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

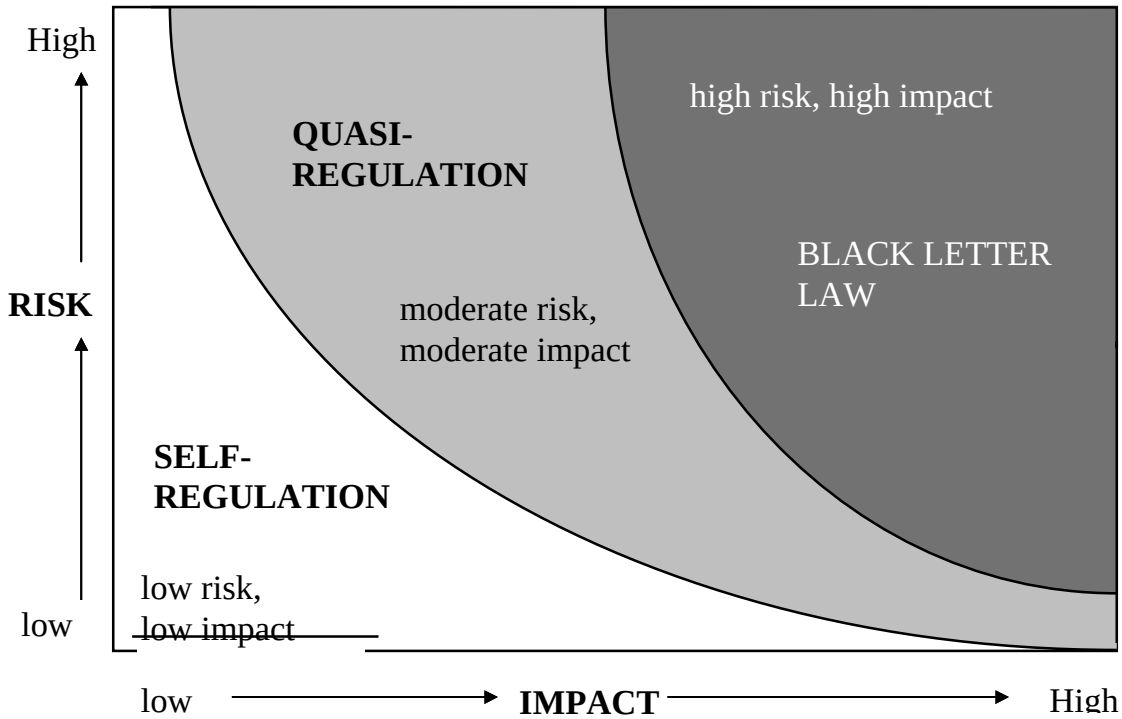
failure eg lack of competition, information problems, public goods which might otherwise not be provided by the market? Is there a need for minimum standards to address a major public health and safety issue? Are there other social goals, such as fair trading, which need to be addressed?

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.