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.