GREY–LETTER LAW

Report of the Commonwealth Interdepartmental Committee on Quasi-regulation

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CONTENTS

ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
APMA	Australian Pharmaceutical Manufacturers Association
AQIS	Australian Quarantine and Inspection Service
ASX	Australian Stock Exchange
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
DIST	Department of Industry, Science and Tourism
FBCA	Federal Bureau of Consumer Affairs
HREOC	Human Rights and Equal Opportunity Commission
IDC	Inter-departmental Committee
ISC	Insurance and Superannuation Commission
LIFA	Life Insurance Federation of Australia
MCA	Media Council of Australia
MoU	Memorandum of Understanding
NIA	National Interest Analysis
NOHSC	National Occupational Health and Safety Commission (Worksafe Australia)
OH&S	occupational health and safety
ORR	Office of Regulation Review
QIAS	Quality Improvement Accreditation Scheme
RIS	Regulation Impact Statement
SBDTF	Small Business Deregulation Task Force
TPA	Trade Practices Act 1974
TPC	Trade Practices Commission
WTO	World Trade Organisation

PREFACE

This report was prepared by the Commonwealth Interdepartmental Committee (IDC) on Quasi-regulation.

The IDC on Quasi-regulation was established in response to concerns raised in the 1996 report of the Small Business Deregulation Taskforce about inadequate review and scrutiny of quasi-regulation in Australia. In March 1997, the Prime Minister, in his statement *More Time for Business*, announced that a Commonwealth interdepartmental committee would be established to inquire into:

- the extent of quasi-regulation;
- the circumstances in which quasi-regulation is a viable alternative to government regulation;
- essential features of successful quasi-regulation; and
- processes for monitoring and reviewing quasi-regulation to ensure that it is current, effective and efficient.

The interdepartmental committee was chaired by the Office of Regulation Review — part of the Productivity Commission — and consisted of representatives of the following departments and agencies:

Attorney-General's Department
Australian Competition and Consumer Commission
Department of Industry, Science and Tourism
Department of Prime Minister and Cabinet
Department of Workplace Relations and Small Business
Treasury

The report was presented to the Assistant Treasurer on 19 December 1997.

The Government's decisions in response to this report will be embodied in a revised edition of the Office of Regulation Review publication *A Guide to Regulation*.

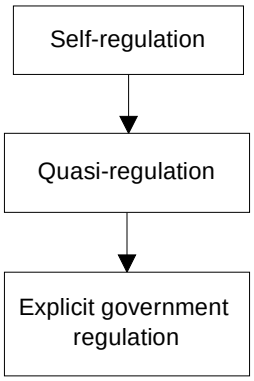
SUMMARY AND RECOMMENDATIONS

WHAT IS QUASI-REGULATION?

Regulation can usefully be considered as a spectrum ranging from self-regulation where there is no government involvement, through various regulatory arrangements with increasing degrees of government influence and involvement, to explicit government regulation (often referred to as "black-letter law").

In this report the term "quasi-regulation" refers to the range of rules, instruments and standards where government influences businesses to comply, but which does not form part of explicit government regulations. Quasi-regulation can take many forms such as codes of practice, advisory notes, guidelines, and rules of conduct, issued by either non-government or government bodies. In the context of a regulatory spectrum, quasi-regulation might be considered as "grey-letter law".

A simplified spectrum of regulation



Importantly, the boundaries between these three principal forms of regulation are indistinct. For example, if an industry develops and implements a code of practice in response to government suggestions that there is a need for such a code, its essential characteristics may move away from self-regulation towards quasi-regulation. Further, if Parliament writes into law the ability for industry codes to be made mandatory for any single

company which fails to voluntarily meet the code, then its character becomes less quasi-regulatory and closer to explicit government regulation.

Thus, it is evident that these three principal forms of regulation should not be regarded as mutually exclusive groups. It is better to consider them as lying on a continuous regulatory spectrum, ranging from no government involvement to complete government control, with quasi-regulation occupying the middle ground.

WHAT ARE THE CONCERNS ABOUT QUASI-REGULATION?

Particular concerns were raised in the 1996 National Small Business Summit and in the report of the Small Business Deregulation Task Force that quasi-regulation can affect the behaviour of businesses and impose a burden similar to explicit government regulation. In contrast to the situation with government regulation, there is no mechanism for ensuring that specific quasi-regulatory arrangements confer a net public benefit.

The Task Force recommended that, as is the case for new or amended government regulation, quasi-regulatory arrangements should be subjected to cost-benefit analyses and independent review processes to ensure they remain effective and efficient.

The Commonwealth Government's response *More Time for Business* (Prime Minister 1997) was to agree in part, but to note that further work was required in order to fully respond to these issues. Part of that work was given to this Committee.

PURPOSE OF THIS REPORT

The Committee was asked by the Government to inquire into and report (with recommendations) on:

- the characteristics and extent of quasi-regulation (mainly in the Commonwealth jurisdiction);
- the circumstances in which quasi-regulation is a viable alternative to government regulation;
- essential features of successful quasi-regulation; and

- processes for monitoring and reviewing quasi-regulation to ensure that it is current, effective and efficient.

The Committee was asked to propose guidelines as to the circumstances where self-regulation is likely to be appropriate, and to contrast those with circumstances where quasi-regulation or explicit government regulation may be appropriate.

In addition, the Committee was asked to include in this report its comments on the referencing of previously voluntary standards in regulation and suggestions as to appropriate criteria to be met before codes can be prescribed under the *Trade Practices Act 1974*.

In preparing this report, the Committee consulted with a cross-section of industry bodies, consumer representatives and regulatory agencies.

CHARACTERISTICS AND EXTENT OF QUASI-REGULATION

Early in its work program, the Committee found that it would not have sufficient time or resources to undertake a methodical collation of the extent of quasi-regulation in the Commonwealth's jurisdiction. In addition, the Committee wanted to avoid duplication of work commissioned by the Department of Industry, Science and Tourism (DIST) to develop a database on codes of practice. This initiative, in response to Recommendation 41 of the report of the Small Business Deregulation Task Force, will provide business with information on all codes which may affect their operations.

The consultant engaged by DIST (Stenning and Associates) completed a scoping study in October 1997 which identified upwards of 30,000 codes, standards and specifications. While these cover all levels of government and include self-regulation and mandatory codes as well as quasi-regulatory schemes, the study suggests that quasi-regulation (codes, guidelines, rules etc) is used extensively.

Also, the consultant reported:

> "Quasi-regulatory codes are very difficult to identify and maintain. There is no formal mechanism by which government announces the adoption of a quasi-regulatory instrument. This makes identification, collection and monitoring extremely difficult." (Stenning 1997, p. 7)

The Committee therefore has relied on a cross-section of quasi-regulatory arrangements, and on information gathered during its program of consultations, to build up a picture of major characteristics of quasi-regulation. Some types identified, and specific examples, are provided in Table 1.

ISSUES RAISED BY QUASI-REGULATION

Such examples and the information gathered during consultations point to key issues raised by the use of quasi-regulation. Issues include how quasi-regulation fits in to the broader regulatory environment, how it is used, and the consequences of quasi-regulation.

Lack of government justification and risk assessment. There are perceptions that governments are inconsistent in their choices of regulatory forms, sometimes insisting on quasi-regulation or explicit government regulation when a self-regulatory approach could work. But governments also were criticised for sometimes being too light-handed. Some of those consulted said that governments often fail to justify their chosen course of action, and that there appears to be little effort made in assessing actual risks (rather than perceived risks) when particular problems arise.

"Backdoor" regulation. Those consulted said that inappropriate adoption and use of quasi-regulation may give too much discretion to regulators. The consultant engaged by DIST noted similarly:

> Government agencies favour the use of codes because they are more easily introduced than traditional statutory rules and in some cases because they may be amended without reference to Parliament. (Stenning 1997, p. 5)

Some of those consulted emphasised that when industry is pressured by government into quasi-regulatory arrangements, compliance tends to be low thereby undermining the long-term effectiveness of the regulation. The reverse, industry pressuring government into putting its authority behind voluntary arrangements, may also lead to inappropriate quasi-regulation.

Table 1: Types and examples of quasi-regulation

Types of quasi-regulation	*Examples*
1. Industry based code with endorsement by a government agency	Supermarket (checkout) scanning code is industry formulated and enforced, and has TPC/ACCC endorsement.
2. Industry based code or standard developed in response to actual or perceived threat by government to regulate	Master Builders' Code acknowledges the need to change from within the industry "or suffer the consequences of government regulation".
3. Substantial government involvement in the development and subsequent monitoring of a code or standard	Code of Banking Practice was developed by a committee of officials, is implemented by the banks, but reported on annually by the Australian Payments System Council (a government body).
4. Industry code or standard required by legislation, but developed and implemented by industry, with reserve enforcement powers given to a regulatory authority	New telecommunications legislation provides for industry codes of practice, including for billing and customer complaints. Compliance will be voluntary but the Australian Communications Authority has the power to direct any particular company to comply.
5. Agreements negotiated between industry and government	In April 1997 the Australian and New Zealand Environment and Conservation Council (ANZECC) signed new voluntary waste reduction agreements with the newsprint, paper packaging, steel can and high density polyethylene industries.
6. Government guidelines to assist business meet legislative requirements by suggesting actions not specified in law	Human Rights and Equal Opportunity Commission has published advisory notes on access to premises for disabled persons — the Disability Discrimination Act makes it unlawful to discriminate against a person with a disability. Adherence to these notes is said to assist in defending a complaint if one were lodged.
7. Standards and codes established by government, with compliance being achieved because it is a pre-condition for other benefits	Quality Improvement Accreditation System (QIAS) — a child must attend a day care centre which meets QIAS standards in order for the parents to qualify for financial assistance under the Commonwealth's Childcare Assistance Program.
8. Use by the courts of voluntary standards and codes in determining what is reasonable in, for example, negligence cases	In *Anne Christina Benton v Tea Tree Plaza Nominees* (1995 64 SASR 494), Duggan J used non-compliance with a voluntary Australian Standard for kerb height as a factor in determining negligence. In *Paul Maurice Nagle v Rottnest Island Authority* (1993 112 ALR 393), the High Court found the defendant failed to provide appropriate warning of dangerous swimming conditions, referring to Australian Standard 2416.

Regulatory "creep". Those consulted raised concerns that sometimes what starts out as self-regulation can become widely accepted practice, gain an

imprimatur from a government agency, and then become embodied in a quasi-regulatory arrangement (and may become black letter law). For example, the Banking Industry Ombudsman scheme, a complaints handling mechanism implemented and funded by the banks, was subsequently linked to the Code of Banking Practice which is subject to substantial Government involvement.

Minimum acceptable or best practice? The approach behind many self-regulatory codes of practice is to improve the overall quality of products and services, and therefore tends to be pitched at "best practice". Should a best practice approach be built into mandatory requirements, either quasi-regulation or government regulation, they may impose a significantly higher compliance burden than would be justified by the principle that mandatory regulation should be the minimum necessary to achieve the set objectives.

For example, the Quality Improvement Accreditation System (QIAS) which promotes best practice in terms of a high quality environment in day care centres for children, is judged by some representatives of that sector as imposing an unjustifiable compliance burden. They contend also that this quasi-regulatory arrangement has imposed the costs of an additional Commonwealth layer of regulation on top of the established State and local regulation, for no tangible benefit.

Uncertainty and litigation. The use of performance based regulation provides flexibility as to how business can meet the set objectives thereby giving scope for efficiency improvements and innovation. Yet many small businesses do not have the resources or expertise to operate under such conditions, and prefer the certainty of following a prescribed set of specific rules. Doing so also is preferred because the risk of litigation, for example for negligent conduct, is perceived as less under prescriptive regulation. As a result, where there is performance based regulation, there is often a demand for quasi-regulatory rules which can provide guidance to business on how to comply with mandatory requirements.

Confusion. There is confusion, particularly in the small business sector and consumer organisations, as to the status and enforceability of many quasi-regulatory arrangements. Reactions among businesses range from "compliance obsessiveness" from some large businesses, which adhere to all regulations regardless of their status because they are concerned about public perceptions, to disenchantment by some small businesses which may

contribute to their failure to comply with some regulations, including explicit government regulations.

Flexibility and costs. Industry representatives are of the view that quasi-regulation generally leads to higher costs for the industry as a whole than does explicit government regulation because it requires substantial industry involvement. There may be consequent higher prices for consumers. Yet the added flexibility, and the enhanced consultation between industry and the relevant regulatory authority, are judged by some of those consulted to be worth the additional costs.

Potential advantages of quasi-regulation. Compared with explicit government regulation, quasi-regulation can:

- encourage a collaborative, rather than an adversarial approach, to achieving joint industry-government-consumer objectives;
- be more amenable to innovative ways of achieving objectives; and
- avoid the formality and inscrutability of much legislation.

VOLUNTARY STANDARDS AND REGULATION

More Time for Business indicated that this Committee should comment on the use of standards in regulation.

The bulk of widely recognised standards are those developed by Standards Australia, a non-government standards writing body. There are some 5700 Australian Standards. About half are referenced in legislation and regulations by government, whereby they become mandatory. Half are voluntary standards. Standards play an important informational and quality assurance role with regard to products and services.

Many recommendations in the Kean report on Australia's standards and conformance infrastructure (Kean 1995) focussed on Standards Australia's structure and the processes it uses in developing Australian Standards, as well as the relationship between the Commonwealth Government and Standards Australia. The Government and Standards Australia have taken action on these matters. Although the Kean report made recommendations on the use of voluntary standards in regulation (Recs. 27, 28 and 46), the Committee concluded that further action on these matters seems necessary in view of the consequent impact on business in complying with the regulations.

Government regulators have made use of Australian Standards without adequate assessment of whether they are necessary to meet the objectives of the regulation. One consequence is that quite technical, prescriptive and input oriented Australian Standards are referred to in regulation when a more outcome oriented approach may have resulted in more effective regulation. While regulators are meant to assess the suitability of standards before using them in regulation, there is little evidence in regulation impact statements that they do so. There would be merit in an explicit directive to regulators that they must assess and justify the referencing of standards in regulation.

An outcome oriented approach to regulation which includes "deemed to comply" provisions has a number of advantages. It gives producers and service providers freedom to choose how the outcomes required by the regulator can best be met. In this way it encourages innovation and the development of least cost solutions. At the same time it provides certainty for those who desire it that if they can demonstrate that they meet technical standards specified by the regulator, which may be an Australian Standard, they will be deemed to comply.

The Commonwealth Government is taking various initiatives to make the law more accessible. For example, it has proposed a register of legislative instruments and is making legislation available on the Internet. Yet those laws which make substantial use of Australian Standards may remain relatively inaccessible because of the need to purchase and comprehend the referenced Standards so as to be able to comply with the law. The Committee recognises that Australian Standards are the intellectual property of Standards Australia which sells its products to users, but notes the desirability that those who must comply with the law should have reasonably low-cost access to referenced Standards.

Recommendation 1

The Committee recommends that departments and regulatory agencies, when using standards, should:

- *wherever possible, reference in regulation only those parts of a voluntary standard that are essential to satisfy regulatory objectives;*
- *ensure that all future reviews of Commonwealth legislation and regulation include an explicit assessment of the suitability and impact of all standards referenced therein, and justify their retention if they remain as referenced standards;*
- *ensure that, where appropriate, Australian Standards are used as "deemed to comply" provisions rather than as mandatory requirements; and*
- *investigate, with Standards Australia, mechanisms to provide businesses with low cost access to Australian Standards referenced in legislation.*

There is misunderstanding, mainly among small businesses and consumers, as to the status of Standards Australia, with some presuming it to be a government body or at least that all Australian Standards are government endorsed. Consideration of any appropriate action to correct such misunderstanding could await further deliberations of the Working Group of Commonwealth, State and Territory officials because the impact on business of Australian Standards appears to be more in areas of State and local government responsibility than of Commonwealth responsibility.

Recommendation 2

The Committee recommends that action be taken to counter the perception held by some elements of small business that Standards Australia is a government body and that there is an expectation that all its standards must be complied with. The appropriate form of action should be based on advice of the quasi-regulation Working Group of Commonwealth, State and Territory officials.

Standards Australia on occasions develops standards in areas which are regulated by specific government agencies such as Worksafe Australia, raising the risk of duplication and inconsistency and possibly adding to confusion among businesses as to what is mandatory and what is voluntary.

Recommendation 3

The Committee recommends that Commonwealth Government regulators establish mechanisms to help ensure that existing and new standards developed by private organisations are consistent with mandatory government regulations. One way of doing this would be for regulatory bodies to establish a closer working relationship with Standards Australia through, for example, negotiating Memoranda of Understanding which establish the relative roles of each party in relation to the development of standards.

Finally, those Australian Standards which are not referenced in regulation, and are therefore voluntary in nature, may be accepted in courts of law as having evidentiary status. Two examples were provided in Table 1. The Committee notes that use of Australian Standards as a factor in, for example, determining negligence is just one element in a range of evidence used by courts. Furthermore, such standards can be used both for demonstrating negligence and as a defence. The Committee is of the view that no action is warranted at this stage, but that it would be worthwhile monitoring this aspect of the use of standards because if it becomes more widespread it may have implications for how standards should be developed and applied.

CHOOSING FROM THE REGULATORY SPECTRUM

When addressing some particular issue, guidelines are needed as to which of the three principal regulatory forms — self-regulation, quasi-regulation or explicit government regulation — may be the most appropriate.

With regard to self-regulation, the Commonwealth Government has said that it

> .....is keen for industry to take ownership for developing effective and efficient self-regulation mechanisms where this is appropriate. To this end the Commonwealth interdepartmental committee on quasi-regulation will consider the circumstances in which self-regulation may be appropriate." (Prime Minister 1997, p. 77)

With regard to quasi-regulation, *A Guide to Regulation* (ORR 1997) indicates that when such arrangements are considered by government they should be subject to the regulation impact statement (RIS) process described in that publication.

While the RIS framework requires that consideration be given to all three principal forms of regulation, little information is currently provided about the basis on which the choice should be made, except that all feasible options should be assessed and compared.

The Committee and those consulted concluded that a checklist would assist with the selection from among the different regulatory forms.

The following checklist attempts to provide more specific guidance on choosing the best regulatory form. It indicates factors that will help determine which of self-regulation, quasi-regulation or explicit government regulation is, prima facie, worth considering as a regulatory option. The checklist should not be used as a means of determining which option would be best, but can be used for identifying suitable options which would warrant a full cost-benefit analysis in the context of a regulation impact statement. In the final analysis, relative cost effectiveness will be the key factor in deciding which regulatory option should be used.

Checklist for the selection of regulatory options

STEP 1 - Identify the problem

- Clearly define the problem, for example:
  - lack of competition

- human health and safety risks
- damage to the physical environment
- unacceptable industry behaviour/unfair trading practices
- insufficient or misleading market information
- unacceptable transactions costs for consumers

- Are there deficiencies in the existing regulatory system which, if corrected, might fix the problem?
- Is the problem one for government or of purely private interest?

STEP 2 - Assess the risk

- What is the risk of the problem occurring?
- How widespread is it — local, state, national, international?
- Is it recurring?
- Is it significant?

STEP 3 - Assess the consequences of no action

- List the consequences of no action
- Can relying on the market in conjunction with the general application of existing laws solve the problem? Why not?
- Will the market self correct within a reasonable timeframe?
- Can a regulatory scheme improve the situation?

STEP 4 - Assess regulatory forms for effectiveness

(1) Self-regulation should be considered where:

- there is no strong public interest concern, in particular, no major public health and safety concern
- the problem is a low risk event, of low impact/significance
- the problem can be fixed by the market itself, ie there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements (industry survival, market advantage).

In addition, for self-regulatory industry schemes, as opposed to individuals voluntarily opting for a particular standard, success factors include:

- presence of a viable industry association

- adequate coverage of industry concerned
- cohesive industry with like minded/motivated participants committed to achieve the goals
- voluntary participation can work – effective sanctions and incentives can be applied, with low scope for the benefits being shared by non-participants
- cost advantages from tailor made solutions and less formal mechanisms such as access to quick complaints handling and redress mechanism.

(2) Quasi-regulation should be considered where:

- there is a public interest in some government involvement in regulatory arrangements and the issue is unlikely to be addressed by self-regulation
- there is a need for an urgent, interim response to a problem in the short term, while a long-term regulatory solution is being developed
- government is not convinced of the need to develop or mandate a code for the whole industry
- there are cost advantages from flexible, tailor made solutions and less formal mechanisms such as access to a speedy, low cost complaints handling and redress mechanism
- there may be advantages in the government engaging in a collaborative approach with industry, with industry having substantial ownership of the scheme. For this to be successful, the following conditions need to apply:
  - a specific industry solution is required rather than regulation of general application
  - there is a cohesive industry with like minded participants, motivated to achieve the goals
  - a viable industry association exists with the resources necessary to develop and/or enforce the scheme
  - effective sanctions or incentives can be applied to achieve the required level of compliance, with low scope for benefits being shared by non-participants
  - there is effective external pressure from industry itself (survival factors), or threat of consumer or government action.

(3) Explicit government regulation should be considered where:

- the problem is high risk, of high impact/significance, for example, a major public health and safety issue
- the government requires the certainty provided by legal sanctions
- universal application is required (or at least where the coverage of an entire industry sector or more than one industry sector is judged as necessary)
- there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles and no possibility of effective sanctions being applied
- existing industry bodies lack adequate coverage of industry participants, are inadequately resourced or do not have a strong regulatory commitment.

Recommendation 4

The Committee recommends that a checklist similar to that above, which provides guidance on choosing from the principal regulatory forms and in particular on the appropriate use of quasi-regulation, be endorsed by the Government, be published in a revised edition of "A Guide to Regulation", and be used by all Commonwealth officials in considering proposals for new or amended quasi-regulation or government regulation.

CRITERIA FOR PRESCRIPTION OF CODES UNDER THE TPA

In September 1997 the Commonwealth Government announced that it would propose amendments the *Trade Practices Act 1974* (TPA) to allow prescription of industry developed codes of practice as either:

- **mandatory**, whereby they can be enforced o all businesses in the specified industry regardless of whether they are signatories to the codes; or

- **voluntary** and therefore enforceable only on those businesses which are signatories.

This approach was described as giving "small business the capacity to influence the type of industry regulation by participation in code development, as well as the security of legal recognition of codes and the remedies that flow from that." (Minister for Workplace Relations and Small Business, September 1997)

The Government indicated its intention to prescribe both the Franchising Code of Practice and the Oilcode as mandatory under the TPA. Against a background of its policy that industry should take ownership for developing efficient and effective self-regulatory mechanisms, the Government has directed this Committee to suggest criteria which should be satisfied before other codes are considered as candidates for prescription under the TPA.

Recommendation 5

The Committee recommends that prescription under the TPA should proceed only if all of the following prerequisites have been met:

- *a market failure has been identified that will, in the absence of government intervention, have a significant detrimental impact on a substantial group in the community* ***or*** *there is a social policy objective that, if not pursued by government, will have a significant detrimental impact on a substantial group in the community;*

- *a systemic enforcement issue exists, for example with breaches of voluntary industry codes and lack of agreement on fair trading principles, which has led to the failure of self-regulatory or quasi-regulatory arrangements;*
- *there are significant deficiencies in any existing regulatory regime which cannot be remedied (for example, inadequate industry coverage);*

- *a range of self-regulatory options and "light-handed" quasi-regulatory options has been examined and demonstrated to be ineffective.*

The Committee notes that the Commonwealth's RIS process provides for the analysis of the above issues and that a comprehensive RIS will be required for any code which is under consideration for prescription under the TPA. The Committee proposes that the RIS should be distributed as part of the consultation with all affected parties.

STRATEGIES TO ACHIEVE SUCCESSFUL QUASI-REGULATION

The Committee has identified strategies to help ensure that quasi-regulatory arrangements are successful in achieving their objectives.

The relationship between business, government and consumer representatives should be collaborative so that all parties have ownership of, and commitment to, the arrangements. That commitment will be reinforced if appropriate incentives are built in. Importantly, sufficient resources must be made available to ensure the arrangements work, and there must be equitable contributions from both business and government. It is important, also, to ensure that compliance costs are reasonable given the problem being addressed.

Because there is no systematic way of announcing, launching or promulgating quasi-regulatory arrangements, knowledge of their existence and details as to their content may not be readily accessible by all groups affected. A strategy should be adopted to publicise to all interested groups some basic information and details as to how further information can be obtained if required.

In cases where the extent of government involvement is not significant, this role should remain with industry. However, where there is substantial government involvement, it would be appropriate for the relevant agency to ensure that adequate information is made available to those affected.

Recommendation 6

The Committee recommends that in cases where departments and agencies have a substantial role in the

initiation, development or implementation of new or amended quasi-regulations, they take steps to notify those affected and keep a public register of relevant details. The public register should be accessible in electronic format by, for example, inclusion in departments' and agencies' home pages.

It is widely accepted that many quasi-regulatory arrangements will not be effective unless a satisfactory complaints handling mechanism is in place which is able to trigger effective sanctions and provide relevant information and incentives for industry to identify any problems.

Recommendation 7

The Committee recommends that those involved in the development of quasi-regulation affecting relationships between businesses and consumers, or between businesses, should actively support establishment of an accessible, low cost and transparent complaints handling mechanism which is able to trigger effective redress and sanctions.

Despite having suitable incentives, many quasi-regulatory arrangements will only be effective if meaningful sanctions can be applied to those who fail to meet their obligations. Code administrators have been deterred from applying sanctions when threatened with legal action, thereby rendering the arrangements ineffective.

Recommendation 8

The Committee recommends that defamation and negligence issues that may be associated with the administration of codes of practice be addressed by government officials involved in the development of these types of quasi-regulation by:

(a) drawing these issues, where appropriate, to the attention of the proponents of the quasi-regulation and/or its prospective administrators; and

(b) promoting the need for all codes of practice to contain provisions which clearly set out the role of the administrator and, in particular, in reporting on the operation of the code and applying sanctions against members.

MONITORING AND REVIEW OF QUASI-REGULATION

There is a well-established principle that legislative and other mandatory regulatory arrangements should be formally reviewed at regular intervals and, if necessary, be amended to ensure their ongoing effectiveness. Given the absence of a formal mechanism for Parliamentary scrutiny for quasi-regulatory arrangements, it is even more important that they be monitored and reviewed at specified regular intervals.

Recommendation 9

The Committee recommends that departments and agencies involved in the formulation or funding of quasi-regulation should encourage the industry parties to establish a formal monitoring and review mechanism or, in cases where the government involvement is so extensive as to require such accountability, should carry out that function.

WHAT WILL HAPPEN TO THIS REPORT

In parallel with the work of this Commonwealth Committee, a Working Group of Commonwealth, State and Territory officials has been established to report on what further action might be appropriate in relation to review and scrutiny of quasi-regulation. The Working Group will draw on this report in preparing a document for the next national small business summit in June 1998, for subsequent consideration by COAG.

The Commonwealth Government announced in *More Time for Business* that its decisions in response to this report would be embodied in a revised edition of the Office of Regulation Review publication *A Guide to Regulation*.

CHAPTER 1
What is quasi-regulation?

1.1 INTRODUCTION

Regulatory reform — including the canvassing of regulatory alternatives to 'black-letter' law which has led to increased interest in quasi-regulation and self-regulation — has been driven by several factors. These factors include:

- a need to remove unnecessary obstacles to dynamic market forces that drive efficiency, innovation and growth;
- concerns about reducing unreasonable compliance costs imposed on some business, particularly small businesses; and
- finding better ways to achieve legitimate public policy goals.

In the Commonwealth sphere, interest in regulatory alternatives has been reflected in Government policies that guide regulation makers towards less heavy handed regulatory options than traditional 'black-letter law'. Indeed, in the Prime Minister's March 1997 Statement *More Time for Business*, the Government stated it was keen for industry to take ownership and responsibility for developing effective and efficient self-regulation, where this is appropriate. Furthermore, the Government decided that self-regulation should be the first regulatory option considered by policy makers. In addition, the Minister for Customs and Consumer Affairs, the Hon Warren Truss MP, has responsibility for encouraging effective codes of conduct and will be releasing a policy framework for codes which deals with this issue.

The consideration of alternatives to explicit government regulation is also reflected in Commonwealth Regulation Impact Statement (RIS) requirements. The RIS process requires regulators to, amongst other things, assess all viable alternatives when formulating new regulatory proposals that affect business or restrict competition (see the Office of Regulation Review publication *A Guide to Regulation* for the Commonwealth RIS requirements).

This chapter describes what quasi-regulation is, and how it relates to self-regulation and to explicit government regulation. Selected examples

indicate the many and varied forms of quasi-regulation; detailed examples are in Chapter 2.

1.2 WHAT IS 'REGULATION'?

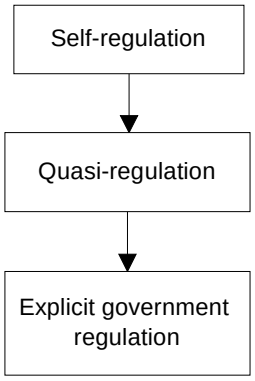
One of the terms that people often interpret differently is 'regulation'. To some, it means 'black-letter law' or legislation only; to others it can mean a broad spectrum, from self-regulation through to 'black-letter law'. The Committee judged the former definition as too limiting for its purposes — if quasi-regulation is a subset of regulation as a whole, then a broad interpretation of regulation is required.

Therefore, the Committee used the following definition of regulation. [1]

> Regulation includes any law or 'rule' which influences the way people behave. Regulation is not limited to government legislation; and it need not be mandatory.

It is helpful to view the principal forms of regulation as part of a continuing spectrum of increasing government involvement, as illustrated in summary form in Figure 1 below.

Figure 1 A summary of the spectrum of regulation



At the top of the spectrum lies self-regulation where industry formulates and enforces its own rules. At the bottom is 'black-letter law' where

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[1] The variety of forms of regulation are reflected in the diversity of terms used to describe them, including: legislation, codes of practice, rules, standards, laws, principles, best practice processes and guidelines.

government formulates and enforces legislation. In between these boundaries lies a range of quasi-regulatory regimes and mechanisms.

Overlaying the spectrum of regulation is the common law, consisting of legal principles and precedents arising from court decisions. This body of law can be relevant over the whole of the regulatory spectrum. For example, court action initiated by an industry participant may develop legal principles which will have an industry-wide impact. Furthermore, court decisions may take voluntary principles and refer to or comment on them to make judgements on industry standards and the duty of care in negligence cases. Common law is also used to interpret legislation. Hence, the common law appears to overlay the whole of the regulatory spectrum, from self-regulation through to explicit government regulation.

Sections 1.3 to 1.5 of this chapter sketch the characteristics of the three principal forms of regulation, including the extent of government involvement in such areas as formulation, enforcement and funding; and the perception of the need to comply with the regulation.

1.2.1 Boundaries of the work of the Committee arising from the terms of reference

The terms of reference (see Appendix A) of the Committee focus its work on regulations which impact on business, especially small business.

In particular, the Committee was asked to investigate:

(a) the characteristics and extent of quasi-regulation;

(b) the circumstances in which quasi-regulation is a viable alternative to government regulation;

(c) essential features of successful quasi-regulation; and

(d) processes for monitoring and reviewing quasi-regulation to ensure that it is current, effective and efficient.

The Committee was also asked in the terms of reference to propose guidelines as to the circumstances where self-regulation is likely to be appropriate, and to contrast those with circumstances where quasi-regulation or, alternatively, explicit government regulation, may be appropriate.

In addition, the Committee was asked to comment on the use of standards in regulation and to make suggestions as to appropriate criteria to be met before codes can be prescribed under the proposed s.51AD of the *Trade Practices Act 1974*.

It should be noted that the terms of reference exclude some areas — treaties, administration of laws, and taxation issues — from consideration by the Committee.

Some unratified treaties resemble quasi-regulation in that, while they do not have the full force of law, there is a widespread expectation that they should be complied with.[2] It is noted that the Government has decided that treaties involving regulation will be subject to RIS requirements.

The administration of laws is also excluded from the Committee's scope. The administration of laws refers, amongst other things, to the way in which regulatory agencies handle complaints and serve customers. Improving the administration of laws has already been addressed in the Government's response to the Small Business Deregulation Task Force's (the Task Force) Recommendations 38 and 39 (*More Time for Business* p.54-5). The Government's response requires that service charters be progressively developed during 1997-98 by Commonwealth departments, agencies and enterprises dealing with the public and that they report annually on performance against service charters. This complements other initiatives in the Government's public sector reform agenda, including the revision of the Public Service Employment framework and the Quality Client Service project.

To an extent, taxation, which has drawn criticism for generating high compliance costs, has also been addressed in the Government's responses to the Task Force Recommendations 1 to 11 and 51(b) (*More Time for Business* pp.17-28, 66). The Government's responses to Recommendations 1 to 11 concern specific taxes and taxation issues. The Government's response to Recommendation 51(b) requires a modified RIS to be prepared for tax initiatives, which will examine the administrative options for ensuring compliance with taxation proposals and the costs of each alternative to ensure that compliance cost considerations are fully taken into

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[2] See, for example, *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273

account. The modified RIS guidelines for tax measures are outlined in *A Guide to Regulation*.

1.3 EXPLICIT GOVERNMENT REGULATION

Explicit government regulation consists mainly of two basic groups — primary and subordinate legislation — distinguished by the basis of the legal mechanism by which it is made. The following comments apply to the Commonwealth. Similar arrangements exist in the States and Territories.

1.3.1 Primary legislation

This form of regulation receives scrutiny and passage by Parliament.

> Primary legislation consists of Acts of Parliament.

1.3.2 Subordinate legislation

Subordinate legislation can be made in a variety of forms. The three main forms at the Commonwealth level are:

- statutory rules which must be approved by the Governor-General in Council and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament;
- disallowable instruments which are made by Ministers or government agencies and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament; and
- other subordinate legislation which is not subject to parliamentary scrutiny.

> Subordinate legislation comprises instruments (however described) which have the force of law and are made by an authority to which Parliament delegates part of its legislative power.

1.4 SELF-REGULATION

The Committee was given the specific task of proposing guidelines as to the circumstances where self-regulation is likely to be appropriate. Self-regulation is one of the ways that regulatory outcomes can be achieved in a more flexible and non-interventionist manner than by government regulation. Self-regulatory approaches can achieve minimum effective regulation, but can be as inefficient as any regulatory type if they do not address the underlying problem, or are poorly drafted or administered.

The Committee found that many different perceptions existed of what constitutes self-regulation. Appendix B lists some previous definitions.

Self-regulation can cover a range on the regulatory spectrum. For example, in 1988 the Trade Practices Commission (as it then was) reported on self-regulation in Australian industry.[3] Volume 3 of that report was a compendium which listed 480 self-regulatory schemes. Whilst a proportion of these schemes had some government involvement in their development, some were formulated and enforced without any government involvement whatsoever.

Therefore, at one end of the range, self-regulation can include industry schemes with no government involvement. Self-regulation can also include industry schemes where government agencies have been involved in the initial formulation stages of the regulation.

The Committee's working definition of self-regulation is as follows.

> Self-regulation is any regulatory regime which has generally been developed and funded by industry, and is enforced exclusively by industry.

In addition, self-regulation can include schemes where one industry or group of businesses agree with another industry or group of businesses on

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[3] Trade Practices Commission 1988

certain obligations. For example, the Australian Cold Chain Code of Practice was designed by three groups — manufacturerers, distributors and retail groups — and is intended to ensure refrigerated and frozen products are handled in conditions that ensure optimum product quality for the consumer. This voluntary code has been adopted by the majority of the businesses in the above three groups and hence has become a requirement for doing business in those sectors. Each company effectively enforces code compliance.

1.5 QUASI-REGULATION

Reflecting the movement of Government policy away from 'black-letter' legislation, interest in alternative regulatory forms such as quasi-regulation has increased.

See Appendix B for previous definitions of quasi-regulation.

For the purposes of the Committee, quasi-regulation covers the range of regulatory options on the spectrum (illustrated in Figure 1 above) falling between the extremes of self-regulation and mandatory government legislation. It is important to note that the boundaries between the regulatory options are often blurred. The Committee used the following as its working definition of quasi-regulation.

> Quasi-regulation refers to the range of rules, instruments and standards where government influences business to comply, but which does not form part of explicit government regulation.

Quasi-regulation often has an aura of government endorsement because of government involvement in the development or monitoring of the regulatory arrangement, or through the provision of funding associated with a regulatory regime.

Commonwealth quasi-regulation can be broadly divided into two categories:

- industry arrangements where industry organisations play a critical role in formulation and/or administration of codes, guidelines, standards and the like, and where government involvement means that the requirements become quasi-regulatory; and
- other Government initiated arrangements which use a variety of methods other than direct legislation to encourage compliance.

Within these broad categories are many different regulatory types, some of which are described in Chapter 2.

A selection of examples of quasi-regulation within the Commonwealth domain are listed below. It serves to illustrate the breadth and diversity of this form of regulation.

Some examples of quasi-regulation

Australian Ballast Water Management Guidelines
Australian Guidelines for the Registration of Drugs
Australian Securities Commission guidance notes
Building Energy Code
Code of Banking Practice
Codes of practice relating to transport of livestock and feedlotting
Codes under the Broadcasting Services Act
Codes under the new Telecommunications Act
Electronic Funds Transfer Code of Conduct
Guidance materials on compliance with Australia motor vehicle design rules
Human Rights and Equal Opportunity Advisory Notes on Access to Premises
Industry Waste Reduction Agreements such as those included in the national kerbside recycling strategy
Insurance and Superannuation Commission circulars and codes
Ministerial press release regarding the use of the Australian Standard for babies' dummies
National Code of Practice for the Construction Industry
National Heavy Vehicle Accreditation Scheme
National Standard for Organic and Biodynamic Produce
Nutrient Claims Labelling Code
Pension Payments Code
Proposed National Scheme for Fair Information Practices in the Private Sector
Requirements in procurement guidelines that go beyond ensuring the commercial interests of participants into public policy
Safety Management system guidelines for chemical companies
The Quality Improvement Accreditation System for childcare centres
The Supermarket Scanning Code
Use of an Australian Standard on kerb height in determining negligence

1.6 THE RELATIONSHIP BETWEEN EXPLICIT GOVERNMENT REGULATION, SELF-REGULATION, AND QUASI-REGULATION

The relationship between quasi-regulation and government (mandatory) legislation can be quite clear. Mandatory legislation, including subordinate regulation (and legislative instruments) is *not* quasi-regulation. Mandatory legislation is explicit government regulation. It is government developed (sometimes drawing on consultations) and government enforced — it clearly receives full government endorsement.

Where self-regulation has no government involvement in its operation, there can be no aura of government endorsement. Hence, self-regulatory schemes implemented without government involvement or endorsement are not quasi-regulation. There are many industry self-regulatory schemes (see Section 1.4).

However, there can be some overlap between self-regulation and quasi-regulation in cases where there is some government involvement in the formulation stage or funding. Self-regulatory schemes for which there have been consultations with government at the development stage, or are partially funded by government, display some of the characteristics of both self-regulation and quasi-regulation.

In addition, there is a dynamic element to some regulation. Regulation may evolve — because of deliberate action taken by participants or otherwise — from voluntary self-regulation through quasi-regulation to 'black-letter law'. For example, this evolution of regulatory form may occur as industry self-regulatory rules become more widely used and are picked up in government guidelines. These guidelines may then be formalised in legislation.

1.7 CONCLUSION

In order to achieve the Government's objective of effective and efficient regulation, Government policies are guiding regulation makers towards regulatory alternatives to black-letter law. These alternatives include quasi-regulation and self-regulation.

The Committee makes no value judgement on the desirability of quasi-regulation per se. The appropriateness of self-regulation, explicit

government regulation and quasi-regulation will depend on the specific circumstances and the nature of the industry concerned.

In determining what constitutes quasi-regulation, the Committee found there was blurring between the main regulatory forms on the regulatory spectrum. The proliferation of different regulatory types suggests that the three principal forms of regulation should not be regarded as mutually exclusive groups. Rather they should be viewed as gradations on a continuous regulatory spectrum, ranging from self-regulation, through quasi-regulation, to explicit government regulation or 'black-letter law'.

CHAPTER 2
Characteristics and extent of quasi-regulation

2.1 INTRODUCTION

This chapter presents information on the extent and types of quasi-regulatory arrangements resulting from Commonwealth regulatory activity and their role in the overall regulatory framework. As well as providing examples of a number of different types of quasi-regulation, the chapter includes case studies of four specific arrangements. The case studies provide some insights into the factors which affect the success of quasi-regulation.

Quasi-regulation takes a wide variety of forms. The following outline of Commonwealth quasi-regulation divides it into two broad categories:

- industry arrangements where industry organisations play a critical role in formulation and/or administration of codes, guidelines, standards and the like, and where government involvement means that the requirements become quasi-regulatory; and
- Government initiated arrangements which use a variety of methods other than direct legislation to encourage compliance.

2.2 INDUSTRY ARRANGEMENTS

2.2.1 Industry based codes

Codes of practice or codes of conduct are probably the best known examples of quasi-regulation. While some codes are self-regulation, other industry-based codes of practice may qualify as quasi-regulation because of significant government involvement and/or pressure on business to comply.

Arrangements of this sort in many ways resemble self-regulation. They typically rely on the support of industry organisations and representative bodies to function, often have a high level of industry involvement in and

ownership of the standards set and are often managed by non-government administrators. What distinguishes these arrangements from self-regulation is the government's role, which can take a number of forms, including:

- endorsement or promotion by government bodies (see Example 1);

Example 1: Supermarket Scanning Code

At the request of the Minister for Consumer Affairs, the Trade Practices Commission (TPC), as it then was, consulted with the Australian Retailers' Association and consumer representatives on the development of a national code of conduct for supermarkets using computerised checkout systems. An agreed code was implemented in 1989. The code informs consumers about the operation and effectiveness of the scanning technology and gives them visible assurances about the quality and price integrity of the system. It provides informal, accessible arrangements for dealing with customer complaints. The Commission allowed the Australian Retailers' Association to use its logo on the supermarket scanning code documentation and to include the words 'this code has been drawn up in consultation with the TPC in the interests of fair competition in the industry and of fair trading with its customers.' The Commission indicated that it would need to be satisfied by periodic reviews that the key elements remain effective and that the code is achieving its objectives in the market place, otherwise consideration would be given to withdrawing the TPC imprimatur.

- government involvement in development or management (see Example 2). See also the case studies on the Code of Practice for Advising, Selling and Complaint Handling in the Life Insurance Industry and the Advertising Code of Ethics;

Example 2: Electronic Funds Transfer Code of Conduct

This Code was jointly developed by government, industry and consumers. It deals with the relationship between financial institutions and consumers using electronic funds transfer technology. The Code is industry based, but is monitored by the Australian Payments System Council and periodically reviewed by the Australian Competition and Consumer Commission and the Treasury. As a result of these reviews the Government may make recommendations to industry about possible changes to the Code.

- the threat of regulation if a successful industry-based scheme is not established (see the case study on the Code of Banking Practice); and
- establishment of a legislative underpinning for a code which does not make compliance mandatory but gives it greater force. Underpinning of this sort can take many forms, such as reserve powers to mandate a code if it is failing or to make it mandatory for a non-complying industry member; powers for regulators to register codes, involvement in their development or the investigation of breaches; or provision for a voluntary code to become binding on businesses or industry groups which choose to subscribe to them (see Example 3).

Example 3: Codes under the Broadcasting Services Act

The Commercial Television Industry Code of Practice, Commercial Radio Code of Practice and the Community Broadcasting Code of Practice are voluntary codes developed by industry organisations under the Broadcasting Services Act. Further codes under the Act are in development. The Australian Broadcasting Authority (ABA) is consulted in the development of codes and must register them if they provide appropriate community safeguards, have been endorsed by a majority of relevant service providers and there has been appropriate public consultation.

If no code has been developed in a particular area or the ABA is convinced that a code is not working, it may prescribe a mandatory standard. While complaints relating to codes must in the first instance be made to the relevant service provider, the ABA may investigate unresolved complaints relating to codes of practice. One sanction available to the ABA is to make compliance with a code of practice a mandatory licence condition.

Case Study 1: Code of Practice for Advising, Selling and Complaint Handling in the Life Insurance Industry

Background

In the light of complaints about life insurance agents and the extent of early termination of many life insurance products, the then Trade Practices Commission (TPC) was directed by the Government to research consumers' experiences with life insurance and superannuation agents. The TPC recommended compulsory measures to improve consumer information, the competence and conduct of life agents and the availability of redress for consumers.

In July 1993 Cabinet decided to develop a compulsory Code of Practice for the life industry. The Code was initially developed by a Government working group. Subsequently, a Working Group chaired by LIFA with representatives of government, consumer groups, product providers and intermediaries, was formed to achieve a consensus position.

How the Code operates

The Code applies to all life companies and life brokers, and their life insurance advisers. It deals with:

- acceptable practices when advising on or selling life insurance policies;
- basic competencies and training that life advisers must have; and
- internal complaints handling requirements and membership of an external dispute scheme.

Life companies and life brokers are required to provide regular reports to the Insurance and Superannuation Commission (ISC) about compliance with the Code. Breaches of the Code are to be referred to the life company's Board or Code Compliance Committee or to the life broker's directors or principals.

Costs involved

The ISC was provided with resources to implement and monitor the new regime. Funding resources were to be recouped through a rise in the existing supervisory levy on life companies which was expected to rise from $28,000 in 1992/93 to around $70,000 in 1994/95. Costs for insurers in complying with the Code are not known.

Procedures for review

The code does not contain any requirement for review. However, the ISC expected to review within two years of commencement. This review has been delayed pending the implementation of the Government's response to the Financial Systems Inquiry.

Why this is considered to be an example of quasi-regulation

The Code was implemented by way of a non-binding Circular but was intended to be legislatively based. As the legislative provisions are not yet operative, the Code is not explicit government regulation. However, the Government influences the life industry to comply because of its involvement in the development and monitoring of the Code.

Features which bear on the success or failure of this example of quasi-regulation

Industry considers that the Code has been a limited success. It has involved the life industry in considerable cost. Some would concede that a change of culture was needed and the Code helped to achieve this outcome. The Code has probably contributed to the reduction in the number of life agents.

The impact of the Code on consumers is difficult to assess. Life insurance policies are long-term products. The Life Insurance Complaints Service (which is the recognised external dispute scheme to which Code members must subscribe) is still dealing with complaints about policies sold before the Code came into operation.

From the Government perspective, while the resources involved are recouped from industry, monitoring the Code requires intensive effort. According to the ISC, most companies are striving to improve their customer advice, sales and internal complaints handling in accordance with the Code, but more work needs to be done.

Case Study 2: Advertising Code of Ethics

Background

The Media Council of Australia (MCA) accredited advertising agencies which received a commission on the value of their media placements with MCA members and which had to comply with the codes administered by MCA, including the Advertising Code of Ethics. In 1974 the MCA applied to the then Trade Practices Commission (TPC) for authorisation under the *Trade Practices Act 1974* of the accreditation system. The Trade Practices Tribunal granted full authorisation in February 1978, subject to the TPC periodically reviewing the system.

In 1995 the TPC conducted a review of the system and revoked the authorisation. On appeal, the Australian Competition Tribunal upheld the revocation. The Australian Competition and Consumer Commission (ACCC) announced it would review the codes. On 31 December 1996 the MCA disbanded, abandoning the accreditation system and closing the Advertising Standards Council (the Council) which was set up to hear complaints about breaches of the Code.

How the code operated

The Advertising Code of Ethics applied to the content of advertisements submitted for publication or broadcast by members of the MCA. It set out principles with which advertisements were required to comply including:

- not demeaning the dignity of men, women or children;
- not containing anything which in the light of generally prevailing community standards was likely to cause serious offence to the community or a significant section of the community; and
- not exploiting the superstitious or unduly playing on fear.

Under the code any person could complain to the Council about advertisements believed to breach the Code. Decisions of the Council were enforced by collective media boycott.

Costs involved

The main cost of the scheme for industry was the Council. The funding scheme as at January 1995 was a levy of 0.017% of all advertising nationally, except newspaper classifieds. In 1995 total national advertising expenditure in Australia was estimated at $5.4 billion.

Procedures for review

There was no provision for formal review of the Code. There was a Code Committee which considered amendments to the Code. The Council provided input to the Code Committee.

Why this is considered to be an example of quasi-regulation

The system has been described variously as self-regulation and co-regulation. It is not apparent that the commencement of the system was influenced by government. Government has, through the authorisation process, had at least a formal monitoring role in relation to the scheme. The Government was also consulted in relation to the appointment of some members to the Council.

The features which bear on the success or failure of this example of quasi-regulation

The Council considered that the Code was a success, but saw the almost constant review of the system by the TPC/ACCC as burdensome and costly. It also considered that one of the main industry organisations no longer supported the system. Industry appears to have considered the scheme a success but shared the Council's concerns about the number of reviews under the authorisation process. This is supported by the quick response by industry to set up a new scheme, but without seeking authorisation.

Consumer organisations have criticised the Code and the operation of the Council for reasons including inconsistency and lack of impartiality, the extent to which the council members represented the public, the poor rate of successful complaints, and the length of time taken to consider complaints.

The Government would probably not regard the code as being successful if, as did occur, both consumer and industry groups abandoned the scheme. Nevertheless, the scheme operated for twenty years and provided a forum, which had not previously existed, to hear advertising complaints at no cost to the consumer. Whether or not an advertisement breached the Code was often a subjective decision which tended to leave the Council open to criticism.

Case Study 3: Code of Banking Practice

Background

In the light of bank behaviour and losses in the late 1980s, the then House of Representatives Committee on Banking, Finance and Public Administration conducted an Inquiry and subsequently produced a report entitled "A Pocket Full of Change" (the Martin Report) which proposed the establishment of a Code of Banking Practice.

The then Federal Government adopted the recommendation for a code and announced the setting up of a Government working party to draft the Code. Following negotiation between the Government and the banks, a final version was adopted by the banks and supported by the then Government

How the code operates

The Code includes provisions which:

- improve disclosure of fees and charges and, particularly, of changes in fees and charges;
- enable consumers to prevent the passing on of personal information to bank subsidiaries;
- prohibit 'all monies' guarantees; and
- require banks to offer access to an external redress mechanism.

Banks are bound to the Code when they announce that they adopt the Code and must refer to it in any terms and conditions. The code was not fully in operation until late 1996, with the commencement of the Uniform Credit Code. Monitoring of compliance with the Code is undertaken by the Australian Payments System Council.

Costs involved

At the time of the release of the working party's second draft, banks publicly claimed the compliance costs would be about $120 million. Amendments proposed by the banks reduced the costs to what was acceptable to the banks. No precise figure is available, but the slow rate of implementation of the Code would have minimised printing costs, as these would likely have been incurred anyway. The principal costs to the banks are for the continuing training of their staff in the application of the Code.

Procedures for review

Banks are required to report each year to the Reserve Bank on the operation of the Code and certain disputes.

The Code has provisions requiring review every three years. It has not, however, yet been reviewed, as it was not fully in operation until late 1996.

Why this is considered to be an example of quasi-regulation

The Code of Banking Practice originated with government which was also heavily involved in its drafting. At the time it was formally introduced, the Federal Treasurer also stated that the banks might face legislation if they did not comply with the Code. Government is also involved in monitoring.

The features which bear on the success or failure of this example of quasi-regulation

At the time it was released, consumer groups characterised the Code as essentially a restatement of existing obligations and criticised its failure to address certain issues. For its part, the banks could point to substantial compliance costs in changing disclosure material and in new mailing costs.

It may be that the review process will enable a considered assessment to be made of the effects of the Code and any shortcomings.

The Government considers that the Code has been successful in improving standards of disclosure and in ending the practice of 'all monies' guarantees.

Case Study 4: General Insurance Code of Practice

Background

In announcing the Cabinet decision for regulation of the life insurance industry in July 1993, the then Treasurer and the Minister for Consumer Affairs also announced that a separate code was to be developed covering agent regulation and dispute resolution standards for the general insurance industry.

Industry responded that a code would work better if the industry developed it, owned it and enforced it on a 'voluntary' basis. A Task Force consisting of Government and industry representatives developed the Code in consultation with consumers. The Code was approved by the then Federal Minister for Consumer Affairs in December 1994 and came into operation in July 1995.

Recent amendments to the *Insurance Act 1973* have mandated the general insurance code for those carrying out certain types of prescribed insurance business. However, before the code became mandatory, it was a good example of quasi-regulation.

How the Code operates

The Code includes standards of practice for general insurers in relation to:

- supervision and training of agents and employees;
- improved policy documentation including information about the existence of the Code;
- improved claims handling procedures; and
- documented internal procedures for complaints handling and participation in an external disputes scheme.

A separate company, the Insurance Enquiries and Complaints Limited (IEC Ltd) monitors compliance, receives complaints about breaches of the Code and can impose sanctions such as rectification, audit, corrective advertising and publication in its annual report. One insurance company was named in the 1996 annual report for failing to adhere to the Code.

Costs involved

The Insurance Council of Australia (ICA) and the general insurance industry are committed to the Code and have expended a significant amount in implementing it. Implementation of the Code was estimated to cost ICA members $26-30 million in year one and $8-10 million each year thereafter. The significant areas of cost were agent training ($1.8 million), monitoring ($2.2 million), re-drafting and re-printing documents ($20 million), and consumer information ($10.5 million).

Procedures for review

The Code provides for a review to commence two years after the Code is fully operational. A formal review will therefore occur in July 1998. The ICA has undertaken to consult with government agencies and consumer groups in the course of the review.

Why this is considered to be an example of quasi-regulation

This was a classic example of quasi-regulation. The Government stated its intention to have a mandatory code for the general insurance industry. The industry reacted to that announcement by initially regulating itself. The industry, in effect, self-regulated, but the Government was involved in drafting the Code, informally monitored its operation and expected to be involved in its review.

The features which bear on the success or failure of this quasi-regulation

At the outset, consumer organisations did not consider this to be a satisfactory Code because it did not contain specific detailed practices with which the industry should comply. Because the industry embraced the Code and has shown its commitment to improvement, it appears that consumer groups have changed their views about the Code.

The Government considers that the Code has significantly improved company training standards and the general customer focus of the industry and is therefore a success.

The industry has spent a lot of money on training, implementation and enforcement. It might consider the Code is a success because it has managed to keep the Government and consumers at arms' length, maintaining ultimate control over its own affairs but nevertheless producing results to satisfy critics.

2.2.2 Agreements which business groups negotiate with Government

Agreements which business groups negotiate may also constitute quasi-regulation, even where they do not involve establishment of an industry code (see Example 4). The extent to which such agreements are quasi-regulatory depends on the extent to which they are a vehicle for government influence on business behaviour. For example, agreements negotiated under some threat of mandatory action are likely to be quasi-regulation.

> **Example 4: Industry waste reduction agreements**
>
> In 1992, the Australian and New Zealand Environment and Conservation Council (ANZECC) endorsed the establishment of a national kerbside recycling strategy which included voluntary waste reduction agreements with major industries and recycling targets. Most industries met their recycling targets and some even exceeded them. Those targets expired in 1995 and subsequently ANZECC authorised a special taskforce to negotiate new extended waste reduction agreements. In April 1997, new agreements were signed with companies involved in the newsprint, paper packaging, steel can and high density polyethylene industries. These agreements were signed by the Commonwealth Minister for the Environment and the chair of ANZECC (currently the Queensland environment minister). There are no formal compliance and reporting mechanisms. ANZECC is currently negotiating a national packaging covenant for waste minimisation with industry to cover the entire packaging industry.

2.3 GOVERNMENT INITIATED QUASI-REGULATION

While many examples of quasi-regulation are developed and managed co-operatively with industry, many others are effectively initiated by the Government with less reliance on industry organisations. These arrangements are in some ways more akin to legislation than to self-regulation. While, as with legislation, the Government would typically consult closely with business and other interested parties, the rules which are developed are usually those of the Government rather than of industry.

The fundamental difference between quasi-regulation of this sort and strict regulation is that, instead of requiring compliance in legislation, the Government uses a variety of alternative means to achieve compliance. A

number of different strands can be identified, based on the approaches used to achieve compliance and the different functions performed:

- guidelines and the like which elaborate on mandatory legislative requirements, but are not themselves mandatory;
- standards, codes and the like where compliance affects access to benefits or rights controlled by government; and
- voluntary rules which are given force by related mandatory rules, the threat of legislation, or other benefits or sanctions.

2.3.1 Guidelines and the like which elaborate on mandatory legislative requirements

Not all guidelines of this sort are quasi-regulatory. Many of them are essentially advisory or explanatory, aiming to assist business in understanding and meeting its obligations, rather than adding an additional layer of regulation. Guidelines are likely to be quasi-regulation if:

- they suggest particular actions or procedures not specified in the law itself which businesses should adopt: and
- business has a strong incentive to comply.

The incentive to comply can take a number of forms, including:

- an indication that a business following the guidelines will not be in breach of the relevant legal requirement (see Example 5);

Example 5: Guidance material on compliance with Australian motor vehicle design rules

The Federal Office of Road Safety issues a range of quasi-regulatory documents to assist business in complying with mandatory Australian Design Rules or technical regulations, many of which are performance based. These include:

- the Test Facility Inspection Manual which deals with testing procedures;
- administrative circulars which supplement the manuals on specific points; and
- various codes of practice and bulletins which provide advice on particular manufacturing issues, for example the National Code of Practice for Manufacture of Additional Seats.

None of these documents are legally binding. However, a manufacturer wishing to depart from the advice contained in them would need to be able to demonstrate that it was nevertheless meeting mandatory performance requirements. Compliance with the guidance material would generally be accepted by the regulator as indicating compliance with mandatory requirements, though there is no formal "deemed to comply" provision.

- an indication by a regulator that compliance with the guidelines will be a consideration in its enforcement of regulation, decision making or handling of complaints (see Example 6);

Example 6: Human Rights and Equal Opportunity Advisory Notes on Access to Premises

The Human Rights and Equal Opportunity Advisory Notes on Access to Premises give specific guidance on how to comply with the Disability Discrimination Act 1992 (DDA). The objects of the DDA include eliminating, as far as possible, discrimination against persons on the grounds of disability. In particular, s. 23 of the DDA makes it unlawful to discriminate against persons with a disability, or their associates, in relation to access, and use of, premises that the public, or a section of the public, is entitled or allowed to enter or use. Failure to comply with this provision can be defended on a case by case basis. To assist business meet its obligations under s. 23 of the Act, the HREOC has prepared the aforementioned Advisory Notes.

- a perception that adherence to guidelines will help to keep businesses in compliance with the law (see Example 7).

Example 7: Codes of Practice relating to livestock

A number of codes of practice relating to the transport of livestock and feedlotting have been developed through the Agriculture and Resource Management Council of Australia and New Zealand. While not legally binding, businesses have a strong incentive to comply as action may be taken in the event of unacceptable outcomes (such as an excessive proportion of livestock dying). Generally animal welfare issues in Australia are the responsibility of State Governments and action would be taken by State and Territory authorities in the event of unacceptable domestic situations. Export livestock legislation administered by the Australian Quarantine and Inspection Service (AQIS) refers specifically to some of the codes relating to stocking densities and feeding regimes for livestock travelling overseas to ensure animal welfare considerations are observed. Industries have been involved in the development of the codes. Pressure on businesses to comply with the codes is indirect in the sense that failure to follow the guidelines may increase their chances of events which lead to action against them. Compliance with the codes should defend businesses against action to some extent depending on the issue under discussion.

As these examples demonstrate, this type of quasi-regulation is usually used as an adjunct to performance based regulation.

Performance or principles based regulation is widely seen as an appropriate vehicle for building flexibility into requirements and encouraging innovation. By focussing on the outcomes required rather than prescribing the precise means of achieving those outcomes, this approach to regulation gives businesses the opportunity to achieve regulatory objectives in ways that suit their needs and minimise compliance costs.

Where performance based requirements are set up by government, businesses, and especially small businesses, may also benefit from detailed advice about the specific steps which they can take to meet these requirements. Advice of this sort, while not legally binding, may be quasi-regulatory in that it affects the actions of a large number of businesses and creates a strong perception that compliance will satisfy performance based regulation.

2.3.2 Standards, codes and the like where compliance affects access to benefits under the control of government

There is a range of ways in which the Government can use its role in transactions or its position as a regulator to offer rewards for compliance with voluntary codes, standards or the like, for example:

- by making compliance a factor or pre-condition for involvement in government contracts (see Example 8); or

Example 8: National Code of Practice for the Construction Industry

This code was written by the Australian Procurement and Construction Council (APCC) in consultation with the Departments of Labour Advisory Committee (DOLAC). It sets out standards for behaviour of participants in the construction industry, and represents an agreed position of Commonwealth, State and Territory governments. The code deals with matters such as ethical behaviour, industrial relations and occupational health and safety.

Those who do not comply with all aspects of the Code will not be permitted to work on government construction projects. Sanctions for breaches include partial or total exclusion from government work, publication of details of the breach or reference of the breach to other relevant authorities. In issuing the Code, the APCC and DOLAC indicated that they were using the position as major clients of business to encourage "changes in industry production processes to raise productivity, and other actions that will help develop an industry which achieves internationally competitive standards."

- by making compliance a condition if clients of the business are to receive a benefit (see Example 9).

Example 9: Quality Improvement Accreditation Scheme for child care centres

The Commonwealth effectively regulates quality in certain day care centres through the Quality Improvement Accreditation System (QIAS). Only parents with children in centres which meet the requirements of QIAS are eligible for financial assistance under the Commonwealth's Childcare Assistance Program.

To the extent that the Government is simply protecting the public's interest in particular transactions with business, it could be argued that its purpose in instigating this type of arrangement is not regulatory. However, in many of the examples of this type identified by the Committee it is clear that the Government has a broader intent of altering the way in which business operates, for public policy reasons. These are clearly examples of quasi-regulation.

The Government also uses its position as a regulator to encourage compliance with quasi-regulation, for example by offering relief from certain types of compliance (see Example 10).

Example 10: National Heavy Vehicle Accreditation Scheme

The National Heavy Vehicle Accreditation Scheme (NHVAS) is a voluntary, independently audited quality assurance scheme which allows trucking operators to obtain exemption from some State and Territory compliance requirements. The Scheme, which is still at a pilot stage, has been developed co-operatively by State regulators, the Federal Office of Road Safety and the National Road Transport Commission. Issues covered by the NHVAS in trials to date are mass management, maintenance and fatigue management.

Trucking operators which sign up to the scheme avoid certain audit mechanisms such as random checking and weighbridge visits.

2.3.3 Voluntary rules which are given force

There is a range of other methods by which the Government can encourage compliance with rules which are technically voluntary. Some of the methods in current use are:

- the threat of legislation (see Example 11);

Example 11: The Minister's press release on the Australian Standard for babies' dummies

Standards Australia has published a voluntary Australian Standard for babies' dummies. In August 1996 the then Minister for Consumer Affairs issued a press release indicating that tests had shown that popular makes of dummy were meeting the "key safety requirements of the Australian Standard". He also indicated that the Federal Bureau of Consumer Affairs would continue to monitor dummies on sale and that if standards were not maintained he would consider taking regulatory action. The message to industry was that failure to meet the Australian Standard for dummies would invite regulatory action.

- the presence of legally enforceable requirements which could be invoked in the event of non-compliance with voluntary guidelines (see Example 12); and

Example 12: Australian Ballast Water Management Guidelines

These guidelines were developed by the Australian Quarantine Inspection Service (AQIS), in consultation with key stakeholders, for managing ships' ballast water to minimise the risk of introducing exotic marine pests. The guidelines are currently voluntary, though AQIS does have some powers under the Quarantine Act to take action against non-complying vessels, for example preventing discharge of ballast water and boarding ships to carry out inspections.

The International Maritime Organisation has recently extended its ballast water guidelines, and the Australian guidelines will be amended accordingly. The IMO has agreed that ballast water guidelines will become mandatory, and have set a target date of the year 2000 for adoption of a mandatory annexe to MARPOL (International Convention for Prevention of Pollution from Ships). Australia will introduce the IMO mandatory arrangements in the year 2000 following adoption of the Annexe by the IMO. The reason for moving to mandatory requirements is the fact that the international community has recognised that for effective ballast water management mandatory controls are necessary.

- sanctions under related legislation (see Example 13).

Example 13: National Standard for Organic and Biodynamic Produce

This standard was developed by AQIS in consultation with industry associations and consumer bodies. While the standard is voluntary, there will be mandatory export controls which prevent export of food labelled organic unless AQIS has conducted a third party audit of certifying associations to ensure that their members comply with the national standard. This means that producers who wish to export food labelled organic will have to meet the National Standard as a minimum requirement.

2.4 TRADE PRACTICES ACT: AUTHORISATIONS AND SECTION 87B UNDERTAKINGS

Some types of regulation under the *Trade Practices Act 1974* (the Act) bear some resemblance to quasi-regulation. Two examples are:

- the anti-competitive provisions of codes which have been authorised by the Australian Competition and Consumer Commission (ACCC) under Part VII of the *Trade Practices Act 1974*; and
- enforceable undertakings under s. 87B of the Act.

2.4.1 Authorisation

The Act allows the ACCC to authorise a contract, arrangement or understanding ('agreement') containing an anti-competitive provision if the ACCC is satisfied the public benefits flowing from the agreement outweigh its anti-competitive effects. The ACCC cannot require a firm or industry to apply for authorisation. It is a voluntary process. The effect of authorisation is that self-regulatory conduct that would otherwise breach the Act is made immune from the relevant competition provisions of the Act.

The anti-competitive aspects of a number of industry codes of conduct have been authorised to date (see Example 14).

Example 14: an authorised code — Agsafe

In 1990 authorisation was given to the accreditation scheme and code of conduct of the Agricultural and Veterinary Chemicals Association of Australia (AVCA). The conduct authorised allows AVCA to refuse to deal with traders who do not measure up to AVCA standards for the handling of farm chemicals. The accreditation scheme requires that premises involved in the transport of farm chemicals conform to the standards imposed under dangerous goods legislation in the various states and territories. Staff employed at these premises are required to gain accreditation by undergoing a training course administered by an independent course management board and to comply with AVCA's code of conduct. The Commission considered that the scheme would result in public benefits to users and the community in general from the safe use of farm chemicals. It believed that the public benefits outweighed the anti-competitive elements such as the use of sanctions, the entry requirements for individuals and the possible exclusion of firms from the industry. The scheme has since been reauthorised and is known as Agsafe.

To the extent that an authorisation may be instrumental in determining that a self regulatory code containing anti-competitive elements is allowed to operate, it can be seen as having an effect on the behaviour of the businesses subject to the code. However, in authorising anti-competitive elements of a code the ACCC is exercising a specific statutory power rather than extending any general endorsement to the code. The Commission's determinations on authorisation applications are subject to a formal review process by the Australian Competition Tribunal (formerly the Trade Practices Tribunal).

2.4.2 Section 87B undertakings

Under s.87B of the Act, the ACCC can accept a written enforceable undertaking from a person in relation to any matter where the ACCC has a power or function under the Act. However, the Commission has no power to require that an undertaking be offered. The ACCC encourages the use of such undertakings in situations where there is evidence of a breach of the Act, as an administrative alternative to court proceeding. If the undertaking is breached the ACCC can seek a court order against the person. The undertaking can only be varied or withdrawn with the consent of the ACCC. The cost of negotiating Section 87B undertakings is significantly lower than the cost of litigation. As part of alleviating what the Commission considers

to be a contravention of the Act, most undertakings involve corrective action and compensation. Additional requirements such as specific compliance programs to alleviate the possibility of a recurrence of such conduct and complaints handling procedures are not uncommon.

> Example 15: an enforceable undertaking — entered into by Chubb Security Australia
>
> Chubb Security Australia Pty Ltd provides a variety of mobile security patrol services. In 1996 the ACCC alleged that Chubb had failed to provide services as contracted and had falsified records to indicate that clients' sites had been visited when in fact they had not. The company gave an enforceable undertaking which required the company to send letters of apology to all affected consumers, introduce a management control program to monitor patrol services each year for three years, implement a code of ethics for the administration of patrol services, pay for an ACCC officer to address the next two conferences of ASIAL, the security industry's association, and lobby for the Australian Standard AS4421 to be amended to require all security firms to run trade practices compliance programs.

A significant difference between enforceable undertakings and quasi-regulation is that such undertakings are legally binding once they have been entered into and have limited application usually only to a single business. However, they resemble quasi-regulation in that unless a business offers an undertaking acceptable to the Commission the business is aware that it may face legal proceedings. Section 87B undertakings have been held to be instruments under the Act and thus subject to the Administrative Decisions (Judicial Review) Act 1977 (see *Australian Petroleum v Australian Competition and Consumer Commission (1977) ATPR 41-444*) Undertakings are broadly analogous in effect to consent judgements although there are important legal differences.

2.5 EXTENT AND ROLE OF QUASI-REGULATION

Early in its work program, the Committee concluded that it did not have sufficient time or resources to undertake a methodical collation of the extent of quasi-regulation in the Commonwealth's jurisdiction. In addition, it wanted to avoid duplication of work commissioned by the Department of Industry, Science and Tourism (DIST) to develop a database on codes of practice which will provide business with information on all codes which

may affect their operations — this initiative is in response to Recommendation 41 of the report of the Small Business Deregulation Task Force.

The consultant engaged by DIST (Stenning and Associates) completed a scoping study in October 1997 which identified upwards of 30,000 codes, standards and specifications, covering all levels of government. While these include self-regulation and mandatory codes as well as quasi-regulatory schemes, the study suggests that quasi-regulation is used extensively.

Also, the consultant reported:

> "Quasi-regulatory codes are very difficult to identify and maintain. There is no formal mechanism by which government announces the adoption of a quasi-regulatory instrument. This makes identification, collection and monitoring extremely difficult." (Stenning 1997, p. 7)

The Committee therefore has relied on a cross-section of quasi-regulatory arrangements (such as the sixteen examples and four case studies provided in this chapter), and on information gathered during its program of consultations, to build up a picture of major characteristics of quasi-regulation.

As a general rule, quasi-regulation affects specific industry sectors rather than the business community as a whole. In particular, industry-based arrangements necessarily have limited application where specific industry associations are integral to the arrangement. There are some exceptions to this, for example the proposed national scheme for privacy protection. Regulation of general application is mainly dealt with by legislation.

Nevertheless, many industry sectors are affected by quasi-regulation. This became evident during the Committee's consultations where it was possible to identify some quasi-regulation relevant to most of the industry sectors investigated. The Committee identified a large number of examples of quasi-regulatory arrangements, many of which involved a multiplicity of codes, standards, guidelines or the like. For example, guidance material on Australian motor vehicle design rules includes a complex set of manuals, circulars, codes and bulletins issued by the Federal Office of Road Safety.

Quasi-regulation typically complements other forms of regulation. It has a wide coverage, but is rarely a comprehensive scheme of regulation for an industry. Insurance, finance, telecommunications and food are examples of industry sectors which are substantially affected by quasi-regulation, but where the dominant form of regulation is clearly legislation.

Figure 2 ranks a selection of regulatory arrangements, mainly quasi-regulatory. Those with light-handed Government involvement are towards the top, with examples of more heavy handed involvement as one moves down the spectrum.

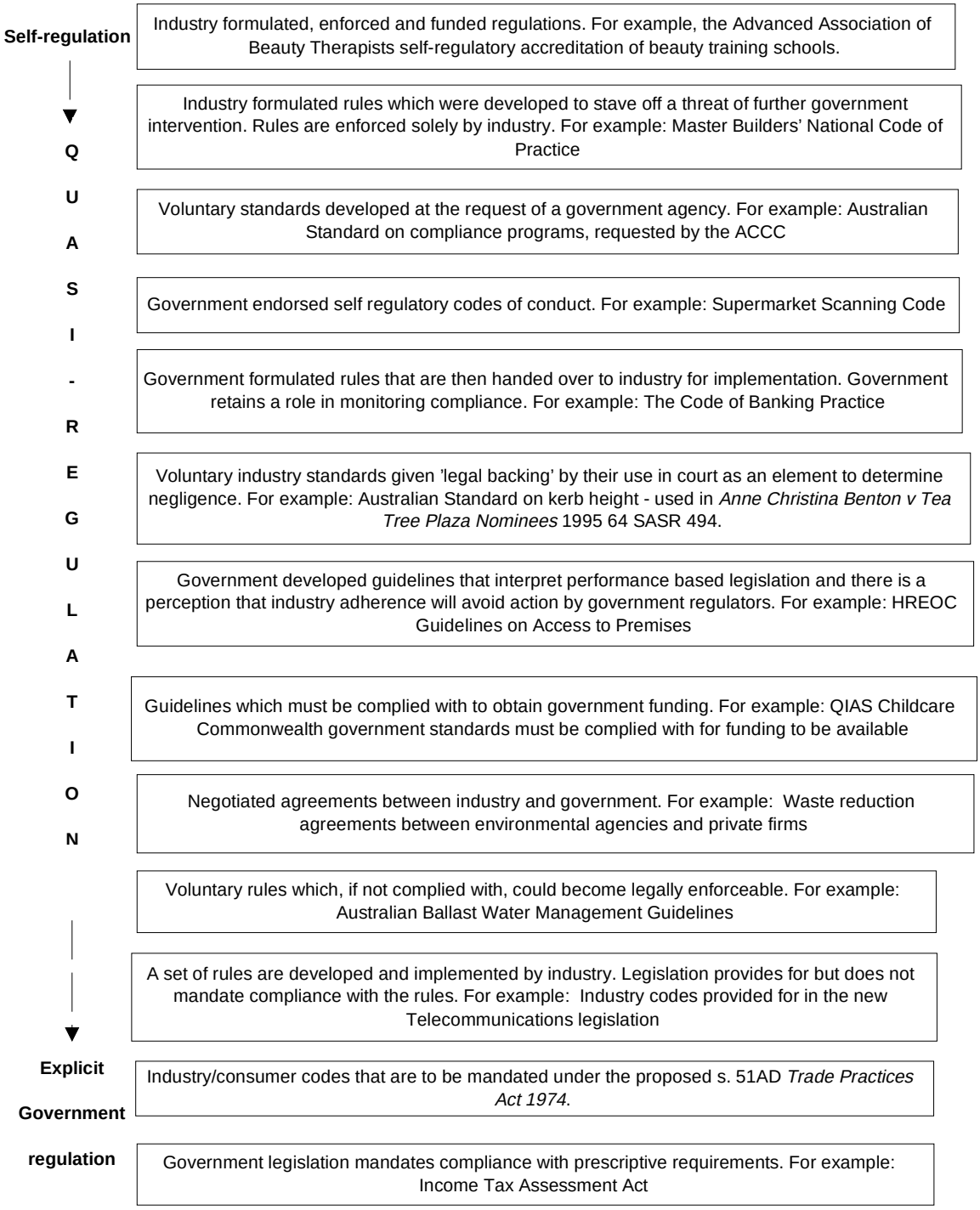
While it is difficult to generalise about the role of quasi-regulation in different circumstances in which it is used, it is possible to make some observations. Some of the more common functions of quasi-regulation are:

- to improve the quality of dealings between business and consumers. This is a common, though not the only, function of industry codes of practice; and
- to elaborate on mandatory requirements and provide assistance to business in taking practical steps to meet mandatory, performance-based requirements in legislation.

There is a perception that the body of quasi-regulation is growing. A large proportion of the arrangements identified by the Committee are either proposals in development or were introduced within the past few years. Some significant recent developments in quasi-regulation include:

- changes to telecommunications regulation which introduced provision for industry codes with potential to cover a wide range of consumer protection issues in the telecommunications area;
- a proposed National Scheme for Fair Information Practices in the Private Sector, put forward in a discussion paper issued by the Privacy Commissioner, which would involve a quasi-regulatory scheme for privacy controls on the private sector. This proposal is significant as it has potential to affect most businesses and consumers.

Figure 2 A more comprehensive spectrum of regulation



2.6 THE USE OF AUSTRALIAN STANDARDS IN QUASI-REGULATION

2.6.1 Standards Australia

Standards Australia has a central role in voluntary standard setting in Australia. Under its Memorandum of Understanding (MoU) with the Commonwealth it is recognised as Australia's peak non-government standards writing body, and as Australia's member of the International Organization for Standardization, the International Electrotechnical Commission and the Pacific Area Standards Congress. Standards Australia owns the trademark "Australian Standard"

Standards Australia has developed cooperative arrangements with several national standards setting bodies within Australia, such as the Australian Communications Authority and the Therapeutic Goods Administration, to develop standards for them. Its MoU with the Commonwealth provides for Standards Australia to establish a board for the accreditation of other bodies to write Australian Standards. To date, no other bodies have been formally accredited.

Standards Australia is a non-government body and compliance with Australian Standards is only legally required if they are referenced in legislation. Out of approximately 5,700 current Australian and joint Australian/New Zealand Standards, slightly over half are referenced in Commonwealth, State or Territory legislation. The remainder are voluntary standards.

The Commonwealth has revised a Memorandum of Understanding (MoU) with Standards Australia, which includes a number of provisions on how standards are to be developed. Under these provisions, Standards Australia may:

- take steps to ensure that standards are consistent with regulatory requirements;
- ensure that Australian Standards only depart from equivalent international standards where there is a compelling reason to do so;
- continue to explore ways of refining procedures for a cost/benefit analysis of proposed standards and development projects;
- write standards in terms which do not inhibit competition;

- where possible establish performance-based requirements;
- where requested by government to develop a standard for regulatory purposes, produce draft standards in a form suitable for referencing in legislation and which represent a minimum effective solution; and
- involve stakeholders, including business, in decisions on whether a standard needs to be developed or revised.

2.6.2 Australian Standards and quasi-regulation

Standards produced by Standards Australia are not in themselves quasi-regulation. Where Australian Standards are mandatory by virtue of being referenced in legislation they would be regarded as explicit government regulation rather than quasi-regulation. However, there are circumstances in which a voluntary Australian Standard does become quasi-regulation by virtue of the actions of the Government or the courts:

- the Government may place direct pressure on business to comply with a voluntary standard, for example by the threat of regulation (see Example 11 above); or
- the courts may use voluntary Australian Standards as benchmarks in determining issues such as negligence (see Example 16).

Example 16: Use of the Australian Standard on kerb height in determining negligence.

In *Anne Christina Benton v Tea Tree Plaza Nominees* 1995 64 SASR 494, Duggan J found that non-compliance with a voluntary Australian Standard on kerb height was one of the factors that could be taken into account in determining negligence. Even though the standard was voluntary, it was given legal weight as it was indicative of a 'reasonable' height for a kerb.

CHAPTER 3

Choosing from the regulatory spectrum

3.1 BACKGROUND

The Committee has been asked to report on the circumstances in which quasi-regulation is a viable alternative to government regulation and self-regulation, and on the appropriate use of voluntary standards in regulation. In addition, allied to its recent decisions on the House of Representatives committee inquiry into fair trading, the Government has asked the Committee to propose appropriate criteria for the prescribing of voluntary and mandatory codes under the *Trade Practices Act 1974*.

This chapter examines the issues involved in the selection of the appropriate regulatory form — self-regulation, quasi-regulation or explicit government regulation — and proposes guidelines to assist with the selection process.

3.1.1 The Government's objectives for regulatory reform

The Government has an objective that, where appropriate, industry should take increased ownership and responsibility for developing efficient and effective regulation (having regard to minimum feasible compliance costs). The Government also wishes to reduce the regulatory burden and compliance costs on all sectors of the community, but particularly on small businesses.

The Government has imposed quality control processes to ensure that regulation should not proceed unless it results in net benefits to the community. As a result, Commonwealth departments and regulatory agencies are required to justify the need for explicit government regulation and consider alternative ways of attaining policy objectives. A major vehicle for ensuring quality control is regulation impact analysis which calls for an economy-wide perspective in identifying who benefits from the regulations, who incurs the costs and whether the regulation achieves its objectives without excessively burdening the community.

In the Prime Minister's March 1997 statement *More Time for Business*, such analysis in the form of a Regulation Impact Statement (RIS) was made mandatory for any proposed regulatory change which has the potential to affect business. RISs must be prepared prior to Cabinet or Prime Ministerial consideration of such proposals. In addition, RISs must be tabled as part of the explanatory documents when proposals for legislative change are put to Parliament. The RIS requirements apply to all government departments, agencies and statutory authorities that review or make regulations that impact on business, including agencies with administrative or statutory independence. Regulation includes all existing, new and amended primary, subordinate and other regulations such as quasi-regulation.

In addition, regulatory arrangements must adhere to the Competition Principles Agreement which requires governments to remove from regulations any provisions which restrict competition, unless it can be demonstrated that there is a net public benefit and the objective cannot be achieved by any means other than restricting competition.

3.1.2 The RIS approach

The main steps in the preparation of a RIS are:

- problem or issue identification
- specification of desired objectives
- identification of options (regulatory and non-regulatory)
- assessment of impacts (costs and benefits)
- consultation
- recommended option
- implementation and review.

A Guide to Regulation provides information on a range of instruments which might be employed to address problems, including self- and quasi-regulation, together with 'softer' options such as information and education campaigns and alternative legislative options. However, there is a need for better guidance for government agencies considering regulatory proposals on the choice of the appropriate regulatory form — self-regulation, quasi-regulation or explicit government regulation.

The Committee and those consulted concluded that a checklist to guide users through the selection of the different regulatory forms would be useful. However, the Committee agreed that such a checklist (see Section 3.5) should not substitute for the formal analysis of costs and benefits contained in the RIS. The checklist would be an adjunct to the RIS process.

3.2 CHARACTERISTICS OF THE PRINCIPAL REGULATORY FORMS

The principal regulatory forms have various characteristics such as their cost-effectiveness, flexibility, responsiveness, accessibility, and level of scrutiny; all of which are important in assessing which form might be best for addressing a particular problem. These characteristics are discussed below.

3.2.1 Self-regulation

Self-regulation is any regulatory regime which has generally been developed by industry, but is enforced exclusively by industry. It may take a number of forms: individual businesses choosing to adopt a standard; private institutions regulating themselves by a set of rules; and, the introduction of an industry-wide regulatory code. Such standards and rules may cover general market conduct issues or social goals such as consumer protection, public health and safety.

Industry groups often choose to regulate their members to enhance the standing of the group in the market, minimise the damage to consumer confidence caused by unacceptable trading practices and thereby increase returns. Self-regulation may take the form of membership qualifications or minimum standards for processes, practices or products to reduce liability. Increased confidence and feedback may be provided through customer complaints mechanisms. Examples of self-regulation raised in consultation meetings include the Cold Chain Advisory Code, the Code of Professional Conduct for accountants and the Lysaghts steel sheet standard.

Self-regulation is often considered to be a flexible, responsive and efficient form of regulation. Self-regulation, by definition, utilises direct industry experience and provides tailor-made solutions. Because of the speed with which it can be implemented and the degree of ownership of rules by

participants, self-regulation is likely to be relatively effective in addressing the need for rapid cultural change within organisations and industries.

There are also disadvantages associated with self regulation. Self-regulation is often seen as being an ineffective response to problems. There is a perception that sometimes rules are designed to protect or confer commercial advantage on one group over another group, to exclude new entrants to an industry, limit competition, or to provide a smokescreen for market behaviour so as to avoid formal regulation. These issues need to be considered and assessments made of the restrictions on competition that may arise from particular schemes. Another problem is obtaining industry compliance and coverage. Voluntary arrangements are unlikely to deviate far from individual and industry self interest. Self-regulation may be difficult to enforce due to the lack of legal sanctions. However, there may also be greater scope for innovative sanctions to be developed and applied by those closely involved in the industry.

3.2.2 Quasi-regulation

Quasi-regulation covers a variety of options between self-regulation and explicit government regulation, from light-handed to heavy-handed quasi-regulatory arrangements. The involvement by government, whether through official endorsement, representation on monitoring committees, provision of guidelines or voluntary agreements with industry, is perceived by industry as requiring its compliance with the particular code, standard or arrangement and therefore may have a significant impact.

Compared to black letter law, quasi-regulation, as with self-regulation, can offer the advantages of flexibility, responsiveness, less cost to government and greater collaboration with industry, particularly with industry initiated schemes. Greater compliance is possible if rules are clear and designed in collaboration with industry experts. Quasi-regulation can also make use of innovative compliance mechanisms and quicker, cheaper dispute resolution schemes and, due to greater involvement and ownership, industry may also be more willing to contribute resources to developing, implementing and enforcing this form of regulation.

Disadvantages associated with quasi-regulation include:

- increase in the regulatory burden due to administrative costs shifting to business;

- information on particular codes and rules is often less accessible than for Acts of Parliament;
- quasi-regulation may overlap with other regulatory regimes;
- there is often a lack of clarity on compliance obligations, creating uncertainty for industry and increased compliance costs in order to avoid litigation;
- it may also result in a backlash against regulation, with small businesses choosing not to comply because of the costs of involved; and
- it is often introduced without formal assessment of its compliance costs, economy-wide impacts, international competitiveness aspects or the effects on competition.

3.2.3 Explicit government regulation

Legislation is often considered to offer more certainty, including industry-wide coverage, and greater effectiveness compared to other forms of regulation, due to the availability of legal sanctions. It is often preferred by regulators, particularly in dealing with high risk, high impact public issues. In some circumstances, compliance costs might be lower for legislation due to the greater certainty. Black letter law is subject to scrutiny from Parliament and from the Government's regulation making and review processes.

Legislative backing is sometimes needed to make a code effective, thus allowing industry to regulate itself better. For example, legislation may be required to ensure sufficient coverage of an industry or to provide enforceable sanctions. Such backing might involve provision under general law for private rights of action, the establishment of a specific regulatory authority, the requirement under the law that all members of an industry belong to an approved code, or provision for intervention by an existing enforcement agency.

Disadvantages associated with legislation include:

- the potential time lags inherent in making and amending legislation;
- legislation is not well suited for influencing the quality of complex services such as those provided by many of the professions;
- the perception by some people that legislative drafting is complex and difficult to understand may deter some of them from trying to comply;

- government budgetary costs are higher with black letter law and there may be less accountability for administrative costs compared to other regulatory forms which utilise relatively more industry resources;
- compliance costs may be high as the law often does not reflect accepted commercial practices; and
- costs and delays associated with the justice system may mean poor access for those without means to pursue their legal rights.

3.3 STANDARDS

Before considering those factors of importance in choosing between the three principal regulatory forms (Section 3.4), the role of standards must be addressed. Standards per se are not a regulatory form, but how they are used can have a significant effect on the nature and implementation of regulation.

Standards can benefit the community through better health and safety outcomes, enhanced business efficiency and competitiveness, and improvements in quality. Many standards are developed for voluntary adoption by businesses to provide a demonstration that certain technical requirements are being met. However, in some instances governments also require businesses to meet specified standards to ensure that products satisfy health, safety and environmental requirements. This use of standards as an extension of black letter law represents the most significant role of standards in regulation, although standards also play a role in some quasi-regulation and self-regulation.

3.3.1 Some confusion about standards

Australian Standards are consensus-based voluntary documents with which compliance is non mandatory unless incorporated into law or called up in contractual documents. Around half of some 5700 Australian Standards are voluntary standards. However, a number of industry groups consulted claimed that often they can discern little distinction between voluntary and mandatory Australian Standards and some users can be confused about their compliance obligations. There is also misunderstanding, mainly among small businesses and consumers about the status of Standards Australia, with some presuming it to be a Commonwealth Government body, or at least that Australian Standards are endorsed by the Government.

Confusion about compliance obligations in relation to standards may arise in circumstances where:

- veiled threats are made by government that, unless voluntary standards are complied with, legislation may be enacted;
- standards are promoted as 'the new Australian Standard' implying a need for compliance;
- voluntary and mandatory requirements are encapsulated in the one document with little distinction made between compliance obligations;
- there is an overlap or inconsistency between voluntary Australian Standards and mandatory standards written by government bodies (such as the National Occupational Health and Safety Commission (NOHSC));
- Australian Standards are accepted in courts as having evidentiary status; and
- there is little accompanying information with standards on actual legal requirements.

Nevertheless, many businesses are well aware of the differences between voluntary standards and mandatory standards. The use of voluntary standards by businesses is normally driven by commercial considerations rather than by a mistaken view that compliance is required by government.

3.3.2 The development of Australian Standards

The Committee heard a number of concerns from industry groups consulted regarding the development of Australian Standards, such as their often highly technical nature and the development of Australian Standards where satisfactory international standards already exist, and the consequent additional costs these factors impose on businesses.

The Report of the Committee of Inquiry into Australia's Standards and Conformance Infrastructure (the Kean report) made a number of recommendations regarding the structure of Standards Australia and the processes it uses in developing Australian Standards. The new Memorandum of Understanding between the Commonwealth and Standards Australia and changes being introduced by Standards Australia itself will address most of these concerns. For example, the Kean report concluded that technical regulations should be written for the purpose and should in general be written in performance based terms, rather than being technically

prescriptive. This is now Standards Australia policy. That said, there will always remain specific situations where the development of technically prescriptive standards is entirely appropriate (for example, the development of test methodology standards).

As outlined in Chapter 2, standards can be developed with the specific intention of their being subsequently referenced in legislation/regulation. This is often done at the instigation of regulatory authorities who consider that this approach not only offers the most efficient process but also encourages a high degree of industry commitment to the regulatory regime. While not ruling out the practice of regulators adopting standards 'off the shelf', the Kean report considered that the development of standards specifically for regulatory purposes to be the most efficient way of achieving regulatory objectives. However, it is the practice of government regulators calling into legislation standards that were originally developed for voluntary purposes that was of most concern during consultations and this issue is discussed below.

3.3.3 Use of standards by regulators

The voluntary standards most frequently adopted by regulators are those prepared by Standards Australia. The practice of adopting such standards is often attractive to regulators because it is faster and less costly than developing mandatory standards.

The Kean report noted the significant disadvantages of adopting voluntary standards if it is not done carefully:

- unnecessary costs may be imposed on business if there is inadequate assessment of the suitability of a voluntary standard for the specific regulatory purpose;
- voluntary standards have in the past tended to be prescriptive and cover a wider perspective than is often necessary for regulatory purposes;
- regulators therefore call up only part of the standard which can lead to non-uniformity of regulation across state borders.

Concerns raised during consultations include the tendency to call into regulation parts of a standard that were not intended for mandatory purposes. For example, best practice standards may be adopted and subsequently become the mandatory minimum standard. Many industry groups consulted stressed the need for rigorous appraisal of the workability

of proposed standards. An example of where use of a standard in regulations is said to be unworkable is provided in the accompanying box.

An example of the use of a standard in regulations: surfaces under playground equipment

The Australian Confederation of Child Care told the Committee that NSW regulations require that the surfaces under playground equipment conform with Australian Standard 4422: 1996. The Confederation commented as follows.

"The standard is written in highly technical terms. It is directed at engineers, not child carers.

The regulator in NSW does not appear to know when the Standard has been complied with as evidenced by its recent practice of requiring operators to provide certificates of compliance. The industry is now trying to find a way to obtain such certificates.

To make matters worse, the regulator has recently extended the rule to indoor equipment.

There is nothing wrong with government regulating on this issue. It also makes sense to have a Standard to provide guidance. The problem is in lazy risk management by regulators. This is not risk management — it is risk shifting. *Proper* analysis of benefits and costs, and *proper* consultation with parties would have revealed that it is not workable to make this standard the Law."

The Committee notes that there are processes in place concerning the appropriate use of standards in the regulatory environment. For example:

- The Council of Australian Governments (COAG) Principles and Guidelines for National Standards Setting and Regulatory Action state that legislation should entail the minimum necessary amount of regulation to achieve the objectives. Only those parts of a standard originally developed for voluntary compliance by private standards writers that are necessary to satisfy regulatory objectives should be referenced in mandatory regulatory instruments adopted by government.
- The World Trade Organization (WTO) agreement on Technical Barriers to Trade requires that where relevant international standards exist or their completion is imminent, members shall use them as a basis for their technical regulations except when such international

standards or relevant parts would be ineffective or inappropriate, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

- In *More Time for Business*, all governments agreed in principle not to use voluntary standards in regulations from July 1997 unless it can be demonstrated that the standard represents a minimum effective solution to the problem being addressed (Prime Minister 1997, p. 75).
- *A Guide to Regulation* states that where standards developed by Standards Australia, and other third party accredited standards writing bodies, are to be used for regulatory purposes, it must be demonstrated in the Regulatory Impact Statement (RIS) that they are the most effective means of achieving the relevant policy objective.

Despite all these developments, they are essentially about processes and it will take some time before consequent advantages of improved use of standards become evident to those who are having some difficulty complying with elements of existing regulation which draws on standards.

One approach that the Committee considered for addressing difficulties such as those described in the playground equipment example above is the possibility of regulators adopting a "deemed to comply" approach. This allows regulators to frame requirements in terms of desired outcomes. Businesses are "deemed to comply" with these outcome based requirements if they conform to specified more detailed standards or guidelines. These more prescriptive guidelines are the "deemed to comply" solutions. They give producers/service providers certainty as to a way in which the requirements can be met. The most common form of "deemed to comply" solutions is through the manufacturer meeting a specified voluntary standard (or part thereof). That procedure, however, is not mandatory, and producers remain free to demonstrate compliance in other ways should they wish to do so. This general approach has been adopted by the European Union in most areas of regulation.

The Committee was also made aware of a number of examples of the use of standards in quasi-regulation, including the Australian Standard on dummies endorsed by the Commonwealth Minister for Consumer Affairs (see Example 11, Chapter 2) and the Australian Standard on complaints handling requested by the ACCC. There are likely to be other requests made to Standards Australia by government departments for the development of particular non-mandatory standards. Such standards may then become endorsed by government officials for use in industry-based

schemes and it is essential that their potential effects be assessed in the context of regulation impact statements.

Conversely there may be a cost and confusion associated with government ignoring an established standard that generally satisfies its requirements and institutes a new standard for the purpose of legislation. There may well be instances where the majority, or the major players in an industry, have already adjusted their processes to meet a voluntary standard. In such cases industry is likely to argue for the use the existing standard, as a new and different standard will only cause confusion and extra cost**.**

Finally, another concern about the use of standards is in legal action, for example, the use of voluntary standards in negligence cases (see Example 16, Chapter 2, regarding the Australian Standard on kerb height). The Committee has been asked to comment on what action should be taken in relation to this issue. No industry groups consulted raised the specific issue of use of voluntary standards by the courts, although the general concern was raised that, as society becomes more litigious, lack of clarity about legal requirements means that businesses fear increasingly finding themselves in court defending their practices.

The Committee considered that the use of Australian Standards as an element in determining negligence was a logical extension of the use of a range of evidence by the courts in such cases. It noted that such standards could be used as a defence, as well as in establishing proof, of negligence. Consequently, the Committee considers that no further action is warranted at this stage, but that it would be worthwhile monitoring this aspect of standards because if it becomes more widespread it may have implications for how standards should be developed and applied.

3.3.4 Accessibility

The Small Business Deregulation Task Force in its report suggested that business should have access to information on both regulatory and voluntary standards and that all governments should take action to ensure that adequate information is available on standards. In relation to black letter law, the Commonwealth Government is taking various initiatives to make the law more accessible through, for example, the proposal to establish a register of legislative instruments and making legislation readily available on the Internet.

Australian Standards referenced in legislation must be purchased by businesses from Standards Australia in order for them to comprehend and comply with legal requirements. This represents a return on Standards Australia's intellectual property. However, it can also impede access to information, particularly for small businesses, due to the costs and effort involved. This is particularly the case in circumstances where mandated standards contain cross-references to other standards. For example, AS1576 Scaffolding, which is picked up in NOHSC's OH&S standard on plant and in various ways in State and Territory legislation, refers to some 35 other Australian Standards. Further problems arise where a standard is referenced and subsequently amended if the reference is not updated to refer to amended documents.

The Committee considers that those who must comply with the law should have reasonably low-cost access to referenced standards, including Australian Standards.

3.3.5 Further steps for effective use of standards

As a result of its consultations with industry groups and its consideration of the principal issues raised by the use of standards, the Committee considers it essential that further steps be taken in relation to standards.

Recommendation 1

The Committee recommends that departments and regulatory agencies, when using standards, should:

- *wherever possible, reference in regulations only those parts of a voluntary standard that are essential to satisfy regulatory objectives;*

- *ensure that all future reviews of Commonwealth legislation and regulation include an explicit assessment of the suitability and impact of all standards referenced therein, and justify their retention if they remain as referenced standards;*

- *ensure that, where appropriate, Australian Standards are used as "deemed to comply" provisions rather than as mandatory requirements; and*

investigate, with Standards Australia, mechanisms to provide business with low cost access to Australian Standards referenced in legislation.

Recommendation 2

The Committee recommends that action be taken to counter the perception held by some elements of small business that Standards Australia is a government body and that there is an expectation that all its standards must be complied with. The appropriate form of action should be based on advice of the quasi-regulation Working Group of Commonwealth, State and Territory officials.

Recommendation 3

The Committee recommends that Commonwealth Government regulators establish mechanisms to help ensure that existing and new standards developed by private organisations are consistent with mandatory government regulations. One way of doing this would be for regulatory bodies to establish a closer working relationship with Standards Australia through, for example, negotiating Memoranda of Understanding which establish the relative roles of each party in relation to the development of standards.

3.4 FACTORS RELEVANT TO CHOOSING THE BEST REGULATORY FORM

There is much debate about why governments regulate markets. The general rationale for government intervention is that in some circumstances a market left unfettered will fail to deliver socially optimal outcomes. Intervention may address market failures evidenced by lack of competition, externalities or information problems. Government intervention also may be primarily to achieve social goals such as requiring minimum standards by industry to protect public health and safety; to address unacceptable industry behaviour/unfair trading; or to ensure adequate access to services for all members of the community.

Strong views about the goals of particular intervention are often held by different market participants. In the absence of quantifiable data, in many cases judgements must be made about the optimal level and the form of intervention. Whatever the reason, the case for intervention does not rest on market failure or social concerns alone. To enhance social welfare, it must be demonstrated that the net benefits to society of any intervention outweigh the net costs.

Factors relevant to choosing the best regulatory form include the following.

The nature of the problem

Understanding the nature of the problem and assessing why the existing regulatory system will not work are important first steps in choosing whether to regulate and which form is best. What is the particular market

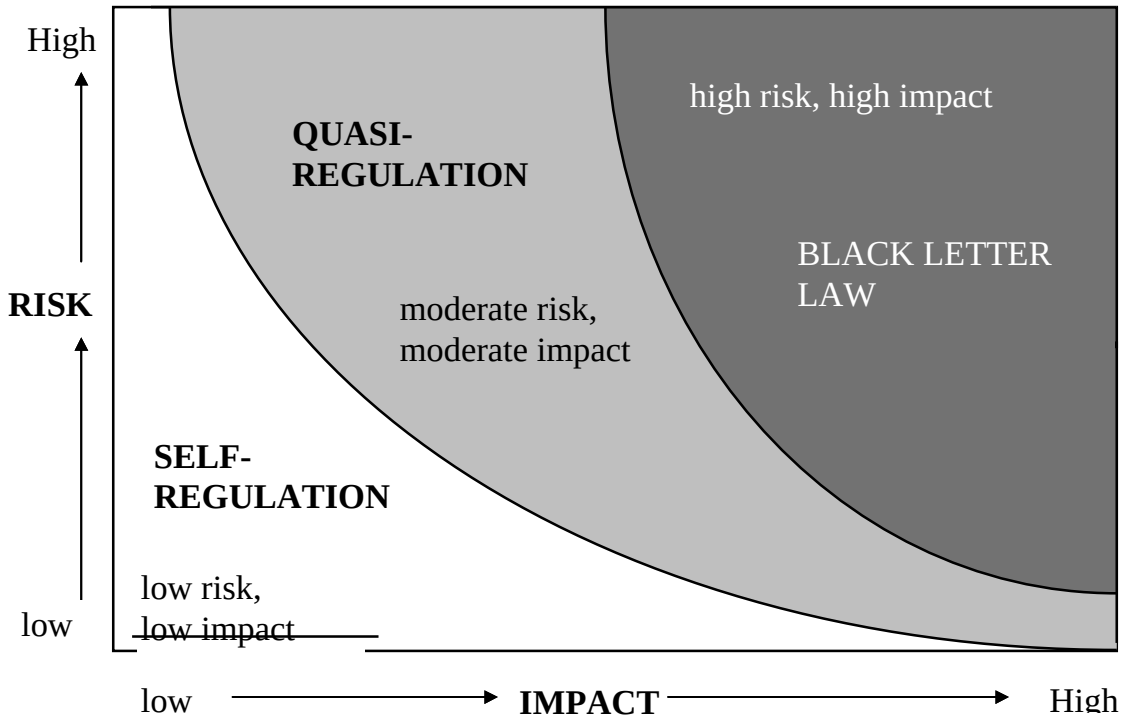
failure eg lack of competition, information problems, public goods which might otherwise not be provided by the market? Is there a need for minimum standards to address a major public health and safety issue? Are there other social goals, such as fair trading, which need to be addressed?

Risk assessment

Analysis of the likely risk to the population, trade or physical environment, of a particular event, and the significance of its impact, is a necessary step in assessing regulatory proposals. This involves considerations of the scale of the event (local, national, global) and its likely frequency of occurrence. For example, much regulation in the area of public health and safety is based on the risks to the human population of a particular activity such as communicable disease or working with dangerous equipment.

As a general guide, if the risk of an event is low, and its impact is also low, then there would be little need for a strong regulatory hand by government. There may, however, be responses by groups of businesses or other interested parties to regulate themselves to guard against commercial losses or personal injury. Conversely, if there is a high risk of a particular event occurring, and significant impacts on a national scale are likely – for example, widespread outbreaks of disease or plane crashes if minimum standards are not followed – then governments may choose to intervene to ensure standards are enforced. The necessity for legally enforceable sanctions to ensure compliance can often point regulators towards black letter law. However, the presence of risk is not necessarily evidence that governments should intervene further. For example, robust liability laws and insurance markets may act as sufficient incentives to reduce the risk of accidents or injury. As a general guide, the following diagram depicts the relationship between risk and regulatory forms.

Figure 3.1 Relationship between risk and regulatory forms



Flexibility and responsiveness

These features are particularly important for situations where an industry is evolving so rapidly so as to require constant changes to regulatory regimes. It is also important in circumstances in which a variety of means to achieve specified outcomes is likely to be available and for allowing speedy responses to critical problems which emerge from time to time, but for which the best long-term approach may not be immediately evident.

Costs

Small business often bears a disproportionately high burden of compliance and faces resource constraints compared to big business. The impact on small businesses of more flexible, tailor-made self- and quasi-regulatory schemes needs to be balanced against the costs of uncertainty associated with less formal regulations, the risk of litigation and the extent of resources required to examine appropriate compliance strategies.

Legislative environment

In the Committee's consultations, small and large business organisations expressed a preference for explicit government regulation in areas where the threat of litigation is high, due to the greater certainty it provides. Where mandatory performance based requirements are in place or being considered, there will often be a demand for these to be supplemented with more specific rules and guidance on compliance obligations or "deemed to comply" provisions. These rules may or may not be quasi-regulation, depending on whether there is a perceived expectation of compliance by business. For small businesses, "deemed to comply" provisions may provide greater certainty of compliance and can be incorporated in overarching performance based regulation.

Minimum standards or best practice

It is important to establish what is the minimum effective solution to an industry or consumer issue and whether strong legal backing is required. The aim may be to establish best practice benchmarks or aspirational goals which suggest a more light-handed approach might be preferred.

Industry organisation and attitude

This is a major factor affecting the likely success of regulation. For more light-handed approaches to be successful, the solutions must have widespread industry support. Is there a commitment to meaningful industry self-regulation and an active industry association? Or is there a history of disagreement on and non-compliance with fair trading principles?

External pressure

Is the threat of government legislation, consumer action or sanctions by industry bodies sufficient to encourage compliance? Or are stronger legal sanctions required?

Certainty

Is there a need for greater certainty because of lengthy industry investment horizons? Is certainty important for smaller businesses, because of the high level of resources required to implement a compliance program?

3.5 CHECKLIST FOR CHOOSING FROM THE REGULATORY SPECTRUM

A checklist to guide users through the selection of the different regulatory forms — self-regulation, quasi-regulation and explicit government regulation, is provided in Figure 3.2 below. The checklist is intended to supplement the RIS process by providing additional information to help determine which regulatory forms are worth considering, prior to the more formal testing of the effectiveness and likely costs and benefits of different regulatory options which is undertaken in a RIS.

Figure 3.2 Checklist for the selection of regulatory options

STEP 1 - Identify the problem

- Clearly define the problem, for example:
  - lack of competition
  - human health and safety risks
  - damage to the physical environment
  - unacceptable industry behaviour/unfair trading practices
  - insufficient or misleading market information
  - unacceptable transactions costs for consumers
- Are there deficiencies in the existing regulatory system which, if corrected, might fix the problem?
- Is the problem one for government or of purely private interest?

STEP 2 - Assess the risk

- What is the risk of the problem occurring?
- How widespread is it - local, state, national, international?
- Is it recurring?
- Is it significant?

STEP 3 - Assess the consequences of no action

- List the consequences of no action
- Can relying on the market in conjunction with the general application of existing laws solve the problem? Why not?
- Will the market self correct within a reasonable timeframe?
- Can a regulatory scheme improve the situation?

STEP 4 - Assess regulatory forms for effectiveness

(1) Self-regulation should be considered where:

- there is no strong public interest concern, in particular, no major public health and safety concern
- the problem is a low risk event, of low impact/significance
- the problem can be fixed by the market itself, ie there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements (industry survival, market advantage).

In addition, for self-regulatory industry schemes, as opposed to individuals voluntarily opting for a particular standard, success factors include:

- presence of a viable industry association
- adequate coverage of industry concerned
- cohesive industry with like minded/motivated participants committed to achieve the goals
- voluntary participation can work – effective sanctions and incentives can be applied, with low scope for the benefits being shared by non-participants
- cost advantages from tailor made solutions and less formal mechanisms such as access to quick complaints handling and redress mechanism.

(2) Quasi-regulation should be considered where:

- there is a public interest in some government involvement in regulatory arrangements and the issue is unlikely to be addressed by self-regulation
- there is a need for an urgent, interim response to a problem in the short term, while a long-term regulatory solution is being developed
- government is not convinced of the need to develop or mandate a code for the whole industry

- there are cost advantages from flexible, tailor made solutions and less formal mechanisms such as access to a speedy, low cost complaints handling and redress mechanism.
- there are advantages in the government engaging in a collaborative approach with industry, with industry having substantial ownership of the scheme. For this to be successful, the following conditions need to apply:
  - a specific industry solution is required rather than regulation of general application
  - there is a cohesive industry with like minded participants, motivated to achieve the goals
  - a viable industry association exists with the resources necessary to develop and/or enforce the scheme
  - effective sanctions or incentives can be applied to achieve the required level of compliance, with low scope for benefits being shared by non-participants
  - there is effective external pressure from industry itself (survival factors), or threat of consumer or government action.

(3) Explicit government regulation should be considered where:

- the problem is high risk, of high impact/significance, for example, a major public health and safety issue
- the government requires the certainty provided by legal sanctions
- universal application is required (or at least where the coverage of an entire industry sector or more than one industry sector is judged as necessary)
- there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles and no possibility of effective sanctions being applied
- existing industry bodies lack adequate coverage of industry participants, are inadequately resourced or do not have a strong regulatory commitment.

Recommendation 4

The Committee recommends that a checklist similar to that above, which provides guidance on choosing from the principal regulatory forms and in particular the appropriate use of quasi-regulation, be endorsed by the Government, be published in a revised edition of "A Guide to Regulation", and be used by all government officials in considering proposals for new or amended quasi-regulation or government regulation.

3.6 CRITERIA FOR PRESCRIPTION OF CODES UNDER THE TRADE PRACTICES ACT

'Underpinning' of industry codes is considered necessary in certain circumstances for the effective operation of codes. Underpinning can take such codes from the realm of self- or quasi-regulation into black letter law. The Government has proposed amendments to the TPA to allow prescription of an industry or consumer code, or relevant provisions of such codes, as either

- **mandatory**, whereby they can be enforced against all businesses in the specified industry regardless of whether they are signatories to the code; or
- **voluntary** and therefore enforceable only against those businesses which are signatories.

Prescription will apply the remedies contained in the TPA to those who contravene such codes. These remedies include: injunctions, damages, orders for corrective advertising, variation of contracts, refund of monies and refusing enforcement of contractual terms.

An important feature of prescribed codes is that they retain a high degree of industry involvement while providing the enforceability and coverage that can only be ensured through legislative means. Voluntary prescribed codes are particularly relevant to situations where subscription to a code attracts a market premium but where there are concerns about the enforceability of voluntary arrangements.

The proposed amendments provide a framework for prescribing industry codes of conduct to address specific fair trading issues in defined sectors.

Codes are to be prescribed in the franchising and petroleum marketing sectors because of the:

- sufficiently serious social and economic costs of problems in these sectors which are judged by government to warrant intervention; and
- failure of existing regulatory mechanisms to address persistent business conduct problems in these sectors.

The ability to prescribe these and other codes will allow for regulatory solutions which are proportionate to the problem and which minimise economic distortion. This framework will assist in delivering the Government's preference for codes of conduct over 'black letter law'. The Committee has been asked to suggest criteria which should be satisfied before other codes are considered as candidates for prescription. This is in keeping with Government policy that industry should take ownership for developing efficient and effective self-regulatory mechanisms and that only the minimum necessary regulation should be used. Policy responsibility for the development of these codes will rest with the Minister for Customs and Consumer Affairs, in consultation with responsible agencies.

The Committee notes that the Commonwealth's RIS process provides for the analysis of the issues below and a comprehensive RIS will be required for any code which is under consideration for prescription under the TPA. The Committee draws attention to the merits of distributing a draft RIS as part of the consultation with all affected parties.

Recommendation 5

The Committee recommends that prescription under the TPA should proceed only if all of the following prerequisites have been met:

- *a market failure has been identified that will, in the absence of government intervention, have a significant detrimental impact on a substantial group in the community* ***or*** *there is a social policy objective that, if not pursued by government, will lead to a significant detrimental impact on a substantial group in the community*
- *a systemic enforcement issue exists, for example with breaches of voluntary industry codes and lack of agreement on fair trading principles, which has led*

to the failure of self-regulatory or quasi-regulatory arrangements

- *there are significant deficiencies in any existing regulatory regime which cannot be remedied (for example, inadequate industry coverage)*
- *a range of self-regulatory options and "light-handed" quasi-regulatory options has been examined and demonstrated to be ineffective.*

3.7 TRANSITIONAL ISSUES

Transitional issues might arise in two respects — moving from no regulation to self- or quasi-regulation, and moving away from black letter law. In the first situation, issues to be addressed might include whether a period of time should be allowed for businesses to put in place compliance and monitoring mechanisms prior to the commencement of regulation. When moving from black letter law to self- or quasi-regulation, consideration might need to be given to matters such as whether any alteration of rights (eg to information, privacy, confidentiality or to appeal) needs to be addressed.

Some industry groups consulted were concerned that moving from black letter law to quasi-regulation is merely an attempt by governments to shift costs. Industry challenges the equity of it being asked to administer schemes, often at the same time being asked to meet full cost recovery for government monitoring, enforcement and/or surveillance activities. In these circumstances the public interest component of regulation needs to be taken into account in determining cost-recovery levels and strong accountability measures should be established for the costs of public administration.

CHAPTER 4

Strategies to achieve effective quasi-regulation

4.1 INTRODUCTION

This chapter outlines strategies which can be used to establish quasi-regulatory arrangements with features likely to ensure their effectiveness and success. It draws on the case studies of quasi-regulation set out in Chapter 2 and on information provided to the Committee during its consultations with representatives of industry, consumers and government agencies.

In common with other forms of regulation, there are some general features which quasi-regulation must have if it is to be effective. In particular, quasi-regulation should:

- be aimed at achieving defined objectives, and include strategies for achieving those objectives;
- be efficient — that is, adopt the best means of achieving objectives without any unnecessary side-effects;
- not impose an unjustifiable burden on business;
- avoid restricting competition — as agreed by all Australian governments under the Competition Principles Agreement; and
- be consistent with Australia's international obligations, including those under the World Trade Organization agreement on Technical Barriers to Trade.

However, it is important to note that the mechanisms by which quasi-regulation achieves its results and the way it impacts on businesses differ from other regulatory forms. The strategies set down in Section 4.2 aim to take these differences into account.

4.2 STRATEGIES

This section sets out nine strategies which need to be adopted in the development and management of quasi-regulation to help ensure that it will be effective. While these strategies are intended for use by government officials when they are involved, a broader awareness of the strategies may help foster better collaboration between industry, consumer interests and government.

In addition to these strategies, the general Regulation Impact Statement (RIS) approach outlined in Chapter 3 will help ensure that appropriate consultation is an inherent part of the quasi-regulation process, and that the likely impacts on all groups affected will be assessed and documented. Given the collaborative nature of much quasi-regulation, these matters of consultation and impacts are even more critical to success than they are for explicit government regulation.

4.2.1 Understand the industry

A crucial factor in developing a system of quasi-regulation is for officials to understand the industry or businesses to which it will apply, especially in the case of industry codes. Knowledge of an industry will need to include information about the number and type of businesses involved, whether they have diverse or cohesive interests, and whether there is an effective and sufficiently resourced industry organisation. This last point is particularly important with schemes where consideration is given to industry having a central role in developing and managing regulation. Without adequate knowledge of the structure and nature of the industry, it would be difficult for officials to adopt effectively any of the remaining (eight) strategies.

4.2.2 Set appropriate requirements

The requirements which form the basis of the quasi-regulation should be carefully constructed to help ensure they will achieve their objectives. To that end it is important that government and industry deliberately choose to adopt a quasi-regulatory route. Unfortunately, there is a tendency for "regulatory drift" whereby an existing voluntary code or standard evolves into an arrangement which is quasi-regulatory in nature, with no assessment as to whether it sets appropriate requirements.

Also, in setting appropriate requirements it is particularly important that new quasi-regulatory arrangements do not duplicate, or are not inconsistent with, existing arrangements. As there is no systematic way of registering and disseminating information on quasi-regulation, potential duplication is a significant risk and requires special attention at the design phase.

In cases where there is available information about potential duplication, it is important to gauge its extent and the allied costs. An example of where this will be an important issue is in the proposed National Scheme for Fair Information Practices in the Private Sector, where it is noted that:

> There are already many industry codes of practice in Australia, some containing an information privacy element. None deals with the full range of information privacy issues. This is not to say that the information privacy parts of existing codes are not useful or that they should be abandoned in favour of specialised privacy codes, but it does suggest that more consistent protection could be achieved if benchmark standards were accepted in all sectors. (HREOC 1997)

The existing RIS process, which must be applied to quasi-regulatory arrangements, should provide useful guidance on setting appropriate requirements. For quasi-regulation the principle applies, as it does for explicit government regulation, that the Government should not involve itself in regulation without demonstrating that the form of regulation represents the most appropriate and cost-effective solution to a problem.

The responsible government body should, therefore, prepare a RIS before taking any action which constitutes endorsement of a code (or other rules), such as formal registration, promotion or a commitment to government involvement in administration or funding, all of which create an expectation that industry should comply with otherwise non-binding regulation.

4.2.3 Promote ownership and commitment

Government officials in particular should work on the basis that, where possible, industry should retain ownership of the regulatory scheme. This is a corollary to the Government's policy that it:

> .....is keen for industry to take ownership and responsibility for developing effective and efficient self-regulatory mechanisms where this is appropriate. (Prime Minister 1997, p. 77)

The approach of industry to quasi-regulation will be crucial to its success. As has been seen from the case studies provided in Chapter 2, quasi-

regulation can involve a cultural change for a company and also substantial costs. Without the commitment of an industry association or the senior management of a company to the proposal for quasi-regulation, the chances of success will be small.

Where government has the primary role in initiating quasi-regulation, its commitment to achieving an effective outcome is essential. However, even where business has a major role in the development of quasi-regulation, government support and commitment is still crucial to the process.

4.2.4 Ensure access to quasi-regulation

Because there is no systematic way of announcing, launching or promulgating quasi-regulatory arrangements, knowledge of their existence and details as to their content may not be readily accessible by all groups affected. A strategy should be adopted to publicise to all interested groups some basic information and details as to how further information can be obtained if required.

The Small Business Deregulation Task Force recommended that a national business information service be implemented to help overcome the problem of not knowing what regulations exist. In response, the Government implemented a substantial program to amalgamate and integrate information in a Business Information Service, and has indicated that quasi-regulatory arrangements would be part of this service (Prime Minister 1997, p. 58).

Nevertheless, it should remain the responsibility of government and industry working together to develop specific quasi-regulatory schemes to ensure that those affected have access to relevant details.

Recommendation 6

The Committee recommends that in cases where departments and agencies have a substantial role in the initiation, development or implementation of new or amended quasi-regulations, they take steps to notify those affected and keep a public register of relevant details. The public register should be accessible in electronic format by, for example, inclusion in departments' and agencies' home pages.

4.2.5 Obtain adequate resources for administration

Many of the administrative functions performed by industry bodies in quasi-regulatory arrangements are akin to functions for which government bodies would normally be responsible in areas covered by legislation. Administration may include such tasks as co-ordinating implementation, monitoring compliance, handling complaints, undertaking education and publicity requirements, and dealing with breaches.

Reflecting the collaborative nature of quasi-regulation, it is important that administrative costs be borne equitably as between government and industry, taking into account the extent of government involvement. It may not be reasonable for government to expect all of the costs to be borne by industry simply because no explicit government regulation is involved.

Where government bodies implement quasi-regulatory schemes which impose administrative costs on industry, they should ensure such costs are justified, taking into account the extent to which the scheme has public objectives and the extent to which industry benefits.

4.2.6 Minimise costs to industry (and consumers)

Where industry bears the full costs of regulation, it must be borne in mind that these costs may be passed on to end-users/consumers of the regulated goods or services. Quasi-regulation should be designed to minimise costs to industry.

Some of the areas where costs arise are:

- the direct costs of changes in business behaviour to comply with rules set up by quasi-regulation;
- costs for industry groups of participating in development and management of quasi-regulatory arrangements;
- costs associated with maintaining access to information about arrangements and interpreting rules; and
- costs arising from systems for demonstrating compliance and dealing with any disputes or litigation related to the scheme.

Some steps which will tend to reduce business compliance costs are:

- involving affected business groups in the development of rules;
- making sure that rules are clearly expressed in plain language;

- developing an appropriate strategy for disseminating information about rules established by quasi-regulation (see 4.2.4 above);
- avoiding unduly prescriptive requirements; and
- reviewing quasi-regulation arrangements regularly to ensure they remain current and relevant (see 4.2.7 below).

The success or otherwise of quasi-regulation will depend also on the ability of industry to manage any transitional stage. It needs to be recognised that moving from other forms of regulation to quasi-regulation may be resource-intensive for both industry and government.

4.2.7 Monitor and review the arrangements

There needs to be a mechanism for assessing how effectively quasi-regulation is operating. This is particularly important for quasi-regulation because of the complexity of the mechanisms which influence businesses and typically the absence of "command and control" type mechanisms for achieving compliance.

In some cases, such as the general insurance code of practice (see Chapter 2 for details), this can be done by industry publishing the results of monitoring. In other cases, the government may have a greater role in monitoring such as with the life insurance code of practice (see also Chapter 2). Where quasi-regulation has been initiated by government with relatively little industry involvement, the responsibility for monitoring will generally rest with government agencies.

Like any regulation, quasi-regulation should be regularly reviewed to assess its effectiveness and continuing relevance. Its success or otherwise in achieving the desired outcomes and its impact on the target groups are factors to be taken into account.

Issues of monitoring and review are dealt with in more detail in Chapter 5.

4.2.8 Establish mechanisms for complaints handling and dispute resolution

Where a proposed quasi-regulation involves the supply of goods and services to consumers, it should include some mechanism for redress for faulty goods and services supplied in breach of the standards. Consumers would expect a business to have procedures in place to deal with complaints and for a system to be provided whereby unresolved complaints can be

determined fairly and at little cost to the consumer. Redress such as compensation or rectification should form part of the proposed quasi-regulation (Minister for Customs and Consumer Affairs 1997).

Four reasons for incorporating a complaints handling mechanism are:

- speedy, low cost, resolution of complaints;
- quasi-regulation may not offer the same avenues for redress through the courts or through a government regulator as does legislation; and
- complaints can provide a powerful tool for monitoring compliance with quasi-regulations, by encouraging individuals to draw attention to cases of non-compliance; and
- complaints can provide valuable market information and feedback which industry can use to improve its performance.

For quasi-regulation arrangements covering relationships between businesses, a similar mechanism would focus on resolving disputes, thereby avoiding costly legal action in the courts.

In order to be effective, these mechanisms must be able to draw on suitable sanctions.

4.2.9 Check compliance and establish effective sanctions

Because quasi-regulation depends on inducing business compliance rather than direct enforcement, the factors that lead businesses to comply with quasi-regulation are important. Consideration should be given to:

- an incentive scheme that will encourage compliance (industry should have a particular interest and take the lead in these matters);
- how businesses are to be informed about the quasi-regulation and the reasons for complying with it;
- the consequences of compliance and non-compliance;
- where relevant, how cases of non-compliance would be detected and acted upon; and
- who has responsibility for these tasks and whether they have the capacity to carry them out effectively.

Sanctions for non-compliance can assist in enhancing the credibility, and thus the degree of public and government confidence, in a scheme — essential pre-requisites for effectiveness. Commercially significant

sanctions may be necessary to achieve credibility with, and thus compliance by, industry members and also to engender consumer confidence.

Sanctions for breaches of industry codes should be flexible enough to reflect the nature and seriousness of the breach of a code and the damage suffered by the complainant — for example, censures, warnings, corrective letters, publicity, corrective advertising, withdrawal of advertisements, fines, suspension or expulsion.

The body responsible for the administration of an industry code will need to establish procedures to identify serious or repeated breaches, to hear the case against the member concerned, and to decide on an appropriate penalty. In cases where there may be serious repercussions on a code member subject to a sanction, an appeal mechanism should be in place, not only for equity reasons but also because it might reduce recourse to the courts.

Associations may seek Australian Competition and Consumer Commission authorisation for codes that provide for expulsion or suspension, in circumstances where such action may affect a member's capacity to compete or operate in the industry. In such circumstances, there should be provision in the code for an appeal to an independent body.

Recommendation 7

The Committee recommends that those involved in the development of any quasi-regulation which affects relationships between businesses and consumers, or between businesses, should actively support establishment of an accessible, low cost and transparent complaints handling mechanism which is able to trigger effective redress and sanctions.

4.3 DEFAMATION AND NEGLIGENCE[1]

Code administrators may be at risk of actions for defamation or negligence in certain circumstances.

With some types of quasi-regulation, such as codes of practice, an administrator might need to consider expelling a member, naming a member (either to other members or publicly) for a breach of the code, or publishing information on the member's operation which reveals, for example, a large number of complaints against a member. Applying these types of sanctions against a member raises the question whether the member can make a successful claim for defamation against the administrator and/or the relevant body.

A defamatory statement is one which tends to lower a person in the estimation of his fellow men by making them think less of him. To establish a cause of action in defamation, three elements must be present: the matter complained of must be capable of being defamatory, the matter must be capable of identifying the person defamed and the matter must have been communicated to at least one third party. If the relevant member is incorporated (eg a company) the defamatory imputations must adversely affect its commercial reputation. It is defamatory of a company to assert that it carries on business in a 'discreditable, unjustifiable and disreputable manner'.

It would seem unlikely for an administrator to be successfully sued for defamation where the administrator has acted in accordance with the provisions of a code which governs the relevant industry body. If this is the case, the administrator and/or the relevant industry body, to avoid liability in a defamation action, must prove, on the balance of probabilities, at least one defence to the publication of a defamatory statement. The defences potentially relevant to an administrator and the relevant industry body are justification (or truth), fair comment and qualified privilege. The availability of the defences depends on the applicable law in each Australian jurisdiction.

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[1] The information set out in this part (Section 4.3) is included for general information only, and should not be taken as constituting advice about any particular circumstances. Readers concerned about defamation and negligence issues should obtain their own independent advice.

At common law it has always been possible to successfully defend an action in defamation by establishing that the imputation in question is true in substance and in fact. The defence does not apply to statements of opinion. The defence is available irrespective of the motive of the person making the publication. Truth forms a complete defence in Victoria, Western Australia, South Australia and the Northern Territory. In the ACT, Queensland and Tasmania, it is a defence that the statement is true and made for the public benefit.

At common law the elements of the defence of 'qualified privilege' are:

- the defamatory statement was made in the discharge of a public or private duty (whether legal, social or moral);
- the person to whom the statement is made has a corresponding duty or interest in receiving it; and
- the statement was made in good faith and was not actuated by ill will or other improper motive.

The common law defence operates in Victoria, Western Australia, South Australia, the Australian Capital Territory and the Northern Territory. The defence of qualified privilege as it operates under statute in the remaining states is broader than the common law defence.

In acting in accordance with a code, the administrator should be able to use the defence of 'qualified privilege' by demonstrating that:

- their action discharged a duty under the code;
- the dissemination of the statement was to those with an interest in receiving it (including other code members or to the public, if a member or the public had an interest in knowing the information, eg to protect their interests);
- the administrator acted in good faith; and
- the action was not actuated by ill-will (or other improper motive) towards the member.

The defence of fair comment in the public interest is available where a statement clearly distinguishes between fact and comment, the factual part of the statement is true and the comment is fair on a matter of public interest.

It is important to note that where an administrator has a duty under a code to take action of the type mentioned above, not to do so might open the administrator to an action for negligence (which further supports the view that a successful action for defamation would be very difficult to sustain).

Accordingly, it would appear to be advisable for the powers of a code administrator to be expressed clearly, covering:

- the need for any sanctions available to the administrator to be obvious and to be open for scrutiny by new and existing members;
- achievable duties for the administrator;
- clear processes for code administration generally, including processes for applying sanctions; and
- at the same time, code provisions which retain flexibility and do not restrict competition.

There may be circumstances where a code administrator is faced with the threat of a defamation action as part of a perceived strategy of the member concerned to prevent the release of material harmful to that member's interests. The administrator may feel obliged not to release the material which would be to the detriment of the proper functioning of the code. Consideration therefore needs to be given to mechanisms to ensure that the code administrator can deal with such a situation, such as:

- as mentioned above, clearly worded code provisions on which the administrator can rely in applying a sanction;
- sufficient resources to seek sound advice, if necessary;
- contractually based limits on defamation (and negligence) actions on an administrator, agreed between code members;
- appropriate insurance.

As to the issue of negligence, a member of a code or a member of the public who suffers loss from relying on information supplied by the code administrator, may be entitled to bring an action for negligence. This might occur where a member of a code or the public suffers harm from the actions, or inaction, of an administrator not taking sufficient care.

It is therefore possible that code administrators may be exposed to legal action if they negligently publish inaccurate information about code members, or negligently take some other action, which causes the member

or a member of the public damage or injury. Administrators might also be open to a negligence action to third parties if they fail to act, such as failing to fulfil a duty under a code to report breaches of its provisions, and as a result someone suffers harm. In order to establish a successful claim against the administrator or the relevant industry body a person would need to establish that the administrator and/or industry body had a 'duty of care' to that person, the administrator and/or industry body did not observe the appropriate standard of care in relation to that person and thereby breached that duty (ie the administrator and/or industry body failed to exercise reasonable care); and the person suffered reasonably foreseeable and proximate loss or damage as a result of the breach.

However, so long as an administrator acts reasonably and in accordance with the provisions of a code, the likelihood of a successful negligence action will be minimal, but one to be borne in mind regarding the proper performance of the functions of an administrator.

Recommendation 8

The Committee recommends that defamation and negligence issues that may be associated with the administration of codes of practice be addressed by government officials involved in the development of these types of quasi-regulation by:

(a) drawing these issues, where appropriate, to the attention of the proponents of the quasi-regulation and/or its prospective administrators; and

(b) promoting the need for all codes of practice to contain provisions which clearly set out the role of the administrator and, in particular, in reporting on the operation of the code and applying sanctions against members.

4.4 CONCLUSION

To assist in the design of successful quasi-regulation, government officials should adopt the following strategies.

1. Understand the industry
2. Set appropriate requirements
3. Promote ownership and commitment
4. Ensure access to quasi-regulation
5. Obtain adequate resources for administration
6. Minimise costs to industry and consumers
7. Monitor and review the arrangements
8. Establish mechanisms for complaints handling and dispute resolution
9. Check compliance and establish effective sanctions
10. Guard against defamation and negligence actions

CHAPTER 5
Monitoring and review of quasi-regulation

5.1 INTRODUCTION

For quasi-regulation to be successful (and importantly for it to remain successful), appropriate mechanisms for monitoring and review should be an integral part of the scheme. Monitoring, and reviews at specified intervals, yield assessments of the effectiveness and continuing relevance of quasi-regulatory schemes. Whether they are making progress in achieving the desired objectives and their impact on target groups should be under continuing review. Monitoring can also act as a powerful aid to compliance and provide valuable feedback for industry to improve its performance.

The focus of this chapter is on quasi-regulatory schemes with a high level of industry involvement and ownership, such as codes of practice, but monitoring and review is relevant to all forms of quasi-regulation.

5.2 THE TERMS — 'MONITORING' AND 'REVIEW'

This section outlines what is meant by the monitoring and review of regulatory schemes.

Monitoring — addresses how a regulatory scheme is working and involves collecting information, on an ongoing basis, for use by those administering the scheme to assess whether the specified objectives of the scheme are being achieved and to provide feedback to participants in the scheme to adjust their behaviour to accord with those objectives. It might involve the measurement of such things as:

- the level of satisfaction with the operation of the scheme held by participants and, where relevant, consumers;
- the number and type of complaints brought under the scheme by consumers or other participants;

- the level of awareness of the scheme amongst the participants (and other firms not participating in the scheme) and amongst those whom the regulation is designed to benefit (usually consumers but a scheme might be directed at improving the relationship between participants; eg the previous Franchising Code of Practice which regulated behaviour between franchisors and franchisees, rather than between the franchising industry and consumers of their products);
- the degree of compliance by participants;
- the level of compliance costs placed on participants; and
- how accessible the scheme is to consumers or other participants.

Review — addresses how a scheme has worked up until a particular point in time and provides an opportunity to fundamentally assess the progress made towards meeting the scheme's objectives and whether the scheme should be altered or abandoned and, if so, whether other alternatives should be considered. A review should be able to draw from information obtained from the monitoring process.

Overall, monitoring and review combined should be designed to ensure that the regulatory scheme represents best practice/minimum effective regulation in that:

- the scheme is appropriate (up-to-date, relevant) and its objectives remain sound and are being met;
- costs, such as compliance costs on participants, and adverse side-effects, such as any necessary restriction on competition, are minimised; and
- the scheme results in improved economic performance of those industry participants which it affects, and/or improved consumer satisfaction with the goods and services the participants produce.

Fundamentally, monitoring and review of a regulatory scheme should ensure that its benefits to the Australian community continue to outweigh any costs.

5.3 CURRENT LEVELS OF MONITORING AND REVIEW

All new Commonwealth and State/Territory regulation, affecting business, is required to be monitored and periodically reviewed. The rules for preparation of regulation impact statements specifically require policy makers to establish how the chosen regulatory option is to be monitored in order to assess its progress in achieving its objectives and a review strategy that will allow it to be evaluated, after it has been in place for some time.

In respect of delegated legislation under Acts of Parliament, the Legislative Instruments Bill 1996 contains detailed provisions for the making, scrutiny and sunsetting of all delegated legislation/regulation. With existing regulation the Bill provides for its expiration at the end of 5 years. If the substance of the regulation is still relevant, a further instrument will need to be made. That further instrument will require an extensive and comprehensive consultation process, including the preparation of a RIS, and the Parliamentary scrutiny of the regulation so made.

In addition, legislation reviewed in accordance with the COAG Competition Principles Agreement is required to be systematically reviewed at least once every 10 years.

It is understood that with industry self-regulation there has been no consensus view on the need for monitoring and review nor any industry norms as to the period after which a review should take place.

There appears to have been no consistent approach to monitoring and reviewing of quasi-regulatory schemes. The following are evident from the case studies of quasi-regulation in Chapter 2.

The Code of Practice for Advising, Selling and Complaints Handling in the Life Insurance Industry, which commenced informally in 1994/95, is monitored by the ISC. The ISC is to assess the need for review of the Code in the course of its monitoring. The Code has internal complaints handling requirements and an external dispute scheme to which Code members must subscribe. Life companies and life brokers are required to provide regular reports to the ISC about compliance with the Code. Breaches of the Code are referred to the life company's Board or Code Compliance Committee or to the life broker's directors or principals.

Under the Advertising Code of Ethics (now defunct), complaints could be made to the Advertising Standards Council. Monitoring was carried out by a Code Committee. There was no provision for formal review of the Code.

The Code of Banking Practice, established in late 1996, has an external redress mechanism — the Banking Ombudsman. Banks are required to report each year to the Reserve Bank on the operation of the Code and on certain disputes. The Code has provisions requiring review every three years.

The General Insurance Code of Practice came into operation in 1995. It specifies internal procedures for complaints handling and participation in an external disputes scheme. A separate company monitors compliance, receives complaints about breaches of the Code and can impose sanctions such as rectification, audit, corrective advertising and publication in its annual report. One insurance company was named in the 1996 annual report for failing to adhere to the Code. A review is to commence two years after the Code is fully operational.

The above suggests that, while there may be exceptions, the current level of monitoring and review of quasi-regulatory schemes could be improved.

5.4 MONITORING AND REVIEW PROCESSES

Any monitoring and review arrangements need to be designed to maximise their benefits and minimise their costs. Below are some aspects of the arrangements that need to be considered.

Benefits

To maximise the benefits of monitoring:

- The information collected should be targeted to provide meaningful, unambiguous and well directed advice on how the scheme is operating and how it might be improved.
- The information should stand up to scrutiny when aggregated. That is, information should be collected which is comparable between industry participants and between consumers.
- Aggregated information should be published and made available to the stakeholders, both participants and consumers.

- The information collected should be capable of assisting businesses in improving their performance and improving consumer satisfaction.
- Privacy and confidentiality concerns should be met.

To maximise the benefits of a review:

- The review body should be capable of being seen to be impartial, either by having it independent of participants and consumers or by having equal representation from participants and consumers with an independent chair.
- The review body should be acceptable to participants and consumers and be given a sufficiently wide mandate to undertake a proper assessment of the success or failure of a scheme.
- The review body should be adequately resourced, be given sufficient time for its task and publish its report.

A transparent monitoring and review process (eg publication of results), of itself, should add to consumer/participant confidence in the regulatory scheme.

Costs

Monitoring and review is not costless.

In particular, the participants might need to put in place information gathering systems and expend resources in separately identifying, and reporting on, information needed for monitoring and review.

In addition, code administrators will need to be sufficiently resourced to consult with those affected by the regulatory scheme and collate information collected. Review bodies will need the resources to draw together information and make their assessments.

Further, resources are required to publicly report the results of monitoring and/or review.

Care therefore needs to be taken not only to maximise the benefits from monitoring and review but also to minimise associated costs. For example:

- The collection of information should be the minimum necessary.
- Information requirements should be assessed to ensure that they are easy to collect (low cost, low resource use, readily available, minimum repetition, etc).

- Whether information collected for other purposes can be used for monitoring needs to be examined. On the other side of the coin, consideration should be given to whether the information collected might have other productive uses.
- Administration of the scheme should be aligned with the generation of, or at least be compatible with, information monitoring requirements.
- Information requirements should be proportional to the scale of the regulatory scheme, the size of the industry and the relative size of industry participants. In this regard, the interests of small business should be specifically addressed.
- The terms of reference for any review body should require it to achieve best practice/minimum effective regulation.

5.5 COMMON FEATURES FOR ADEQUATE MONITORING AND REVIEW

There appear to be a number of common features in achieving adequate monitoring and review arrangements.

Their development should be undertaken by the industry participants directly affected to ensure industry ownership and commitment, and involve other stakeholders such as consumers.

If government is developing the scheme arrangements, then monitoring and review requirements need to be developed in close collaboration with industry and any other stakeholders.

Open, transparent monitoring and review requirements should be incorporated into the provisions of the scheme.

A scheme administrator should be given specific responsibility to ensure that the monitoring and review requirements are met, and should be adequately funded for this purpose.

Responsibilities should be placed on scheme participants to provide specified information to the administrator on a regular basis and the administrator should consult regularly with scheme participants.

Complaints mechanisms should be designed and used for both feedback for industry participants and as a major source of information for monitoring purposes.

Where it is appropriate, information should be gathered from industry members which are not participants in the scheme and from consumers, who have not had cause to make complaints under the scheme, about their awareness of the scheme.

The time period for conducting reviews should be set. While circumstances will vary depending on the type of scheme, every five years appears to be a reasonable period. Where technological or other changes are occurring rapidly (such as with the Internet) a shorter period may be warranted.

Reviews should be conducted by individuals who are independent from the day-to-day operation of the scheme and should fairly represent the interests of the stakeholders involved.

The results of both monitoring (on a regular basis such as in an annual report) and review should be made publicly available.

5.6 POSSIBLE GOVERNMENT INVOLVEMENT

Self-regulation

Currently, Commonwealth Government guidelines are being developed to assist businesses wishing to develop self-regulation. They are to contain advice on the way monitoring and review might be undertaken.

Government should not, however, be directly involved in the monitoring and review of schemes which are self-regulatory. Otherwise, the essential character of self-regulation may be lost. Government involvement may change the character of the self-regulatory scheme to one of quasi-regulation.

Quasi-regulation

In the light of the types of factors discussed in earlier chapters of this report, government may decide that its involvement in an industry scheme is necessary to achieve desired objectives. Certain responsibilities will fall on government when it considers whether to become involved in what would otherwise be a self-regulatory scheme.

The first responsibility is for government to ensure that what is proposed (ie the type of regulation advocated) is the best regulatory approach to the problem(s) proposed to be addressed (Chapter 3 addresses this point).

Secondly, the government needs to ensure that the content of the advocated regulation follows regulatory best practice. That is, it is minimum effective regulation (Chapter 4 addresses this point).

The third responsibility, depending on the level of government involvement, may be to ensure that the regulatory scheme in place continues to be effective and relevant and is achieving its desired objectives. This may require government agencies to insist on, assist with, or put into place, appropriate arrangements for monitoring and review of the regulatory scheme.

It is relevant that the Government is putting in place performance indicators to allow it and the business community to track the success of regulators and the whole Commonwealth administration in improving the quality of business regulation. The purpose of the indicators is to measure the success of regulators in achieving aims such as:

- minimising the impact of regulation on business;
- applying appropriate scrutiny and consultation processes; and
- producing regulation which meets tests of transparency, fairness and accessibility.

The development and mandatory reporting of performance indicators is meant to ensure that areas of government regulatory activity such as quasi-regulation do not escape the appropriate scrutiny and review processes. The first reporting period will commence on 1 July 1998.

5.7 LIMITS ON GOVERNMENT INVOLVEMENT

Any arrangements for monitoring and review will need to reflect the type of regulatory scheme to be implemented and the type and level of government involvement.

That is, government involvement in monitoring and review should be proportional to the role it has taken in respect of other aspects of the regulatory scheme (as well as to the scope of the scheme itself).

It is important to note that where government does become involved in a review of a quasi-regulatory scheme a central focus for government should be on whether the arrangement which gives the scheme its essential quasi-regulatory character should be continued, altered or abandoned.

Formulation

Where the government involvement is limited to assistance with the formulation of a regulatory scheme, then government should ensure that the scheme includes arrangements for adequate monitoring and review.

Funding

The reasons for government involvement in funding might stem from the judgement that a particular industry itself cannot afford to fund (or fully fund) a worthwhile regulatory scheme and that the benefits to the broader community warrant a government contribution to the funding.

In this situation government needs to consider whether adequate monitoring and review arrangements are in place and whether a component of that funding should be allotted specifically for monitoring and review. In addition, any auditing of the government funding should specifically include a check on the monitoring and review arrangements.

Administration

In quasi-regulatory schemes which are initiated and administered by government, the relevant government organisation should generally take responsibility for monitoring and review of the arrangement.

More broadly, those departments and agencies responsible for the preparation of regulation impact statements should include the costs of monitoring and review (apportioned as appropriate between industry and government) in the analysis of options involving quasi-regulation.

Recommendation 9

The Committee recommends that departments and agencies involved in the formulation or funding of quasi-regulation should encourage the industry parties to establish a formal monitoring and review mechanism or, in cases where the government involvement is so extensive as to require such accountability, should carry out that function.

APPENDIX A
Terms of Reference

As part of the Commonwealth's response to recommendations made by the Small Business Deregulation Task Force, a Commonwealth inter-departmental committee (IDC) is to inquire into and report on aspects of quasi-regulation, including on its relationship with self-regulation and with explicit government regulation.

The IDC is to consist of representatives from the Department of the Prime Minister and Cabinet, the Treasury, the Attorney-General's Department, the Department of Industry, Science and Tourism, the Australian Competition and Consumer Commission, and the Office of Regulation Review (ORR). The ORR is to chair the IDC.

"Quasi-regulation" covers a wide range of rules or arrangements for which there is a reasonable expectation of compliance and for which there is government (or court) involvement, such as in formulation, enforcement or funding. Quasi-regulation excludes explicit government regulation. Examples of quasi-regulation are:

- those codes of conduct in which there is some government involvement;
- co-regulation, where government and industry cooperate in development and operation of a scheme, but which does not form part of explicit government regulation; and
- voluntary standards made by Standards Australia or other bodies such as international organisations.[1]

While self-regulation typically lies outside the scope of quasi-regulation, there is overlap between them which may have important consequences for regulatory best practice and for the extent of compliance costs.

Terms of reference

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[1] The Committee subsequently concluded that voluntary standards made by Standards Australia are not examples of quasi-regulation (see Chapter 2, Section 2.6, for details)

1. The Government has an objective that, where appropriate, industry should take increased ownership and responsibility for developing efficient and effective regulation (having regard to minimum feasible compliance costs). The Government also intends to reduce the regulatory burden and compliance costs on all sectors of the community, but particularly on small businesses.

2. The IDC on quasi-regulation is to inquire into, and report on, aspects of quasi-regulation pertinent to those objectives, including:

   (a) the characteristics and extent of quasi-regulation;

   (b) the circumstances in which quasi-regulation is a viable alternative to government regulation;

   (c) essential features of successful quasi-regulation; and

   (d) processes for monitoring and reviewing quasi-regulation to ensure that it is current, effective and efficient.

3. The report of the IDC is also to propose guidelines as to the circumstances where self-regulation is likely to be appropriate, and to contrast those with circumstances where quasi-regulation or, alternatively, explicit government regulation, may be appropriate.

4. For the purposes of this inquiry, some areas which could be regarded as quasi-regulation should *not* be addressed because they are the subjects of other inquiries and processes. They are:

   (a) international treaty obligations of which there is a reasonable expectation of compliance even though Australia has not ratified the treaty; and

   (b) expectations of compliance which stem from the way regulations are administered, rather than from the actual regulations — this would include administration of taxation and customs regulations, for example.

5. In undertaking this inquiry, the IDC shall:

   (a) focus mainly on quasi-regulation in the Commonwealth domain;

   (b) coordinate with a separate working group of Commonwealth, State and Territory officials which will report on quasi-regulation to the

National Small Business Summit in mid-1997, and make use of information exchanged between jurisdictions in that forum;

(c) complement work being developed by the Minister for Customs and Consumer Affairs on a strategic framework for voluntary codes of practice;

(d) undertake appropriate consultations, including with peak business organisations;

(e) present its report (with recommendations) to the Government by 31 December 1997.

6. The Government's response to the report of the IDC will be used to update the ORR's publication *"A Guide to Regulation"*.

Post script to the terms of reference

Consequent on correspondence between the Assistant Treasurer and the Attorney-General and the Minister for Industry, Science and Tourism, the Committee was asked to report also on the following matters:

- the relationship between voluntary standards and regulatory standards;
- how a better understanding of the nature of voluntary standards could be promoted;
- the issues raised by courts' use of voluntary standards and how they might be addressed; and
- appropriate criteria to be met before any code is prescribed under the Trade Practices Act.

In addition, the Committee was asked to ensure that the consultation process was not limited to peak business organisations but included community organisations and relevant government agencies and authorities.

APPENDIX B

Previous definitions relevant to quasi-regulation

Quasi-regulation

Quasi-regulations are rules or instruments for which there is a reasonable expectation of compliance but which do not have the full force of law. This definition includes: • codes of conduct; • self-regulation; • co-regulation; and • standards made by Standards Australia or other bodies such as international organisations. Quasi-regulation does not include ministerial directions and guidelines, or statutory instruments.	Bell, C. 1996, *Time for Business*, Report of the Small Business Deregulation Task Force, 1 November, p.123
Quasi-regulation includes codes of conduct, standards and guidelines.	Minister for Small Business and Tourism (Vic) 1996, *Presentation to the National Small Business Summit*, The Hon Louise Asher MP, 12 June, p.10
Quasi-regulations include instruments such as codes of practice, standards, guidelines, determinations and declarations.	National Small Business Summit 1996, *Communique*, 12 June, p.8
Quasi-regulation includes codes of practice, guidance notes and standards.	Australian Chamber of Manufactures Business Council Bulletin 1995, *Regulatory Reform — the Australian Experience*, Oct/Nov p.29

Self-regulation and codes

A code of conduct can be described as a self-regulatory arrangement whereby rules which govern behaviour in the market are developed, administered and enforced by the people whose behaviour is to be governed.	FBCA (Federal Bureau of Consumer Affairs) 1996, *Codes of Conduct*, Issues Paper, November, p.4
Voluntary codes of practice or industry self-regulation describe the types of actions or procedures, as determined by the particular industry or profession, that are believed to be acceptable within the peer group and the wider society. They can range from simple statements of intent to rules of professional conduct and are applicable in a wide cross section of the economy. They are usually developed via a consultative process between all parties in a particular industry and, in many cases with Government.	Office of Regulation Reform (Vic) 1996, *Regulatory Alternatives*, p.27
Self-regulation is the acceptance of mutual obligations by firms in an industry or by members of a profession.	ORR (Office of Regulation Review) 1993, *Recent developments in regulation and its review*, Information Paper, November, p.33
Self-regulation is defined as the implementation of codes of practice (or conduct) embodying mutual obligations by competing players in a market.	TPC (Trade Practices Commission) 1988, *Self-regulation in Australia and the professions: report by the Trade Practices Commission*, February, Vol.1, p. 2
Market pressures aside, complete self-regulation can be said to exist if industry both designs and enforces regulation affecting the way it acts. Complete Government regulation, on the other hand, exists if regulation is designed and enforced by government. Between these extremes partial self-regulation exists if industry designs regulations which are later enforced by government or, indeed, if it has responsibility for enforcing regulation designed by government.	Victorian Ministry of Consumer Affairs Self-Regulation Working Party 1984, *Industry self regulation: its role in consumer policy*, November, pp.9-10

APPENDIX C
Issues arising from consultations

The Committee found the consultations were extremely useful, adding considerably to its knowledge of:

- real world examples of quasi-regulation;
- the issues involved in self-, quasi-, and government regulation, and the relative importance of these issues to those groups consulted.

Some of the examples of quasi-regulation raised during the consultations have been discussed elsewhere in this report (see, for example, Chapter 2). This appendix — after first listing the groups consulted — concentrates on the main issues and perceptions raised during the consultations.

It is important to note that this appendix summarises the views of those groups consulted and should **not** be taken to be the views or recommendations of the Committee.

LIST OF GROUPS THAT PARTICIPATED IN CONSULTATIONS

Australia New Zealand Food Authority
Australian Association of Permanent Building Societies
Australian Bankers' Association
Australian Business Ltd
Australian Chamber of Commerce and Industry
Australian Communications Industry Forum
Australian Confederation of Childcare
Australian Council of Professions
Australian Dairy Products Federation
Australian Institute of Company Directors
Australian Medical Association Ltd
Australian Quarantine and Inspection Service
Australian Small Business Association
Australian Society of Certified Practicing Accountants
Business Council of Australia
Consumer Law Centre Vic Ltd

Consumers' Federation of Australia
Council of Small Business Organisations of Australia
Farmwide
Federal Office of Road Safety
Franchise Council of Australia Ltd
Institution of Engineers
Insurance and Superannuation Commission
Insurance Council of Australia
Law Council of Australia
Life, Investment and Superannuation Association of Australia Inc
Meat Industry Council
Motor Trades Association of Australia
National Farmers' Federation
National Occupational Health and Safety Commission
National Registration Authority of Agricultural and Veterinary Chemicals
New South Wales Farmers' Association
Pharmacy Guild of Australia
Property Council of Australia
Proprietary Medicines Association of Australia
Standards Association of Australia
Therapeutic Goods Administration
Victorian Employers' Chamber of Commerce and Industry

Other groups invited to participate

Australian Building Codes Board
Australian Chamber of Manufactures
Australian Communications Authority
Australian Consumers' Association
Australian Financial Planning Association of Australia Ltd
Australian Pharmaceutical Manufacturers Association
Real Estate Institute of Australia
SETEL (Small Enterprise Telecommunications Centre)
Small Business Coalition

ISSUES

The principal issues that came out of the consultations fall into four main groups. They are:

1. targeting the problem and using the best regulatory solution;
2. regulatory impacts on industry;
3. issues for government; and
4. other issues.

These issues are discussed in more detail below.

1 Targeting the problem and using the best regulatory solution

Those groups consulted, whether representative of industry, government or consumers, were all supportive of the principle that the regulatory solution should be tailored to the particular problem or issue at hand. For example, the mere existence of a market failure was stated as insufficient to justify government intervention. To properly target the problem, those consulted agreed that the nature, magnitude and risk of the problem are threshold issues which must be assessed.

The need for risk analysis by regulators was strongly recommended. For example, where there is a high risk of a problem occurring with a high magnitude of impact, then government legislation may be appropriate. However, the point was made that community acceptance of risk should also be a part of this analysis. For example, car travel, where the community appears to accept a relatively high risk of harm, contrasts with the consumption of food, where the community appears not to accept even a low risk of harm.

Some of the groups consulted thought that certain problems or issues may naturally point towards a particular type of regulation. For example:

- information problems, staff training and counselling may be best addressed in codes which can address issues that may be inappropriate for legislation; and

- harm to human health or safety resulting from a product/activity appeared to warrant government involvement in the regulation of that product/activity.

A distinction was drawn between minimum standards and best practice issues. Those consulted stated that a problem exists where government regulators do not distinguish between the two. They said that while minimum standards may require government involvement, best practice standards are suited to codes or non-mandatory regulatory forms. For example, concern was expressed about best practice regulation — for example the Human Rights and Equal Opportunity Commission (HREOC) Advisory Notes on access to premises — becoming costly 'de facto' minimum standards over time.

Those consulted stated that firms should be allowed to cater for different consumer wants. In particular, firms should not all be expected to adhere to best practice codes, as this may not be satisfying some consumers' demands. Some consumers may want lower prices/quality, whilst others may want higher prices/quality, as well as other combinations (eg medium price/medium quality). However, a non-mandatory best practice code could be useful as a marketing tool for firms catering to that part of the market willing to pay for higher standards.

In addition, participants wanted a checklist to outline the circumstances in which each broad type of regulation — self-, quasi-, and explicit government regulation — might be appropriate. Furthermore, participants asked that some of the particular choices of instruments within these broad types also be matched to the circumstances in which they are appropriate in such a checklist. The best regulatory instrument that targets the particular problem should be chosen.

2 Regulatory impacts on industry

Many of the issues raised by those consulted were about the impacts of regulation on industry. These are identified and discussed below.

An increasing stock of regulation

One of the major themes that came out of the consultations was that businesses perceive they are faced with an increasing stock of regulation, including an increasing stock of quasi-regulation.

Businesses faced with increasing regulation have taken different approaches, depending on resources and other factors. Some comply with all regulations to be certain of avoiding any punitive action. For example, some (larger) businesses stated that they were 'compliance compulsives'. On the other hand, some groups considered that where there is a large amount of complex regulation businesses, in particular small businesses, may adopt a fatalistic attitude ie "We can't comply with every applicable regulation, even if we try". Thus, more regulation may result in perverse outcomes because it can lead to businesses choosing not to comply with some regulation, including explicit government regulation.

However, some pieces of regulation — even explicit government regulation — are welcomed by businesses. They see some regulations as working with, rather than obstructing, their business.

Another issue arising from this apparent increasing stock of regulation is the accessibility of regulations to industry and consumers. Those consulted stated that some small businesses are not aware of relevant legislative requirements, let alone quasi-regulations that are in the public domain. Consumers also find it difficult to access regulations. Industry and consumer groups consulted said that governments should not expect associations to promote or educate consumers and businesses on an overly complex system of government regulations, as they lacked the resources to do so.

Businesses and consumers may have to place more faith in interpreters of regulation — for example, lawyers — as a result of the increasing stock of regulation. Small businesses and consumers may be disadvantaged in this area because they cannot afford to hire specialist advisers.

One participant in the consultations noted that the increased stock of quasi-regulation could be driven by the Government's stated preference for codes of practice. Another noted that the increasing stock of regulation was, in some cases, an inevitable response to community demands — the remaining issue then being quality control.

The costs of regulation

Regulation, whether it be self- quasi- or government regulation, can impose substantial costs on businesses and consumers.

Participants raised the issue of governments shifting the administrative costs of regulation — or the costs of formulating, implementing and administering regulation — onto industry. These costs may then be passed on to consumers in the form of higher prices or lower levels and/or quality of goods or services provided. Most groups accepted that as industry takes more responsibility for regulation making, it will bear more of the associated costs. However, where there are public benefits from regulation, it was stated as inappropriate that industry should bear all of the costs of that regulation. Government funding proportionate to the level of public benefit may be more appropriate under these circumstances.

One of the particular costs from self- and quasi-regulations involving private sector code administrators is the risk of civil suits such as negligence and defamation. Some of the groups consulted stated that they had received legal advice that they would be open to defamation suits if they named a recalcitrant firm that was not adhering to a code. However, the availability of an indemnity against prosecution for defamation was not seen as viable by some, as it would rule out any legitimate defamation claims.

The availability of adequate resources was regarded as fundamental to the success of a regulatory system.

The benefits of regulation

Those consulted pointed to the benefits that ensue from industry and consumer involvement in the formulation and administration of a scheme. Industry ownership of a scheme contributes importantly to industry commitment, and that promotes compliance. It can mean that there is more genuine consultation with affected groups than would otherwise occur. Industry participation in the development and implementation of codes can utilise industry knowledge of the best ways to comply, and can reduce compliance costs. The flexibility of non legislative forms of regulation is another benefit of shifting away from explicit government regulation. One of the factors which contributed to the success of the Electronic Funds Transfer (EFT) Code was that the evolving technology was more suited to a flexible code format.

Industry development of regulation was stated by those consulted as having the advantage, in some cases, of pre-empting government regulatory intervention in a market.

Tensions in regulation making

To some extent, consultations revealed that tensions exist in community expectations of government involvement in regulation making. Whilst in general industry prefers self regulation, some participants wanted government backing for industry formulated schemes for promotion purposes and to increase industry compliance.

Deregulation by governments was noted as not necessarily reducing the level of regulation in the economy, but rather shifting regulation making from Parliament to, in effect, the courts. This may increase uncertainty and result in increased costs for businesses. Litigation may then be used as a weapon by industry participants. One of those groups consulted by the Committee noted that courts should adopt certain principles to ensure that a case is dealt with before the cost of litigation becomes larger than the amount disputed. Deregulation may also place additional costs on consumers — as they may have to search for the goods and services that have the characteristics that they desire.

In addition, there are tensions between the use of performance based and prescriptive regulations. Whilst those consulted generally supported performance based regulations — citing flexibility and encouragement of innovation as key benefits — they acknowledged prescriptive regulations as satisfying the need for businesses to have certainty for compliance purposes. Where regulation is unclear or too broadly expressed, more businesses may find themselves in court defending their practices. In general, larger businesses would be able to work with performance based regulation, as they have the incentive and the resources to find innovative methods of compliance. Some smaller businesses were stated as generally preferring prescription, as they have neither the skills nor the resources to develop their own compliance methods. However, participants agreed that these generalisations would not hold true in all cases. In particular, some small businesses note the costs of compliance with overly prescriptive regulation.

A solution to this tension between performance based and prescriptive regulations was suggested by some participants in ‘deemed to comply’ provisions. Prescriptive provisions that are ‘deemed to comply’ with performance based requirements may give certainty to some firms yet retain innovative opportunities for others.

3 Issues for government

Other issues raised at the consultation meetings related mainly to government regulators.

The RIS process

Most of the groups consulted supported the discipline which the Regulation Impact Statement (RIS) process puts on government regulators. However, they thought that there was insufficient empirical analysis behind many regulations made by government. For example, one participant thought that some of the growth in regulations appears to be politically driven and based on anecdotal evidence. In response, others stated that whilst some anecdotal evidence should not be presented as empirical, it is relevant evidence and should not be ignored.

Some of the groups consulted believed that some of the growth in quasi-regulation may have been fuelled by a desire by government regulators to avoid the discipline involved with changes to government regulation. In addition, where government agencies or delegated bodies are creating quasi-regulation without Parliamentary scrutiny, those consulted agreed that these bodies should be held accountable.

When should government be involved?

Most of the participants agreed that there is a clear need for information to guide regulators to the most appropriate regulatory solution. Government regulators should resist their apparent bias towards black letter law and focus on addressing the problem in the best regulatory fashion. Government involvement, according to some of those consulted, should only be triggered where:

- there is a systemic industry problem. Governments should not, for example, be involved where only a small section of the industry is involved in one-off disputes;
- minimum standards are needed. Many of those consulted agreed that government involvement was required were in the area of minimum standards concerning human health/safety and quarantine.

In addition, governments should not make new laws without first taking stock of, and attempting to address the problems in, existing regulations.

These existing regulations include international regulations, as well as Australian regulations.

Participants also noted that where government makes choices from the regulatory spectrum, these should be deliberate. The unplanned evolution of regulations — in particular the unintended slippage of self-regulation down the regulatory spectrum into quasi- and explicit government regulation — was noted by participants as a cause of some of the problems with existing quasi- and explicit government regulations.

The use of standards by government regulators

During the consultations, Australian Standards were put forward as not falling within quasi-regulation per se.[1] Those that are developed as voluntary standards using a consensus based approach, are self-regulation.

The problem with standards as stated during the consultations was how they are applied by government regulators. The main problem mentioned was that some government officials show a tendency to call into regulation parts of a standard that were not intended for that purpose — for example, 'best practice' standards becoming the regulatory minimum. Groups consulted agreed there is a pressing need for much better guidelines on the use of standards (and other voluntary regulations) in explicit government regulation. One participant suggested that such guidelines on the use of standards in regulations/legislation could be attached as an appendix to the Council of Australian Government document *Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies.*

A particular problem noted by one participant was that some government regulators that are on Standards Australia standard development committees understandably have a close attachment to the standards that they helped

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[1] It was noted during the consultations that Standards Australia is not the only standard setting body in Australia. Industry itself sets standards — for example the sheet steel standard formulated by the Lysaght company is accepted by the industry and regulators as the industry standard. However, many of the issues concerning standards were expounded with reference to Standards Australia. This section raises some issues in relation to Standards Australia which also apply to other standard setting bodies.

develop. When they go back to their own jurisdiction, they may promote that Australian Standard as the minimum standard in their own jurisdiction.

Other problems with Standards Australia standards include:

- the language used is sometimes unclear (the use of 'shall' and 'should' is confusing in that it projects a false sense of authority);
- cross referencing within Australian Standards to other standards forces businesses to buy multiple standards, which is costly;
- once referenced by date in regulation, the standard referred to in the regulation will be out of date if the Australian Standard changes. Not all jurisdictions may decide to pick up any changes;
- duplication in regulation where there is more than one standard on a certain issue.

Some of the groups consulted noted that their constituent members still thought that Standards Australia was a government regulator. It was pointed out by Standards Australia, however, that there had been attempts to address this problem — it is stated clearly in all public documents and speeches by Standards Australia that it is a non-government organisation.

In the areas where an international standard exists, Standards Australia has an 80 per cent adoption rate.

In addition, it was noted by Standards Australia that the price structure of Australian Standards is one of the lowest in the world. Standards Australia is also moving to address one of the problems as noted above by tailoring the language of standards to the intended end use of the standard — whether regulatory, explanatory, or voluntary. Standards Australia has agreed guidelines with the Australian Building Codes Board and the National Occupational Health and Safety Commission regarding the standards written for these bodies.

4 Other issues

Some of those consulted noted that regulations may effectively be used to block new entrants into an industry and to benefit existing firms. Whilst some of these regulations may control the quality of goods or services offered by that industry, where they focus on restricting inputs into that industry rather than outputs, the argument of ensuring industry quality control is weakened. To counter these concerns, those consulted stated that

consumer representation in regulation making processes, as well as in the ongoing monitoring and review of existing regulation, was required.

Participants noted that non-mandatory regulations offering incentives for compliance may have a better chance of attracting firms to comply. For example, where firms that comply with certain standards receive a discount on insurance premiums, this will attract firms who wish to decrease premium costs.

The globalisation of regulation and standards, which is becoming increasingly relevant as trade expands, must be kept in mind by regulators. In some cases, adopting domestic standards which are more stringent than international ones can make it difficult for international companies to enter the Australian market and can be inconsistent with international conventions. This situation can also act to the marketing advantage of Australian exporters. If Australian standards are too high, firms may be burdened with high compliance costs and may locate offshore.

Those groups consulted were often initially confused about what constituted quasi-regulation and about how the Committee would be able to address the problems they had with current arrangements. They asked that the report clearly articulate its place within Commonwealth Government policies and processes such as National Competition Policy. In addition, a need was articulated for this report to be linked to State and Territory processes as it is in those jurisdictions that references to standards and codes in legislation are more prominent.

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