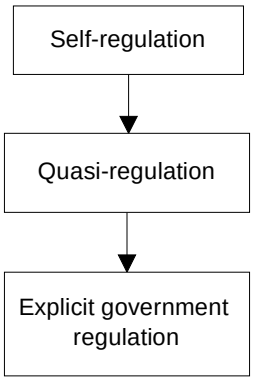
SUMMARY AND RECOMMENDATIONS

WHAT IS QUASI-REGULATION?

Regulation can usefully be considered as a spectrum ranging from self-regulation where there is no government involvement, through various regulatory arrangements with increasing degrees of government influence and involvement, to explicit government regulation (often referred to as "black-letter law").

In this report the term "quasi-regulation" refers to the range of rules, instruments and standards where government influences businesses to comply, but which does not form part of explicit government regulations. Quasi-regulation can take many forms such as codes of practice, advisory notes, guidelines, and rules of conduct, issued by either non-government or government bodies. In the context of a regulatory spectrum, quasi-regulation might be considered as "grey-letter law".

A simplified spectrum of regulation



Importantly, the boundaries between these three principal forms of regulation are indistinct. For example, if an industry develops and implements a code of practice in response to government suggestions that there is a need for such a code, its essential characteristics may move away from self-regulation towards quasi-regulation. Further, if Parliament writes into law the ability for industry codes to be made mandatory for any single

company which fails to voluntarily meet the code, then its character becomes less quasi-regulatory and closer to explicit government regulation.

Thus, it is evident that these three principal forms of regulation should not be regarded as mutually exclusive groups. It is better to consider them as lying on a continuous regulatory spectrum, ranging from no government involvement to complete government control, with quasi-regulation occupying the middle ground.

WHAT ARE THE CONCERNS ABOUT QUASI-REGULATION?

Particular concerns were raised in the 1996 National Small Business Summit and in the report of the Small Business Deregulation Task Force that quasi-regulation can affect the behaviour of businesses and impose a burden similar to explicit government regulation. In contrast to the situation with government regulation, there is no mechanism for ensuring that specific quasi-regulatory arrangements confer a net public benefit.

The Task Force recommended that, as is the case for new or amended government regulation, quasi-regulatory arrangements should be subjected to cost-benefit analyses and independent review processes to ensure they remain effective and efficient.

The Commonwealth Government's response *More Time for Business* (Prime Minister 1997) was to agree in part, but to note that further work was required in order to fully respond to these issues. Part of that work was given to this Committee.

PURPOSE OF THIS REPORT

The Committee was asked by the Government to inquire into and report (with recommendations) on:

- the characteristics and extent of quasi-regulation (mainly in the Commonwealth jurisdiction);
- the circumstances in which quasi-regulation is a viable alternative to government regulation;
- essential features of successful quasi-regulation; and

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

The Committee was asked 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 explicit government regulation may be appropriate.

In addition, the Committee was asked to include in this report its comments on the referencing of previously voluntary standards in regulation and suggestions as to appropriate criteria to be met before codes can be prescribed under the *Trade Practices Act 1974*.

In preparing this report, the Committee consulted with a cross-section of industry bodies, consumer representatives and regulatory agencies.

CHARACTERISTICS AND EXTENT OF QUASI-REGULATION

Early in its work program, the Committee found that it would not have sufficient time or resources to undertake a methodical collation of the extent of quasi-regulation in the Commonwealth's jurisdiction. In addition, the Committee wanted to avoid duplication of work commissioned by the Department of Industry, Science and Tourism (DIST) to develop a database on codes of practice. This initiative, in response to Recommendation 41 of the report of the Small Business Deregulation Task Force, will provide business with information on all codes which may affect their operations.

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. While these cover all levels of government and include self-regulation and mandatory codes as well as quasi-regulatory schemes, the study suggests that quasi-regulation (codes, guidelines, rules etc) 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, and on information gathered during its program of consultations, to build up a picture of major characteristics of quasi-regulation. Some types identified, and specific examples, are provided in Table 1.

ISSUES RAISED BY QUASI-REGULATION

Such examples and the information gathered during consultations point to key issues raised by the use of quasi-regulation. Issues include how quasi-regulation fits in to the broader regulatory environment, how it is used, and the consequences of quasi-regulation.

Lack of government justification and risk assessment. There are perceptions that governments are inconsistent in their choices of regulatory forms, sometimes insisting on quasi-regulation or explicit government regulation when a self-regulatory approach could work. But governments also were criticised for sometimes being too light-handed. Some of those consulted said that governments often fail to justify their chosen course of action, and that there appears to be little effort made in assessing actual risks (rather than perceived risks) when particular problems arise.

"Backdoor" regulation. Those consulted said that inappropriate adoption and use of quasi-regulation may give too much discretion to regulators. The consultant engaged by DIST noted similarly:

> Government agencies favour the use of codes because they are more easily introduced than traditional statutory rules and in some cases because they may be amended without reference to Parliament. (Stenning 1997, p. 5)

Some of those consulted emphasised that when industry is pressured by government into quasi-regulatory arrangements, compliance tends to be low thereby undermining the long-term effectiveness of the regulation. The reverse, industry pressuring government into putting its authority behind voluntary arrangements, may also lead to inappropriate quasi-regulation.

Table 1: Types and examples of quasi-regulation

Types of quasi-regulation	*Examples*
1. Industry based code with endorsement by a government agency	Supermarket (checkout) scanning code is industry formulated and enforced, and has TPC/ACCC endorsement.
2. Industry based code or standard developed in response to actual or perceived threat by government to regulate	Master Builders' Code acknowledges the need to change from within the industry "or suffer the consequences of government regulation".
3. Substantial government involvement in the development and subsequent monitoring of a code or standard	Code of Banking Practice was developed by a committee of officials, is implemented by the banks, but reported on annually by the Australian Payments System Council (a government body).
4. Industry code or standard required by legislation, but developed and implemented by industry, with reserve enforcement powers given to a regulatory authority	New telecommunications legislation provides for industry codes of practice, including for billing and customer complaints. Compliance will be voluntary but the Australian Communications Authority has the power to direct any particular company to comply.
5. Agreements negotiated between industry and government	In April 1997 the Australian and New Zealand Environment and Conservation Council (ANZECC) signed new voluntary waste reduction agreements with the newsprint, paper packaging, steel can and high density polyethylene industries.
6. Government guidelines to assist business meet legislative requirements by suggesting actions not specified in law	Human Rights and Equal Opportunity Commission has published advisory notes on access to premises for disabled persons — the Disability Discrimination Act makes it unlawful to discriminate against a person with a disability. Adherence to these notes is said to assist in defending a complaint if one were lodged.
7. Standards and codes established by government, with compliance being achieved because it is a pre-condition for other benefits	Quality Improvement Accreditation System (QIAS) — a child must attend a day care centre which meets QIAS standards in order for the parents to qualify for financial assistance under the Commonwealth's Childcare Assistance Program.
8. Use by the courts of voluntary standards and codes in determining what is reasonable in, for example, negligence cases	In *Anne Christina Benton v Tea Tree Plaza Nominees* (1995 64 SASR 494), Duggan J used non-compliance with a voluntary Australian Standard for kerb height as a factor in determining negligence. In *Paul Maurice Nagle v Rottnest Island Authority* (1993 112 ALR 393), the High Court found the defendant failed to provide appropriate warning of dangerous swimming conditions, referring to Australian Standard 2416.

Regulatory "creep". Those consulted raised concerns that sometimes what starts out as self-regulation can become widely accepted practice, gain an

imprimatur from a government agency, and then become embodied in a quasi-regulatory arrangement (and may become black letter law). For example, the Banking Industry Ombudsman scheme, a complaints handling mechanism implemented and funded by the banks, was subsequently linked to the Code of Banking Practice which is subject to substantial Government involvement.

Minimum acceptable or best practice? The approach behind many self-regulatory codes of practice is to improve the overall quality of products and services, and therefore tends to be pitched at "best practice". Should a best practice approach be built into mandatory requirements, either quasi-regulation or government regulation, they may impose a significantly higher compliance burden than would be justified by the principle that mandatory regulation should be the minimum necessary to achieve the set objectives.

For example, the Quality Improvement Accreditation System (QIAS) which promotes best practice in terms of a high quality environment in day care centres for children, is judged by some representatives of that sector as imposing an unjustifiable compliance burden. They contend also that this quasi-regulatory arrangement has imposed the costs of an additional Commonwealth layer of regulation on top of the established State and local regulation, for no tangible benefit.

Uncertainty and litigation. The use of performance based regulation provides flexibility as to how business can meet the set objectives thereby giving scope for efficiency improvements and innovation. Yet many small businesses do not have the resources or expertise to operate under such conditions, and prefer the certainty of following a prescribed set of specific rules. Doing so also is preferred because the risk of litigation, for example for negligent conduct, is perceived as less under prescriptive regulation. As a result, where there is performance based regulation, there is often a demand for quasi-regulatory rules which can provide guidance to business on how to comply with mandatory requirements.

Confusion. There is confusion, particularly in the small business sector and consumer organisations, as to the status and enforceability of many quasi-regulatory arrangements. Reactions among businesses range from "compliance obsessiveness" from some large businesses, which adhere to all regulations regardless of their status because they are concerned about public perceptions, to disenchantment by some small businesses which may

contribute to their failure to comply with some regulations, including explicit government regulations.

Flexibility and costs. Industry representatives are of the view that quasi-regulation generally leads to higher costs for the industry as a whole than does explicit government regulation because it requires substantial industry involvement. There may be consequent higher prices for consumers. Yet the added flexibility, and the enhanced consultation between industry and the relevant regulatory authority, are judged by some of those consulted to be worth the additional costs.

Potential advantages of quasi-regulation. Compared with explicit government regulation, quasi-regulation can:

- encourage a collaborative, rather than an adversarial approach, to achieving joint industry-government-consumer objectives;
- be more amenable to innovative ways of achieving objectives; and
- avoid the formality and inscrutability of much legislation.

VOLUNTARY STANDARDS AND REGULATION

More Time for Business indicated that this Committee should comment on the use of standards in regulation.

The bulk of widely recognised standards are those developed by Standards Australia, a non-government standards writing body. There are some 5700 Australian Standards. About half are referenced in legislation and regulations by government, whereby they become mandatory. Half are voluntary standards. Standards play an important informational and quality assurance role with regard to products and services.

Many recommendations in the Kean report on Australia's standards and conformance infrastructure (Kean 1995) focussed on Standards Australia's structure and the processes it uses in developing Australian Standards, as well as the relationship between the Commonwealth Government and Standards Australia. The Government and Standards Australia have taken action on these matters. Although the Kean report made recommendations on the use of voluntary standards in regulation (Recs. 27, 28 and 46), the Committee concluded that further action on these matters seems necessary in view of the consequent impact on business in complying with the regulations.

Government regulators have made use of Australian Standards without adequate assessment of whether they are necessary to meet the objectives of the regulation. One consequence is that quite technical, prescriptive and input oriented Australian Standards are referred to in regulation when a more outcome oriented approach may have resulted in more effective regulation. While regulators are meant to assess the suitability of standards before using them in regulation, there is little evidence in regulation impact statements that they do so. There would be merit in an explicit directive to regulators that they must assess and justify the referencing of standards in regulation.

An outcome oriented approach to regulation which includes "deemed to comply" provisions has a number of advantages. It gives producers and service providers freedom to choose how the outcomes required by the regulator can best be met. In this way it encourages innovation and the development of least cost solutions. At the same time it provides certainty for those who desire it that if they can demonstrate that they meet technical standards specified by the regulator, which may be an Australian Standard, they will be deemed to comply.

The Commonwealth Government is taking various initiatives to make the law more accessible. For example, it has proposed a register of legislative instruments and is making legislation available on the Internet. Yet those laws which make substantial use of Australian Standards may remain relatively inaccessible because of the need to purchase and comprehend the referenced Standards so as to be able to comply with the law. The Committee recognises that Australian Standards are the intellectual property of Standards Australia which sells its products to users, but notes the desirability that those who must comply with the law should have reasonably low-cost access to referenced Standards.

Recommendation 1

The Committee recommends that departments and regulatory agencies, when using standards, should:

- *wherever possible, reference in regulation 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 businesses with low cost access to Australian Standards referenced in legislation.*

There is misunderstanding, mainly among small businesses and consumers, as to the status of Standards Australia, with some presuming it to be a government body or at least that all Australian Standards are government endorsed. Consideration of any appropriate action to correct such misunderstanding could await further deliberations of the Working Group of Commonwealth, State and Territory officials because the impact on business of Australian Standards appears to be more in areas of State and local government responsibility than of Commonwealth responsibility.

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.

Standards Australia on occasions develops standards in areas which are regulated by specific government agencies such as Worksafe Australia, raising the risk of duplication and inconsistency and possibly adding to confusion among businesses as to what is mandatory and what is voluntary.

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.

Finally, those Australian Standards which are not referenced in regulation, and are therefore voluntary in nature, may be accepted in courts of law as having evidentiary status. Two examples were provided in Table 1. The Committee notes that use of Australian Standards as a factor in, for example, determining negligence is just one element in a range of evidence used by courts. Furthermore, such standards can be used both for demonstrating negligence and as a defence. The Committee is of the view that no action is warranted at this stage, but that it would be worthwhile monitoring this aspect of the use of standards because if it becomes more widespread it may have implications for how standards should be developed and applied.

CHOOSING FROM THE REGULATORY SPECTRUM

When addressing some particular issue, guidelines are needed as to which of the three principal regulatory forms — self-regulation, quasi-regulation or explicit government regulation — may be the most appropriate.

With regard to self-regulation, the Commonwealth Government has said that it

> .....is keen for industry to take ownership for developing effective and efficient self-regulation mechanisms where this is appropriate. To this end the Commonwealth interdepartmental committee on quasi-regulation will consider the circumstances in which self-regulation may be appropriate." (Prime Minister 1997, p. 77)

With regard to quasi-regulation, *A Guide to Regulation* (ORR 1997) indicates that when such arrangements are considered by government they should be subject to the regulation impact statement (RIS) process described in that publication.

While the RIS framework requires that consideration be given to all three principal forms of regulation, little information is currently provided about the basis on which the choice should be made, except that all feasible options should be assessed and compared.

The Committee and those consulted concluded that a checklist would assist with the selection from among the different regulatory forms.

The following checklist attempts to provide more specific guidance on choosing the best regulatory form. It indicates factors that will help determine which of self-regulation, quasi-regulation or explicit government regulation is, prima facie, worth considering as a regulatory option. The checklist should not be used as a means of determining which option would be best, but can be used for identifying suitable options which would warrant a full cost-benefit analysis in the context of a regulation impact statement. In the final analysis, relative cost effectiveness will be the key factor in deciding which regulatory option should be used.

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 may be 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 on 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 Commonwealth officials in considering proposals for new or amended quasi-regulation or government regulation.

CRITERIA FOR PRESCRIPTION OF CODES UNDER THE TPA

In September 1997 the Commonwealth Government announced that it would propose amendments the *Trade Practices Act 1974* (TPA) to allow prescription of industry developed codes of practice as either:

- **mandatory**, whereby they can be enforced o all businesses in the specified industry regardless of whether they are signatories to the codes; or

- **voluntary** and therefore enforceable only on those businesses which are signatories.

This approach was described as giving "small business the capacity to influence the type of industry regulation by participation in code development, as well as the security of legal recognition of codes and the remedies that flow from that." (Minister for Workplace Relations and Small Business, September 1997)

The Government indicated its intention to prescribe both the Franchising Code of Practice and the Oilcode as mandatory under the TPA. Against a background of its policy that industry should take ownership for developing efficient and effective self-regulatory mechanisms, the Government has directed this Committee to suggest criteria which should be satisfied before other codes are considered as candidates for prescription under the TPA.

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 have 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.*

The Committee notes that the Commonwealth's RIS process provides for the analysis of the above issues and that a comprehensive RIS will be required for any code which is under consideration for prescription under the TPA. The Committee proposes that the RIS should be distributed as part of the consultation with all affected parties.

STRATEGIES TO ACHIEVE SUCCESSFUL QUASI-REGULATION

The Committee has identified strategies to help ensure that quasi-regulatory arrangements are successful in achieving their objectives.

The relationship between business, government and consumer representatives should be collaborative so that all parties have ownership of, and commitment to, the arrangements. That commitment will be reinforced if appropriate incentives are built in. Importantly, sufficient resources must be made available to ensure the arrangements work, and there must be equitable contributions from both business and government. It is important, also, to ensure that compliance costs are reasonable given the problem being addressed.

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.

In cases where the extent of government involvement is not significant, this role should remain with industry. However, where there is substantial government involvement, it would be appropriate for the relevant agency to ensure that adequate information is made available to those affected.

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.

It is widely accepted that many quasi-regulatory arrangements will not be effective unless a satisfactory complaints handling mechanism is in place which is able to trigger effective sanctions and provide relevant information and incentives for industry to identify any problems.

Recommendation 7

The Committee recommends that those involved in the development of quasi-regulation affecting 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.

Despite having suitable incentives, many quasi-regulatory arrangements will only be effective if meaningful sanctions can be applied to those who fail to meet their obligations. Code administrators have been deterred from applying sanctions when threatened with legal action, thereby rendering the arrangements ineffective.

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.

MONITORING AND REVIEW OF QUASI-REGULATION

There is a well-established principle that legislative and other mandatory regulatory arrangements should be formally reviewed at regular intervals and, if necessary, be amended to ensure their ongoing effectiveness. Given the absence of a formal mechanism for Parliamentary scrutiny for quasi-regulatory arrangements, it is even more important that they be monitored and reviewed at specified regular intervals.

Recommendation 9

The Committee recommends that departments and agencies involved in the formulation or funding of quasi-regulation should encourage the industry parties to establish a formal monitoring and review mechanism or, in cases where the government involvement is so extensive as to require such accountability, should carry out that function.

WHAT WILL HAPPEN TO THIS REPORT

In parallel with the work of this Commonwealth Committee, a Working Group of Commonwealth, State and Territory officials has been established to report on what further action might be appropriate in relation to review and scrutiny of quasi-regulation. The Working Group will draw on this report in preparing a document for the next national small business summit in June 1998, for subsequent consideration by COAG.

The Commonwealth Government announced in *More Time for Business* that its decisions in response to this report would be embodied in a revised edition of the Office of Regulation Review publication *A Guide to Regulation*.