CHAPTER 2
Characteristics and extent of quasi-regulation

2.1 INTRODUCTION

This chapter presents information on the extent and types of quasi-regulatory arrangements resulting from Commonwealth regulatory activity and their role in the overall regulatory framework. As well as providing examples of a number of different types of quasi-regulation, the chapter includes case studies of four specific arrangements. The case studies provide some insights into the factors which affect the success of quasi-regulation.

Quasi-regulation takes a wide variety of forms. The following outline of Commonwealth quasi-regulation divides it into two broad 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
- Government initiated arrangements which use a variety of methods other than direct legislation to encourage compliance.

2.2 INDUSTRY ARRANGEMENTS

2.2.1 Industry based codes

Codes of practice or codes of conduct are probably the best known examples of quasi-regulation. While some codes are self-regulation, other industry-based codes of practice may qualify as quasi-regulation because of significant government involvement and/or pressure on business to comply.

Arrangements of this sort in many ways resemble self-regulation. They typically rely on the support of industry organisations and representative bodies to function, often have a high level of industry involvement in and

ownership of the standards set and are often managed by non-government administrators. What distinguishes these arrangements from self-regulation is the government's role, which can take a number of forms, including:

- endorsement or promotion by government bodies (see Example 1);

Example 1: Supermarket Scanning Code

At the request of the Minister for Consumer Affairs, the Trade Practices Commission (TPC), as it then was, consulted with the Australian Retailers' Association and consumer representatives on the development of a national code of conduct for supermarkets using computerised checkout systems. An agreed code was implemented in 1989. The code informs consumers about the operation and effectiveness of the scanning technology and gives them visible assurances about the quality and price integrity of the system. It provides informal, accessible arrangements for dealing with customer complaints. The Commission allowed the Australian Retailers' Association to use its logo on the supermarket scanning code documentation and to include the words 'this code has been drawn up in consultation with the TPC in the interests of fair competition in the industry and of fair trading with its customers.' The Commission indicated that it would need to be satisfied by periodic reviews that the key elements remain effective and that the code is achieving its objectives in the market place, otherwise consideration would be given to withdrawing the TPC imprimatur.

- government involvement in development or management (see Example 2). See also the case studies on the Code of Practice for Advising, Selling and Complaint Handling in the Life Insurance Industry and the Advertising Code of Ethics;

Example 2: Electronic Funds Transfer Code of Conduct

This Code was jointly developed by government, industry and consumers. It deals with the relationship between financial institutions and consumers using electronic funds transfer technology. The Code is industry based, but is monitored by the Australian Payments System Council and periodically reviewed by the Australian Competition and Consumer Commission and the Treasury. As a result of these reviews the Government may make recommendations to industry about possible changes to the Code.

- the threat of regulation if a successful industry-based scheme is not established (see the case study on the Code of Banking Practice); and
- establishment of a legislative underpinning for a code which does not make compliance mandatory but gives it greater force. Underpinning of this sort can take many forms, such as reserve powers to mandate a code if it is failing or to make it mandatory for a non-complying industry member; powers for regulators to register codes, involvement in their development or the investigation of breaches; or provision for a voluntary code to become binding on businesses or industry groups which choose to subscribe to them (see Example 3).

Example 3: Codes under the Broadcasting Services Act

The Commercial Television Industry Code of Practice, Commercial Radio Code of Practice and the Community Broadcasting Code of Practice are voluntary codes developed by industry organisations under the Broadcasting Services Act. Further codes under the Act are in development. The Australian Broadcasting Authority (ABA) is consulted in the development of codes and must register them if they provide appropriate community safeguards, have been endorsed by a majority of relevant service providers and there has been appropriate public consultation.

If no code has been developed in a particular area or the ABA is convinced that a code is not working, it may prescribe a mandatory standard. While complaints relating to codes must in the first instance be made to the relevant service provider, the ABA may investigate unresolved complaints relating to codes of practice. One sanction available to the ABA is to make compliance with a code of practice a mandatory licence condition.

Case Study 1: Code of Practice for Advising, Selling and Complaint Handling in the Life Insurance Industry

Background

In the light of complaints about life insurance agents and the extent of early termination of many life insurance products, the then Trade Practices Commission (TPC) was directed by the Government to research consumers' experiences with life insurance and superannuation agents. The TPC recommended compulsory measures to improve consumer information, the competence and conduct of life agents and the availability of redress for consumers.

In July 1993 Cabinet decided to develop a compulsory Code of Practice for the life industry. The Code was initially developed by a Government working group. Subsequently, a Working Group chaired by LIFA with representatives of government, consumer groups, product providers and intermediaries, was formed to achieve a consensus position.

How the Code operates

The Code applies to all life companies and life brokers, and their life insurance advisers. It deals with:

- acceptable practices when advising on or selling life insurance policies;
- basic competencies and training that life advisers must have; and
- internal complaints handling requirements and membership of an external dispute scheme.

Life companies and life brokers are required to provide regular reports to the Insurance and Superannuation Commission (ISC) about compliance with the Code. Breaches of the Code are to be referred to the life company's Board or Code Compliance Committee or to the life broker's directors or principals.

Costs involved

The ISC was provided with resources to implement and monitor the new regime. Funding resources were to be recouped through a rise in the existing supervisory levy on life companies which was expected to rise from $28,000 in 1992/93 to around $70,000 in 1994/95. Costs for insurers in complying with the Code are not known.

Procedures for review

The code does not contain any requirement for review. However, the ISC expected to review within two years of commencement. This review has been delayed pending the implementation of the Government's response to the Financial Systems Inquiry.

Why this is considered to be an example of quasi-regulation

The Code was implemented by way of a non-binding Circular but was intended to be legislatively based. As the legislative provisions are not yet operative, the Code is not explicit government regulation. However, the Government influences the life industry to comply because of its involvement in the development and monitoring of the Code.

Features which bear on the success or failure of this example of quasi-regulation

Industry considers that the Code has been a limited success. It has involved the life industry in considerable cost. Some would concede that a change of culture was needed and the Code helped to achieve this outcome. The Code has probably contributed to the reduction in the number of life agents.

The impact of the Code on consumers is difficult to assess. Life insurance policies are long-term products. The Life Insurance Complaints Service (which is the recognised external dispute scheme to which Code members must subscribe) is still dealing with complaints about policies sold before the Code came into operation.

From the Government perspective, while the resources involved are recouped from industry, monitoring the Code requires intensive effort. According to the ISC, most companies are striving to improve their customer advice, sales and internal complaints handling in accordance with the Code, but more work needs to be done.

Case Study 2: Advertising Code of Ethics

Background

The Media Council of Australia (MCA) accredited advertising agencies which received a commission on the value of their media placements with MCA members and which had to comply with the codes administered by MCA, including the Advertising Code of Ethics. In 1974 the MCA applied to the then Trade Practices Commission (TPC) for authorisation under the *Trade Practices Act 1974* of the accreditation system. The Trade Practices Tribunal granted full authorisation in February 1978, subject to the TPC periodically reviewing the system.

In 1995 the TPC conducted a review of the system and revoked the authorisation. On appeal, the Australian Competition Tribunal upheld the revocation. The Australian Competition and Consumer Commission (ACCC) announced it would review the codes. On 31 December 1996 the MCA disbanded, abandoning the accreditation system and closing the Advertising Standards Council (the Council) which was set up to hear complaints about breaches of the Code.

How the code operated

The Advertising Code of Ethics applied to the content of advertisements submitted for publication or broadcast by members of the MCA. It set out principles with which advertisements were required to comply including:

- not demeaning the dignity of men, women or children;
- not containing anything which in the light of generally prevailing community standards was likely to cause serious offence to the community or a significant section of the community; and
- not exploiting the superstitious or unduly playing on fear.

Under the code any person could complain to the Council about advertisements believed to breach the Code. Decisions of the Council were enforced by collective media boycott.

Costs involved

The main cost of the scheme for industry was the Council. The funding scheme as at January 1995 was a levy of 0.017% of all advertising nationally, except newspaper classifieds. In 1995 total national advertising expenditure in Australia was estimated at $5.4 billion.

Procedures for review

There was no provision for formal review of the Code. There was a Code Committee which considered amendments to the Code. The Council provided input to the Code Committee.

Why this is considered to be an example of quasi-regulation

The system has been described variously as self-regulation and co-regulation. It is not apparent that the commencement of the system was influenced by government. Government has, through the authorisation process, had at least a formal monitoring role in relation to the scheme. The Government was also consulted in relation to the appointment of some members to the Council.

The features which bear on the success or failure of this example of quasi-regulation

The Council considered that the Code was a success, but saw the almost constant review of the system by the TPC/ACCC as burdensome and costly. It also considered that one of the main industry organisations no longer supported the system. Industry appears to have considered the scheme a success but shared the Council's concerns about the number of reviews under the authorisation process. This is supported by the quick response by industry to set up a new scheme, but without seeking authorisation.

Consumer organisations have criticised the Code and the operation of the Council for reasons including inconsistency and lack of impartiality, the extent to which the council members represented the public, the poor rate of successful complaints, and the length of time taken to consider complaints.

The Government would probably not regard the code as being successful if, as did occur, both consumer and industry groups abandoned the scheme. Nevertheless, the scheme operated for twenty years and provided a forum, which had not previously existed, to hear advertising complaints at no cost to the consumer. Whether or not an advertisement breached the Code was often a subjective decision which tended to leave the Council open to criticism.

Case Study 3: Code of Banking Practice

Background

In the light of bank behaviour and losses in the late 1980s, the then House of Representatives Committee on Banking, Finance and Public Administration conducted an Inquiry and subsequently produced a report entitled "A Pocket Full of Change" (the Martin Report) which proposed the establishment of a Code of Banking Practice.

The then Federal Government adopted the recommendation for a code and announced the setting up of a Government working party to draft the Code. Following negotiation between the Government and the banks, a final version was adopted by the banks and supported by the then Government

How the code operates

The Code includes provisions which:

- improve disclosure of fees and charges and, particularly, of changes in fees and charges;
- enable consumers to prevent the passing on of personal information to bank subsidiaries;
- prohibit 'all monies' guarantees; and
- require banks to offer access to an external redress mechanism.

Banks are bound to the Code when they announce that they adopt the Code and must refer to it in any terms and conditions. The code was not fully in operation until late 1996, with the commencement of the Uniform Credit Code. Monitoring of compliance with the Code is undertaken by the Australian Payments System Council.

Costs involved

At the time of the release of the working party's second draft, banks publicly claimed the compliance costs would be about $120 million. Amendments proposed by the banks reduced the costs to what was acceptable to the banks. No precise figure is available, but the slow rate of implementation of the Code would have minimised printing costs, as these would likely have been incurred anyway. The principal costs to the banks are for the continuing training of their staff in the application of the Code.

Procedures for review

Banks are required to report each year to the Reserve Bank on the operation of the Code and certain disputes.

The Code has provisions requiring review every three years. It has not, however, yet been reviewed, as it was not fully in operation until late 1996.

Why this is considered to be an example of quasi-regulation

The Code of Banking Practice originated with government which was also heavily involved in its drafting. At the time it was formally introduced, the Federal Treasurer also stated that the banks might face legislation if they did not comply with the Code. Government is also involved in monitoring.

The features which bear on the success or failure of this example of quasi-regulation

At the time it was released, consumer groups characterised the Code as essentially a restatement of existing obligations and criticised its failure to address certain issues. For its part, the banks could point to substantial compliance costs in changing disclosure material and in new mailing costs.

It may be that the review process will enable a considered assessment to be made of the effects of the Code and any shortcomings.

The Government considers that the Code has been successful in improving standards of disclosure and in ending the practice of 'all monies' guarantees.

Case Study 4: General Insurance Code of Practice

Background

In announcing the Cabinet decision for regulation of the life insurance industry in July 1993, the then Treasurer and the Minister for Consumer Affairs also announced that a separate code was to be developed covering agent regulation and dispute resolution standards for the general insurance industry.

Industry responded that a code would work better if the industry developed it, owned it and enforced it on a 'voluntary' basis. A Task Force consisting of Government and industry representatives developed the Code in consultation with consumers. The Code was approved by the then Federal Minister for Consumer Affairs in December 1994 and came into operation in July 1995.

Recent amendments to the *Insurance Act 1973* have mandated the general insurance code for those carrying out certain types of prescribed insurance business. However, before the code became mandatory, it was a good example of quasi-regulation.

How the Code operates

The Code includes standards of practice for general insurers in relation to:

- supervision and training of agents and employees;
- improved policy documentation including information about the existence of the Code;
- improved claims handling procedures; and
- documented internal procedures for complaints handling and participation in an external disputes scheme.

A separate company, the Insurance Enquiries and Complaints Limited (IEC Ltd) 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.

Costs involved

The Insurance Council of Australia (ICA) and the general insurance industry are committed to the Code and have expended a significant amount in implementing it. Implementation of the Code was estimated to cost ICA members $26-30 million in year one and $8-10 million each year thereafter. The significant areas of cost were agent training ($1.8 million), monitoring ($2.2 million), re-drafting and re-printing documents ($20 million), and consumer information ($10.5 million).

Procedures for review

The Code provides for a review to commence two years after the Code is fully operational. A formal review will therefore occur in July 1998. The ICA has undertaken to consult with government agencies and consumer groups in the course of the review.

Why this is considered to be an example of quasi-regulation

This was a classic example of quasi-regulation. The Government stated its intention to have a mandatory code for the general insurance industry. The industry reacted to that announcement by initially regulating itself. The industry, in effect, self-regulated, but the Government was involved in drafting the Code, informally monitored its operation and expected to be involved in its review.

The features which bear on the success or failure of this quasi-regulation

At the outset, consumer organisations did not consider this to be a satisfactory Code because it did not contain specific detailed practices with which the industry should comply. Because the industry embraced the Code and has shown its commitment to improvement, it appears that consumer groups have changed their views about the Code.

The Government considers that the Code has significantly improved company training standards and the general customer focus of the industry and is therefore a success.

The industry has spent a lot of money on training, implementation and enforcement. It might consider the Code is a success because it has managed to keep the Government and consumers at arms' length, maintaining ultimate control over its own affairs but nevertheless producing results to satisfy critics.

2.2.2 Agreements which business groups negotiate with Government

Agreements which business groups negotiate may also constitute quasi-regulation, even where they do not involve establishment of an industry code (see Example 4). The extent to which such agreements are quasi-regulatory depends on the extent to which they are a vehicle for government influence on business behaviour. For example, agreements negotiated under some threat of mandatory action are likely to be quasi-regulation.

> **Example 4: Industry waste reduction agreements**
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> In 1992, the Australian and New Zealand Environment and Conservation Council (ANZECC) endorsed the establishment of a national kerbside recycling strategy which included voluntary waste reduction agreements with major industries and recycling targets. Most industries met their recycling targets and some even exceeded them. Those targets expired in 1995 and subsequently ANZECC authorised a special taskforce to negotiate new extended waste reduction agreements. In April 1997, new agreements were signed with companies involved in the newsprint, paper packaging, steel can and high density polyethylene industries. These agreements were signed by the Commonwealth Minister for the Environment and the chair of ANZECC (currently the Queensland environment minister). There are no formal compliance and reporting mechanisms. ANZECC is currently negotiating a national packaging covenant for waste minimisation with industry to cover the entire packaging industry.

2.3 GOVERNMENT INITIATED QUASI-REGULATION

While many examples of quasi-regulation are developed and managed co-operatively with industry, many others are effectively initiated by the Government with less reliance on industry organisations. These arrangements are in some ways more akin to legislation than to self-regulation. While, as with legislation, the Government would typically consult closely with business and other interested parties, the rules which are developed are usually those of the Government rather than of industry.

The fundamental difference between quasi-regulation of this sort and strict regulation is that, instead of requiring compliance in legislation, the Government uses a variety of alternative means to achieve compliance. A

number of different strands can be identified, based on the approaches used to achieve compliance and the different functions performed:

- guidelines and the like which elaborate on mandatory legislative requirements, but are not themselves mandatory;
- standards, codes and the like where compliance affects access to benefits or rights controlled by government; and
- voluntary rules which are given force by related mandatory rules, the threat of legislation, or other benefits or sanctions.

2.3.1 Guidelines and the like which elaborate on mandatory legislative requirements

Not all guidelines of this sort are quasi-regulatory. Many of them are essentially advisory or explanatory, aiming to assist business in understanding and meeting its obligations, rather than adding an additional layer of regulation. Guidelines are likely to be quasi-regulation if:

- they suggest particular actions or procedures not specified in the law itself which businesses should adopt: and
- business has a strong incentive to comply.

The incentive to comply can take a number of forms, including:

- an indication that a business following the guidelines will not be in breach of the relevant legal requirement (see Example 5);

Example 5: Guidance material on compliance with Australian motor vehicle design rules

The Federal Office of Road Safety issues a range of quasi-regulatory documents to assist business in complying with mandatory Australian Design Rules or technical regulations, many of which are performance based. These include:

- the Test Facility Inspection Manual which deals with testing procedures;
- administrative circulars which supplement the manuals on specific points; and
- various codes of practice and bulletins which provide advice on particular manufacturing issues, for example the National Code of Practice for Manufacture of Additional Seats.

None of these documents are legally binding. However, a manufacturer wishing to depart from the advice contained in them would need to be able to demonstrate that it was nevertheless meeting mandatory performance requirements. Compliance with the guidance material would generally be accepted by the regulator as indicating compliance with mandatory requirements, though there is no formal "deemed to comply" provision.

- an indication by a regulator that compliance with the guidelines will be a consideration in its enforcement of regulation, decision making or handling of complaints (see Example 6);

Example 6: Human Rights and Equal Opportunity Advisory Notes on Access to Premises

The Human Rights and Equal Opportunity Advisory Notes on Access to Premises give specific guidance on how to comply with the Disability Discrimination Act 1992 (DDA). The objects of the DDA include eliminating, as far as possible, discrimination against persons on the grounds of disability. In particular, s. 23 of the DDA makes it unlawful to discriminate against persons with a disability, or their associates, in relation to access, and use of, premises that the public, or a section of the public, is entitled or allowed to enter or use. Failure to comply with this provision can be defended on a case by case basis. To assist business meet its obligations under s. 23 of the Act, the HREOC has prepared the aforementioned Advisory Notes.

- a perception that adherence to guidelines will help to keep businesses in compliance with the law (see Example 7).

Example 7: Codes of Practice relating to livestock

A number of codes of practice relating to the transport of livestock and feedlotting have been developed through the Agriculture and Resource Management Council of Australia and New Zealand. While not legally binding, businesses have a strong incentive to comply as action may be taken in the event of unacceptable outcomes (such as an excessive proportion of livestock dying). Generally animal welfare issues in Australia are the responsibility of State Governments and action would be taken by State and Territory authorities in the event of unacceptable domestic situations. Export livestock legislation administered by the Australian Quarantine and Inspection Service (AQIS) refers specifically to some of the codes relating to stocking densities and feeding regimes for livestock travelling overseas to ensure animal welfare considerations are observed. Industries have been involved in the development of the codes. Pressure on businesses to comply with the codes is indirect in the sense that failure to follow the guidelines may increase their chances of events which lead to action against them. Compliance with the codes should defend businesses against action to some extent depending on the issue under discussion.

As these examples demonstrate, this type of quasi-regulation is usually used as an adjunct to performance based regulation.

Performance or principles based regulation is widely seen as an appropriate vehicle for building flexibility into requirements and encouraging innovation. By focussing on the outcomes required rather than prescribing the precise means of achieving those outcomes, this approach to regulation gives businesses the opportunity to achieve regulatory objectives in ways that suit their needs and minimise compliance costs.

Where performance based requirements are set up by government, businesses, and especially small businesses, may also benefit from detailed advice about the specific steps which they can take to meet these requirements. Advice of this sort, while not legally binding, may be quasi-regulatory in that it affects the actions of a large number of businesses and creates a strong perception that compliance will satisfy performance based regulation.

2.3.2 Standards, codes and the like where compliance affects access to benefits under the control of government

There is a range of ways in which the Government can use its role in transactions or its position as a regulator to offer rewards for compliance with voluntary codes, standards or the like, for example:

- by making compliance a factor or pre-condition for involvement in government contracts (see Example 8); or

Example 8: National Code of Practice for the Construction Industry

This code was written by the Australian Procurement and Construction Council (APCC) in consultation with the Departments of Labour Advisory Committee (DOLAC). It sets out standards for behaviour of participants in the construction industry, and represents an agreed position of Commonwealth, State and Territory governments. The code deals with matters such as ethical behaviour, industrial relations and occupational health and safety.

Those who do not comply with all aspects of the Code will not be permitted to work on government construction projects. Sanctions for breaches include partial or total exclusion from government work, publication of details of the breach or reference of the breach to other relevant authorities. In issuing the Code, the APCC and DOLAC indicated that they were using the position as major clients of business to encourage "changes in industry production processes to raise productivity, and other actions that will help develop an industry which achieves internationally competitive standards."

- by making compliance a condition if clients of the business are to receive a benefit (see Example 9).

Example 9: Quality Improvement Accreditation Scheme for child care centres

The Commonwealth effectively regulates quality in certain day care centres through the Quality Improvement Accreditation System (QIAS). Only parents with children in centres which meet the requirements of QIAS are eligible for financial assistance under the Commonwealth's Childcare Assistance Program.

To the extent that the Government is simply protecting the public's interest in particular transactions with business, it could be argued that its purpose in instigating this type of arrangement is not regulatory. However, in many of the examples of this type identified by the Committee it is clear that the Government has a broader intent of altering the way in which business operates, for public policy reasons. These are clearly examples of quasi-regulation.

The Government also uses its position as a regulator to encourage compliance with quasi-regulation, for example by offering relief from certain types of compliance (see Example 10).

Example 10: National Heavy Vehicle Accreditation Scheme

The National Heavy Vehicle Accreditation Scheme (NHVAS) is a voluntary, independently audited quality assurance scheme which allows trucking operators to obtain exemption from some State and Territory compliance requirements. The Scheme, which is still at a pilot stage, has been developed co-operatively by State regulators, the Federal Office of Road Safety and the National Road Transport Commission. Issues covered by the NHVAS in trials to date are mass management, maintenance and fatigue management.

Trucking operators which sign up to the scheme avoid certain audit mechanisms such as random checking and weighbridge visits.

2.3.3 Voluntary rules which are given force

There is a range of other methods by which the Government can encourage compliance with rules which are technically voluntary. Some of the methods in current use are:

- the threat of legislation (see Example 11);

Example 11: The Minister's press release on the Australian Standard for babies' dummies

Standards Australia has published a voluntary Australian Standard for babies' dummies. In August 1996 the then Minister for Consumer Affairs issued a press release indicating that tests had shown that popular makes of dummy were meeting the "key safety requirements of the Australian Standard". He also indicated that the Federal Bureau of Consumer Affairs would continue to monitor dummies on sale and that if standards were not maintained he would consider taking regulatory action. The message to industry was that failure to meet the Australian Standard for dummies would invite regulatory action.

- the presence of legally enforceable requirements which could be invoked in the event of non-compliance with voluntary guidelines (see Example 12); and

Example 12: Australian Ballast Water Management Guidelines

These guidelines were developed by the Australian Quarantine Inspection Service (AQIS), in consultation with key stakeholders, for managing ships' ballast water to minimise the risk of introducing exotic marine pests. The guidelines are currently voluntary, though AQIS does have some powers under the Quarantine Act to take action against non-complying vessels, for example preventing discharge of ballast water and boarding ships to carry out inspections.

The International Maritime Organisation has recently extended its ballast water guidelines, and the Australian guidelines will be amended accordingly. The IMO has agreed that ballast water guidelines will become mandatory, and have set a target date of the year 2000 for adoption of a mandatory annexe to MARPOL (International Convention for Prevention of Pollution from Ships). Australia will introduce the IMO mandatory arrangements in the year 2000 following adoption of the Annexe by the IMO. The reason for moving to mandatory requirements is the fact that the international community has recognised that for effective ballast water management mandatory controls are necessary.

- sanctions under related legislation (see Example 13).

Example 13: National Standard for Organic and Biodynamic Produce

This standard was developed by AQIS in consultation with industry associations and consumer bodies. While the standard is voluntary, there will be mandatory export controls which prevent export of food labelled organic unless AQIS has conducted a third party audit of certifying associations to ensure that their members comply with the national standard. This means that producers who wish to export food labelled organic will have to meet the National Standard as a minimum requirement.

2.4 TRADE PRACTICES ACT: AUTHORISATIONS AND SECTION 87B UNDERTAKINGS

Some types of regulation under the *Trade Practices Act 1974* (the Act) bear some resemblance to quasi-regulation. Two examples are:

- the anti-competitive provisions of codes which have been authorised by the Australian Competition and Consumer Commission (ACCC) under Part VII of the *Trade Practices Act 1974*; and
- enforceable undertakings under s. 87B of the Act.

2.4.1 Authorisation

The Act allows the ACCC to authorise a contract, arrangement or understanding ('agreement') containing an anti-competitive provision if the ACCC is satisfied the public benefits flowing from the agreement outweigh its anti-competitive effects. The ACCC cannot require a firm or industry to apply for authorisation. It is a voluntary process. The effect of authorisation is that self-regulatory conduct that would otherwise breach the Act is made immune from the relevant competition provisions of the Act.

The anti-competitive aspects of a number of industry codes of conduct have been authorised to date (see Example 14).

Example 14: an authorised code — Agsafe

In 1990 authorisation was given to the accreditation scheme and code of conduct of the Agricultural and Veterinary Chemicals Association of Australia (AVCA). The conduct authorised allows AVCA to refuse to deal with traders who do not measure up to AVCA standards for the handling of farm chemicals. The accreditation scheme requires that premises involved in the transport of farm chemicals conform to the standards imposed under dangerous goods legislation in the various states and territories. Staff employed at these premises are required to gain accreditation by undergoing a training course administered by an independent course management board and to comply with AVCA's code of conduct. The Commission considered that the scheme would result in public benefits to users and the community in general from the safe use of farm chemicals. It believed that the public benefits outweighed the anti-competitive elements such as the use of sanctions, the entry requirements for individuals and the possible exclusion of firms from the industry. The scheme has since been reauthorised and is known as Agsafe.

To the extent that an authorisation may be instrumental in determining that a self regulatory code containing anti-competitive elements is allowed to operate, it can be seen as having an effect on the behaviour of the businesses subject to the code. However, in authorising anti-competitive elements of a code the ACCC is exercising a specific statutory power rather than extending any general endorsement to the code. The Commission's determinations on authorisation applications are subject to a formal review process by the Australian Competition Tribunal (formerly the Trade Practices Tribunal).

2.4.2 Section 87B undertakings

Under s.87B of the Act, the ACCC can accept a written enforceable undertaking from a person in relation to any matter where the ACCC has a power or function under the Act. However, the Commission has no power to require that an undertaking be offered. The ACCC encourages the use of such undertakings in situations where there is evidence of a breach of the Act, as an administrative alternative to court proceeding. If the undertaking is breached the ACCC can seek a court order against the person. The undertaking can only be varied or withdrawn with the consent of the ACCC. The cost of negotiating Section 87B undertakings is significantly lower than the cost of litigation. As part of alleviating what the Commission considers

to be a contravention of the Act, most undertakings involve corrective action and compensation. Additional requirements such as specific compliance programs to alleviate the possibility of a recurrence of such conduct and complaints handling procedures are not uncommon.

> Example 15: an enforceable undertaking — entered into by Chubb Security Australia
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> Chubb Security Australia Pty Ltd provides a variety of mobile security patrol services. In 1996 the ACCC alleged that Chubb had failed to provide services as contracted and had falsified records to indicate that clients' sites had been visited when in fact they had not. The company gave an enforceable undertaking which required the company to send letters of apology to all affected consumers, introduce a management control program to monitor patrol services each year for three years, implement a code of ethics for the administration of patrol services, pay for an ACCC officer to address the next two conferences of ASIAL, the security industry's association, and lobby for the Australian Standard AS4421 to be amended to require all security firms to run trade practices compliance programs.

A significant difference between enforceable undertakings and quasi-regulation is that such undertakings are legally binding once they have been entered into and have limited application usually only to a single business. However, they resemble quasi-regulation in that unless a business offers an undertaking acceptable to the Commission the business is aware that it may face legal proceedings. Section 87B undertakings have been held to be instruments under the Act and thus subject to the Administrative Decisions (Judicial Review) Act 1977 (see *Australian Petroleum v Australian Competition and Consumer Commission (1977) ATPR 41-444*) Undertakings are broadly analogous in effect to consent judgements although there are important legal differences.

2.5 EXTENT AND ROLE OF QUASI-REGULATION

Early in its work program, the Committee concluded that it did not have sufficient time or resources to undertake a methodical collation of the extent of quasi-regulation in the Commonwealth's jurisdiction. In addition, it wanted to avoid duplication of work commissioned by the Department of Industry, Science and Tourism (DIST) to develop a database on codes of practice which will provide business with information on all codes which

may affect their operations — this initiative is in response to Recommendation 41 of the report of the Small Business Deregulation Task Force.

The consultant engaged by DIST (Stenning and Associates) completed a scoping study in October 1997 which identified upwards of 30,000 codes, standards and specifications, covering all levels of government. While these include self-regulation and mandatory codes as well as quasi-regulatory schemes, the study suggests that quasi-regulation is used extensively.

Also, the consultant reported:

> "Quasi-regulatory codes are very difficult to identify and maintain. There is no formal mechanism by which government announces the adoption of a quasi-regulatory instrument. This makes identification, collection and monitoring extremely difficult." (Stenning 1997, p. 7)

The Committee therefore has relied on a cross-section of quasi-regulatory arrangements (such as the sixteen examples and four case studies provided in this chapter), and on information gathered during its program of consultations, to build up a picture of major characteristics of quasi-regulation.

As a general rule, quasi-regulation affects specific industry sectors rather than the business community as a whole. In particular, industry-based arrangements necessarily have limited application where specific industry associations are integral to the arrangement. There are some exceptions to this, for example the proposed national scheme for privacy protection. Regulation of general application is mainly dealt with by legislation.

Nevertheless, many industry sectors are affected by quasi-regulation. This became evident during the Committee's consultations where it was possible to identify some quasi-regulation relevant to most of the industry sectors investigated. The Committee identified a large number of examples of quasi-regulatory arrangements, many of which involved a multiplicity of codes, standards, guidelines or the like. For example, guidance material on Australian motor vehicle design rules includes a complex set of manuals, circulars, codes and bulletins issued by the Federal Office of Road Safety.

Quasi-regulation typically complements other forms of regulation. It has a wide coverage, but is rarely a comprehensive scheme of regulation for an industry. Insurance, finance, telecommunications and food are examples of industry sectors which are substantially affected by quasi-regulation, but where the dominant form of regulation is clearly legislation.

Figure 2 ranks a selection of regulatory arrangements, mainly quasi-regulatory. Those with light-handed Government involvement are towards the top, with examples of more heavy handed involvement as one moves down the spectrum.

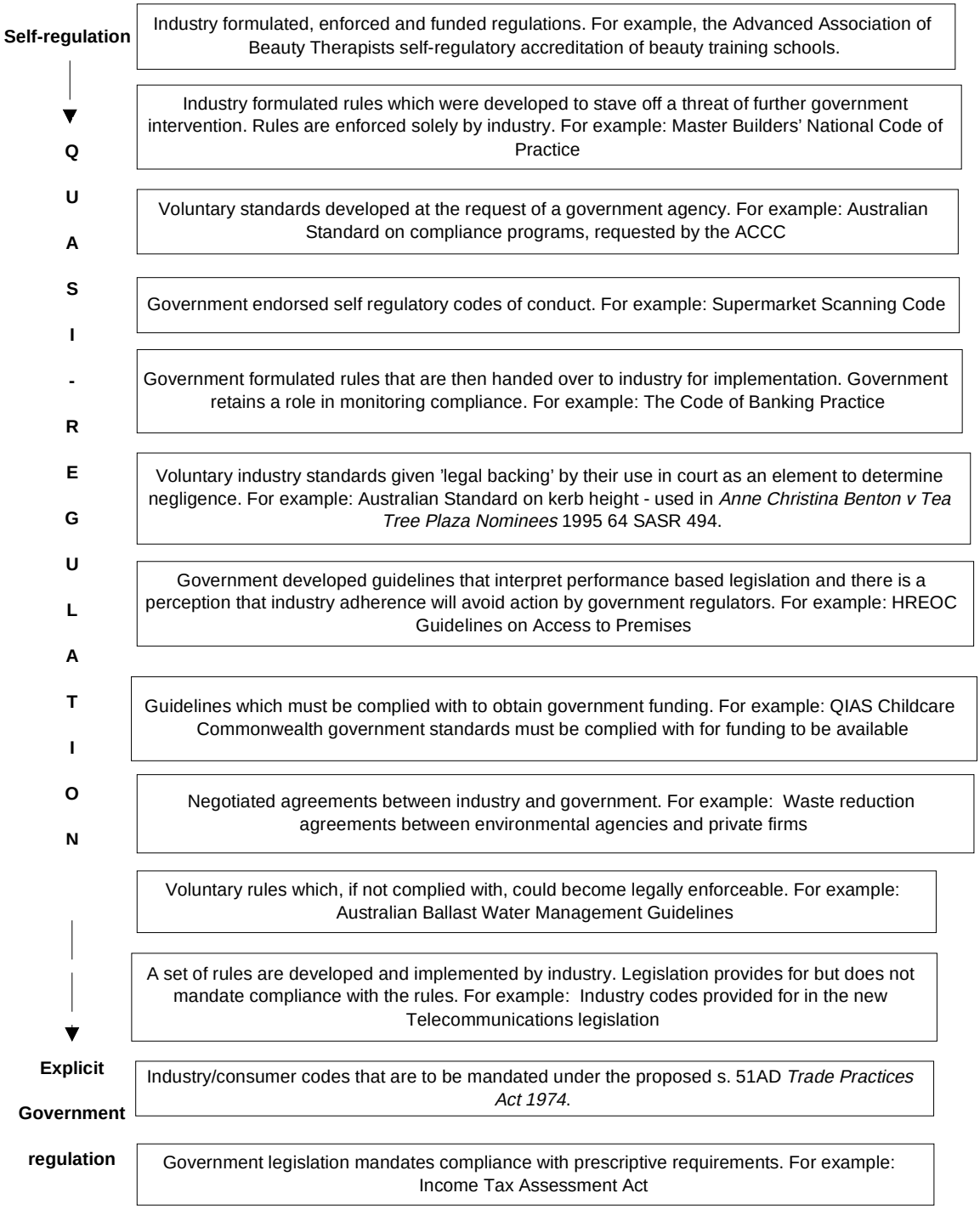
While it is difficult to generalise about the role of quasi-regulation in different circumstances in which it is used, it is possible to make some observations. Some of the more common functions of quasi-regulation are:

- to improve the quality of dealings between business and consumers. This is a common, though not the only, function of industry codes of practice; and
- to elaborate on mandatory requirements and provide assistance to business in taking practical steps to meet mandatory, performance-based requirements in legislation.

There is a perception that the body of quasi-regulation is growing. A large proportion of the arrangements identified by the Committee are either proposals in development or were introduced within the past few years. Some significant recent developments in quasi-regulation include:

- changes to telecommunications regulation which introduced provision for industry codes with potential to cover a wide range of consumer protection issues in the telecommunications area;
- a proposed National Scheme for Fair Information Practices in the Private Sector, put forward in a discussion paper issued by the Privacy Commissioner, which would involve a quasi-regulatory scheme for privacy controls on the private sector. This proposal is significant as it has potential to affect most businesses and consumers.

Figure 2 A more comprehensive spectrum of regulation



2.6 THE USE OF AUSTRALIAN STANDARDS IN QUASI-REGULATION

2.6.1 Standards Australia

Standards Australia has a central role in voluntary standard setting in Australia. Under its Memorandum of Understanding (MoU) with the Commonwealth it is recognised as Australia's peak non-government standards writing body, and as Australia's member of the International Organization for Standardization, the International Electrotechnical Commission and the Pacific Area Standards Congress. Standards Australia owns the trademark "Australian Standard"

Standards Australia has developed cooperative arrangements with several national standards setting bodies within Australia, such as the Australian Communications Authority and the Therapeutic Goods Administration, to develop standards for them. Its MoU with the Commonwealth provides for Standards Australia to establish a board for the accreditation of other bodies to write Australian Standards. To date, no other bodies have been formally accredited.

Standards Australia is a non-government body and compliance with Australian Standards is only legally required if they are referenced in legislation. Out of approximately 5,700 current Australian and joint Australian/New Zealand Standards, slightly over half are referenced in Commonwealth, State or Territory legislation. The remainder are voluntary standards.

The Commonwealth has revised a Memorandum of Understanding (MoU) with Standards Australia, which includes a number of provisions on how standards are to be developed. Under these provisions, Standards Australia may:

- take steps to ensure that standards are consistent with regulatory requirements;
- ensure that Australian Standards only depart from equivalent international standards where there is a compelling reason to do so;
- continue to explore ways of refining procedures for a cost/benefit analysis of proposed standards and development projects;
- write standards in terms which do not inhibit competition;

- where possible establish performance-based requirements;
- where requested by government to develop a standard for regulatory purposes, produce draft standards in a form suitable for referencing in legislation and which represent a minimum effective solution; and
- involve stakeholders, including business, in decisions on whether a standard needs to be developed or revised.

2.6.2 Australian Standards and quasi-regulation

Standards produced by Standards Australia are not in themselves quasi-regulation. Where Australian Standards are mandatory by virtue of being referenced in legislation they would be regarded as explicit government regulation rather than quasi-regulation. However, there are circumstances in which a voluntary Australian Standard does become quasi-regulation by virtue of the actions of the Government or the courts:

- the Government may place direct pressure on business to comply with a voluntary standard, for example by the threat of regulation (see Example 11 above); or
- the courts may use voluntary Australian Standards as benchmarks in determining issues such as negligence (see Example 16).

Example 16: Use of the Australian Standard on kerb height in determining negligence.

In *Anne Christina Benton v Tea Tree Plaza Nominees* 1995 64 SASR 494, Duggan J found that non-compliance with a voluntary Australian Standard on kerb height was one of the factors that could be taken into account in determining negligence. Even though the standard was voluntary, it was given legal weight as it was indicative of a 'reasonable' height for a kerb.