APPENDIX C
Issues arising from consultations

The Committee found the consultations were extremely useful, adding considerably to its knowledge of:

- real world examples of quasi-regulation;
- the issues involved in self-, quasi-, and government regulation, and the relative importance of these issues to those groups consulted.

Some of the examples of quasi-regulation raised during the consultations have been discussed elsewhere in this report (see, for example, Chapter 2). This appendix — after first listing the groups consulted — concentrates on the main issues and perceptions raised during the consultations.

It is important to note that this appendix summarises the views of those groups consulted and should **not** be taken to be the views or recommendations of the Committee.

LIST OF GROUPS THAT PARTICIPATED IN CONSULTATIONS

Australia New Zealand Food Authority
Australian Association of Permanent Building Societies
Australian Bankers' Association
Australian Business Ltd
Australian Chamber of Commerce and Industry
Australian Communications Industry Forum
Australian Confederation of Childcare
Australian Council of Professions
Australian Dairy Products Federation
Australian Institute of Company Directors
Australian Medical Association Ltd
Australian Quarantine and Inspection Service
Australian Small Business Association
Australian Society of Certified Practicing Accountants
Business Council of Australia
Consumer Law Centre Vic Ltd

Consumers' Federation of Australia
Council of Small Business Organisations of Australia
Farmwide
Federal Office of Road Safety
Franchise Council of Australia Ltd
Institution of Engineers
Insurance and Superannuation Commission
Insurance Council of Australia
Law Council of Australia
Life, Investment and Superannuation Association of Australia Inc
Meat Industry Council
Motor Trades Association of Australia
National Farmers' Federation
National Occupational Health and Safety Commission
National Registration Authority of Agricultural and Veterinary Chemicals
New South Wales Farmers' Association
Pharmacy Guild of Australia
Property Council of Australia
Proprietary Medicines Association of Australia
Standards Association of Australia
Therapeutic Goods Administration
Victorian Employers' Chamber of Commerce and Industry

Other groups invited to participate

Australian Building Codes Board
Australian Chamber of Manufactures
Australian Communications Authority
Australian Consumers' Association
Australian Financial Planning Association of Australia Ltd
Australian Pharmaceutical Manufacturers Association
Real Estate Institute of Australia
SETEL (Small Enterprise Telecommunications Centre)
Small Business Coalition

ISSUES

The principal issues that came out of the consultations fall into four main groups. They are:

1. targeting the problem and using the best regulatory solution;
2. regulatory impacts on industry;
3. issues for government; and
4. other issues.

These issues are discussed in more detail below.

1 Targeting the problem and using the best regulatory solution

Those groups consulted, whether representative of industry, government or consumers, were all supportive of the principle that the regulatory solution should be tailored to the particular problem or issue at hand. For example, the mere existence of a market failure was stated as insufficient to justify government intervention. To properly target the problem, those consulted agreed that the nature, magnitude and risk of the problem are threshold issues which must be assessed.

The need for risk analysis by regulators was strongly recommended. For example, where there is a high risk of a problem occurring with a high magnitude of impact, then government legislation may be appropriate. However, the point was made that community acceptance of risk should also be a part of this analysis. For example, car travel, where the community appears to accept a relatively high risk of harm, contrasts with the consumption of food, where the community appears not to accept even a low risk of harm.

Some of the groups consulted thought that certain problems or issues may naturally point towards a particular type of regulation. For example:

- information problems, staff training and counselling may be best addressed in codes which can address issues that may be inappropriate for legislation; and

- harm to human health or safety resulting from a product/activity appeared to warrant government involvement in the regulation of that product/activity.

A distinction was drawn between minimum standards and best practice issues. Those consulted stated that a problem exists where government regulators do not distinguish between the two. They said that while minimum standards may require government involvement, best practice standards are suited to codes or non-mandatory regulatory forms. For example, concern was expressed about best practice regulation — for example the Human Rights and Equal Opportunity Commission (HREOC) Advisory Notes on access to premises — becoming costly 'de facto' minimum standards over time.

Those consulted stated that firms should be allowed to cater for different consumer wants. In particular, firms should not all be expected to adhere to best practice codes, as this may not be satisfying some consumers' demands. Some consumers may want lower prices/quality, whilst others may want higher prices/quality, as well as other combinations (eg medium price/medium quality). However, a non-mandatory best practice code could be useful as a marketing tool for firms catering to that part of the market willing to pay for higher standards.

In addition, participants wanted a checklist to outline the circumstances in which each broad type of regulation — self-, quasi-, and explicit government regulation — might be appropriate. Furthermore, participants asked that some of the particular choices of instruments within these broad types also be matched to the circumstances in which they are appropriate in such a checklist. The best regulatory instrument that targets the particular problem should be chosen.

2 Regulatory impacts on industry

Many of the issues raised by those consulted were about the impacts of regulation on industry. These are identified and discussed below.

An increasing stock of regulation

One of the major themes that came out of the consultations was that businesses perceive they are faced with an increasing stock of regulation, including an increasing stock of quasi-regulation.

Businesses faced with increasing regulation have taken different approaches, depending on resources and other factors. Some comply with all regulations to be certain of avoiding any punitive action. For example, some (larger) businesses stated that they were 'compliance compulsives'. On the other hand, some groups considered that where there is a large amount of complex regulation businesses, in particular small businesses, may adopt a fatalistic attitude ie "We can't comply with every applicable regulation, even if we try". Thus, more regulation may result in perverse outcomes because it can lead to businesses choosing not to comply with some regulation, including explicit government regulation.

However, some pieces of regulation — even explicit government regulation — are welcomed by businesses. They see some regulations as working with, rather than obstructing, their business.

Another issue arising from this apparent increasing stock of regulation is the accessibility of regulations to industry and consumers. Those consulted stated that some small businesses are not aware of relevant legislative requirements, let alone quasi-regulations that are in the public domain. Consumers also find it difficult to access regulations. Industry and consumer groups consulted said that governments should not expect associations to promote or educate consumers and businesses on an overly complex system of government regulations, as they lacked the resources to do so.

Businesses and consumers may have to place more faith in interpreters of regulation — for example, lawyers — as a result of the increasing stock of regulation. Small businesses and consumers may be disadvantaged in this area because they cannot afford to hire specialist advisers.

One participant in the consultations noted that the increased stock of quasi-regulation could be driven by the Government's stated preference for codes of practice. Another noted that the increasing stock of regulation was, in some cases, an inevitable response to community demands — the remaining issue then being quality control.

The costs of regulation

Regulation, whether it be self- quasi- or government regulation, can impose substantial costs on businesses and consumers.

Participants raised the issue of governments shifting the administrative costs of regulation — or the costs of formulating, implementing and administering regulation — onto industry. These costs may then be passed on to consumers in the form of higher prices or lower levels and/or quality of goods or services provided. Most groups accepted that as industry takes more responsibility for regulation making, it will bear more of the associated costs. However, where there are public benefits from regulation, it was stated as inappropriate that industry should bear all of the costs of that regulation. Government funding proportionate to the level of public benefit may be more appropriate under these circumstances.

One of the particular costs from self- and quasi-regulations involving private sector code administrators is the risk of civil suits such as negligence and defamation. Some of the groups consulted stated that they had received legal advice that they would be open to defamation suits if they named a recalcitrant firm that was not adhering to a code. However, the availability of an indemnity against prosecution for defamation was not seen as viable by some, as it would rule out any legitimate defamation claims.

The availability of adequate resources was regarded as fundamental to the success of a regulatory system.

The benefits of regulation

Those consulted pointed to the benefits that ensue from industry and consumer involvement in the formulation and administration of a scheme. Industry ownership of a scheme contributes importantly to industry commitment, and that promotes compliance. It can mean that there is more genuine consultation with affected groups than would otherwise occur. Industry participation in the development and implementation of codes can utilise industry knowledge of the best ways to comply, and can reduce compliance costs. The flexibility of non legislative forms of regulation is another benefit of shifting away from explicit government regulation. One of the factors which contributed to the success of the Electronic Funds Transfer (EFT) Code was that the evolving technology was more suited to a flexible code format.

Industry development of regulation was stated by those consulted as having the advantage, in some cases, of pre-empting government regulatory intervention in a market.

Tensions in regulation making

To some extent, consultations revealed that tensions exist in community expectations of government involvement in regulation making. Whilst in general industry prefers self regulation, some participants wanted government backing for industry formulated schemes for promotion purposes and to increase industry compliance.

Deregulation by governments was noted as not necessarily reducing the level of regulation in the economy, but rather shifting regulation making from Parliament to, in effect, the courts. This may increase uncertainty and result in increased costs for businesses. Litigation may then be used as a weapon by industry participants. One of those groups consulted by the Committee noted that courts should adopt certain principles to ensure that a case is dealt with before the cost of litigation becomes larger than the amount disputed. Deregulation may also place additional costs on consumers — as they may have to search for the goods and services that have the characteristics that they desire.

In addition, there are tensions between the use of performance based and prescriptive regulations. Whilst those consulted generally supported performance based regulations — citing flexibility and encouragement of innovation as key benefits — they acknowledged prescriptive regulations as satisfying the need for businesses to have certainty for compliance purposes. Where regulation is unclear or too broadly expressed, more businesses may find themselves in court defending their practices. In general, larger businesses would be able to work with performance based regulation, as they have the incentive and the resources to find innovative methods of compliance. Some smaller businesses were stated as generally preferring prescription, as they have neither the skills nor the resources to develop their own compliance methods. However, participants agreed that these generalisations would not hold true in all cases. In particular, some small businesses note the costs of compliance with overly prescriptive regulation.

A solution to this tension between performance based and prescriptive regulations was suggested by some participants in ‘deemed to comply’ provisions. Prescriptive provisions that are ‘deemed to comply’ with performance based requirements may give certainty to some firms yet retain innovative opportunities for others.

3 Issues for government

Other issues raised at the consultation meetings related mainly to government regulators.

The RIS process

Most of the groups consulted supported the discipline which the Regulation Impact Statement (RIS) process puts on government regulators. However, they thought that there was insufficient empirical analysis behind many regulations made by government. For example, one participant thought that some of the growth in regulations appears to be politically driven and based on anecdotal evidence. In response, others stated that whilst some anecdotal evidence should not be presented as empirical, it is relevant evidence and should not be ignored.

Some of the groups consulted believed that some of the growth in quasi-regulation may have been fuelled by a desire by government regulators to avoid the discipline involved with changes to government regulation. In addition, where government agencies or delegated bodies are creating quasi-regulation without Parliamentary scrutiny, those consulted agreed that these bodies should be held accountable.

When should government be involved?

Most of the participants agreed that there is a clear need for information to guide regulators to the most appropriate regulatory solution. Government regulators should resist their apparent bias towards black letter law and focus on addressing the problem in the best regulatory fashion. Government involvement, according to some of those consulted, should only be triggered where:

- there is a systemic industry problem. Governments should not, for example, be involved where only a small section of the industry is involved in one-off disputes;
- minimum standards are needed. Many of those consulted agreed that government involvement was required were in the area of minimum standards concerning human health/safety and quarantine.

In addition, governments should not make new laws without first taking stock of, and attempting to address the problems in, existing regulations.

These existing regulations include international regulations, as well as Australian regulations.

Participants also noted that where government makes choices from the regulatory spectrum, these should be deliberate. The unplanned evolution of regulations — in particular the unintended slippage of self-regulation down the regulatory spectrum into quasi- and explicit government regulation — was noted by participants as a cause of some of the problems with existing quasi- and explicit government regulations.

The use of standards by government regulators

During the consultations, Australian Standards were put forward as not falling within quasi-regulation per se.[1] Those that are developed as voluntary standards using a consensus based approach, are self-regulation.

The problem with standards as stated during the consultations was how they are applied by government regulators. The main problem mentioned was that some government officials show a tendency to call into regulation parts of a standard that were not intended for that purpose — for example, 'best practice' standards becoming the regulatory minimum. Groups consulted agreed there is a pressing need for much better guidelines on the use of standards (and other voluntary regulations) in explicit government regulation. One participant suggested that such guidelines on the use of standards in regulations/legislation could be attached as an appendix to the Council of Australian Government document *Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies.*

A particular problem noted by one participant was that some government regulators that are on Standards Australia standard development committees understandably have a close attachment to the standards that they helped

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[1] It was noted during the consultations that Standards Australia is not the only standard setting body in Australia. Industry itself sets standards — for example the sheet steel standard formulated by the Lysaght company is accepted by the industry and regulators as the industry standard. However, many of the issues concerning standards were expounded with reference to Standards Australia. This section raises some issues in relation to Standards Australia which also apply to other standard setting bodies.

develop. When they go back to their own jurisdiction, they may promote that Australian Standard as the minimum standard in their own jurisdiction.

Other problems with Standards Australia standards include:

- the language used is sometimes unclear (the use of 'shall' and 'should' is confusing in that it projects a false sense of authority);
- cross referencing within Australian Standards to other standards forces businesses to buy multiple standards, which is costly;
- once referenced by date in regulation, the standard referred to in the regulation will be out of date if the Australian Standard changes. Not all jurisdictions may decide to pick up any changes;
- duplication in regulation where there is more than one standard on a certain issue.

Some of the groups consulted noted that their constituent members still thought that Standards Australia was a government regulator. It was pointed out by Standards Australia, however, that there had been attempts to address this problem — it is stated clearly in all public documents and speeches by Standards Australia that it is a non-government organisation.

In the areas where an international standard exists, Standards Australia has an 80 per cent adoption rate.

In addition, it was noted by Standards Australia that the price structure of Australian Standards is one of the lowest in the world. Standards Australia is also moving to address one of the problems as noted above by tailoring the language of standards to the intended end use of the standard — whether regulatory, explanatory, or voluntary. Standards Australia has agreed guidelines with the Australian Building Codes Board and the National Occupational Health and Safety Commission regarding the standards written for these bodies.

4 Other issues

Some of those consulted noted that regulations may effectively be used to block new entrants into an industry and to benefit existing firms. Whilst some of these regulations may control the quality of goods or services offered by that industry, where they focus on restricting inputs into that industry rather than outputs, the argument of ensuring industry quality control is weakened. To counter these concerns, those consulted stated that

consumer representation in regulation making processes, as well as in the ongoing monitoring and review of existing regulation, was required.

Participants noted that non-mandatory regulations offering incentives for compliance may have a better chance of attracting firms to comply. For example, where firms that comply with certain standards receive a discount on insurance premiums, this will attract firms who wish to decrease premium costs.

The globalisation of regulation and standards, which is becoming increasingly relevant as trade expands, must be kept in mind by regulators. In some cases, adopting domestic standards which are more stringent than international ones can make it difficult for international companies to enter the Australian market and can be inconsistent with international conventions. This situation can also act to the marketing advantage of Australian exporters. If Australian standards are too high, firms may be burdened with high compliance costs and may locate offshore.

Those groups consulted were often initially confused about what constituted quasi-regulation and about how the Committee would be able to address the problems they had with current arrangements. They asked that the report clearly articulate its place within Commonwealth Government policies and processes such as National Competition Policy. In addition, a need was articulated for this report to be linked to State and Territory processes as it is in those jurisdictions that references to standards and codes in legislation are more prominent.