practice processes.

The ORR keeps the Assistant Treasurer informed of any significant regulatory developments or issues associated with compliance with RIS requirements. In

certain cases where departments and agencies are not adequately meeting the Government's RIS requirements, or where the ORR anticipates lodging a 'negative' coordination comment on a Cabinet submission proposing regulation, the ORR may advise the Assistant Treasurer, who may choose to intervene if necessary.

Liaison with key departments with regulatory management roles

The Treasury, Department of Prime Minister and Cabinet and the Office of Small Business within the Department of Employment, Workplace Relations and Small Business, all have important roles in overseeing the implementation of the regulation reform agenda.

The ORR liaises on a regular basis with the Structural Reform Division of Treasury. The Division is responsible for policy advice on reform issues in key infrastructure industries, as well as on competition policy and laws. The latter includes the coordination of the implementation of National Competition Policy (including the Commonwealth's Legislation Review Schedule).

On a more *ad hoc* basis, the ORR also maintains contact with the Department of Prime Minister and Cabinet, in particular the Industry and Environment Division. The responsibilities of this Division include competition policy and intergovernmental relations (encompassing matters relating to the Council of Australian Governments (COAG)).

During 1998-99, the ORR provided advice and assistance to the Office of Small Business in relation to the development of the regulatory plans and regulatory performance indicator (RPI) initiatives (see A.4 below and chapter 1) which the Office has primary responsibility for implementing.

Self-Regulation Task Force

As part of the Commonwealth Government's commitment to encourage industry to develop effective self-regulation approaches, in August 1999 the Minister for Financial Services and Regulation announced the establishment of a taskforce to inquire into the operation of industry self-regulation in Australia and to identify best practice. The ORR provided advice to Treasury on draft terms of reference for the inquiry and on the membership of the taskforce.

A Guide to Regulation

Another significant ORR activity during 1998-99 was the publication in December 1998, and subsequent wide dissemination, of the second edition of *A Guide to Regulation*. The Guide is a reference document on good regulatory practice for those developing and assessing policy options (see discussion below).

A.2 Advise on regulatory impact analysis

A key function of the ORR is liaising with departments and agencies on the Government's requirements for regulation impact analysis (see chapter 1), and on how to comply with these requirements.

In undertaking this role, the ORR seeks to ensure that it provides timely and constructive feedback. Those occasions when it was not able to offer a standard of service which met agencies' expectations were typically cases where the preparation of a RIS had been commenced too late in the policy process.

Chapter 2 of this volume provides information on the level of regulatory activity and the extent of compliance with the Government's requirements in 1998-99 and chapter 3 suggests measures that might be taken to improve compliance.

During 1998-99, ORR officers worked intensively with some agencies to try and strike a balance between ensuring that the Government's regulatory best practice requirements were met without unduly impeding the agencies in their day-to-day activities. In this regard, particular attention has been given to the Department of Agriculture, Fisheries and Forestry — Australia, the Australian Quarantine and Inspection Service; the Civil Aviation Safety Authority; the Federal Office of Road Safety (now part of the Australian Transport Safety Bureau) and the Australian Communications Authority.

Also, over the past year, in response to issues raised by agencies and questions raised within the office, the ORR has sought to clarify whether certain types of proposals should require a RIS. While the ORR has always sought to provide appropriate advice, it is only over time, and with experience, that it has become possible to clearly delineate when RISs are required for certain 'grey areas'. The result has been clarification of some issues which have been contentious (see box A.3). It has also meant that RISs are no longer being required in circumstances that in the past were interpreted as requiring a RIS. In retrospect, some agencies have had to bear an extra burden as a consequence of this learning process. However, agencies will benefit from the greater clarity provided to the criteria and this should,

ultimately, result in the more effective allocation of agency resources and increased compliance.

Box A.3 **Clarifications**

- Where regulatory frameworks exist with *clear criteria*, RISs are not required for any product of that regulation, for example, licences, orders and decisions. However, where instruments arising out of primary regulation are themselves regulatory in nature — for example, management plans — these will continue to require a RIS.
- A RIS is not required where a proposal substantially adopts recommendations from a recent review which in effect (if not explicitly) adequately addresses the elements of the RIS, and
  - the report of the review is publicly available, and
  - there are no proposed changes additional to those covered in the review.

During 1998-99, the ORR also provided advice on the adequacy of a RIS, covering standards for gas appliances and installations, prepared by the Victorian Office of Gas Safety and a private consultant. The Victorian *Subordinate Legislation Act 1994* requires that independent advice be sought to confirm that RISs adequately meet the requirements contained in the Act. The task served as a useful check on the comparative standard of RISs between Victoria and the Commonwealth.

A.3 Provide training and guidance to officials

Over 1998-99, the ORR continued its program of training and briefings to departments and agencies, with the aim of assisting them to enhance processes for the development and review of regulatory proposals. As in previous years, this training covered the reasons for the Government's requirements and the features of a RIS, but in many cases extended to more tailored and detailed presentations on particular elements of the RIS or regulatory issues of specific interest to a department or agency. Over the course of the year, such presentations were made to over 350 Commonwealth officials. Participants ranged across all levels, including senior executives, and reflected diverse experience and qualifications. The ORR also participated in a number of RPI workshops hosted by the Office of Small Business. The ORR's presentations focused on the RIS process and its relationship to the Government's RPI initiative.

In addition to these more formal general training presentations, the ORR is also able to provide advice and guidance to agencies as particular issues arise, through

meetings or more tailored assistance in the preparation of specific RISs. The ORR has also found Interdepartmental committees to be effective fora for providing guidance on issues that are of interest to a number of agencies — such as the application of RIS requirements to reviews of regulation under the *Trans-Tasman Mutual Recognition Arrangement*.

Over 2000 copies of the Guide have been distributed. The Guide has been accessed on the Productivity Commission's web site (http://www.pc.gov.au/orr/reguide2/index.html) some 850 times.

The ORR also liaises with a range of non-government bodies with an interest in regulatory issues and ORR staff make presentations to conferences and interested groups. The Chairman of the Productivity Commission also gave an address on best practice regulation to a conference organised by the Electricity Supply Association of Australia Limited.

A.4 Report on compliance and on regulatory reform developments

Regulation and its Review 1998-99 is part of the series of publications associated with the Productivity Commission's Annual Report and meets the Commission's requirement to report on compliance with the Commonwealth Government's RIS requirements. This year, for the first time, disaggregated compliance information has been reported at the departmental and agency level (see chapter 2 and appendix B). In addition, the ORR monitors and reports on the progress and outcomes of the Commonwealth's legislation review program (see chapter 4).

The Chairman wrote to departmental secretaries and agency heads in October 1998 to inform them that the Commission would be assessing compliance with RIS requirements and reporting aggregate information in *Regulation and its Review 1997-98*. The letters also provided secretaries, on a confidential basis, with the ORR's qualitative assessment of their department's/agency's compliance performance and suggestions for how that performance could be improved. In addition, the letters foreshadowed that this year's report would publish compliance details for individual departments and agencies.

As noted in chapter 1, the Office of Small Business is required to report annually on the performance of departments and regulatory agencies against a set of nine RPIs. The first report will be for the 1998-99 financial year. The ORR has particular responsibility for monitoring performance indicators one, two and eight (see table A.1).

Table A.1 **Regulatory performance indicators**

Key Objective	*Performance indicators*
To ensure that all new or revised regulation confers a net benefit on the community.	1. Proportion of regulations for which the Regulation Impact Statement (RIS) adequately addressed net benefit to the community. *This indicator would be monitored by the ORR.*
To achieve essential regulatory objectives without unduly restricting business in the way in which these objectives are achieved.	2. Proportion of regulations for which the RIS adequately justified the compliance burden on business. *This indicator would be monitored by the ORR.* 3. Proportion of regulations which provide businesses and stakeholders with some appropriate flexibility (as defined) to determine the most cost-effective means of achieving regulatory objectives. A regulation would be regarded as providing flexibility if it had one or more of the following attributes: • it set a performance or outcome-based standard without prescribing in detail steps which businesses must take in order to comply; or • it included provision for businesses to seek acceptance of an alternative compliance mechanism to that prescribed in regulation; or • it used a market-based mechanism such as tradeable permits to allow businesses flexibility in determining a compliance strategy; or • it incorporated any other means to ensure that businesses have flexibility in deciding what steps to take to comply with regulation.
To ensure that regulatory decision-making processes are transparent and lead to fair outcomes.	4. Proportion of cases in which external review of decisions (as defined) led to a decision being reversed or overturned. External review for these purposes is limited to processes with the following characteristics: • review is carried out by a judicial body or any other review body which is either separate from the department or agency which made the decision or is set up by legislation and has a function of reviewing decisions made by the department or agency; • the review body is empowered to reverse or overturn the decision; and • the department or agency is a party to the review. 5. Proportion of regulatory agencies whose mechanisms for internal review of decisions meet standards for complaints handling outlined in *Principles for Developing a Service Charter*, published by the Department of Finance and Administration.

(Continued next page)

Table A.1 **(continued)**

Key Objective	*Performance indicators*
To ensure that information and details on regulation and how to comply with it are accessible and understood by business.	6. Proportion of regulatory agencies having communications strategies for regulation, or formal consultative channels for communicating information about regulation. • Guidelines for this purpose should be documented.
To create a predictable regulatory environment so business can make decisions with some surety of future environment.	7. Proportion of regulatory agencies publishing an adequate forward plan for introduction and review of regulation. An adequate forward plan for regulation should include the following elements: • it should be published in a way which makes it readily accessible to the business community; for example in an annual report, on the Internet, or by distribution to relevant business organisations; • it should outline planned or likely regulatory activity … expected to occur within a specified period, and should be published before that period starts; • it should include information about reviews of legislation to be undertaken in the relevant period, including reviews underway at the beginning of the period; • it should include information about policy development processes which will be taking place during the relevant period which could affect business regulation, where information about those processes is publicly available; • it should include information about Government decisions to develop or implement legislation during the relevant period to the extent where those decisions have been publicly announced.
To ensure that consultation processes are accessible and responsive to business and the community.	8. Proportion of regulations for which the RIS included an adequate statement of consultation. *This indicator would be monitored by the ORR.* 9. Proportion of regulatory agencies with organisational guidelines outlining consultation processes, procedures and standards. • Guidelines for this purpose should be documented.

Source: DEWRSB 1999.

The RPI objectives outlined in table A.1 are consistent with a checklist for best practice regulatory design compiled by the ORR (see box A.4). The checklist draws mainly on the principles enunciated in the Guide and the COAG Guidelines, but also takes into account principles of good regulatory design identified by a number of other bodies, including the Victorian Office of Regulation Reform, the Organisation for Economic Co-operation and Development and the United Kingdom Regulatory Impact Unit.

Box A.4 **A checklist for best practice regulatory design**

Regulations that conform to best practice design standards are characterised by the following seven principles and features.

1. Set to the minimum necessary
   (a) Kept simple to avoid unnecessary restrictions
   (b) Targeted at the problem to achieve the objectives
   (c) Not imposing an unnecessary burden on those affected

2. Not unduly prescriptive
   (a) Performance and outcomes focused
   (b) General rather than overly specific
   (c) Flexible enough to allow business some freedom to find the best way to comply

3. Accessible, transparent and accountable
   (a) Readily available to the public
   (b) Easy to understand
   (c) Fairly and consistently enforced
   (d) Some flexibility for dealing with special circumstances
   (e) Open to appeal and review

4. Integrated and consistent with other laws
   (a) Addressing a problem not addressed by other regulations
   (b) Recognises existing regulations and international obligations

5. Communicated effectively
   (a) Written in 'plain language'
   (b) Clear and concise

6. Mindful of the compliance burden imposed
   (a) Proportionate to the problem
   (b) Set at a level that minimises costs

7. Enforceable
   (a) Providing the minimum incentives needed for reasonable compliance
   (b) Able to be monitored and policed effectively, given the available resources

A.5 Advise Ministerial Councils and national standard-setting bodies

Under the COAG *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG Guidelines), the ORR has a role in providing advice and assistance to Ministerial Councils and national standard-setting bodies on the preparation of RISs for regulatory proposals. The ORR also monitors compliance with the requirements of the COAG Guidelines. Chapter 2 included a report on compliance in 1998-99.

On two occasions during the year, the ORR contacted the secretariats of Ministerial Councils to remind them of the COAG requirements and to provide information on compliance for last year.

A.6 Prepare reports and submissions on regulatory issues

The ORR's charter requires it to concentrate its limited resources where they will have most effect. The expanding workload associated with advising agencies on the adequacy of RISs has required the Office to curtail its research and publication program in the last couple of years. Apart from last year's annual report (*Regulation and its Review 1997–98*), the only other ORR publication in 1998-99 was the second edition of *A Guide to Regulation*.

The Guide, revised to incorporate the Government's response to the recommendations of the Interdepartmental Committee report *Grey-Letter Law*, was published in December 1998. It is designed to assist officials working on the review of existing regulation or proposals for new or amended regulation. The Guide explains the Commonwealth's best practice requirements and how the processes — in particular the use of RISs — can lead to better regulatory outcomes.

During the year the ORR also provided comments to the Australian Taxation Office (ATO) to assist with the preparation of *ATO Guidelines for the Preparation of Regulation Impact Statements*. The publication, which focuses on making compliance cost estimates, was released in September 1998.

The ORR continues to contribute to various Productivity Commission inquiries dealing with regulatory issues. For example, assistance was provided during 1998-99 to the inquiries on: *Broadcasting; Impact on Competition Policy Reforms on Rural and Regional Australia;* and *Progress in Rail Reform*.

A.7 Monitor regulation reform developments around Australia and internationally

The ORR collaborates in several ways with officials in regulatory reform agencies in all States and Territories. Activities in 1998-99 included:

- In April 1999, the ORR co-organised the annual meeting of Commonwealth and State/Territory regulatory reform officials hosted by the Victorian Department of State Development, Office of Regulation Reform. Issues of significance and mutual interest were discussed, including: the Victorian Law Reform Committee's inquiry into *Regulatory Efficiency Legislation*; and regulatory budgeting.
- Participation (when appropriate) in meetings of the Commonwealth-State Committee on Regulatory Reform (a COAG committee of officials).

A brief summary of developments in the States and Territories forms appendix D of this report.

The ORR also keeps abreast of relevant developments in other countries. The Office has actively participated in the OECD's work of monitoring and promoting regulatory reform in member countries. Information is exchanged mainly through the Public Management Service within the OECD Secretariat. Copies of ORR publications are sent to the OECD and the ORR receives relevant papers prepared by member countries or the secretariat. Appendix E provides information on selected OECD developments in 1998-99.

Australia has been amongst the leaders in regulatory reform efforts and the implementation of review processes. For this reason, the ORR regularly receives requests for information and advice from overseas officials and visiting delegations — progress in Australia has been of particular interest to other countries operating under a federal system of government. At the same time, Australia can learn from overseas best practice, so the ORR continues to monitor international developments, particularly in those countries with the greatest commitment to reform. Major activities in relation to international liaison and monitoring during 1998-99 are included in table A.2.

Table A.2 **Major international liaison and monitoring activities of the ORR**

Month / Year	*Activity*
July 1998	The ORR provided a briefing to four visiting officials from the Republic of South Africa. The ORR subsequently (January 1999) provided a week of training to an officer from South Africa's National Small Business Regulatory Review. South Africa is seeking to implement best practice regulatory processes to reduce the compliance burden on small business and has been keen to gain a better understanding of processes in Australia.
July – September 1998	The ORR provided assistance with Australia's contribution to an OECD multi-country survey of small businesses. The survey focused on measuring and comparing business compliance costs in meeting taxation, environmental and employment regulatory requirements. Australia's contribution was a collaborative project undertaken with the Office of Small Business and the Australian Chamber of Commerce and Industry.
July - October 1998	The ORR contributed to an OECD project on developing indicators of regulatory capacities in member countries — intended to enhance the capacity of OECD members to self-assess progress in regulatory reform by improving cross-country comparisons.
September 1988	A representative from the New Zealand Ministry of Commerce visited the ORR to discuss both countries' experience with RISs and to explore ways in which they might work more closely together in contributing to OECD regulation review and reform work.
March 1999	The head of the ORR represented Australia at the meeting of the OECD Ad Hoc Multidisciplinary Group on Regulatory Reform in Paris and then travelled to Brussels to meet with European Union officials from several directorates.
May 1999	The Counsellor (Economic) from the Embassy of Korea was given a briefing on the ORR's role and activities and the Government's policy on regulatory best practice and the head of the ORR later met with a visiting adviser to the Prime Minister of Korea.
June 1999	The head of the ORR met with an economic councillor from the Japanese Embassy.

B Compliance by portfolio

This appendix reports on compliance in 1998-99 by Commonwealth portfolios with the Government's RIS requirements for proposals introduced via primary legislation (see table B.1) and for disallowable delegated instruments (see table B.2). Where possible, compliance data have been further disaggregated to separately identify department and agency compliance within each portfolio. Only those portfolios, departments and agencies which prepare Bills or disallowable instruments that triggered Commonwealth RIS requirements are reported.

In making its compliance assessments, the ORR has relied mainly on information reported by departments and agencies. Limited checking against independent data sources and the ORR's compliance databases was also undertaken and any discrepancies investigated.

The ORR's compliance assessment has also taken into account cases where the department or agency with responsibility for compliance with the RIS requirements at the policy approval stage no longer had primary carriage for the matter at the time of tabling. This was the result either of the normal division of responsibilities between policy and administrative areas within portfolios or because of the revised Administrative Arrangements Orders that took effect in October 1998. Compliance is reported on the basis of which portfolio/department/agency was responsible for preparation of a RIS at the decision-making stage.

While compliance with the RIS requirements was generally satisfactory, some organisations performed better than others. For example, the Department of Communications, Information Technology and the Arts (DoCITA) performed well for measures introduced via primary legislation. The Department prepared 17 RISs for the decision-making stage, and all but two contained an adequate level of analysis. The Department improved these two RISs and both were then considered adequate for tabling. The departments of the Environment and Heritage (DE&H), Health and Aged Care (DHAC), the Treasury and the Attorney-General's (AG's) Department, while preparing fewer RISs, also performed well, meeting the RIS requirements for both the decision-making and tabling stages in either all or most cases.

Three agencies and two departments were fully compliant with the Commonwealth RIS requirements for disallowable instruments — the Civil Aviation Safety

Authority (CASA), the Australian Broadcasting Authority (ABA), the Australian Communications Authority (ACA), the Department of Health and Aged Care (DHAC) and the Department of Immigration and Multicultural Affairs (DIMA).

In considering compliance figures, it is important to note that there is no necessary relationship between the number of proposals or instruments requiring RISs, and the social or economic impact of those proposals. For example, a single proposal introduced by one department may have a greater impact than 20 proposals introduced by another. A failure by a department to prepare a RIS for a significant proposal should, in this respect, be regarded as a more serious instance of non-compliance than a failure to prepare a RIS for a less significant proposal. The ORR has not been in a position to make this type of assessment on the basis of the reported compliance information.

Table B.1 **RIS compliance for proposals introduced via Bills, 1998-99**

Portfolio Dept/Agency[a]	*Prepared for decision maker*[b]	*Adequate*	*Tabled*	*Adequate*
AFFA	1/3	0/3	3/4	1/4
AG's	3/4	3/4	4/4	4/4
ACS	2/3	1/3	2/3	1/3
DoCITA	17/17	15/17	17/17	17/17
DETYA	0/1	0/1	1/1	1/1
DEWRSB	1/10	0/10	10/10[c]	9/10[c]
DE&H	3/3	3/3	4/4	4/4
DoFA	1/1	1/1	1/1	1/1
DHAC	6/7	6/7	7/7	6/7
DISR[d]	6/12	4/12	14/14	11/14
DTRS	3/5	1/5	6/6	4/6
PM&C	1/1	1/1	2/2	1/2
Treasury				
Policy	3/3	3/3	3/3	3/3
Tax Policy[e]	14/16	14/16	40/40	40/40
DoCITA/Treasurer	1/1	1/1	1/1	1/1
Total [f]	62/87	53/87	115/117	104/117

[a] For the full names of departments and agencies, see the list of abbreviations on pages viii to ix. [b] Compliance is reported on the basis of which portfolio/department/agency was responsible for preparation of a RIS at the decision-making stage. [c] The Department tabled one RIS covering nine proposals when legislation was introduced into the House of Representatives. This RIS was assessed as inadequate. Further work was undertaken by the Department and nine RISs were subsequently tabled prior to the commencement of debate on the Bill. These were assessed as adequate. [d] Includes data from the Department of Industry, Science and Resources and the National Standards Commission. [e] A modified RIS process applies to taxation measures (see chapter 1). Includes data from the Australian Taxation Office and the Department of the Treasury, although another portfolio or department may seek policy approval for the proposed measure. [f] The RIS requirements were waived for thirty measures at the decision-making stage, but a RIS was required for tabling.

Source: ORR estimates.

The ORR also noted an improvement in the compliance of several departments and agencies between the first and second halves of 1998-99. For example, the compliance of the Department of Agriculture, Fisheries and Forestry (AFFA) improved significantly in the second half of the year. The Department failed to consult the ORR on the need to prepare a RIS for only two disallowable instruments.

Table B.2 **RIS compliance for disallowable instruments made, 1998-99[a]**

Portfolio Dept/Agency[b]	*Prepared for decision maker*	*Adequate*	*Tabled*	*Adequate*
AFFA[c]	11/19	10/19	14/19	12/19
DoCITA	12/12	11/12	12/12	11/12
ABA	3/3	3/3	3/3	3/3
ACA	33/33	33/33	33/33	33/33
DE&H	2/4	2/4	2/4	2/4
DHAC	19/19	19/19	19/19	19/19
DIMA	1/1	1/1	1/1	1/1
DTRS	7/8	5/8	8/8	6/8
CASA	10/10	10/10	10/10	10/10
Treasury	0/1	0/1	0/1	0/1
Total	98/110	94/110	102/110	97/110

a The ORR has not assessed RIS compliance for 30 (out of 1620) disallowable instruments made within the reporting period because departments and agencies provided insufficient information about these instruments in their compliance reports. **b** For the full names of departments and agencies, see the list of abbreviations on pages viii to ix. **c** Includes data from the Department of Agriculture, Fisheries and Forestry and the Australian Fisheries Management Authority. In two cases, RISs were not prepared because of a misunderstanding between the Department and the ORR as to when the RIS requirements applied to amendments to agricultural levies.

Source: ORR estimates.

C Commonwealth Legislation Review Schedule — status of reviews as at 30 June 1999

Table C.1 **Commonwealth Legislation Review Schedule**

No. [1]	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
Reviews under way when the Commonwealth's program was announced in June 1996				
1	Communications, Information Technology 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	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	Employment, Workplace Relations and Small Business	*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 Resources	*Patents Act 1990*, ss. 198–202 (Patent Attorney registration)	Gives patent attorneys exclusive rights.	Review completed in June 1996. Report released.
5	Attorney-General's; and Industry, Science and Resources	Commerce (Imports) Regulations and Customs Prohibited Imports Regulations	Ongoing rationalisation of customs regulations.	Not commenced.
6	Industry, Science and Resources	*Bounty (Books) Act 1986*	Assists Australian production via payment of bounty.	Review completed in October 1996. Report released in August 1997.
7	Industry, Science and Resources	*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 Resources	*Bounty (Fuel Ethanol) Act 1994*	Assists Australian production via payment of bounty.	Review completed in July 1996. Report released in August 1997.

(Continued next page)

[1] Reviews are numbered as they appeared in the original schedule with added reviews consecutively numbered from the last originally scheduled review.

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
9	Agriculture, Fisheries and Forestry	*Quarantine Act 1908*	Quarantine restrictions have potential to reduce competition from imports.	Review completed in October 1996. Report released in December 1996.
10	Environment and Heritage	*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 in 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				
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	Communications Information Technology 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	Communications Information Technology 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, Workplace Relations and Small Business	*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. Report released in June 1997.
19	Health and Aged Care	*Quarantine Act 1908*, in relation to human quarantine	Restricts import of biological materials that pose risk of disease.	Review completed.

(Continued next page)

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
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 and 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) and related regulations	Requires the registration of those persons who intend to provide immigration assistance and advice.	Review combined with #24.
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	Employment, Workplace Relations and Small Business	*Tradesmen's Rights Regulation Act 1946*	Assesses individuals' foreign trade qualifications, and determines whether they may practise that trade in Australia.	Review completed. Report released in March 1999.
26	Attorney-General's	*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	Attorney-General's	*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. Report released in September 1997.
28	Attorney-General's	*Duty Drawback (Customs Regulations 129 to 136B)* and *TEXCO (Tariff Export Concession Scheme)* — *Customs Tariff Act 1995*, Schedule 4, Item 21 Treatment Code 421	Provides reimbursement or exemption from duty for goods imported but subsequently re-exported.	Review completed.
29	Industry, Science and Resources	*Pooled Development Funds Act 1992*	Gives concessional tax treatment to those who make patient equity capital available to small and medium enterprises.	Review completed.

(Continued next page)

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
30	Treasury	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. Report released in October 1997.
31	Agriculture, Fisheries and Forestry	*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.
32	Agriculture, Fisheries and Forestry	*Income Equalisation Deposits (Interest Adjustment) Act 1984* and *Loan (Income Equalisation Deposits) Act 1976*	Provides risk management options for farm businesses.	Review completed.
33	Prime Minister and Cabinet	*Aboriginal Land Rights (Northern Territory) Act 1976*	Regulates and restricts mining and other commercial use.	Review completed.
34	Transport and Regional Services	International Air Service Agreements	Guarantees access for Australian designated carriers, but contains restrictions on international airline routes and/or capacity.	Review completed. Report released in June 1999.
35	Transport and Regional Services	*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 Services	*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.
37	Employment, Workplace Relations and Small Business	*Australian Maritime Safety Authority (AMSA) Act 1990*	Licensing and safety functions both cost and benefit shipping.	Review completed.
38	Treasury	*Bills of Exchange Act 1909*	May prevent adoption of electronic transactions and record keeping.	Review completed.
39	Treasury	Review of Foreign Investment Policy, including associated regulation	May restrict foreign investment.	Review in progress.

(Continued next page)

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
Reviews scheduled to commence in 1997-98				
40	Attorney-General's	The trustee registration provisions of the *Bankruptcy Act 1966* and Bankruptcy Rules	Imposes compliance costs on businesses.	Review completed.
41	Communications, Information Technology 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 affects the structure of, and conduct within, the broadcasting industry.	Review in progress.
42	Communications, Information Technology 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.	Delayed until second half of 1999.
43	Defence	*Defence Housing Authority Act 1987*	Provides a monopoly in provision of housing to Defence personnel.	Deferred.
44	Education, Training and Youth Affairs	*Higher Education Funding Act 1988* plus include: *Vocational Education and Training Funding Act 1992* and any other regulation with similar effects to the *Higher Education Funding Act 1988*	Restricts private sector entry and competition in higher education.	Review subsumed into comprehensive review of Higher Education Funding and Policy. Report released in April 1997.
45	Education, Training and Youth Affairs; and Industry, Science and Resources	*Mutual Recognition Act 1992*	Review to focus on any impediments to mobility of occupations and sale of goods throughout Australia.	Review completed.
46	Health and Aged Care[2]	*National Health Act 1953* (Part 6 and Schedule 1) and *Health Insurance Act 1973* (Part 3)	Restricts the market in private health insurance.	Review completed. Report released in April 1997.
47	Health and Aged Care	*Environmental Protection (Nuclear Codes) Act 1978*	Controls nuclear activities for environmental and health/safety reasons.	Not commenced.

(Continued next page)

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.

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
48	Employment, Workplace Relations and Small Business	*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 released in June 1998.
49	Attorney-General's	*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.
50	Attorney-General's	*Customs Act 1901* Sections 154–161L	Covers valuation of imported goods which affects amount of duty to be paid.	Review completed. Report released in June 1999.
51	Treasury	Trade Practices (Consumer Product Information Standards)(Cosmetics) Regulations	Imposes minor costs on businesses which must provide consumer information.	Review completed. Report released in July 1998.
52	Industry, Science and Resources	*Petroleum Retail Marketing Sites Act 1980*	Restricts the number of retail sites a major oil company may directly control.	Not commenced.
53	Industry, Science and Resources	*Petroleum Retail Marketing Franchise Act 1980*	Sets minimum contractual terms and conditions between franchised service station operators and the major oil companies.	Not commenced.
54	Agriculture, Fisheries and Forestry	Primary Industries Levies Acts and related Collection Acts	Impose costs via levies and their collection. Yield benefits from, for example, research and development.	Review in progress.
55	Agriculture, Fisheries and Forestry	*Wool International Act 1993*	Imposes a levy on production to fund disposal and marketing of wool.	Delisted.
56	Agriculture, Fisheries and Forestry	*Imported Food Control Act 1992* and regulations	Imposes conditions and restrictions on importers of food.	Review completed. Report released in November 1998.
57	Agriculture, Fisheries and Forestry	*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.	Review in progress.
58	Agriculture, Fisheries and Forestry	*Pig Industry Act 1986* and related Acts	Levy funding used to promote pork consumption.	Review in progress.
59	Agriculture, Fisheries and Forestry	*Torres Strait Fisheries Act 1984* and related Acts	Fisheries management has the potential to restrict competition.	Review in progress.
60	Agriculture, Fisheries and Forestry	*Export Control (Unprocessed Wood) Regulations under the Export Control Act 1982*	Restricts woodchip exports whilst achieving environmental objectives.	Review deferred until 1999-2000.

(Continued next page)

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
61	Transport and Regional Services	*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. Report released in June 1999.
62	Transport and Regional Services	*Motor Vehicle Standards Act 1989*	Adds to motor vehicle costs whilst maintaining safety standards.	Review in progress.
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*	Imposes substantial compliance costs on the superannuation industry and restricts competition.	Review deferred until 1999-2000.
64	Treasury	s 51(2) and s 51(3) exemption provisions of the *Trade Practices Act 1974*	Exempts specific activities from generally applied competition laws.	Review completed. Report released in March 1999.
65	Treasury	*General Insurance Supervisory Levy Act 1989*	Imposes a levy to recover administrative costs of regulating the industry.	Delisted.
66	Treasury	*Insurance (Agents and Brokers) Act 1984*	Adds to industry costs, but protects consumers.	Review deferred until 1999-2000. See #63.
67	Treasury	*Life Insurance Supervisory Levy Act 1989*	Imposes a levy to recover administrative costs of regulating the industry.	Delisted.

Reviews scheduled to commence in 1998-99

68	Finance and Administration	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.	Review in progress.
69	Attorney-General's	*Financial Transactions Reports Act 1988* and regulations	Imposes substantial costs on financial institutions.	Not commenced. Discussion on terms of reference.

(Continued next page)

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
70	Attorney-General's	*Proceeds of Crime Act 1987* and regulations	May have indirect consequences for businesses.	Review completed. Working group to address CPA requirements.
71	Attorney-General's; and Industry, Science and Resources	Intellectual property protection legislation (*Designs Act 1906, Patents Act 1990, Trade Marks Act 1995, Copyright Act 1968,* and *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.	Review in progress.
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.	Not commenced.
73	Environment, and Heritage	*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.	Delisted.
74	Environment and Heritage	*Hazardous Waste (Regulation of Imports & Exports) Act 1989, Hazardous Waste (Regulation of Imports & Exports) Amendment Bill 1995* and related regulations	Has potential to restrict trade.	Deferred until 1999-2000.
75a	Health and Aged Care[3]	*Australia New Zealand Food Authority Act 1991*	Extensive regulation, not limited to health and safety objectives, adds to industry costs.	Review completed in June 1998.
75b	Health and Aged Care	Food Standards Code	Extensive regulation, not limited to health and safety objectives, adds to industry costs.	Not commenced.
76	Foreign Affairs and Trade	*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.	Not commenced.
77	Agriculture, Fisheries and Forestry[4,5]	*Agricultural and Veterinary Chemicals Act 1994*	Recovers costs from chemical industry of regulating sale of agricultural and veterinary chemicals.	Review completed January 1998. Report public.

(Continued next page)

3 A national review of food regulation was conducted in 1997-98, incorporating the Commonwealth review of the *Australia New Zealand Food Authority Act 1991*, which was initially scheduled for 1998-99. The Food Standards Code remained scheduled for review in 1998-99.

4 A national review of agricultural and veterinary chemicals was conducted in 1997-98 incorporating 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.

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
78	Agriculture, Fisheries and Forestry	Dairy Industry Legislation	Intervenes in the fresh and manufactured milk markets.	Not commenced.
79	Agriculture, Fisheries and Forestry	Fisheries Legislation	May restrict fishing activities.	Review in progress.
80	Agriculture, Fisheries and Forestry	Dried Vine Fruits Legislation	Provides statutory export marketing arrangements for dried vine fruits.	Deferred to 2nd half 2000.
81	Agriculture, Fisheries and Forestry[6]	*Prawn Boat Levy Act 1995*	Imposes a levy and requires record keeping and data provision.	Delisted.
82	Agriculture, Fisheries and Forestry	*Export Control Act 1982* (fish, grains, dairy, processed foods etc)	Imposes conditions and restrictions on exporters.	Review in progress.
83	Attorney-Generals and Industry, Science and Resources	Export controls under regulation 11 of the *Customs Act 1901* (Prohibited exports — nuclear materials)	Increases exporter costs.	Delisted.
84	Transport and Regional Services	Part X of *Trade Practices Act 1974* (shipping lines)	Sanctions cooperative pricing arrangements in international shipping which could increase costs to users.	Review in progress.
85	Transport and Regional Services	*Navigation Act 1912*[7] *(excluding Part VI)*	Restricts ability of foreign ships to operate between Australian ports.	Review in progress.
86	Treasury	*Financial Corporations Act 1974*	Imposes costs by requiring provision of information.	Delisted.
87	Treasury	*Prices Surveillance Act 1983*	Affects ability to increase prices for specified goods and services.	Deferred to 1999-2000.
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)	Imposes additional administrative costs on providers of services. Preference is given to use of public facilities, thereby restricting ability of private providers to compete.	Not commenced.

(Continued next page)

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

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 Employment, Workplace Relations and Small Business to widen the review to encompass the entire Act (excluding part VI).

Table C.1 **(continued)**

No.	*Portfolio*	*Legislation*	*Impact on business or restriction on competition*	*Status of Reviews as at 30 June 1999*
23 and 24	Immigration and Multicultural Affairs	*Migration Act 1958*	Review to focus on statutory self-regulation of the Migration Advice Industry	Review in progress. Continuation of reviews #23 and 24.
99	Health and Aged Care	*Health Insurance Act 1973 — Part IIA*	May restrict competition by licensing pathology collection centres.	Not commenced.
100	Attorney-General's	*Marine Insurance Act 1909*	Regulates all aspects of marine insurance.	Not commenced.

Reviews scheduled 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 and Heritage	*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 Aged Care	*Home and Community Care Act 1985*	Excludes businesses from providing certain care services.
92	Industry, Science and Resources	*Petroleum (Submerged Lands) Act 1967*	Controls access to petroleum resources and imposes fees.
93	Agriculture, Fisheries and Forestry	*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 1974* (including exemptions)	Enables access to services, thereby enhancing competition.
96	Treasury	Part 6 (access provisions) of the *Moomba–Sydney Pipeline System Sale Act 1994*[8]	Enables access to services, thereby enhancing competition.
97	Treasury	2D exemptions (local government activities) of the *Trade Practices Act 1974*	Exempts specific activities from generally applied competition law.
98	Treasury	Fees charged under the *Trade Practices Act 1974*	Imposes costs on business.
101	Attorney-General's	*Disability Discrimination Act 1992*	Considerable uncertainty about how business should comply with the Act and concerns about potential costs of compliance.

8 This review has been delisted.

Table C.2 **Status of reviews for 1998-99 and terms of reference cleared**

Review	**Review preparation**				
	Did the review commence as scheduled or was a variation approved?	*Was the ORR consulted at least 3 months prior to start?*	*Did the ORR agree on the ToR as meeting CPA and LRS?*	*Was the review body as specified (or better)?*	*Was a reporting date or period included in the ToR?*
41. Broadcasting	✓	✓	✓	✓	✓
42. Spectrum allocation	Delayed until 2nd half of 1999				
43. *Defence Housing Authority Act 1987*	Deferred[9]				
49. Anti-Dumping	Deferred to 1999				
60. Export Wood	Deferred to 1999-2000				
63. Superannuation Acts	Deferred to 1999-2000				
65. General Insurance Levy	Delisted				
66. Insurance Agents	Deferred to 1999-2000				
67. Life Insurance Levy	Delisted				
68. Land Acquisition Acts	✓	✓	✓	✓	✓
69. *Financial Transactions Reports Act 1988*	(×)				
70. *Proceeds of Crime Act 1987*	✓	×	✓	✓	✓
71. Intellectual property legislation	✓	✓	✓	✓	✓
72. *Defence Force (Home Loans Assistance) Act 1990*	×				
73. *World Heritage Properties Conservation Act 1983*	Delisted				
74. Hazardous Waste	Deferred 1999-2000				
75b. Food Standards Code	×				
76. *Export Finance & Insurance Corporation Act*	×				

(Continued next page)

9 Review has not commenced. Awaiting the outcome of a joint review by Defence and DoFA.

Table C.2 **(continued)**

Review	**Review preparation**				
	Did the review commence as scheduled or was a variation approved?	*Was the ORR consulted at least 3 months prior to start?*	*Did the ORR agree on the ToR as meeting CPA and LRS?*	*Was the review body as specified (or better)?*	*Was a reporting date or period included in the ToR?*
78. Dairy Industry Legislation	×				
79. Fisheries legislation	✓	✓	✓	✓	✓
80. Dried Vine Fruits Legislation	Deferred to 2nd half 2000				
81. *Prawn Boat Levy Act 1995*	Delisted				
82. *Export Control Act 1982* (fish, grains etc)	✓	×	✓	✓	✓
83. Export controls under reg 11 of the *Customs Act 1901*	Delisted				
84. Part X of *Trade Practices Act 1974* (shipping lines)	✓	✓	✓	✓	✓
85. *Navigation Act 1912* (excluding Part VI)	(✓)	✓	✓	✓	✓
86. *Financial Corporations Act 1974*	Delisted				
87. *Prices Surveillance Act 1953*	Deferred 1999-2000				
88. Treatment Principles – *Veterans Entitlement Act*	×				
99. *Health Insurance Act 1973* Part IIA	×				
100. *Marine Insurance Act 1909*	×				

Note: Each cell records the answer to the column heading. 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 negative to a very limited extent and/or the outcome largely failed to satisfy the requirements. × Question answered in the negative.

D Regulatory reform in the States and Territories

This appendix outlines existing mechanisms and developments in regulation review in the States and Territories during 1998-99.

D.1 New South Wales

Responsibility for streamlining and simplifying New South Wales' regulatory environment rests with the Inter-governmental and Regulatory Reform Branch of the New South Wales Cabinet Office.

Existing mechanisms for regulation review

Review mechanisms which operate in New South Wales 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. The RIS is tabled in Parliament at the time when notice is given of the making of a new regulation, or as soon as possible thereafter.

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 New South Wales 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 coordination 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

In January 1999, the Regulation Review Committee of the Parliament of New South Wales released a report prepared by the Public Management Service of the OECD on Regulatory Impact Assessment in New South Wales. The report (RRC 1999) found that the basic approach taken to regulatory impact assessment contained in the *Subordinate Legislation Act 1989* is sound and has delivered important gains in terms of regulatory quality and public participation in the regulation-making process. The report also identified several areas where improvements could be made to the New South Wales system. The suggested improvements will be considered along with other options for improving regulatory quality.

D.2 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. In addition to its role of providing advice and assistance to agencies on Regulation Impact Statements (RISs) and National Competition Policy legislation reviews, the Victorian Office of Regulation Reform provides research and secretariat support to the Government's Industry Sector Review Program. This Program is designed to develop a more streamlined regulatory environment and improve government services to key industry sectors. The Victorian Office of Regulation Reform also maintains an ongoing role in benchmarking best practice regulation across a wide range of industry sectors and jurisdictions and in examining industry concerns in relation to specific regulatory instruments.

Existing mechanisms for regulation review

The institutional arrangements in place for regulation reform are described briefly below.

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

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.

Annual Regulation Alert — A publication designed to allow business and the general public to know in advance those regulations due to sunset and it includes details of many new regulations proposed for the coming financial year.

Developments in regulation review

As noted in the last edition of *Regulation and its Review*, the Victorian Office of Regulation Reform has enhanced its research and benchmarking role with a focus on industry sector reviews. In the main, private independent consultants now undertake the certification of RISs under the *Subordinate Legislation Act 1994*.

The industry sector approach to reviews has been designed to ensure that Victorian industries are served by best practice regulation and administration. The tourism industry was the first review in this series and implementation of the Tourism Industry's Task Force recommendations is now complete. To date, the Office has provided secretariat support to two further reviews of the Victorian Aquaculture and Cut Flowers and Nurseries industries.

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

The recommendations made as a result of these reviews have received widespread industry support and implementation strategies are now being developed. The Office is currently in the process of identifying further industry sectors for inclusion in the Program on the basis of their potential growth and regulatory burden.

In March 1999, the Victorian Office of Regulation Reform launched its new Website which can be found at http://www.dsd.vic.gov.au/regreform. The site is tailored to the needs of business users, industry associations and government agencies and offers:

- improved access to up-to-date information on current reform initiatives;
- benchmarking of best practice regulation across a wide range of sectors;
- the full suite of Victorian Office of Regulation Reform publications and reports; and
- links to key sites covering a range of regulatory issues in Victoria, Australia and overseas.

The recommendation of the Victorian Law Reform Committee report (1997), *Regulatory Efficiency Legislation*, to permit businesses to obtain approval for alternative compliance mechanisms, was endorsed by the Victorian Government. This provides an opportunity for industry associations and businesses to develop alternative compliance mechanisms which will allow business to meet the objectives of regulatory regimes in a more efficient manner than provided for under prescriptive regulations. It is further anticipated that, in the near future, the Victorian Parliament's Scrutiny of Acts and Regulations Committee will be given the terms of reference to conduct a review of the Victorian RIS process.

D.3 Queensland

It is the role of the Business Regulation Reform Unit to instil change across Government in relation to legislative intervention by working with public and private sector agencies to improve the development and review of regulation and the client/government regulatory interface. The Unit is part of the Department of State Development.

The Business Regulation Reform Unit undertakes research into regulation reform issues, provides assistance and advice in relation to compliance of Queensland government agencies 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 to Government 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 or amended subordinate legislation which is likely to impose an 'appreciable' cost on business and the community in general. The Act provides that a RIS must include a statement of objectives, options for achieving the objectives and a cost-benefit analysis of each option. The Act also requires that the RIS be made available for consultation for a period of not less than 28 days.

RIS Guidelines and Software — Software has been developed to assist agencies undertaking a RIS. The software incorporates the requirements of the RIS and is used in conjunction with the RIS Guidelines.

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 after 10 years.

Developments in regulation review

The Red Tape Reduction Task Force has been re-established. The Task Force comprises representatives of business and industry and reports to the Minister for State Development on ways to reduce red tape for business, in particular, small business.

The nominal number of business licences is being reduced by 50 per cent and 115 business licences are being extended in term. The nominal reduction in business licences is being achieved by 'rolling up' similar licences into one licence and abolishing 96 licences. The extension in term will offer longer licence terms to business as an option. These initiatives will reduce compliance costs to business and are being implemented over a two year period. To date, approximately 50 per cent of licence rationalisation reforms have been achieved.

Guidelines on regulatory alternatives are being developed to improve regulations and create a more flexible regulatory environment for business. The guidelines will encourage agencies to introduce and promote non-regulatory ways of achieving the required objective.

Guidelines on customer service standards have been developed to improve service for business clients of regulatory agencies. The guidelines encourage agencies to

identify the customer needs of business and improve service, including flexible and efficient regulatory systems.

A consultancy study has been completed to identify ways of improving enforcement and appeal processes and making them simpler for business. Based on the major findings of the study, an interdepartmental working group has been established to develop consistent dispute resolution processes.

D.4 South Australia

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

Existing mechanisms for regulation review

Regulatory 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 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 legislation — The South Australian *Cabinet Handbook* gives effect to the Treasurer's Instruction which 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.

Consultation Requirements — The South Australian *Cabinet Handbook* requires 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

South Australia passed the *Trans-Tasman Mutual Recognition (South Australia) Act 1999* in March 1999, however, the Act has not yet commenced operation.

Business Licence Information System licences and forms are to become accessible via the Internet through the Business Channel project which is being managed by the Business Centre in the Department of Industry and Trade. The fully integrated Commonwealth, State and Local Government Business Licence Information System was officially launched in October 1997.

All codes of practice referenced in South Australian legislation have been identified so they can be added to the national Business Information Service.

D.5 Western Australia

The Federal and Constitutional Affairs Division of the Ministry of Premier and Cabinet is responsible for coordinating and overseeing regulatory reforms on a whole-of-government basis.

Each Minister and government agency is responsible for ensuring that reviews of legislation within their portfolios are conducted in an open and transparent manner, including a suitable period of public consultation.

The Competition Policy Unit of the Department of the Treasury is responsible for ensuring that the objectives of the National Competition Policy are carried out by government and local government agencies responsible for legislation and local laws. The Unit also advises and assists agencies to undertake reviews of existing and proposed legislation that potentially restrict competition.

Existing mechanisms for regulation review

Review initiatives in Western Australia are outlined below.

Regulation Review Panel — The Small Business Development Corporation and the Regulation Review Panel, which is convened by the Corporation, maintain a watching brief over legislation and policies that impact on small business. The

Corporation and the Panel submit comments and make recommendations to the Minister for Small Business on any proposed, or existing, legislation that is considered to have an adverse impact on small business.

Red tape forums — These forums were introduced by the Small Business Development Corporation to assist small business operators to 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. 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 before Parliament or the Joint Standing Committee on Delegated Legislation requires an explanatory memorandum outlining the purpose of the law, its 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

Local Laws Management and Review System — Developed by the Small Business Development Corporation, the Local Laws Management and Review System is a software tool designed to assist local governments to better manage their local laws and associated regulatory controls and, in doing so, minimise the regulatory burden placed on small business. The Local Laws Management and Review System provides small business and/or their representatives with the opportunity to be advised of, and involved in, regulation review and development processes that impact on the operation of a small business.

D.6 Tasmania

The Regulation Review Unit is located within the Department of Treasury and Finance and is responsible for administering Tasmania's regulation review system. This system comprises 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 framework does not unnecessarily impede or restrict overall economic activity and that businesses are only subject to well-targeted and appropriately justified legislation.

The Legislation Review Program principally covers primary legislation, incorporating both a review mechanism for existing legislation and gatekeeper arrangements for new legislation. The *Subordinate Legislation Act 1992* 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 on any sector of the public. In these circumstances, a RIS is submitted to the Regulation Review Unit for consideration and endorsement by the Secretary of the Department of Treasury and Finance prior to being publicly released for a mandatory 21 day period. Following this process, the proposed subordinate legislation is submitted to the Governor for approval.
- *Staged repeal* — The Act establishes a timetable for the staged automatic repeal of all existing subordinate 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 making subordinate legislation* — These guidelines require regulators to consider alternative options for achieving the Government's objectives and to estimate the impact of proposed subordinate legislation on competition.

The Legislation Review Program

The Legislation Review Program was introduced in 1996 and meets Tasmania's legislation review obligations under 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 in a negative manner are appropriately justified in the public interest.

- *Assessment of new legislation* — All new legislation is assessed by the Regulation Review Unit. 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 restricting competition. Where it is considered by the Regulation Review Unit 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 undertake a mandatory public consultation process. The RIS will assist in identifying whether the benefits to the public of the restriction outweigh the costs. Where a restriction is considered to be minor, review bodies will only be required to conduct 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 be also considered.

Developments in regulation review

The Tasmanian Government remains committed to reducing the burden of red tape and has also emphasised the importance of consultation in the policy process.

D.7 Australian Capital Territory

The National Competition Policy Unit in the Chief Minister's Department is responsible for the policy, coordination and implementation of regulatory reform in the ACT. The Business Support Unit within the Chief Minister's Department is responsible for business-related reforms and programs.

Existing mechanisms for regulation review

Regulatory reform — The *Manual for Regulatory Reform*, currently being re-drafted, provides guidelines on preparing Regulatory Needs Analyses and Business Impact Assessments. As mandated by the *Cabinet Handbook*, both documents are required when submitting regulatory proposals for Cabinet's consideration.

Legislation reviews — In the ACT, responsibility for conducting reviews has been devolved to agencies. The National Competition Policy Unit, in the Chief Minister's Department, oversights the timeliness, rigour and robustness of the reviews and any subsequent reforms and delivers the Chief Minister's Department review program.

All agencies, under clause 5(3) of the *Competition Principles Agreement*, are required to review and, where appropriate, reform portfolio legislation containing anti-competitive provisions by 2000. Legislation reviews are proceeding according to the revised schedule which reflects the schedule published in 1996, but modified with the benefit of experience from reviews since that time.

Agency regulatory plans — As part of the ACT Government's response to the recommendations of the Red Tape Taskforce, the Government agreed that agencies should develop regulatory plans each year. The plans provide information on the regulatory proposals to be considered during the year including any anticipated reform to existing regulations administered by the agencies and any reform initiatives planned by the agencies. In addition to this information, this year agencies will also provide information on achievements against the objectives published for the previous year. Each year in September, the Government publishes the consolidated report *ACT Government - Agency Plans*.

Developments in regulation review

Expansion of Independent Pricing and Regulatory Commission

On 15 June 1999, the Government agreed to amend the *Independent Pricing and Regulatory Commission Act 1997* to broaden the powers of the Independent Pricing and Regulatory Commission.

The effect of the amendments will be to expand the powers of the Commission from prices and access to encompass the reform of utilities regulatory arrangements and the development of a general regulatory role in the ACT.

Business Advisory and Regulatory Review Team

The Team was appointed by the ACT Government in May 1999 to advise on matters relating to small business and provides a mechanism for ongoing dialogue between the public and private sectors. It replaces the former Consultative Panel of Business Representatives.

Specifically, the team provides an important link to the business community and, in particular, assists the Government by providing feedback on government business initiatives. It consults with a range of business individuals, groups and associations on an *ad-hoc* basis and coordinates business community responses. In addition, the Team provides advice to the Government, when requested, on regulatory reform

and red tape issues in general, and specific regulatory proposals and issues as appropriate.

D.8 Northern Territory

The Northern Territory Department of Industries and Business continues to provide a regulatory review role within the Northern Territory.

Existing mechanisms for regulation review

The mechanisms for regulatory review continue with the Department of Industries and Business scrutinising any proposed regulation and its accompanying explanatory memorandum. Regulations which are complex or those that have wide ranging impacts on government and non-government agencies are referred to the Coordination Committee, which includes the Chief Executive Officers of all departments and government agencies, for consideration.

The Department of Industries and Business continues to work in partnership with the Chief Minister's Cabinet Office to ensure 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, minimal.

Developments in regulation review

A review of regulatory functions, including statutory boards commenced in 1998 as part of the 'Planning for Growth' exercise. The review will continue during the next two years.

One of the outcomes arising from the Planning for Growth exercise was the consolidation of agencies which provide services or regulatory functions to business and industry into a single Department. The Department of Industries and Business, was established in October 1998 and incorporates functions relating to:

- industry development (business services, industry investment, regional development, territory business centres and defence, tourism and major industry support);
- racing, gaming, liquor and licensing (policy and development and licensing inspectorate); and

- business practices (work health, fair trading, business registrations, trade measurement, procurement review, consumer and business affairs).

The Department was further enhanced in May 1999 with the introduction and establishment of Territory Business Centres in the four main regional centres, Darwin, Alice Springs, Katherine and Tennant Creek. These centres provide a single coordinated delivery and referral point for the services provided by the Department and can process various business licences.

E OECD reviews

Keeping watch over developments in regulatory review overseas can provide useful insights into how Australia can continue to improve its regulatory practices. The OECD has recently completed its first round of country reviews, which are an important aspect of the OECD Regulatory Reform Program. The reviews highlight many issues and challenges facing reformers and regulators.

E.1 The OECD country review process

The OECD Regulatory Reform Program involves the review of member country progress in regulatory reform and aims to help member countries improve regulatory quality. Established under a mandate from OECD Ministers, the program draws on the analysis and recommendations of good regulatory practices in the OECD (1997) report to Ministers, *Report on Regulatory Reform*.

Under the program, self-assessment and peer evaluation of regulatory review progress is carried out by review teams, made up of experts from various OECD committees and members of the International Energy Agency. The reviews take a multidisciplined, in-depth approach to examining a country's regulatory reform processes. They are focused on targeted areas of reform within the country under review, rather than seeking to be comprehensive.

The OECD commenced its first round of country reviews in March 1998. Japan, the United States, the Netherlands and Mexico were the first countries to come under review with the reports being finalised in mid-1999. The second round of reviews involving Denmark, Spain, Hungary and Korea has begun.

The OECD country reviews:

- focus on the reform of regulations that raise unnecessary obstacles to competition, innovation and growth and on ensuring regulations meet their social objectives;
- aim to help governments improve regulatory quality by highlighting future regulatory challenges facing the country;

- involve consultation with government officials (including some elected officials), business and union representatives, consumer groups and academics from broad-ranging regulatory disciplines; and
- attempt to contribute to the steady improvement of regulatory practices by strengthening self-assessment methods already in place, improving transparency and helping to sustain momentum for beneficial reform in member countries.

E.2 Identified strengths and weaknesses

This section reports the main findings of the first round of country reviews, including the review teams' interpretation of developments in regulatory reform.

United States

According to the US review team, regulatory reform in the United States helped launch the global reform movement and domestically has yielded many benefits. Deregulation and improvements in the quality of social regulation have contributed to 'one of the most innovative, flexible and open economies in the OECD, while maintaining health, safety and environmental standards at relatively high levels' (OECD 1999, p. 31).

The review team observed that the United States is not less regulated when compared to many member countries, but differently regulated even where the underlying policy objectives are similar. Two distinct regulatory approaches govern the US regulatory domain:

- a strong pro-competition stance, supported by well developed institutions — this stance means regulators favour competition neutral policy instruments; and
- openness and contestability of regulatory processes — this approach lowers the chances of the formation of information monopolies and encourages entrepreneurialism, market entry, boosts consumer confidence and the search for better regulatory processes.

The US Review team found that the dynamic effects of regulatory reform were larger than expected. Greater flexibility of labour and capital markets, competition throughout all sectors of the economy and a macroeconomic environment geared to growth all help to make regulatory reform most effective. A favourable entrepreneurial environment that gives business the ability to adjust to regulatory change increases the benefits and the speed at which the benefits filter through the

economy. The review found that regulatory flexibility and adaptability are as important as cost-effectiveness in assessing regulation.

It also found that 'in the electricity sector, the United States is relying more on markets to obtain economic and social policy objectives' (OECD 1999, p. 33) and the new institutions and policies are still in transition. There is trading in sulphur dioxide emissions permits and there are market mechanisms in place to promote the supply of 'green' electricity through choices in technology, generator and price. In the US telecommunications sector, the long distance market has been opened to competition and the number of households with telephones has grown over the reform period, achieving the US policy goal of 'universal service' in telecommunications.

In spite of many advances, significant challenges still remain for the United States. The review team identified factors that are likely to have eroded the benefits of pro-competitive reforms and regulatory transparency including:

- badly designed or applied regulations in many areas with lengthy procedures and excessively adversarial approaches;
- complex, highly detailed and rigid social and government formalities; and
- overlap of the federal and state systems.

According to the review report, the United States needs to make greater use of flexible and market oriented policy instruments, especially in social policy areas. Typically the states act as 'innovators and testing grounds for new ideas … a national asset that can speed up change and regulatory responsiveness' (OECD 1999, p. 35). It added that the way forward for the United States in continuing regulatory reform should involve the streamlining of cumbersome processes and the systematic review of regulations to ensure they continue to meet their objectives in an efficient and effective way.

The US review team recommended closer coordination of federal-state regulatory relations and that 'assessments of the effects of proposed rules on inward trade and investment should be carried out as part of regulatory impact analysis' (OECD 1999, p. 36). It also suggested that the United States should continue to promote the integration of regulatory policies internationally, through initiatives such as mutual recognition, conformity assessment procedures and the increased use of industry developed standards (instead of national measures) to produce benefits in the United States and in other countries.

Japan

Japan was seen as making slow but steady moves toward more transparent and less discretionary regulatory practices, led by the market and driven by recognition of the gap between international and traditional Japanese practices. The OECD review team recommended urgent action to speed up and deepen regulatory reform while at the same time managing the economic and social effects.

The Japanese economy has stagnated since 1992. While cyclical factors are present, the outmoded institutional framework has been identified as a contributing factor. Reforming restrictive government arrangements to improve administrative transparency, accountability, adaptability, and competition policy and enforcement were seen as priorities.

The review team noted that Japan was one of the first OECD countries to liberalise the telecommunications sector and that significant progress has been made. However, a lack of competitive safeguards initially dampened consumer benefits. According to the OECD, individual reform plans are needed to open the way for more competition in airlines, other transport modes, electricity, telecommunications and land use.

Sustained political support at the highest levels was seen as being essential for the reform effort. There has been strong support recently, but this will be difficult to sustain as more wide-reaching reforms come through. Improving public comment procedures is important on transparency and accountability grounds. The OECD review report also recommended that the Deregulation Committee in Japan should be given broader authority and its independence from government ministries clarified.

Mexico

Indicative of how far Mexico had to go, the pace and breadth of regulatory reform was found by the review team to have exceeded that of most other OECD countries (and compares to that of the emerging Eastern European countries). International commitments — Mexico's membership in GATT, APEC and the OECD, its part in NAFTA and other trade agreements with Latin American countries — have underpinned domestic reform efforts.

Regulatory cost-effectiveness has been promoted through the establishment of institutions — such as the Economic Deregulation Unit in the Ministry of Commerce and Industry — and the multi-party political system has challenged the traditional regulatory practices. The review also found that a major benefit of

Mexico's effort is the increased adaptability of the economy, enabling Mexico to rebound more quickly from major economic crises.

Mexico has reduced costs to industry in the communication and transport sectors contributing to increased productive efficiency and growth in exports. The opening up of the telecommunications sector illustrates Mexico's progress in reform, however, further efforts are required to ensure the benefits flow to consumers. The number of telephones per capita in Mexico is the lowest of all OECD countries and prices for consumers remain high. According to the OECD, sound competition law and policy were introduced in 1993 and provide 'an essential framework for economywide regulatory reform' (OECD 1999, p. 17). Complementary reforms are still necessary in water supply and energy and in legislative areas affecting business.

The review team noted that, the continuing success of regulatory reform depends on political support and the Government's ability to communicate the benefits of reform to stakeholders and the public. Government administration, despite some progress, still falls short of OECD best practice, particularly in regard to full public consultation.

It found that Mexico is an example of how trade liberalisation, market competition and reform of administrative processes are mutually supportive. For the future, the challenge is to build a wider constituency for reform. The reform program should aim to include visions of social welfare to ensure that business and citizens see substantive benefits.

The OECD review team recommended that the Economic Deregulation Unit presently in the Ministry of Commerce and Industry should be given greater autonomy (or transferred to central government) for ease of nationwide coordination. Also, the practice of regulation impact analysis should be advocated as a necessary tool for all areas of government and the level of analysis increased. Presently, gaps in some sectors undermine the overall effectiveness of reform. A systematic review of all regulation is needed with an emphasis on outdated laws in crucial business areas.

Netherlands

According to the OECD review, the Netherlands is an impressive example of the successful modernisation of a European state and its integration into the developing European single market. Three major strategies have been adopted:

- new competition law;
- increased exposure of the public sector to market forces; and

- a multifaceted program, called Functioning of markets, Deregulation and Legislative Quality, which focuses on improving the cost effectiveness of national and European regulations affecting economic activity.

Regulatory reform has produced major benefits for the Netherlands including, the reduction of export, distribution and transit costs and increased flexibility and innovation in the supply side of the economy. The review noted that flexibility and innovation will be important attributes as competition intensifies under the single European currency.

Reforms in electricity, transport and health sectors have brought wider choice and improved service quality for consumers. Many competitors have entered the telecommunications industry since the market was liberalised, but the challenge now is how best 'to manage the presence of a dominant incumbent' (OECD 1999, p. 26).

The review team found that flexible and efficient market based regulatory practices in the Netherlands mean that high levels of protection of health, safety and the environment have been possible. Policy responsiveness means that the economy can adjust to new conditions and problems readily.

While a single market has been a stimulus for beneficial regulatory and competition reform, the potential conflict for the Netherlands is that some European regulations may not meet Dutch regulatory quality standards.

The OECD review team concluded that new methods might be required to ensure that 'consensus-building traditions' do not detract from policy responsiveness. Greater emphasis should be given to transparency. According to the review team, the institutions and policy linkages governing reform need to be strengthened, with more supervision of delegated and self-regulatory powers.

Given the fast rate of technological change, for example in 'the convergence of telecommunications and broadcasting' (OECD 1999, p. 26), regulatory reform should be given priority to ensure change can be embraced. Also, globalisation, structural change and population ageing present significant challenges for the Netherlands.

Some lessons from the OECD reviews

It is the OECD's view that, importantly, the review process has shown that there are benefits from a sustained and comprehensive regulatory review program. Benefits are evident to consumers in terms of price and choice. For an economy as a whole,

advantages lie in greater innovation, investment and the birth of new industries stimulating growth and generating new jobs. This not only reinforces the value in pursuing reforms to the review countries, but also provides incentives to all countries to continue with regulatory reform.

A comprehensive approach, according to the review reports, will yield the greatest benefits. Political leadership and a demonstrated commitment to reform serve to guard against the forces of vested interests and are fundamental to the success of reforms. An open public dialogue on the benefits and costs of the reform process is the way to sustain reform efforts.

The OECD review teams found that the process of regulatory reform and deregulation brought significant adjustment costs and that the use of supportive social policies was appropriate to ease the burden of the changes. They also found that regulatory reform is not simply a process of eliminating inefficient regulation, but in the transition, new regulations and regulatory institutions may well be needed. Such steps help to ensure that anticompetitive behaviour does not come to light in the transition process and work to block the benefits of reform.

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