CHAPTER 4

Strategies to achieve effective quasi-regulation

4.1 INTRODUCTION

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

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

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

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

4.2 STRATEGIES

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

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

4.2.1 Understand the industry

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

4.2.2 Set appropriate requirements

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

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

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

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

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

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

4.2.3 Promote ownership and commitment

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

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

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

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

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

4.2.4 Ensure access to quasi-regulation

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

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

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

Recommendation 6

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

4.2.5 Obtain adequate resources for administration

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

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

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

4.2.6 Minimise costs to industry (and consumers)

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

Some of the areas where costs arise are:

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

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

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

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

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

4.2.7 Monitor and review the arrangements

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

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

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

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

4.2.8 Establish mechanisms for complaints handling and dispute resolution

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

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

Four reasons for incorporating a complaints handling mechanism are:

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

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

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

4.2.9 Check compliance and establish effective sanctions

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

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

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

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

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

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

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

Recommendation 7

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

4.3 DEFAMATION AND NEGLIGENCE[1]

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 8

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

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

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

4.4 CONCLUSION

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

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