



**LAW REFORM
COMMITTEE**

Regulatory Efficiency Legislation

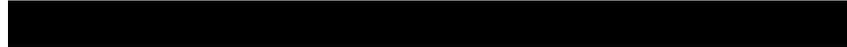
ISSUED FOR PUBLIC DISCUSSION AND COMMENT

DISCUSSION PAPER

MAY 1997

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MAY 1997



REGULATORY EFFICIENCY
LEGISLATION



LAW REFORM COMMITTEE

PARLIAMENT OF VICTORIA



COMMENTS AND SUBMISSIONS INVITED

Parliament of Victoria, Australia
Law Reform Committee
Melbourne
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It is important to note that the issues raised for specific consideration in this Discussion Paper are not necessarily in order of importance or the order in which they should be dealt with by the Committee or persons making submissions. Nor does the paper's statement of issues purport to be exhaustive. Also some issues may be regarded as interconnected although the Committee's paper does not indicate that. The Committee will consider any suggestions that recommendations should be contingent on other recommendations being adopted.

The Committee would find it convenient to receive submissions by way of files on floppy disks or attached to e-mail messages to its e-mail address: lawrefvc@vicnet.net.au.

However a covering signed letter to authenticate the submission should be sent separately to the Committee.

This Discussion Paper will be available via the Internet on the day of its publication on the Committee's home page at — <http://www.vicnet.net.au/~lawref>

REGULATORY EFFICIENCY LEGISLATION HAVE YOUR SAY

How to make comments and submissions

You are invited to make comments and submissions on issues relevant to the Inquiry into Regulatory Efficiency Legislation, including but not limited to the issues raised in this Discussion Paper.

Written comments and submissions should be sent to –

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Closing date – Monday, 14 July 1997

Anyone can make a submission or comment. If you are an individual or organisation subject to Government regulation or a regulator or have a particular interest in this area, the Committee would like to hear from you. It is not necessary to have legal or any other special qualifications. The Committee is keen to hear from all those who have something to say about regulatory efficiency and alternative compliance mechanisms.

The Committee is interested in any comments on how the system of regulation is operating in Victoria or how it might be improved. You may wish to address some or all of the issues raised in this Discussion Paper.

Submissions on floppy disks or as files attached to e-mail messages are welcome. A separate signed authentication should be forwarded to the Committee.

The Committee will also hold public hearings at which oral submissions and evidence can be given.

Confidentiality – All submissions are treated as public documents, unless confidentiality is requested.

MEMBERSHIP

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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 April 1997.

Dated 28 June 1996
Responsible Minister:

LOUISE ASHER, MP
Minister for Small Business

Victoria Government Gazette, G 25 , 27 June 1996, p. 1632.

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CHAIRMAN'S FOREWORD

Transparent, efficient and effective regulation is something I feel passionate about. I am lucky to be working in Victoria, where there has been over a decade of practice with mechanisms which are only being contemplated in other OECD economies. Cost-benefit analysis, negotiated rule-making, public consultation, parliamentary veto and automatic 10 year sunset clauses are well entrenched in Victoria.

This discussion paper looks at the next level of reform and focuses on the concept of regulatory flexibility. The core mechanism we examine is the alternative compliance mechanism. The alternative compliance mechanism is a North American concept permitting licensing which avoids the terms of a particular regulation, if the result is better achievement of the objectives of the regulation. This is said to allow governments and industry to work together to meet the challenges of technological change. However, the concept is not without its critics and dangers. We ask the readers of this paper to turn their minds to this concept and to give us their views on whether this will benefit our Australian society and, if so, what are the best ways of implementing the same.

The Committee is interested in hearing views on what you would insert in a Regulatory Efficiency Bill for the State of Victoria. It also seeks your views on the way regulation has operated and is operating in Victoria. All ideas are welcome!

In writing this discussion paper, the Committee and its staff have been assisted by Mr Stephen Argument who prepared the first drafts of the paper. We have received helpful advice from representatives of the Business Council of Australia, the Victorian Employers Chamber of Commerce and Industry, the Australian Chamber of Manufacturers and the Plastics and Chemicals Industries Association. Rex Deighton-Smith at the OECD in Paris has made some challenging editing comments. We have received helpful information and advice from the US Federal Government's National Performance Review and the Canadian Government's Treasury Board.

Victor Perton, MP

Chairman

May 1997

LIST OF ISSUES RAISED IN THIS PAPER

Regulatory Impact Statements

Issue 1:

Are the current RIS procedures adequate? Do they meet the objective of efficiency? In what ways can the RIS process be improved?

Paragraphs 2.2–2.21

Environment Protection Act 1970 (Vic.) – Accredited Licensees

Issue 2:

Are the current procedures for accredited licences granted under the Environment Protection Act 1970 (Vic.) satisfactory? Do they meet the objective of efficiency?

Paragraphs 2.23–2.28

Legislative Instruments Bill 1996(Cwlth)

Issue 3:

Does the current process of staged repeal of statutory rules work? If yes, is the current Victorian requirement for repeal of statutory rules after 10 years acceptable or should some other time period (e.g. the NSW requirement for repeal after 5 years) be adopted?

Paragraphs 2.39–2.43

Alternative Compliance Mechanisms

Issue 4:

What other examples of possible or existing alternative compliance mechanisms are there?

Paragraphs 3.1–3.3

Alternative Compliance Mechanisms in the Victorian Context

Issue 5:

Has the case been made out for the enactment of Regulatory Efficiency Legislation in Victoria?

Paragraphs 4.1–4.29

Issue 6:

If the answer is yes, what are the current deficiencies and inadequacies that Regulatory Efficiency Legislation would address? What would be the benefits of enacting Regulatory Efficiency Legislation?

Paragraphs 4.1–4.29

Issue 7:

If Regulatory Efficiency Legislation is to be enacted in Victoria, does the proposal outlined by the Office of Regulation Reform provide appropriate mechanisms for the operation of the Rule of Law, the principles of equity and fairness and the accountability of government? Does the proposal involve any abrogation of the legislative power of the Parliament?

Paragraphs 4.1–4.29

Issue 8:

Do the mechanisms suggested adequately provide for parliamentary scrutiny? Is the suggested role of the Scrutiny of Acts and Regulations Committee appropriate?

Paragraphs 4.1–4.29

Issue 9:

If the proposal outlined by the Office of Regulation Reform is to be adopted, would the existing mechanisms of the Freedom of Information Act 1982 adequately protect commercially sensitive information? If not, what alternative measures are available?

Paragraphs 4.1–4.29

Issue 10:

Are there any other elements of the proposal that require comment?

Paragraphs 4.1–4.29

Other Reform Proposals

Issue 11:

Are any of the alternative proposals discussed in Chapter 5 acceptable or appropriate to the Victorian jurisdiction?

Paragraphs 5.1–5.33

What is Regulatory Efficiency?

1.1 In this reference on regulatory reform, the Law Reform Committee is required to examine and advise on Regulatory Efficiency Legislation 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 doing so, the Committee is required to consider the applicability of alternative compliance mechanisms (hereafter referred to as 'ACMs') to the Victorian regulatory environment.

1.2 This discussion paper is written with a view to receiving helpful comment from interested people in the Victorian, Australian and international community.

1.3 While to those in government and business the term regulatory efficiency may have an overfamiliar ring, in properly conducting this inquiry the Committee will first consider what is contemplated by the term regulatory efficiency.

1.4 In 1984, the late Senator Alan Missen, in an article entitled *Attacking Excessive Regulation*, adopted a definition of regulatory activity from the 1980 Confederation of Australian Industry report *Government Regulation in Australia*.¹

It means action taken by governments, whether under the authority of statute or as a result of administrative practice, which has the effect of controlling prices; entry into or exit from the market place; product standards and patterns of distribution and other aspects of activity in the market place.

1.5 This definition is very much economically orientated. There are other areas of regulatory activity that cannot be considered to have substantial economic implication—for instance, litter regulations on public transport;

¹ A. Missen, 'Attacking excessive regulation', *IPA Review*, 1984, Spring, p. 134.

camping regulations in national parks; and, the side of the road to be driven on by motor vehicles.

1.6 On the face of it, regulatory efficiency would appear to involve 'the need for regulations to achieve their goals, without imposing unnecessary costs on commerce, industry, households and individuals'.² The New South Wales Government has defined regulatory efficiency in the following terms:³

Regulatory efficiency 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.

1.7 Regulatory efficiency requires regulatory reform which is being carried out in almost all OECD countries. In almost all countries, business and their representatives seek regulatory reform. In some cases, these expressions of support for reform are viewed cynically which is reflected in the observation that:⁴

To some business spokespeople, government interference in the marketplace is regarded as the embodiment of evil. Others adopt a more flexible approach, objecting strenuously to some forms of regulation, but tolerating, indeed, embracing, those forms of government involvement which happen to foster their own business interests.

1.8 The reality is the fact that the majority in business take a moderate stance. As Mr Martin Soutter from the Business Council of Australia told the Committee:⁵

I think, in essence, it is not what you regulate, it is how you regulate it. ... [I]n the broad area of regulation of business ... when asked the question 'shouldn't there be some sort of control over this sort of area?' [t]he answer in 99.9 per cent of cases is

² S. Rimmer, 'Regulation reform in the '90s: Challenges and opportunities', *Policy*, 1995, Spring, p. 20.

³ New South Wales Government, *Regulatory Innovation: Regulation for Results*, Discussion Paper, Sydney, 1996, pp. 15-16.

⁴ P. N. Grabosky, and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, Melbourne, 1986, p. 1.

⁵ M. Soutter, Business Council of Australia, *Minutes of Evidence*, 7 Apr.1997, pp. 28-29.

there is some broad reason for having some sort of standards of conduct in that particular area. How you achieve it is the real point.

1.9 Regulatory efficiency involves more than just a reduction in the number of regulations, although reducing the number of regulations is important. The Minister for Small Business, the Hon. Louise Asher published a press release on 21 March 1997, which, in part, stated:

Speaking at the Regulatory Impact Statement seminar at the World Congress Centre today, (Ms Asher) said 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. Ms Asher said 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. She said 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, Ms Asher said. 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. Ms Asher said Victorias success in slashing red tape complied with one of the recommendations under the Federal Governments Bell Taskforce report on small business.

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

Regulatory Reform: The Context

1.11 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 report of the Independent Committee of Inquiry into National Competition Policy (the Hilmer Report) was presented to the Council of Australian Governments (COAG) in August 1993.

1.12 The Hilmer report recommended the implementation of a national competition policy for Australia to improve productivity, increase international competitiveness and to maintain and improve living conditions.⁶ A key recommendation of the report was that as part of a

⁶ The Independent Committee of Inquiry, *National Competition Policy*, AGPS, 1993.

national competition policy, there should be no regulatory restrictions on competition unless such restrictions were demonstrably in the public interest.⁷

1.13 In April 1995, COAG adopted a national competition policy that built on the recommendations of the Hilmer Report. The national competition policy was given effect through the *Competition Policy Reform Act 1995* and three intergovernmental agreements. The importance of the national competition policy package in regulatory reform terms, is that it requires all Australian governments to develop programs to review and reform (where appropriate) all existing regulation that restrict competition by the year 2000.⁸ COAG also adopted a set of Principles and Guidelines for National Standard Setting and Regulatory Action which 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.

1.14 The present federal government has also made a commitment to tackle the regulatory burden on small business. It established the Small Business Deregulation Task Force to report on ways to halve the compliance and paperwork burden 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 60 recommendations across a broad range of regulations that impact on small business.⁹ 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. The Prime Minister has responded by introducing a range of initiatives in line with the recommendations of the Bell Report including the establishment of a national business information service to streamline licensing and to increase access to information for small business.¹⁰

⁷ *ibid*, p. 212.

⁸ 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).

⁹ Small Business Deregulation Task Force, *Time For Business*, AGPS, 1996.

¹⁰ *The Australian*, 25 Mar. 1997.

1.15 These measures on a national level¹¹ along with innovation and reform on a state level (discussed below) have set the climate for the present inquiry into the appropriateness of regulatory efficiency legislation.

Regulatory Reform in Victoria

1.16 This reference is, at least in part, a reflection of a commitment made prior to the last election by the current Victorian Government.¹² In its *Small Business Policy*, under the heading 'Cutting red tape', the Coalition 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.

1.17 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 should also 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. There is a general ignorance of what those in government are doing to make the regulatory process more efficient.

1.18 The best publicised project in regulatory reform is the National Performance Review of the United States of America, chaired by Vice-

¹¹ 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': *Corporate Law Economic Reform Program*, Business Law Division, Treasury, Canberra, 1997.

¹² 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.

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

President Al Gore, with its objective of 're-inventing government'. However, even this project receives relatively little credit, however, leading to the Vice-President's September 1996 report having the title of *The Best Kept Secrets in Government*.¹⁴

1.19 Furthermore, this assumption that those involved in the business of regulation are doing nothing is not true in Victoria, where there is a long history of innovative approaches to regulation. This is because, by bipartisan agreement, we have already implemented 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 by either house of the bicameral parliament.

1.20 While much has been achieved, we still grapple with the assessment of the costs and benefits of regulation, how such costs are changing over time and what effect increasing complexity has on compliance.

1.21 To clarify some of these issues, the Committee organised a public hearing with representatives from four major business groups on 4 April 1997. The Business Council of Australia, the Victorian Employers Chamber of Commerce and Industry (VECCI), the Australian Chamber of Manufacturers and the Plastics and Chemicals Industries Association were represented at the hearing. The Committee gained valuable information on the inadequacies of the present regulatory framework and on the initiatives business would include in a Regulatory Efficiency Bill. Some of the common themes that emerged were the need for uniformity across state and federal jurisdictions; the problems with the regulatory impact statement process; and support for alternative compliance mechanisms. These points will be discussed in chapters 2 and 4.

¹⁴ A. Gore, *The Best Kept Secrets of Government*, US Government Printing Office, Washington, DC, 1996.

1.22 The Committee notes that, 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'.¹⁵ The paper canvasses various alternatives to the current system of regulation, including performance based regulation, negotiated rule making, class exemptions for small business, regulatory flexibility and third party certification.

1.23 The concept of regulatory efficiency legislation has much to recommend it, particularly because, at its core, it involves a cooperative effort between the government, the regulated and the community. Similarly, other alternative approaches to regulation have features that require further examination. It should be borne in mind, however, that such alternatives should be seen as a means of enhancing the existing system in Victoria and not as an indictment on the current regulatory regime.

1.24 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.

1.25 The thesis that the business of regulation is becoming too much for governments to handle has been expressed by an Australian specialist in regulatory policy, Dr Peter Grabosky, of the Australian Institute of Criminology. Dr Grabosky has noted that 'governments are not omniscient', nonetheless, many governments are torn between a pressure to reduce public spending and an increasing pressure to deliver more – with the more being something that is beyond their capacity to deliver. He has suggested that one way of addressing this issue 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.¹⁶

¹⁵ New South Wales Government, *Regulatory Innovation: Regulation for Results*, Discussion Paper, Sydney, 1996, Foreword.

¹⁶ 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.

1.26 Developing this theme, Dr Grabosky suggests that 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'.¹⁷ Under this system, the role of government is in 'manipulating incentives in order to facilitate the constructive contributions of non-government interests';¹⁸ a role which requires governments to 'act as facilitators and brokers, rather than commanders'.¹⁹

1.27 Writing in 1995, Dr Grabosky emphasised the importance, for the future, of co-production in regulatory affairs, suggesting that governments can 'enlist the variety and resourcefulness of private interests and guide them in the direction of regulatory ends'.²⁰

1.28 Similar sentiments have been expressed by Peter Jonson, Managing Director of the Norwich Financial Services Group and Elizabeth Jonson, Senior Lecturer in the Institute of Ethics and Public Policy at Monash University. In a 1994 article in *Quadrant*, they argued:²¹

Increasingly, the question will not be whether to regulate, but rather what form the regulation should take. We strongly advocate that much greater attention be given to the use of incentives and the graduated response in devising regulations which are least costly and least intrusive.

1.29 There would appear to be evidence that there is more to the current reform proposals (and to the impetus behind them) than a desire to give business what it wants. There is evidence that there is a deeper need, that of necessity.

1.30 The Victorian Office of Regulation Reform (ORR) proposed the introduction of Regulatory Efficiency Legislation in a discussion Paper

Similar themes are also discussed in P. N. Grabosky, 'Green Markets: Environmental Regulation by the Private Sector', *Law and Policy*, 1994, vol. 16, no. 4, p. 419. For similar views from an alternative source, see P. D. Jonson & E. P. Jonson, 'Financial regulation and moral suasion', *Quadrant*, Jul.-Aug. 1994, p. 89.

¹⁷ P. N. Grabosky, 'Using non-governmental resources to foster regulatory compliance', op. cit., p. 543.

¹⁸ *ibid.*, p. 544.

¹⁹ *ibid.*, p. 545. This idea was also taken up by the Chairman of the Environment Protection Authority (Victoria), Dr Brian Robinson, in a speech to the Australian Centre for Environmental Law on 2 July 1996, entitled 'ISO 14000: eagle or albatross' pp. 2-3.

²⁰ P. N. Grabosky, *ibid.*

²¹ P. D. Jonson & E. P. Jonson, op. cit., p. 89.

submitted to the Law Reform Committee.²² The ORR proposal suggests that Regulatory Efficiency Legislation, which would enable ministers responsible for regulation to approve an alternative compliance mechanism that satisfies regulatory objectives, has the benefits of tailoring regulation to meet the needs of business and provides a means of achieving certainty of compliance. The ORR's proposal is described and evaluated in detail in Chapter 4.

1.31 On its face (and subject to the discussion in the body of this paper), the proposal for regulatory efficiency legislation that has been described to the Committee would appear to be an option that accords with what academic and business opinion supports. It should be stressed, however, that (if it is to be adopted) it should be regarded as an enhancement to the existing mechanisms and not an alternative to those mechanisms.

²² Office of Regulation Reform, *Regulatory Efficiency Legislation*, Discussion Paper.

2.1 Where does Victoria currently stand on regulation efficiency? The simple answer to this question is that Victoria stands in good stead as a regulatory innovator when compared to other jurisdictions in Australia and the British Commonwealth. Set out below is an analysis of the legislation that currently operates in Victoria, followed by an assessment of legislation (and proposed legislation) in other relevant Australian jurisdictions.

Victorian Legislation

Subordinate Legislation Act 1994 (Vic)

Regulatory Impact Statements

2.2 The main source of regulatory review mechanisms in Victoria are those contained in what is now the *Subordinate Legislation Act 1994* (Subordinate Legislation Act). The relevant provisions have been in effect since 1985 when they were first inserted into what was then the *Subordinate Legislation Act 1962*.²³ The 1994 Act was the Victorian Government's response to a report of the Scrutiny of Acts and Regulations Committee.²⁴ 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', and commended the Government for its prompt response to the Committee's report.²⁵

²³ The relevant amendments were contained in the *Subordinate Legislation (Review and Revocation) Act 1984*.

²⁴ 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.

²⁵ 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.

2.3 The general scheme of the provisions requires that government departments consider various matters, including the existence of alternative methods of achieving the desired ends, *before* introducing statutory rules; that is, in general terms, regulations. There is also a requirement that the making of proposed regulations be publicised in advance and that interested parties be consulted.²⁶ In most substantial cases²⁷ a regulatory impact statement (RIS) has to be prepared by the government department proposing the regulation, in which the costs and benefits of the regulation—both economic and social—have to be evaluated. The making of a RIS has to be advertised and comments sought from those affected by the proposal before the regulation can be made.²⁸

2.4 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*.²⁹ It contains the following statement of the objectives of the RIS process:³⁰

The basic purposes 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.

²⁶ *Subordinate Legislation Act 1994* (Vic), s. 6.

²⁷ There are exceptions and exemptions to the RIS process, under sections 8 and 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) 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.

²⁸ *Subordinate Legislation Act 1994* (Vic.), ss. 7–12.

²⁹ Victoria, Department of State Development, Office of Regulation Reform, *Regulatory Impact Statement Handbook* (no publication date listed). Other useful publications include *Principles of Good Regulation* and *Regulatory Alternatives* (no publication date listed for either).

³⁰ *Regulatory Impact Statement Handbook*, Part 1.2.

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.

2.5 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?’³¹ This threshold question is important as it can highlight whether a particular proposed regulatory regime could result in regulatory failures that may be greater than the market failure it proposed to address. Furthermore, it would be unrealistic to place regulatory regimes on a target group where because of the complexity and expansion of regulations there is less likelihood of compliance. The ORR thus suggest that the threshold question should have the effect of restricting compliance requirements to significant problems.³²

2.6 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’.³³

2.7 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;

31 *ibid.*

32 *ibid.*

33 *ibid.*

- (f) any other matters specified by the guidelines;
- (g) a draft copy of the proposed statutory rule.

2.8 In relation to paragraph (d) above, it should be noted that the ORR has also provided guidance in relation to the issue of other practicable alternatives. In a document entitled *Regulatory Alternatives*, the following alternatives are set out:³⁴

- (a) performance-based regulation;
- (b) co-regulation;
- (c) extending the coverage of principal legislation;
- (d) removing other legislative impediments;
- (e) increased enforcement;
- (f) tradeable permits/licences;
- (g) voluntary codes/self-regulation;
- (h) negative licensing;
- (i) public education programmes;
- (j) information disclosure;
- (k) economic incentives;
- (l) risk-based insurance or guarantee funds; and
- (m) rewarding good behaviour.

Some of these alternatives are discussed in this discussion paper.

2.9 The RIS process is monitored by the Scrutiny of Acts and Regulations Committee,³⁵ a committee of the Victorian Parliament made up of members of both Houses. The Scrutiny Committee's role includes one of scrutinising regulations to ensure that the formal requirements of the *Subordinate Legislation Act* have been complied with. This, in turn, includes a role in assessing the adequacy of RISs.

Consultation

³⁴ Office of Regulation Reform, *Regulatory Alternatives* (undated), pp. 14–38.

³⁵ Set up 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*.

2.12 An important aspect of the RIS process is the extent to which it involves consultation, both with business and the general public and with the Office of Regulation Reform. Section 11 of the *Subordinate Legislation 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, that:³⁶

- (a) sets out the reason for, and the objectives of, the proposed statutory rule;
- (b) summarises the results of the RIS;
- (c) provides details of where copies of the RIS and the proposed statutory rule can be obtained; and
- (d) invites public comments or submissions.

The 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.³⁷

2.13 Subsection 11(3) of the *Subordinate Legislation Act* requires that the responsible Minister must ensure that all comments and submissions are considered before the statutory rule is made and that a copy of all comments and submissions is given to the Scrutiny of Acts and Regulations Committee as soon as practicable after the statutory rule is made.

2.14 The Office of Regulation Reform also has a role in assessing RISs, in that subsection 10(3) of the *Subordinate Legislation Act* requires that independent advice be available as to the adequacy of an RIS. The ORR is available to provide this advice (though it is not the only source of such advice).

2.15 A recent example of ORR's role 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 Regulation Act*. The Scrutiny of Acts and Regulations Committee undertook an inquiry in relation to the qualified advice, including taking submissions from interested groups and organisations and conducting a

³⁶ *Subordinate Legislation Act 1994* (Vic.), subs. 11(2).

³⁷ *ibid.*, subs. 11(1).

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. The Scrutiny Committee reported to the Parliament – on the basis of paragraph 14(1)(j) and Schedule 3 of the Subordinate Legislation Act – noting its concerns about the regulations in question.³⁸

Does the RIS Process Work?

2.16 As mentioned in the introduction, the Committee organised a public hearing with four major business groups on regulatory efficiency legislation. The Committee's preliminary impression had been that the RIS process was working in Victoria. However, the general consensus expressed by the business representatives was that the RIS process was not working. Ms Roper from the Australian Chamber of Manufacturers summed up the problems with the RIS process as being:³⁹

firstly, the instruments that are excluded, such as state environment protection policies, and secondly, the preparation of the RIS. They (the department) might go through the motions but they do not look at alternatives.

2.17 The representatives at the hearing believed that the RIS process has been hijacked by bureaucrats concerned with process rather than genuine consultation. All participants expressed a need for genuine consultation with stakeholders at the start of the process before a decision to regulate has been made. Ms Roper from the Australian Chamber of Manufacturers felt that a needs analysis that examined all the alternatives, including the option of doing nothing, and that sought input from stakeholders, should be conducted at the start of the process.

2.18 Another problem identified with the RIS process was the lack of genuine commitment by bureaucrats to the RIS process. Mr Shepherd of the

³⁸ 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.

³⁹ A. Roper, Australian Chamber of Manufacturers, *Minutes of Evidence*, 7 Apr. 1997, p 23.

Victorian Employers Chamber of Commerce and Industry (VECCI) believed there were two reasons for this lack of commitment:⁴⁰

The first one is incompetence of the regulator to do cost-benefit analysis; I think this is overwhelming. ... The other issue which we have more concern with, and it is much more insidious, and I'll give some examples, is deliberate undermining and white-anting of the process by bureaucrats. Firstly, at a state level - I am not going to name the individual at this table but I will do so off the record - a very senior state bureaucrat said to me, 'I will never allow regulatory impact statements to be applied to my regulations'. I said, 'Why is that?', and the individual said, 'Because it would simply undermine the political imperative'. So that gives you the politics of the whole cost-benefit analysis and RIS.

Suggestions for Improving the RIS Process

2.19 Some suggestions were made at the hearing in relation to how this 'white-anting' by bureaucrats can be rectified. It was suggested that bureaucrats need more training on RIS processes. Recommendation 53 of the Small Business Deregulation Task Force⁴¹ was highlighted as it suggested that the ORR develop and promote new or improved training courses on RIS processes.

2.20 Another suggestion from VECCI was that performance contracts of senior executives include a performance indicator that they have to attempt to reduce compliance costs. Mr Shepherd said:⁴²

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.

2.21 All the participants at the public hearing also believed that the ORR needed to be given more power and needed to be better resourced. Currently under the Subordinate Legislation Act, it is possible to use bodies other than ORR to assess an RIS. It was suggested that the Subordinate Legislation Act needed to be amended so that the ORR was the only body that could certify an RIS. Mr Soutter from the Business Council of Australia said:⁴³

I think the problem with the process is that those who go through the RIS already know the outcome they want and they tailor their approach to achieve that outcome.

⁴⁰ S. Shepherd, Victorian Employers Chamber of Commerce and Industry, *Minutes of Evidence*, 7 Apr. 1997, p. 8.

⁴¹ Small Business Deregulation Task Force, *Time for Business*, AGPS, Canberra, 1996.

⁴² S. Shepherd, op. cit., p.11.

⁴³ M. Soutter, Business Council of Australia, *Minutes of Evidence*, 7 Apr. 1997, p. 25.

[I]n terms of the regulatory process the thing we have argued with the commonwealth government ... 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.

These points, however, are matters upon which the Committee seeks comments.

Issue 1: Are the current RIS procedures adequate? Do they meet the objective of efficiency? In what ways can the RIS process be improved?

Automatic revocation of statutory rules

2.22 One other important element of the Subordinate Legislation Act should be noted. Section 5 of the Act provides for the automatic revocation of all statutory rules 10 years after their making. It provided for the staged revocation of existing statutory rules by setting out a schedule for sunseting. In so providing, the Subordinate Legislation 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 (in addition to being subject to the requirements of the RIS process) are forced to consider whether or not the regulations in question are really necessary.

Environment Protection Act 1970 (Vic)—Accredited Licensees

2.23 A form of alternative compliance already operates in Victoria under amendments made in 1994 to the *Environment Protection Act 1970 (Vic)*.⁴⁴ Under this system, companies subject to environmental regulation can be freed from 'the standard prescriptive approach to works approval and licensing' if they can demonstrate a high level of environmental performance and an ongoing capacity to maintain and improve that performance.⁴⁵ They can be designated as 'accredited licensees'.

⁴⁴ The relevant amendments are set out in the *Environment Protection (General Amendment) Act 1994 (Vic)*.

⁴⁵ 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*, Publication 424, Feb. 1996.

2.24 Three cornerstones are required of companies participating in the accredited licensee process: an environmental management system, an environmental audit program and an environmental improvement plan (existing or in progress). A company must be able to convince the Environment Protection Authority (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'.⁴⁶

2.25 Once issued with a licence, an operator must be able to demonstrate to the EPA that they are complying with its terms. This is achieved through the provision of performance reports. Continuation of the licence 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 (for example, prosecutions) in relation to the operator.⁴⁷

2.26 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 the environment improvement plan. 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.⁴⁸

2.27 As at 3 February 1997, 5 accredited licences were operating in Victoria.⁴⁹ The Chairman of the EPA, Dr Brian Robinson, recently said that the overall aim of the accredited licence system is 'environmental improvement **through co-operation between industry, government and the community**' [emphasis added].⁵⁰

2.28 A representative from Kemcor (one of the companies that has obtained an accredited licence) was present at the public hearing organised by the

⁴⁶ B. Robinson, 'Is seamless regulation possible', paper delivered at the Annual Conference of The Textile Institute, Southern Australia Section, 18 Jun. 1996, p. 6.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ The EPA advised the Committee that accredited licences have been issued to: (1) Generation Victoria Newport Power Station; (2) BHP Steel Pty. Ltd.; (3) Yarra Valley Water; (4) Kemcor Australia Pty. Ltd.; and (5) Yallourn Energy Ltd.

⁵⁰ B. Robinson, , *loc. cit.*

Committee. The evidence presented suggested that while Kemcor found the accredited licence system extremely valuable, the monetary benefit in the system is not great. It was suggested that the system works only for larger companies; small companies are not adequately equipped to tackle the hurdles that need to be negotiated.⁵¹

Issue 2: Are the current procedures for accredited licences granted under Environment Protection Act 1970 (Vic) satisfactory? Do they meet the objective of efficiency?

Building Act 1993 (Vic)—Third Party Certification

2.29 A more efficient form of regulation that currently operates in Victoria is the system of ‘third party certification’ that operates under the *Building Act 1993 (Vic)*. Under section 76 of that Act 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.

2.30 The Building Control Commission has advised the Committee that as a result of the innovations, processing times for building permits have halved in many cases.⁵² Another result has been that insured building practitioners have benefited from significant reductions in premiums for professional indemnity cover.⁵³ As is discussed in more detail below, third party

⁵¹ As Mr Wilson from Kemcor said:
‘For Kemcor, the licence currently costs around \$100 000 a year, and a 25 per cent reduction brings it down by \$25 000. It would cost immeasurably more than that to put in place the environmental management systems that are required for an accredited licensee to develop an environmental improvement plan. Although it is a welcome reduction, it is not significant and would not be a reason for doing it. I believe that is one of the factors that has inhibited many companies moving forward on it.’: Brian Wilson, Kemcor Australia, *Minutes of Evidence*, 7 Apr. 1997, p 15.

⁵² 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.

⁵³ 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 \$1,200 previously for \$50,000 of fee income.

certification is one of the regulatory innovations that is currently being considered by the New South Wales Government.⁵⁴

New South Wales

Subordinate Legislation Act 1989 (NSW)

2.31 A similar system to that described in 2.2 operates—i.e. a system that incorporates both RISs and the staged repeal of regulations—has existed in New South Wales since 1989, under provisions of the *Subordinate Legislation Act 1989* (NSW). The most significant difference between the two systems is that, in New South Wales, the automatic repeal mechanism operates after 5 years, rather than 10. An assessment of the operation of the New South Wales system can be found in Report No 23 of the Regulation Review Committee of the New South Wales Parliament (which has a similar role to that of the Scrutiny of Acts and Regulations Committee in Victoria).⁵⁵ The Report is generally supportive of the New South Wales scheme (though it does make recommendations as to how the scheme might be improved).

The Green Paper on Regulatory Innovation

2.32 It is relevant to note that, in May 1996, the New South Wales Government issued a Discussion Paper entitled *Regulatory Innovation: Regulation for results*.⁵⁶ In the foreword to that paper, the New South Wales Government stated that it was ‘firmly committed to cutting the burden of ‘red tape’ in order to build a strong economy which can deliver essential services.’⁵⁷ The Discussion Paper states that:⁵⁸

Much of the criticism of ‘red tape’ comes from the inability of regulatory systems to respond to technological and social change. Traditional regulation-making processes are seen as slow, unresponsive, and imposing inappropriate requirements. Specific criticisms of ‘unresponsive’ regulations have been that:

⁵⁴ It should be noted that ‘third party certification’ is one of the options set out in the New South Wales Government’s discussion paper entitled *Regulatory Innovation: Regulation for Results*, which is discussed in more detail below.

⁵⁵ Parliament of New South Wales, Regulation Review Committee, *Report of the Regulation Review Committee on Future Directions for Regulatory Review in New South Wales*, Report no. 23, 1993.

⁵⁶ The New South Wales Government is in the process of gathering and analysing submissions received from the public.

⁵⁷ New South Wales Government, *Regulatory Innovation: Regulation for Results – Discussion Paper*, (May 1996), Foreword.

⁵⁸ *ibid.*, pp. 1-2.

- rules and regulations are unnecessarily prescriptive even where there are circumstances which make alternative methods of compliance feasible;
- 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’;
- current regulations are unable to recognise alternative compliance models in use in other jurisdictions, without statutory amendment;
- 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;
- government officials are slow to evaluate changes in technologies or have insufficient expertise to design compliance strategies which take advantage of these advances.

2.33 The Discussion Paper notes that there have been a variety of responses by governments to the pressures for, and against, regulatory reform. The most common response has been to redraft regulations to more accurately reflect current practices and technology. However, the process of redrafting can be slow and involves government officials, rather than business and the community, determining the review priorities.⁵⁹

2.34 Against this background, the Discussion Paper outlines a range of regulatory alternatives, namely:

- (a) performance based regulation;⁶⁰
- (b) negotiated rule making;⁶¹
- (c) class exemptions for small business;⁶²
- (d) regulatory flexibility;⁶³ and
- (e) third party certification.⁶⁴

⁵⁹ *ibid.*, p. 2.

⁶⁰ *ibid.*, pp. 7–8.

⁶¹ *ibid.*, pp. 8–10. See also the discussion in Chapter 4.

⁶² New South Wales Government, *Regulatory Innovation: Regulation for Result*, Discussion Paper, May 1996, pp. 10–12.

⁶³ *ibid.*, pp. 12–15. This option is similar to the Victorian and Canadian proposals for Regulatory Efficiency Legislation, which are discussed in Chapter 3.

⁶⁴ *ibid.*, p. 12.

Recent Announcements Concerning New South Wales Planning Laws

2.35 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.⁶⁵ So far as major projects are concerned, multiple assessment processes will be collapsed into one integrated approval. State Government agencies will provide their requirements at the time of development assessment. This will reduce the need for sequential assessments by different agencies.⁶⁶

Western Australia

2.36 In April 1994, the Western Australian Standing Committee on Government Agencies published a report entitled *State agencies – their nature and function*.⁶⁷ 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 US Administrative Procedure Act. In particular, 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.⁶⁸

2.37 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

⁶⁵ P. Totaro, 'Huge planning shake-up to remove 'labyrinth of red tape'', *Sydney Morning Herald*, 13 Feb. 1997, p. 2.

⁶⁶ New South Wales, Minister for Urban Affairs and Planning; Minister for Housing, *News Release*, 'Planning overhaul will abolish red tape', 12 Feb. 1997.

⁶⁷ Parliament of Western Australia, Legislative Council, Apr. 1994.

⁶⁸ See generally, Parliament of Western Australia, Legislative Council, *Thirty-sixth Report of the Standing Committee on Government Agencies*, Apr. 1994.

Legislation Act be adopted in Western Australia. In particular, the Committee on Delegated Legislation recommended:⁶⁹

- (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) introducing a timetable for the staged repeal of existing subordinate legislation and for the sunseting of all new subordinate legislation; and
- (d) the establishment of an Office or Regulation Review.

The Committee's current information is that the recommendations of these two committees have not yet been taken up.

Queensland

2.38 A Business Regulation Review Unit (BRRU) was established in 1990 to co-ordinate a thorough review of all legislation and regulation that affects business in Queensland. The BRRU's 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 a RIS to be prepared and made public if the regulation is likely to impose an appreciable cost on the community. New subordinate legislation must also be reviewed after 10 years.⁷⁰

The Commonwealth

Legislative Instruments Bill 1996

2.39 There is currently a Bill—the Legislative Instruments Bill 1996—before the Australian Federal Parliament that, among other things, would require

⁶⁹ Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, *Sixteenth Report: The Subordinate Legislation Framework in Western Australia*, Nov. 1995.

⁷⁰ M. Williams-Winn, *Enhancing Australia's Competitiveness: The Impact of Government Regulations*, Committee for Economic Development, 1996, p. 20.

that all 'legislative instruments'⁷¹ 'directly affecting business, or having a substantial indirect effect on business'⁷² be the subject of consultation procedures similar to those currently operating in Victoria and in New South Wales.⁷³ The significant difference to the Victorian system is that Schedule 2 to the Bill actually prescribes the Commonwealth Acts whose legislative instruments are to be subject to the consultation procedures set out in the Bill. There is nothing in the body of the Bill in relation to the issue of instruments 'directly affecting business, or having a substantial indirect effect on business'. Rather, this is stated in the Explanatory Memorandum to the Bill as being the criterion upon which the inclusion of an Act in Schedule 2 is based.

2.40 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. Clause 21(2) of the Legislative Instruments Bill provides:

A Legislative Instrument Proposal must contain:

- (a) a full statement of the issues giving rise to the need for the proposed legislative instrument and the objective of the instrument; and
- (b) a statement of the various options (whether legislative or otherwise and whether raised in submissions referred to in subsection (1) or not) that may constitute viable means for achieving the objective; and
- (c) a statement of the direct and indirect social and economic costs and benefits of each such option; and

⁷¹ This term is defined in clause 5 of the Legislative Instruments Bill. In essence, it covers all forms of what we would generally refer to as 'delegated legislation'.

⁷² Legislative Instruments Bill 1996 (Cwlth), Explanatory Memorandum para. 41.

⁷³ It may be of interest that 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*, 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*, 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.

(d) an evaluation of the options with a recommendation.

2.41 Clause 21(3) then provides:

Without limiting the generality of paragraph (2)(c), the statement of costs and benefits of an option must include:

- (a) an evaluation of the impact of the option on particular groups in the community; and
- (b) a statement of the costs and benefits so far as competition, resource allocation, administration and compliance are concerned; and
- (c) if the option restricts competition - consideration of whether the restriction is necessary to achieve the stated objective and, if so, consideration of whether the option should be pursued despite the restriction.

2.42 Subclause 21(4) 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.

2.43 The Legislative Instruments Bill also provides for a process of 'sunsetting'⁷⁴ after five years and 'backcapturing'⁷⁵ of legislative instruments. The end result of these processes would be similar to the staged repeal process operating in Victoria and New South Wales. The Bill also provides for the establishment of a federal register of legislative instruments and unless instruments are recorded on this register they will not be enforceable.

Issue 3: Does the current process of staged repeal of statutory rules work? If yes, is the current Victorian requirement for repeal of statutory rules after 10 years acceptable or should some other time period (e.g. the New South Wales requirement for repeal after 5 years) be adopted?

Proposals Emanating from the National Road Transport Commission

2.44 Other activity at the Commonwealth level emanates from the National Road Transport Commission (NRTC), which is also pursuing the concept of alternative compliance mechanisms. It issued a discussion paper on

⁷⁴ See cl. 66, Legislative Instruments Bill 1996.

⁷⁵ See cll. 48–50, Legislative Instruments Bill 1996.

alternative compliance in May 1994⁷⁶ and an interim regulatory impact statement on alternative compliance options in April 1995.⁷⁷

2.45 In its May 1994 discussion paper, the NRTC stated that there were three types of compliance: conventional enforcement, alternative compliance and licensing or mandatory accreditation.⁷⁸ According to the discussion paper, alternative compliance arrangements:⁷⁹

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.

2.46 The NRTC states that it is examining the concept of alternative compliance with a view to determining whether it offers any benefits in terms of the three objectives guiding the NRTC's work, namely, increased road safety, improved efficiency of road transport and reduced administration costs.⁸⁰ It is important to note, however, that the discussion paper goes on to issue the following caution:⁸¹

Regulatory agencies need to ensure that alternative compliance schemes do not compromise road safety standards in pursuit of efficiency.

2.47 Current information is that the NRTC is still actively pursuing its proposals. The NRTC has advised the Committee that three areas are currently being worked on:

- (a) An RIS is being developed in relation to the proposals for alternative compliance;
- (b) A discussion paper will shortly be published on 'Maintenance and Mass Management'. It will include an alternative regulation framework, which is proposed to be put to the relevant Ministers in August 1997. It is planned that there will be a Bill to amend the *Road Transport Reform (Vehicles and Traffic) Act 1993*

⁷⁶ National Road Transport Commission, *Alternative Compliance*, Discussion Paper, May 1994.

⁷⁷ National Road Transport Commission, *Interim Regulatory Impact Statement on Alternative Compliance Options*, Apr. 1995, revd May 1995.

⁷⁸ *ibid.*, p. 3.

⁷⁹ *ibid.*, pp. 3-4.

⁸⁰ *ibid.*, p. 5.

⁸¹ *ibid.*, p. 4.

(Vic) to provide the hooks for the adoption of alternative compliance mechanisms. The enabling legislation is to form a template framework for other jurisdictions to adopt, if so minded; and

- (c) A fatigue management program is to be introduced in the future. The first stage is compiling the principles for the RIS, which is being undertaken by Queensland Transport.

3 REGULATORY EFFICIENCY & ALTERNATIVE COMPLIANCE MECHANISMS

ALTERNATIVE COMPLIANCE MECHANISMS

3.1 As has already been touched on in the previous chapter, there has recently been a great deal of interest and activity, in Australia and overseas, in the concept of alternative compliance mechanisms (ACMs). The example given in the current Victorian Liberal National Party Election Policy on Small Business is as follows:⁸²

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.

3.2 In the same vein, the National Road Transport Commission states (in the context of its particular subject matter):⁸³

Alternative compliance is intended to increase transport efficiency through reduced costs of compliance. Alternative compliance allows operators greater flexibility in determining how compliance is monitored. This will allow greater innovation and lower cost outcomes. Most forms of alternative compliance involve reductions in on-road enforcement leading to increased vehicle productivity.

The potential benefits of alternative compliance are:

- enhanced compliance with existing standards by operators included in the schemes;
- improved efficiency for these operators due to reduced incidence of on-road enforcement;
- increased compliance of operators outside the scheme through increased concentration of enforcement measures; and
- reductions in enforcement resources to achieve a given level of compliance.

⁸² *Small Business Policy*, p. 8.

⁸³ National Road Transport Commission, *Alternative Compliance*, Discussion paper, May 1994, p. 5.

3.3 While the discussion above (and elsewhere in this discussion paper) points to possible uses of ACMs, it is the Committee's opinion that one of the purposes of ACMs is to provide a capacity to deal with problems that government has not even contemplated.

Issue 4: What other examples of possible or existing alternative compliance mechanisms are there?

Canadian Regulatory Efficiency Bill (C-62)

3.4 The Committee believes that the first legislative embodiment of the concept of alternative compliance mechanisms is contained in the (Canadian) Regulatory Efficiency Bill (C-62) (the Canadian Bill). Under this Bill, which was introduced into the Canadian Parliament in 1994, Ministers would be able to approve alternative methods of complying with regulations applying to a particular business or industry.

3.5 The purposes of the Canadian Bill are set out in clause 3. They are to:

- (a) allow regulatory goals to be achieved through alternatives to designated regulations that:
 - (i) do not compromise the safety, health, environmental or other objectives of designated regulations; and
 - (ii) are consistent with the principles of sustainable development, being development that meets the needs of the present without compromising the ability of future generations to meet their own needs;
- (b) reduce regulatory costs to the public, including individuals, businesses and industries; and
- (c) improve regulatory efficiency while respecting principles of equality, fairness and government accountability.

3.6 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 designating:

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

- (b) that any Act or regulation may be subject to ‘administrative arrangements’;⁸⁴ or
- (c) that a Minister or other person or body act as the regulatory authority for approving proposed compliance plans or changes to approved compliance plans or for entering into administrative agreements.⁸⁵

3.7 Clause 4(3) of the Canadian Bill provides that a copy of each regulation that the Governor in Council proposes to make under clause 4 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.

3.8 Subclause 6(1) of 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 have been published in the *Canada Gazette*.⁸⁶

3.9 Clause 7 of the Canadian Bill provides that, 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.

3.10 Clause 9 of the Canadian Bill provides for evaluation and approval of proposed compliance plan or change. 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]’.⁸⁷

⁸⁴ 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.

⁸⁵ Cl. 4(1) of the Canadian Bill.

⁸⁶ Cl. 6(3) of the Canadian Bill.

⁸⁷ Cl. 9(2) of the Canadian Bill.

3.11 Clause 10 of the Canadian Bill is essential to the operation of the scheme. It provides:

- (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).⁸⁸

3.12 A key feature of the scheme proposed by the Canadian Bill is that any 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.

Problems with the Canadian Bill

3.13 The Committee's current information is that the Canadian Bill lapsed and is unlikely to be reintroduced in the short term. It is useful to set out some of the reasons for this outcome, as they have relevance to elements of the Victorian proposal, which is set out in Chapter 4.

3.14 It appears to the Committee that one of the most significant reasons why the Canadian Bill has not received a smooth and speedy passage through the Canadian Parliament is that it was the subject of a fairly scathing report by the Standing Joint Committee for the Scrutiny of Regulations (the Canadian

⁸⁸ 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.

Scrutiny Committee).⁸⁹ 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 and the like), the Canadian Scrutiny 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'.⁹⁰

3.15 The Committee believes that it is important to set out the concerns of the Canadian Scrutiny Committee in detail because of the likelihood that similar concerns will be expressed in relation to the Victorian proposals. Those proposals will then have to be examined against the Canadian concerns, to see whether (and to what extent) the Victorian proposals warrant similar concern.

3.16 The particular problems that the Canadian Scrutiny Committee identified were:

- (a) that it would give the Executive a discretion to grant dispensations from the operation of subordinate laws in favour of individuals; and
- (b) that it was inconsistent with other constitutional values.

3.17 In relation to the first of these issues, the Canadian Scrutiny Committee said 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.⁹¹ If the Executive was given the power to grant dispensations from subordinate laws, the Committee questioned how long it would be before another government sought to extend its authority to the ability to grant dispensations from not just regulations but statutes themselves in the name of efficiency.⁹²

3.18 In relation to the second issue, the Canadian Scrutiny Committee stated that the Canadian Bill was contrary to the Rule of Law, because:⁹³

⁸⁹ Parliament of Canada, Standing Joint Committee for the Scrutiny of Regulations, *Report on Bill C-6*, 16 Feb. 1995.

⁹⁰ *ibid.*, p. 1.

⁹¹ *ibid.*, p. 4.

⁹² *ibid.*, p. 5.

⁹³ *ibid.*, p. 6.

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.

3.19 The Canadian Scrutiny Committee also expressed concerns that the Bill was contrary to the principles of equity and fairness. The Committee felt that the compliance scheme plan offended the principle of equality before the law as it put forward a system where there could eventually be 'as many different rules as there were persons initially subject to a particular regulation'.⁹⁴ 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.

3.20 The Canadian Scrutiny Committee felt that the fairness of a system where large corporations could easily obtain dispensations from regulations while smaller competitors due to their lack of resources continued to be bound by regulations, had to be questioned. They 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.

3.21 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'.⁹⁵

⁹⁴ *ibid.*, pp. 7-8.

⁹⁵ Standing Joint Committee for the Scrutiny of Regulations, *Report on Bill C-62* (16 February 1995), pp. 8-9.

3.22 The Canadian proposal was defeated in the caucus room of the Canadian Liberal Party. In a recent speech by the Chairman of the Victorian Law Reform Committee, Victor Perton, MP, gave his assessment of that defeat:⁹⁶

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 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.

US Comprehensive Regulatory Reform Bill

3.23 The Comprehensive Regulatory Reform Bill was recently introduced into the US Congress. It is understood to have been inspired by the Canadian Bill.⁹⁷ It provides that:

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.

3.24 A major rule is defined as one that has costs or benefits of more than \$50 million or which has other significant adverse impacts. The Bill contains a presumption in favour of the granting of approval for alternative compliance mechanisms, in that agencies are **obliged** to approve such mechanisms if there is a reasonable likelihood that the ACM would achieve a level of performance that is at least equivalent to that achieved under the regulation. Agencies would not be required to approve an ACM, however, if to do so would impose an undue burden on the agency.

3.25 Other features of the Bill are that agencies would be subject to a 180 day time limit in relation to the assessment of an ACM proposal and that their decision would be final and not subject to appeal. Rules relating to taxation and revenue raising are excluded from the operation of the Bill.⁹⁸ This Bill did not become law. The US Congress passed a strong version of the comprehensive Bill and it was sent to the President as part of the first Debt

⁹⁶ V. Perton, 'Regulatory review—The next wave', Paper delivered at the Fourth Commonwealth Conference on Delegated Legislation, Wellington, New Zealand, 10–13 Feb. 1997.

⁹⁷ See Office of Regulation Reform, *Discussion Paper: Regulatory Efficiency Legislation*, p. 6.

⁹⁸ *ibid.*, pp. 6–7.

Limit Bill. The President vetoed the Bill partly because 'he wanted to deny a victory to its chief Senate sponsor, Bob Dole'.⁹⁹ However, while not nearly as comprehensive, the US Congress has passed eight other 'lesser-known' regulatory reform laws.¹⁰⁰

⁹⁹ T. Gaziano, Chief Counsel, U.S. House of Representatives, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, *SBREFA and Other Landmark Regulatory Reform Laws of the 104th Congress*, Washington, 1997.

¹⁰⁰ *ibid.*

4 ALTERNATIVE COMPLIANCE MECHANISMS IN THE VICTORIAN CONTEXT

4.1 While the Canadian and United States Bills discussed in Chapter 3 have been defeated, there is some impetus in Victoria to take up the idea and to run with it. As already noted, this is, in part, a reflection of the fact that, as part of its platform for the 1996 election, the current Victorian Government pledged that it would introduce Regulatory Efficiency Legislation to allow for alternative means of compliance with regulatory objectives.¹⁰¹

4.2 This commitment was, in turn, picked up after the election by the Executive Council which, on 28 June 1996, referred the issue of Regulatory Efficiency Legislation to the Law Reform Committee for inquiry, consideration and report.

4.3 As mentioned in the Introduction and chapter 2, the Committee conducted a public hearing with representatives from four major business groups. The Committee went into the hearing fairly sceptical about how Alternative Compliance Mechanisms (ACMs) would be received. However, there was overwhelming support expressed by the representatives present for the concept of ACMs and the flexibility they allowed.

4.4 Concerns expressed by the Committee regarding the benefits of ACMs to small business were largely averted by evidence from the Plastics and Chemicals Industries Association (PACIA). The Australian Chamber of Manufacturers and PACIA identified sharing programs where larger companies transfer information and help smaller companies.¹⁰² The general consensus was that if Regulatory Efficiency Legislation allowed for ACMs, the trickle down effect and information sharing programs would mean that smaller companies would also benefit from the development of ACMs.

¹⁰¹ *Small Business Policy*, p. 8.

¹⁰² Kemcor is already sharing the program it has in place with smaller chemical companies. Ivan Wilson, Kemcor Australia, *Minutes of Evidence*, 7 Apr. 1997, p. 19.

ORR Proposal

4.5 What the Victorian Government proposes has largely been outlined to the Committee in submissions from the Office of Regulation Reform (ORR), which operates within the Department of State Development. The proposal has been described to the Committee in a Discussion Paper entitled *Regulatory Efficiency Legislation* and in evidence to the Committee by the then Director of the ORR, Mr Rex Deighton-Smith.¹⁰³ Those sources are the basis for the discussion below.

4.6 The essence of the proposal is similar to that of the Canadian Bill. There is an emphasis on the fact that the proposal does not imply any lowering of regulatory standards and 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**.¹⁰⁴ In particular, an ACM would not be approved if it would compromise any safety, health or environmental objectives of the relevant regulations. There is also an understanding that principles of equality, fairness, competitive neutrality and government accountability will be respected and that government budgetary policy will not be compromised.¹⁰⁵

4.7 The scheme outlined by ORR would apply only to statutory rules (within the meaning of the Subordinate Legislation Act)¹⁰⁶ and only to those statutory rules that are specifically scheduled as being appropriate for the application of 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.¹⁰⁷ Proposals for scheduling would be made by the Minister responsible for the relevant legislation and would only be carried through after consultation with those persons and groups most likely to be affected by the scheduling.¹⁰⁸

¹⁰³ Mr Deighton-Smith has subsequently joined the Public Management Service of the OECD.

¹⁰⁴ See Office of Regulation Reform, *op. cit.*, pp. 2–3.

¹⁰⁵ The purposes and principles of the proposed Regulatory Efficiency Bill (REB) are set out in an annexure to the discussion paper (the Annexure). These ‘general principles’ are set out in para. 2.

¹⁰⁶ Office of Regulation Reform, *op. cit.*, Annexure, para. 4.

¹⁰⁷ *ibid.*, Annexure, paras 4–5.

¹⁰⁸ *ibid.*, Annexure, para. 5.

4.8 The 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:¹⁰⁹

- (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 will 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.

4.9 The 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.¹¹⁰ It also proposes that the relevant criteria should be open to review by the Scrutiny of Acts and Regulations Committee 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.¹¹¹

4.10 The 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'.¹¹² All proposed changes to government fees would be subject to the prior approval of the Treasurer.¹¹³

¹⁰⁹ *ibid.*, Annexure, para. 6.

¹¹⁰ *ibid.*, Annexure, para. 7.

¹¹¹ *ibid.*, Annexure, para. 8 (first occurring).

¹¹² *ibid.*, Annexure, para. 8 (second occurring).

¹¹³ *ibid.*

4.11 Approval of an ACM would not be possible unless the formal requirements discussed above have 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).¹¹⁴

4.12 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.¹¹⁵

4.13 Approvals of an ACM would be open to amendment and termination. The ORR proposal states that:¹¹⁶

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]

4.14 The ORR proposal suggests that a proponent can seek approval to 'amend, vary, extend or cancel' an ACM from the relevant Minister(s).¹¹⁷ 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.

4.15 The proposal indicates that copies of an ACM should be available to the public for inspection and purchase, though there is also a question posed

¹¹⁴ *ibid.*, Annexure, para. 9.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*, Annexure, para. 11.

¹¹⁷ *ibid.*

as to whether section 34 of the *Freedom of Information Act 1982* would adequately protect commercially sensitive information.¹¹⁸

4.16 It is clear to the Committee that this is a significant issue for discussion, in that there may be arguments that such material should be kept confidential, because publication may involve divulging trade secrets. The ORR's Discussion Paper favours publication, partly on the basis of ensuring the 'transparency'¹¹⁹ 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'.¹²⁰

4.17 The publication issue is also important to the ORR proposal for another reason, in that (in the ORR's submission) it operates to address the equity criticism that was levelled at the Canadian Bill:¹²¹

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 [Regulatory Efficiency Legislation] mechanism as being pro-competitive at the margin.

4.18 Under the 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.¹²² It is also proposed, however, that there be a mechanism in the proposed legislation to ensure that breach of the ACM renders the proponent liable to be prosecuted in the criminal courts for a breach of the relevant regulations (that is, that the ACM operates as an alternative to) and/or to be subject to the forfeiture of security deposits and/or any other penalty prescribed in the relevant guarantee.¹²³

118 *ibid.*, Annexure, para. 12.

119 *ibid.*, p. 23.

120 *ibid.*, p. 26.

121 *ibid.*, p. 23.

122 *ibid.*, Annexure, para. 12.

123 *ibid.*, Annexure, para. 15.

4.19 It is 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.¹²⁴

4.20 Finally, it is proposed that there be a provision in the Bill that the ACM should be subject to review 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.¹²⁵

The Victorian ORR Proposal as Opposed to the Canadian Bill

4.21 Given the serious problems identified by the Canadian Scrutiny Committee in relation to the Canadian Bill, it is important to consider whether those problems exist in relation to the Victorian ORR proposal. In this context, the Committee notes that the ORR, in the material and information presented to the Committee, was most anxious to assure the Committee that the Victorian proposal would not involve such problems.

4.22 The ORR attempts to address the concerns raised by the Canadian Scrutiny Committee in a number of ways. The ORR stresses in its Discussion Paper that to ensure public confidence in the system there is a need for any Bill to incorporate a high level of transparency by making the process open to public consultation and scrutiny.¹²⁶

4.23 The concerns expressed by the Canadian Committee regarding government authorities possessing wide unreviewable discretionary powers are addressed by the ORR in terms of Parliamentary Scrutiny. 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 the Scrutiny of Acts and Regulation Committee (SARC). Under the ORR proposal, the Bill would specify strictly limited grounds upon

¹²⁴ *ibid.*, Annexure, para. 13.

¹²⁵ *ibid.*, Annexure, para. 19.

¹²⁶ *ibid.*, p. 10.

which scrutiny from SARC would be based. SARC would report to Parliament on whether the ACM conformed with the criteria and whether the criteria were capable of achieving the regulatory objectives.

4.24 The ORR further suggest that the ministerial responsibility aspect of their proposal should be emphasised in terms of the relationship to parliament. By providing a larger range of discretions regarding the means of regulatory compliance, the ORR indicate that the Bill would enhance the 'effective level of ministerial responsibility for the exercise of the delegated authority of Parliament to regulate'.¹²⁷ One of the issues for discussion is the extent to which these claims by the ORR are correct.¹²⁸

Concerns Regarding the ORR Proposal

4.25 Despite the efforts by ORR to address some of the main criticisms levelled at the Canadian Bill, concerns regarding their proposal have been expressed. On 13 February 1996, the Chairman of the Committee, Victor Perton MP, delivered a paper to the 4th Commonwealth Conference on Delegated Legislation, 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.

4.26 The following is a summary of some of the main concerns that were 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.

(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

¹²⁷ *ibid.*

¹²⁸ On this issue, the Committee notes that material supplied to it by the Regulatory Affairs Division of the Treasury Board of Canada, indicates that the Canadians may be taking a similar approach to that described in the ORR proposal, in the hope of getting around the difficulties with the Canadian Bill.

the bureaucracy under delegated authority that Parliament does not believe it is party to?

(3) On a political level, there were concerns raised around 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?

(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 it be done in the best possible way. This would cut down regulations and would put the onus on the business to prove that it is doing it in the best possible way.

Given that there remain concerns expressed despite the ORR's attempt to address the criticisms aimed at the Canadian Bill, the following section articulates issues that need further discussion.

Issues for Discussion

4.27 Clearly, the Committee is concerned to ensure that the kinds of issues generated in relation to the Canadian Bill (that, in turn, attracted the negative comments of the Canadian Scrutiny Committee) will not arise in relation to whatever legislation arises out of the Victorian proposal. In particular, the Committee is concerned to ensure that any Victorian legislation will **not** involve an inappropriate delegation of legislative power to the Executive Government and, indeed, that it will maintain the proper role of the Victorian Parliament.

4.28 It is the Committee's view that, if there is to be a capacity in the proposed legislation for a Minister to allow particular persons or companies not to comply with the letter of a particular law, it will be necessary for the Minister to be accountable to the Parliament for any exercise of that power. The Minister will also have to be accountable to the general public for any proposed exercise of such a power. In general terms, the Committee believes that this would be achieved by ensuring that proposal – and the criteria by which they are to be judged – are published. Transparency and accountability should be guiding principles for any proposed legislation.

4.29 Having made those general comments, the Committee suggests that the following are issues for discussion in relation to the Victorian proposal, as outlined to the Committee by the Office of Regulation Reform:

Issue 5: Has the case been made out for the enactment of Regulatory Efficiency Legislation in Victoria?

Issue 6: If the answer is yes, what are the current deficiencies and inadequacies that Regulatory Efficiency Legislation would address? What would be the benefits of enacting Regulatory Efficiency Legislation?

Issue 7: If Regulatory Efficiency Legislation is to be enacted in Victoria, does the proposal outlined by the Office of Regulation Reform provide appropriate mechanisms for the operation of the Rule of Law, the principles of equity and fairness and the accountability of government? Does the proposal involve any abrogation of the legislative power of the Parliament?

Issue 8: Do the mechanisms suggested adequately provide for parliamentary scrutiny? Is the suggested role of the Scrutiny of Acts and Regulations Committee appropriate?

Issue 9: If the proposal outlined by the Office of Regulation Reform is to be adopted, would the existing mechanisms of the Freedom of Information Act 1982 adequately protect commercially sensitive information? If not, what alternative measures are available?

Issue 10: Are there any other elements of the proposal that require comment?

5.1 The Committee is aware of several other options for regulatory reform that either exist or have been proposed. Some have already been mentioned above but are described in more detail below.

Canada

Regulations Bill

5.2 In 1995, the Canadian Minister for Justice introduced a Regulations Bill. The purpose of the Bill (which represented the second arm of the Canadian Government's 'Regulatory Legislative Initiative') was to rename and reform the (Canadian) Statutory Instruments Act. It is intended that the new procedures contained in the Bill will ensure that the process of regulation-making remains open to the public and accountable to the Canadian Parliament and that regulations remain both legal and enforceable.¹²⁹ Key features of the Bill are:

- (a) changing the regulatory process, both to allow regulations to be published on an electronic registry and to permit the use of electronic forms (with the aim of increasing 'environmental friendliness' as well as improving regulatory efficiency and openness);¹³⁰
- (b) clarification of the law, employing plain language in place of unnecessarily complicated legal terms (which also is intended to improve public accessibility to the regulatory process);
- (c) the streamlining of approval processes relating to minor technical changes (such as changes to fee structures), while maintaining the existing procedures in relation to other regulatory changes. This is intended to allow the government to be more responsive to regulatory needs as they arise, without

¹²⁹ *The Federal Reform Agenda* (May 1995).

¹³⁰ The concept of an electronic register is similar to what is proposed by Part 4 of the (Commonwealth) Legislative Instruments Bill 1996.

jeopardising the need for adequate notice, public participation and accountability to the Parliament; and

- (d) codifying the law, by conferring express authority to incorporate standards by reference. This is intended to allow regulators and the regulated alike to take advantage of improvements to national and international industry standards, helping to ensure the competitiveness of many of Canada's regulated industries.¹³¹

United States

Negotiated Rule Making—'Reg-Neg'

5.3 One of the regulatory strategies that Dr Peter Grabosky canvasses is that of 'interest co-optation' and, in particular, the concept of building support for policy outcomes, by involving those who are to be regulated in the actual process of making the regulations.¹³² The example that he gives is the concept of 'negotiated rule making', also known as 'Reg-Neg', that operates under the United States' Negotiated Rulemaking Act of 1990.

5.4 Briefly, the basic idea behind Reg-Neg is that a government agency that is considering making a *rule* (which is the US equivalent of what most of us here would call 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 that 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.¹³³

5.5 The Committee notes that the Regulatory Impact Statement process that currently operates in Victoria and New South Wales (and the similar scheme that is proposed under the Commonwealth's Legislative Instruments Bill) is a form of Reg-Neg.

¹³¹ *The Federal Reform Agenda* (May 1995).

¹³² 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. 533.

¹³³ 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.

The Agenda for Regulatory Reform in the United States

5.6 The Clinton Administration in the United States has made re-inventing the federal government's regulatory system a top priority. Consistent with this commitment, the President and the Vice-President charged agencies and departments with making the regulatory process open and results orientated. Specifically, in early 1995, the President directed agencies to:

- (a) Conduct a page-by-page review of all their regulation in the Code of Federal Regulations (CFR), eliminating or revising those that are outdated or otherwise in need of reinvention.
- (b) Reward results, not red tape, by changing performance measurement systems to focus on ultimate goals (for example, clean air and safer workplaces) rather than on the number of citations written and fines assessed.
- (c) 'Get out of Washington' and create grassroots partnerships between the front-line regulators and the people affected by their regulations.
- (d) Negotiate, rather than dictate, by expanding opportunities for consensual rulemaking wherever possible.
- (e) Waive fines or allow them to be used to fix the problem when a small business is a first-time violator and has been acting in good faith.
- (f) Double the amount of time that passes before a report is required (for example, a semiannual report should now be required annually) and accept reports filed electronically whenever possible.¹³⁴

5.7 In addition, as set out below, various other reform proposals are currently before the Congress.

Private Property Protection Bill

5.8 This Bill was introduced into Congress in 1995. If enacted, it would require the Federal Government to compensate a property owner whose use of his or her property has been limited by the action of a Government agency

⁵ A. Gore, *The Best Kept Secrets in Government: A Report to President Bill Clinton*, US Government Printing Office, 1996.

under a specified regulatory law that results in a diminution of the value of the property by 20 per cent or more. The Bill would also require the Federal Government to buy, at fair market value, any portion of a property whose value has been diminished by more than 50 per cent. The Committee understands that this Bill is still before the Congress.

Regulatory Reform and Relief Bill

5.9 This Bill, also introduced into Congress in 1995, would operate in three areas. First, it would allow an affected small entity to petition for judicial review of a rule, within 1 year of the effective date of a final rule that an agency certified would not have a significant economic impact on a number of small entities or for which an agency prepared a final regulatory flexibility analysis. The relevance of this mechanism is that it would open some of the exceptions to the Reg-Neg procedures up to challenge.

5.10 The second element of the Bill proposes amendments to the *Administrative Procedure Act* (under which Reg-Neg operates), to define a major rule as one that is likely to result in:

- (a) an annual effect on the economy of \$50 million or more;
- (b) a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or
- (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of US-based enterprises to compete with foreign-based enterprises in domestic and export markets.

5.11 The Bill would require agencies to publish notices of intent to engage in major rule making at least 90 days before publication of the general notice of such a proposal. It would require a hearing for any proposed major rule, and extension of the normal comment period, if more than 100 interested persons acting individually request such action. It would also require an agency to prepare a regulatory impact analysis for each major rule promulgated by the agency and would prohibit an agency from adopting a major rule unless the regulatory impact analysis has been approved or commented on by the Director of the Office of Management and Budget.

5.12 The Bill would require the head of an agency to ensure that any proposed major rule or regulatory impact analysis of such a rule is written in

a reasonably simple and understandable manner and provides adequate notice of the content of the rule to affected persons. It would also require the Director of the Office of Management and Budget to report to Congress on the rule making procedures of Federal Government agencies, including an analysis of the impact of those procedures on the regulated public and the regulatory process.

5.13 The third element of the Bill would require the President to prescribe regulations for employees of the Executive Branch, to ensure that Federal laws and regulations are administered consistently with the principle that any person shall, in connection with the enforcement of such laws and regulations, be protected from abuse, reprisal or retaliation, and shall be treated fairly, equitably and with due regard for the person's rights under the Constitution. The Committee understands that this Bill is still before the Congress.

Regulatory Transition Bill

5.14 This Bill, also introduced into the Congress in 1995, would establish a moratorium on Federal rule making (with exceptions for emergencies). The Committee understands that this Bill is still before the Congress.

Regulatory Accountability Bill—The Concept of 'Regulatory Budgets'

5.15 Another option that has been proposed in the United States is that of the regulatory budget. Under this concept, which is embodied in the Regulatory Accountability Bill, which was introduced into the Congress in 1996, government agencies would be required to estimate the economic cost of implementing their regulatory policies and then to weigh this cost against the benefit that those policies would produce. There would be an obligation on government that only those policies whose benefits outweighed the net costs would be implemented. Further, there would be a set sum of money available to regulators, from which the cost of regulation would have to be met. The effect of this would be that, in order to find the money to pay for

new regulations, regulators would have to repeal some old ones.¹³⁵ This is not a new idea.¹³⁶

5.16 While, for historical reasons, this concept has attracted interest in the United States, even the economists have conceded that it involves fundamental problems, the most obvious being that it is perilously difficult to measure the value of, for example, a clean beach or racial equality.¹³⁷ The initial information gathered by the Committee from the representatives of four major business organisations is that there would be no support for the idea of a regulatory budget at a state or federal level.¹³⁸

Other Options—General

5.17 As noted in Chapter 2 above, the New South Wales Green Paper suggested various other options for regulatory innovation and the Victorian Office of Regulation Reform's publication *Regulatory Alternatives* also identifies various alternatives to regulation. Those alternatives that have not been canvassed to this point are discussed briefly below.

Performance Based Regulation

5.18 Performance based regulation is described as being a system under which compliance is specified in terms of regulatory outcomes, rather than by prescribing a process by which compliance can be achieved:¹³⁹

It is the regulation of ends, rather than means. This usually involves the re-drafting of regulations from prescriptive and detailed rules about how a business should act to description of measures and outcomes.

5.19 This option is similar in approach to the concept of alternative compliance mechanisms (discussed in Chapters 3 and 4 above).

¹³⁵ See discussion in Antonelli, A 'Government's hidden tax: Time to account for the cost of regulation', The Heritage Foundation, Executive Memorandum No 459, 10 September 1996.

¹³⁶ The idea was put forward at least 250 years ago by Montesquieu, though others have used it since (see Argument, S, 'Why shouldn't we shoot the messenger?', 1993, *Alternative Law Journal* vol. 18, no. 6, p. 252.

¹³⁷ See, for example, 'The hidden cost of red tape', *The Economist*, 27 July 1996, p. 11.

¹³⁸ See *Minutes of Evidence*, 7 April 1997, p. 17.

¹³⁹ New South Wales Government, *Regulatory Innovation: Regulation for Results – Discussion Paper* (May 1996), p 7. See also Office of Regulation Reform, *Regulatory Alternatives* (no publication date), p. 15.

‘Class Exemptions’—Small Business

5.20 This option would allow for small business (as a class) to be exempted from a particular regulatory requirement where it can be demonstrated that compliance is not justified. Small business would be exempted where it cannot be demonstrated that the exemption would create an appreciable risk to health and safety, or to the environment, or where cost-benefit analysis shows that it is not in the community interest to apply the relevant requirements to small business.¹⁴⁰

Third Party Certification

5.21 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 required by the relevant regulation. It is said to streamline compliance oversight, by introducing independent, certified agents to monitor industry performance.¹⁴¹ Dr Grabosky refers to this option as ‘required private interface’.¹⁴²

Co-regulation

5.22 Under co-regulation, the regulatory role is shared between the government and an industry body or occupational representative. It is usually effected ‘through legislative reference or endorsement of a self-regulatory body responsible for the competency assessment of an occupation’. Typically, it involves a code of practice (formulated in consultation with the government), breaches of which are enforced by sanctions imposed by the relevant industry or professional organisation.¹⁴³ Dr Grabosky refers to this option as ‘delegation or deference to private parties’.¹⁴⁴

¹⁴⁰ New South Wales Government, *ibid.*, p. 10.

¹⁴¹ *ibid.*, p 15. The example given in the Discussion Paper is the regulation of the building industry in Victoria. This refers to the fact that, under Part 6 of the *Building Act 1993* (Vic.), a ‘private building surveyor’ can be appointed to carry out functions under that Act such as the issuing of building permits and the inspection of buildings.

¹⁴² P. N. Grabosky, *op. cit.*, pp. 530–1.

¹⁴³ Office of Regulation Reform, *op. cit.* p. 17.

¹⁴⁴ P. N. Grabosky, *op. cit.*, pp. 535–6.

Extending the Coverage of Principal Legislation

5.23 This option involves building on the scheme provided by the principal legislation (that is, the Act) in preference to the promulgation of regulations.¹⁴⁵

Removing Other Legislative Impediments

In simple terms, this option amounts to de-regulation.¹⁴⁶

Increased Enforcement

5.25 This option involves enhancing the enforcement of the existing legislative regime, in preference to building on its substance. It is suggested as an option in situations where the problem is identified as being one of a low level of compliance with the existing legislation, rather than a reflection of the substantive inadequacy of that legislation.¹⁴⁷

Tradable Permits/Licences

5.26 Tradable permits are government-issued permits or licences that grant a tradable property right to the holder, which can be bought or sold. They are suggested to encourage an efficient allocation of resources and a market-based solution to 'environmental and distributive concerns'.¹⁴⁸

Voluntary Codes/Industry Self-regulation

5.27 This option generally involves a description of the types of actions or procedures that are determined, by a particular industry or profession, to be acceptable within a peer group or the wider society. They can range from statements of intent to rules of professional conduct.¹⁴⁹

Negative Licensing

5.28 In simple terms, this option involves the preclusion of the incompetent or the irresponsible (as demonstrated by their prior action and performance) from operating in a particular industry.¹⁵⁰

¹⁴⁵ Office of Regulation Reform, *op. cit.* p. 19.

¹⁴⁶ *ibid.*, p. 21.

¹⁴⁷ *ibid.*, p. 22.

¹⁴⁸ *ibid.*, p. 25.

¹⁴⁹ *ibid.*, p. 28.

¹⁵⁰ *ibid.*, p. 29.

Public Education Programmes

5.29 If it is determined that non-compliance with a particular form of regulation is, in fact, a reflection of ignorance of the relevant regulations rather than an intentional desire to flout the law, then this option suggests that an education programme be considered, as an alternative to amendment of the regulations or the promulgation of further regulations.¹⁵¹

Information Disclosure

5.30 This option (which is similar to public education programmes but is nevertheless considered to be distinct) requires that information about the attributes of products or processes be disclosed (for example, hazardous substances that are currently in use). Information disclosure does not directly seek to prohibit or regulate the consumption of a good or service but, rather, tries to ensure that the public is aware of the pros and cons of using the product. The disclosure can be effected either by requiring the producer to disclose the information to the public or by the government collecting and publishing the relevant information.¹⁵² Dr Grabosky deals with this option under the heading 'required record-keeping and disclosure'.¹⁵³

Economic Incentives

5.31 In summary, economic incentives can be applied either by taxing undesirable behaviour or by rewarding desirable behaviour (by the dispensation of subsidies or contributions to costs).¹⁵⁴

Risk-based Insurance or Guarantee Funds

5.32 This option involves governments encouraging individuals or firms to lower the costs associated with elements of risk or uncertainty involved in a particular activity by taking out insurance against those risks and uncertainties. Governments can have a role either in establishing insurance

¹⁵¹ *ibid.*, p. 31. See also, generally, M. D. Young, N. Gunningham, J. Elix, B. Lambert, P. Howard, P. N. Grabosky, & E. McCrone, *Reimbursing the Future: An Evaluation of Motivational, Voluntary, Price-Based, Property Right, and Regulatory Incentives for the Conservation of Biodiversity*, Biodiversity Series Paper no. 9, Biodiversity Unit, Department of the Environment, Sport and Territories, Canberra, 1996.

¹⁵² Office of Regulation Reform, *op. cit.*, p. 33.

¹⁵³ P. N. Grabosky, *op. cit.*, pp. 531-2.

¹⁵⁴ Office of Regulation Reform, *op. cit.*, p. 35. See also, generally, Grabosky, PN, 'Regulation by reward: on the use of incentives as regulatory instruments', 1995, *Law and Policy*, vol. 17, no. 3, p. 257.

schemes or by merely encouraging firms or individuals to be involved in existing schemes.¹⁵⁵

Rewarding Good Behaviour

5.33 This option involves addressing the positive elements of firms with good regulatory track records, as well as penalising those with bad records. Rewards for regulatory compliance can take the form of a reduction in the number of licences required, a lowering of the frequency of random audits, allowing for self-regulation or by reducing other burdens.¹⁵⁶

Issue: 11 Are any of the alternative proposals discussed in this Chapter acceptable or appropriate to the Victorian jurisdiction?

¹⁵⁵ Office of Regulation Reform, *op. cit.*, p. 37. See also P. N. Grabosky, 'Green markets: environmental regulation by the private sector', 1994, *Law and Policy*, vol. 16, no. 4, p. 419, especially at p. 436. Dr Grabosky cautions that the role of insurers in this field may not always be beneficial.

¹⁵⁶ Office of Regulation Reform, *op. cit.*, p. 38. . See also, generally, P. N. Grabosky, 'Regulation by reward: on the use of incentives as regulatory instruments', 1995, *Law and Policy*, vol. 17, no. 3, p. 257.

6.1 In 1995, Christopher Booker, an English author and journalist, observed that his government had¹⁵⁷

recently unleashed the greatest avalanche of regulations in peacetime history; and wherever we examine their working we see that they are using a sledge hammer to miss a nut.

6.2 Parliamentarians are not oblivious to this concern. The Fourth Report of the United Kingdom House of Commons Procedure Committee tabled in June 1996 observed that:¹⁵⁸

There is widespread concern at the growing volume and complexity of delegated legislation, and the obvious deficiencies in its consideration and scrutiny by Parliament.

6.3 While this may be true in the United Kingdom—and while there is ample evidence to support the general thrust of such arguments—criticisms about the volume of regulations, for example, fail to recognise that, in some jurisdictions at least, there is legislation in place to require that redundant regulations be repealed.¹⁵⁹ In Victoria and New South Wales, the volume of regulation has been almost halved with the impact of sunset clauses and regulatory impact statements.

6.4 It is equally the case that not enough credit is paid to the efforts of governments who do explore and implement innovative regulatory strategies. This being so, the Committee recognises that the Executive and Parliament need to work hard to ensure that the general public and business understands what we are doing. Like the National Performance Review, the work of

¹⁵⁷ Quoted in A. Jay, *The Oxford Dictionary of Political Quotations*, Oxford University Press, Oxford, 1996, p. 52.

¹⁵⁸ Quoted in A. F. Bennett, 'Delegated powers: Uses and abuses of regulations', paper delivered at the Fourth Conference on Delegated Legislation, Wellington, New Zealand, 10–13 Feb. 1997.

¹⁵⁹ See e.g., Vic. and NSW. If the Legislative Instruments Bill 1996 (Cwlth) is enacted, the same can be said of the Federal jurisdiction in Australia.

Victoria's Office of Regulation Reform and the Victorian Parliament's Scrutiny of Acts and Regulations Committee are among our best kept secrets.

Government should ensure that the resourcefulness of the private sector is brought to bear on regulatory mechanisms—whether it be by consulting the private sector on the form and content of regulations or by inviting the private sector to use its own expertise (and resources) to develop alternative compliance mechanisms. Even if there are very few Alternative Compliance Mechanisms produced because of the high cost of preparation, we will have opened a door to business and an avenue of counter-attack to criticism. We will be able to invite the critics of regulation to propose alternative means better benefiting the community and themselves.¹⁶⁰

6.5 It is simply not good enough for the critics of regulation to operate merely as critics, particularly when (as indicated above) they probably do not have as comprehensive an understanding of the regulatory reform environment as they might have. One of the great advantages of alternative compliance mechanisms is that it allows the critics of regulation to show how things can be done better. This can only be in the best interests of all concerned.

¹⁶⁰ V. Perton, 'Regulatory review—The next wave', paper delivered at the Fourth Commonwealth Conference on Delegated Legislation, Wellington, New Zealand, 10–13 Feb. 1997.