# CHAPTER 1
# What is quasi-regulation?

## 1.1 INTRODUCTION

Regulatory reform — including the canvassing of regulatory alternatives to 'black-letter' law which has led to increased interest in quasi-regulation and self-regulation — has been driven by several factors. These factors include:

- a need to remove unnecessary obstacles to dynamic market forces that drive efficiency, innovation and growth;
- concerns about reducing unreasonable compliance costs imposed on some business, particularly small businesses; and
- finding better ways to achieve legitimate public policy goals.

In the Commonwealth sphere, interest in regulatory alternatives has been reflected in Government policies that guide regulation makers towards less heavy handed regulatory options than traditional 'black-letter law'. Indeed, in the Prime Minister's March 1997 Statement *More Time for Business*, the Government stated it was keen for industry to take ownership and responsibility for developing effective and efficient self-regulation, where this is appropriate. Furthermore, the Government decided that self-regulation should be the first regulatory option considered by policy makers. In addition, the Minister for Customs and Consumer Affairs, the Hon Warren Truss MP, has responsibility for encouraging effective codes of conduct and will be releasing a policy framework for codes which deals with this issue.

The consideration of alternatives to explicit government regulation is also reflected in Commonwealth Regulation Impact Statement (RIS) requirements. The RIS process requires regulators to, amongst other things, assess all viable alternatives when formulating new regulatory proposals that affect business or restrict competition (see the Office of Regulation Review publication *A Guide to Regulation* for the Commonwealth RIS requirements).

This chapter describes what quasi-regulation is, and how it relates to self-regulation and to explicit government regulation. Selected examples

indicate the many and varied forms of quasi-regulation; detailed examples are in Chapter 2.

## 1.2 WHAT IS 'REGULATION'?

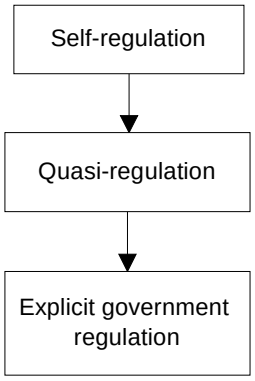
One of the terms that people often interpret differently is 'regulation'. To some, it means 'black-letter law' or legislation only; to others it can mean a broad spectrum, from self-regulation through to 'black-letter law'. The Committee judged the former definition as too limiting for its purposes — if quasi-regulation is a subset of regulation as a whole, then a broad interpretation of regulation is required.

Therefore, the Committee used the following definition of regulation. [1]

> Regulation includes any law or 'rule' which influences the way people behave. Regulation is not limited to government legislation; and it need not be mandatory.

It is helpful to view the principal forms of regulation as part of a continuing spectrum of increasing government involvement, as illustrated in summary form in Figure 1 below.

Figure 1 A summary of the spectrum of regulation




At the top of the spectrum lies self-regulation where industry formulates and enforces its own rules. At the bottom is 'black-letter law' where

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[1] The variety of forms of regulation are reflected in the diversity of terms used to describe them, including: legislation, codes of practice, rules, standards, laws, principles, best practice processes and guidelines.

government formulates and enforces legislation. In between these boundaries lies a range of quasi-regulatory regimes and mechanisms.

Overlaying the spectrum of regulation is the common law, consisting of legal principles and precedents arising from court decisions. This body of law can be relevant over the whole of the regulatory spectrum. For example, court action initiated by an industry participant may develop legal principles which will have an industry-wide impact. Furthermore, court decisions may take voluntary principles and refer to or comment on them to make judgements on industry standards and the duty of care in negligence cases. Common law is also used to interpret legislation. Hence, the common law appears to overlay the whole of the regulatory spectrum, from self-regulation through to explicit government regulation.

Sections 1.3 to 1.5 of this chapter sketch the characteristics of the three principal forms of regulation, including the extent of government involvement in such areas as formulation, enforcement and funding; and the perception of the need to comply with the regulation.

### 1.2.1 Boundaries of the work of the Committee arising from the terms of reference

The terms of reference (see Appendix A) of the Committee focus its work on regulations which impact on business, especially small business.

In particular, the Committee was asked to investigate:

(a) the characteristics and extent of quasi-regulation;

(b) the circumstances in which quasi-regulation is a viable alternative to government regulation;

(c) essential features of successful quasi-regulation; and

(d) processes for monitoring and reviewing quasi-regulation to ensure that it is current, effective and efficient.

The Committee was also asked in the terms of reference to propose guidelines as to the circumstances where self-regulation is likely to be appropriate, and to contrast those with circumstances where quasi-regulation or, alternatively, explicit government regulation, may be appropriate.

In addition, the Committee was asked to comment on the use of standards in regulation and to make suggestions as to appropriate criteria to be met before codes can be prescribed under the proposed s.51AD of the *Trade Practices Act 1974*.

It should be noted that the terms of reference exclude some areas — treaties, administration of laws, and taxation issues — from consideration by the Committee.

Some unratified treaties resemble quasi-regulation in that, while they do not have the full force of law, there is a widespread expectation that they should be complied with.[2] It is noted that the Government has decided that treaties involving regulation will be subject to RIS requirements.

The administration of laws is also excluded from the Committee's scope. The administration of laws refers, amongst other things, to the way in which regulatory agencies handle complaints and serve customers. Improving the administration of laws has already been addressed in the Government's response to the Small Business Deregulation Task Force's (the Task Force) Recommendations 38 and 39 (*More Time for Business* p.54-5). The Government's response requires that service charters be progressively developed during 1997-98 by Commonwealth departments, agencies and enterprises dealing with the public and that they report annually on performance against service charters. This complements other initiatives in the Government's public sector reform agenda, including the revision of the Public Service Employment framework and the Quality Client Service project.

To an extent, taxation, which has drawn criticism for generating high compliance costs, has also been addressed in the Government's responses to the Task Force Recommendations 1 to 11 and 51(b) (*More Time for Business* pp.17-28, 66). The Government's responses to Recommendations 1 to 11 concern specific taxes and taxation issues. The Government's response to Recommendation 51(b) requires a modified RIS to be prepared for tax initiatives, which will examine the administrative options for ensuring compliance with taxation proposals and the costs of each alternative to ensure that compliance cost considerations are fully taken into

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[2] See, for example, *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273

account. The modified RIS guidelines for tax measures are outlined in *A Guide to Regulation*.

## 1.3 EXPLICIT GOVERNMENT REGULATION

Explicit government regulation consists mainly of two basic groups — primary and subordinate legislation — distinguished by the basis of the legal mechanism by which it is made. The following comments apply to the Commonwealth. Similar arrangements exist in the States and Territories.

### 1.3.1 Primary legislation

This form of regulation receives scrutiny and passage by Parliament.

> Primary legislation consists of Acts of Parliament.

### 1.3.2 Subordinate legislation

Subordinate legislation can be made in a variety of forms. The three main forms at the Commonwealth level are:

- statutory rules which must be approved by the Governor-General in Council and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament;
- disallowable instruments which are made by Ministers or government agencies and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament; and
- other subordinate legislation which is not subject to parliamentary scrutiny.

> Subordinate legislation comprises instruments (however described) which have the force of law and are made by an authority to which Parliament delegates part of its legislative power.

## 1.4 SELF-REGULATION

The Committee was given the specific task of proposing guidelines as to the circumstances where self-regulation is likely to be appropriate. Self-regulation is one of the ways that regulatory outcomes can be achieved in a more flexible and non-interventionist manner than by government regulation. Self-regulatory approaches can achieve minimum effective regulation, but can be as inefficient as any regulatory type if they do not address the underlying problem, or are poorly drafted or administered.

The Committee found that many different perceptions existed of what constitutes self-regulation. Appendix B lists some previous definitions.

Self-regulation can cover a range on the regulatory spectrum. For example, in 1988 the Trade Practices Commission (as it then was) reported on self-regulation in Australian industry.[3] Volume 3 of that report was a compendium which listed 480 self-regulatory schemes. Whilst a proportion of these schemes had some government involvement in their development, some were formulated and enforced without any government involvement whatsoever.

Therefore, at one end of the range, self-regulation can include industry schemes with no government involvement. Self-regulation can also include industry schemes where government agencies have been involved in the initial formulation stages of the regulation.

The Committee's working definition of self-regulation is as follows.

> Self-regulation is any regulatory regime which has generally been developed and funded by industry, and is enforced exclusively by industry.

In addition, self-regulation can include schemes where one industry or group of businesses agree with another industry or group of businesses on

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[3] Trade Practices Commission 1988

certain obligations. For example, the Australian Cold Chain Code of Practice was designed by three groups — manufacturerers, distributors and retail groups — and is intended to ensure refrigerated and frozen products are handled in conditions that ensure optimum product quality for the consumer. This voluntary code has been adopted by the majority of the businesses in the above three groups and hence has become a requirement for doing business in those sectors. Each company effectively enforces code compliance.

## 1.5 QUASI-REGULATION

Reflecting the movement of Government policy away from 'black-letter' legislation, interest in alternative regulatory forms such as quasi-regulation has increased.

See Appendix B for previous definitions of quasi-regulation.

For the purposes of the Committee, quasi-regulation covers the range of regulatory options on the spectrum (illustrated in Figure 1 above) falling between the extremes of self-regulation and mandatory government legislation. It is important to note that the boundaries between the regulatory options are often blurred. The Committee used the following as its working definition of quasi-regulation.

> Quasi-regulation refers to the range of rules, instruments and standards where government influences business to comply, but which does not form part of explicit government regulation.

Quasi-regulation often has an aura of government endorsement because of government involvement in the development or monitoring of the regulatory arrangement, or through the provision of funding associated with a regulatory regime.

Commonwealth quasi-regulation can be broadly divided into two categories:

- industry arrangements where industry organisations play a critical role in formulation and/or administration of codes, guidelines, standards and the like, and where government involvement means that the requirements become quasi-regulatory; and
- other Government initiated arrangements which use a variety of methods other than direct legislation to encourage compliance.

Within these broad categories are many different regulatory types, some of which are described in Chapter 2.

A selection of examples of quasi-regulation within the Commonwealth domain are listed below. It serves to illustrate the breadth and diversity of this form of regulation.

### Some examples of quasi-regulation

Australian Ballast Water Management Guidelines
Australian Guidelines for the Registration of Drugs
Australian Securities Commission guidance notes
Building Energy Code
Code of Banking Practice
Codes of practice relating to transport of livestock and feedlotting
Codes under the Broadcasting Services Act
Codes under the new Telecommunications Act
Electronic Funds Transfer Code of Conduct
Guidance materials on compliance with Australia motor vehicle design rules
Human Rights and Equal Opportunity Advisory Notes on Access to Premises
Industry Waste Reduction Agreements such as those included in the national kerbside recycling strategy
Insurance and Superannuation Commission circulars and codes
Ministerial press release regarding the use of the Australian Standard for babies' dummies
National Code of Practice for the Construction Industry
National Heavy Vehicle Accreditation Scheme
National Standard for Organic and Biodynamic Produce
Nutrient Claims Labelling Code
Pension Payments Code
Proposed National Scheme for Fair Information Practices in the Private Sector
Requirements in procurement guidelines that go beyond ensuring the commercial interests of participants into public policy
Safety Management system guidelines for chemical companies
The Quality Improvement Accreditation System for childcare centres
The Supermarket Scanning Code
Use of an Australian Standard on kerb height in determining negligence

## 1.6 THE RELATIONSHIP BETWEEN EXPLICIT GOVERNMENT REGULATION, SELF-REGULATION, AND QUASI-REGULATION

The relationship between quasi-regulation and government (mandatory) legislation can be quite clear. Mandatory legislation, including subordinate regulation (and legislative instruments) is *not* quasi-regulation. Mandatory legislation is explicit government regulation. It is government developed (sometimes drawing on consultations) and government enforced — it clearly receives full government endorsement.

Where self-regulation has no government involvement in its operation, there can be no aura of government endorsement. Hence, self-regulatory schemes implemented without government involvement or endorsement are not quasi-regulation. There are many industry self-regulatory schemes (see Section 1.4).

However, there can be some overlap between self-regulation and quasi-regulation in cases where there is some government involvement in the formulation stage or funding. Self-regulatory schemes for which there have been consultations with government at the development stage, or are partially funded by government, display some of the characteristics of both self-regulation and quasi-regulation.

In addition, there is a dynamic element to some regulation. Regulation may evolve — because of deliberate action taken by participants or otherwise — from voluntary self-regulation through quasi-regulation to 'black-letter law'. For example, this evolution of regulatory form may occur as industry self-regulatory rules become more widely used and are picked up in government guidelines. These guidelines may then be formalised in legislation.

## 1.7 CONCLUSION

In order to achieve the Government's objective of effective and efficient regulation, Government policies are guiding regulation makers towards regulatory alternatives to black-letter law. These alternatives include quasi-regulation and self-regulation.

The Committee makes no value judgement on the desirability of quasi-regulation per se. The appropriateness of self-regulation, explicit

government regulation and quasi-regulation will depend on the specific circumstances and the nature of the industry concerned.

In determining what constitutes quasi-regulation, the Committee found there was blurring between the main regulatory forms on the regulatory spectrum. The proliferation of different regulatory types suggests that the three principal forms of regulation should not be regarded as mutually exclusive groups. Rather they should be viewed as gradations on a continuous regulatory spectrum, ranging from self-regulation, through quasi-regulation, to explicit government regulation or 'black-letter law'.