PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

Regulatory Efficiency Legislation

REPORT

Ordered to be Printed

Melbourne

Government Printer

October 1997

N° 61 Session 1996ñ97

Parliament of Victoria, Australia
Law Reform Committee
Melbourne

Bibliography
ISBN 0 7311 0863 9

COMMITTEE MEMBERSHIP

CHAIRMAN

Mr Victor Perton, MP

DEPUTY CHAIR

Mr Neil Cole, MP

MEMBERS

Mr Florian Andrighetto, MP

Hon Carlo Furletti, MLC

Hon Monica Gould, MLC

Mr Peter Loney, MP

Mr Noel Maughan, MP

Mr Alister Paterson, MP

Mr John Thwaites, MP

The Committee's address is —

Level 8, 35 Spring Street
MELBOURNE VICTORIA 3000

Telephone inquiries — (03) 9651 3644

Facsimile — (03) 9651 3674

Email — lawrefvc@vicnet.net.au

Internet — http://www.vicnet.net.au/~lawref

COMMITTEE STAFF

EXECUTIVE OFFICER and DIRECTOR OF RESEARCH

Mr Douglas Trapnell

RESEARCH OFFICERS

Ms Padma Raman

Ms Rebecca Waechter

OFFICE MANAGERS

Mrs Rhonda MacMahon (until 18 October 1996)

Ms Lyn Petersen (from 2 December 1996 to 1 June 1997)

Ms Angelica Vergara (from 11 August 1997)

CONTENTS

APPENDICES

CHAIRMAN'S FOREWORD

The Law Reform Committee has found this to be an exciting, challenging and rigorous reference. Exciting because the original nature of the subject-matter has required the use of new communications technologies to conduct research, to achieve the optimum degree of public and expert consultation and to advance the cause of law reform in this important area. Challenging because it has required the Committee to operate at the cutting edge of the theory and practice of regulatory reform.

This reference has been rigorous because it has required the Committee to be innovative in developing solutions to the problem of reducing the burden of government regulation. The solution was a multi-disciplinary study, involving constitutional law, administrative law and practice, legislative drafting, environmental and planning laws, business law and economics. Victoria is the ideal place for such an Inquiry owing to its long history and commitment to regulatory reform which has laid the foundations for this innovative Inquiry.

The Inquiry into Regulatory Efficiency Legislation has posed several challenges to the Committee in seeking to obtain a high level of public input. Upon receiving the reference the Committee realised that Regulatory Efficiency Legislation was a fairly specific area of inquiry with a few experts who are scattered around the world. The term 'regulatory efficiency' is not widely understood and does not evoke a clear link to specific concerns facing Victorian businesses. This view was reinforced when the Committee's initial advertisements received a muted response. Thus, the Committee realised that it would have to look beyond conventional methods of consultation in order to obtain the necessary information and to encourage educated responses to the Inquiry.

I developed a number of strategies to overcome these difficulties. A fundamental approach was to complement traditional methods of consultation with the extensive use of new communications technologies. During the course of the Inquiry, the Committee used the internet for research, publication, and collaboration. It utilised the world wide web, email, internet discussion groups and listservers, which not only provided the Committee with invaluable comments and a wealth of information from around the world, but also brought the Committee praise for its utilisation of innovative and creative approaches to public consultation.

Initial literature searches on the internet revealed that while there were relatively few hard copy articles in leading journals on the subject of regulatory reform, there was considerable material on the internet. It became clear that most of the experts who could discuss the technical requirements and nuances of alternative compliance mechanisms resided in North America. The Committee used internet email to contact these experts and has maintained contact with them during the course of this Inquiry.

The Committee published its discussion paper on the internet simultaneously with its publication in hard copy. I invited comments on the discussion paper by using relevant listservers. The Committee's internet site was also used to publish feedback received and to publicise new issues as they arose. The result has been that the Committee has received numerous email submissions of a very high quality. Contributions have come from as far afield as the Kennedy School of Government at Harvard, London University, the Organisation for Economic Co-operation and Development in Paris and the Premiers' departments of New Brunswick, Saskatchewan and Manitoba in Canada.

This Inquiry has challenged the Committee to 'rethink its processes, create new processes for collecting and disseminating information and creatively incorporate the old processes into the new'.[1] Meeting these challenges has produced a collaborative report that incorporates international expertise and experience and has placed the Committee at the forefront of innovative law reform.

I wish to thank all the members of the Committee for their contributions to this Report. I also wish to thank the many individuals and organisations which made written submissions and the expert witnesses who gave generously of their time to assist the Committee with its inquiry.

In presenting its Report the Committee acknowledges the assistance it has received from Mr Stephen Argument, who was the principal author of the Committee's discussion paper on this reference. Drafts of this Report were read and commented upon by Prof Greg Reinhardt from the University of Melbourne, Mr John McMillan from the Australian National University and Mr John Allen, the Chairman of the Victorian Attorney-General's Law Reform Advisory Council. I thank them for their generous assistance and the valuable comments they provided. Of course, the Committee takes full responsibility for the contents of this Report and any errors which may remain.

1 S. J. McGarry, 'A Perspective on the Internet and the Legal Profession', paper presented to the Global Forum, Paris, 17 Sept. 1995, p. 3, reproduced at <http://www.hg.org/article01.html>.

Finally, I wish to thank the Committee's Director of Research, Mr Douglas Trapnell, who has worked tirelessly and thoroughly on this reference while managing all the other functions of the Committee. The Committee's research officers, Ms Padma Raman and Ms Rebecca Waechter, have worked diligently, thoughtfully and cheerfully during the project. Our former office managers Mrs Rhonda MacMahon and Ms Lyn Petersen, and our present office manager Ms Angelica Vergara have provided valuable administrative support throughout the Inquiry.

I commend the report to the Parliament.

Victor Perton, MP
Chairman
21 October 1997

FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

4E. The functions of the Law Reform Committee are—

(a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;

(b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

The Law Reform Committee of Parliament is requested to inquire into, consider, and report to Parliament on the most appropriate manner in which to frame Regulatory Efficiency Legislation as a means to reduce the burden of regulatory compliance on business, while ensuring that key regulatory objectives continue to be met and that regulatory standards are not compromised.

In particular, the committee is requested to examine:

1. the nature and effectiveness of similar legislation or legislative proposals in other relevant jurisdictions;

2. available options within the broad model of Regulatory Efficiency Legislation and advise on their merits and appropriateness in application to the Victorian regulatory environment;

3. appropriate processes and responsibilities for alternative compliance mechanisms under Regulatory Efficiency Legislation;

4. the costs for both business and government of the development and application of alternative compliance mechanisms under Regulatory Efficiency Legislation; and

5. the application of similar models under specific regulatory regimes, e.g. the alternative scheme envisaged to operate within the compliance and enforcement module of the National Road Transport Law.

The Committee is requested to make a final report to Parliament on the above terms of reference by 30 September 1997.

Dated 28 June 1996
Responsible Minister: LOUISE ASHER, MP
Minister for Small Business

Victoria Government Gazette, G 25 , 27 June 1996, p. 1632.
Amended *Victoria Government Gazette*, G13, 3 April 1997, p. 770.

LIST OF RECOMMENDATIONS

Regulatory Reform in Context

Recommendation 1

Regulatory Efficiency Legislation should be enacted in Victoria. It should include:

(a) *The provisions currently contained in the* Subordinate Legislation Act 1994 *(Vic.) relating to the preparation, making, tabling, publication and availability of statutory rules and the scrutiny, suspension and disallowance thereof.*

(b) *The modifications of and additions to the regulatory impact statement process recommended in Chapter 7 of this Report.*

(c) *The provisions of the* Subordinate Legislation Act 1994 *(Vic.) relating to the automatic revocation of statutory rules.*

(d) *The Committee's model for alternative compliance mechanisms recommended in Chapter 5, which provide for compliance with regulatory objectives by means other than those prescribed in subordinate legislation.*

Paragraphs 2.1–2.73

Starting the Alternative Compliance Scheme and Coverage

Recommendation 2

The system of alternative compliance mechanisms should apply to all regulations under the Subordinate Legislation Act 1984 *(Vic.).*

Paragraphs 5.9–5.19

Recommendation 3

All regulations made after the commencement of Regulatory Efficiency Legislation should contain clear regulatory objectives which will be the objectives for the purposes of alternative compliance mechanisms.

Paragraphs 5.9–5.19

Recommendation 4

Where a regulation does not contain regulatory objectives—that is, any regulation enacted prior to the commencement of Regulatory Efficiency Legislation—the regulatory objectives for the purposes of alternative compliance mechanisms should be the objectives specified in any regulatory impact statement referrable to the regulation.

Paragraphs 5.9–5.19

Obtaining an Alternative Compliance Mechanism

Recommendation 5

There should be a Minister responsible for the administration and operation of Regulatory Efficiency Legislation.

Paragraph 5.20–5.25

Recommendation 6

An alternative compliance mechanism should not be granted unless the Minister responsible for Regulatory Efficiency Legislation and the Minister responsible for the regulation that is to be the subject of the proposed alternative compliance mechanism ('the responsible Ministers') jointly decide to grant the alternative compliance mechanism.

Paragraph 5.20–5.25

Recommendation 7

Any person who is the subject of a regulatory regime should be entitled to apply to the responsible Ministers for the grant of an alternative compliance mechanism.

Paragraph 5.20–5.25

Recommendation 8

Any member of an industry body should be entitled to authorise the industry body:

(a) to draft an alternative compliance mechanism on the member's behalf; and

(b) to negotiate with the responsible Ministers on the member's behalf.

Paragraph 5.20–5.25

Recommendation 9

A copy of every application for an alterative compliance mechanism should be made available to the Office of Regulation Reform, which should certify whether or not the alternative compliance mechanism meets the regulatory objectives of the regulation(s) it supersedes.

Paragraph 5.20–5.25

Recommendation 10

Regulatory efficiency legislation should incorporate the following minimum criteria:

(a) *Every alternative compliance mechanism should meet the identified regulatory objectives of the regulation it supersedes at least as effectively as the regulation does.*

(b) *A clear explanation of the proposed alternative compliance mechanism, together with the identification of businesses, activities, and classes of persons subject to it, should be published. The explanation should include a description of how the stated regulatory objectives will be achieved under the alternative compliance mechanism.*

(c) *An alternative compliance mechanism should not be approved where it would compromise any safety, health or environmental objectives of the regulation it supersedes or any other relevant legislation.*

(d) *An alternative compliance mechanism should not be approved where it would restrict competition, unless the benefits of the restriction to the community outweigh the costs.*

(e) *Every alternative compliance mechanism should allow for adequate means of monitoring compliance including providing sufficient access to such information as may be necessary to effectively monitor compliance.*

Paragraph 5.20–5.25

Recommendation 11

The responsible Ministers should be empowered to determine additional criteria for the approval of alternative compliance mechanisms.

Paragraph 5.20–5.25

Recommendation 12

The responsible Ministers should advise the applicants for an alternative compliance mechanism of the result of the application within three months of its lodgment. Failure to make a decision whether or not to grant an application within three months should be deemed to be a rejection of the application for an alternative compliance mechanism.

Paragraph 5.20–5.25

Publication of Proposed Alternative Compliance Mechanisms

Recommendation 13

All proposed alternative compliance mechanisms and the criteria for approval should be published and public comment sought in accordance with the requirements currently contained in section 11 of the Subordinate Legislation Act 1994.

Paragraphs 5.26–5.27

Recommendation 14

Regulatory Efficiency Legislation should provide for the electronic publication of alternative compliance mechanisms on the Victorian Government's website.

Paragraphs 5.26–5.27

Tabling, Disallowance and Scrutiny

Recommendation 15

In line with the current section 12 of the Subordinate Legislation Act 1994*, the responsible Ministers should ensure that a notice advising of the decision to approve or reject an alternative compliance mechanism is published in the* Victoria Government Gazette*, a daily newspaper circulating throughout Victoria and the internet as soon as practicable after the decision is made and before the alternative compliance mechanism comes into effect.*

Paragraph 5.28–5.31

Recommendation 16

In line with the current section 15 of the Subordinate Legislation Act 1994*, the alternative compliance mechanism, regulatory objectives it seeks to achieve, and criteria for approval should be tabled in both Houses of Parliament.*

Paragraph 5.28–5.31

Recommendation 17

As is the case with subordinate legislation, any member of Parliament should be entitled to move for disallowance of an alternative compliance mechanism.

Paragraph 5.28–5.31

Recommendation 18

Alternative compliance mechanisms should be subject to Parliamentary scrutiny by the Scrutiny of Acts and Regulations Committee.

Paragraph 5.28–5.31

Recommendation 19

The criteria for Parliamentary scrutiny of alternative compliance mechanisms should be based on section 21 of the Subordinate Legislation Act 1994 *as currently enacted.*

Paragraph 5.28–5.31

Recommendation 20

The Scrutiny of Acts and Regulations Committee should have the power to report to Parliament on any alternative compliance mechanism and should have the power to recommend disallowance or amendments to the same.

Paragraph 5.28–5.31

Status of Alternative Compliance Mechanisms

Recommendation 21

Regulation Efficiency Legislation should provide that an alternative compliance mechanism is a public document that has no intellectual property attaching to it.

Paragraph 5.32–5.36

Recommendation 22

In the event that the alternative compliance mechanism relies on technology or a process that has intellectual property attaching to it, in such a way as to effectively prevent the adoption of the alternative compliance mechanism by other businesses which do not have access to the technology or process, then the alternative compliance mechanism must contain a licensing regime for the use of such technology or process. The licensing regime should be subject to the approval of the responsible Ministers.

Paragraphs 5.32–5.36

Automatic Revocation and Review of Alternative Compliance Mechanisms

Recommendation 23

Regulatory Efficiency Legislation should provide that an alternative compliance mechanism is automatically revoked at the same time as the regulation it supersedes is revoked pursuant to section 5 of the Subordinate Legislation Act 1994 *as currently enacted.*

Paragraph 5.37–5.41

Recommendation 24

Where an alternative compliance mechanism has been automatically revoked because the regulation it supersedes has been revoked pursuant to section 5 of the Subordinate Legislation Act 1994*, Regulatory Efficiency Legislation should provide for fast-tracking of applications for replacement mechanisms where the original mechanism would comply with the regulatory objectives of the replacement regulation.*

Paragraph 5.37–5.41

Recommendation 25

Regulatory Efficiency Legislation should provide that where a regulation the subject of an alternative compliance mechanism is automatically revoked pursuant to section 5 of the Subordinate Legislation Act 1994 *and it is not proposed that the alternative compliance mechanism will form part of the new regulatory regime, the regulatory impact statement must give reasons why the alternative compliance mechanism was not incorporated in the replacement regulations.*

Paragraph 5.37–5.41

Recommendation 26

Upon three alternative compliance mechanisms being approved in relation to any regulation, that regulation should be automatically revoked at the end of twelve months from the introduction of the third alternative compliance mechanism. The ensuing review process should focus on incorporating the alternative compliance mechanisms into the replacement regulations.

Paragraph 5.37–5.41

Recommendation 27

Regulatory Efficiency Legislation should provide that approved alternative compliance mechanisms should be recorded in agency annual reports.

Paragraph 5.37–5.41

Recommendation 28

The Government should establish and maintain an easily accessible register of alternative compliance mechanisms

Paragraph 5.37–5.41

Recommendation 29

A threshold review of the alternative compliance mechanism scheme should be conducted within five years of its introduction

Paragraph 5.37–5.41

Penalties

Recommendation 30

Regulatory Efficiency Legislation should provide that the breach of an alternative compliance mechanism is deemed to constitute a breach of the regulation the alternative compliance mechanism supersedes.

Paragraph 5.42–5.43

Recommendation 31

Regulatory Efficiency Legislation should grant a discretionary power to the responsible Ministers to require security deposits and/or guarantees against performance of the requirements contained in an alternative compliance mechanism.

Paragraph 5.42–5.43

Recommendation 32

Regulatory Efficiency Legislation should provide that where there is a serious breach of an alternative compliance mechanism the court imposing any penalty for such breach should have a discretionary power to terminate the alternative compliance mechanism

Paragraph 5.42–5.43

Revocation, Termination, Suspension and Variation of ACMs

Recommendation 33

Regulatory Efficiency Legislation should provide the Minister responsible for the regulation that is the subject of the alternative compliance mechanism with a power to revoke, terminate, suspend or unilaterally vary an alternative compliance mechanism. There should be a requirement for that Minister to consult with the Minister responsible for Regulatory Efficiency Legislation. Adequate notice and specific reasons for the decision should be provided to the aggrieved party who should be given a reasonable opportunity to show cause why the proposed action should not be taken.

Paragraph 5.44–5.46

Recommendation 34

In the case of an emergency, the responsible Ministers should be empowered to suspend the alternative compliance mechanism for a period of 14 days, without notice, where there is a substantial risk to the public. During the period of suspension, consideration should be given to permanent revocation, termination or variation of the alternative compliance mechanism.

Paragraphs 5.44–5.46

Improving the Extent and Quality of Consultation in the Regulatory Impact Statement Process

Training

Recommendation 35

In an effort to make good consultation a priority, the training regime provided by the Office of Regulation Reform on the regulatory impact statement process should be augmented with departmental strategies which ensure that regulatory officers receive assistance from the public relations departments of their agencies on how best to conduct public consultation.

Paragraphs 7.9–7.13

Increasing the Use of Early Consultation

Recommendation 36

A 'reasonable efforts' expectation in consulting should be introduced for Ministers to strengthen section 6 of the Subordinate Legislation Act 1994 *(Vic.), which states that the responsible Minister must ensure that there is consultation.*

Paragraphs 7.14–7.23

Government and Business Working Together for Better Regulations

Recommendation 37

Greater use should be made of early consultation or Reg-Neg. The Committee therefore recommends placing a duty on regulatory agencies to circulate issues papers to key stakeholders during the development of major regulatory proposals and to issue guidelines for consultation with key stakeholders on all legislative proposals.

Paragraphs 7.24–7.29

Special Considerations in Respect of Consultation with Small Business

Recommendation 38

In order to take more account of the needs of small business, an executive summary and list of questions should accompany a regulatory impact statement. This would encourage people to make a contribution to the formulation of regulations without having to read the whole regulatory impact statement. This approach would be particularly valuable where the regulatory impact statement is lengthy and includes complex information.

Paragraphs 7.30–7.33

Recommendation 39

Regulatory Efficiency Legislation should provide for the electronic publication of all regulatory impact statements on the internet, together with a form which provides simple boxes to encourage responses to the regulatory impact statement. This approach is particularly desirable given that a regulatory impact statement may deal with difficult technical issues so that there may be very few experts on a particular subject in Melbourne, but numerous experts around the world.

Paragraphs 7.30–7.33

Resourcing of Victorian Office of Regulation Reform

Recommendation 40

The Victorian Government should give consideration to better resourcing the Office of Regulation Reform so as to ensure that it is able to provide a multi-disciplinary service.

Paragraphs 7.54–7.55

Recommendation 41

The Victorian Government should give consideration to making specialist panels available to the Office of Regulation Reform to assist in the consultation process.

Paragraphs 7.54–7.55

Review of the Regulatory Impact Statement Process

Recommendation 42

The Scrutiny of Acts and Regulations Committee (SARC) should undertake a review of the regulatory impact statement system in twelve months' time. The review should seek to determine how the system is operating. The review should ascertain also whether the Law Reform Committee's suggestions relating to the need for increased early public consultation on regulatory impact statements, and the need for consultation to occur at an early stage in the policy formation process, have been implemented. Separate terms of reference should be given to SARC to conduct this Inquiry.

Paragraphs 7.66–7.75

Legislative Impact Statements

Recommendation 43

The Victorian Government should give consideration to the introduction of mandatory legislative impact statements for tabling in the Parliament in accordance with the Commonwealth Government's response to the Bell Report.

Paragraphs 8.1–8.44

LIST OF ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACM	Alternative Compliance Mechanism
COAG	Council of Australian Governments
DPC	Department of Premier and Cabinet
EP Act	*Environment Protection Act 1970* (Vic)
EPA	Environment Protection Authority
LIS	Legislative Impact Statement
NCP	National Competition Policy
NRTC	National Road Transport Commission
OECD	Organisation for Economic Co-operation and Development
ORR	Office of Regulation Reform
PACIA	Plastics and Chemicals Industries Association
PUMA	Public Management Service, OECD
Reg–Neg	Negotiated Rule-Making
REL	Regulatory Efficiency Legislation
RIA	Regulatory Impact Analysis
RIS	Regulatory Impact Statement
RTRTF	Red Tape Reduction Task Force
SARC	Scrutiny of Acts and Regulations Committee
VECCI	Victorian Employers' Chamber of Commerce and Industry

1 INTRODUCTION

Scope of the Inquiry

1.1 On 28 June 1996, the Victorian Law Reform Committee received a reference from the Governor in Council to inquire into, consider and report to the Parliament on the most appropriate way to frame Regulatory Efficiency Legislation (REL) as a means of reducing the regulatory burden on business, while ensuring that regulatory standards are not compromised and regulatory objectives continue to be met. In doing so, the Committee is required to consider the applicability of alternative compliance mechanisms (ACMs) to the Victorian regulatory environment.[2]

1.2 The terms of reference directed the Committee to examine the nature and effectiveness of similar legislation or proposals in other jurisdictions; the merits and appropriateness of the available options within the broad model of REL; appropriate processes and responsibilities for ACMs under REL; the costs for business and government of the development of ACMs; and the application of similar models of alternative compliance like the alternative scheme proposed by the National Road Transport Corporation.[3]

1.3 The Law Reform Committee is a joint investigatory Committee of the Victorian Parliament with a statutory power to conduct investigations into matters concerned with legal, constitutional and parliamentary reform or the administration of justice.[4] The Committee's membership, which includes lawyers and non-lawyers, is drawn from both Houses of the Victorian Parliament and all political parties are represented.

1.4 The Committee has consulted widely in Victoria, interstate and in a number of overseas jurisdictions during its Inquiry. The Committee has also used the internet extensively for its research and consultations and considered oral evidence from representatives of business organisations prior to preparing its discussion paper, which was published in May 1997.[5]

---

2 *Victoria Government Gazette*, G25, 27 Jun. 1996, p. 1632.

3 ibid.

4 *Parliamentary Committees Act 1968* (Vic.), s. 4E.

5 Parliament of Victoria, Law Reform Committee, *Regulatory Efficiency Legislation: Discussion Paper,* Law Reform Committee, Melbourne, 1997.

1.5 Following receipt of the reference, a subcommittee travelled overseas to Canada and the United States to investigate legislative proposals in relation to REL. In Ottawa the subcommittee consulted with officers of the Canadian Treasury Board who drafted the Regulatory Efficiency Bill (C-62). In Washington, DC the Committee met with officers of the Office of National Performance Review, the Sub-Committee on National Economic Growth, Natural Resources and Regulatory Affairs of the House of Representatives Committee on Government Reform and Oversight, officers of the Senate Committee on Government Affairs, and staff of the House of Representatives Constitutional Committee.[6]

1.6 The Committee also sent a subcommittee to Canberra and New South Wales to discuss issues relating to the reference. In Canberra, the subcommittee met with the Assistant Treasurer and the Minister for Small Business. The subcommittee also met with the Chairman and an Assistant Commissioner of the Australian Competition and Consumer Commission, an Assistant Commissioner and officers of the Commonwealth Office of Regulation Review within the Australian Industry Commission, and officers of the Attorney-General's Department, the Department of Industry Science and Tourism, and the Treasury. In Sydney, the subcommittee met with staff at the Inter-governmental and Regulatory Reform Unit of the Cabinet Office and with the Human Rights Commissioner.[7]

1.7 In Melbourne, the Committee held a Public Hearing with representatives from major business organisations, a Twilight Seminar on regulatory reform for the public and a round table conference with officers from all Victorian Government departments. The Committee also consulted with several Chief Executive Officers from large companies operating in Victoria and met with the Business Committee of the Victorian Attorney-General's Law Reform Advisory Council.[8]

1.8 The Committee has received 33 written submissions.[9] It has also taken oral evidence from several individuals.[10]

---

6 Appendix C contains a list of the names of people the subcommittee consulted during its overseas travels.

7 Appendix D contains a list of the names of people who provided information to the Committee at these meetings.

8 Appendix E contains a list of the names of people who provided information to the Committee at meetings held in Melbourne.

9 Appendix A contains a list of the names of people who made written submissions to the Inquiry.

10 Appendix B contains a list of the names of people who gave oral evidence to the Inquiry.

Background to the Inquiry

1.9 The Victorian Office of Regulation Reform (ORR) first proposed the introduction of REL in Victoria in late 1995 in a working paper entitled *Regulatory Efficiency Legislation*.[11] An interdepartmental working party was set up to discuss the concept and to examine and comment on the content of the working paper. ORR intended to release the working paper as a discussion paper for public comment once the content of the paper was approved. The interdepartmental working party approved the content of the working paper, but before it could be published as a discussion paper the 1996 State election intervened.

1.10 On 5 March 1996 the Parliament was dissolved for the State election. As part of its platform for the 1996 election, the Victorian Government[12] pledged that it would:[13]

> Introduce Regulatory Efficiency Legislation which allows business to propose alternative means of compliance with regulatory objectives. This will lower compliance costs across a range of regulations, by allowing business to tailor its method of compliance to suit its specific business circumstances and will build on flexibilities which are already being implemented in relation to specific legislation.

1.11 This commitment was in turn taken up by the Executive Council,[14] which on 28 June 1996 referred the issue of REL to the Law Reform Committee for inquiry, consideration and report.

1.12 This commitment reflects a general trend towards regulatory reform. As the New South Wales Government notes:[15]

> There is no doubt that there is community demand for government regulation, particularly to achieve social and environmental goals. At the same time, the public expects government to act more efficiently, to reduce its cost and size to the taxpayers. These contradictory demands amount to calls for both more and less regulation, for both bigger and smaller government. Resolution of this problem is a major challenge facing public administration.

---

11 Victoria, Department of State Development, Office of Regulation Reform, *Working Paper – Regulatory Efficiency Legislation*, Melbourne, [1995].

12 A coalition of the Liberal and National Parliamentary Parties.

13 Victorian Liberal National Party Coalition, *Election Policy March 1996 – Small Business: Assisting and Encouraging Victoria's Largest Private Employer*, Melbourne, 1996, p. 8.

14 The Executive Council is established under Part IV of the *Constitution Act 1975* (Vic.) and consists of the Governor and usually four Ministers, including the Minister responsible for the area which the Council is considering.???

15 New South Wales, Cabinet Office, Regulatory Review Unit, *From Red Tape to Result. Government Regulation*: *A Guide to Best Practice*, Sydney, 1995, quoted in Organisation for Economic Co-operation and Development (OECD), *Regulatory Reform: A Country Study of Australia*, Paris, 1996, p. 15 reproduced at <http://www.oecd.org/puma/country/gdoz.pdf>, (hereafter 'Country Study').

1.13 There is also increasing pressure on governments to improve the business environment by reducing costs and other impediments. There are increasing demands that government regulation be efficient and effective. In response, governments increasingly pledge that they will cut 'red tape'. However, governments also realise that innovative approaches to regulation and regulatory reform can only succeed if there is public confidence in the legal system. As Dr Fiona Haines of the Department of Criminology in the University of Melbourne noted in a submission to the Committee:[16]

> Good regulatory frameworks need to retain public confidence. Without such confidence public outrage may lead to ill advised changes in the event of environmental, consumer, occupational or some other harm.

1.14 It is this balance between increasing regulatory efficiency while maintaining public confidence in the system that the Victorian Law Reform Committee has attempted to achieve in its Inquiry into Regulatory Efficiency Legislation.

Terms and Concepts

Regulation

1.15 Central to this Inquiry is the meaning of the term 'regulation'. The Organisation for Economic Co-operation and Development (OECD) defines regulation as:[17]

> the instruments by which governments place requirements on enterprises, citizens, and government itself, including laws, orders and other rules issued by all levels of government and by bodies to which governments have delegated regulatory powers.

This is a generic usage of the term in the sense of government regulatory activity. In Australia the term 'regulation' can have a broad or narrow meaning. In the broad sense government regulation is undertaken through primary legislation, subordinate legislation and administrative decisions. In its narrow usage 'regulation' has come to mean a subordinate legislative instrument made under authority delegated by the Parliament.

1.16 Given the context in which this Inquiry arose, the Committee will limit its focus to subordinate legislative instruments made by delegated authority under the

16 Submission no. 18.

17 OECD, *Draft Report to Ministers on Regulatory Reform*, April 1997, p.3. For a more economically orientated definition of regulations see A Missen, 'Attacking Excessive Regulation', *IPA Review*, 1984, Spring, p. 134.

Subordinate Legislation Act 1994 (Vic.). The central concern of this Inquiry is the introduction of REL into Victoria. Historically, the scope of the concept of Regulatory Efficiency Legislation has always been confined to subordinate legislative instruments. While it is theoretically possible to extend the concept of Regulatory Efficiency Legislation to primary legislation, the Committee has decided that such an extension is not warranted because the concept has evolved out of the system for control of subordinate instruments. Moreover, much of the complaint in relation to over-regulation is directed at subordinate legislative instruments. The Committee also believes that there would be objections in principle to allowing an individual or business to be exempted from primary laws by way of an alternative compliance regime.

Regulatory Efficiency Legislation

1.17 Regulatory Efficiency Legislation (REL) can have a broad or narrow application. Broadly drafted legislation would include general measures directed towards making government regulatory processes more efficient. This would include a number of features already present in Victoria, such as, mandatory consultation with interest groups and the public ('reg-neg'), consideration of alternatives to prescriptive regulation, a regulatory impact statement process including mandatory cost-benefit analysis, automatic revocation of regulations after a specified time period ('sunsetting' of regulations) and effective parliamentary scrutiny and disallowance of regulations.

1.18 In its narrow meaning REL has traditionally been confined to legislation which introduces alternative compliance mechanisms (ACMs) of general application. The concept of regulatory efficiency was first embodied in 1994 in proposed legislation in the Canadian Regulatory Efficiency Bill (C-62). In Canadian, OECD and New South Wales usage, REL has acquired the fairly precise meaning of legislation which seeks to reduce the regulatory burden on business through the use of ACMs. In this restricted sense REL has come to connote the introduction of ACMs which meet regulatory objectives without meeting prescriptive requirements imposed by subordinate legislation. It is in this sense that the term was used by the Victorian Office of Regulation Reform in its initial proposal for the introduction of REL, which is examined in Chapter 4 of this Report.

1.19 The Committee's terms of reference are unclear as to whether REL is to be interpreted in its wide or narrow usage. Accordingly, in this report, unless the context requires otherwise, REL will be used to mean broadly drafted legislation

which includes general measures directed towards making government regulatory processes more efficient. Accordingly, the Committee believes that REL should contain the regulatory reform measures presently in existence under the *Subordinate Legislation Act 1994* (Vic.), and what the Committee considers to be the next stage in the development of regulatory reform in Victoria, that is, the introduction of alternative compliance mechanisms.

Alternative Compliance Mechanisms

1.20 In general terms, an ACM provides a mechanism for a person to meet regulatory objectives using means other than those prescribed in the relevant subordinate legislative instrument (also referred to as 'a regulation'). ACMs focus on the end rather than the means They allow for flexibility in the means of achieving regulatory objectives. In granting an ACM the government does not exempt a business from the regulations; rather, business may propose and government may approve an alternative arrangement which departs from the prescriptive details of the regulation to meet the objectives of the regulations. The Victorian Government's election policy, referred to earlier, provides an example of an ACM:[18]

> For example, a road haulage firm with an integrated anti-fatigue program might have this accredited as an alternative to compliance with detailed driving log requirements, or a business might propose an inspection schedule for major machinery which suits its own maintenance schedule rather than meeting periodic requirements set in regulation.

1.21 The New South Wales Government has also put forward a proposal in a Green Paper which in essence encapsulates the main elements of an ACM: [19]

> Regulatory flexibility is established through an overarching statute which sets out the ways regulators can allow variation in compliance with rules under statutes which are appended in schedules to the Act. It provides a framework (for example through a negotiated compliance agreement) for the achievement of regulatory ends by means that have not been prescribed by the law. The means must be approved by the regulators. Businesses put forward their own approach to compliance, including exemption from regulation. Government then decides whether the proposed compliance plan meets the objectives of regulatory policy while continuing to protect the public interest.

---

18 Victorian Liberal National Party Coalition, loc. cit.

19 New South Wales Government, *Regulatory Innovation: Regulation for Results—Discussion Paper*, Sydney, 1996,
pp. 15–16.

1.22 On a narrow reading of the terms of reference for this Inquiry, the Committee is limited to examining how to introduce REL. However, the Committee takes the view that its terms of reference are not limited in this manner, but extend to inquire into whether or not to introduce REL.

1.23 The Committee has been requested to inquire into 'the most appropriate manner in which to frame Regulatory Efficiency Legislation as a means to reduce the burden of regulatory compliance on business, while ensuring that key regulatory objectives continue to be met'. The Committee is specifically asked to examine the options available 'within the broad model of Regulatory Efficiency Legislation'.[20]

Thus, the Committee has also taken the view that while ACMs are an important aspect of REL, this does not preclude the Committee from examining related concepts within the broad model that would reduce the regulatory burden on business without compromising regulatory standards.

General Terminology

1.24 During the course of the Inquiry the Committee has become aware of the varied terminology used in the area of regulatory reform. The New South Wales Government, while looking at identical concepts to those that are central to this Inquiry, refers to regulatory efficiency as 'regulatory flexibility', and uses the term 'compliance plans' rather than alternative compliance mechanisms.[21] On an international level, 1996 amendments to a United States Act entitled the 'Regulatory Flexibility Act'[22] in fact go no further than to put in place the basic elements of the rule making and reviewing process that operates in Victoria.

Regulatory Reform

1.25 In an era of rapid economic and social change, there is a real danger that subordinate legislation can become an obstacle to achieving the very policy goals for which regulation was intended. Regulatory reform is aimed at improving economic

---

20 *Victoria Government Gazette*Terms of Reference, loc. cit.

21 New South Wales Government, loc. cit.

22 5 U.S.C. 601–612 as amended by the Contract with America Advancement Act 1996, Pub. L. 104-121, secs. 241–245 & 251.

efficiency and increasing the ability for economies to be responsive to change and become more productive:[23]

> Regulatory reform is directed to making sure that...regulations are fully responsive to changes in the economic, social and technical conditions surrounding them.

1.26 The OECD terms the current phase of government action on regulations the 'regulatory reform stage', whereby reform efforts are directed:[24]

> not at reducing regulations, but at creating more efficient, flexible, and effective regulations, and at developing better non regulatory policy instruments.

Thus, regulatory efficiency as a concept is integrally linked with regulatory reform, which may require major reform to achieve its broad goals.

Performance-based Regulation

1.27 Performance-based regulation specifies the desired outcomes or objectives to be achieved and is neutral as to the means by which they are achieved. In this sense it is similar to an ACM. Performance-based regulation would involve the re-drafting of regulations 'from prescriptive and detailed rules about how a business or individual should act to description(s) of measures and outcomes'.[25] The Committee believes that, by focusing on the end rather than the means, ACMs will provide the necessary catalyst towards the desirable end of more performance-based regulation.

Self-Regulation and Voluntary Codes

1.28 Self-regulation often appears in the form of a voluntary code of conduct in which an organised sector or profession regulates the behaviour of its members. Examples can be found in areas such as advertising, financial markets, the insurance industry and the pharmaceutical industry.[26] Voluntary codes have no legal authority to ensure compliance and rely on a commonality of interest within the industry to deter non-compliance.

---

23 OECD, DSTI, *Regulatory Reform and Innovation*, p. 7, reproduced at <http://www.oecd.org/dsti/regref.pdf>.

24 OECD, PUMA, *Control and Management of Government Regulation*, reproduced at <http://www.oecd.org/puma/regref/pubs/con95>.

25 New South Wales Government, op. cit., p. 5.

26 See e.g. the Banking code of conduct, Electronic funds transfer code, Advertising code of conduct & Media code of ethics cited in Victoria, Department of State Development, Office of Regulation Reform, *Regulatory Alternatives*, Melbourne, n.d., p. 27.

Co-Regulation

1.29 Co-regulation refers to the sharing of the regulatory role between government and an industry. Co-regulation usually involves an industry group developing a code of practice in consultation with government whereby the code would ensure that breaches would be enforceable by the industry or professional organisations applying sanctions.[27]

Framework of this Report

1.30 Following this introductory chapter, Chapter 2 provides the context for the present Inquiry and Report and provides a broad overview of regulatory reform activity at an international, national and State level. The chapter will examine regulatory reform efforts within the OECD and will assess Australia's relative position. The chapter will then consider the recent influx of regulatory reform measures at the Australian Federal level contained in the National Competition Policy, the Small Business Deregulation Task Force recommendations and the Federal Government's response to this Task Force in *More Time For Business*. Finally, the chapter will analyse the history of regulatory reform in Victoria so as to provide a basis for determining whether the necessary foundations are in place for the introduction of REL.

1.31 The terms of reference require the Committee to examine the nature and effectiveness of legislation or legislative proposals in other jurisdictions that are similar to regulatory efficiency legislation. The Canadian Regulatory Efficiency Bill C-62 will be examined Chapter 2 because it is one of the original efforts to formulate REL. The chapter will also consider a similar proposal for the introduction of ACMs in the United States of America.

1.32 Chapter 3 considers existing Australian models for ACMs including the Victorian accredited licensee system that operates under the *Environment Protection Act 1970* and third party certification schemes, such as those operating under the *Building Act 1993* (Vic.) and in the New South Wales proposed model for regulatory flexibility. In accordance with the Committee's final term of reference, which requires it to consider the 'application of similar models under specific regulatory regimes', Chapter 3 will conclude by describing and evaluating the success of the National Road Transport Commission's alternative scheme of compliance and enforcement.

---

27 ibid., p. 17.

1.33 Chapter 4 outlines the Victorian Office of Regulation Reform's proposal for the introduction of REL, and then considers the evidence and submissions that have been received by the Committee in relation to that proposal. Chapter 5 outlines in detail the Committee's model for the introduction of ACMs under Regulatory Efficiency Legislation.

1.34 In the course of consultations the Committee has received evidence and submissions on the current regulatory system in Victoria and, particularly, on the regulatory impact statement (RIS) process. The effectiveness of the RIS process is important to the operation of the Committee's model for the introduction of ACMs. The Committee's model recommends the use of regulatory objectives specified in the RIS as the objectives to be met by ACMs under REL. Accordingly, Chapter 6 describes the requirements and practice of RISs in Australia and Chapter 7 considers the criticisms of the current process in Victoria before recommending ways of improving the process.

1.35 The Committee's travels interstate highlighted the fact that at the federal level, following the Government's response to the Small Business Deregulation Task Force, legislative impact statements (LIS) will be mandatory for all new legislative proposals. The Committee also notes that the OECD has viewed regulatory reform efforts in Australia as limited by the exclusion from review of primary legislation.[28] Chapter 8, therefore, examines the reasons for introducing LISs and assesses their success in other jurisdictions before looking at their appropriateness in the Victorian context.

[28] OECD, Country Study, p. 70.

2 REGULATORY REFORM IN CONTEXT

Introduction

2.1 Since the early 1980s there has been much increased international support for regulatory reform. Productivity and innovation began to slow down as inflation rose in most OECD countries in the 1970s, cutting short the sustained growth of the 1950s and 1960s.[29] The impact on business of regulation increased in the 1970s and 1980s with the expansion of regulatory laws in the areas of health, safety and the environment. The lack of cost-benefit analysis and rigour in the regulatory process led to an increasing level of protest from business and the community. These protests led governments to consider the management and reform of regulatory systems:[30]

> The evolution of regulatory reform must be understood as the result of direct conflict between insistent external forces, on the one hand, and on the other hand the conceptual, political, structural, and practical difficulties faced by governments in defining an ever widening set of problems and in motivating the will and resources to respond.

2.2 In recent years the reform effort on an international and national level has been substantially advanced. Victoria has been viewed as a world leader in the area of regulatory reform because many of the reforms now being instituted on national and international levels occurred in Victoria in 1984.[31] This legislation was based on a 1962 Act of Parliament which was itself a leader.[32]

2.3 This chapter explores the various streams of regulatory reform in order to provide a context for this Inquiry into Regulatory Efficiency Legislation. The chapter begins with an analysis of reform at the OECD level, including a brief overview of relevant reform measures in Canada and the United States of America. It then explores recent measures at the Australian federal level before outlining the history of reform in the State of Victoria.

---

29 Organisation for Economic Co-operation and Development (OECD), Public Management Service (PUMA), *Control and Management of Government Regulation*, reproduced at <http://www.oecd.org/puma/regref/pubs/con95 >, (hereafter 'Government Regulation').

30 ibid.

31 See *Subordinate Legislation (Review and Revocation) Act 1984* (Vic.).

32 *Subordinate Legislation Act 1962* (Vic.).

Regulatory Reform: OECD Initiatives

2.4 By the early 1980s most OECD countries had begun to consider a program of regulatory reform to address the complaints from business that the burden of regulation was reducing efficiency and competitiveness. By the mid 1980s a wave of competitive deregulation (or elimination of regulations from a sector) in international financial, telecommunications and transport sectors was sweeping OECD countries. This accelerated after the 1992 collapse of the Soviet Union. Regardless of its success in some sectors, it soon became evident that deregulation could not replace sensible regulation.[33] Most reform efforts have changed focus to look at the quality rather than the quantity of regulations. According to the OECD:[34]

> Modern reform involves a mix of regulation, deregulation, and re-regulation across the entire economy backed up by institutional reform where necessary. In general deregulation strategies are applied to economic regulation, while various means of improving regulatory quality and reducing burdens are used in social and administrative regulation.

2.5 It has been suggested that there are three main interrelated circumstances where regulatory reform is called for.[35] First, 'regulatory failure', which occurs when regulations have failed to achieve their objectives either because of their poor design or because they have caused negative side-effects. Secondly, technological change and developments may make previously appropriate regulations obsolete. Thirdly, it is becoming evident that regulations designed to meet domestic goals can prevent economies from capitalising on the perceived potential benefits of increased globalisation.[36]

2.6 All OECD countries share some experience of the cumulative burden of regulations and have attempted to institute reform. The OECD secretariat has been active in arguing the need for reform, providing guidelines and policy recommendations that can be applied consistently across all OECD countries, and evaluating the results of reform efforts.

2.7 It was not until 1990 that the Public Management Service (PUMA) within the OECD was established with a brief to work on regulatory management and reform.

---

33 OECD, PUMA, Government Regulation, loc. cit.

34 OECD, *The OECD Report on Regulatory Reform – Synthesis*, Council at Ministerial Level, 26–27 May 1997, C/MIN(97)10/ADD, p. 7.

35 K. Shigehara, 'Results of regulatory reform for consumers, innovation and economic performance', Address given at Business Week on 'Regulatory Reform: Building a Dynamic Economy for the Future', Erasmus University of Rotterdam, 17 Mar. 1997.

36 ibid.

PUMA reports on analyses and assesses information on public management developments in OECD member countries: [37]

> Through meetings of member country officials and experts, exchanges of information and expertise, and reports, PUMA examines what governments do, and how they are seeking to improve public policy effectiveness, efficiency, responsiveness to citizens, and quality of services.

2.8 In 1995, the OECD analysed the reform strategies of fourteen member countries and published a finding that most had established a clear regulatory reform policy and that most were pursuing international harmonisation and mutual recognition objectives.[38] According to the report, most of the countries reviewed had established: some form of regulatory impact analysis ('regulatory impact statements' in Victoria), clearer legal drafting standards and some form of public consultation.

2.9 Thirteen of the fourteen OECD countries reviewed had established a form of specialised unit to oversee regulatory reform, usually located in a central government agency.[39] However, from the Committee's research, it appears that some of these agencies appear to engage in more rhetoric than reform. The most far reaching strategy for reform has been the adoption of the regulatory impact analysis process for all new subordinate laws. The methodologies vary in the countries reviewed, yet Australia, Canada, the United States and the United Kingdom are perceived as the countries with the greatest commitment to reform.[40] In so far as Australia at the federal level is concerned, this commitment may be questioned because at the present time the Australian Government's Legislative Instruments Bill is stalled in the Senate.

2.10 In May 1997 the OECD Ministerial Council[41] met in Paris. The ministers from twenty-nine OECD member countries agreed that:[42]

> the attack on structural rigidities in their economies should encompass comprehensive reform including higher quality regulation and deregulation where existing regulation is excessive.

2.11 The ministers endorsed the following seven recommendations to help streamline domestic regulations and regulatory processes:[43]

---

37 OECD, PUMA, *About PUMA*, reproduced at <http://www.oecd.org/puma/about/index.htm>.

38 OECD, PUMA, Government Regulation, loc. cit.

39 In Australia on a national level, this body is located in the Industry Commission and on a State level, the Office of Regulation Reform is situated in the Small Business Division of the Department of State Development.

40 Industry Commission, *Regulation and its Review 1995-96*, AGPS, Canberra, 1996, p. 41.

41 Hon. Tim Fischer, MP, Deputy Prime Minister and Minister for Trade attended on behalf of Australia.

42 OECD, *Meeting of the Council at Ministerial Level: Communique,* 26–27 May 1997, SG/COM/NEWS(97) 45, p. 4.

1) Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.

2) Review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively.

3) Ensure that regulations and regulatory processes are transparent, non-discriminatory and efficiently applied.

4) Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.

5) Reform economic regulations in all sectors to stimulate competition, and eliminate these regulations except where clear evidence demonstrates that they are the best way to serve broad public interests.

6) Eliminate unnecessary regulatory barriers to trade and investment by enhancing implementation of international agreements and strengthening international principles.

7) Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

Each of these recommendations is accompanied by guidelines on ways that they can be implemented.[44]

2.13 Apart from Australia's involvement in the OECD, there is also a growing number of international agreements and treaties that impact on the regulatory environment in Australia. The establishment of the World Trade Organisation and the completion of the Uruguay Round Agreement in 1984 led to changes in domestic regulation in areas such as intellectual property.[45] Regional trade groups are also becoming increasingly important. The major focus of Asia Pacific Economic Cooperation (APEC) is a program to harmonise 'national regulatory regimes with international norms'.[46] There are also efforts directed towards aligning Australian and New Zealand regulation concerning business law, agricultural and veterinary chemicals registration, food standards and taxation.[47]

---

43 OECD, *The OECD Report on Regulation Reform – Summary*, May 1997, C/MIN(97)10, reproduced at <http://www.oecd.org/subject/regreform/>.

44 ibid., pp. 9–10.

45 S. Rimmer, 'Regulation Reform in the '90s' Challenges and Opportunities, (1995) *Policy* 20, p. 21

46 ibid.

47 For example, the Australia New Zealand Food Standards Council will be responsible for the implementation and oversight of food standards in the two countries while the Australia and

Canada Regulatory Efficiency Bill C-62

2.14 As noted in Chapter 1, the strongest proponents for the concept of regulatory flexibility have been in Canada.[48] By the early 1980's Canada, like other OECD countries, began to recognise the need to manage regulation better. In 1980 the House of Commons Special Committee on Regulatory Reform produced twenty-nine recommendations for improving the management of government regulation.[49] By the mid 1980s, which saw the introduction of major deregulatory initiatives in sectors such as air transport, Canada had named a Minister responsible for regulatory management. In 1992 the Canadian Government adopted a 'Regulatory Policy' which became more detailed in 1994 in the 'Federal Regulatory Reform Agenda'.[50] The most important aspect of this agenda, for the purposes of this report, was the introduction of the Regulatory Efficiency Bill C-62.

2.15 Under the Regulatory Efficiency Bill C-62, which was introduced into the Canadian Parliament in December 1994, ministers would be able to approve alternative methods of complying with subordinate legislation (referred to in the Bill as 'regulations') applying to a particular business or industry. The purpose of the Bill was to allow for regulatory objectives to be achieved through alternatives to designated regulations without compromising any safety, health or environmental standards, to improve efficiency and reduce regulatory costs.[51]

2.16 Under the scheme proposed by the Canadian Bill, the Governor in Council, on the recommendation of the President of the Treasury Board and the Minister responsible for a particular set of regulations, would be able to make regulations stipulating:

(a) that the particular set of regulations may be subject to compliance plans;

(b) any Act or regulation that may be subject to 'administrative arrangements';[52] or

---

New Zealand Food Authority will maintain and develop uniform food standards through the *Food Standards Code*.

48 See para. 1.15.

49 Treasury Board of Canada, 'Regulatory Reform in Canada', reproduced at <http://www.tbs.sct.gc.ca/tb/rad/english/reform.html>.

50 ibid.

51 Cl. 3 of the Canadian Bill.

52 The concept of 'administrative arrangements' is set out in clause 13 of the Canadian Bill. It would allow a regulatory authority to enter into an agreement with one or more territorial or other governments or government agencies, or any other person, in relation to the administration of a 'designated' Act or regulation.

(c) a Minister or other person or body as the regulatory authority for approving proposed compliance plans or changes to approved compliance plans or for entering into administrative arrangements.[53]

2.17 A copy of each regulation that the Governor in Council proposes to make must be tabled in each House of Parliament at least 30 days before the regulation is made and must be published in the *Canada Gazette* at least 60 days before the regulation is made.[54]

2.18 The Canadian Bill provides that the designated regulatory authority must publish in the *Canada Gazette*:

(a) procedures for submitting and evaluating proposed compliance plans and changes to approved compliance plans; and

(b) the factors that will be taken into account in deciding whether to approve them.

No compliance plan or change would be able to be approved unless the applicable procedures and factors had been published in the *Canada Gazette*.[55]

2.19 Before approving a proposed compliance plan or change, the designated regulatory authority must make reasonable efforts to consult the persons, governments or government agencies that would be directly affected by the plan or change.[56]

2.20 The Canadian Bill also provides for evaluation and approval of proposed compliance plans or changes to a plan. It provides that a designated regulatory authority may approve a plan or change if, in its opinion, the plan or change 'meets the regulatory goals of the designated regulation and is consistent with the purposes of [the Bill]'.[57]

2.21 Clause 10 of the Canadian Bill is essential to the operation of the scheme. It provides:[58]

---

53 Cl. 4(1) of the Canadian Bill.
54 Cl 4(3) of the Canadian Bill.
55 Cl. 6(3) of the Canadian Bill.
56 Cl. 7 of the Canadian Bill.
57 Cl. 9(2) of the Canadian Bill.
58 Cl. 15(b) of the Canadian Bill provides that the Governor in Council may make regulations, among other things, prescribing steps that are to be taken in bringing compliance plans (or approved changes to them) to the attention of the public and in making them available to the public.

> (1) An approved compliance plan, including any approved changes to it, applies and is binding according to its terms in substitution for the designated regulation to which it relates and the application of the designated regulation is suspended to the extent that the plan is substituted for it.
>
> (2) The approved compliance plan is subject to any administrative or penal provisions of any Act that apply in relation to the designated regulation and, in particular,
>
> (a) any enactment that creates an offence for contravening the designated regulation shall be interpreted as creating an offence in relation to the compliance plan; and
>
> (b) any punishment or other sanction that may be imposed for an offence involving the designated regulation may be imposed in relation to the offence involving the compliance plan, but no person is liable to the punishment or other sanction unless it is proved that at the time of the alleged offence the person had actual notice of the plan or reasonable steps had been taken to bring the plan to the attention of the persons who are subject to it, including any steps required by the regulations made under paragraph 15(b).

2.22 A key feature of the scheme proposed by the Canadian Bill is that any alternative compliance mechanism (ACM), while it does not meet the prescriptive requirements of the relevant regulations, must nevertheless meet the **regulatory objectives** of the regulations. In that sense, it focuses on the end, rather than the means. A further important feature of the scheme is that clause 10 preserves existing sanctions against a breach of the regulatory regime that the ACM replaces.

2.23 The Committee has been advised by Hon. Marcel Massé, President of the Treasury Board of Canada, that the Bill has lapsed and will not be reintroduced 'because of the variety of concerns expressed by the stakeholders'.[59] It is useful to set out some of the reasons for this outcome because they have relevance to elements of the Victorian Office of Regulation Reform proposal discussed in the next chapter.

2.24 It appears to the Committee that one of the reasons why the Canadian Bill has not passed through the Canadian Parliament was the impact on the Canadian Liberal Party Caucus of a negative report by the Standing Joint Committee for the Scrutiny of Regulations (the Canadian Scrutiny Committee).[60] While taking no issue with the goals of the Canadian Bill (that is, to relieve the public, especially businesses, from the effects of unnecessarily burdensome or costly regulations), the Canadian Scrutiny

---

59 Electronic communication from M. Massé, President Treasury Board Canada, 22 Jul. 1997. The President of the Treasury Board is equivalent to the Australian Treasurer.

60 Parliament of Canada, Standing Joint Committee for the Scrutiny of Regulations, *Report on Bill C–62*, 16 Feb. 1995. The report was prepared by staff of the Canadian Committee. However, the Law Reform Committee understands that it was never adopted as the report of the Committee: submission no. 28.

Committee stated that the Bill represented 'a major departure from traditions of law and government' and, as a result, 'ought to be very carefully examined and tested.'[61]

2.25 Among other things, the Canadian Scrutiny Committee argued:

(a) that the Bill would give the Executive a discretion to grant dispensations from the operation of subordinate laws in favour of individuals; and

(b) that the Bill was inconsistent with other constitutional values.

2.26 In relation to the first of these issues, the Canadian Scrutiny Committee argued that the scheme proposed by the Canadian Bill amounted to a partial abrogation of the Bill of Rights of 1689, which declared illegal the exercise of a power of dispensation by the Crown.[62] The Committee argued rhetorically that if the Executive was given the power to grant dispensations from subordinate laws, how long would it be before another government, acting in the name of efficiency, sought to extend its authority to the ability to grant dispensations from not just subordinate instruments, but statutes?[63] The Law Reform Committee has been advised that the argument in relation to the Bill of Rights fails to take account of Canadian case law which holds that the 1689 Bill has no legal effect in Canada.[64]

2.27 The Bill of Rights **of 1688** (the Bill) continues to have the same force and effect in Victoria as it had prior to July 1980 when the *Imperial Acts Application Act 1980* (Vic.) came into operation.[65] What force and effect the Bill had at that time is a question which is not easily resolved.[66] In any event, accepting that the Bill is part of Victorian law, it can be overridden by a later inconsistent Act of the Victorian Parliament, such as, a Regulatory Efficiency Act. What is more to the point, therefore, is that the Bill is regarded by some as an important part of the legal heritage, which expresses the principle that it is for Parliament and not the Executive to declare the legal obligations of the community. Even though the Bill of Rights objection is not as

---

61 ibid., p. 1.

62 ibid., p. 4.

63 ibid., p. 5.

64 Electronic Communication from Mr J. Martin (former Executive Director of Regulatory Affairs in the Treasury Board of Canada), 17 Jun. 1997. The views expressed by Mr Martin are his personal views and do not represent the views of the Canadian Government. See also submission no. 28.

65 Sec. 3.

66 See *Clarkson v. Director-General of Corrections* [1986] V.R. 425 where it was held that there was no room for the operation of s. 6 of the Habeas Corpus Act 1679 (31 Charles II, c. 2) within the framework of present criminal procedure in Victoria. Cf. *Fitzgerald v. Muldoon* [1976] 2 NZLR 615 where it was held that the principle of s. 6 of the Bill of Rights of 1689 is still capable of operating in New Zealand.

strong where it is subordinate, not primary, legislation that is suspended, the Canadian Scrutiny Committee raises an important issue of principle that is very much the subject of the remainder of this report. As will be seen from the discussion in Chapter 5, the Committee's model avoids the Canadian Scrutiny Committee's criticism of the Canadian Bill by providing for parliamentary scrutiny and disallowance of alternative compliance mechanisms.[67]

2.28 In relation to the second issue, the Canadian Scrutiny Committee stated that the Canadian Bill was contrary to the Rule of Law and the principles of equity and fairness, because:[68]

> It would put into place a system whereby governmental authorities have an uncontrolled and unreviewable discretion to set aside the law in particular instances and substitute for it a private agreement that is not legislative in nature but that would nevertheless be made binding on persons who are not parties to it. For the first time in this country, citizens could be convicted and fined or imprisoned, not because they disobeyed a law, but because they disobeyed a private agreement between a designated regulatory authority...and their employer. Such a system can hardly be said to be consistent with the Rule of Law or with the principles of equity and fairness which are derived from it.

2.29 The Committee felt that the compliance scheme plan offended the principle of equality before the law because it put forward a system where there could eventually be 'as many different rules as there were persons initially subject to a particular regulation'.[69] The Committee expressed the view that while it could be theoretically argued that the scheme allowed for equality of opportunity, giving all people an equal opportunity to seek a dispensation from regulations, practical reality dictated that those with greater financial resources would have better opportunities to gain approval of a compliance plan.

2.30 The Canadian Scrutiny Committee questioned the fairness of a system where large corporations could easily obtain dispensations from regulations while smaller competitors, owing to their lack of resources, continued to be bound by regulations. However, the Victorian Law Reform Committee's information indicates that small business organisations in Canada were generally in favour of the Bill.[70] The Canadian Scrutiny Committee further questioned the fairness of a system where public officials did not have to justify their refusal of dispensations and where laws enacted by Parliament could be set aside as a result of private negotiations without prior notice to other concerned people.

---

67 See below paras. 5.29–5.31.

68 Parliament of Canada, op. cit., p. 6.

69 ibid., pp. 7–8.

70 Electronic Communication from J. Martin, loc. cit.

2.31 Finally, the Canadian Scrutiny Committee suggested that the proposals contained in the Canadian Bill were contrary to the principles of government accountability. This suggestion was made on the basis of an assessment that, under the operation of administrative arrangements, there would be no Minister answerable to the Parliament for a dispensation from the operation of a law. The Canadian Scrutiny Committee also stated that the tabling provisions in the Bill were 'ineffective'.[71]

2.32 The Victorian Law Reform Committee's discussions and correspondence with officials of the Treasury Board of Canada and other Canadian commentators indicate that there were strategic and tactical political issues at stake. Further, there was a general feeling in the Canadian Government that the Canadian Scrutiny Committee did not give proper weight to the purpose and operation of the Regulatory Efficiency Bill.[72] It was open to the Canadian Scrutiny Committee to suggest amendments to address any stated objections but, instead, it condemned the concept outright.

2.33 Moreover, there were a number of influential groups, including environmental and consumer representative organisations who were opposed to the Canadian Bill. While officers of the Treasury Board of Canada considered them misinformed about the intent and likely operation of the Bill, the Treasury Board was never able to effectively counter the tactics of the Bill's opponents, because the Board's arguments were economic, while the opposition arguments were emotive.[73]

2.34 Other reasons for this opposition were summed up by the British Columbian Minister of Employment and Investment , Hon. Dan Miller, when he wrote:[74]

> The main argument is the regulations per se should be revised rather than introducing an override mechanism that seems to lack sufficient public accountability mechanisms.

2.35 The Canadian proposal was ultimately rejected by the caucus of the ruling Canadian Liberal Party. In a recent speech, the Chairman of the Victorian Law Reform Committee, Mr Victor Perton, MP, gave his own assessment of the account he had heard of that defeat when he said:[75]

> It appears to me that the main reason for its defeat was a political assessment that the proposal would be bad politics in that it would be seen as the Liberal Party pandering to its

71 Parliament of Canada , op. cit., pp. 8–9.

72 Electronic Communication from J. Martin, loc. cit.

73 See T. J. Weiler, 'The Straight Goods on Federal Regulatory Reform', 1995, reproduced at <http://www.usask.ca/library/gic/v2n2/weiler/weiler.html>.

74 Submission no. 33.

75 V. Perton, 'Regulatory Review—The Next Wave', Paper delivered at the Fourth Commonwealth Conference on Delegated Legislation, Wellington, New Zealand , 10–13 Feb. 1997.

business constituency. A secondary reason for its caucus defeat was a perceived lack of equity in that only large corporations could afford the resources to successfully apply for and maintain an ACM.

2.36 While the Regulatory Efficiency Bill failed to become law in Canada, the Government has initiated various other regulatory reform measures. The Federal Regulatory Reform Agenda gave priority to improving regulatory efficiency in six sectors of the economy: biotechnology; health, food and therapeutic products; mining; the automotive industry; forest products; and aquaculture.[76] The Agenda also put in place an interactive soft-ware based tool called the 'Business Impact Test' to help regulators ascertain the impact of proposed regulations on business. Since 1996, all regulatory departments are required to use the Business Impact Test for major regulatory change.[77] The Canadian Government has also introduced initiatives to increase access to regulatory information and to reduce the paper work burden on small business by developing benchmarks and monitoring itself for compliance over the next five years.[78]

Regulatory Reform in the United States of America

2.37 The United States, like Canada, the United Kingdom and Australia, has been pursuing regulatory reform for the last two decades. Since 1978 several Executive Orders embodying Presidential policies have required federal agencies to publish agendas of their current and planned regulatory activities. Since 1983 agency agendas have been published biannually in a uniform format in the Unified Agenda.[79] The best publicised project in regulatory reform is the National Performance Review chaired by Vice-President Al Gore, with its objective of 're-inventing government'. The National Performance Review released a report in 1996 entitled *The Best Kept Secrets in Government* which reaffirmed that a core objective of regulatory reform is to create a sustainable partnership between government and business, thereby increasing efficiency while reducing the size of government.[80]

2.38 For the purposes of the current Inquiry, the most important regulatory reform measure was the Comprehensive Regulatory Reform Bill (the Comprehensive Bill) as

---

76 Treasury Board of Canada, loc. cit.

77 ibid.

78 ibid.

79 Regulatory Information Service Centre, <http://policyworks.gov/org/main/mi/kissues/issuelst.htm>.

80 A. Gore, *The Best Kept Secrets of Government*, US Government Printing Office, Washington, DC, 1996.

reported to the US Senate.[81] The Bill was referred to the Senate Committee on the Judiciary which in its report amended the Bill to provide for alternative compliance mechanisms.[82] This section of the Bill is understood to have been inspired by the Canadian Bill.[83] The Bill as reported by the Committee provided that:[84]

> Any person subject to a major rule may petition the relevant agency to modify or waive the specific requirements of the major rule and to authorise such person to demonstrate compliance through alternative means not otherwise permitted by the major rule. The petition shall identify with reasonable specificity the requirements for which the waiver is sought and the alternative means of compliance being proposed.

2.39 A major rule was defined as one that has costs or benefits of more than $50 million or which has other significant adverse impacts. The Comprehensive Bill contained a presumption in favour of the granting of approval for an alternative means of compliance, in that agencies were **obliged** to approve such means where there was a reasonable likelihood that the proposal would achieve a level of performance that was at least equivalent to that achieved under the regulation. However, agencies would not be required to approve an alternative means of compliance if to do so would impose an undue burden on the agency.

2.40 Other features of the Comprehensive Bill were that agencies would be subject to a 180 day time limit in relation to the assessment of an proposal for an alternative means of compliance and that their decision would be final and not subject to appeal. Rules relating to taxation and revenue raising were to be excluded from the operation of the Bill.[85] While alternative compliance mechanisms were not part of the final Bill that was passed by the US Congress, the Congress did pass a strong version of the Comprehensive Bill that included progressive regulatory reform measures. The Bill was sent to the President as part of the first Debt Limit Bill. It appears that the President vetoed the Bill partly because 'he wanted to deny a victory to its chief Senate sponsor, Bob Dole',[86] who was then President Clinton's opponent for the 1996

---

81 S. 343 which was introduced into the House of Representatives as Bill H.R. 2586 on 7 November 1995. H.R. 2586 is reproduced at <http://thomas.loc.gov/cgi-bin/query/D?c104:2:./temp/~c104hh6z::>.

82 Committee Report no. 104-90.

83 See Victoria, Department of State Development, Office of Regulation Reform, *Working Paper: Regulatory Efficiency Legislation*, Melbourne, [1995], p. 6.

84 S. 343 as reported by the Senate Committee on the Judiciary, s 623 (g) (1), reproduced at <http://thomas.loc.gov/cgi-bin/query/D?3:./temp/~c1048XcD::>.

85 ibid., s 621.

86 T. Gaziano, 'SBREFA and other landmark regulatory reform laws of the 104th Congress', Washington, 1997.

Presidential elections. There are presently no plans to re-introduce the Bill into the 105th Congress to override the veto.[87]

2.41 However, while not nearly as comprehensive, the United States Congress has passed eight other 'lesser-known' regulatory reform laws that have been viewed as 'the most significant changes in administrative law and regulatory practice since at least 1980'.[88] These laws include: the Unfunded Mandates Reform Act,[89] which requires regulators to consider the impact of their rules on state and local governments, Indian tribes and private parties; the reauthorisation of the Paperwork Reduction Act,[90] which establishes new paperwork reduction mandates; and a regulatory accounting law, that requires regulators to calculate and publish the cost of existing regulations on the American people, to take into account public comments and to disclose final figures to Congress.[91] The most significant changes are contained in five regulatory relief laws enacted as The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[92]

2.42 The SBREFA package requires regulatory agencies to publish plain English guides to explain regulatory requirements to small business. It also creates a Small Business and Agriculture Regulatory Enforcement Ombudsman to enable small businesses confidentially to appraise regulators. SBREFA amends the Regulatory Flexibility Act to require that regulators provide detailed information on the impact of proposed regulations on small business and consider regulatory alternatives to reduce the burden on small business. SBREFA also amends the Congressional Review Act to allow Congress to review each new rule and consider a joint resolution to overrule the regulation.[93] While these laws do change regulatory practice, it is noted that many of these reforms have been in place in Victoria since 1984.

---

87 Telephone conversation held in early Apr. 1997 with Mr T. Gaziano, Chief Counsel, United States House of Representatives Committee on Government Reform & Oversight, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs.

88 ibid.

89 Pub. L. No. 104-4, 109 Stat. 48-71 (1995), reproduced at <http://thomas.loc.gov/cgi-bin/query/z?c104:S.1.ENR:>.

90 Pub. L. No. 104-13, 109 Stat. 163-85 (1995), reproduced at <http://thomas.loc.gov/cgi-bin/query/z?c104:S.244.ENR:>.

91 Pub. L. No. 104-208, title II, section 645 (1996), reproduced at <http://thomas.loc.gov/cgi-bin/cpquery/R?cp104.FLD010:@1[hr863]:>.

92 Pub. L. No. 104-121, title II, 110 Stat 847, 857-74 (1996), reproduced at <http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3136.ENR:>.

93 For an outline of these laws see T. Gaziano, loc. cit.

Regulatory Reform: Commonwealth of Australia Initiatives

2.43 Since the 1980s regulatory reform in Australia has been at the centre of 'microeconomic and structural adjustment policies intended to improve the competitiveness of an economy that had become, in post-war years, highly regulated'.[94] By the early 1980s deregulation became the main strategy for structural reform with the Prime Minister, Hon. Robert Hawke, MP, announcing in 1984:[95]

> We will examine critically the whole range of business regulation, most importantly with a view to assessing a contribution to long-term economic growth performance. We will maintain regulation which, upon careful analysis, clearly promotes economic efficiency or which is clearly an effective means of achieving more equitable income distribution. And we will abandon all regulation which fails these tests.

2.44 Deregulation in the 1980s was targeted at the airline industry, financial markets and the operation of government business enterprises. As part of a comprehensive program of reform the federal Government conducted extensive reviews of regulatory laws in eleven policy areas including foreign investment controls, customs and building codes.[96]

2.45 Despite these efforts, progress did not meet the expectations of business or government. The volume of new and amended Commonwealth regulations has continued to expand since the early 1980s. In the financial year 1983/84, 793 regulations subject to parliamentary scrutiny were introduced. This figure had risen to 2087 in the financial year 1994/95.[97] As curbing the quantity of regulations has had minimal success at the federal level, the emphasis has begun to shift to examining the quality of regulations and their impact on competition and efficiency.

National Competition Policy

2.46 In October 1992, following an agreement by Australian governments on the need for a national competition policy, the Prime Minister established a Committee chaired by Professor Fred Hilmer to undertake an inquiry into such a policy. The Independent Committee of Inquiry into National Competition Policy (the Hilmer Report) was presented to the Council of Australian Governments (COAG) in August 1993.

---

94 OECD, *Regulatory Reform: A Country Study of Australia*, 1996, p. 1. reproduced at <http://www.oecd.org/puma/country/gdoz.pdf>, (hereafter 'Country Study').

95 ibid., p. 5.

96 ibid., p. 6.

97 Industry Commission, op. cit., p. 10.

2.47 The Hilmer Report echoed the frustration of business in relation to the slow pace of reform. It recommended the implementation of a National Competition Policy (NCP) for Australia to improve productivity, increase international competitiveness and to maintain and improve living conditions.[98] A key recommendation of the report was that, as part of a NCP, all Australian governments should adopt a set of principles aimed at removing regulatory restrictions on competition unless such restrictions were demonstrably in the public interest.[99] This would involve:[100]

1) acceptance of the principle that any restriction on public competition must be clearly demonstrated to be in the public interest;

2) new regulatory proposals being subject to increased scrutiny, with a requirement that any significant restrictions on competition lapse after no more than five years, unless re-enacted after scrutiny through a public review process;

3) existing regulations imposing a significant restriction on competition being subject to systematic review to determine if they conform with the first principle, and thereafter lapsing within no more than 5 years, unless re-enacted after scrutiny through a further review process; and

4) to the extent practicable, reviews of regulations taking an economy-wide perspective.

2.48 In April 1995 COAG adopted a NCP that embodied and built on the recommendations of the Hilmer Report. The NCP was given effect through the *Competition Policy Reform Act 1995* (Cth) and three intergovernmental agreements—the Competition Principles Agreement, the Conduct Code Agreement and the Agreement to Implement National Competition Policy and Related Reforms. The importance of the Competition Policy Agreement in regulatory reform terms is that it required all Australian governments to publish by June 1996 a schedule of review and to develop programs to review and reform (where appropriate) all existing regulations that restrict competition by the year 2000.[101] COAG also adopted a set of *Principles and Guidelines for National Standard Setting and Regulatory Action*, which

98 The Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993.

99 ibid., p. 212.

100 ibid., see also OECD, Country Study, op. cit., p. 7.

101 See COAG, *Competition Principles Agreement,* 1995. It is important to note that the Agreement specifies that a Regulatory Impact Statement Framework is to be used for the review. The national competition policy package also established two new regulatory bodies: the National Competition Council (NCC) and the Australian Competition and Consumer Commission (ACCC).

requires Ministerial Councils and National Standard Setting Bodies to use nationally consistent assessment processes for new regulations, including the completion of a regulatory impact statement.

2.49 The review of legislation and regulations under the Competition Policy Agreement is currently underway in all Australian jurisdictions. Over 1800 pieces of legislation and regulation throughout Australia are currently being reviewed. Different States have individually determined their schedule for review as evidenced by the fact that there is a significant discrepancy in the number of Acts and regulations under review in each jurisdiction. For instance, Victoria has identified 441 pieces of anti-competitive legislation, New South Wales 200, Queensland 130, the Commonwealth 98 and Tasmania 213. Some States have had difficulty meeting the tight deadlines in the process. However, the regulation review process seems to be less onerous on States because in 'many cases review processes which were already under way appear to have been deemed to be de facto NCP Legislative Reviews'.[102] The National Competition Council has the responsibility for assessing governments' compliance.

Mutual Recognition

2.50 The establishment of a common Australian market by removing barriers to interstate trade is an objective of bipartisan Australian economic policy. Mutual recognition of regulatory laws, aimed at removing regulatory barriers to the free flow of labour and goods between States and Territories, was introduced by Australian governments in 1993[103] and became a reality in 1995. It enables most goods sold under regulatory laws in one State to be freely sold in other jurisdictions, and enables members of registered occupations to enter the equivalent occupation in another jurisdiction. Although the process is not complete, it is advancing rapidly.

2.51 The impact of mutual recognition in the area of occupations is giving rise to a high level of mobility with over 15,000 people using the scheme to register in States other than their home State.[104] While it is harder to evaluate the success of mutual recognition in the area of interstate trade in goods, the Industry Commission suggests that it has enhanced trade in some sectors of the economy, for example, food

---

102 Institution of Engineers Australia, Australian Law Reform Commission, Public Sector Research Centre, Consumer Law Centre, Public Interest Advocacy Centre, *Competition Policy Legislative Review - Roundtable Outcomes*, 14 Feb. 1997.

103 Office of Regulation Review, *Impact of Mutual Recognition on Regulations in Australia: A Preliminary Assessment*, AGPS, Canberra, 1997.

104 ibid., p. viii.

products.[105] Mutual recognition is beginning to be extended to more areas of regulation, and it is being used to give effect to national schemes, such as that proposed by the National Road Transport Corporation.[106]

Mutual Recognition between Australia and New Zealand

2.52 In June 1996 a mutual recognition treaty was signed between New Zealand, the Commonwealth and all Australian States and Territories. The agreement takes effect when New Zealand, the Commonwealth and one State have passed legislation to give effect to the treaty. New South Wales and the Commonwealth introduced legislation in December 1996 and New Zealand legislation is presently at the Committee stage. Victorian legislation is expected to pass through the Parliament in the Spring Session of 1997.

Small Business Deregulation Task Force

2.53 The Federal Government has made a commitment to tackle the regulatory burden on small business. In early 1996 it established the Small Business Deregulation Task Force under the Chairmanship of Mr Charlie Bell, the Managing Director of McDonalds Australia Ltd., to report on ways to halve the compliance burden and paperwork on small business. The Task Force delivered its report (the Bell Report) to the Federal Government in November 1996. The Bell Report made more than sixty recommendations across a broad range of regulations that impact on small business.[107] It made a series of key recommendations to ensure that regulations would be reduced to the minimum necessary to achieve business, government and community interests.

2.54 The Prime Minister has responded to many of the recommendations of the Small Business Deregulation Task Force in a document entitled *More Time for Business*.[108] The new measures include mandatory regulatory impact statements for all legislation impacting on business; all regulatory impact statements are to be tabled in Parliament; the Office of Regulation Review is given responsibility for training programs for regulators and for reporting on compliance to Parliament. Further

105 ibid.

106 The National Road Transport Commission schemes are discussed in Chapter 3 of this Report.

107 Small Business Deregulation Task Force, *Time For Business*, AGPS, Canberra, 1996. The report is reproduced at <http://www.dist.gov.au/smallbus/sbtf.html>.

108 Hon J. Howard, MP, *More Time for Business – Statement by the Prime Minister, the Hon John Howard MP 24 March 1997*, AGPS, Canberra, 1997, reproduced at <http://www.dist.gov.au/smallbus/moretime/index.html>.

changes include giving the Assistant Treasurer, Senator Rod Kemp, the responsibility to supervise regulatory best practice; and requiring that serious consideration be given by rule-makers to self-regulation before moving to make regulations.[109]

2.55 The subcommittee which travelled to Canberra in July 1997 found that the Bell Task Force recommendations and the Prime Minister's response have combined with the legislative reviews under NCP to make regulatory reform central to government policy aimed at increasing efficiency and competition in the economy.

2.56 These measures on an international and national level,[110] together with innovation and reform at a State level (discussed below), have set the climate for the present Inquiry into the appropriateness of Regulatory Efficiency Legislation.

Regulatory Reform: Victorian Initiatives

2.57 While at a federal level progress has been slow, Victoria and New South Wales instituted substantial reforms to the regulation making process in the early 1980s, including a type of negotiated rule-making, cost-benefit analysis, public consultation and parliamentary scrutiny.

2.58 It has been internationally recognised that regulatory reform in Australia has been substantially advanced by State governments, rather than the Commonwealth Government. The OECD has noted: [111]

> combined with the emergence of a national internal market, regulatory reform in the states has resulted from, and contributed to, a competition for reform, in which efficient state regulation is seen to give state producers an edge in the market.

In Victoria the zeal for regulatory reform continues to be an important part of government policy and bipartisan support.

2.59 The present Inquiry is at least, in part, a reflection of a commitment made prior to the last election by the Victorian Government.[112] In its *Small Business Policy*, under

---

109 These measures, together with the Commonwealth Legislative Instruments Bill 1996, are discussed further in Chapter 6.

110 On the national level, the Federal Government has also released details of the Corporate Law Economic Reform Program which aims to simplify and reform corporate law to increase business opportunities. According to the Plan, the principles underpinning reform include 'cost/benefit analysis of all new legislative proposals as against the existing law'; 'the development of a regulatory and legislative environment that is consistent, flexible, adaptable and cost-effective'; and 'the provision of an appropriate balance between government regulation and industry self-regulation': Treasury, Business Law Division, *Corporate Law Economic Reform Program*, Canberra, 1997.

111 OECD, Country Study, loc. cit.

the heading 'Cutting red tape', the Liberal National Party Coalition pledged that it would: [113]

> Introduce Regulatory Efficiency Legislation which allows business to propose alternative means of compliance with regulatory objectives. This will lower compliance costs across a range of regulations, by allowing business to tailor its method of compliance to suit its specific business circumstances and will build on flexibilities which are already being implemented in relation to specific legislation.

2.60 While in conceptual terms there can be little argument that governments need to be mindful of the effects of their regulatory policies and mechanisms on business (and on the wider community), there also should be some recognition of existing efforts in that regard. In particular, there should be some reticence in adopting the general assumption that those involved in the business of regulation are not doing anything to assist in meeting these demands and alleviating these pressures. The Committee's impression is that there is a general ignorance of what those in government are doing, and have done, to make the regulatory process more efficient and to ensure that regulation better meets the needs of the whole community.

History of Regulatory Reform in Victoria

2.61 The assumption that those involved in the business of regulation are doing nothing has little credibility in Victoria where there has been a long history of innovative approaches to regulation. This is because bipartisan agreement in 1984 enabled Victoria to implement reforms including:

(a) mandatory cost-benefit analysis;

(b) mandatory consultation with interest groups and the general public;

(c) ten year sunset clauses;

(d) a strong system of review by an all-party parliamentary committee with disallowance (veto) by either house of the bicameral Victorian Parliament.

---

112 This reference is also complemented by the current Inquiry into Overlap and Duplication which is being undertaken by the Federal- State Relations Committee of the Victorian Parliament. The Inquiry will examine the extent of the problem of duplication and overlap in the roles and responsibilities of the Commonwealth and the State; areas where State responsibility should be enhanced; and options for improved technological links between State and Federal Governments.

113 Victorian Liberal National Party Coalition, *Election Policy March 1996*, *Small Business: Assisting and Encouraging Victoria's Largest Private Employer*, Melbourne, 1996, p. 8.

2.62 In 1984 Victoria became the first State in Australia to introduce reforms which entrenched ten year sunsetting for new regulations, a staged repeal process, public consultation and regulatory impact statements. The history and passage of the Bill into law reveals the importance of regulatory reform and the bipartisan support it had started to gain in the early 1980's. As one New South Wales Labor Minister pointed out:[114]

> In the past, the regulatory reform agenda has been dominated by those who favour small government, on principle…However, the debate has moved on. It is now clear to all those with a…commitment to better government that regulatory reform is close to the core of much public policy development and public administration.

2.63 In 1983, the Subordinate Legislation (Deregulation) Bill was introduced to Parliament in the form of a Private Member's Bill by the then leader of the Opposition, Hon. Alan Hunt.[115] In the second reading speech on the Bill, which the then Attorney-General described as 'one of the best second-reading speeches I have ever heard in this place',[116] Mr Hunt outlined the purposes of the Bill:[117]

> The Bill in essence does three things. It provides for the phasing out of old and obsolete regulations; it lays down a coherent, systematic and co-ordinated set of guidelines and procedures which should be observed for the future; and it adds considerable strength to the review process both at the Parliamentary and departmental levels.

2.64 The Bill received strong bipartisan support and was referred to the Legal and Constitutional Committee for inquiry, consideration and report. The Legal and Constitutional Committee produced, in an exceptionally short time, a comprehensive and pioneering report containing 101 recommendations.[118] The Report supported the general thrust of the Bill and made many useful suggestions for improvements. The Committee recommended that the Bill be called the *Subordinate Legislation (Review and*

---

114 A. Refshauge, quoted in OECD, Country Study,op. cit., p. 10.

115 In a conversation in August 1997 with the Chairman, the now retired Mr Hunt, referred to the present Premier, Mr Jeff Kennett, as the catalyst for his study. Mr Kennett had asked him to investigate whether the complaints of small business in respect of the burden of regulation could be dealt with. Mr Hunt assembled a committee including Mr Don Cooper, a solicitor, and Ms Janine Kirk, now Executive Director of the Committee for Melbourne. The Committee found that various elements of reform had been implemented in overseas jurisdictions. The package was then drafted by Mr Hunt.

116 Hon. J. H. Kennan, Legislative Council, Parliament of Victoria, *Hansard*, Session 1983-84, Vol 372, p. 1138.

117 Hon A. Hunt, ibid, p. 1137.

118 Parliament of Victoria, Legal & Constitutional Committee, *Report on the Subordinate Legislation (Deregulation) Bill*, F. D. Atkinson, Government Printer, Melbourne, 1984. The Committee's Report received a high level of praise during the debate in the Legislative Council on the Bill, see Parliament of Victoria, Legislative Council, *Hansard*, Session 1984, vol. 375, pp 449– 458.

Revocation) Act 1984 and that the *Subordinate Legislation Act 1962* be amended to incorporate the recommendations of the Committee.[119]

2.65 The staged repeal process, which commenced in 1984, repealed all regulations made before 1984 and replaced them with updated regulations. Between 1987 and 1990 the Office of Regulation Reform (ORR) conducted 'industry-based reviews' (major reviews of entire regulatory structures) covering shop trading hours, food processing, planning and construction, and chemicals and drugs.

2.66 After a decade of experience with the review and repeal processes instituted in 1984, the Victorian Government's commitment to regulatory reform was affirmed when it gave a reference to the Scrutiny of Acts and Regulations Committee, chaired by Victor Perton MP, to review certain aspects of the operation of the *Subordinate Legislation Act 1962*. The Committee's Report appended a Draft Bill.[120] The Government response was to adopt most of the recommendations of the Victorian Scrutiny Committee in the *Subordinate Legislation Act 1994*, which sets out improved processes for the making and scrutiny of regulations. The Act was designed to 'place [a] much greater emphasis on Ministerial responsibility in the process of making... rules'.[121]

2.67 The Act also put into place ministerial certifications whereby ministers must certify that they have followed the consultation process, that the regulation does not duplicate or conflict with other ministries, and that they have complied with the requirement for a regulatory impact statement. The current process also requires three independent reviews:

1) The regulator must seek independent advice on the adequacy of a regulatory impact statement either from ORR or from outside experts.[122]

2) The Office of Chief Parliamentary Counsel must certify that the regulations meet a range of criteria, including that the regulation is legally authorised, is expressed as clearly as possible, and does not overlap or conflict with other regulations.[123]

---

119 Parliament of Victoria, loc. cit.

120 Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Report upon an Inquiry into the Operation of the Subordinate Legislation Act 1962*, L. V. North, Government Printer, Melbourne, 1993.

121 Victoria, Department of State Development, Office of Regulation Reform, *Procedures for Making Statutory Rules: A Step-by-Step Approach*, Melbourne, 1995.

122 Section 10(3), *Subordinate Legislation Act 1994.*

123 Section 13, *Subordinate Legislation Act 1994.*

3) The Scrutiny of Acts and Regulations Committee reviews the regulation and all documentation after tabling of the regulation in Parliament. The Scrutiny Committee has the power to report to Parliament on whether the regulation meets several rights-based criteria and, if not, whether the regulation should be disallowed or amended.[124]

2.68 These efforts in regulatory reform have brought some success in Victoria in regard to changing the culture of regulators, withdrawing poor regulations and increasing scrutiny of regulations.[125] In a press release dated 21 March 1997 the Minister for Small Business, Hon. Louise Asher, MP, noted:

> small business regulations had fallen 60.2 per cent from 1241 under the Labor regime in 1987 to 494 under the Kennett Government last year…. the State Government had also reduced the number of new regulations introduced each year by 40.3 per cent from 278 in 1993, the first full year under the Coalition, to 166 last year…. the total of 869 regulations introduced from 1993 to 1996 was 43.8 per cent lower than the 1546 produced from 1989 to 1992. The figures, produced by the Office of Regulation Reform, were an excellent result for the State Government and provided a benchmark for further reforms during the Governments second term. The Government is dedicated to clearing away the debris of unnecessary and outdated controls for small business to operate as unhindered as possible…. It has now shifted from a quantitative to a qualitative approach on regulation and I last year initiated a regulatory audit of the tourism industry as part of that process… Victoria's success in slashing red tape complied with one of the recommendations under the Federal Government's Bell Task Force report on small business.

2.69 As acknowledged by the Minister, regulation reform in Victoria is no longer a matter of mere deregulation, but now focuses on improving the quality of regulations by reducing their legal and technical complexity, and enhancing their effectiveness by increasing their transparency.

The Way Forward

2.70 While Victoria has been a leader in the area of regulatory reform, it has not been the only State to recognise the need for innovation in this area. In May 1996 the NSW Government issued a Green Paper entitled *Regulatory Innovation: Regulation for Results*. In that paper the NSW Government opened up discussion on the concept of 'regulatory innovation strategies' the common thread of which is expressed to be 'that they create room for businesses to influence the means by which they will satisfy the objectives of the regulation'.[126] The paper canvasses various alternatives to

124 Section 21, *Subordinate Legislation Act 1994.*
125 OECD, Country Study, op. cit., p. 34.
126 New South Wales Government, op. cit., Foreword.

the current system of regulation, including performance based regulation, negotiated rule making, class exemptions for small business, regulatory flexibility and third party certification.

2.71 Recently, there have been suggestions that government must look at ways of improving its approach to regulation, because the process of regulation is, in simple terms, something that is increasingly beyond the capacity of governments to manage on their own—and from their own resources. That being so, there is also a wider public interest in regulatory reform.

2.72 The view that the business of regulation is becoming too much for governments to handle has been expressed by several commentators.[127] It has been suggested that one way of addressing the conflicting pressures faced by government is to harness resources outside the public sector, to mobilise non-governmental resources and to enter into co-productive arrangements with those that are to be regulated.[128] Governments may achieve greater compliance if they engineer a regulatory system in which they themselves play a less dominant role; one in which they facilitate the 'constructive regulatory participation of private interests'.[129]

---

127 See P. N. Grabosky, 'Using non-governmental resources to foster regulatory compliance', *Governance: An International Journal of Policy and Administration*, 1995, vol. 8, no. 4, p. 527, (hereafter 'Using non-governmental resources'); P. N. Grabosky, 'Green Markets: Environmental Regulation by the Private Sector', *Law and Policy*, 1994, vol. 16, no. 4, p. 419; P. D. Jonson & E. P. Jonson, 'Financial regulation and moral suasion', *Quadrant*, July-August 1994, p. 89; J. Braithwaite, 'Responsive Regulation for Australia' in P Grabosky & J. Braithwaite (eds), *Business Regulation and Australia's Future*, Australian Institute of Criminology, 1992, p. 81; N. Gunningham, 'Thinking about Regulatory Mix—Regulating Occupational Health and Safety, Futures Markets and Environmental Law' in P Grabosky & J. Braithwaite (eds), *Business Regulation and Australia's Future*, Australian Institute of Criminology, 1992, p. 133. See also OECD publications for example, OECD, PUMA, *Control and Management of Government Regulation*, http://www.oecd.org/regref/pubs/con95/toc.htm.

128 P. N. Grabosky, Using non-governmental resources, loc. cit.

129 ibid., p. 543.

2.73 In light of the national and international developments discussed earlier, Victorian Law Reform Committee is of the view that Regulatory Efficiency Legislation can contribute to a regulatory system whereby government, business and the community work together to create better regulations. As noted in Chapter 1,[130] Victoria has had several regulatory efficiency measures in place for over a decade. This State has had almost fifteen years of experience with reg-neg, a regulatory impact statement process that includes the elements that the OECD identify as best practice, automatic revocation of regulations after ten years and a strong system of parliamentary scrutiny of regulations. The Committee believes that these features should be characterised as regulatory efficiency measures.

2.74 It is the Committee's view that alternative compliance regimes form part of the next stage of regulatory reform. It believes that while similar measures have failed in Canada and the United States, Victoria is unique in that it has the necessary foundations to implement successfully such important reform. The Committee takes the view that in light of the complex concerns of business regarding regulations, ACMs may be an important mechanism for alleviating the regulatory burden on business. As Mr M. Soutter observes: [131]

> We should acknowledge that at the end of the day regulation is needed to protect the community and that there must be some sort of bottom line—a lower base, if you like—that provides a measure of protection for the community from those who would behave egregiously. There should, therefore, be an attempt in setting regulation to look at both carrots and sticks. Obviously you need the existence of sticks for people who will simply not comply with the rules as the community might expect, but equally regulation or alternative regulation should fundamentally be aimed at achieving best-practice outcomes in the community, and I think this is the real challenge before Parliament: not simply to regulate in a way that will stop people doing things that might kill or harm people, but to do things in a way that encourages all…to adopt best-practice outcomes.

2.75 Accordingly, it is the Committee's view that Regulatory Efficiency Legislation should be enacted in Victoria. It should incorporate the elements of reform that have been part of Victorian law since 1984, together with the modifications and additions recommended by the Committee in Chapter 7 of this Report. It should also introduce an alternative compliance regime. The Committee believes that this approach rightly recognises Victoria's achievements to date in regulatory reform, while introducing increased regulatory flexibility for Victorian businesses.

---

130 See para. 1.17.

131 M. Soutter, Parliament of Victoria, Law Reform Committee, *Public Hearing with Business Organisations, Minutes of Evidence*, 7 Apr. 1997, p. 5.

Recommendation 1

Regulatory Efficiency Legislation should be enacted in Victoria. It should include:

- ***(a)*** ***The provisions currently contained in the* Subordinate Legislation Act 1994 *(Vic.) relating to the preparation, making, tabling, publication and availability of statutory rules and the scrutiny, suspension and disallowance thereof.***
- ***(b)*** ***The modifications of and additions to the regulatory impact statement process recommended in Chapter 7 of this Report.***
- ***(c)*** ***The provisions of the* Subordinate Legislation Act 1994 *(Vic.) relating to the automatic revocation of statutory rules.***
- ***(d)*** ***The Committee's model for alternative compliance mechanisms recommended in Chapter 5, which provide for compliance with regulatory objectives by means other than those prescribed in subordinate legislation.***

3 ALTERNATIVE COMPLIANCE: SOME EXISTING MODELS

3.1 Under its terms of reference the Committee is required to examine the application of models under specific regulatory regimes which are similar to alternative compliance mechanisms under Regulatory Efficiency Legislation.[132] This chapter considers these models with specific attention being given to the Victorian accredited licensee system under the *Environment Protection Act 1970*, third party certification schemes which operate under the *Building Act 1993* (Vic.), and that recently proposed in New South Wales, and the alternative schemes operating and proposed within the compliance and enforcement module of the National Road Transport Law.

Accredited Licensee System under the Environment Protection Act 1970 (Vic.)

3.2 A form of alternative compliance already operates in Victoria under amendments made in 1994 to the *Environment Protection Act 1970* (Vic.) (EP Act).[133] Under this system companies subject to environmental regulation can be freed from the standard prescriptive approach of the regulatory regime if they can demonstrate a high level of environmental performance and an ongoing capacity to maintain and improve that performance. Successful applicants are designated as 'accredited licensees' by the Environment Protection Authority (EPA).[134]

Operation of the Accredited Licensee System

3.3 Three cornerstones are required of companies participating in the accredited licensee process: an environmental management system, an environmental audit

---

132 Victorian Government Gazette, G 25, 27 Jun. 1996, p. 1632.

133 The relevant amendments are set out in the *Environment Protection (General Amendment) Act 1994* (Vic.).

134 See e.g., Victoria, Environment Protection Authority, *A Question of Trust – Accredited Licensee Concept: A Discussion Paper*, Publication 385, Jul. 1993; and Victoria, Environment Protection Authority, *EPA Information Bulletin: Accredited Licensee Guidelines for Applicants*, Publication 424, Feb. 1996, (hereafter 'Information Bulletin').

program and an environmental improvement plan (existing or in progress).[135] Guidelines provide for third party certification of environment management systems by an EPA appointed auditor or an independent certification body.[136] The guidelines also require that the environmental audit program provides a system for determining the performance of the environment management system, compliance with performance requirements, risks and environmental impact, and the extent and sources of waste.

3.4 A company must be able to convince the EPA that it meets these cornerstones to a sufficient standard. If the EPA is so convinced, it will issue a licence that allows the licensee 'a high degree of operational freedom'.[137]

3.5 Once issued with a licence, an operator must be able to demonstrate to the EPA that it is complying with its terms, otherwise it will lose accreditation and return to the more prescriptive licence control system. Monitoring of compliance is achieved through the provision of performance reports which must 'contain any information or performance indicators required by the Authority'.[138] The performance indicators are usually listed in the accredited licence.[139] Continuation of the accreditation is assessed on the basis of actual environmental performance and is judged against factors such as licence compliance, implementation of environment improvement plans and the level of legal action (such as, prosecutions) in relation to the operator.[140]

3.6 A significant degree of transparency and accountability is built into this system. The transparency aspect is met by the requirement for community participation, consultation and access, particularly in relation to environment improvement plans.[141] In assessing environmental performance, the Authority considers whether the applicant has prepared or is preparing an environment improvement plan which includes the matters specified in section 31C(6) of the EP Act.

---

135 See s. 26B *Environment Protection Act 1970,* (hereafter 'EP Act').

136 Victoria, Environment Protection Authority, Information Bulletin, loc. cit.

137 B. Robinson, 'Is seamless regulation possible', paper delivered at the Annual Conference of The Textile Institute, Southern Australia Section, 18 Jun. 1996, p. 6.

138 EP Act, s. 26C.

139 Victoria, Environment Protection Authority, Information Bulletin, loc. cit.

140 B. Robinson, loc. cit.

141 EP Act, s. 31C(6)(d).

3.7 Accountability is facilitated by virtue of the cornerstones of the licence being the subject of review at a predetermined frequency that must not exceed 5 years.[142] For the community there is the benefit of having increased access to information about the licensee's operations through its annual report to the EPA, as well as increased provision for community participation under section 31C(6)(d) of the EP Act. There may also be a review of the licence at any time if there is reason to believe that there has been a failure to comply with its conditions.[143]

Characterisation of the Accredited Licensee System

3.8 A question arises as to whether the accredited licensee system is strictly a form of alternative compliance mechanism or simply a merit-based licensing system operating within an existing (albeit expanded) regulatory framework. The Department of Premier and Cabinet (DPC) in its submission prefers the latter characterisation,[144] whereas, BHP Steel describes the accredited licence for its Western Port facility as being 'an example of a successful form of Alternative Compliance Measure'.[145] In the final analysis the distinction is probably semantic. It is understandable that a system of alternative compliance which operates within a narrow field of regulation will itself be incorporated into the existing regulatory framework. However, where a system of alternative compliance mechanisms is to be established across the whole range of government regulation, it is necessary that such a system be implemented through overarching legislation in the form of a Regulatory Efficiency Act. The success of a restricted industry model of alternative compliance can provide the impetus for a more widespread use of the concept.

Benefits of the Accredited Licensee System

3.9 The accredited licensee scheme's similarity with ACMs is a reflection of the shared benefits which both mechanisms can provide. Several of the benefits which have been experienced by BHP Steel with respect to its Western Port facility are similar to those which would be promoted by the introduction of an ACM model. The submission by BHP Steel details these benefits and concludes that 'the accredited licence for Western Port has been positive and gives us reason to be optimistic about

142 ibid. The guidelines for applicants provide that an application for re-accreditation should be made at least 6 months prior to the expiry date.

143 Victoria, Environment Protect Authority, Information Bulletin, loc. cit.

144 The relevant part of the submission was prepared in conjunction with the EPA.

145 Submission no. 30.

the broader application of Alternative Compliance Measures in Victoria'.[146] The submission identifies a number of benefits including: a 25% reduction in fees, the specification of 'whole of plant' performance, less prescriptive regulation, a greater ability for BHP to manage its own affairs and successful liaison with the EPA and the local community.

3.10 According to the DPC and the EPA, community confidence in the scheme has been secured as a result of these mechanisms.[147]

> The procedures provide the community with an adequate level of confidence in the Scheme. This is critical to forming the partnership between industry, the community and the EPA which enables increased regulatory flexibility to be provided.

3.11 Mr Terry A'Hearn, Senior Economist at the EPA, expressed the view that transparency and accountability are essential to the system's ability to engender community support.[148] He also suggested that the community would benefit because of the resulting improvements in environmental performance:[149]

> The importance of protecting their Accredited Licensee status and commitment to continuing improvement is expected to produce better environmental performance with fewer mishaps.

3.12 Dr Brian Robinson, the Chairman of the EPA, summarised the overall aim of the accredited licensee system as being 'environmental improvement through co-operation between industry, government and the community'.[150]

3.13 In its discussion paper on this reference, the Committee asked whether the current procedures for accredited licences granted under the EP Act met the objective of efficiency. Several submissions concluded that the scheme does comply with this objective. Notably, the DPC (in conjunction with the EPA) said that the scheme increases regulatory flexibility and efficiency, while promoting public confidence in the observance of standards.[151] It suggested that the scheme is designed to meet the following objectives: that of 'providing more flexible regulatory approaches, developing outcome-orientated approaches, rewarding good performers, and harnessing market forces'.[152] Likewise, the Metal Trades Industry Association of

146 ibid.
147 Submission no. 26.
148 T. A'Hearn, 'Harnessing the Market: Reform of Environmental Regulation in Victoria', EPA, p. 6.
149 ibid.
150 B. Robinson, loc. cit.
151 Submission no. 26.
152 ibid.

Australia emphasised that the scheme not only has social safeguards in place, but that it promotes best practice and continued development:[153]

> The accredited "non-license" system that operates under the Victorian *Environment Protection Act* holds immense attraction to management. The social safeguards are in place through the demonstrated commitment of the business to address environmental management and compliance issues by a recognised system that can easily reinstall more burdensome requirements through penalties and fines and reintroduction of a licensing system.
>
> In the meantime, 'best practice' is rewarded, not penalised. Moreover, the continued development and implementation of strategies addressing new or more complex environmental concerns gives momentum to the maintenance of the accreditation.

3.14 Support for the use of accredited licences was also expressed during the Committee's public hearing with business representatives. According to Mr Ian Swann of the Plastics and Chemicals Industries Association (PACIA), the accredited licence approach is supported, although the issue of how to define performance remains to be addressed.[154] Kemcor gave even stronger support for the system, describing accredited licences as being highly valuable, despite a fairly minimal direct cost saving (a reduction of fees by 25%).[155] The benefits of the system are broader than mere financial rewards. The main benefit is the availability of a works approval exemption, which means that delays in work can be avoided.[156] As observed by Mr Ivan Wilson, the Health Safety and Environment Manager of Kemcor Australia, the ability to avoid delays is important:[157]

> We have an accredited licence for our elastomer site at Altona. Recently we installed a new drier at that plant—a major piece of equipment—and the ability to do that without works approval saved us the delay of six or nine months that would have been incurred if we had gone through the system. We were able to do that because we were replacing an existing drier and the emissions were lower than the bubble.

3.15 Furthermore, he indicated that efficiency has been achieved in obtaining an agreement for major projects as a result of the committee process within the Department of State Development. This is because under this framework Kemcor did not have to work individually with the various agencies:[158]

> There have been a number of positive outcomes along the way. A committee is now called together by the Department of State Development whenever the complex has a major project it would like considered. The new furnace I mentioned for our olefin site was considered by that

153 Submission no. 12.
154 Parliament of Victoria, Law Reform Committee, Public Hearing with Business Organisations, *Minutes of Evidence*, 7 Apr. 1997, p. 11.
155 ibid., p. 12.
156 See EP Act, s. 26D.
157 Parliament of Victoria, Law Reform Committee, op. cit., pp. 12 & 13.
158 ibid., p. 13.

> committee just before Christmas, and within a few hours we were able to obtain agreement on what was required. That would normally have taken many months to work through individually with the various agencies. The EPA told us that because we had an accredited licence for the old olefin site no works approval would be required.

3.16 Kemcor's commitment to the accredited licensee system has been extensive. It was the first company to obtain an accredited licence in late 1995, having previously been involved in developing the concept on the EPA's working committee.[159]

3.17 A number of potential benefits of the scheme were also reported by licensees surveyed in 1996. These benefits were:[160]

(a) increased flexibility;

(b) savings from implementing an environment management system, an environment improvement plan, and an environmental audit;

(c) licence fee reduction;

(d) marketing advantage;

(e) assisting with overseas investment.

3.18 According to Mr A'Hearn, the scheme can assist with overseas investment because 'markets, especially European markets, are increasingly looking for proven environmental credentials before doing business'.[161] The scheme may also have the benefit of allowing firms to build upon an environmental management system which they intend to implement, or already have in place. Mr Wilson, of Kemcor observed:[162]

> Putting in place the cornerstones that are required for an accredited licence provides a lot of benefits. The environmental management system for Kemcor is part of the integrated health and safety environment management system that we had been installing irrespective of this, and we have gained benefits from that. The environment improvement plan was in place for a period—three years—before we obtained an accredited licence, and because it was developed with the local community it has given us significant benefits in the community.

3.19 The scheme also has advantages for the EPA, in that it frees up its resources to deal with other matters. Mr A'Hearn observed:[163]

> The reduced demand on EPA resources in servicing the new system enables pressing problems such as diffuse pollution sources to be more effectively addressed within existing resource allocations. It also frees EPA resources to provide additional assistance to small

159 ibid., p. 12.
160 See submission no. 26.
161 T. A'Hearn, loc. cit.
162 Parliament of Victoria, Law Reform Committee, op. cit., p. 13.
163 T. A'Hearn, loc. cit.

> companies experiencing environmental problems.

Criticisms of the Accredited Licensee Scheme

3.20 One submission suggested that an appropriate level of regulatory effectiveness was not being achieved by the scheme because the performance standards were perceived as being minimum standards which were to be achieved all of the time. This results in 'varying degrees of "overkill" in implementing internal control measures, and corresponding escalation of the resources involved'.[164] The submission recommended that the scheme should be targeted towards a wider group of industries, than 'major petrochemical undertakings', and that there should be a 'more effectively targeted compliance base, while maintaining high focus on *essential* issues' [original italics].

3.21 Some submissions suggested that the procedure for accredited licences does not necessarily improve efficiency. One submission suggested that it 'helps the companies to co-operate and keep the regulators away from confrontation'.[165] This submission also described accredited licences as being a good idea which was fraught with the following danger:[166]

> It opens up the flood gates for big and powerful organisations to set higher and higher standards. They can afford to reduce the tolerability of risk.

3.22 The criticism that, owing to the costs involved, the scheme is only available to large corporations, was countered to some extent during the Committee's public hearing with business representatives. Ms Roper from the Australian Chamber of Manufactures commented on the possibility of flow-on effects to small business after large businesses have used the scheme:[167]

> The accredited licence scheme is recognised as helping only large businesses, but you need larger companies to put in the development resources to get it right. ACM [Australian Chamber of Manufactures] is examining it to see how it can translate the process at some future time so that it assists small business.

3.23 Despite concerns that small business may not benefit from the scheme, it may be inappropriate to judge its success by its ability to deliver flow-on benefits. This is because there are other more appropriate ways to encourage small business to

---

164 Submission no. 25.
165 Submission no. 7.
166 ibid.
167 Parliament of Victoria, Law Reform Committee, op. cit., p. 16.

comply with its obligations under the *Environment Protection Act*. The DPC in its submission described the regulatory regime as it applies to small business:[168]

> The EPA only currently licences those premises with the potential for significant environmental impact (currently about 1,200 premises in Victoria). Therefore, there are few small businesses in the licensing system. The EPA uses more appropriate tools to ensure that small businesses meet their obligations under the *Environmental Protection Act*. These tools would include the development of industry codes of practice and best practice environment management guidelines. The flexibility of the licensing system means that codes of practice and guidelines can also play an important role in setting licence conditions.

Assessing the Accredited Licensee Scheme

3.24 Presently there are only five accredited licences operating in Victoria.[169] The Town Planning Sub-Committee of the Property Law Section of the Law Institute of Victoria regards this number as being too small to enable the scheme's success to be judged.[170]

3.25 The Committee accepts that the small number of licences issued under the system means that any assessment of its effectiveness is somewhat tenuous. Nonetheless, the Committee has concluded that in general the accredited licensee system has been successful in meeting the regulatory objectives and efficiency. The success of the system lends support to extending the use of its key features to other regulatory regimes. The features which could be applied to other regimes are:

(a) The identification of the overall aims of the system.

(b) The identification of specific objectives which are to be achieved for the industry, the government department or agency, and the community.

(c) The identification of prerequisites for participating companies, with these prerequisites being targeted towards meeting the overall aim of the system. They would involve: a management system, an audit program, and an improvement plan.

(d) The opportunity to enable a specific performance regime to be approved as an alternative to the licence requirements.

---

168 Submission no. 26. The relevant part of the submission was prepared in conjunction with the EPA.

169 The EPA advised the Committee that accredited licences have been issued to: (1) Generation of Victoria Newport Power Station; (2) BHP Steel Pty. Ltd.; (3) Yarra Valley Water; (4) Kemcor Australia Pty. Ltd.; and (5) Yallourn Energy Ltd.

170 Submission no. 22.

(e) The requirement for incentives for industry to participate voluntarily by seeking approval for their specific manner of complying with regulatory objectives.

(f) The requirement for public annual performance reports, in order to verify whether businesses are complying with their approved licence performance requirements. Continuation of accreditation is then assessed based on the actual performance of the company in meeting the overall aims and standards.

(g) Accreditation of the performance requirements or licence by a third party that is skilled in systems management within the relevant field, with the decision to do so being based on standards agreed by the relevant department or agency.

Third Party Certification

3.26 Third party certification is a form of alternative compliance whereby certification within a regulatory regime is performed by a person or body other than the regulator. Two examples will be discussed: the system under the Victorian *Building Act 1993* and proposals currently being considered by the New South Wales Government.

Victorian Building Act 1993

3.27 Pursuant to section 76 of the *Building Act 1993* (Vic.) a private building surveyor can be appointed to carry out all or any of the following functions under the Act:

(a) the issuing of building permits;

(b) the carrying out of inspections of buildings and building work;

(c) the issuing of occupancy permits and temporary approvals.

Prior to the enactment of the *Building Act*, only building surveyors employed by municipal councils could perform these functions.

3.28 The Building Control Commission advised the Committee that as a result of these innovations, processing times for building permits have halved in many

cases.[171] Another result has been that insured building practitioners have benefited from significant reductions in premiums for professional indemnity cover.[172] The New South Wales Government has recognised Victoria's achievement in this area. In a recent Green Paper it noted that the Victorian model 'has resulted in lower fees, more flexible hours of service, and faster turnaround'.[173]

3.29 However, according to the submission from the Town Planning Sub-Committee of the Law Institute of Victoria, the system needs to be further refined. The following problems were identified:[174]

(a) There is a need for a mechanism to ensure that building approvals and planning approvals work together, so that buildings do not proceed without planning approvals.

(b) Where an application for a building permit is made to a private surveyor there is an increased potential for members of the public to be unaware of drains and sewers constructed by water and drainage authorities because the relevant records may not be readily available.

The Committee has been advised that these problems have been referred to the Planning Advisory Council for its consideration.[175]

New South Wales Options for Regulatory Reform

3.30 In February 1997 the New South Wales Government announced that it would shortly be introducing legislation into the State Parliament that would remove 'the labyrinth of red tape' in the New South Wales planning system. The proposals that were announced included a system of exempting minor building proposals from the more onerous approval processes and also the opening up of the approval process to third party certification.[176] So far as major projects are concerned, multiple assessment processes will be collapsed into one integrated approval. State

---

171 The Building Control Commission (BCA) advised the Committee that this was the finding of an independent survey commissioned by the Municipal Association of Victoria, which is the peak body for local councils.

172 The BCA advised the committee that, as a result of the reforms brought about by the *Building Act 1993*, a 'typical' minimum premium for $1 million cover for architects is now approximately a minimum of $600–$700 or about 1.3–1.5% on fee income, whichever is the greater. This compares with a premium of around $12,000 previously for $50,000 of fee income.

173 New South Wales Government, *Regulation Innovation – Regulation for Results*: *Discussion Paper*, May 1996, pp. 15–16.

174 Submission no. 22.

175 ibid.

176 P. Totaro, 'Huge planning shake-up to remove "'labyrinth of red tape"', *Sydney Morning Herald*, 13 Feb. 1997, p. 2.

Government agencies will provide their requirements at the time of development assessment. This will reduce the need for sequential assessments by different agencies.[177]

3.31 The announcement followed the release in May 1996 by the New South Wales Government of a discussion paper entitled *Regulatory Innovation: Regulation for Results*.[178] The discussion paper suggested that many of the criticisms of the regulatory framework resulted from its unresponsiveness to new technologies.[179] 'Traditional regulation-making processes are seen as slow, unresponsive, and imposing inappropriate requirements'.[180] This unresponsiveness is accentuated by a number of difficulties:[181]

1. rules and regulations are unnecessarily prescriptive even where there are circumstances which make alternative methods of compliance feasible;
2. many statutes fail to specify compliance standards in any meaningful way, so that businesses are unsure about the levels of compliance required and so 'over-comply';
3. current regulations are unable to recognise alternative compliance models in use in other jurisdictions, without statutory amendment;
4. the rapid emergence of new technologies enables the objectives of regulation to be satisfied in ways which were not anticipated when the regulation was first drafted;
5. government officials are slow to evaluate changes in technologies or have insufficient expertise to design compliance strategies which take advantage of these advances.

3.32 According to the discussion paper the typical response to these problems has been to redraft regulatory requirements in line with new developments. However, this can be a slow process.[182] The discussion paper makes the critical point that this approach to regulation reform means that 'government officials determine the review priorities, rather than the business and the community'.[183]

3.33 The discussion paper put forward five options for reform, including third party certification, which it defined as meaning:

> Third party certification allows a business to select the agent who will certify that a process or a piece of work has been carried out in the manner or to the standard prescribed by the regulation.

---

177 Parliament of New South Wales, Minister for Urban Affairs and Planning, Minister for Housing, *News Release*, 'Planning overhaul will abolish red tape', 12 Feb. 1997.
178 New South Wales Government, op. cit.
179 ibid., pp. 1–2.
180 ibid., p. 1.
181 ibid.
182 ibid., p. 2.
183 ibid.

The other options were: performance based regulation, negotiated rule making, class exemptions for small business and regulatory flexibility.[184]

3.34 Of these five options only third party certification has been pursued by the New South Wales Government to date. In February 1997 it released a White Paper and Exposure Draft Bill, entitled *Environmental Planning and Assessment Amendment Bill 1997*. The approach in the Bill appears to be based on the Victorian third party certification model which operates under the *Building Act 1993*.[185]

3.35 The discussion paper observed that several precautions were necessary to ensure the integrity of a third party certification system.[186] First, measures need to be in place to ensure that practitioners who carry out the certification are competent. Secondly, a compensation mechanism must be available to deal with situations where loss is suffered through the incompetence of the certifier. In this context, the Law Reform Committee observes that it may be necessary to require compulsory professional indemnity insurance cover for certifiers.

3.36 Although a number of submissions in response to the Green Papers expressed concern about the 'potential loss of public consultation and the professionalism/objectivity of certifiers when considering the merits of proposals',[187] submissions were generally supportive of regulatory reform aimed at increasing efficiency, consistency and certainty.[188] Third party certification was seen by the industry groups as being a way of reducing costs and delays.[189]

3.37 The draft Bill provides for a system of third party certification for the issuing of completion of building work certificates, complying component certificates, subdivision certificates and complying development certificates. The definition of an accredited certifier embodies the precautions suggested in the discussion paper.

3.38 According to the discussion paper, the use of third party certification is easier and appropriate where certification relates to technical matters, rather than those involving the exercise of discretion.[190] This aspect of the system has been recognised

184 ibid.
185 This third party certification model is discussed at paragraphs 3.26–3.29.
186 New South Wales Government, op. cit., p. 16.
187 ibid.
188 ibid., p. 35.
189 ibid., .p. 36.
190 ibid., p. 15.

in the Government's White Paper and draft Bill.[191] The information sheet on the draft Bill states that under the proposed system 'both applicants and consent authorities will be able to engage accredited certifiers to confirm or check compliance with procedural or technical aspects'.[192]

3.39 According to the White Paper the proposed system is intended to encourage competition by increasing the role played by the private sector in development assessment:[193]

> Another major feature of the Government's broad regulatory reform agenda is the implementation of policies to encourage competition. The draft Bill proposes to expand the role of the private sector in the development assessment process through the establishment of a certification scheme. The public interest will be protected through provisions covering issues such as liability and conflict of interest.

3.40 The success of the Victorian third party accreditation scheme and its adoption in New South Wales is yet another example of a process akin to an alternative compliance mechanism working well in practice. The key features of and the cautionary observations made regarding the Victorian and New South Wales schemes have been considered by the Committee during the framing of its model for alternative compliance mechanisms.

National Road Transport Commission's Proposed Scheme

3.41 The National Road Transport Commission (NRTC) was established by the *National Road Transport Commission Act 1991(Cwlth)*. Its role is to 'develop an acceptable policy framework and a package of uniform or consistent national rules and regulations for road transport'.[194] The NRTC reports to a Ministerial Council on Road Transport.[195]

3.42 The NRTC has been actively pursuing the concept of alternative compliance, which it defines as 'the use of voluntary alternatives to conventional methods of enforcement'.[196] It issued a discussion paper on alternative compliance in May

---

191 New South Wales, Department of Urban Affairs and Planning, *Integrated Development Assessment*, White Paper and Exposure Draft Bill, Environmental Planning and Assessment Amendment Bill 1997, Feb. 1997.

192 New South Wales, Department of Urban Affairs and Planning, *Integrated Development Assessment: Information Sheet*, p. 3 reproduced at <http//www.duap.nsw.gov.au>.

193 NSW, Department of Urban Affairs and Planning, op. cit., p. 6.

194 National Road Transport Commission (NRTC), *Annual Report 1996*, Melbourne, i.

195 *National Road Transport Commission Act*, s. 9.

196 NRTC, *Alternative Compliance Policy Proposal*, Melbourne, Mar. 1997, p. 1.

1994[197] and an interim regulatory impact statement on alternative compliance options in April 1995.[198] In February 1997 the final Regulatory Impact Statement (RIS) on *Alternative Compliance for Maintenance Management and Mass Management* was released,[199] and in March 1997 the *Alternative Compliance Policy Proposal* was circulated for public discussion.[200]

3.43 According to the NRTC there are three types of compliance: conventional enforcement, alternative compliance and licensing or mandatory accreditation.[201] The key advantage of alternative compliance arrangements is that they tend to be cost effective. These arrangements:[202]

> enable compliance to be tailored to specific requirements in circumstances where this may be cost effective. Faced with a choice between conventional and alternative compliance, operators will choose the option which enables them to achieve the greatest efficiency.

3.44 The NRTC's policy proposal sets out eleven key principles which were endorsed by the Ministerial Council in December 1994 as follows:[203]

1. Alternative compliance schemes should be measured against the objective of increased road safety, improved efficiency of road transport and reduced administration costs.
2. The scheme should be implemented and operated on a nationally uniform or consistent basis.
3. The scheme should be capable of audit by external parties.
4. The road transport industry should be involved in the development, implementation and operation of the schemes.
5. Access to the scheme should be non-discriminatory and be based on criteria that are objective and relevant.
6. Administrative actions under alternative compliance schemes should be subject to review, either through mechanisms determined within the scheme or externally.

197 NRTC, *Alternative Compliance: Discussion Paper*, Melbourne, May 1994.
198 National Road Transport Commission, *Interim Regulatory Impact Statement on Alternative Compliance Options*, Melbourne, May 1995.
199 NRTC, *Regulatory Impact Statement – Alternative Compliance for Maintenance Management and Mass Management*, NRTC, Melbourne, 1997.
200 NRTC, *Alternative Compliance Policy Proposal*, loc. cit.
201 ibid., p. 3; NRTC, *Alternative Compliance: Discussion Paper,* loc. cit.
202 ibid., pp. 3–4.
203 NRTC, *Alternative Compliance Policy Proposal*, op. cit., p. 3.

7. Sanctions should be appropriate to the offence and consistent with sanctions outside the scheme.

8. The schemes should be subject to public scrutiny, with information being accessible, and affected parties having an opportunity to comment on proposed schemes. For significant schemes there should be public consultation and a formal assessment of costs and benefits.

9. The process and frequency of review of the scheme should be specified, together with objectives and expected outcomes.

10. Vehicles, drivers and operators subject to the alternative compliance arrangements must be easily identifiable by enforcement agencies.

11. Agencies that recover the costs of the scheme from its members, should ensure that this is done in a way which allows operators to make decisions on the basis of the differential costs of the compliance options open to them.

3.45 In order to further refine the framework adopted by the Ministerial Council, the NRTC recently requested public comment as to whether or not these principles were still appropriate. The following additional themes were suggested for inclusion in the principles for alternative compliance:[204]

(a) National uniformity or consistency should be amended to better reflect that National schemes must be uniform while Non-national schemes may be based on non-uniform standards. non-national schemes would therefore be consistent.

(b) Audit requirements should not be unnecessarily onerous and should be capable of integration with other forms of audit.

(c) Public scrutiny consisting of public consultation and a formal assessment of impacts is required of all National schemes and significant Non-national schemes.

3.46 All these principles clearly have a much wider relevance than simply as applied to road transport regulation. Consequently, where relevant and with necessary modifications, they have been incorporated into the present Committee's model.

3.47 One of the challenges for those formulating ACMs in this area is that they must be made attractive to operators while maintaining public and industry credibility. During the Law Reform Committee's Twilight Seminar on Regulatory Reform, Mr Barry Moore, the NRTC Manager of Economic Policy and Project

[204] ibid., p.8.

Manager of Compliance and Enforcement, said that a key component for credibility is an external audit by a third party who is outside the road industry and the traditional enforcement schemes.[205] He observed that ACMs challenge the enforcement culture, but are rewarding because they enhance compliance levels and reduce the cost of complying.

3.48 A number of submissions to the Committee concluded that independent audit and external scrutiny of the ACM was necessary. The Road Transport Forum, the 'national voice of the trucking industry', said in its submission:[206]

> We believe it is fundamental that an informed sceptical observer should be entitled to receive an independent and unequivocal answer to the question "Is this Alternative Compliance Scheme Working?" We believe that the processes already launched through the Alternative Compliance Programs, and the structural elements that have been put in place ensure that this critical public goal is being met.

3.49 Notably, the Road Transport Forum said that the ability to withstand independent audit was one of four features of genuine alternative compliance. The other desirable objectives for such a scheme are that it should:[207]

> Achieve high quality outcomes,
>
> Transform the relationship between Regulatory Agencies and business,
>
> Provide flexibility and efficiency needed to achieve community goals.

3.50 The NRTC has three pilot programs, which give attention to performance standards, rather than prescriptive standards.[208]

1. **Mass**: If operators can demonstrate compliance with load limits then they are not pulled over and weighed.
2. **Maintenance**: This involves roadworthiness without roadworthy standards checks. Thirty operators have been participating in this pilot program.
3. **Fatigue management**. If an operator can demonstrate that the factors which lead to fatigue are being controlled then they are exempt from the prescriptive standard. In June 1997, there were six pilot operators who had been running for 4 years, and twenty operators wanting to

205 ibid., pp. 5–6.
206 Submission no. 15.
207 ibid.
208 ibid.

enter the scheme. The NRTC expects that the results of this third pilot program will be known by mid to late 1998.[209]

3.51 In its discussion paper, the Victorian Law Reform Committee observed that there were plans for a Bill to amend the *Road Transport Reform (Vehicles and Traffic) Act 1993* (Cth) in order to provide the 'hooks' for the adoption of alternative compliance mechanisms. The intention was that the enabling legislation would then form a template framework for other jurisdictions to adopt. More recently, the NRTC advised that although this has not occurred, an ACM package is to be put to a meeting of Transport Ministers in November 1997. The package is to include: the mass and maintenance schemes, and proposed drafting instructions for use by States and Territories when drafting legislation.

3.52 It is intended that a fatigue management program will be introduced in the future after the results of the current pilot study are known. The results are expected by mid to late 1998.[210] It should be noted that the RIS stage has already been completed with respect to mass and maintenance.[211]

3.53 Based on its work, the NRTC has suggested that there are two key factors which affect the viability of ACMs.[212] First, for ACMs to be able to be introduced there needs to be effective conventional enforcement in order to encourage people to go into the new ACM scheme. Secondly, ACMs need to be industry specific. For this reason, the NRTC has suggested to the Victorian Law Reform Committee that it consider the operation of pilot schemes in specific areas before moving towards the broader application of ACMs. The Committee discusses this issue in Chapter 5 and concludes not to restrict the operation of ACMs in this way.[213]

Conclusion

3.54 Although one really needs to await the outcome of the Ministerial Council meeting in November 1997, it appears from all accounts that the NRTC alternative compliance pilot programs have been a great success. Certainly, those submissions to

---

209 NRTC, *Alternative Compliance Policy Proposal*, Mar. 1997, p. 21.

210 ibid., pp. 20–21.

211 Kinhill Economics, *Regulatory Impact Statement – Alternative Compliance for Maintenance Management and Mass Management*, Prepared for the NRTC, 1997.

212 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Twilight Seminar, 11 June 1997.

213 See para. 5.9–5.19.

the present Inquiry which considered the NRTC's programs were very supportive of them.[214]

3.55 Accordingly, the Committee in presenting its model for the introduction of broad based Regulatory Efficiency Legislation in Victoria, which is detailed in Chapter 5, is fortified by the fact that the alternative compliance mechanisms discussed in this Chapter appear to have been so successful. Seen in this light, the Committee's proposal is not radical, but simply an extension of existing concepts into a broadly based scheme.

214 Submission nos. 15 & 21. See also the discussion of the use of ACMs in submission no. 16.

4 ALTERNATIVE COMPLIANCE: VICTORIA'S INITIAL PROPOSAL

4.1 Prior to the 1996 Victorian State election, the Victorian Office of Regulation Reform (ORR)[215] investigated the possible introduction of Regulatory Efficiency Legislation (REL) into Victoria. The ORR proposal relied heavily upon the Canadian Regulatory Efficiency Bill C-62 and sought to take into account the criticisms made by the Canadian Parliamentary Committee discussed in Chapter 2 of this report. ORR prepared an internal government working paper in which it set out its proposal for Regulatory Efficiency Legislation, the principal feature of which was the introduction of alternative compliance mechanisms (ACMs). As noted earlier,[216] an ACM is an instrument which provides for compliance with regulatory objectives by means other than those prescribed in the subordinate legislative instrument.

4.2 It was noted in Chapter 1[217] that the ORR proposal uses the concept of REL in its narrow sense to connote legislation which merely introduces a system of ACMs. However, the Law Reform Committee has adopted a broader view of the concept as encompassing a number of mechanisms directed towards making government regulatory processes more efficient **including** ACMs.

4.3 In approaching this Inquiry the Committee sought submissions, opinion and advice regarding the appropriateness of the ORR proposal for the introduction of ACMs. In the course of consultation the Committee has concluded that the ORR proposal is generally workable but requires significant amendment in order to make it a viable policy option for Victoria.

4.4 In this chapter the ORR proposal will be set out, followed by an examination of the submissions and evidence received in relation to it. The evidence and submissions received by the Committee indicate strong support for the introduction of ACMs in Victoria as part of Regulatory Efficiency Legislation.

---

215 Then within the Department of Small Business and now part of the Department of State Development.

216 Para. 1.20.

217 Para. 1.18.

4.5 In Chapter 5 the Committee presents a workable model for ACMs in Victoria. Informed by extensive consultations, the Committee has developed a model for ACMs which is applicable to the conditions in Victoria and adaptable to any OECD jurisdiction. Such a model would be introduced through a Regulatory Efficiency Act.

Victorian Office of Regulation Reform Proposal

4.6 The Victorian Government's Office of Regulation Reform proposed the enactment of REL in a working paper entitled *Regulatory Efficiency Legislation.* This working paper was released to the Committee by the Minister and together with the evidence provided by the then Director of ORR, Mr Rex Deighton-Smith, forms the basis for the discussion below.[218]

4.7 The ORR proposal has some additional safeguards lacking in the Canadian Bill. ORR emphasises the idea that the proposal does not involve any lowering of regulatory standards with an assurance that proponents of ACMs would, in all cases, be required to demonstrate that their proposals would meet the identified regulatory objectives and performance standards at least as effectively as the specific regulations that they seek to replace.[219] An ACM would not be approved if it would compromise any safety, health or environmental objectives of the relevant regulations. There is also a clear expression that principles of equality, fairness, competitive neutrality and government accountability will be respected and that government budgetary policy will not be compromised.[220]

4.8 The scheme outlined by ORR would apply only to statutory rules (within the meaning of the *Subordinate Legislation Act*)[221] specifically scheduled for the application of ACMs. Individual ministers would have the discretion to decide which, if any, of the regulations for which they have administrative responsibility would be subject to ACMs. A statutory rule would only be proposed for scheduling where it imposed an appreciable economic burden on business or another sector of the community.[222] The Minister who was proposing to schedule regulations would

218 Mr Deighton-Smith has subsequently joined the Public Management Service of the OECD.

219 See Victoria, Department of State Development, Office of Regulation Reform, *Working Paper: Regulatory Efficiency Legislation*, Melbourne, [1995], pp. 2–3.

220 The purposes and principles of the proposed Regulatory Efficiency Bill (REB) are set out in an annexure to the working paper (the Annexure). These 'general principles' are set out in para. 2.

221 Victoria, Department of State Development, Office of Regulation Reform, op. cit., Annexure, para. 4.

222 ibid., Annexure, paras 4–5.

be under a general obligation to consult with interested parties before a decision to schedule was made.[223]

4.9 The ORR proposal includes a requirement that the relevant Minister must prescribe all the relevant criteria that would be taken into account in deciding whether or not to approve an ACM. Certain minimum criteria are suggested, namely:[224]

(a) consistency with the stated statutory objectives;

(b) clear specification of the part(s) of the statutory rule(s) for which the ACM is to substitute;

(c) a clear explanation of the proposal, including a description of how the stated regulatory objectives would be achieved under the ACM and identification of businesses, activities or classes of persons to be subject to the ACM;

(d) adequate means of monitoring compliance with an ACM, including sufficient access to information necessary for monitoring performance.

4.10 The ORR proposal envisages that there will be a requirement that the Minister publish (including in a daily newspaper circulating generally throughout Victoria) details of the statutory rule that is proposed to be scheduled, the stated statutory objectives and all relevant criteria.[225] It also proposes that the relevant criteria should be open to review by the Scrutiny of Acts and Regulations Committee (SARC) of the Victorian Parliament, which would determine whether the criteria were adequate and whether they were consistent with both the stated regulatory objectives of the relevant statutory rule and the purposes and principles of the proposed Bill.[226] SARC, under the ORR proposal, would report its findings to Parliament without necessarily having any power to make a formal recommendation.[227]

4.11 The ORR proposal suggests that the Bill should provide that an ACM may vary government fees 'only to the extent that such changes are justified on the basis of variations to the costs incurred in providing the relevant services'.[228] All proposed changes to government fees would be subject to the prior approval of the Treasurer.[229]

---

223 ibid., Annexure, para. 5.
224 ibid., Annexure, para. 6.
225 ibid., Annexure, para. 7.
226 ibid., Annexure, para. 8 (first occurring).
227 ibid., p.15.
228 ibid., Annexure, para. 8 (second occurring).
229 ibid.

4.12 Approval of an ACM would not be possible unless the formal requirements discussed above had been satisfied. There would also be an obligation on the relevant department or agency to evaluate the ACM and recommend to the Minister whether or not it should be approved. Before making such a recommendation, the relevant department or agency would be required to consult with parties and groups affected directly and significantly by the proposed ACM (including other departments and agencies).[230]

4.13 If a Minister decided to approve an ACM, he or she would be able to do so for whatever period he or she thought appropriate in a given case. The Minister would be required to publish a notice of his or her approval and also to table such a notice in the Parliament. There would be an obligation on the relevant department or agency to make copies of the ACM available to the general public for inspection and purchase. There would also be an obligation on the proponent to inform all parties directly affected by the ACM (including the employees of the proponent, if relevant) of the details of the ACM.[231]

4.14 Approval of an ACM would be open to amendment and termination. The ORR proposal states that:[232]

> The relevant Minister(s) should have the power to vary, amend and extend the duration of an approved alternative compliance mechanism, *subject to the written consent of the proponent and reasonable notice being given*. [original emphasis]

4.15 The ORR proposal provides that a proponent can seek approval to 'amend, vary, extend or cancel' an ACM from the relevant Minister(s).[233] The relevant Minister should also have the power to terminate the approval for an ACM if there is clear evidence that the ACM has failed to be at least as effective as the regulations it has substituted. In such cases reasonable notice of termination and reinstatement of the original regulations is required to be given to the affected parties.

4.16 The ORR working paper indicates that copies of an ACM should be available to the public for inspection and purchase, though there is also a question posed as to whether section 35 of the *Freedom of Information Act 1982* (Vic.) would adequately protect commercially sensitive information.[234]

---

230 ibid., Annexure, para. 9.
231 ibid.
232 ibid., Annexure, para. 11.
233 ibid.
234 ibid., Annexure, para. 12.

4.17 It is clear to the Committee that the protection of commercially sensitive information is a significant issue because publication may involve divulging trade secrets. The ORR's working paper favours publication, partly on the basis of ensuring the 'transparency'[235] of the process and partly on the basis of the 'over-riding interest in ensuring the widest possible dissemination of new and more efficient compliance options'.[236]

4.18 The publication issue is also important to the ORR proposal for another reason—it operates to address the equity criticism that was levelled at the Canadian Bill:[237]

> If, as suggested above, all ACMs were to become public documents and be available to any competitors (subject to Ministerial judgement as to the appropriateness of their circumstances) there is little room for the situation of different compliance regimes among competitors to generate or endure, other than by choice.
>
> That is, new and smaller competitors, even if lacking the technical expertise required to develop an ACM (which is unlikely, given the broader demands imposed by the need to compete successfully with existing players) would be able to rely on ACMs previously approved for their competitors. Indeed, because they can adopt this at virtually zero cost, this can be seen as a subsidy for incumbent firms to new entrants. In that sense it may be reasonable to see the [alternative compliance] mechanism as being pro-competitive at the margin.

4.19 Under the ORR proposal outlined to the Committee, the ACM would operate to bind both the Government and the proponent to its terms. The legislation would contain a statement to that effect.[238] It is also proposed that a breach of the ACM would render the proponent liable to prosecution in the courts for a breach of the relevant statutory rule which the ACM was replacing and/or to be subject to the forfeiture of security deposits and/or any other penalty prescribed in any relevant guarantee.[239]

4.20 ORR proposed that there be a discretionary power on the part of departments to recover the costs incurred in providing services relating to the preparation, finalisation, evaluation and approval of a proposed ACM. It is also proposed that there be the capacity for departments to charge fees for any administrative action taken after the approval of an ACM, for example, where higher administrative costs are incurred or where requests are made to amend, vary, extend or cancel the approved ACM.[240]

---

235 ibid., p. 23.
236 ibid., p. 26.
237 ibid., p. 23.
238 ibid., Annexure, para. 12.
239 ibid., Annexure, para. 15.
240 ibid., Annexure, para. 13.

4.21 Finally, the ORR proposed that there should be a provision in the Bill that it be reviewed within 5 years of its commencement, at which time a report should be prepared, for tabling in the Parliament, on the operation and effectiveness of the Bill.[241]

Differences Between the Victorian ORR Proposal and the Canadian Bill

4.22 The Committee must give some weight to the concerns of the Canadian Scrutiny Committee. Accordingly, it is relevant to consider whether such concerns could apply to the Victorian ORR proposal. In this context, it is significant that Mr Deighton-Smith in his evidence to the Committee was most anxious to assure the Committee that ORR's proposal would not involve such problems.

4.23 In its proposal ORR attempts to address the concerns raised by the Canadian Scrutiny Committee in a number of ways. The ORR stresses the idea that to ensure public confidence in the regulatory system there is a need for any reform legislation to incorporate a high level of transparency, making the ACM process open to public consultation and scrutiny.[242]

4.24 The concerns expressed by the Canadian Committee regarding wide and unreviewable discretionary powers are answered by the ORR with a requirement for Parliamentary scrutiny and veto. The ORR accepts that while the Minister under their proposal does seem to have a sole discretion to reject or approve an ACM without provision of any formal appeal mechanisms, ACMs could become the subject of parliamentary scrutiny through SARC. Under the ORR proposal, the Bill would specify strictly limited grounds upon which scrutiny by SARC would be based. SARC would report to Parliament on whether the ACM conformed with the relevant published criteria for approval of ACMs and whether the criteria were capable of achieving the regulatory objectives.

Comments on the ORR Proposal

4.25 In general, the Committee has received positive feedback and useful suggestions on the implementation of ACMs in Victoria. However, despite the efforts by ORR to address some of the main criticisms levelled at the Canadian Bill, concerns regarding the ORR proposal have been expressed. These suggestions and criticisms

241 ibid., Annexure, para. 19.
242 ibid., p. 10.

have assisted the Committee in its deliberations and have been incorporated into the Committee's model for ACMs set out in Chapter 5.

4.26 On 13 February 1997, the Chairman of the Committee, Victor Perton MP, delivered a paper to the 4th Commonwealth Conference on Delegated Legislation in Wellington, New Zealand. The paper canvassed issues arising out of the Committee's present Inquiry and also outlined the general concept of ACMs. It generated considerable discussion.[243]

4.27 The following is a summary of some of the concerns and suggestions expressed in the discussion.

(1) It was suggested that while ACMs may work in areas such as the environmental field, where there is the benefit of having an agency like the Environment Protection Agency (EPA) which has broad skill, knowledge and power, the same may not be true of other areas of regulation that do not have an agency like the EPA.[244]

(2) As regulations are drafted to cover a broad range of people, there was also some concern expressed as to the status of ACMs. Do ACMs have the status of subordinate legislation or are they legislation with limited application made by the bureaucracy under delegated authority that Parliament does not believe it is party to?[245]

(3) On a political level, there were concerns raised about the impression in the community of the Government being pro-business. What would it take to convince the community that ACMs can be beneficial to both business and the community?[246]

(4) There were also suggestions that rather than ACMs, perhaps we should look at making regulations more simple and open ended. Regulations, rather than spelling a detailed set of actions, could simply require that the objectives of the regulation be met in the best possible way. This

---

243 The paper is reproduced at <http://www.vicnet.net.au/~lawref/nw/title.html>.

244 C. Carli, MP, Member of Victorian Scrutiny of Acts and Regulations Committee, *Transcript–4th Commonwealth Conference on Delegated Legislation*, Wellington, New Zealand, 10–13 Feb. 1997.

245 J. Sullivan, Deputy Chair, Queensland Scrutiny of Legislation Committee, *Transcript–4th Commonwealth Conference on Delegated Legislation, Wellington*, New Zealand, 10–13 Feb. 1997.

246 C. Carli, MP, loc. cit.

> would cut down regulations and would put the onus on the business to prove that it is meeting regulatory objectives in the best possible way.[247]

4.28 The Committee's Discussion Paper on Regulatory Efficiency Legislation raised a number of issues for discussion on ACMs.[248] The issues broadly elicited responses on the merits of the ACM proposal, the existing deficiencies such a proposal would address, and whether the ORR proposal adequately addressed the concerns raised in Canada.

4.29 Having widely distributed the Discussion Paper, the Committee sent a delegation to Canberra and Sydney to discuss the issues relating to Regulatory Efficiency Legislation with various agencies and government departments.[249] The delegation was heartened by the response it received in relation to ACMs, with support being expressed for the development of ACMs in Victoria because it has the longest-standing traditions of regulatory reform.[250] Similarly, the Committee's consultation with business[251] has indicated strong business support for the introduction of ACMs as part of REL into the Victorian regulatory environment. The Committee hosted a Twilight Seminar on regulatory reform where the response in relation to ACMs was again positive.[252] The Committee met with members of the Business Committee of the Attorney-General's Law Reform Council.[253] The members of the Business Committee present at the meeting expressed their personal support for the introduction of ACMs in Victoria. Many ideas and suggestions received from these various discussions have been incorporated in the Committee's model for ACMs.

4.30 The Committee received several suggestions for improving the ORR proposal. The Australian Competition and Consumer Commission suggested that proper

---

247 A. Bennett, Chair, United Kingdom Joint Committee on Statutory Instruments and Professor St John Bates, Clerk of Tynwald, Isle of Mann, *Transcript - 4th Commonwealth Conference on Delegated Legislation*, Wellington, New Zealand, 10-13 February 1997.

248 Parliament of Victoria, Law Reform Committee, *Regulatory Efficiency Legislation: Discussion Paper*, May 1997, para. 4.29.

249 Appendix D contains a list of the persons consulted during this trip.

250 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with Small Business and Consumer Affairs Division, Department of Industry, Science and Technology, 4 Jun. 1997; Meeting with Hon. Rod Kemp, Assistant Treasurer and David Parker, Assistant Secretary, Competition Policy Branch, Treasury, 4 Jun. 1997.

251 See for example, Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with BHP Steel, 12 Jun. 1997; Meeting with James Richardson Corporation, 26 May 1997; Meeting with Coopers & Lybrand, 22 Jul. 1997.

252 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Twilight Seminar on Regulatory Reform, 11 Jun. 1997.

253 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with the Business Committee of the Attorney-General's Law Reform Council, 29 Jul. 1997.

safeguards needed to be built into the process of granting ACMs to avoid granting the executive undue control and to ensure ministerial accountability.[254] The Commonwealth ORR had some concerns in relation to the efficient distribution of the net gains of the Victorian ORR proposal.[255] As noted in the previous chapter, Mr Barry Moore from the National Road Transport Corporation (NRTC) suggested that ACMs needed to be industry specific and that the Committee should adopt a similar approach to the NRTC in terms of 'piloting' ACMs in defined areas before allowing for broader application.[256] The Committee believes that these concerns and suggestions have influenced the design of its model for ACMs.

Submissions on Alternative Compliance Mechanisms

4.31 The Committee received written submissions from a varied range of individuals and organisations both nationally and internationally.[257] Of the submissions that dealt specifically with ACMs, the majority were in favour of the concept.[258] Most of these submissions agreed with the ORR proposal and acknowledge that the implementation of ACMs should only proceed if adequate safeguards are in place and if regulatory standards are not compromised. As the Road Transport Forum noted:[259]

> we believe there is a very good case for the enactment of a Regulatory Efficiency Legislation to facilitate the introduction of Alternative Compliance in a way which properly achieves the outcomes desired for the industry concerned (in our case road transport) and also provides adequate assurance to the community that the industry is subject to independent external review.

4.32 The Australian Institute of Petroleum supported the introduction of ACMs noting that many of their members were global businesses:[260]

> Global companies often institute technical, health, safety and environmental standards for their subsidiaries that at least satisfy, and often exceed, local regulatory requirements....Alternative compliance mechanisms should also serve to limit excessive and unnecessarily prescriptive regulation since they would enable businesses to opt out through

254 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with ACCC, 5 Jun. 1997, Canberra

255 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with Federal ORR, 4 Jun. 1997.

256 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Twilight Seminar on Regulatory Reform, 11 Jun. 1997.

257 See Appendix A.

258 Submission nos. 7, 9, 10, 13, 15, 16, 20, 21, 22, 24, 25 & 33.

259 Submission no. 15.

260 Submission no. 16.

> adopting alternative compliance procedures that had at least equivalent performance outcomes.

4.33 While there is strong support for the introduction of ACMs in Victoria, and despite the fact that the introduction of Regulatory Efficiency Legislation was part of the Government's election policy, the strongest criticisms of the ORR proposal and the concept of ACMs comes from the central government agency, the department of Premier and Cabinet.[261] SARC also expresses caution in relation to the concept of ACMs and believes that the checks and balances contained in the *Subordinate Legislation Act 1994* are adequate.[262]

4.34 The issues of concern in respect of the ORR proposal fall into four broad categories. They are the applicability and effect of ACMs on small business; ACMs in the context of National Competition Policy; executive control and ministerial accountability; and the use of commercially confidential information as part of ACMs.

Effect of Alternative Compliance Mechanisms on Small Business

4.35 The Department of Premier and Cabinet (DPC) seems to adopt many of the arguments of the Canadian Scrutiny Committee in relation to the disadvantages ACMs would pose for small business. In its submission the DPC argues that:[263]

> a key problem is that smaller firms may lack the expertise, time and financial resources to develop ACMs which are suitable for approval. At the very least they are likely to find this process more difficult than their larger competitors. This means that small business may be unable to tap into the cost savings which their large competitors enjoy by virtue of the fact that they are able to operate under a more efficient compliance regime.

4.36 SARC expresses similar concerns:[264]

> Based on the notion of regulatory efficiency, Government might enter a private ACM developed by a major company which has the advantage of enormous international resources. It might be so financially advantageous for the company that it wipes out all smaller competition.

4.37 This view is supported by two other submissions that argue that small business will not be able to take advantage of ACMs on the grounds of lack of

261 Submission no. 26.
262 Submission no. 32.
263 Submission no. 26.
264 Submission no. 32.

resources and expertise.[265] DPC also argue that large corporations are unlikely to want to share details of their ACMs with other competitors and that businesses may resist ACMs if they have to publish all the details in relation to an ACM.[266]

4.38 However, the evidence received by the Committee from business organisations counters these views. The representatives of small business support the proposal. At the Public Hearing organised by the Committee, representatives from the Victorian Employers' Chamber of Commerce and Industry (VECCI), the Plastics and Chemicals Industries Association (PACIA), the Business Council of Australia and the Australian Chamber of Manufactures acknowledged that while big business will have to take the lead with ACMs, there is no reason why this benefit will not be passed on to small business. PACIA gave examples of sharing programs that currently operate whereby large corporations identify smaller partners in the same industry to share their knowledge:[267]

> One of the programs PACIA is running at the moment in conjunction with the Workcover Authority is a sharing program. A number of the larger companies in the chemicals industry have identified smaller partners. Borden, a small company in Laverton is an example and there are seven or eight of those developed to date. The Workcover Authority is trying to spread that concept beyond the chemical industry to other industries.

4.39 Similarly, the Australian Chamber of Manufactures noted:[268]

> We have a program with the Environment Protection Authority called the EPA-ATM plant production training program which gets larger companies to help smaller companies develop cleaner production techniques.

4.40 Another counter-argument to the DPC view is propounded in a submission by Mr Stephen Pathmarajah, a Ph. D. student and consultant in the United Kingdom:[269]

> Most of the pressure for reducing the regulatory burden comes from the trade associations who represent the small business rather than actual complaints from small business themselves.... (ACMs do) give equality to all operators in that it allows them to meet the size of their operation. If a blanket regulation is being imposed then the small business with minor hazards will be subjected to the same level of regulations as the high hazard operations.

4.41 By making ACMs public documents and by encouraging industry groups to negotiate and draft ACMs on behalf of their members, the Committee's model does

---

265 Submission nos. 1 & 20.
266 Submission no. 26.
267 I. Wilson, Parliament of Victoria, Law Reform Committee, Public Hearing with Business Organisations, *Minutes of Evidence*, 7 Apr. 1997, p. 19.
268 A. Roper, ibid.
269 Submission no. 7.

address the concerns expressed in relation to small business. The Committee shares ORR's views that, by making ACMs public documents, smaller competitors will be able to rely on ACMs developed by larger competitors.[270] Moreover, ACMs, because they focus on regulatory ends rather than prescriptive means, provide the ideal catalyst for performance based regulation. To this end the Committee later proposes that where three ACMs are made in relation to any regulation, then that regulation would sunset so as to provide the opportunity for the new regulations to incorporate the principles of the ACMs. In this way, small business will benefit not only from the public nature of ACMs, but also from innovators of ACMs moving prescriptive regulation towards performance based regulation.

Alternative Compliance Mechanisms in the Context of National Competition Policy

4.42 The DPC suggests that ACMs may represent a restriction on competition because it 'may raise barriers to entry into the market by giving incumbent firms a competitive advantage which potential entrants are unable to match'.[271] SARC also indicates that the 'competitive neutrality of regulations is (a)... key issue which could be skewed by ACMs'.[272] A submission made by Luminico supports this point and adds that if an ACM confers a competitive advantage on a business, an aggrieved party may view this as an act of 'preferential treatment'.[273] The DPC also points out that there are currently 200 regulations to be reviewed under National Competition Policy by the year 2000. It believes that it is essential that any regulatory reform does not clash with the reviews under National Competition Policy.

4.43 However, the Committee's discussions with the Australian Competition and Consumer Commission (ACCC) contradicted this view. While there was a suggestion that competition could form one of the legislative criteria for approval of ACMs, the ACCC did not consider ACMs as placing restrictions on competition. In fact, Professor Fels, the Chair of the ACCC, said that in one sense the ACM concept represented 'competition within regulation'.[274] The Committee believes that since ACMs would be public documents, the ability to adopt ACMs at minimal cost can be perceived as providing a subsidy for new entrants into the market and in this sense it can be characterised as being a mechanism that encourages competition. Moreover,

---

270 Victoria, Department of State Development, Office of Regulation Reform, op. cit., p. 23.
271 Submission no. 26.
272 Submission no. 32.
273 Submission no. 20.
274 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with ACCC, 5 Jun. 1997.

the Committee believes that its model for ACMs will complement rather than clash with any reviews of regulation under competition policy.

Ministerial Accountability

4.44 Despite the ORR proposal's attempt to place safeguards such as tabling and Parliamentary scrutiny of ACMs, some submissions still expressed concern around ministerial accountability. One Submission viewed giving a Minister the power to approve ACMs as part of a broader trend:[275]

> There are numerous examples of this move away from the overall Parliamentary control to allowing elected Parliamentarians, as Ministers, to make decisions about a wide range of matters when all acknowledge that individual politicians tend to make expedient decisions to suit their own interests....This trend places the Parliament in the unwelcome position of defending charges of ministerial incompetence and vested interest decision making. To have Parliamentary Ministers add ACM decisions to this already questionable practice places them in a direct line of fire for increased charges of vested interests, possibly allegations of corruption...

4.45 Similarly, the DPC submission suggests that the ORR proposal for 'Regulatory Efficiency Legislation risks placing Ministers in an invidious position':[276]

> [T]he fact that a Minister may have to reject aspects of one scheme while approving of another will inevitably open the Minister up to allegations that he or she is favouring one business over another.

4.46 The essence of subordinate legislation is that the Minister or other rule-maker exercises the delegated power of the Parliament. The Committee notes that there are many areas where Ministers have discretion to exempt individuals or sections of the community from the strict operation of the law.[277] The Committee further notes that Ministers are often in a position of being the ultimate decision-maker on the granting of licences.[278]

4.47 The Committee also believes that its model for ACMs has appropriate safeguards built into the system to avoid, as much as possible, the dangers alluded to in the above submissions. The Committee's model for ACMs would involve two

---

275 Submission no. 1.

276 Submission no. 26.

277 See e.g., *Planning and Environment Act 1987* (Vic.), s. 20 (Planning Schemes).

278 E.g., a Minister with power to give financial grants to industry is in a position to show favouritism to one industry over another.

Ministers (the Minister responsible for the regulation[279] that is the subject of the ACM; and the Minister responsible for Regulatory Efficiency Legislation) together determining the criteria for approval and whether to approve or reject an ACM. Moreover, safeguards suggested by the Committee for ACMs are **at least** as stringent as they are in relation to subordinate legislation. An ACM would have to be published, tabled in both Houses of Parliament and would be subject to Parliamentary veto and scrutiny by SARC in a similar process to that followed with all regulations.

Commercial Confidentiality

4.48 The use of commercially confidential information has been highlighted as an issue that could restrict the use and benefits of ACMs. SARC suggests that:[280]

> in relation to commercial-in-confidence ACMs, the...possibility of Ministers facing bias and corruption charges could arise because of there being no public checks and balances in place for such documents.

4.49 The DPC Submission surmised that commercially sensitive information provided along with or as part of an ACM would be protected by the *Freedom of Information Act 1982* in most circumstances. The only risk of disclosure of such information would be if there was a compelling public interest that overrode the public interest in maintaining the ACM.[281] However, the Department was also of the view that 'the ultimate public interest will be best served if this public interest override is maintained and allowed to apply to information provided under an ACM'.[282]

The Committee agrees with this point and believes that the success of the ACM framework lies in the transparency and accountability built into the process. The Committee is keen to encourage best practice performance based solutions to the regulatory burden faced by business. The Committee believes that this can only be achieved if the process is accessible and open to all stakeholders. To this end the Committee's model for ACMs requires that the whole ACM be a public document that be tabled and published. In circumstances where the ACM relies on technology or a process that has intellectual property attached to it, then the ACM would have to

---

279 'Minister responsible for the regulation' is a shorthand term used by the Committee to mean the Minister responsible for the legislation (in accordance with the *Administrative Arrangements Act 1983*) under which regulations are made.

280 Submission no. 32.

281 Submission no. 26.

282 ibid.

contain a licensing regime for potential users of the ACM. Detailing these and other components of the Committee's model for the introduction of ACMs in Victoria will be the focus of the next chapter.

5 ALTERNATIVE COMPLIANCE: THE COMMITTEE'S MODEL

5.1 As noted in Chapter 1, the Committee has sought to ensure it received expert advice and opinions and has consulted the stakeholders in relation to the introduction of alternative compliance mechanisms (ACMs) into Victoria. It has conducted a series of meetings with relevant federal, interstate and overseas agencies. The Committee has held a public hearing for representatives from business organisations, a Twilight Seminar on regulatory reform and has met with regulatory officers from all Victorian Government Departments to discuss the proposal. The Committee has also met with the heads of several of the largest businesses in Victoria to aid the consultation process. As noted in Chapter 4, the thrust of the evidence received is that ACMs have the greatest chance of success in Victoria where there has been a history of regulatory reform.

5.2 The Committee has received evidence that Victoria already has some positive experience with alternative compliance in action in the form of the accredited licensees system under *the Environmental Protection Act 1970*. As discussed in Chapter 3 the accredited licensee system enables a business that can demonstrate a high level of environmental performance and ongoing ability to maintain and improve that performance, to be exempt from prescriptive works approval and licensing requirements.

5.3 In this chapter the Committee sets out its model for the introduction of ACMs in Victoria. The Committee's model for ACMs has extensive safeguards to ensure that regulatory objectives are not compromised while providing for increased efficiency and flexibility for business in Victoria. The Committee's model for ACMs includes general application of ACMs to all existing regulations that have required a regulatory impact statement (RIS) under the *Subordinate Legislation Act 1994*, and to all future regulations.

5.4 Under the Committee's model the Minister responsible for Regulatory Efficiency Legislation (REL) and the Minister responsible for the regulation that is the subject of an ACM act jointly as the decision-makers in relation to granting the ACM.

REL would contain minimum criteria for the approval of ACMs. The ACM and criteria for approval would be published, would invite public comment and, upon approval, would be tabled in both Houses of Parliament. The Scrutiny of Acts and Regulations Committee (SARC) would scrutinise the ACM using similar criteria to those it uses with respect to subordinate legislation. Breach of an ACM would be treated as a breach of the original regulation, but the responsible Ministers would also have a discretion to impose additional civil penalties if necessary.

5.5 Under the Committee's model, the Minister responsible for the regulation that the ACM is subject to (in consultation with the Minister responsible for REL) can vary, suspend or terminate an ACM, as long as reasonable notice has been provided to the proponents. The notice provision can be waived in circumstances where the public interest warrants such action. Under the Committee's model, the ACM would sunset at the same time as the regulation it supersedes. Where a regulation that is the subject of ACMs sunsets, there would be a fast-track mechanism for approval of any replacement ACM so long as the regulatory objectives of the new regulations remain unchanged or are otherwise fulfilled. Where a regulation which is the subject of an ACM sunsets, the RIS must give reasons for why the ACM was not incorporated in the new regulation. To aid the move towards performance based regulation, where three ACMs have been granted in relation to any regulation, that regulation would sunset so that the procedures contained in the ACM could be incorporated into a new regulation. The introduction of ACMs would have to be reviewed within five years.

5.6 Having considered the evidence and submissions, the Committee believes that ACMs will have a fairly narrow operation. The Committee envisages that ACMs would provide the ideal mechanism for businesses subject to, or utilising, rapidly developing technology where prescriptive, command and control type regulations quickly become obsolete and may impede progress. As the OECD has noted:[283]

> Regulation directly affects the innovative process, while innovation and technical change have significant impacts on regulation. To be successful, regulatory reform efforts must take into account the linkages between regulation and innovation.

5.7 The Committee believes that ACMs have the ability to make use of these linkages between regulation and innovation for the benefit of business and the general community of Victoria. ACMs provide for co-regulation where Government and business negotiate the most appropriate means of meeting regulatory objectives.

---

283 OECD, DSTI, *Regulatory Reform and Innovation,* p. 7, reproduced at <http://www.oecd.org /dsti/regref.pdf>.

They also allow for increased community input in the analysis of regulations and alternatives. Most importantly, the Committee believes that ACMs can provide the impetus and acceleration required to achieve the ultimate aim of performance basedperformance- regulation.[284]

5.8 While the Committee's consultations have clearly emphasised the need for regulatory flexibility, the challenge is to find the right mix of checks and balances in the system without complicating the process to the point where it loses its benefits. The Committee recognises that if the proposal is ultimately adopted in Victoria, it will only succeed if it ensures maximum transparency and accessibility to the general public and, in turn, maximum accountability of the Government to the electorate.

Starting the Alternative Compliance Scheme and Coverage

5.9 In formulating a model for ACMs, one of the first issues faced is how such a scheme would be started and the appropriate level of coverage. The Committee has carefully considered several options regarding these issues.

5.10 The options considered for commencing the scheme include:

a) using existing provisions for sunsetting of regulations under the *Subordinate Legislation Act* as a trigger for ACMs;

b) enabling Ministers to schedule regulations where ACMs would apply;

c) nominating industries or portfolios to begin the ACM scheme;

d) piloting ACMs in specific areas; and

e) bringing all existing regulations within the ACM framework by deeming the regulatory objectives specified in the RIS process[285] as being the regulatory objectives for the purposes of ACMs.

5.11 It was noted earlier in Chapter 2[286] that Victoria has a system whereby regulations are automatically revoked after ten years. This process is termed 'sunsetting' of regulations. The option of using this mechanism as a trigger for ACMs would involve utilising the schedule from the *Subordinate Legislation Act 1994*. The

---

284 As discussed later in this Chapter, towards this end the Committee has decided that once there are three ACMs in relation to a regulation, the regulation sunsets with the view of rewriting it in performance based terms to ensure the necessary flexibility. Alternative compliance mechanisms, if introduced, will also be reviewed within five years of their introduction.

285 For a discussion of the RIS process, see Chapters 6 & 7.

286 See paras. 2.61–2.69.

next regulation to come up for revocation and review would be the next regulation on the schedule for the applicability of ACMs. The Committee believes that this option would be haphazard and lacks a systematic approach. As regulations in Victoria sunset after ten years, it could be years before regulations that are suitable for ACMs, or that affect business, come up for sunsetting and therefore ACMs. This is not a workable option.

5.12 The next option considered was put to the Committee by ORR in its proposal. ORR suggests that individual ministers should have the discretion to determine which, if any, of their regulations would be subject to ACMs. Regulations to which ACMs would apply would be identified using a published schedule.[287] The advantages in using this option is that the effectiveness of ACMs could be evaluated at the level of individual sets of regulations, that it would be administratively more manageable and would allow for a cautious approach to implementation. However, the Committee recognises the importance of public confidence for the successful implementation of REL and believes that this option could attract the criticism of allowing undue ministerial discretion. In light of the Canadian criticisms and the concerns expressed to the Committee by various organisations on the need to minimise ministerial discretion,[288] the Committee believes that this is not the preferred option.

5.13 The Committee has also considered using an industry by industry approach or a pilot program to begin the ACM scheme. These options have a number of benefits including a systematic approach to evaluation and implementation and a focused effort of introducing ACMs to industries. A pilot scheme may also have the benefit of averting some public criticism since it would provide the public with an opportunity of determining whether ACMs can work and would allow for further input into whether the scheme should be broadened for wider application. However, the Committee believes that a major disadvantage in these approaches is that it would inevitably privilege some industries or businesses over others. There is also the potential for controversy in relation to which industries are chosen and who determines this choice. The Committee is keen to ensure that all businesses in Victoria can take advantage of the flexibility inherent in ACMs regardless of their resources, size or field of operation. In light of the lack of equality in these approaches, the Committee has decided against these options.

---

287 Victoria, Department of State Development, Office of Regulation Reform (hereafter 'ORR'), *Working Paper: Regulatory Efficiency Legislation*, Melbourne, [1995], p. 3.

288 Submission nos. 1 & 26; Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with ACCC, 5 Jun. 1997, Canberra.

5.14 The final option considered was to bring in existing regulations by deeming the regulatory objectives identified in the RIS process as the objectives to be met by ACMs. One great benefit that Victoria has is that all regulations have sunsetted and have gone through a process of review whereby regulatory objectives have had to be identified. These objectives would become the basis for ACMs, for all regulations that have sunsetted. ACMs would apply to all regulations that have gone through the RIS process and have identified objectives. Utilising such an approach would also require that all future regulations contain clearly articulated regulatory objectives. The major advantage of this option is that it allows for general equal application of ACMs and removes discretionary powers. The Committee believes that this is the most practical and workable method of beginning the scheme.

5.15 In so far as coverage of ACMs is concerned, the Committee considered:

a) allowing ACMs to apply to all regulations under the *Subordinate Legislation Act 1994*;

b) allowing ACMs to apply to 'quasi-regulation' in addition to regulations under the *Subordinate Legislation Act 1994*;

c) limiting coverage to those regulations that affect a particular industry or pilot area.

d) limiting ACMs to those regulations that affect business;

e) excluding those regulations that are procedural or impose a fee or tax;

5.16 In considering the second and broadest option of allowing ACMs broad general applicability to all regulations and 'quasi-regulation', the Committee noted the efforts at the Commonwealth level to address the burden imposed by quasi-regulations. The Small Business Deregulation Task Force recommended that all future quasi-regulation be subject to cost-benefit analysis.[289] The Government's response entitled *More Time for Business* noted the significant effect of quasi-regulation on business, but decided that more work was required on the issue.[290]

To this end, the Federal Government has set up an inter-departmental committee, chaired by the Commonwealth ORR. In its discussions with government departments in Canberra, the Committee heard that there has been much difficulty in categorising

289 Recommendation 57, Small Business Deregulation Task Force, *Time for Business*, AGPS, Canberra, 1996. This report is reproduced at <http://www.dist.gov.au/smallbus/sbtf.html>.

290 Hon J. Howard, MP, *More Time for BusinessStatement by the Prime Minister, the Hon John Howard MP 24 March 1997*, AGPS, Canberra, 1997, p. 74. The statement is reproduced at <http://www.dist.gov.au/smallbus/moretime/index.html>.

quasi-regulation.[291] While it is generally defined to be a category of rules that does not have the force of law but nevertheless has some governmental force, there remains a level of confusion as to what rules are actually covered by such a term, whether they are binding, and the consequences arising from their breach. In light of the amorphous nature of quasi-regulation, and since not all rules are necessarily appropriate for ACMs, the Committee has decided that this option would be too difficult to implement in the short term.

5.17 The Committee also closely examined the option of piloting ACMs in certain industries or nominating industries where ACMs could apply. The benefits and disadvantages of these options have been outlined above in paragraph 5.13. The Committee has rejected these options because it wishes to encourage as wide a use of ACMs as possible, without causing further confusion in the regulatory arena.

5.18 The Committee considered limiting the ACMs to those regulations that affect business and excluding regulations that impose a fee or tax. The attraction of these options lies in the fact that they narrow the application of ACMs. However, as ORR pointed out in its proposal, these options bring in too many definitional problems that could frustrate the operation of REL in general.[292]

5.19 Ultimately, the issues of coverage and starting the ACM scheme are interrelated. As the Committee has decided to adopt the option of deeming the regulatory objectives specified in the RIS process as those to be met by ACMs, the ACM framework will apply to all regulations under the current *Subordinate Legislation Act 1994* that have required an RIS. The advantage of using this option is that it will apply equally across industries while limiting the applicability of ACMs to those regulations that have been subject to an RIS. Regulations that have sunsetted but have not required an RIS are minor procedural regulations which are unlikely to be appropriate for ACMs. The use of the objectives identified in the RIS process for ACMs will also encourage regulators to focus on regulatory objectives in drafting new regulations.

Recommendation 2

The system of alternative compliance mechanisms should apply to all regulations under the* Subordinate Legislation Act 1984 *(Vic.).

---

291 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with Federal ORR, 4 Jun. 1997, Canberra; Meeting with Small Business and Consumer Affairs Division, Department of Industry, Science and Technology, 4 Jun. 1997, Canberra.

292 ORR, op. cit., pp. 8–9.

Recommendation 3

All regulations made after the commencement of Regulatory Efficiency Legislation should contain clear regulatory objectives which will be the objectives for the purposes of alternative compliance mechanisms.

Recommendation 4

Where a regulation does not contain regulatory objectives—that is, any regulation enacted prior to the commencement of Regulatory Efficiency Legislation—the regulatory objectives for the purposes of alternative compliance mechanisms should be the objectives specified in any regulatory impact statement referrable to the regulation.

Obtaining an Alternative Compliance Mechanism

5.20 The Committee believes that the ACM proposal must not involve any inappropriate delegation of legislative power to the Executive Government. It is necessary for the Minister to be accountable to the Parliament and the general public for any exercise of that power. Due to the concerns expressed on the issue of ministerial accountability, the Committee has adopted a dual Minister process for determining the criteria for approval and whether an ACM should be approved. Under this process, the Minister responsible for REL and the Minister responsible for the regulations being 'superseded' by the ACM will jointly act as the decision-makers in relation to the criteria and approval of ACMs. The 'Minister responsible for regulations' is a shorthand term used by the Committee to mean the Minister responsible for the legislation (in accordance with the *Administrative Arrangements Act 1983*) under which the regulations in issue are made. Accountability would also be achieved by ensuring that proposed ACMs—and the criteria by which they are to be judged—are published and subject to input from stakeholders and the public.

5.21 The Committee believes that any person should be permitted to apply for an ACM. To obtain an ACM the applicant would apply to the responsible Ministers. The Committee has received some evidence suggesting that REL should enable industry organisations to design and prepare ACMs for their members.[293] Allowing industry organisations to assist with ACMs would be advantageous to small businesses which may lack the appropriate expertise, time or financial resources. It is the Committee's view that industry groups should be encouraged to negotiate with government and draft ACMs on behalf of their members. However, the Committee recognises that

---

293 Submission no. 10; Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Inter Governmental and Regulatory Reform Unit, Cabinet Office, 6 Jun. 1997, Sydney.

businesses would have to individually seek approval of the ACM so as to be bound by its terms.

5.22 The ACM would be subject to independent certification in a similar fashion to the RIS process. However given that expertise in the area is yet to be established, in the early stages of operation of REL, ORR is the most appropriate organisation to certify whether or not the ACM meets the regulatory objectives of the regulation it supersedes.

5.23 To determine whether an ACM should be approved, the ORR's working paper suggests that broadly applicable criteria be written into REL and that further criteria be left to ministerial discretion.[294] The ACCC, however, suggested that REL should have fairly clear and extensive legislative criteria or trigger questions for approval of ACMs to reduce concerns regarding ministerial accountability.[295]

5.24 The Committee agrees with both these views to the extent that it believes that REL should contain some legislative guidelines for the approval of ACMs. Given the individual nature of ACMs, and since each ACM may depend on varying technical criteria, the Committee believes that the legislative criteria for approval of an ACM should be broad. Additional criteria would be left to dual-ministerial discretion, but would have to be published along with the proposed ACM. REL should provide for certain broad 'minimum criteria' in relation to a proposed ACM to the following effect:

(a) Every ACM should be consistent with regulatory objectives and meet the identified regulatory objectives at least as effectively as the specific regulations they seek to supersede.

(b) A clear explanation of the proposed ACM, including a description of how the stated regulatory objectives will be achieved under the ACM together with the identification of businesses, activities, or classes of persons subject to the ACM, should be published.

(c) An ACM should not be approved where it would compromise any safety, health or environmental objectives of the relevant legislation.

294 ORR, op. cit., Annexure, para. 6.

295 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with ACCC, 5 Jun. 1997, Canberra.

(d) An ACM should not be approved where it would restrict competition, unless the benefits of the restriction to the community outweigh the costs.[296]

(e) Every ACM should allow for adequate means of monitoring compliance including sufficient access to such information as may be necessary to monitor compliance.

replace;

legislation;

costs

compliance.

5.25 The Committee is keen to ensure that the decision-making process and gaining approval of an ACM occurs in an efficient manner. To this end, the Committee has decided that failure to make a decision in relation to a proposed ACM within three months should be deemed to be a rejection of the ACM. The Committee believes that the failure to make a decision cannot be deemed to be an approval of an ACM because to do so would lead to uncertainty in relation to the existence of ACMs and would defeat the need for a transparent and public process.

Recommendation 5

There should be a Minister responsible for the administration and operation of Regulatory Efficiency Legislation.

Recommendation 6

An alternative compliance mechanism should not be granted unless the Minister responsible for Regulatory Efficiency Legislation and the Minister responsible for the regulation that is to be the subject of the proposed alternative compliance mechanism ('the responsible Ministers') jointly decide to grant the alternative compliance mechanism.

Recommendation 7

Any person who is the subject of a regulatory regime should be entitled to apply to the responsible Ministers for the grant of an alternative compliance mechanism.

296 ibid. Also suggested in Submission no. 19.

Recommendation 8

Any member of an industry body should be entitled to authorise the industry body:

- ***(a) to draft an alternative compliance mechanism on the member's behalf; and***
- ***(b) to negotiate with the responsible Ministers on the member's behalf.***

Recommendation 9

A copy of every application for an alterative compliance mechanism should be made available to the Office of Regulation Reform, which should certify whether or not the alternative compliance mechanism meets the regulatory objectives of the regulation(s) it supersedes.

Recommendation 10

Regulatory efficiency legislation should incorporate the following minimum criteria:

- ***(a) Every alternative compliance mechanism should meet the identified regulatory objectives of the regulation it supersedes at least as effectively as the regulation does.***
- ***(b) A clear explanation of the proposed alternative compliance mechanism, together with the identification of businesses, activities, and classes of persons subject to it, should be published. The explanation should include a description of how the stated regulatory objectives will be achieved under the alternative compliance mechanism.***
- ***(c) An alternative compliance mechanism should not be approved where it would compromise any safety, health or environmental objectives of the regulation it supersedes or any other relevant legislation.***
- ***(d) An alternative compliance mechanism should not be approved where it would restrict competition, unless the benefits of the restriction to the community outweigh the costs.***
- ***(e) Every alternative compliance mechanism should allow for adequate means of monitoring compliance including providing sufficient access to such information as may be necessary to effectively monitor compliance.***

- ***replace;***

-
- ***legislation;***
- ***and***

Recommendation 11

The responsible Ministers should be empowered to determine additional criteria for the approval of alternative compliance mechanisms.

Recommendation 12

The responsible Ministers should advise the applicants for an alternative compliance mechanism of the result of the application within three months of its lodgment. Failure to make a decision whether or not to grant an application within three months should be deemed to be a rejection of the application for an alternative compliance mechanism.

Publication of Proposed Alternative Compliance Mechanisms

5.26 The Committee believes that the proposed ACM and the criteria for approval should be published and invite public comment in line with the requirements of an RIS. Section 11 of the *Subordinate Legislation Act 1994* sets out those requirements whereby the responsible Minister must publish in the Government Gazette, daily newspapers and (where appropriate) trade, professional or public interest publications, a notice in relation to an RIS. The notice must incorporate the reasons and objectives of the proposed regulations, summarise the results of the RIS, and specify where an RIS can be obtained. Moreover, the Minister must invite comments and submissions within 28 days. The Committee believes that this is an appropriate way to publish and seek public participation in relation to ACMs.

5.27 The Committee has used the internet very effectively during the course of this Inquiry. The Committee has received several email submissions and has elicited comments and submissions from all around the world.[297] In the Committee's view ACMs and the criteria for approval should be published as described above and on the internet where possible.

[297] See Appendix A.

Recommendation 13

***All proposed alternative compliance mechanisms and the criteria for approval should be published and public comment sought in accordance with the requirements currently contained in section 11 of the* Subordinate Legislation Act 1994.**

Recommendation 14

Regulatory Efficiency Legislation should provide for the electronic publication of alternative compliance mechanisms on the Victorian Government's website.

Tabling, Disallowance and Scrutiny

5.28 To ensure the system remains transparent and accountable, it is the Committee's view that a decision to approve or reject an ACM should be published by notice in the Government Gazette and a daily newspaper circulating throughout Victoria. Consistent with the *Subordinate Legislation Act 1994*, where the ACM is rejected, the notice must be published as soon as practicable after the decision is made and where the ACM is approved, the notice must be published before the ACM comes into effect.

5.29 The Committee believes that once approved an ACM should be subject to tabling and disallowance in the same manner as a subordinate instrument. The ACM, the regulatory objectives it supersedes and the criteria for approval should be tabled in both Houses of Parliament. As is the case with subordinate legislation, any member of Parliament could move for disallowance in relation to an ACM.

5.30 The ACM would also be subject to scrutiny by the Scrutiny of Acts and Regulations Committee (SARC). The Committee has considered the criteria for Parliamentary scrutiny of ACMs. The ORR suggests that SARC should scrutinise ACMs against very narrow criteria. SARC would look at whether the ACM fully conforms with the published criteria and whether the published criteria describes and provides for the achievement of the regulatory objectives. Under the ORR proposal, SARC would report any findings to Parliament, but unlike their role in relation to subordinate instruments,[298] SARC would have no formal recommendation powers.

5.31 The Law Reform Committee believes that Parliamentary scrutiny is extremely important in ensuring the success of ACMs and protection of the public interest. The

[298] *Subordinate Legislation Act 1994 (Vic.*), s. 21 (2).

consultations conducted and submissions received echo this need for proper Parliamentary scrutiny.[299] The Committee believes that it would be more appropriate for the criteria for scrutiny of ACMs to be based on section 21 of the *Subordinate Legislation Act 1994*, which provides for review of statutory rules by SARC. Section 21 gives SARC the power to recommend disallowance or appropriate amendments. The Committee believes that SARC should have these powers in relation to ACMs.

Recommendation 15

In line with the current section 12 of the* Subordinate Legislation Act 1994*, the responsible Ministers should ensure that a notice advising of the decision to approve or reject an alternative compliance mechanism is published in the* Victoria Government Gazette*, a daily newspaper circulating throughout Victoria and the internet as soon as practicable after the decision is made and before the alternative compliance mechanism comes into effect.

Recommendation 16

In line with the current section 15 of the* Subordinate Legislation Act 1994*, the alternative compliance mechanism, regulatory objectives it seeks to achieve, and criteria for approval should be tabled in both Houses of Parliament.

Recommendation 17

As is the case with subordinate legislation, any member of Parliament should be entitled to move for disallowance of an alternative compliance mechanism.

Recommendation 18

Alternative compliance mechanisms should be subject to Parliamentary scrutiny by the Scrutiny of Acts and Regulations Committee.

Recommendation 19

The criteria for Parliamentary scrutiny of alternative compliance mechanisms should be based on section 21 of the* Subordinate Legislation Act 1994 *as currently enacted.

Recommendation 20

[299] This point was emphasised in all of the Committee's discussions both interstate and in Melbourne (see Appendix D & Appendix E). It was also raised as a matter of importance in submission nos. 1, 3, 10, 15, 24 & 26.

The Scrutiny of Acts and Regulations Committee should have the power to report to Parliament on any alternative compliance mechanism and should have the power to recommend disallowance or amendments to the same.

Status of Alternative Compliance Mechanisms

5.32 As the ACM will be a public document tabled in Parliament, there will be no intellectual property attached to an ACM. Moreover, the ACM will be a public document that can, upon ministerial approval, be utilised by any business.

5.33 ACMs may be accompanied by commercially sensitive material. The ORR proposal suggests that only the ACM itself is a public document and that while the supporting documentation may be subject to a *Freedom of Information Act* (FOI) request, commercially sensitive information would be exempted under the FOI Act.[300]

5.34 The submission made by the DPC agrees that in most circumstances confidential information will be exempted from the operation of the FOI Act.[301] The Committee notes the point made by the DPC that the only risk of disclosure of commercially sensitive information is if there is a compelling public interest that overrides the public interest in maintaining the ACM. The Committee agrees with the DPC that this balance should be maintained and that the public should be able to utilise the FOI Act to seek access to information provided under an ACM. It is the Committee's belief that, to ensure transparency and equality of access to ACMs and to avoid the ambiguities of the operation of the FOI Act, the ACM and all documentation provided should be public or available upon request to the public.

5.35 The Committee recognises that some ACMs will be based on technology or processes that already have intellectual property attaching to them, and that it will not be possible for another person to copy the ACM without having access to the technology or processes. In these cases, it is the Committee's view that the ACM must contain a licensing regime to enable other companies to be able to utilise the ACM. The Committee believes that in such circumstances, the applicant should include a licensing scheme within the ACM, the terms of which could be negotiated with the responsible Ministers. For instance, the licensing scheme would contain the terms under which the technology could be used, and the cost of the use of such technology which would be approved if it met with the criteria established by the responsible

300 *Freedom of Information Act 1982* (Vic.), s. 34 (1) (a) and (b).

301 Submission no. 26.

Ministers. The Ministers may decide to assist small business in its access to such ACMs.

5.36 The Committee believes that it has answered concerns regarding commercially confidential information by requiring the compulsory incorporation of licensing regimes for those ACMs based on processes that have intellectual property attaching to them and by requiring all ACMs to be public documents. In doing so, the Committee recognises that business will have to make a commercial decision on the value of ACMs to their operation. While such safeguards may reduce the number of ACMs obtained, the Committee believes that they are essential to ensure that the public interest is protected, that small business is not disadvantaged and that public confidence in the regulatory system is maintained.

Recommendation 21

Regulation Efficiency Legislation should provide that an alternative compliance mechanism is a public document that has no intellectual property attaching to it.

Recommendation 22

In the event that the alternative compliance mechanism relies on technology or a process that has intellectual property attaching to it, in such a way as to effectively prevent the adoption of the alternative compliance mechanism by other businesses which do not have access to the technology or process, then the alternative compliance mechanism must contain a licensing regime for the use of such technology or process. The licensing regime should be subject to the approval of the responsible Ministers.

Automatic Revocation and Review of Alternative Compliance Mechanisms

5.37 ACMs would be required to sunset at the same time as the regulations that they supersede. REL should provide for a fast-track approval process for renewal of existing ACMs where the regulatory objectives do not change upon sunsetting and the ACM continues to meet those objectives.

5.38 It is the Committee's view that ACMs can provide the necessary accelerator towards performance based regulations. For this to be achieved, it is anticipated that when a regulation that is the subject of an operating ACM sunsets, the content of the ACM should be incorporated into the new regulation. In the event that this does not occur, the REL should contain a provision that requires that the RIS for the new regulation give reasons for why the ACM was not incorporated.

5.39 The ORR proposal suggests that REL should contain a clause that requires that scheduling and approval of ACMs be recorded in agency annual reports. The Committee agrees with this proposal and believes that approved ACMs accompanied by general information on their operation should be included in agency annual reports, so as to increase the public's access to information on ACMs. The Committee also believes that an easily accessible central register of ACMs should be established and maintained by government.

5.40 The Committee agrees with the ORR suggestion that REL should also specify that the responsible Ministers should commission a threshold review within the first five years of its introduction so as to properly monitor the progress of ACMs and evaluate its operation.

5.41 As discussed above in paras 4.42 and 5.6, the Committee believes that REL is a mechanism which should accelerate reform towards increased performance based regulation. To this end, REL should provide that upon three ACMs being approved in relation to any one particular regulation, that regulation will sunset in twelve months from the introduction of the third ACM. The normal process for sunsetting should be followed with the review focusing on incorporating the ACMs and an examination of the possibility of making the regulation performance based. This mechanism would potentially benefit proponents of ACMs as review of the prescriptive regulation would remove the obstacles and penalties that affect their businesses.

Recommendation 23

Regulatory Efficiency Legislation should provide that an alternative compliance mechanism is automatically revoked at the same time as the regulation it supersedes is revoked pursuant to section 5 of the* Subordinate Legislation Act 1994 *as currently enacted.

Recommendation 24

Where an alternative compliance mechanism has been automatically revoked because the regulation it supersedes has been revoked pursuant to section 5 of the* Subordinate Legislation Act 1994*, Regulatory Efficiency Legislation should provide for fast-tracking of applications for replacement mechanisms where the original mechanism would comply with the regulatory objectives of the replacement regulation.

Recommendation 25

Regulatory Efficiency Legislation should provide that where a regulation the subject of an alternative compliance mechanism is automatically revoked pursuant to section 5 of the* Subordinate Legislation Act 1994 *and it is not proposed that the alternative compliance mechanism will form part of the new regulatory regime, the regulatory impact statement must give reasons why the alternative compliance mechanism was not incorporated in the replacement regulations.

Recommendation 26

Upon three alternative compliance mechanisms being approved in relation to any regulation, that regulation should be automatically revoked at the end of twelve months from the introduction of the third alternative compliance mechanism. The ensuing review process should focus on incorporating the alternative compliance mechanisms into the replacement regulations.

Recommendation 27

Regulatory Efficiency Legislation should provide that approved alternative compliance mechanisms should be recorded in agency annual reports.

Recommendation 28

The Government should establish and maintain an easily accessible register of alternative compliance mechanisms.

Recommendation 29

A threshold review of the alternative compliance mechanism scheme should be conducted within five years of its introduction.

Penalties

5.42 In its submission to the Committee, SARC pointed out the importance of penalties applying to ACMs.[302] The Committee agrees with this view and believes that the breach of an ACM should be the equivalent of breaching the regulations they supersede. To this end, REL should provide that non-compliance with an ACM is a breach of the regulation it supersedes.

5.43 An additional option put forward by ORR is to provide for some form of security deposit in some circumstances as a means of ensuring that the penalty can be paid. The Committee believes that as ACMs do provide a tailored means of achieving

302 Submission no. 32.

regulatory objectives, additional civil penalties such as security deposits or guarantees may be necessary in certain circumstances to maintain public confidence in the regulatory system. Consequently, REL should provide the responsible Ministers with a discretionary power to require the lodgment of security deposits or the execution of guarantees against performance. The Committee has also concluded that where there is a serious breach of an ACM the Court imposing any penalty for such breach should have a discretionary power to terminate the ACM.

Recommendation 30

Regulatory Efficiency Legislation should provide that the breach of an alternative compliance mechanism is deemed to constitute a breach of the regulation the alternative compliance mechanism supersedes.

Recommendation 31

Regulatory Efficiency Legislation should grant a discretionary power to the responsible Ministers to require security deposits and/or guarantees against performance of the requirements contained in an alternative compliance mechanism.

Recommendation 32

Regulatory Efficiency Legislation should provide that where there is a serious breach of an alternative compliance mechanism the court imposing any penalty for such breach should have a discretionary power to terminate the alternative compliance mechanism.

Revocation, Termination, Suspension and Variation of Alternative Compliance Mechanisms

5.44 The Committee believes that REL should clearly specify the steps needed for revocation, termination, suspension and any unilateral variation of an ACM. It is the Committee's view that the Minister responsible for the regulation, in consultation with the Minister responsible for REL, should have the power to revoke, suspend terminate or vary any ACM. The procedure for and the circumstances permitting an agreed variation would be set out in the ACM itself. REL would also have to provide for partial revocation or suspension of an ACM in circumstances where there needs to be an investigation into whether the regulatory objectives are being met by the ACM.

5.45 REL should include a requirement that, other than in cases of emergency (discussed below), where an intention to revoke, terminate, suspend or unilaterally vary an ACM is evinced, specific reasons for the proposed action should be given. The recipient of the ACM should be given a reasonable opportunity to show cause why the intended action should not occur. Where a decision to revoke, terminate, suspend or unilaterally vary an ACM has been made, REL should provide for adequate notice to be given to any aggrieved party.

5.46 There should be provision for emergency revocation, termination, suspension or variation of ACMs to take account of any serious situation that needs to be dealt with expeditiously. The requirement of giving notice to the proponent of the ACM may have to be waived in some situations—for instance, where the public interest in terminating or suspending an ACM overrides the public interest in maintaining the ACM or where there is clear evidence that the ACM has failed or is likely to fail in relation to health, safety or environmental standards. REL should empower the Minister responsible for the regulation that the ACM replaces to suspend the ACM for a period of fourteen days during which time consideration can be given to whether there is a substantial public need to permanently revoke, terminate, or vary the ACM.

34

Recommendation 33

Regulatory Efficiency Legislation should provide the Minister responsible for the regulation that is the subject of the alternative compliance mechanism with a power to revoke, terminate, suspend or unilaterally vary an alternative compliance mechanism. There should be a requirement for that Minister to consult with the Minister responsible for Regulatory Efficiency Legislation. Adequate notice and specific reasons for the decision should be provided to the aggrieved party who should be given a reasonable opportunity to show cause why the proposed action should not be taken.

Recommendation 34

In the case of an emergency, the responsible Ministers should be empowered to suspend the alternative compliance mechanism for a period of 14 days, without notice, where there is a substantial risk to the public. During the period of suspension, consideration should be given to permanent revocation, termination or variation of the alternative compliance mechanism.

Administrative Fees

5.47 The Business Committee of the Attorney-General's Law Reform Advisory Council suggested that there might be an application fee in relation to ACMs.[303] While the Committee agrees with this suggestion because it would help to recover some of the costs of assessments of ACMs, the Committee believes that the responsible Ministers should have the discretion to waive the fee, wholly or in part, in certain circumstances. The Committee is keen to ensure that small business does secure the benefits of ACMs and is of the opinion that the access of small business to those benefits should not be impeded by Government fees.

303 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with the Business Committee of the Attorney-General's Law Reform Advisory Council, 29 Jul. 1997, Melbourne.

5.47

6 THE REGULATORY IMPACT STATEMENT PROCESS

Introduction

6.1 As discussed in the previous chapter, the Victorian Regulatory Impact Statement (RIS) process is important to this Inquiry. The Committee's model for alternative compliance mechanisms (ACMs) brings existing regulations within its operation by deeming the regulatory objectives specified in the relevant RISs to be the regulatory objectives for the purposes of any ACMs. ACMs focus on regulatory objectives, and the Committee's model for ACMs is dependent, therefore, on the overall success of the RIS process and, in particular, on the ability of the RIS to accurately define regulatory objectives.

6.2 After an extensive examination of the operation of RIS in Victoria and in other jurisdictions and taking into account the evidence and submissions received, the Committee has concluded that while the process is generally working well, there are areas that need improvement. In Chapter 7 the Committee makes recommendations that aim to strengthen the consultation process by requiring early consultation with stakeholders, increased public input into the process and improved training for

regulation officers. In making these recommendations, the Committee accepts that it has not been in a position to carry out an in-depth analysis of the RIS process as it presently operates in Victoria, because the issue is peripheral to the terms of reference for this Inquiry. In recognition of the need for a more detailed and thorough study of the RIS process, the Committee recommends that the Scrutiny of Acts and Regulations Committee (SARC) should be given a specific reference to carry out a study on the operation of the RIS process under the *Subordinate Legislation Act 1994* (Vic.).

6.3 This chapter begins with an overview of the operation of the RIS system in Victoria. This is followed by a discussion of the mechanics and operation of the RIS process in other Australian jurisdictions. The chapter then examines recent OECD best practice guidelines for the RIS process and concludes that the Victorian model compares well with other models. However, this should not lead to complacency. Accordingly, Chapter 7 addresses the perceived problems with the RIS process that the Committee has been made aware of in submissions and evidence, and presents the Committee's recommendations for reform.

6.4 Amongst those working in the field, the term 'RIS process' has come to include the negotiated rulemaking ('Reg-Neg') or early consultation phase prior to the preparation of the formal document, and the public consultation phase following the preparation of the document. The RIS is a formal document setting out the cost-benefit analysis and other statutory detail. The Committee will adopt this terminology. The OECD terminology uses the term `Regulatory Impact Analysis' (RIA) and this term will be used only when discussing the OECD's guidelines for best practice regulatory review.

6.5 For the purposes of introducing ACMs into Victoria two elements of the current regulatory framework under the *Subordinate Legislation Act* are important. They are the RIS process under ss. 10 and 11 of the Act and the automatic sunsetting of regulations under s. 5 of the Act. These elements are the focus for the following discussion.

Victorian Regulatory Impact Statement Process

6.6 The main source of regulatory review mechanisms in Victoria are those contained in what is now the *Subordinate Legislation Act 1994*. The relevant provisions have been in effect since 1985, when they were first inserted into what was then the

Subordinate Legislation Act 1962.[304] The 1994 Act was the Victorian Government's response to the *Report upon an Inquiry into the Operation of the Subordinate Legislation Act 1962* by the SARC, then chaired by Victor Perton, MP.[305] That Committee's *Alert Digest* described the 1994 Bill as 'practical legislation which updates the manner of review of subordinate legislation in Victoria in several significant ways'.[306] The importance of the RIS process was described by Mr Perton during the Bill's second reading:[307]

> For almost a decade Victoria has been a world leader in the process of regulating the making of subordinate legislation...Regulatory impact statements are very important documents because they are designed to demonstrate to the public the economic and social costs and benefits of the regulation. The process requires that the government enter into consultation and consider the submissions made by interested sectors of the public.

6.7 The general scheme provided by the legislation requires that government departments consider various matters, including the existence of alternative methods of achieving the desired ends, **before** introducing statutory rules. There is also a requirement that the making of proposed regulations be publicised in advance and a requirement which allows public consultation.[308] In most substantial cases, an RIS has to be prepared by the government department proposing the regulation,[309] in

---

304 The relevant amendments were contained in *the Subordinate Legislation (Review and Revocation) Act 1984* (Vic.).

305 Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Report upon an Inquiry into the Operation of the Subordinate Legislation Act 1962*, L. V. North, Government Printer, Melbourne, 1993.

306 Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Reports to Parliament: Alert Digest Nos. 8–14 of 1994*, L. V. North, Government Printer, Melbourne, 1995, pp. 172 & 176.

307 Parliament of Victoria, *Hansard*, Legislative Assembly, 1 Dec. 1994, p. 2179.

308 *Subordinate Legislation Act 1994* (Vic.), s. 6. As observed by SARC, 'all the Act requires with respect to an RIS is that public comments or submissions are invited'. See submission no. 32.

309 There are exceptions and exemptions to the RIS process, under ss. 8 & 9 of the *Subordinate Legislation Act 1994* (Vic.). The exceptions include situations where the proposed statutory rule increases fees in respect of a financial year by an annual rate that does not exceed the annual rate approved by the Treasurer and where the proposed statutory rule relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal. The exemptions cover situations where, in the Minister's opinion, the proposed statutory rule would not impose an appreciable economic or social burden on a sector of the public; or is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme; or it is of a fundamentally declaratory or machinery nature; or deals with administration or procedures within or as between departments or declared authorities within the meaning of the *Public Sector Management Act 1992* (Vic.); or where the notice of the statutory rule would render the proposed statutory rule ineffective or would unfairly advantage or disadvantage any person likely to be affected by the proposed statutory rule. Subsection 9(3) of the 1994 Act also provides an exemption if the Premier specifies, in writing, that in the special circumstances of the case, the public interest requires that the proposed statutory rule should be made without complying with the RIS procedures.

which the costs and benefits of the regulation—both economic and social—have to be evaluated. The making of an RIS has to be advertised and comments sought from those affected by the proposal before the regulation can be made.[310]

6.8 The Office of Regulation Reform (ORR), which exists within the Department of State Development, has produced a number of publications on the RIS process. One is the *Regulatory Impact Statement Handbook*.[311] It contains the following statement of the objectives of the RIS process: [312]

> The basic purpose of the RIS process is to ensure that only the most efficient regulations are adopted and there is adequate public involvement to both ensure this is the case and it is seen to be the case.
>
> For a regulation to represent the *most efficient* solution to an identified problem, it must not only be shown to be likely to yield benefits greater than the costs it imposes but also to yield greater net benefits (ie benefits less costs) than any of the feasible alternative approaches. It is for this reason the RIS must include cost/benefit analysis of not only the proposed regulation but of all the identified alternatives.

6.9 Additionally, the RIS process by comparing the extent of harm that the regulation seeks to address with the cost of regulation, answers the 'necessary threshold question: Is there a sufficient case to justify any regulatory (or other public policy) action at all?'[313] This threshold question is important because it can highlight whether a particular proposed regulatory regime could result in regulatory failures that may be greater than the market failure it proposes to address. Moreover, it would be unrealistic to place regulatory regimes on a target group where, because of the complexity and expansion of regulations, there is little likelihood of compliance. The ORR thus suggests that the threshold question should have the effect of restricting compliance requirements to significant societal issues.[314]

6.10 The *Regulation Impact Statement Handbook* also notes the major benefits that flow from releasing the RIS as part of a public consultation process. Allowing public participation and making the regulatory process transparent has the obvious benefit of promoting a vision of government as accountable and attentive to the needs of those who are regulated and the wider community. Informed public participation should also ensure that the quality of regulation will improve, resulting in the RIS process being seen as 'an aid to regulators, rather than solely a burden'.[315]

---

310 *Subordinate Legislation Act 1994* (Vic.), ss. 7–12.

311 ORR, *Regulatory Impact Statement Handbook,* op. cit. Other useful publications include *Principles of Good Regulation* and *Regulatory Alternatives*, undated.

312 ORR, *Regulatory Impact Statement Handbook*, ibid., Part 1.2.

313 ibid.

314 ibid.

315 ibid.

6.11 Subsection 10(1) of the *Subordinate Legislation Act* requires that an RIS must include:

(a) a statement of the objectives of the proposed statutory rule;

(b) a statement explaining the effect of the proposed statutory rule, including in the case of a proposed statutory rule which is to amend an existing statutory rule the effect on the operation of the existing statutory rule;

(c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;

(d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;

(e) the reasons why the other means are not appropriate;

(f) any other matters specified by the guidelines;

(g) a draft copy of the proposed statutory rule.

6.12 The RIS process is monitored by the Scrutiny of Acts and Regulations Committee (SARC),[316] a committee of the Victorian Parliament made up of members of both Houses and all parties. SARC's role includes the scrutiny of regulations to ensure that the requirements set out in the *Subordinate Legislation Act* have been complied with. This, in turn, includes a role in assessing the adequacy of RISs.

Consultation Process

6.13 One of the best qualities of the Victorian RIS process is the extent to which it mandates consultation with stakeholders—including business, interest groups and the general public—both leading up to and following the preparation of an RIS.

6.14 Section 6 of the Act requires consultation before the RIS. The responsible Minister is required to ensure that consultation occurs in accordance with the guidelines. Consultation is required with any other Minister whose area of responsibility may be affected by a proposed statutory rule and any sector of the public on which an appreciable economic or social burden may be imposed.

6.15 Additionally, section 11 of the Act requires that, if an RIS has been prepared in relation to a proposed statutory rule, the responsible Minister must ensure that a notice is published stating the reasons for, and objectives of the proposed statutory rule; summarising the results of the RIS; and specifying where a copy of the RIS and

316 SARC is established under the *Parliamentary Committees Act 1968* (Vic.). The Committee's role in relation to RISs emanates from its responsibilities under s. 21 of the *Subordinate Legislation Act*.

regulation can be obtained, and that public comments or submissions are invited within a particular time, being not less than 28 days.[317] This notice must be published in the *Government Gazette*, a daily newspaper circulating generally throughout Victoria and, if the responsible Minister considers it appropriate, in such trade, professional or public interest publications as the Minister determines.[318]

6.16 Subsection 11(3) of the Act requires that the responsible Minister must ensure that all comments and submissions are considered before the regulation is made and that a copy of all comments and submissions is given to SARC as soon as practicable after the regulation is made.

6.17 The Act also requires that if an RIS has been prepared the responsible Minister must ensure that a notice is published advising of the decision to make or not to make a proposed statutory rule, in the case of the former, before it is made, and in the case of the latter, as soon as practicable after the decision has been made.[319]

6.18 The Office of Regulation Reform also has a role in assessing RISs. Subsection 10(3) of the Act requires that the responsible Minister must ensure that independent advice as to the adequacy of an RIS and the assessment therein is obtained and considered in accordance with the guidelines. Accordingly, the RIS must be certified before release. The ORR is available to provide this advice—though it is not the only source of such advice.

Automatic Revocation of Statutory Rules

6.19 Automatic revocation or 'sunsetting' of all statutory rules 10 years after their making is required under section 5 of the *Subordinate Legislation Act*. It provides for the staged revocation of existing statutory rules by setting out a schedule for sunsetting. In so providing, the Act contains an invaluable mechanism for reducing the volume of regulations applying in Victoria. Part of the rationale behind this assertion is that, in deciding whether or not to re-make regulations that have been repealed, government departments are forced to consider whether or not the regulations in question are really necessary.

6.20 Automatic revocation of statutory rules ('sunsetting') commenced in Victoria in 1985 as a result of amendments to the *Subordinate Legislation Act 1962*. The operation of this process for over a decade has placed Victoria in the unique position

317 *Subordinate Legislation Act 1994* (Vic.), s. 11(2).
318 *Subordinate Legislation Act 1994* (Vic.), subs. 11(1).
319 *Subordinate Legislation Act 1994* (Vic.), s. 12.

that all existing regulations have gone through the automatic revocation process and, unless excepted or exempted, have been subject to an RIS. This has not only ensured that redundant regulations are no longer on the Victorian statute book, but has meant that most regulations have regulatory objectives identified as part of the RIS process. The Committee believes that it is this position that provides the foundations for the operation and success of ACMs in Victoria.

6.21 These features of the Victorian regulatory system have been internationally recognised as constituting a good model for regulation-making and review. However, Victoria should not be complacent in this regard. Consequently, the following section of this chapter examines the models and operation of RIS systems in other Australian jurisdictions. This will provide the context for the discussion in Chapter 7 of the practical operation of the Victorian process. Any improvements necessary to that process will be recommended.

***Act*—noting its concerns about the regulations in question.**[320]

Experience of other Australian Jurisdictions

6.22 Victoria's experience of the RIS process has been viewed with interest by other Australian jurisdictions.

Moreover, the experience and studies in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Western Australia have been of particular interest to the Victorian Law Reform Committee in considering the performance of the RIS process in this State, and the ways in which it could be improved. The effect of National Competition Policy is also relevant.

National Competition Policy

6.23 As noted in Chapter 2[321] Victoria, in company with the Commonwealth and the other States and Territories, has signed the Competition Principles Agreement, the Conduct Code Agreement and the Agreement to Implement the National

---

320 See e.g., Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Seventh Report on Subordinate Legislation Concerning: Environment Protection (Scheduled Premises and Exemptions) Regulations 1994*, L. V. North, Government Printer, Melbourne, 1995. In that Report, the Committee received evidence from ORR that it had concerns about the RIS prepared by the Environment Protection Authority in relation to the relevant regulations.

321 See paras. 2.46–2.49.

Competition Policy and Related Reforms (together referred to as NCP).[322] NCP requires the testing of restrictions on competition, showing that any such restriction is necessary to attain the objectives of government regulation, and an assessment of the costs and benefits to the community of the restriction.

6.24 The Competition Principles have been interpreted by the federal Office of Regulation Reform (ORR) as requiring the production of what is, in effect, an RIS.[323] This interpretation is based on clause 5(9) of the Competition Principles Agreement, which stipulates that a 'legislation review' (here legislation includes regulation) should:

(a) clarify the objectives of the legislation;

(b) identify the nature of the restriction on competition;

(c) analyse the likely effect of the restriction on competition and on the economy generally;

(d) assess and balance the costs and benefits of the restriction; and

(e) consider the alternative means for achieving the same result including non-legislative approaches.

6.25 Where a regulatory impact statement is needed under the law of the jurisdiction concerned, these requirements must be completed as part of the RIS process.[324] Where an RIS is not required, the same requirements must be satisfied and included in an addendum to the regulations.

Australian Capital Territory

6.26 Following the 1995 recommendations of the Red Tape Task Force, the ACT Government introduced a requirement in its Manual for Regulatory Reform that agencies carry out a Regulatory Needs Analysis to determine if regulation is the most appropriate option.[325] Agencies are reminded that 'the Government has agreed that voluntary compliance should be considered the preferred enforcement

322 These agreements have been reproduced in Commonwealth, *Report of the House of Representatives Standing Committee on Financial Institutions and Public Administration – Cultivating Competition*, Canberra, Jun. 1997, appendix 6.

323 Personal communication with Mr Stephen Rimmer, Federal ORR, 7 Aug. 1997.

324 *National Competition Policy – Steps to Assist Agencies in complying with the Guidelines for the Application of the Competition Test to New Legislative Proposals*, p. 4, reproduced at <http//www.vic.gov.au/ncp/steps.htm>.

325 ACT, *Manual for Regulation Reform*, Jun. 1997, Section 3. Background to Regulatory Reform, reproduced at <http://www.dpa.act.gov.au/reg_reform/index.html>.

mechanism'.[326] This process involves looking at the costs and benefits of regulatory measures, and usually consultation with groups who are likely to be affected. A copy of the Regulatory Needs Analysis should be given to the Regulatory Reform Unit, and where the Unit disagrees with the proposal, its reasons for doing so should be stated in the agency's submission to Cabinet.[327] In assessing the impact of the proposal on business, the following questions are asked:[328]

1. What parts of industry/commerce will be affected?
2. What are the likely direct costs imposed on industry to comply with the proposal?
3. What are the administrative costs imposed on business?
4. Will any controls on entry into the industry be imposed?
5. Will controls be imposed on ACT companies which are not imposed in other states?
6. Will firms be required to pay for the cost of the regulation and if so how?

6.27 A Business Impact Assessment is required to be appended to the Cabinet submission for all proposed legislation and other regulatory measures.[329] The key issues considered in this assessment are:[330]

1. Have the regulatory objectives been clearly stated?
2. Has the method of compliance and enforcement been clearly described?
3. What are the likely benefits and costs of the proposed regulatory measure?
4. Has the relevant business community been consulted?
5. Have other relevant State and Commonwealth regulations been considered?
6. Are there any unnecessary or defunct existing regulations that can be removed as a result of introducing the regulatory measure?
7. What net effect will the proposal have on business and competition, including restrictions on market entry; restrictions on competitive conduct; regulation of conduct in other ways; an increase or decrease in compliance costs; an increase or decrease in the paperwork burden.

6.28 Additionally, regulatory plans are produced by agencies to provide advance notice of regulatory reforms or proposed new regulations. These plans are tabled in the Legislative Assembly by 30 September each financial year.[331]

New South Wales

326 ibid.
327 ibid., section entitled: 'Regulatory Needs Analysis, Background'.
328 ibid.
329 ibid.
330 ibid., p. 6. section entitled: 'Business Impact Assessments'.
331 ibid., section entitled: 'Regulatory Plans', reproduced at <http://www.dpa.act.gov.au /reg_reform/impactassess1.htm>.

6.29 A system that incorporates both RISs and the staged repeal of regulations has existed in New South Wales since 1989, under the provisions of the *Subordinate Legislation Act 1989*. The most significant difference between the Victorian system and the New South Wales one, is that the automatic repeal mechanism operates after 5 years in New South Wales, rather than 10 years. The Regulation Review Committee of the New South Wales Parliament, which performs a similar role to that of the Scrutiny of Acts and Regulations Committee in Victoria, is generally supportive of the New South Wales scheme.

6.30 Nonetheless, the New South Wales Committee has made recommendations as to how the NSW scheme can be improved.[332] Moreover, it has found that there are problems with the way in which the RIS process is being applied by government departments. At the Commonwealth Delegated Legislation Conference held in Wellington in February 1997, Jill Hall MP, the Vice Chairperson of that Committee, described these problems and commented on the fact that in 1996 the standard had not improved:[333]

> In general it can be said that some of the departments, despite continuing guidance from the Committee, have failed to implement various essentials of the Subordinate Legislation Act and earlier undertakings to do so.
>
> In many RIS's the objectives were not clearly formulated and alternative options were not considered. No attempt at cost/benefit assessment had been made.

Queensland

6.31 A Business Regulation Review Unit was established in 1990 to co-ordinate a thorough review of all legislation and regulation that affects business in Queensland. Its functions also include providing a service for regulatory complaints and promoting uniformity of federal and State regulations with those in Queensland. Recently, the Queensland *Statutory Instruments Act 1992* was amended to require an RIS to be prepared and made public, if a regulation is likely to impose an appreciable cost on the community.[334] New subordinate legislation must also be reviewed after 10 years under section 54 of the Act.[335]

---

332 Parliament of NSW, Regulation Review Committee, *Report of the Regulation Review Committee on Future Directions for Regulatory Review in New South Wales*, Report no. 23, Sydney, 1993.

333 Jill Hall, MP, Regulatory Review Committee of NSW, 'Regulatory Impact Statements', paper presented to the Commonwealth Delegated Legislation Conference, 10–13 Feb. 1997, Wellington, New Zealand, p. 8.

334 *Statutory Instruments Act 1992* (Qld), s. 43.

335 M. Williams-Winn, *Enhancing Australia's Competitiveness: The Impact of Government Regulations*, Committee for Economic Development, 1996, p. 20.

6.32 The Queensland RIS process has already experienced several problems including a reluctance by bureaucrats or agencies to embrace the process. There seems to be a tendency towards government agencies loosely applying the exemptions from the process under the *Statutory Instruments Act*, so as to avoid doing RISs.[336] The Queensland Red Tape Reduction Task Force was especially critical of the exemptions, finding them to be too broad.[337] It therefore recommended that the grounds for exemption be limited where there is:[338]

(a) an amendment of subordinate legislation which does not fundamentally affect the legislation's application or operation;

(b) a matter arising under legislation substantially uniform or complementary with legislation of the Commonwealth or another State;

(c) a matter involving the adoption of an Australian or international protocol, standard, code, or intergovernmental agreement or instrument, if an assessment of the benefits and costs has already been made and the assessment was made for, or is relevant to, Queensland;

(d) an amendment of a fee, charge or tax consistent with announced government policy.

6.33 Additionally, Mr Jon Sullivan, MP, the Deputy Chairman of the Queensland Parliament's Scrutiny of Legislation Committee, has indicated there has been bipartisan concern about the fact that RISs have been produced for only 0.5 percent of all regulations produced, whereas in other jurisdictions, the figure tends to be about 20 percent.[339]

6.34 In May 1997 the Queensland Government announced that a number of measures would be taken in response to the first report from the Red Tape Reduction Task Force, including investigating further ways to improve that State's RIS process.[340] Notably, the Task Force recommended that there should be an amendment to the Act to require preliminary consultation with stakeholders, with the extent of this consultation being reported in the RIS. Where a substantive change is made to the proposed regulation based on this consultation, a revised RIS should

---

336 This observation was made by Ms A. Vaughan, Liaison Officer for the Red Tape Reduction Task Force, Qld., Department of Tourism, Small Business and Industry, 18 Jul. 1997.

337 Qld., Red Tape Reduction Task Force, *First Report—Issues Requiring Ministerial Comment*, p. 2.

338 ibid., see *Statutory Instruments Act 1992* (Qld), s. 46(1)(e),(g),(h),(j).

339 Comment made by Mr Jon Sullivan during the Sixth Australasian & Pacific Conference On Delegated Legislation and Third Australasian & Pacific Conference on the Scrutiny of Bills, Parliament House, Adelaide, 16 Jul. 1997.

340 National Small Business Summit, 27 Jun. 1997, Melbourne, Communique, p. 2; reproduced at <http://www.dist.gov.au/smallbus/summit/fincommq.html>.

be published. Support was given for the creation of an Office of Regulatory Assessment to oversee the RIS process, to certify all RISs by State regulatory authorities, and to provide copies of RISs. [341]

6.35 A Red Tape Reduction Implementation Working Group was established, after Cabinet consideration on 20 May 1997, to consider the practicality and desirability of the recommendations contained in the Report by the Red Tape Reduction Task Force.[342] The Working Group consists of Chief Executive Officers from key government departments as well as the office of the Public Service Commissioner. The recommendations dealing with the RIS process will be evaluated by the Working Group following a submission by the Department of Justice and the Department of Tourism, Small Business and Industry on the Task Force's recommendations dealing with the RIS process. The Working Group will then report back to Cabinet.

South Australia

6.36 Unlike most other jurisdictions, South Australia is yet to introduce a formal RIS process. However, since 1991, there has been a requirement that what is equivalent to an RIS must be produced for legislative proposals which are to go before the Cabinet, including proposed regulations, pursuant to the Treasurer's instructions.[343]

6.37 The Cabinet Handbook requires that for all cabinet submissions, relevant Ministers are responsible for ensuring that their agencies consult with people who are likely to be affected. Green and White Papers are to be distributed to 'all areas of government, the judiciary where appropriate, academic and other relevant parties…as well as tabled in Parliament'.[344] The handbook states that Green Papers regarding regulation or deregulation should canvass the background and objectives of the proposed regulatory proposal, alternative means of meeting those objectives,

341 Red Tape Reduction Task Force, op. cit., pp. 2 & 3.

342 Personal communication with Mr John Woods, Regulatory Review Unit, Department of Tourism, Small Business and Industry, 18 Jul. 1997.

343 These instructions are referred to in the Cabinet Handbook. See SA, *Cabinet Handbook 1994*, Appendix V: Treasurer's Instructions 9105.

344 SA, *Cabinet Handbook 1994*, p. 39.

and a financial and social cost-benefit analysis of the alternatives.[345] At the moment no review of the adequacy of this consultation process is planned.[346]

6.38 The Hon Rob Kerin, MP, the South Australian Minister for Primary Industries, told the Committee that the consultation process used by his Department is fairly extensive:[347]

> Officers in my Department are currently undertaking a number of major legislative programs. For these, there has been extensive community consultation to determine their needs before any documentation was produced. This ensured that the discussion papers addressed issues important to the community, not those considered important to the Department.

6.39 A more formal RIS process would elevate the existing financial and social cost-benefit analysis, currently contained within the cabinet submission, to a higher level of prominence as part of the regulatory process.[348] However, the Hon. Robert Lawson, a member of the South Australian Legislative Review Committee, has recently noted a reluctance in his jurisdiction to adopt a formal RIS process. This reluctance is in part based on concerns about the way it would operate:[349]

> South Australia is one jurisdiction which has not yet adopted regulatory impact statements and there is a fair degree of reluctance to do so and scepticism about the process. For [a] long [time] we have had requirements for family impact statements, regional impact statements, budget impact statements, environmental impact statements and the like, and the Cabinet handbook requires agencies to address all those issues in putting forward any proposal, whether for regulation or other measures, to Cabinet…
>
> The reluctance in South Australia to embrace yet another impact statement is that they do become perfunctory and I think policy makers, or some of them, in influential positions, and notwithstanding all the injunctions of competition policy and the like, are rather recalcitrant in this matter of introducing regulatory impact statements.

The South Australian Premier, Hon. John Olsen, MP, partially in response to the requirements of National Competition Policy, has committed the his Government to introduce a formal RIS process by the end of 1997.

---

345 ibid., p. 38.

346 Personal communication with Ms Rosemary Ince, Manager of Regulatory Reform, Department of Premier and Cabinet SA, Strategic Policy and Cabinet Division, Microeconomic Reform Branch, 1 Aug. 1997.

347 Submission no. 27.

348 Personal communication with Ms Rosemary Ince, loc. cit.

349 *Sixth Australasian & Pacific Conference on Delegated Legislation & the Third Australasian and Pacific Conference on the Scrutiny of Bills*, Adelaide, 16 Jul. 1997.

Tasmania

6.40 The *Subordinate Legislation Act 1992* (Tas.) requires that proposed regulations have: clear objectives, be in accordance with community needs, not unnecessarily restrict competition and provide the best alternative with the greatest net benefit.[350] Public consultation and an economic cost-benefit analysis are required where the proposed regulation is expected to have a significant impact. The Department of Treasury and Finance plays a key role in the regulatory process:[351]

> The Department of Treasury and Finance's Regulation Review Unit (RRU) is charged with administering the SLA. Under the SLA, all subordinate legislation must receive a certificate from the RRU before being made. The certificate verifies that the procedures outlined in the SLA have been complied with and that any regulatory impact statement has been prepared to the required standard.

This process operates in tandem with the Government's Legislative Review Program, which implements the National Competition Policy.[352]

Western Australia

6.41 In April 1994, the Western Australian Standing Committee on Government Agencies published a report entitled *State agencies – their nature and function*.[353] In that report, the Standing Committee recommended that a State Agencies Act be enacted to govern the operation of State agencies, which are generally defined to mean government instrumentalities established under statute. The proposed legislation, which was appended to the report, is similar to the United States Administrative Procedure Act. Significantly, Part 2 of the proposed legislation sets out procedures—including requirements for public consultation and hearings in relation to proposed regulations—that are similar to the rule making procedures set out in the Administrative Procedure Act.[354]

---

350 See submission no. 24.

351 ibid.

352 ibid. It appears that the Committee will be producing a further report. The Committee recently travelled to Melbourne to meet with representatives of Victorian agencies including the Chairman of the Law Reform Committee.

353 Parliament of Western Australia, Legislative Council, *State Agencies – their nature and function*, Perth, Apr. 1994.

354 See generally, Parliament of Western Australia, Legislative Council, *Thirty-sixth Report of the Standing Committee on Government Agencies*, Perth, Apr. 1994. The relevant recommendations were not acted upon, according to Mr Jason Agar, the Clerk of the Public Administration Committee; this committee superseded the Standing Committee on Government Agencies: Personal communication, 7 Aug. 1997.

6.42 In November 1995 the Joint Standing Committee on Delegated Legislation, a committee of the Western Australian Parliament, recommended that a system similar to that operating in Victoria under the *Subordinate Legislation Act* should be adopted in Western Australia. In particular, the Committee recommended:[355]

(a) the introduction of a Subordinate Legislation Bill, similar to the Victorian *Subordinate Legislation Act*, and incorporating the RIS concept;

(b) the establishment of a Subordinate Legislation Committee, with a role similar to that of the Victorian Scrutiny of Acts and Regulations Committee;

(c) the introduction of a timetable for the staged repeal of existing subordinate legislation and for the sunsetting of all new subordinate legislation; and

(d) the establishment of an Office of Regulation Review.

6.43 In December 1996 the Western Australian Attorney-General rejected the Joint Standing Committee's proposed Bill, predominantly on the grounds that the existing regulatory framework—namely, scrutiny by the Committee—was sufficient.[356]

Commonwealth's Legislative Instruments Bill

6.44 The Legislative Instruments Bill 1996, which is currently before the Federal Parliament, would require, among other things, that all legislative instruments 'directly affecting business, or having a substantial indirect effect on business'[357] should be the subject of consultation procedures similar to those currently operating in New South Wales and in Victoria with respect to proposed regulations.[358] The

---

355 Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, *Sixteenth Report: The Subordinate Legislation Framework in Western Australia*, Perth, Nov. 1995.

356 Personal Communication with Mr Andrew Mason, Research Officer, Joint Standing Committee on Delegated Legislation, 7 Aug. 1997.

357 Legislative Instruments Bill 1996 (Cth), Explanatory Memorandum, para. 41.

358 A Legislative Instruments Bill was originally introduced in 1994. That Bill was the subject of inquiry and report by the Senate Standing Committee on Regulations and Ordinances (see Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 1994 – Ninety-ninth Report*, Canberra, Oct. 1994) and the House of Representatives Standing Committee on Legal and Constitutional Affairs (see House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill 1994*, Canberra, Feb. 1995). While generally supportive of the Bill, both committees recommended that significant amendments be made to the Bill. The Bill lapsed with the dissolution of the Parliament for the 1996 Federal Election. A re-drafted version was introduced in 1996, incorporating many of the amendments recommended by the two Committees. The 1996 version of the Bill also incorporated the requirements relating to Legislative Instrument Proposals, which had not been a feature of the earlier version of the Bill.

term 'legislative instrument' covers all forms of what would generally be referred to as 'delegated legislation'.[359]

6.45 The significant difference to the Victorian system is that Schedule 2 to the Bill actually prescribes the Commonwealth Acts legislative instruments of which are to be subject to the consultation procedures set out in the Bill. A minor difference is that the Legislative Instruments Bill's equivalent of the RIS is the 'Legislative Instrument Proposal'. The Bill provides that a Legislative Instrument Proposal must be prepared if, after having notified its intention to make a legislative instrument and having considered any submissions in relation to the proposal, the rule-maker considers that the making of a legislative instrument is the preferable means of achieving the desired objective.

6.46 Under the Bill a Legislative Instrument Proposal must contain the reasons for and objectives of the proposed regulations; options on achieving the proposal; a direct and indirect social and economic cost-benefit analysis of each option including its impact on the community and its impact on competition; and an evaluation of the options including a recommendation.

6.47 Subclause 21(4) of the Bill requires the rule-maker to submit a Legislative Instrument Proposal to 'the regulatory review body'—which is expected to be the Commonwealth equivalent of the ORR—and to seek that body's written certification that the Proposal meets the requirements prescribed in the Legislative Instruments Bill for such Proposals.

6.48 The RIS process for a subordinate instrument, included in the Legislative Instruments Bill, has been described as being a 'mini RIS'.[360] The introduction of this 'mini RIS' process would greatly increase ORR's workload, especially as the office would need to be trained to carry out its additional role.[361] This increased workload would reflect also the large volume of regulations at the federal level.

6.49 At the time this report was going to press, the Committee became aware that the Legislative Instruments Bill was extensively amended in the Senate. These amendments have been sent to the House of Representatives for its consideration. If the Legislative Instruments Bill, in one form or another, is enacted by the Parliament then 2,239 regulations in one year will need to be analysed, a quarter of those analysed would affect business and therefore be subject to assessment. Of these

359 This term is defined in clause 5 of the Legislative Instruments Bill.

360 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Federal ORR, Industry Commission, Canberra, 4 Jun. 1997.

361 ibid.

regulations, ORR would have exempted 767, which leaves them with 410 to review.[362]

6.50 While progress has been slow at the Commonwealth level, as the following section demonstrates, Victoria and New South Wales do have models of regulatory review that accord with OECD guidelines.

OECD Council's Findings on Regulatory Impact Analysis

6.51 At the Organisation for Economic Co-operation and Development (OECD) Ministerial Council meeting in May 1997, the Ministers agreed that there was a need for more comprehensive regulatory reform, which included a higher quality of regulation and deregulation in areas of excessive regulation.[363] A year earlier the meeting on Regulatory Impact Analysis (RIA) outlined the best practices in OECD countries and made the finding that RIA is the most appropriate mechanism to improve the basis for regulatory decisions.[364]

6.52 According to the OECD the benefits of the RIA are considerable, yet these benefits must be balanced against problems in the process:[365]

> Assessments of the results of two decades of investment in RIA show a very mixed picture. On one hand, there is nearly universal agreement among regulatory reform offices that RIA, when done well, improves the cost-effectiveness of regulatory decisions…RIA contributes to a 'cultural shift' whereby regulators become more aware of the costs of action, and more ready to adapt decisions to reduce costs. RIA also improves the transparency of decisions, and enhances consultation and participation of affected groups, thereby adding an empirical dimension to consensus and political decisions. Yet positive views are balanced by evidence of massive non-compliance and quality problems in RIA.

In summary, 'RIA is difficult to do well, and results of country efforts have often been disappointing'.[366]

---

362 ibid.

363 OECD, News Release, *Meeting of the Council at Ministerial Level*, Paris, 26–27 May 1997, Communique, p. 4.

364 OECD, *Meeting on Regulatory Impact Analysis: Best Practices in OECD Countries*, Paris, 29–31 May 1996, pp. 1 & 2.

365 OECD Secretariat, Note on 'An Overview of Regulatory Impact Analysis in OECD Countries', Aug. 1996, pp. 3 & 4, reproduced at <http://www.oecd.org/puma/regref/reg(96)7.htm>.

366 ibid., p. 1.

6.53 These problems were experienced in the United States, where half of the adopted regulations failed a cost-benefit test, in Finland, where many new laws have not undergone a private sector cost assessment despite legislative requirements, and in Australia, where quality problems were identified in 1992 in relation to the federal RIA program.[367]

6.54 According to the OECD, problems tend to fall into six categories:[368]

1. Technical issues—where analytical methods need to be redefined, are too expensive or complex. Data may also be expensive or nonexistent.
2. Value conflicts and power struggles—where there is resistance from regulators or interest groups who feel threatened by RIA.
3. Institutional and resource issues—where there is a lack of incentive for regulators to comply with RIA. They may also lack the skills or resources to comply.
4. Legal issues—where laws require regulators to 'pursue their regulatory missions at all costs and not to weigh other impacts and trade-offs'.
5. Procedural issues—where there is poor quality control, where RIAs are prepared after the decision to regulate has been made, or where regulators are under pressure to make decisions quickly, which reduces consultation and analysis.
6. Political issues—where there is a lack of demand from politicians for information.

6.55 The Committee believes that many of the problems identified in Victoria in relation to the RIS process, which are discussed in the next chapter, fall within some of the above categories. In the Committee's opinion, the OECD reference checklist for regulatory decision making should lessen some of these difficulties by requiring regulators to turn their minds to the following ten questions:[369]

1. Is the problem defined correctly?
2. Is government action justified?

---

367 ibid., p. 4. Additionally, in the United States there is a Bill, entitled Regulatory Improvement Act of 1997 (S. 981), which, if enacted, will require that major regulation undergo a risk assessment and cost-benefit analysis. This Bill is discussed in a report by RiskWorld. See <http://www.riskworld.com>.

368 ibid., pp. 4-5.

369 OECD, Appendix 1: 'The OECD Reference Checklist for Regulatory Decision-Making', Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, reproduced at <http://www.oecd.org/puma/regref/pubs/rco95/checklist.htm>.

3. Is regulation the best form of government action?
4. Is there a legal basis for regulation?
5. What is the appropriate level (or levels) of government for this action?
6. Do the benefits of regulation justify the costs?
7. Is the distribution of effects across society transparent?
8. Is the regulation clear, consistent, comprehensible, and accessible to users?
9. Have all interested parties had the opportunity to present their views?
10. How will compliance be achieved?

6.56 The Committee thinks that the Victorian Act and guidelines cover the matters referred to in the checklist. Nonetheless, the checklist does provide an excellent summary, using set of simple questions, which could be introduced into the public service manual, displayed on the desks of regulatory officers, and sent to small businesses. While in general Victoria does have the requisites of an excellent regulatory review model, the following chapter examines some of the problems identified by the Committee, and presents recommendations for improving the system.

7 REGULATORY IMPACT STATEMENT PROCESS: PROBLEMS AND SOLUTIONS

Introduction

7.1 Having described the Regulatory Impact Statement (RIS) process in Victoria and other Australian jurisdictions in Chapter 6, this chapter addresses the perceived problems with the RIS process and makes recommendations on ways to improve the process in Victoria. As noted in Chapter 6[370], the efficiency and effectiveness of the RIS process is essential to the Committee's model for alternative compliance mechanisms (ACMs).

7.2 As noted in the Committee's discussion paper, the general consensus at the public hearing conducted with representatives from four major business groups[371] was that the RIS process was not working as well as it ought. In dramatic language, it was suggested that the RIS process has been 'hijacked by bureaucrats concerned with process rather than genuine consultation'.[372] For Ms Roper from the Australian Chamber of Manufactures the problems with the RIS process were that certain instruments were excluded from the process and that there is insufficient consideration given to the alternatives to regulation. All participants expressed a need for genuine consultation with stakeholders at the start of the process before a decision to regulate is made.

7.3 The evidence and submissions received by the Committee since the release of the discussion paper have highlighted a number of issues for consideration and offered several suggestions for ways to improve the process. Some of these issues are beyond the scope of the terms of reference for this Inquiry. However, the Committee will focus on five broad issues within the RIS process, discuss reform in these areas and conclude by outlining those areas that require more detailed examination. The

---

370 para. 6.1.

371 These groups were: the Australian Chamber of Manufactures, the Business Council of Australia, the Plastics and Chemicals Industries Association and the Victorian Employers' Chamber of Commerce and Industry.

372 Parliament of Victoria, Law Reform Committee, Public Hearing with Business Organisations, *Minutes of Evidence*, 7 Apr. 1997, pp. 20–21.

five areas are the extent and quality of consultation, the appropriateness of economic cost-benefit analysis, the performance of bureaucrats, the role of ORR and automatic sunsetting. These areas will be discussed in turn in this chapter.

7.4 It is important to note at the outset that several submissions concluded that the RIS process was adequate.[373] Notably, SARC suggested that dissatisfaction with the process could be attributed 'in great part to a public perception that there are too many regulations'.[374] In light of the views of the business representatives mentioned above, the Committee decided to consult with regulatory officers within all government departments in order to determine their attitudes to the RIS process. The Committee finds that within government departments there is a general view that the RIS process is working reasonably well.[375] The procedure improves the level of consultation undertaken by departments when formulating regulation and encourages officers to decide whether a matter should be dealt with by regulation or by another means. Some idea of the benefit to the community which is derived from the RIS process is found in estimates provided by ORR:[376]

> The rough quantitative estimates available support the assertion that the RIS process does benefit the community. The Victorian ORR estimates about 20 percent of regulatory proposals coming to their attention via RIS drafts are either modified substantially or withdrawn resulting in cost savings running into tens of millions of dollars. The 20 percent figure would underestimate the effect, in that many poor proposals do not proceed beyond a rough draft. Similarly, the United States Environment Protection Agency analysis of their experience with cost benefit analysis estimated that it had saved the economy $1,000 for every $1 spent doing it.

Improving the Extent and Quality of Consultation

Training

7.9 A number of specific suggestions were made to the Committee as to how the RIS process could be improved, especially in relation to the extent and quality of consultation. For example, at the business groups' hearing it was suggested that

---

373 Submission nos. 15 & 31. The Victorian WorkCover Authority uses the RIS process as a means to informed decision making. For example, 'currently during the development of proposed new Regulations covering hazardous substances, cost-benefit analysis has been instrumental in determining the development of policy on the scope and nature of employer duties, including requirements for health surveillance': Submission no. 31.

374 Submission no. 32.

375 Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Meeting with departmental regulatory officers, 19 Jun. 1997 (hereafter 'regulatory officers meeting').

376 The observation was made by the Committee's Chairman at the *Six Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Conference on the Scrutiny of Bills*, Adelaide, 18 Jul. 1997, Transcript of proceedings, p. 53.

bureaucrats need more training on RIS processes. Mr Shepherd of the Victorian Employers' Chamber of Commerce and Industry (VECCI) supported the implementation of recommendation 53 of the Small Business Deregulation Task Force (the Bell report),[377] which suggested that the federal Office of Regulation Review develop and promote new or improved training courses on the RIS process. The Task Force recommended that there be a two stage process with training directed towards government policy for developing regulations, as well as courses on regulatory impact statements which have agency specific components.[378] The Federal Government has agreed with this recommendation, and will request that ORR's training programs be more extensive.[379]

7.10 Training on the RIS process is provided by the Victorian ORR. This training takes the form of a half-day annual seminar on regulatory reform; distribution of ORR publications to departments; and ORR providing advice to departmental officers on an individual basis. [380]

7.11 The Committee has met with many regulatory officers and, while accepting their high level of expertise and commitment to the RIS process, believes that the training regime should be augmented. Departmental strategies should be put in place to ensure that regulatory officers receive assistance from the public relations departments of their agencies in an endeavour to make good consultation a priority. This practice appears to be operating in several departments.

7.12 Some officers may need additional assistance in ensuring the readability of the RIS. According to Luminico there is a tendency for RISs to be 'structured as complex economic and financial analyses which are difficult for many people to read and appreciate'.[381] The need for points raised in RISs to be stated concisely was echoed in other submissions.[382] Additionally, the Scrutiny of Acts and Regulations Committee (SARC) in its *Ninth Report to Parliament on Subordinate Legislation* observed, in passing, that there were several RISs which were of a 'superior standard', but in so

---

377 Commonwealth of Australia, Small Business Deregulation Task Force, *Time for Business*, AGPS, Canberra, 1996, reproduced at <http://www.dist.gov.au/smallbus/sbtf.html> (hereafter 'Time for Business').

378 ibid., p. 120.

379 Hon J. Howard, MP, *More Time for BusinessStatement by The Prime Minister, The Hon. John Howard, MP, 24 Mar. 1997*, AGPS, Canberra, 1997, p. 69, reproduced at <http://www.dist.gov.au/smallbus/moretime/index.html> (hereafter 'More Time for Business').

380 Personal Communication with Mr Martin Oakley, Director of the Office of Regulation Reform (hereafter 'ORR'), 6 Aug. 1997.

381 Submission no. 20.

382 See e.g., submission no. 23.

doing they drew attention to only four RISs.[383] By the phrase 'superior standard' SARC meant that:[384]

> These RISs are well presented, clear and persuasive and illuminating to all those who read them. Accompanying documentation acknowledges submissions of respondents and occasional appropriate amendments are made to the final Regulation as a result.

7.13 Of course, this part of the SARC report does not imply that the other RISs were inadequate (or not of a high standard), but it does emphasise that there is room for improvement in the drafting of RISs.

Recommendation 35

In an effort to make good consultation a priority, the training regime provided by the Office of Regulation Reform on the regulatory impact statement process should be augmented with departmental strategies which ensure that regulatory officers receive assistance from the public relations departments of their agencies on how best to conduct public consultation.

Early Consultation and Negotiated Rule-making (Reg-Neg)

Reg-Neg

7.14 A number of groups submitted to the Committee that there should be greater consultation with interested groups by way of early consultation or negotiated rule-making (Reg-Neg). By way of overseas example, Reg-Neg operates under the United States Negotiated Rulemaking Act of 1990. The basic idea behind Reg-Neg is that a government agency that is considering making a 'rule' (that is, a regulation), first brings together representatives of the various groups that are likely to be affected by the rule for discussions on what it proposes. The concept of 'affected parties' incorporates interest groups, as well as those who are to be regulated by the proposed rule. When the parties are brought together, the object of the exercise is to achieve consensus about the text of the proposed rule, with a view to avoiding the cost of costly litigation further down the track.[385] As one commentator observed, a

---

383 The RISs related to: SR 15/95 Veterinary Surgeons (Fees) Regulations; SR 186/95 Water Industry Regulations; SR 84/95 Fisheries (Scallop) Regulations; SR 71/96 Agricultural and Veterinary Chemicals (Control of Use) Regulations). Victoria, Scrutiny of Acts and Regulations Committee, *Ninth Report to Parliament on Subordinate Legislation, Annual Report concerning Statutory Rules Series 1995 and 1996*, Government Printer, Melbourne, May 1997, p. 13.

384 ibid.

385 See K. Rubenstein, 'Public participation and rule making: Reg-Neg, the USA experience', *A.I.A.L. Forum*, 1994, no. 2, p. 17. See also, generally, Administrative Conference of the United States, *Negotiated Rulemaking Source Book*, 1990.

key motivation for the parties to reach a consensus during negotiations is 'the knowledge that the agency will write its own rule if the negotiators cannot agree'.[386] Moreover, consensus may be promoted by using an experienced mediator during discussions.[387]

7.15 Despite the benefits associated with Reg-Neg, the experience in the United States has been problematic. This is evidenced by a number of examples of litigation by parties who have participated in reaching a consensus. Cary Coglianese, an Associate Professor of Public Policy at Harvard University, has observed:[388]

> despite all the postulations about how negotiated rulemaking will save time and eliminate judicial review litigation, the procedure so far shows no demonstrable change over the informal rulemaking that agencies ordinarily use'.

Coglianese found that for the United States Environment Protection Agency (EPA), the agency which has used Reg-Neg the most, the rate of litigation for negotiated rulemaking has been 'higher than for other significant EPA rules'.[389]

7.16 Additionally, the process is demanding for staff, who after participating in negotiations must draft the rule and respond to comments.[390] The length of time taken by the Reg-Neg process was found to average just under 2½ years from when the agencies announced an intent to form a negotiated rulemaking committee until when the rule was published.[391] Coglianese therefore concluded:[392]

> in the absence of these promised benefits, agencies' continued reliance on public participation methods which do not depend on consensus will remain the more sensible approach to making regulatory decisions.

7.17 Reg-neg equates with the consultation phase under section 6(b) of the *Subordinate Legislation Act 1994* (Vic.), which provides that the responsible Minister must ensure that where the guidelines require consultation

> there is consultation in accordance with the guidelines with any sector of the public on which an appreciable economic or social burden may be imposed by a proposed statutory rule so that the need for, and the scope of, the proposed statutory rule is considered.

---

386 D. Pritzker, 'Regulation by Consensus: Negotiated Rulemaking in the United States' (1995) 1 *Commercial Dispute Resolution Journal* pp. 217, 224.

387 ibid.

388 C. Coglianese, 'Assessing Consensus: The Promise and Performance of Negotiated Rulemaking', p.2, reproduced at < http://www.ksg.harvard.edu/prg/coglianese/rulemake.htm>.

389 ibid., p. 26.

390 ibid., p. 11.

391 ibid., p. 8.

392 ibid., p. 27.

SARC recommended that a 'reasonable efforts' expectation in consulting might be introduced for Ministers to strengthen section 6 of the Act.[393] The Committee agrees with this recommendation.

7.18 Ms Roper submitted that there should be more consultation at an early stage, 'before pen is put to paper'.[394] The extent of the consultation program should reflect the significance of the regulation. As she observed, the consultation process may involve a discussion paper, workshops, regular meetings and letters to stakeholders.[395] Moreover, there should be a development plan which sets out the objectives of the regulation or the problem to be fixed. Alternatives should be considered, including self-monitoring and codes of practice. The Committee notes that new technologies including internet listservers mean that continuous consultation can be an efficient and inexpensive process.

7.19 Some departments are already engaging in extensive consultation during the drafting of the RIS. At the regulatory officers meeting in June 1997, the Committee heard that departments frequently engage in consultation prior to publishing the RIS, and that amendments are made at the draft stage. In these cases the decision to regulate tends to be made before the RIS is published, with the RIS being a justification for that decision. This is quite justifiable, provided the rule-maker is open to persuasion by submissions received during the public consultation phase.

7.20 This type of approach is favoured by the Department of Premier and Cabinet which conceded some of the criticisms and submitted to the Committee that consultation should occur at an early stage in policy development, instead of once a draft regulation has been prepared.[396] Its main reason for holding this view is that:[397]

> The RIS is intended to answer the question of whether it is necessary to regulate at all, and to determine whether other alternatives may be more suitable. Yet the RIS process seems to come into effect too late in the Regulation making process to allow these issues to be properly addressed.

7.21 Moreover, the Department believes that not only may the RIS process be refined in a way that addresses the concerns of industry and business, as described

---

393 ibid.

394 A. Roper, National Manager, Strategy and Industry Policy, Australian Chamber of Manufactures, Parliament of Victoria, Law Reform Committee, *Notes of Conversation*, Twilight Seminar, 11 Jun. 1997 (hereafter 'Twilight Seminar').

395 ibid.

396 Submission no. 26.

397 ibid.

above, but that the process may be able to be used to achieve the objective of 'efficiency'.

7.22 The better use of early consultation was also supported by the submission from the Metal Trade Industry Association of Australia, which favoured the use of performance based regulation:[398]

> Any assessment of a proposed rule, the termination of an old one, or a change to an existing one must be predicated on a meaningful cost-benefit analysis of both the purpose **and** the desired result. Thus, a performance-based regulation would fit neatly within an economic framework because it would satisfy both sides of the consultation. There has been a myriad of recent examples where it was apparent that the process of consultation had been strenuously adhered to without any real commitment to the purpose of consultation and thereby the efficiency of the procedure highjacked (sic.).
>
> *Often appropriately targeted consultation at the outset can address a perceived problem and resolve a satisfactory solution, simply through a focussed dialogue with relevant stakeholders.* [Italics added]

7.23 Other submissions also favour early consultation. According to the submission from Mr Phil Clark, 'preliminary analytical cost-benefit assessment and regulatee consultations should precede and guide development of the "key regulatory objectives", before any detailed drafting work'.[399]

Recommendation 36

A 'reasonable efforts' expectation in consulting should be introduced for Ministers to strengthen section 6 of the* Subordinate Legislation Act 1994 *(Vic.) which states that the responsible Minister must ensure that there is consultation.

Government and Business Working Together

7.24 Recently the Australian Chamber of Manufactures and the Victorian Environment Protection Authority (EPA) developed a *Protocol for Development of Regulations and the Preparation of Regulatory Impact Statements* (Feb. 1996).[400] The protocol, which is reproduced in Appendix F to this report, was prepared following pressure by the then Chairman of SARC, Mr Victor Perton, MP. The protocol has received praise from a number of groups, for example, Luminico described it is an 'interesting precedent' whose application could be extended:[401]

---

398 Submission no. 12.
399 Submission no. 25.
400 Twilight Seminar.
401 Submission no. 20.

> The Memorandum of Understanding [MoU] between the EPA and [the Australian Chamber of Manufactures] creates an interesting precedent in this regard. In addition to a general RIS consultative process, protocols could be negotiated between Government agencies and their stakeholders in a similar vein to the MoU. This would meet the specific consultative needs of the stakeholders in the initiation and development of the legislative instruments as well as commit the agencies to more effective and active consultation.

7.25 In evidence, Ms Roper submitted that the protocol could be applied to all regulators in all sectors. The protocol is important because it provides a best practice guide for future environmental regulations and RISs.[402] The protocol emphasises the desirability of consulting with 'all sections of the community' at an early stage in the process.[403] The protocol itself provides the following summary of its importance to the regulatory process:

> EPA is committed to best practice environmental regulation. This means that EPA will consider all practicable management options, both regulatory and non-regulatory, when addressing environmental issues. The protocol reflects this commitment by highlighting the steps EPA will take to develop and consider a range of these options, particularly the steps that EPA will follow if a regulatory option is pursued.

7.26 The steps for consultation outlined in the protocol are extensive and begin with a 'needs analysis'. This is intended to assess 'the nature and significance of the issue to be addressed', in order to assess if any action is necessary.[404] At this time consultation is with key stakeholders, including groups which represent the community, industry, as well as with government agencies.[405] Later a separate consultation program is implemented, based on a development plan. This occurs after it is decided that a regulatory approach is needed. One of the benefits of the protocol is that it clearly lists the consultation techniques which may be used by the EPA and the factors to be taken into account in determining the best way to consult. One departmental regulatory officer observed that the protocol accomplishes what a good RIS should do anyway.[406]

7.27 According to its submission, WorkCover has a similar approach. It recommended that the consultation process could be improved by placing a duty on regulatory agencies to circulate an issues paper to key stakeholders during the

---

402 Environment Protection Authority, Community Affairs Branch, 'Protocol for Development of Regulations and the Preparation of Regulatory Impact Statements', *EPA Bulletin*, Publication 484, (Reproduced in Appendix F and hereafter 'EPA Protocol').

403 'Regulatory Reform - The Australian Experience, Environmental Conference, New Developments in Environmental Policy' *Business Council Bulletin* Oct./Nov. 1995, p. 31.

404 EPA Protocol.

405 ibid.

406 Regulatory officers meeting.

development of major regulatory proposals and 'to issue guidelines for consultation with key stakeholders on legislative proposals'.[407] The Committee agrees with these suggestions.

- proposal;
- proposals.

7.28 The Protocol highlights the importance of the public and government working together in the regulatory process. This point was also emphasised in a submission to the Committee from the Saskatchewan Executive Council (Canada).[408] The submission describes a key feature of Saskatchewan's regulatory reform initiative:[409]

> Through the Regulatory Reform Initiative we are currently encouraging departments to undertake an even more stringent analysis and justification for recommending regulations and to build processes that are transparent and inclusive of the clients of government, but which do not overlap or duplicate other work being done within government…We anticipate that by requiring this increased level of analysis that departments will seek more acceptable and realistic options with their clients including non-regulatory options and cooperative measures between and amongst departments.

7.29 The desirability of this approach was also recognised by the Hon. Rob Kerin, MP, the South Australian Minister for Primary Industries and Minister Assisting for Regional Development and Small Business, in his submission to the Committee. He said 'it is the level of community involvement throughout the whole of the legislative review and establishment process that determines the value of the outcome'.[410]

Recommendation 37

Greater use should be made of early consultation or Reg-Neg. The Committee therefore recommends placing a duty on regulatory agencies to circulate issues papers to key stakeholders during the development of major regulatory proposals and to issue guidelines for consultation with key stakeholders on all legislative proposals.

Public

Recommendation

comment.

---

407 Submission no. 31.
408 Submission no. 13.
409 ibid.
410 Submission no. 27.

Recommendation:

world.

Consultation with Small Business

7.30 Small businesses tend not to have an input or be consulted on RISs. The definition of small businesses adopted by Small Business Victoria is that used by the Australian Bureau of Statistics; namely, 'a manufacturer with less than 100 workers, a construction and service sector business with less than 20 workers, or an agricultural firm with a value of operations between $22,500 and $400,000 per annum'.[411]

7.31 The Committee acknowledges the fact that most small business people are unaware of the RIS process and do not have time to go to meetings during business hours. Mr Martin Oakley, the Acting Director of the Victorian ORR, acknowledged the fact that individual small businesses tend not to have a role in the consultation process, with this largely being a reflection of a lack of time on the part of business persons. He referred to the meetings for the Tourism Review where he was told by small business people who had the time to attend the meeting, not to expect them to write their views down, although they were happy to voice them.[412] This means that it would be unusual for small business people who do not belong to an organisation (such as VECCI) to make comments on an RIS.[413] Those who are members of such an organisation will tend to rely on the organisation to make submissions.

7.32 There may also be a tendency for small business people to believe that their views may not be heeded by governments, and that they will not be seen as authoritative, given that departments have greater resources and should know about the issues anyway. This is a problem for departmental regulatory officers who seek to consult broadly with a round table of stakeholders. One solution is to have a unit within Government responsible for acting as a conduit for small business people with respect to the development and reform of regulations.[414] The Committee believes that ORR should have such a role and that in carrying out this function ORR must have strong ministerial support. Consideration should be given to the introduction of a simple list of questions on RISs; or visiting randomly selected small

411 State Government of Victoria, Small Business Victoria, *Big Achievements for Small Business*, 1997, p. 3.

412 Personal communication, 6 Aug. 1997.

413 This view was also voiced by the Executive Director of Small Business and Regulatory Review, Mr Mark Brennan, personal communication, 6 Aug. 1997.

414 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Mr David Parker, Assistant Secretary, Competition Policy Branch, Structural Policy Division, Treasury, Canberra, 4 Jun. 1997.

businesses; or the formation of a standing panel of small to medium sized business enterprises. Regulators would then ask themselves: Which of these mechanisms is the most suitable one to encourage small business to come in and contribute to the framing of regulations?

7.33 However, difficulties in encouraging consultation are not unique to small business. Big business may also be slow to respond to opportunities for consultation. As observed by Mr Peter Rayner, a partner at Coopers & Lybrand, Australia is part of a wider culture which tends to be reactive rather than proactive. Moreover, it was suggested that large corporations are not sufficiently altruistic to promote regulatory reform for the good of business in general or a particular industry, unless there is a direct benefit for them.[415]

Recommendation 38

In order to take more account of the needs of small business, an executive summary and list of questions should accompany a regulatory impact statement. This would encourage people to make a contribution to the formulation of regulations without having to read the whole regulatory impact statement. This approach would be particularly valuable where the regulatory impact statement is lengthy and includes complex information.

Recommendation 39

Regulatory Efficiency Legislation should provide for the electronic publication of all regulatory impact statements on the internet, together with a form which provides simple boxes to encourage responses to the regulatory impact statement. This approach is particularly desirable given that a regulatory impact statement may deal with difficult technical issues so that there may be very few experts on a particular subject in Melbourne, but numerous experts around the world.

Public Service Performance

7.34 Mr Shepherd of VECCI identified a lack of genuine commitment by public servants to the RIS process as being a matter of concern. A number of submissions were similarly critical of the attitude of regulators.[416] Luminico was critical of the

---

415 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Mr Peter Rayner, Partner, and Mr Roger Male, Managing Partner, Melbourne, 22 Jul. 1997.

416 See, e.g., submission nos. 14 & 20.

communication skills of agency staff during the RIS process. It suggested that they should become better communicators and that:[417]

> too often we have seen staff cling to an impractical idea because they have lost the capacity to stand back, in effect becoming personal stakeholders in the proposal.

One submission even suggested that, based on the failure of bureaucrats to incorporate changes suggested to proposed regulation, where a person seeks an amendment to a proposed regulation they should be treated as objecting to it and the matter should then be referred to an independent body for a determination.[418]

7.35 A suggestion from VECCI was that performance contracts of senior executives should include a performance indicator requiring that they attempt to reduce compliance costs. Mr Shepherd said: [419]

> A key issue for concern about regulations was not regulatory standards per se but the cost of compliance and administration....If senior regulators had written into their performance agreements a key performance indicator that said that they had to try to reduce those compliance costs-which at the end of the day should not cost government anything-that would start to change the perception of bureaucrats.

7.36 This approach is consistent with the Bell Report which made the following recommendation:[420]

> That senior executive performance contracts include specific requirements to promote cultural change and a greater client focus in the development of policy and the administration of legislation.

7.37 However, according to Mr Shepherd the recommendation should be extended to include the introduction of various performance indicators within contracts of senior executives. He favoured the adoption of the following indicators:[421]

(a) the compliance burden should be lowered by 5 percent over 3 years;

(b) the type and extent of consultations should be improved by 5 percent over 3 years;

(c) administrative costs and compliance costs ratio should stay historically the same;

(d) the speed and accuracy of information to business should be increased by 5 percent over 3 years;

---

417 Submission no. 20.
418 Submission no. 14.
419 S. Shepherd, Parliament of Victoria, Law Reform Committee, Public Hearing with Business Organisations, *Minutes of Evidence*, p.11.
420 Time for Business, Recommendation no. 37.
421 Twilight Seminar.

(e) the quality of RISs should be increased by 5 percent over 3 years. There should be an independent panel to access performance against minimum standards;

(f) non-regulatory approaches to regulatory burdens should be increased by 5 percent over 3 years;

(g) feedback to groups should be increased by 5 percent over 3 years.

7.38 According to Ms Roper, the Australian Chamber of Manufactures and Environment Protection Authority *Protocol for Development of Regulations and the Preparation of Regulatory Impact Statements* discussed above could be used to develop key performance indicators.[422]

7.39 The use of performance indicators to monitor and improve consultation and to promote other regulatory reform goals seems desirable superficially. However, there is a need to guard against applying these standards in a way which still fails to provide a real improvement in performance. Being seen to comply with these indicators would achieve little if performance was not geared to real improvements in output. For example, an increase in the extent of consultation by 5 per cent may not mean that there has been a real improvement in the process and quality of liaison. Moreover, effective qualitative indicators may be difficult to design, especially where they seek to measure the quality of an RIS.

7.40 The challenge of drafting appropriate performance indicators to monitor the performance of governments and agencies is now being faced by Commonwealth, State and Territory Small Business Ministers, after the Small Business Summit agreed to a program for developing national regulatory performance indicators.[423] The jurisdictions were to consult with agencies and produce proposals for indicators by September 1997. The objectives of these indicators are to: 'minimize the burden of regulations; apply appropriate scrutiny and consultation processes; and produce regulation which meets tests of transparency, fairness and accessibility'.[424] As Mr Philip Noonan observed, the greatest value of these indicators will be in regulators benchmarking with each other, provided that it is possible to define some common criteria.[425]

---

422 ibid.

423 National Small Business Summit, *Communique*, Melbourne, 27 Jun. 1997.

424 ibid.

425 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Small Business & Consumer Affairs Division, DIST, Canberra, 4 Jun. 1997.

7.41 The Committee believes that the Government should give consideration to the inclusion of such performance indicators within the contracts of regulatory officers and heads of regulatory agencies. A system of strong incentives for regulatory officers engaging in good consultation would be well merited. Performance indicators could relate to the number of submissions, the readability of RISs and the amount of informed comment obtained.

Use of Economic Cost-benefit Analysis

7.42 During the Committee's meeting with departmental regulatory officers, the issue of whether an economic cost-benefit analysis was appropriate in all cases was discussed. Several departmental officers believed that the RIS process is not suited to certain types of regulation; namely, cases where the application of an economic cost-benefit analysis to the proposal would be farcical, because the proposal is predominantly targeted towards achieving social benefits. It was suggested that one way to address this problem would be to provide Ministers with a discretion in these circumstances to exclude regulations from the RIS process.

7.43 The Department of Premier and Cabinet believes that there is scope to consider whether the RIS process is appropriate for all forms of regulation, in order to 'ensure that an RIS is required only where there is a genuine need for a detailed cost benefit analysis'.[426] This point was also made by WorkCover in its submission to the Committee.[427] WorkCover listed two situations where an RIS would not be beneficial and may even be inappropriate. First, where the principal legislation expressly identifies the need for regulation, as where the Act 'closely defines the parameters of a regulation or requires that a regulation be made to define a procedure that is only necessary given the operation of a substantive duty in the principal legislation'. Secondly, where the regulation is minor and fulfilling the RIS requirements may constitute a waste of agency resources, especially if the cost of doing so outweighs the benefit. An exemption from the RIS process was also suggested in the submission from SARC where there is 'a proposed statutory rule which came into being because of existing arrangements'.[428]

7.44 Moreover, according to WorkCover 'legislation governing the RIS process should state that the level and complexity of cost-benefit analysis will vary'.[429]

426 Submission no. 26.
427 Submission no. 31.
428 Submission no. 32.
429 Submission no. 31.

WorkCover suggested that a criteria should be developed which addresses this issue, for example, by allowing agencies to decide to use formal cost-benefit analysis where it is warranted, based on the 'size of the problem, foreseeable impact of any regulatory proposal, and the extent to which proposed duties are performance based'.[430]

7.45 A more restrictive ambit for the use of RISs was also sought in the submission from the Building Control Commission. It recommended that there be an automatic exemption from the RIS procedure where the proposed regulation clearly reduces a burden.[431] The Committee notes that an amending regulation may have this effect and in such cases no RIS is required. On the other hand, a regulation made in circumstances where its precursor has sunsetted will usually impose a burden and the fact that the burden is less than the precursor burden does not mean new and better means (or alternative mechanisms) cannot be found.

7.46 However, in the Committee's view these comments confirm that several submissions have misconceived the requirements of the RIS process. The process requires that there must be an honest effort to carry out a cost-benefit analysis. If the costs and benefits are only social, then there is no need for a tortured economical analysis. Naturally, the RIS will vary in detail, for example, the RIS may be only seven to eight pages in a simple matter, with the impact analysis being one to two pages.[432] Moreover, including a cost-benefit analysis in the statement allows the public to assess the likely impact of the regulation.

Victorian Office of Regulation Reform (ORR)

Role of ORR

7.47 Currently under the *Subordinate Legislation Act* (Vic.), it is possible to use bodies other than Victorian Office of Regulation Reform (ORR) to assess an RIS.[433] The Commonwealth Office of Regulation Review (federal ORR) has worked with the Victorian ORR as an independent checker under the *Subordinate Legislation Act*. During a meeting with representatives from the federal ORR, the Law Reform

---

430 ibid.

431 Submission no. 7.

432 According to Mr Martin Oakley, Director of Victorian ORR, an example of a fairly short RIS is the one prepared for the Regulations dealing with Courts Security: personal communication 10 Sept. 1997.

433 *Subordinate Legislation Act 1994* (Vic.), s. 10(3).

Committee was told that there have been cases where the Victorian ORR wrote the RIS and the federal ORR checked and signed off on it under the Victorian Act.[434] The federal ORR is the only body other than the Victorian ORR to have carried out an independent assessment of an RIS.

7.48 A recent example of the role of Victoria's ORR concerns the Environment Protection (Scheduled Premises and Exemptions) Regulations 1994. These regulations were the subject of qualified advice from ORR under subsection 13(4) of the *Subordinate Legislation Act*. The Scrutiny of Acts and Regulations Committee (SARC) undertook an Inquiry in relation to the qualified advice, including taking submissions from interested groups and organisations and conducting a public hearing, at which evidence from the ORR and the sponsoring government agency was heard. As a result of the Inquiry, the ORR's concerns in relation to the RIS were publicised and discussed. SARC reported to the Parliament, under paragraph 14(1)(j) and Schedule 3 of the *Subordinate Legislation Act*, noting its concerns about the regulations in question.[435]

7.49 Mr Soutter from the Business Council of Australia suggested that the *Subordinate Legislation Act* needed to be amended so that the ORR was the only body which could certify an RIS. He expressed concern that a department which has failed to satisfy ORR regarding the quality of its RIS could circumvent the process by shopping around for another body to sign off on the document. [436]

> [I]n terms of the regulatory process the thing we have argued with the Commonwealth Government (sic.)...is that the Office of Regulation Reform would simply have to sign off on the RIS process on each piece of regulation. If it is not happy to sign off, it does not proceed forward but just goes back to the department, and it can sit back there until such time as it can get the ORR to sign off on it.

7.50 Although this is theoretically possible, there would need to be cogent evidence that the system is not only liable to abuse, but is being abused before the Committee

---

434 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Federal ORR, Industry Commission, Canberra, 4 Jun. 1997.

435 See e.g., Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Seventh Report on Subordinate Legislation Concerning: Environment Protection (Scheduled Premises and Exemptions) Regulations 1994*, L. V. North, Government Printer, Melbourne, 1995. In that Report, the Committee received evidence from ORR that it had concerns about the RIS prepared by the Environment Protection Authority in relation to the relevant regulations.

436 M. Soutter, Parliament of Victoria, Law Reform Committee, Public Hearing with Business Organisations*, Minutes of Evidence*, 7 Apr. 1997, p. 25.

would recommend a change to the current system. This is particularly so, having regard to the National Competition Policy implications of such a change.[437]

Location of ORR within the Public Sector

7.51 The Victorian ORR is located within the Department of State Development under the Minister for Small Business, Hon. Louise Asher, MLC. During the course of the present Inquiry an issue arose as to whether ORR should more properly be located within the Department of Premier and Cabinet, because of its whole of Government responsibilities. The New South Wales equivalent of Victoria's ORR is merged with that State's Competition Policy Unit within the Cabinet Office. Under the federal model, the Office of Regulation Review is part of the Industry Commission, an independent statutory body.

7.52 During a meeting with the Committee, Professor Allan Fels, Chairperson of the Australian Competition and Consumer Commission, suggested that it may be appropriate for the Victorian ORR and the Competition Policy review function of the Economic Development Branch of the Cabinet Office to be merged within the Department of Premier and Cabinet.[438] The adoption of this model was recommended by SARC, because ORR would then be able to 'independently advise Ministers from a position outside a Minister's Department.[439]

7.53 Although there is much to be said for these arguments, the Committee has concluded that the location of the Victorian ORR is appropriate and that the case for it being moved to the Department of Premier and Cabinet has not been sufficiently made out.

Resourcing of ORR

437 Concern has also been expressed regarding the need to avoid reducing the Minister's responsibility for taking appropriate advice on the adequacy of the RIS process was raised in the submission from WorkCover: see submission no. 31.

438 ibid.

439 Submission no. 32.

7.54 According to Mr Stephen Shepherd of VECCI, the Victorian ORR is under resourced, and there is a lack of Government commitment towards ORR.[440] Other participants at the public hearing also believed that the ORR needed to be given more power and needed to be better resourced.[441] The Committee agrees with these views, and also believes that the Victorian ORR should be more multi—disciplinary in the composition of its staff. The office needs to draw on a wide range of expertise, including that of lawyers. At present, the Office appears to be largely comprised of economists. This is the case also with the federal ORR. The Victorian office has the support of business, but they want it to be multi-disciplinary, and to have the ability to call in consultants when required.

7.55 Additionally, consideration could be given to reconstructing ORR so that it has a board of small business people who are consulted in circumstances where consultation would otherwise be difficult in relation to proposed regulations. The Committee believes that there could be specialist panels for different areas of regulation—for example, an environment panel where the proposed regulation relates to environment protection. In this way, there would be adequate representation in each of the areas of Government regulation.

Recommendation 40

The Victorian Government should give consideration to better resourcing the Office of Regulation Reform so as to ensure that it is able to provide a multi-disciplinary service.

Recommendation 41

The Victorian Government should give consideration to making specialist panels available to the Office of Regulation Reform to assist in the consultation process.

Automatic Revocation of Statutory Rules

7.56 As discussed in Chapter 6,[442] automatic revocation of all statutory rules 10 years after their making occurs under section 5 of the *Subordinate Legislation Act* (Vic.). The Committee notes that Tasmania has recently introduced a similar provision.[443] In its discussion paper the Committee raised the issues of whether the

440 Parliament of Victoria, Law Reform Committee, Public Hearing with Business Organisations, *Minutes of Evidence,* 7 Apr. 1997.

441 ibid.

442 paras. 6.19–6.21.

443 Submission no. 24.

current process for staged repeal of regulations works and whether the Victorian requirement for 10 year sunsetting is acceptable.

7.57 In relation to the first issue of whether staged repeal of regulations works, the Committee received a few submissions that suggested that there were problems with automatic sunsetting. The Saskatchewan Executive Council said that there were dangers in using automatic sunsetting, because various protections may later be discovered to have been lost.[444] For this reason, it recommended that there should be no blanket sunset clause. Rather, it recommends that all new regulations include their own specific sunset date. New regulations 'which do not have a sunset date should be required to be reviewed within 10 years and at that time if still needed, be given a review date or a rolling review'.[445]

7.58 The automatic application of sunsetting was also criticised in a submission from the Road Transport Forum, which suggested that 'there is a good case to rely more on a structured series of reviews'.[446] Another submission suggested that a 10 year automatic sunsetting showed an acceptance of the fact that the initial regulation was made without proper consideration. Good regulations were seen as standing the test of time.[447]

7.59 However, the Committee believes that the process of sunsetting has been beneficial to Victoria and does not find any conclusive evidence to suggest that it has a detrimental effect for Victorian regulations. Moreover, if it were not for sunsetting, the RIS process would not have operated on all substantial regulations so as to require the specification of regulatory objectives which is essential to the Committee's model for the introduction of ACMs.

7.60 In relation to the time period for sunsetting, some groups have suggested that a shortening of this period may be necessary because of concern that the RIS process is not always as transparent as it could be and the analysis is 'highly speculative'. According to Mr Rex Deighton-Smith, the former Director of the Victorian Office of Regulation Reform, the period should be shortened to 7 years, as is the case in South Australia. He opposed the federal proposal for 5 year sunsetting of regulations[448] on

444 Submission no. 13.
445 ibid.
446 Submission no. 15.
447 Submission no. 7.
448 The proposal is contained in cl. 66 of the Legislative Instruments Bill (Cth.) 1996.

the basis that conditions in such a short time are unlikely to change to such an extent as to render the regulations inappropriate.[449]

7.61 However, the Australian Institute of Petroleum recommended that automatic repeal of regulations should occur after 5 years.[450] This time frame was seen as reflecting the 'increasing rates of change in the business environment, technology and government'. The argument in favour of shortening the period is aptly put by Mr Starkey, the Executive Director of the Institute:[451]

> The automatic repeal mechanism provides an opportunity for regulators to review existing regulations and receive input from industry. A shorter time frame for the automatic repeal of regulations, as in NSW, ensures that regulations are more likely to be contemporary and relevant. The automatic repeal process also means that the review of regulations requires less administrative and political impetus than would otherwise be the case to have regulations changed.

A 5 year sunset period was also supported by the Shooting Sports Council of Victoria.[452]

7.62 According to the Building Control Commission the 10 year sunsetting period should be retained, because 'it allows industry to fully absorb the implications of current regulations before having to consider new regulations'.[453] WorkCover also suggested that the 10 year period was adequate and reasonable and that a 5 year time frame would not allow it to assess the impact of a statutory rule.[454] One submission suggested that review of the 10 year sunsetting provision be deferred 'until *after* the questions posed in the Law Reform Committee Discussion Paper have been addressed'.[455]

7.63 The preponderance of opinion appears to be that 5 years is too short a period of time for the sunsetting of regulations. There is no evidence that the 10 year automatic sunsetting period is either detrimental or producing an excessive workload. Additionally, there is no evidence to suggest that there is an innate virtue in a shorter period. Accordingly, the Committee does not recommend any change in this area.

---

449 Parliament of Victoria, Law Reform Committee, Public Hearing with Business Organisations, *Minutes of Evidence,* 7 Apr. 1997, p. 6.
450 Submission no. 16.
451 ibid.
452 Submission no. 14.
453 Submission no. 7.
454 Submission no. 31.
455 Submission no. 25.

7.64 In reaching its conclusion the Committee is mindful of the situation which can occur where there is no automatic sunsetting. The vital role which sunsetting can play was aptly described by Mr Norman George, MP, from the Cook Islands, who said:[456]

> I am particularly happy and delighted to see for the first time a 10 year sunset clause. In our country we have regulations going back to 1916 and the 1920s that relate to all major events, including the First World War and the Second World War. There are 12 inhabited islands in the Cook Islands, and most of the others are governed by regulations and by-laws. Some of them are so ancient that a 10 year sunset clause would be an appropriate thing to have.

7.65 Nonetheless, the Committee believes that a review of regulations which are approaching sunsetting should not be left to the last minute. The 1997/98 *Victorian Regulation Alert* produced by the Victorian ORR should assist in drawing attention to regulations which are approaching sunset. It provides a list of regulations that are to expire during 1997/98, together with contact details of the relevant departmental officer, so that members of the public may have an input into regulatory proposals.[457]

Conclusions and Issues for Detailed Consideration

7.66 The Committee believes that the performance of the RIS process cannot be examined in isolation, but must be seen as part of an integrated system of law-making. Before an RIS is prepared there is consultation within the public service and between the public service and stakeholders. Many regulatory proposals are rejected at this stage and converted to self-regulation or other alternative solutions to the regulatory problem. It is inherent in the RIS process that a preliminary decision to regulate has been taken before the RIS is prepared.

7.67 Additionally, the fact that the RIS needs to be prepared is important in itself. Mr Stephen Argument, a leading commentator on subordinate legislation, aptly made this point recently when he said:[458]

> The reasons why I was impressed by what I discovered in relation to Victoria was that one of the advantages of having something like a Regulatory Impact Statement process is that it forces the bureaucracy to go through various steps in order to get their delegated legislation into force. I have often thought that it is a great advantage if you can effectively force the

---

456 Proceedings of the Commonwealth Parliamentary Association, 24th Australian and Pacific Regional Conference, Melbourne, 17 June 1997, Parliament of Victoria Hansard (Proof Version Only), p. 62.

457 Victoria, ORR, *1997–98 Victorian Regulation Alert*, Department of State Development, 1997, v.

458 S. Argument, '*Recent Developments in Delegated Legislation*', paper delivered at Sixth Australasian & Pacific Conference on Delegated Legislation & the Third Australasian and Pacific Conference on the Scrutiny of Bills, Adelaide, 16 Jul. 1997.

> bureaucracy to think a little more before it does things. The more they are allowed to just go out and act and take legislative type action without having to go through any sort of formal process or any thought process, the greater chance there is for mistakes being made and for ill thought out legislation being made...One of the things about the Victorian system is that there is a very definite and ordered process that departments have to go through in order to make delegated legislation.

7.68 The evidence and submissions received on the RIS process suggest that, at the very least, there needs to be refinement of the statutory structure setting up the RIS process, better administration of the process and a more proactive approach across government to involve stakeholders and the community in lawmaking. The current system and avenues for business and community participation in lawmaking needs to be better publicised.

7.69 The Law Reform Committee's consultation with business groups and departmental regulatory officers, public hearings, and submissions have identified a number of issues for further consideration. These detailed issues are beyond the scope of the present Inquiry, however, the Committee has concluded that in order to improve the standard of consultation, and thereby the quality of RISs, several matters need to be investigated. For example, how can the manner in which RISs are published be improved? Should proposed regulations be issued in advance with explanatory memoranda in order to promote consultation instead of an RIS? Should further guidance be given on how to apply the 'appreciable burden' test, which is used in determining when a full RIS is to be prepared? Is there any credence to the suggestion made to the Committee by regulatory officers that some departments may avoid the RIS process by placing requirements in primary legislation rather than in regulations?

7.70 There is a need to assess the extent to which submissions from business and the public in response to an RIS result in amendments to regulations. This question was raised in a submission to the Law Reform Committee which asked whether the RIS process had resulted in any substantial amendment to proposed regulations.[459] The submission warned that in answering this question, that while no change in regulations could be taken to mean that the bureaucrats were strongly self-opinionated, it could also mean 'that they got it right the first time'.[460] The Committee notes that 'getting it right the first time' could mean that the pre-RIS consultation or Reg-Neg is effective.

---

459 Submission no. 2. See also submission no. 32. Furthermore, in submission no. 3 it was recommended that SARC 'should have its processes, activity and involvement in the way it carries out its work for the Victorian Government reviewed'.

460 Submission no. 2.

7.71 Some attempt should also be made to assesses the quality of RISs being prepared and to determine whether they were easy to understand. Several submissions expressed concern about the need to avoid the use of data or statistics in RISs that may be confusing or misleading.[461] Moreover, according to Mr Sam Kazman from the Competitive Enterprise Institute in the United States, it is not enough to 'simply require agencies to do cost-benefit analyses' because:[462]

> Agencies can cook the numbers any which way. You must add teeth to the requirement by allowing outside groups to challenge the analyses (in court and elsewhere), or perhaps by creating an agency whose express job is to challenge other agencies.

It is also necessary to consider whether RISs give sufficient weight to qualitative analysis of measures proposed, and to the costs and benefits of the regulation and alternatives to regulation.

7.72 Another matter which requires consideration is whether there should be an exemption from the RIS process where there is a fairly limited number of stakeholders or where Reg-Neg has already occurred with all the major stakeholders? This issue should be considered in light of the danger that the Reg-Neg or RIS process may potentially be hijacked by a limited number of participants. Ms Roper, from the Australian Chamber of Manufactures, also raised the issue of exemptions from the RIS process. In her view, consideration should be given to the application of the RIS process to a wider range of regulatory instruments and quasi-regulations, including, State Environment Protection Policies, Ministerial guidelines, orders in council, declarations, State planning schemes and codes and voluntary accreditation schemes.

7.73 Moreover, in determining whether the RIS process is effective, the work of SARC must be acknowledged. This Committee reviews every regulation and every RIS. It has rejected regulations on the basis of the inadequacy of the RIS.

7.74 Accordingly, the Committee has concluded that there should be a wide-ranging examination of the RIS process, which builds on this Committee's findings. In particular there should be a study into whether the process is complying with its key objectives of promoting accountability and openness, deregulation and improvement of the quality of regulations. It would be useful to undertake a survey of 200 business or industry groups who have made submissions on RISs, in order to find out their views of the RIS process and whether their submissions resulted in any changes to the proposed regulations.

---

461 Submission nos. 14, 18 & 25.

462 Submission no. 5.

7.75 The Committee believes that SARC is the most appropriate body to carry out a detailed evaluation of the efficacy of the RIS process and the quality of RISs being produced. Such an evaluation by SARC would be a natural extension of its existing function of scrutinising RISs under the *Subordinate Legislation Act*. SARC has already expressed interest to this Committee in carrying out such an examination under separate terms of reference.[463] In this context the Committee notes that the Sixth Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Conference on the Scrutiny of Bills passed the following resolution:[464]

> That the Commonwealth and each of the State and Territory Scrutiny Committees be invited to participate in a joint appraisal of the strengths and weaknesses of employing cost benefit & sunset requirements to scrutinise Acts and Regulations and, for this purpose, to set up a steering committee to determine how and when this should be carried out and that the appraisal should also review other relevant scrutiny options.

The Law Reform Committee believes that a detailed examination of the RIS process by SARC would complement this national joint appraisal of the RIS system.

Recommendation 42

The Scrutiny of Acts and Regulations Committee (SARC) should undertake a review of the regulatory impact statement system in twelve months' time. The review should seek to determine how the system is operating. The review should ascertain also whether the Law Reform Committee's suggestions relating to the need for increased early public consultation on regulatory impact statements, and the need for consultation to occur at an early stage in the policy formation process, have been implemented. Separate terms of reference should be given to SARC to conduct this Inquiry.

---

463 Letter from Mr Peter Ryan MP, Chairman of the Scrutiny of Acts and Regulations Committee to Mr Victor Perton MP, dated 2 Jul. 1997.

464 Resolution 6, Adelaide, 18 Jul. 1997. Attachment to Memo from David Pegram to delegates, 23 Jul. 1997.

8 LEGISLATIVE IMPACT STATEMENTS

Introduction

8.1 In the course of conducting its Inquiry the Committee has been made aware of developments at a federal level that will make mandatory a process akin to the regulatory impact statement for all primary legislation. Although an examination of this issue is not encompassed within the terms of reference for this Inquiry, the Committee believes that this is an important issue and ,therefore, it provides the following information to Government. Moreover, as discussed in Chapter 7, at the regulatory officers meeting convened by the Committee it was suggested that there is a tendency to avoid the RIS process by placing the obligations in primary legislation.

8.2 The federal developments in relation to legislative impact statements (LIS) arose out of a recommendation from the Small Business Deregulation Task Force that was accepted by the Federal Government. The Small Business Deregulation Task Force recommended that LISs be mandatory for all primary legislation that imposed compliance obligations. This recommendation was supported by the Government in its response to the Task Force. The introduction of LISs would result in a formal requirement for a published cost-benefit analysis for all proposed legislation. Generally, in this chapter reference will be made to LIS rather than RIS (for primary legislation) in order to promote consistency and avoid confusion in the concepts.

8.3 Currently in Victoria legislative proposals are to be accompanied by Cabinet submissions, the framework of which is outlined in the Cabinet Handbook. This is common to many OECD jurisdictions. The difference between an LIS and the current requirements under the Cabinet Handbook is that an LIS would be a formal public process that would entail a social and economic cost-benefit analysis that is published and that incorporates public consultation for all legislative proposals.

8.4 This chapter begins with an overview of the current procedures for primary legislation in Victoria. It then discusses developments in other jurisdictions before examining the case for the introduction of LISs in Victoria.

Victoria

8.5 Before considering the merits or otherwise of introducing a mandatory LIS process, it is necessary to describe the existing process whereby legislative proposals are prepared for and considered by Cabinet.

Cabinet Requirements for Proposed Legislation

8.6 Cabinet submissions are prepared for proposals to amend or introduce new legislation, with the framework and format of these submissions being outlined in the Cabinet Handbook. Cabinet approval must be obtained if the proposal is to proceed. Among the matters to be included in an 'approval in principle submission' is a 'justification for the legislation as the most appropriate means of implementing the proposal'.[465] The handbook requires that the following five matters be considered in the submission:[466]

(a) the relationship of the proposal to Government objectives, policies and priorities;

(b) whether legislation is needed to implement the policy, or whether it can be implemented by non-legislative means;

(c) the effect on other Government policies and in particular whether other Ministers' portfolios will be affected directly or indirectly;

(d) any cost or revenue implications; and

(e) the timing of the proposal.

8.7 Additionally, where the proposal may have a major regulatory impact submissions should 'clearly identify the costs and benefits for both Government and the community'.[467]

8.8 During the regulatory officers meeting convened by the Law Reform Committee, departmental regulatory officers suggested that the introduction of formal LISs would be somewhat problematic, even though most Cabinet submissions already have the basic requirements of an LIS within them.[468] The use of 'approval in

---

465 Victoria, Department of Premier & Cabinet, *Cabinet Handbook*, Part Two: Legislation, 1987, p. 11.

466 ibid., p. 9.

467 ibid., p. 10.

468 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with departmental regulatory officers, 19 Jun. 1997 (hereafter ' regulatory officers meeting').

principle' (AIP) headings was regarded as a much easier format than that demanded by an LIS.

8.9 Additionally, it was suggested that a Cabinet submission is different in nature from an impact statement. A Cabinet submission, unlike an impact statement, contains all the reasons why the Cabinet wants to proceed in a particular area in order to implement government policy.

Developments in Other Jurisdictions

Commonwealth

Bell Task Force's Recommendation

8.10 The federal Government's decision to introduce LISs followed a recommendation by the Small Business Deregulation Task Force. In November 1996 the Task Force recommended that regulatory impact statements be compulsory for primary legislation:[469]

> Recommendation 51
>
> That Ministers sponsoring primary legislation imposing compliance obligations be required from 1 January 1997 to have tabled a statement form the Office of Regulation Review certifying that minimum acceptable levels of analysis have been undertaken before the proposal can be considered by Cabinet; and that regulatory impact statements or a statement explaining the regulatory impact be tabled in Parliament at the same time as the legislation is introduced.
>
> That taxation legislation be subject to regulation impact statements, including an analysis of the compliance burden on small business.

8.11 The recommendation was largely motivated by the need to ensure that the analysis of a regulatory proposal has been open to public scrutiny and comment. This would not only mean that interested groups have had a chance to comment, but it would reassure Ministers that there has been an adequate level of analysis for the proposal.[470]

---

469 Commonwealth of Australia, Small Business Deregulation Task Force, *Time for Business*, Nov. 1996, p. 118, reproduced at <http://www.dist.gov.au/smallbus/sbtf.html>.

470 ibid.

Federal Government's Response

8.12 In *More Time for Business*, the Commonwealth Government's response to the report by the Small Business Deregulation Task Force, the Government agreed in principle to the recommendation that the preparation of an LIS should be mandatory from now on, with this statement being tabled in Parliament.[471] Under the recommendation, the federal Office of Regulation Review (federal ORR) would have the role of reporting to Cabinet on compliance.

8.13 The decision to support the recommendation was said to be based on a desire to reduce the burden of regulatory compliance on small business.[472] The Government's response proposes that:[473]

> Building on the regulation making framework set out in the Legislative Instruments Bill 1996, the Government will require a regulation impact statement for regulations (ie primary legislation and legislative instruments) and treaties involving regulation which directly affects business or which has a significant indirect effect on business or which restricts competition. The statement would set out the relevant policy objective along with all the viable alternatives for achieving that objective. The purpose of the statement is to ensure that departments and agencies fully consider the costs and benefits of all viable alternatives, with a view to choosing the alternative with the maximum positive impact.

8.14 The response goes on to suggest that in preparing the impact statement, 'the Government will require that there be consultation unless it is considered inappropriate'.[474] The statement would be tabled in Parliament, together with the explanatory memorandum.[475] Additionally, there would be a limited number of exceptions to the process; namely, where regulation is of a minor nature, involves national security, merely meets a specific Commonwealth obligation under an international agreement, or where an LIS would be unnecessary (as in the case of legislation implementing an election commitment) or where the urgency of the matter means an LIS is not possible.[476]

---

471 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Office of Regulatory Review, Industry Commission, (hereafter 'ORR'), Canberra, 4 Jun. 1997.

472 Hon J. Howard, MP, *More Time for BusinessStatement by the Prime Minister, the Hon. John Howard MP, 24 Mar. 1997*, AGPS, Canberra, p. 66, (hereafter, More Time for Business).

473 ibid.

474 ibid., p. 67.

475 ibid.

476 ibid. The statement also suggested that legislative instruments of the type specified in cl. 281(a)(iv), (vi), (vii) or (viii) of the Legislative Instruments Bill 1996 would also be exempt from the process.

Cabinet Handbook Requirements

8.15 Requiring an impact statement for Cabinet proposals is not a new measure—RISs have been required since 1986 for all Commonwealth Cabinet proposals affecting business.[477] According to the Commonwealth Government RIS guidelines, approved by Cabinet in August 1995, 'regulation affecting business' means not only subordinate instruments but 'all Government actions which directly confer benefits or costs on business (with the exception of specific purchases by the Government)'.[478] However, if the approach recommended by the Bell Task Force is adopted, then a formal legislative requirement would need to be introduced.

8.16 The federal ORR has recently redrafted its *Guide to Regulation*.[479]The guide has been rewritten to adopt the Government's response to recommendations made by the Bell report.[480] Part A of the guide broadly describes 'best practice processes and requirements'[481] for developing and amending primary and subordinate legislation. Part B sets down the seven major elements of an RIS, which is designed to formalise and record the steps that should be taken in the formulation of policy. Part C consists of a simple checklist for use by officials in preparing an RIS, while Part D provides more detailed guidance for use in preparing an RIS and Part E sets out some further explanatory material concerning the RIS process.[482] The guide is intended to provide an integrated approach to regulatory impact statements, when they are to be prepared, and the role of ORR.[483]

8.17 The Department of Prime Minister and Cabinet is currently redrafting the Cabinet Handbook, which is due for completion in October 1997.[484] The Handbook will cross reference the ORR *Guide to Regulations*, so that when a Cabinet submission is being prepared for a regulation that affects business, reference will need to be made to the Guide.

---

477 See Commonwealth of Australia, ORR, Industry Commission, *Regulation and its Review 1995–96*, AGPS, Canberra, 1996, p. 46.

478 ibid., p. 149.

479 Commonwealth, Industry Commission, Office of Regulation Review, *A Guide to Regulation*, Canberra, AGPS, 1997 (hereafter 'federal ORR, *Guide*').

480 More Time for Business, op. cit., pp. 65–75.

481 Federal ORR, *Guide*, p. I.

482 ibid.

483 Personal communication with Mr Stephen Rimmer, Federal ORR, 23 Jul. 1997.

484 Personal communication with Greg Witty, Senior Adviser within Cabinet Secretariat, 2 Sept. 1997.

Existing System of Analysis and Consultation

8.18 During the Committee's meeting in Canberra with federal ORR it was said that, despite the fact that the current RIS process for primary legislation is clearly defined in the Cabinet Handbook, the process is not working as well as it ought.[485] Among the reasons given for this were a lack of political weight behind the process, and the absence of sanctions for bureaucrats who fail to do an RIS. It was said that the Cabinet Office had tended not to enforce the requirement.[486] A similar view of the process was expressed by Mr Philip Noonan, the First Assistant Secretary of the Small Business and Consumer Affairs Division of the Commonwealth Department of Industry, Science and Tourism.[487] He suggested that there is a cultural element to this problem, with the traditional federal legislative drafting and rule-making procedure not being an open and public system.[488]

Queensland

8.19 In Queensland the Red Tape Reduction Task Force (RTRTF) has recommended that LISs be introduced. There is presently only a general obligation to consult, pursuant to the Cabinet Handbook. The RTRTF recommended that LISs should be introduced by amending section 7 of the *Statutory Instruments Act*, so as to require 'RISs to be undertaken for new principal legislation and significant proposed amendments which are likely to impose new and appreciable costs on the community'.[489] It also suggested that an Office of Regulatory Assessment be created to monitor the preparation of the statements and certify them before they go to Cabinet.[490]

8.20 The general basis of the RTRTF's recommendation has been the desire to reduce the burden of 'red tape'. More specifically, the recommendation seeks to address the concern that there is a tendency for principal legislation to be passed with a lot of detail which is normally left to regulation.[491] The recommendation also recognises that it would be more efficient to carry out an impact statement for

---

485 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Federal ORR, Industry Commission, Canberra, 4 Jun. 1997.

486 ibid.

487 Parliament of Victoria, Law Reform Committee, *Notes of Conversation,* Meeting with Small Business and Consumer Affairs Division, DIST, Canberra, 4 Jun. 1997.

488 Ibid.

489 Qld, Red Tape Reduction Task Force, *First Report – Issues Requiring Ministerial Comment*, p. 2.

490 ibid.

491 Personal communication with Ms Anita Vaughan, Liaison Officer for the Red Tape Reduction Task Force, Qld Department of Tourism, Small Business and Industry, 14 Aug. 1997.

proposed primary and subordinate legislation at the same time.[492] The Committee's latest information is that this recommendation has not been accepted, although it is still being pursued.[493]

Organisation for Economic Co-operation and Development (OECD)

8.21 The OECD's assessment of the Regulatory Impact Analysis (RIA) process in member countries was discussed in Chapter 6.[494] While accepting that there are difficulties in doing RIAs well, the OECD praised the use of RIA because of the benefits which arise from increased consultation.[495] These difficulties have already been discussed in the context of examining the RIS process.

8.22 In 1996 the OECD detailed the extent to which RIA is used by member countries. The OECD concluded:[496]

> Scope of coverage is patchy. One country uses RIA only when developing proposed laws; four use RIA only for lowerlevel (subordinate) regulations; and nine use it for both, though RIA requirements can vary for the two kinds of regulations. Exemptions to RIA programmes are often broad. The use of RIA at lower levels of government is not well mapped. In federal countries, many states have some kind of RIA programmes. In almost no country is RIA used at local or municipal levels.

It is important to note that this comment on coverage does not detail the requirements of RIA in each country, including whether an analysis will be made publicly available.

8.23 The OECD Secretariat concluded that patchy coverage was not desirable and that the RIA was equally applicable to laws and lower-level laws:[497]

> Uneven coverage of RIA programmes seriously reduces effectiveness. Given that laws and lowerlevel regulations can have similar impacts, there is no reason a priori to distinguish between them; hence, the differences seem to be related to institutional relationships and historical circumstances rather than to rational programme design.

---

492 ibid.

493 ibid. (14 Aug. 1997).

494 Para. 6.51–6.56.

495 OECD, *Meeting on Regulatory Impact Analysis: Best Practices in OECD Countries*, Paris, 29–30 May 1996, p. 1, reproduced at <http://www.oecd.org/puma/regref/summary.htm>.

496 OECD, *An Overview of Regulatory Impact Analysis in OECD Countries (continued),* Note by the OECD Secretariat, Aug. 1996, p. 3, reproduced at <http://www.oecd.org/puma /regref/reg(96)7htm>.

497 ibid.

8.24 Mr Victor Perton, MP in his speech to the Sixth Australasian and Pacific Conference on Delegated Legislation and the Third Australasian and Pacific Conference on the Scrutiny of Bills[498] observed that the OECD has commented on the lack of regulatory reform efforts targeted at underlying statutes in Australia:[499]

> An obvious gap in many of the management and reform activities carried out in Australia is that they focus on lower-level regulation and not on the principal legislation.

8.25 The use of LISs has started to gain momentum among OECD countries. According to recent material from the OECD impact analysis, which requires to varying degrees public disclosure of the analysis, occurs for Bills in the following countries:[500]

(1) Finland—as required by Law and Cabinet Instructions on drafting bills.

(2) Netherlands—under Prime Ministerial Directives.

(3) Denmark—as required by the Cabinet office.

(4) European Union—Legislation which significantly affects business (directives and regulations) are subject to a business impact assessment and environmental assessment. The assessment is given to legislators and affected sections of the public.

(5) Germany—Government resolution requires that a short evaluation of the impact of the Bill on the economy is to be included with draft legislation.

(6) Iceland—Cabinet policy requires that there be a fiscal analysis for Bills when introduced to Parliament[501]

(7) Sweden—Under Cabinet Office and Department of Finance circulars and checklists, benefit cost analysis and cost effectiveness analysis are required for recommendations for bills. These analysis are circulated to affected groups in draft.

---

498 V. Perton, 'Regulatory Reform: the Wave After That - A Sequel to Regulatory Reform: The Next Wave', Paper presented to the Sixth Australasian & Pacific Conference on Delegated Legislation & the Third Australasian and Pacific Conference on the Scrutiny of Bills, Adelaide, 16–18 Jul. 1997.

499 OECD, *Regulatory Reform: A Country Study of Australia*, 1996, p. 70, reproduced at <http://www.oecd.org/puma/country/gdoz.pdf>.

500 Electronic communication from Mr Rex Deighton-Smith, OECD, on Legislative Impact Statements, 17 Sept. 1997, Enclosure, Table 1.

501 According to the OECD, law is being prepared to require a general impact analysis: ibid., Table 1, p. 3.

(8) United Kingdom—A regulatory appraisal is required under Cabinet policy for bills at national level which impact on business. The assessment is disclosed to the public (as part of the final review by parliamentary committee, and published in summary ex post).

8.26 The Committee has received extensive material on the operation of LISs in Finland and the Netherlands. In Finland, publicly disclosed LISs were introduced in the mid 1970s and were expanded upon in 1990. The Netherlands introduced their system of LISs including public disclosure in 1985.[502] The attributes of these systems are as follows:[503]

(a) Public disclosure is limited to when the bill is submitted to Parliament.

(b) The statement is designed to inform decision making.

(c) A general impact analysis is carried out.

(d) Regulators perform the analysis.

(e) The LIS is required by Law in Finland and by Prime Ministerial Directive in the Netherlands.

(f) Quality control measures vary considerably.

8.27 In Finland there is limited guidance on the quality of the analysis, it is merely a matter for the regulators. In 1996 the Law Drafting Department of the Ministry of Justice in Finland outlined a programme to improve law drafting, which advises that the Ministry of Finance and Ministry of the Environment respectively will prepare guidelines for evaluating economic effects and environmental impact assessments.[504] These guidelines are expected to apply from the beginning of 1998.[505]

8.28 In the Netherlands advice comes from the Ministry of Justice and the Ministry for Economic Affairs and there is a review by the independent Council of State. According to the instructions used by all ministries in preparing legislation, the 'Minister of Justice bears primary responsibility for reviewing the administrative

---

502 OECD, *An Overview of Regulatory Impact Analysis in OECD Countries (continued),* op. cit., Table 2. According to the OECD, as of 1995 Iceland also had a Bill to introduce such a system under preparation.

503 ibid.

504 Finland, Ministry of Justice, Law Drafting Department, *The Programme of the Government to Improve Law Drafting*, 3/1996, p. 7.

505 Letter from Pekka Nurmi, the Head of the Law Drafting Department within the Ministry of Justice, Finland, to the Victorian Law Reform Committee, dated 9 Sept. 1997, p. 1.

quality of legislation and determining whether it conforms to the principles of constitutional government'.[506] The review considers the following issues:[507]

(a) Is the legislation lawful?

(b) Can it be implemented and enforced?

(c) Is it effective and efficient?

(d) Does it conform with the principles of subsidiarity and proportionality?

(e) Is it harmonised and is it simple, clear and accessible?

8.29 The Committee notes that in Finland there have been problems in ensuring compliance with the process. According to the OECD:[508]

> a parliamentary committee found that assessments of the costs of new laws on the private sector were often nonexistent, four years after RIA were mandated by the Norms Act [the Act on the Measures relating to the Orders and Guidelines of the Authorities (573/89)].

8.30 A number of strategies is recommended by the OECD to address problems relating to compliance and the quality of impact assessments (whether these assessments relate to proposed laws or proposed regulations). These strategies are listed below:[509]

> While a RIA programme is not easy to do well, careful programme and institutional design can reduce problems. Success seems to be supported by seven conditions:
>
> 1. political support at ministerial or parliamentary level;
> 2. establishment of clear quality standards (such as cost-effectiveness or benefit-cost tests) for regulations that can be measured by RIA;
> 3. selection of a methodology that is flexible and administratively feasible given capacities and resources. In most cases, simplicity is more important than precision, even if only the order of magnitude of impacts can be reliably determined. In all cases, use of a few consistent analytical rules can greatly improve the quality of the analysis;
> 4. development of an institutional structure for a RIA programme that charges regulators with primary responsibility for RIA, and places quality control with an independent oversight body empowered to establish quality standards for analysis;
> 5. testing of assumptions through public consultation;
> 6. integration of analysis into administrative and political decision processes, including communication of information in a coherent and systematic manner;

---

506 Letter from the Dutch Ministry of Justice, General Policy Division on Legislation Quality, to the Victorian Law Reform Committee, dated 2 Sept. 1997, Attachment 1 'Chapter II, General Topics Relating to Regulations', p. 34.

507 ibid., p. 35.

508 OECD, *An Overview of Regulatory Impact Analysis in OECD Countries (continued)*, op. cit., p. 3.

509 ibid., p. 5.

7. development of a programme to build expertise and skills among regulators, including development of written government-wide guidance. Canada has, for example, shifted its focus from examining individual RIAs to providing training, communication and best-practice seminars for personnel involved in the analytical process.

Two programme designs appear to be particularly ineffective: delegating full responsibility to regulators without adequate oversight sacrifices RIA to the narrower incentives and mission of the regulators, while, at the other extreme, placing responsibility for RIA in an independent body isolates the analysis from the decision-making process, and renders it an academic and impotent exercise.

Introducing Legislative Impact Statements into Victoria

Problems to be Addressed

Departmental Regulatory Officers Meeting

8.31 A number of concerns needs to be addressed in order for the LIS proposal to be implemented in Victoria. Notably, departmental regulatory officers raised concerns about whether the LIS process would be incompatible with Cabinet confidentiality, and difficult to implement.[510] Cabinet confidentiality is required for all Cabinet documents, including submissions. This is a part of the collective responsibility of ministers to Cabinet.[511]

8.32 The Committee also heard that implementation difficulties may arise because it would be hard to meet time-lines within the process. Departmental regulatory officers suggested that it is difficult enough to get a Bill onto the legislative program now, and that it is usually because of a political imperative that the Bill makes it. If there was an LIS process, it would be impossible to meet the time-lines. Moreover, they said that most ministers would not be happy about being constrained in this way—'no government would want to be hamstrung'.[512]

8.33 Additionally, during the departmental regulatory officers meeting, the need for such a system was questioned, because ministers are already required to address the impact of Bills in their second reading speech.

510 Regulatory officers meeting.
511 Victoria, *Cabinet Handbook*, op. cit., p. 26.
512 Regulatory officers meeting.

Submissions

8.34 The Committee's Discussion Paper did not specifically seek comment on the introduction of legislative impact statements. For this reason, most submissions did not consider LISs. However, this issue was raised for discussion during the Twilight Seminar, and has become an additional issue for the Committee's consideration. In response to this discussion, the submission by the Building Control Commission said that determining whether or not LISs should be introduced was a matter for Cabinet. Their submission drew attention to the fact that such a measure would involve a fundamental change to the legislative process:[513]

> It would require a fundamental change to the legislative process and a reduction in the influence of government agencies, such as the Attorney-General's Department, the Department of Premier and Cabinet and Treasury. More importantly, it would involve a transfer of power away from the Executive arm of government. The proposal does not acknowledge the existence of well established frameworks for legislative development which are nationally oriented. For example, occupational health and safety, food standards and building control standards are set at a national level.

Support for the Introduction of Legislative Impact Statements

8.35 There has already been some support for the introduction of LISs in Victoria. Until the Bell Task Force report the arguments in support of LISs had not been formally discussed at length, although they were informally discussed in parliamentary committees and the Cabinet office.[514] Publicly, however, Mr Rex Deighton-Smith, formerly Director of the Victorian Office of Regulation Reform, in evidence to the Committee supported their introduction.[515] Nonetheless, he informed the Committee that there may be opposition to the introduction of LISs. He suggested that even if tax legislation and legislation which does not have an impact on business were exempted from a requirement that there be an LIS, there would still probably be opposition to the introduction of LISs.

8.36 He also acknowledged that in Victoria the proposal to add cost-benefit assessments to the Cabinet process through the use of LISs—in order to allow Ministers to make more informed decisions—has met with the concern that this would involve 'too much bureaucratic meddling [in] ministerial prerogatives.' This concern, according to Mr Deighton-Smith, is unfortunate and difficult to dispel.[516]

---

513 Submission no. 10.

514 Informal discussions between Mr Victor Perton MP and senior public service officers.

515 Parliament of Victoria, Law Reform Committee, *Minutes of Evidence*, 5 Aug. 1997.

516 ibid.

8.37 One method of testing the proposal would be to recommend a trial period of one or two years whereby all bills must be accompanied by legislative impact statements which essentially relate to economic and non-economic costs and benefits. This approach was described by Mr Deighton-Smith as being a progressive one for the Committee to take.

Conclusion

8.38 The Committee is concerned that there may be a tendency towards circumventing the RIS process by placing regulatory requirements in primary legislation, when they would normally and more appropriately be placed in subordinate legislation. This concern was supported by comments made during the regulatory officers meeting.

8.39 The Committee believes that there are considerable benefits to be obtained by the use of the LIS process. These benefits were aptly summarised in the Prime Minister's response to the Bell Report: 'This initiative will be an important step in increasing the transparency of government decision-making allowing Parliament and the community to be better informed'.[517]

8.40 The introduction of an LIS process would serve to provide a formal and systematic framework for consultation. The importance of such a framework was emphasised by the OECD when it said:[518]

> If they are to contribute to administrative openness, consultation processes themselves must be transparent, that is, they must take place within the framework of an explicit and systematic consultation policy that allows the public to understand how and when it will be able to participate.

8.41 If Victoria is to continue to lead the way in regulatory reform, and in the process seek to reduce the burden of 'red tape', then the introduction of LIS should be encouraged, provided that it can be done in a way which is compatible with the principle of Cabinet confidentiality.

8.42 At times the principles of Cabinet confidentiality and public accountability can be difficult to reconcile. What is required in order to maintain Cabinet confidentiality is essentially a matter for the Cabinet. What is necessary to satisfy the need for public accountability is ultimately a matter for the whole community. The two principles

---

517 More Time for Business, p. 67.

518 OECD, PUMA, *Public Consultation,* reproduced at <http://www.oecd.org/puma/refref/consultn.htm>.

could conflict where an LIS prepared in relation to a Bill is presented to Cabinet which makes a policy decision not to follow the recommendation contained therein. Tabling the LIS in the Parliament could be embarrassing to the Minister responsible for introducing the Bill which conflicts with the Government's advice. On the other hand, failure to table the LIS in these circumstances defeats the important considerations of transparency and accountability, which, as noted above, have been stressed recently by the Prime Minister and the OECD Secretariat.

8.43 The Committee has concluded that if the Cabinet decision is justifiable on grounds of good public policy, which it presumably will be, then the ideal of responsible government requires the responsible Minister to make that known in the Parliament. This could be done without disclosing any confidential matters regarding Cabinet deliberations on the issue. In these circumstances, tabling the LIS in the Parliament becomes simply procedural step which should not conflict with any principle of good government.

8.44 The Committee believes that the LIS process should be prescribed in legislation, rather than in a handbook or a manual. In recognition of the concerns raised by departmental regulatory officers that the process could cause practical difficulties, the Committee believes that LISs should be introduced on a pilot basis; with the process applying for 2 years to all Bills.

Recommendation 43

The Government should give consideration to the introduction of mandatory legislative impact statements for tabling in the Parliament in accordance with the Commonwealth Government's response to the Bell Report.

APPENDIX A LIST OF SUBMISSIONS

No.	*Date of Submission*	*Name*	*Affiliation*
1	31 May 1997	Mr J. Wilkins	Management and Engineering Consultant
2	12 June 1997	Mr T. Barker	The Policy Consultants
3	12 June 1997	Mr P. Papaemmanouil	Merin Valley Pty Ltd
4	12 June 1997	Mr D. Tonkin	Australian Trade Commission
5	5 June 1997	Mr S. Kazman	Competitive Enterprise Institute, USA
6	12 June 1997	Mr T. Jaenicke	Division of Drinking Water, Department of Health, Washington State, USA
7	9 June 1997	Mr S. A. Pathmarajah	AEA Technology, UK
8	18 June 1997	Confidential	
9	11 June 1997	Mr F. P. Pitura	Chair, Regulation Review Committee, Manitoba, Canada
10	23 June 1997	Mr M. J. Croxford	Building Control Commission
11	24 June 1997	Mr K. Stevenson	Coopers & Lybrand
12	24 June 1997	Mr C. D. Whiting	Metal Trades Industry Association of Australia
13	26 June 1997	Ms L. A. Minja	Saskatchewan Executive Council, Canada
14	7 July 1997	Mr P. G. Brown	Shooting Sports Council of Victoria Inc
15	14 July 1997	Mr A. Higginson	Road Transport Forum
16	14 July 1997	Mr I. Farrow	Australian Institute of Petroleum
17	14 July 1997	Mr P. Spencer	Property Owners' Association

No.	*Date of Submission*	*Name*	*Affiliation*
18	14 July 1997	Dr F. Haines	Department of Criminology, University of Melbourne
19	14 July 1997	Ms L. Tinney	Private citizen
20	14 July 1997	Ms J. Fuller	Luminico Pty Ltd
21	14 July 1997	Mr R. R. Dalziel	Mayne Nickless Ltd.
22	14 July 1997	Mr E. Apostol	Private citizen
23	15 July 1997	Mr C. Barlow	Coltmans Price Brent
24	18 July 1997	Hon R. Cornish, MHA	Minister for Finance, Tasmania
25	23 July 1997	Mr P. S. Clark	Workplace Safety and Health Management Economic Cost-benefit Analysis and Planning
26	24 July 1997	Ms F. Hanlon	Department of Premier & Cabinet
27	28 July 1997	Hon R. Kerin, MP	Minister for Primary Industries, Minister assisting for Regional Development & Small Business, South Australia
28	28 July 1997	Mr Todd Weiler	Private citizen, Canada
29	30 July 1997	Mr Francis Savage	Department of Justice, Canada
30	1 Aug 1997	Mr R. Zimmerman	BHP Steel
31	8 Aug 1997	Dr R. J. Stewart	Victorian Workcover Authority
32	18 Aug 1997	Subordinate Legislation Subcommittee	Scrutiny of Acts & Regulations Committee
33	4 Sept 1997	Mr D. Miller	Minister of Employment and Investment, Province of British Columbia, Canada

APPENDIX B LIST OF WITNESSES

No.	*Date of Hearing*	*Witness*	*Affiliation*
1	5 August 1996	Mr R. Deighton-Smith	Former Director, Victorian Office of Regulation Reform, Department of State Development
2	7 April 1997	Ms A. Roper	National Manger, Strategy & Industry Policy, Australian Chamber of Manufactures
		Mr B. Prosser	Economist, Australian Chamber of Manufactures
		Mr M. Soutter	Assistant Director, Business Council of Australia
		Ms A. E. Starr	Consulting Attorney, Blake Dawson Waldron, Business Council of Australia
		Mr I. Swann	Health Safety & Environment Manager, Plastics & Chemicals Industries Association
		Mr I. Wilson	Health Safety & Environmental Manager, Kemcor Australia Pty. Ltd.
		Mr S. Shepherd	Director Policy & Research, Victorian Employers' Chamber of Commerce & Industry
		Mr C. McLean	Principal Consultant Safety, Health & Environment, Victorian Employers' Chamber of Commerce & Industry

No.	*Date of Hearing*	*Witness*	*Affiliation*
		Mr C. Hristodoulidis	Senior Economist, Victorian Employers' Chamber of Commerce & Industry

APPENDIX C LIST OF OVERSEAS MEETINGS

No.	*Date of Meeting*	*Representative*	*Affiliation*
1	30 August 1996 Ottawa	Mr J. K. Martin } Mr F. Savage }	Executive Director Regulatory Affairs Officer Treasury Board of Canada, Secretariat
2		Ms S. Cohen	Chairperson, Canadian House of Commons Standing Committee on Justice and Legal Affairs
3		Ms R. Last	Director of Programs & Policy, Canadian Environment Industry Association
4	3 September 1996 Washington, DC	Ms M. W. Holmes } Mr T. F. Gaziano }	Staff Director Chief Counsel House of Representatives Committee on Government Reform & Oversight, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs
5	4 September 1996 Washington, DC	Ms J. Logan	Lead Counsel on Regulatory Innovation, Office of National Performance Review
		Mr D. Arbuckle } Mr M. Schumberg } Mr J. Hill }	Attorney Attorney Attorney Office of Management & Budget, Office of Information & Regulatory Affairs.
6	5 September 1996 Washington, DC	Staff of the Senate Committee on Government Affairs.	Senate Committee on Government Affairs

No.	*Date of Meeting*	*Representative*	*Affiliation*
7	6 September 1996 Washington, DC	Ms K. Harrison	House of Representatives Constitutional Committee

APPENDIX D LIST OF INTERSTATE MEETINGS

No.	*Date of Meeting*	*Representative*	*Affiliation*
1	4 June 1997 Canberra	Mr P. Coghlan }	Assistant Commissioner, Office of Regulation Review
		Ms C. Knox }	Research Officer, Financial & Taxation Division
			Industry Commission
2		Prof. D. Pearce }	Professor of Administrative & Constitutional Law
		Mr. J. McMillan }	Reader in Administrative & Constitutional Law
			Australian National University, Law School
3		Mr P. Noonan }	First Assistant Secretary
		Mr B. Armstrong }	Director, Deregulation Implementation A
		Ms Dusanka Sabic }	Director, Deregulation Implementation B
		Ms R. Gallagher }	Director
			Small Business & Consumer Affairs Division, Department of Industry, Science & Tourism
4		Hon G. Prosser, MP }	Federal Minister for Small Business
		Mr D. Hickman }	Small Business Adviser, Officer of the Minister
		Mr P. Noonan }	First Assistant Secretary, Small Business & Consumer Affairs Division, Department of Industry, Science & Tourism

No.	*Date of Meeting*	*Representative*	*Affiliation*
5		Senator Hon. R. Kemp} Mr R. Brake } Mr D. Parker }	Federal Assistant Treasurer Economic Adviser to Asst.Treas. Secretary, Competition Policy Branch, Treasury
6	5 June 1997 Canberra	Senator B. O'Chee } Senator M. Payne } Prof. D. Whelan } Mr D. Creed } Ms J. Paull }	Chairman, Member Legal Adviser Secretary Research Officer Senate Standing Committee on Regulations & Ordinances
7		Mr J. Leachy } Mr R. Hunt } Mr R. Mackay } Mr T. Ward } Ms J. Baillie }	Principal Legislative Counsel Senior Legislative Counsel Senior Legislative Counsel Senior Legislative Counsel A/Manager, Registration & Support Office of Legislative Drafting, Commonwealth Attorney-General's Department
8		Prof. A. Fels } Ms D. Rickard }	Chairperson Assistant Commissioner Australian Competition & Consumer Commission
9	6 June 1997 Sydney	Mr P. Hendy } Mr D. Bernuer } Mr C. Sahlin }	Policy Manager Principal Policy Officer Principal Policy Officer Inter-Governmental & Regulatory Reform Unit, Cabinet Office, NSW Government, Policy Manager
10		Mr C. Sidoti	Human Rights & Equal Opportunity Commission, Human Rights Commissioner

APPENDIX E LIST OF MELBOURNE MEETINGS

No.	*Name*	*Affiliation*
1	**11 June 1997—Twilight Seminar on Regulatory Reform**	
	Ms A. Roper	National Manger, Strategy & Industry Policy, Australian Chamber of Manufactures
	Mr S. Shepherd	Director of Policy and Research, Victorian Employers' Chamber of Commerce and Industry
	Mr M. Oakley	Acting Director, Office of Regulation Reform
	Mr V. Perton	Chairman, Victorian Law Reform Committee
2	**19 June 1997—Departmental Regulation Officers' Meeting**	
	Mr J. Levy }	Department of Education
	Mr H. Race }	Department of Human Services
	Mr P. Fellows } Mr L. Tooher }	Department of Infrastructure
	Mr M. Pollard	VicRoads
	Mr R. Charles } Mr J. Isaacs } Mr A. Monaghan }	Department of Justice
	Mr A. McPherson } Ms J. Rossely }	Department of Natural Resources & Environment
	Ms F. Hanlon } Mr J. Oliver }	Department of Premier & Cabinet
	Mr M. Oakley } Mr G. Bounds }	Department of State Development
	Mr R. Geddes	Department of Treasury & Finance

No.	*Name*	*Affiliation*
2	**19 June 1997—Departmental Regulation Officers' Meeting**	
	Mr K. Dave	Plumbing Industry Board
Meetings with Directors of Large Companies Operating in Victoria		
No.	*Date* / *Name*	*Affiliation*
3	26 May 1997 — Mr D. Mandie } Ms E. Danos }	Chairman & Managing Director, Director, James Richardson Corporation Pty. Ltd
4	12 June 1997 — Mr R. McNeilly; Mr R. Zimmerman; Ms J. van Reyk	Executive Director, BHP; Group General Manager Finance & Planning, BHP Steel; General Manager Legal, BHP Steel
5	22 July 1997 — Mr R. E. Male; Mr P. I. J. Rayner	Managing Partner; Partner, Corporate Finance; Coopers & Lybrand, Chartered Accountants
6	**29 July 1997—Meeting with the Business Committee, Victoria Attorney General's Law Reform Advisory Council**	
No.	*Name*	*Affiliation*
	Mr J. Allen (Chair)	Principal, JDC Allen & Associates
	Mr R. D. Evans	Partner, Horwath, Chartered Accountants
	Mr C.W. Ludescher	Partner, J.M. Smith & Emmerton, Lawyers
	Mr A. Shaw	Manager Policy Development Supervision, Australian Stock Exchange
	Prof M. Tilbury (Academic Secretary)	Professor of Law, University of Melbourne
	Ms B. Yeoh	Director, Oxley Corporate Finance Ltd.

APPENDIX F EPA RIS PROTOCOL

PROTOCOL FOR DEVELOPMENT OF REGULATIONS AND THE PREPARATION OF REGULATORY IMPACT STATEMENTS

Publication 484 February 1996

This protocol has been adopted by the Environment Protection Authority (EPA) to document its approach to the development of regulations and regulatory impact statements (RISs). It was developed in consultation with the Australian Chamber of Manufactures and EPA's Economics Working Group and represents, in the opinion of this Group, current best practice.

The protocol supplements existing requirements for the development of regulatory impact statements (RISs) contained in the *Subordinate Legislation Act 1994* and associated guidelines. It is designed to guide the development of future environmental regulations and the preparation of associated RISs.

EPA is committed to best practice environmental regulation. This means that EPA will consider all practicable management options, both regulatory and non-regulatory, when addressing environmental issues. The protocol reflects this commitment by highlighting the steps EPA will take to develop and consider a range of these options, particularly the steps that EPA will follow if a regulatory option is pursued.

The protocol is divided into four sections:

- key principles
- key steps in regulation development
- consultation program
- assessing costs and benefits.

Key Principles

The protocol is based on the following key principles.

- When proposing a regulation, EPA has a responsibility to prepare an RIS which contains an adequate assessment of the costs and benefits of that regulation.
- All key economic, environmental and social costs and benefits of the proposed regulation must be identified and assessed, including those which are difficult to assess (for example, non-financial values such as environmental benefits and issues of considerable uncertainty such as those involved in ecosystem protection).
- Regulations generate benefits and impose costs. In developing a regulation and preparing an RIS, EPA will endeavour to make such costs and benefits transparent.
- EPA is committed to maximising the opportunity for public input and will work with interested stakeholders throughout the regulation development process.
- Peak representative bodies should play a key role in the consultative process by working with their members to help identify and assess potential costs and benefits, and conveying that information to EPA.
- An RIS is not an end in itself, but a tool to support:
  - better regulation making and

  - stakeholders and decision-makers making informed comment and judgements on the proposed regulation.

- The regulation development, impact assessment and consultation process should reflect the significance, complexity and potential impact of the proposed regulation.

- All parties should focus on issues of key importance and on issues about which there are divergent views.

- In order to provide the best and most comprehensive information to stakeholders and decision makers, a mix of assessment techniques should be used to identify and assess potential costs and benefits.

- An RIS should:
  - establish that the proposed regulation represents the best practicable option
  - document the information gathered, including noting those stakeholders who have contributed information
  - document, in a common-sense manner, the economic, environmental and social costs and benefits of the proposed regulation and other options
  - include all important quantitative and qualitative information
  - provide a description of the methodology used, including comment on any problems in gathering information and the limitations of any assessment techniques used
  - be user-friendly and accessible to all stakeholders and
  - facilitate informed judgements about the merits of the proposed regulation.

Key steps in regulation development

Needs analysis

Before initiating a regulation development process, EPA will analyse the nature and significance of the issue being addressed. This initial "needs analysis" will establish whether the issue is significant enough to warrant EPA taking action. EPA will only initiate the process if this needs analysis demonstrates a clear need to take action.

In conducting this needs analysis, EPA will:

- review relevant data on the nature and significance of the issue
- seek information about approaches used interstate or overseas and
- consult key stakeholders (for example, community groups, environment groups, industry groups, other government agencies).

If it is found that a significant issue exists that needs to be addressed, EPA will identify the full range of feasible management options, both regulatory and non-regulatory.

A preliminary evaluation of these options takes place during this phase. If EPA decides to pursue a regulatory option (ie a statutory rule) as the likely preferred option, then a development plan is prepared (as outlined below). If regulatory options are ruled out, processes other than those specified in this protocol will be followed.

Developing a plan

Having decided that a regulatory approach is a likely preferred option, EPA will prepare a development plan stating:

- objectives to be achieved
- identified management options
- reasons for proposing a regulatory approach as a likely preferred option
- proposed impact assessment methodology, including the preliminary identification of the set of costs and benefits to be considered in developing and assessing the identified management options and
- a consultation program.

EPA will ensure that the preliminary set of costs and benefits is comprehensive and includes those impacts which, by their nature, may be difficult to assess (for example, environmental impacts). This initial identification of costs and benefits will assist EPA in planning the information gathering and consultation processes.

EPA will use the plan to guide the development and consideration of the identified management options and the RIS. EPA will consult with key stakeholders if adjustments to the plan are necessary (for example, in response to issues or stakeholder input).

Public comment and finalising the regulation

Where a regulation is proposed, EPA will, unless there is a pressing urgency, allow a period of public comment on the proposed regulation and RIS which is longer than the minimum twenty-eight day statutory comment period (for example, to allow for formal comment from groups which only meet monthly).

EPA will consider stakeholder input throughout the process. In the final stage, EPA will formally document its response to public comment on the proposed regulation and associated RIS. This response to public comment will clearly document any remaining divergent views amongst stakeholders. EPA will respond to everyone who comments on the proposed regulation and RIS.

Consultation program

Consultation will begin early in the process and continue throughout. If a regulation is made, the consultation process will be supplemented by a range of actions to explain and promote the regulation.

In order to choose which consultation techniques suit a particular proposed regulation, EPA will consider factors such as:

- the number and location of stakeholders potentially affected
- the degree to which stakeholders may be affected
- potential impediments to identifying and involving relevant stakeholders and, in particular, the restrictions on the ability of some stakeholders to participate (especially poorly resourced individuals and groups) and
- making use of a range of networks (including networks of stakeholders) to identify interested parties, including EPA's own networks.

During the early consultation, a number of techniques are available, including:

- advertising EPA 's intention to develop a regulatory option
- informing stakeholders in writing of the objective(s), seeking input and asking stakeholders to identify key issues of interest
- organising briefing sessions for key stakeholders
- releasing discussion papers (for example, to canvass the nature of the issue and possible responses) and
- organising workshops/public meetings with stakeholders.

EPA should ensure that the party which is engaged to provide independent advice on the adequacy of the RIS is involved early in the process.

During the development of the proposed regulation and RIS, a number of consultative mechanisms are available, including:

- regular meetings with key stakeholders
- establishment of contact groups of stakeholders (for example, peak bodies)
- information updates for stakeholders
- using questionnaires
- releasing discussion papers
- public workshops and
- using broad reference groups or working groups to address particular issues.

Where a regulation is made a range of actions may be taken by EPA to promote and explain the regulation including:

- explanatory documents
- mail-outs
- workshops
- presentations to key interested parties

- presentations to parties who must comply with the regulation (for example, via peak industry bodies) and
- media promotion (for example, media kits).

Assessing costs and benefits

In order to judge the merits of the proposed regulation and the identified alternative management options, EPA will work with stakeholders to assess costs and benefits. This will be done through the application of a mix of information gathering and assessment techniques, including:

- using historical evidence (for example, case studies of environmental problems, EPA's internal records and information, reviewing similar approaches used elsewhere)
- conducting surveys and/or case studies of costs and benefits of compliance
- using scientific information
- using risk assessment techniques
- obtaining the views of, and information from, affected parties
- using focus groups and market research techniques
- using sensitivity analysis and
- applying an appropriate range of economic valuation techniques (for example, travel cost, contingent valuation).

In each case, the mix of assessment techniques used will be appropriate for the impacts being assessed. In selecting and using the assessment techniques, the factors which will be considered include:

- the types of information needed for assessment
- the range of information available
- the nature and significance of the potential costs and benefits (ie the effort put into the assessment should be proportionate to the level of the potential impacts)
- the need to ensure that costs and benefits which cannot be expressed in quantitative terms (for example, environmental impacts) are adequately assessed
- the extent to which the technique captures key aspects of the issue
- the cost and time involved in applying various assessment techniques
- the degree to which the incidence of the impacts can be identified (recognising that those who benefit may be different to those who bear the cost)
- the reliability of the resulting information
- the ability of the technique to deal with the uncertainty involved in environmental decision-making
- the attribution of costs and benefits to the proposed regulations (for example, whether the costs and benefits flow only from the proposed regulations, or from other influences such as primary legislation or commercial considerations as well)
- the need to ensure consistency in attribution (a consistent approach should be used in deciding which costs and benefits are attributable to the proposed regulation)
- whether the technique generates information which can be conveyed to a range of stakeholders
- the ability of the technique to help make costs and benefits transparent and
- the degree to which the technique can be practically applied to assist decision making.

While no single assessment technique will satisfy all of the above factors, the aim will be to use a mix of techniques which best fits these factors. In determining the appropriate mix of techniques to use, EPA will consult with stakeholders. EPA has a responsibility to obtain information and assess costs and benefits. EPA will seek information from stakeholders and will work with stakeholders in the application of the selected assessment techniques.