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# 5 Quasi-regulation

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

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

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

## 5.1 What is quasi-regulation?

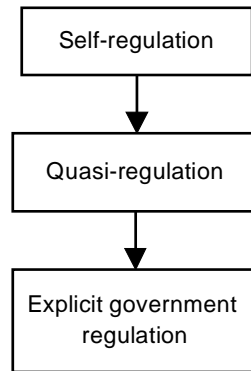
Quasi-regulation is defined as the range of rules, instruments and standards whereby government influences business to comply, but which do not form part of explicit government regulation.

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

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Figure 5.1 **A simplified spectrum of regulation**

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

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

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

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## Box 5.1      **Examples of quasi-regulation**

### **The National Code of Practice for the Construction Industry**

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

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

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

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

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

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## 5.2 The Government's approach to quasi-regulation

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

Specifically the committee was asked to report on:

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

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

The main findings from the committee's report included:

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

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

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

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

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

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### 5.3 Regulatory activity in quasi-regulation

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

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

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

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

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

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### Box 5.2 Codes of practice relating to welfare of livestock

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

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

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

### Box 5.3 The new Franchising Code of Conduct

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

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

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## 5.4 Compliance for quasi-regulation

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

## 5.5 Explaining compliance for quasi-regulation

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

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

## 5.6 Improving compliance for quasi-regulation

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

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

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

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