
A Monitoring quasi-regulation

The term ‘quasi-regulation’ refers to the range of rules, instruments and standards governments use to influence businesses’ behaviour, but which do 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.

The Small Business Deregulation Task Force (SBDTF 1996) recognised that such regulation could have just as large impacts on businesses and other groups as formal Acts of Parliament. It therefore recommended that, as is the case for new or amended government regulation, quasi-regulatory arrangements should be subject to cost-benefit analysis — which forms the core of the Regulation Impact Statement (RIS) process — to help ensure they are effective and efficient.

The Government agreed in part, but directed an interdepartmental committee to investigate further the nature and impact of quasi-regulation; it reported in *Grey-Letter Law* (IDC 1997). The broad range of quasi-regulatory instruments were set out in *Grey-Letter Law* (table A.1).

The Government’s response to the committee’s report was embedded in a revised edition of *A Guide to Regulation*, confirming that regulations to which the RIS requirements apply include quasi-regulation.

Accordingly, as part of the ORR’s RIS compliance monitoring and reporting, all Commonwealth departments and agencies are required to report (every six months) on quasi-regulation that has been implemented or amended, as well as Bills and treaties that have been tabled, and delegated legislation made. Quasi-regulatory activity is also addressed in the Council of Australian Governments’ (COAG) *Principles and Guidelines* which apply to Ministerial Councils and national standard-setting bodies (COAG 1997).

The ORR considers that quasi-regulatory activity is more widespread than is being reported. The under-reporting may be partly because there is some confusion as to what may constitute quasi-regulation.

Table A.1 Types and examples of quasi-regulation

<i>Types of quasi-regulation</i>	<i>Examples</i>
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 <i>Anne Christina Benton v Tea Tree Plaza Nominees</i> (1995 64 SASR 494), Duggan J. used non-compliance with a voluntary Australian Standard for kerb height as a factor in determining negligence. In <i>Paul Maurice Nagle v Rottneest Island Authority</i> (1993 112 ALR 393), the High Court found the defendant failed to provide appropriate warning of dangerous swimming conditions, referring to Australian Standard 2416.

Source: IDC 1997, p. xiii.

Also, there is no common mechanism by which agencies record or ‘register’ quasi-regulatory arrangements, so that the ORR has no systematic way to assess whether the Government’s RIS requirements have been met.

For 2000-01, a total of only 15 quasi-regulatory matters affecting businesses were reported by Commonwealth departments and agencies, of which six were attributed to the Australian Communications Authority and five to the Australian Securities and Investment Commission. The other four were reported by the Australian Broadcasting Authority and the Department of Employment, Workplace Relations and Small Business. Some examples, including one example from a Ministerial Council, are listed in box A.1. The examples may help agencies identify other quasi-regulation.

To further help Commonwealth departments and agencies identify likely quasi-regulatory arrangements, and thereby ultimately improve compliance with the Government’s requirements, the ORR has commenced construction of a list or register to monitor quasi-regulation. It is hoped that departments and agencies will suggest additions to the register which will be maintained on the Commission’s website. (Additions or changes to the register may be emailed to the ORR (orr@pc.gov.au)). As a first step, the ORR has selected nine agencies that appear to make substantial use of various forms of quasi-regulation. They are:

- Australian Broadcasting Authority;
- Australian Communications Authority;
- Australian Competition and Consumer Commission;
- Australian Prudential Regulation Authority;
- Australian Securities and Investments Commission;
- Department of Health and Aged Care;
- Department of Industry, Science and Resources;
- Human Rights and Equal Opportunity Commission; and
- Therapeutic Goods Administration.

In addition to examining quasi-regulation reported by these agencies, the ORR has searched annual reports, websites and other sources, and has selected a limited number of instruments that *appear* to be quasi-regulatory. These are detailed below in what should be regarded as a preliminary list. However, before discussing the particular regulatory arrangements, it is important to make several qualifications.

Box A.1 Some examples of quasi-regulation reported in 2000-01

Australian Communications Authority (ACA)

Six industry codes were reported. Upon registration of an Australian Communications Industry Forum (ACIF) code, under section 117 of the *Telecommunications Act 1997*, the ACA may warn or direct participants, in the relevant section of industry covered by the code, to comply with the code provisions. Failure to comply with an ACA direction may result in pecuniary penalties as determined by the Federal Court.

ACIF C521: August 2000 — Industry Code — Customer Information on Prices, Terms and Conditions. Outlines the minimum standards of information that must be provided to customers by telecommunications carriers, carriage service providers and internet and content service providers.

ACIF C542: June 2000 — Industry Code — Billing. Deals with content and presentation of bills, billing verification and timeliness.

ACIF C522: April 2000 — Industry Code — Calling Number Display. Deals with the privacy issues which arise in the provision of Calling Number Display services to telecommunications customers.

ACIF C547: June 2000 — Industry Code — Complaint Handling. Deals with the complaint handling processes provided by telecommunications carriers and carriage and content service providers to enable their customers to express concern with aspects of service.

ACIF C541: June 2000 — Industry Code — Credit Management. Deals with the credit assessment and management arrangements between suppliers (carriers, carriage service providers and content service providers) and their customers.

ACIF C546: April 2001 — Industry Code — Customer Transfer. Deals with the selling practices and processes used by telecommunications carriers and carriage service providers to protect consumers against unauthorised transfer of their telecommunications services from one supplier to another.

Australian Broadcasting Authority (ABA)

Three individual licensing arrangements were recorded as quasi-regulation. However, the ORR and the Authority have since agreed that these arrangements are of an administrative nature and, in future, these will not be recorded or reported.

Australian Securities and Investment Commission (ASIC)

The *Electronic Funds Transfer Code of Conduct* provides protection to consumers arising from all forms of electronic banking, including Internet banking. It is a voluntary code which was jointly developed by Government, industry and consumers. The Code was revised in April 2001 under the auspices of ASIC.

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Box A.1 (continued)

Policy Statements are issued by ASIC as formal advice, indicating how it will administer *the Corporations Law* and other legislation for which ASIC is responsible. In 2000-01, ASIC issued four new or substantially revised policy statements. They covered issues such as, Internet discussion sites, the use of electronic applications for life insurance and superannuation products, mutuality and, for s621 of *the Corporations Law*, the minimum bid price principle.

Department of Workplace Relations and Small Business

The *Retail Grocery Industry Code of Conduct* is a voluntary code developed in response to the 30 August 1999 Report of the Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure?*. The Code shows some common features of quasi-regulation. It was developed with government support, including choosing the members of the development committee and contributing to secretariat support, and it has been backed by the threat of introducing a mandatory code if participation was determined to be unsatisfactory.

Australian Transport Commission (ATC)

The *Rail Code of Practice (Volumes 1-3)* is a voluntary code, endorsed by the ATC and applicable to rail operators on the Defined Interstate Rail Network (DIRN). The code is designed to address some of the operating anomalies that have hindered the efficiency of the DIRN. Adoption of the code is voluntary, although for organisations to say that they comply with any individual module of the Code they will have to demonstrate that they have implemented the mandatory requirements of that module. Whilst there are no penalties for non-compliance, there is expected to be a high degree of pressure from within the rail industry for organisations managing or operating on the DIRN to comply. The Commonwealth Government has also foreshadowed the possibility of a mandatory code being introduced at a later date, if deemed necessary following a review of the success of the voluntary requirements.

Source: ORR.

First, regulation often has a tiered structure with: an Act of Parliament setting out some quite general principles and a framework; delegated legislation providing more specific regulatory detail; and a third tier of guidelines and policy statements and the like which serve to 'operationalise' the regulations. In terms of getting the best out of the RIS process, there is always the question of whether it should be applied to just the first two tiers, or whether the third tier is also important, as often only then does the real impact on businesses become evident.

Second, there are difficulties identifying quasi-regulation from similar, but non-regulatory instruments. The inclusion of any arrangement in the list does not indicate that it is definitively a form of quasi-regulation, rather that it exhibits characteristics that may be considered quasi-regulatory in nature.

Finally, the important point is to ensure that all regulation, no matter what its type, is identified so that it may be assessed through the RIS process. As is the case with primary or delegated legislation and with treaties, if a quasi-regulatory arrangement does not impact on business or restrict competition, then it does not trigger the RIS requirements. Where the RIS requirements are triggered, quasi-regulation may be excepted, on the grounds that apply uniformly to all forms of regulation (see *A Guide to Regulation*). Consequently, the inclusion of any regulatory arrangement within the list does not imply that a RIS was required for that matter.

In the context of these qualifications, the ORR considers it useful to publish this tentative list of possible quasi-regulation and to use it as a basis for discussions with agencies — with the aim of gradually building up a list or register of quasi-regulatory arrangements.

As the list is refined and expanded to other departments and agencies, it is intended that it be available for use (through the Commission's website) by officials when assessing whether amending an existing or making a new arrangement that is not part of explicit government regulation, but that does affect business, may be quasi-regulatory and therefore possibly require preparation of a RIS.

Quasi-regulation

Australian Broadcasting Authority

1. Digital Television Broadcasting Planning Handbook

- Details the technical standards and specifications which form the basis of ABA decisions on digital channel allocations and delivery requirements.

2. Digital Channel Plan

- A plan for the allocation of additional channels in a geographic area to enable television broadcasting in both analogue and digital forms.

The ABA has reported the Handbook and individual plans as quasi-regulation.

Australian Communications Authority

1. Industry Code (ACIF C525) on the Handling of Life Threatening and Unwelcome Calls

- The code provides a standard procedure for carriers and carriage service providers for the co-operative handling of such calls, including call tracing.

2. Industry Code (ACIF C523) on the *Protection of Personal Information of Customers of Telecommunications Providers*

The ACA reports all industry codes registered under the *Telecommunications Act 1997* as quasi-regulation.

Australian Competition and Consumer Commission

1. Pricing Principles

- Pricing Principles provides information about the Commission's approach to the parties of an access pricing dispute. There are several different pricing models available when assessing pricing disputes. The Pricing Principles indicate which model, in the Commission's opinion, is generally most appropriate. The Commission uses this model to assess the dispute.

Australian Prudential Regulation Authority

1. General Insurance Circular G1/2000 (November 2000)

- Applies to all general insurers and approved auditors providing guidelines for the use of investment managers.

There are 23 similar general insurance circulars on the Authority's website.

2. Superannuation Circular I.C.1 Minimum Benefits Standards (December 1998)

- Provides guidance on minimum benefits which trustees of regulated superannuation funds and approved deposit funds must identify and maintain. While this circular could be characterised as simply explaining general provisions set down in the *Superannuation Industry (Supervision) Act 1993*, it may also be perceived as providing specific regulatory detail not suited to the Act and therefore as having a clear quasi-regulatory character.

There are 29 similar superannuation circulars listed on the Authority's website.

3. Cross Industry Circular No. 1, Custodian Requirements for APRA Supervised Entities (November 2000)

- The custodian requirements are directed at insurance companies and superannuation entities and provide guidance as to how these entities should fulfil their duties to policy holders and fund members.

The Authority also issues Guidance Notes to supplement the prudential standards issued for the Authorised Deposit-taking Institutions, general insurance, superannuation and life insurance industries, and friendly societies.

Australian Securities and Investments Commission

1. Electronic Funds Transfer (EFT) Code of Conduct

- This voluntary industry code was introduced in 1986. The latest revisions in April 2001 extended its coverage from ATM and EFTPOS transactions to all forms of EFT. Because there is active involvement by ASIC in monitoring, reviewing and progressing any changes to the code, it clearly is quasi-regulatory. Indeed, it is used as an example of this form of regulation both in *A Guide to Regulation* and in *Grey-Letter Law*.

2. ASIC makes extensive use of policy statements that are formal declarations of its policies and indicates the way it will administer the Corporations Law and other legislation for which it is responsible. The ASIC website lists around 140 policy statements, some of which are quasi-regulatory and for which RISs have been prepared. These have accounted for a substantial proportion of all Commonwealth quasi-regulatory matters reported to date by the ORR. Examples are:

- PS138 Investment advisory services — personal competencies for licensees; and,
- PS163 Takeovers — minimum bid price principle.

Department of Health and Aged Care

1. Aged Care — Documentation and Accountability Manual

- Intended for use by all care staff employed in residential aged care facilities.

2. Standards and Guidelines for Residential Aged Care Services Manual

- Assists providers to comply with their obligations under the *Aged Care Act 1997*.

Department of Industry, Science and Resources

1. National accreditation scheme for the tourism industry

- This is a voluntary scheme established and operated by the industry for the purposes of quality certification. The scheme is endorsed by the Commonwealth Government, which provides funding to help administration.

2. *Guidelines for Australian Inbound Tour Operators — Approved Destination Status: A Tourism Arrangement between Australia and the People’s Republic of China*

- These guidelines outline the responsibilities of inbound tourism operators in meeting immigration requirements and industry standards.

3. *Export Tourism Code of Conduct*

- This code, being developed by the Australian Tourism Export Council, has a wide range of objectives including setting specific standards, delivering industry self-regulation supported by State legislation and setting entry criteria for new participants in the industry.

4. *National Electricity Market Management Company*

- In December 1999, a limited liability arrangement was implemented to cover any event for which the Company is found to be negligent in its operations.

Human Rights and Equal Opportunity Commission

1. *The Sexual Harassment Code of Practice*

- It provides employers with practical guidance on implementing policies and procedures aimed at eliminating sexual harassment at work.

Therapeutic Goods Administration

1. *Uniform Recall Procedure for Therapeutic Goods — 2001*

- This is an agreement between the therapeutic goods industry and the Commonwealth and State/Territory health authorities.
- Its purpose is to define the action to be taken when therapeutic goods are to be removed from supply or use, or subject to corrective action, for reasons of quality, safety or efficacy.
- The Procedure is obligatory in relation to safety-related recalls of therapeutic goods.

2. *Note for Guidance on Good Clinical Practice — July 2000*

- Good Clinical Practice is an international ethical and scientific quality standard for conducting and reporting trials using human subjects.
- This guidance is to be followed when generating clinical trial data intended to be submitted to regulatory authorities.