Disciplinary action/training

Where an employee is responsible for a breach of the Act, the Commission would expect that there should be some form of disciplinary action or other action (e.g. retraining) to ensure the wrongdoer and line management, are aware of their obligations.

No indemnities

There should be no indemnities offered by the company for wrongdoers and the company's policy should be visible and unequivocal on this matter.

Cooperation

The company must also be able to demonstrate cooperation with any Commission investigation once the breach has been brought to the attention of management.

Public policy

Where a breach arises from pressure applied by a company's supplier or major customer, steps should be taken to make other suppliers and customers aware of the new company policy and the risks they face in participating in a breach.

Continuous improvement

A company should also demonstrate its commitment to continuous improvement of its trade practices compliance program and general attitude to compliance.

Prevention is better than cure

Prevention is always better than cure. Anybody who thinks that they can come to the Commission with an 'off the shelf' compliance manual and a training video, and think that they have satisfied their total compliance obligations needs to think again. The Commission is more interested in the substance and outcomes of a company's program than in the form the program takes.

Liaison with the authorities

On the issue of liaison with regulatory authorities, the standard suggests:

> There should be ongoing formal and informal liaison by the organisation and its compliance professionals with regulatory authorities and other bodies, so that the organisation is aware of current problem areas and compliance methods.

The clause then suggests that it may be useful to hold regular meetings with (i) State, Territory and Federal regulatory authorities; and (ii) also with the relevant industry and community organisations.

It also states that:

> Liaison should be supplemented by the ready availability of relevant information, such as industry and regulatory newsletters and publications.

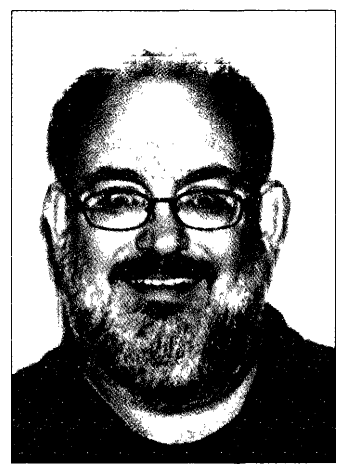
How can we assist

The Commission has a website <http://www.accc.gov.au> which contains information about our publications and current activities.

The Commission also has a compliance strategies section that specifically deals with issues of compliance. And its staff in regional offices are available to discuss issues of concern — note, however, that the Commission and its staff cannot give legal advice, which must be obtained from the legal profession.

I will leave you with my observation that the *Australian Standard on Compliance Programs* is an essential reference document for anyone who is serious about their compliance obligations.

Involving stakeholders in the making of subordinate legislation



Following is an edited version of a paper written by Peter Williams, Consumer Affairs Division, The Treasury, on consultation processes and recent regulatory initiatives in the making of subordinate regulation with emphasis on product safety regulations.[1]

[1] The views expressed and any errors in this paper are those of the author. The views presented in this paper should not necessarily be interpreted as representing the views of the Treasury, the Minister for Financial Services and Regulation or the Government, or the ACCC.

Abstract

Subordinate legislation is an important part of Commonwealth law-making. Its use for complex issues affecting both industry and government activity has been increasingly met with calls for it to be made with greater accountability, participation and transparency. An important example of subordinate legislation is that on consumer product safety and information standards under the Trade Practices Act. These mandatory standards establish the minimum necessary safety requirements for the supply of consumer goods such as pedal bicycle helmets. The agency that produces the standards is the Consumer Affairs Division of The Treasury.

Under national competition policy the process of regulating product standards is subject to Council of Australian Governments principles and guidelines for standard setting bodies. A key feature is a regulatory impact assessment to determine the need and form of the regulation. Crucial to an effective regulatory impact assessment is consultation between governments, consumers, industry and key stakeholders. Identifying relevant stakeholders and having them participate in standards development is fundamental to producing effective mandatory product standards. In this paper I outline the consultative process and recent regulatory initiatives.

Subordinate legislation

> A mass of evidence establishes the fact that there is in existence a persistent and well-contrived system, intended to produce, and in practice producing a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts.
>
> Quoted in *The New Despotism* by Lord Hewart of Bury.

Subordinate legislation, which has long been an important part of Commonwealth law-making, has increased markedly during the past 20 years. It has been described as synonymous with delegated legislation and contains much of the important practical detail of primary legislation.[2] Its use has been justified on the grounds that it relieves parliament of the burden of producing all legislation for a specific area. In particular it allows parliament to attend to the governing principles of the legislative scheme.[3]

Nevertheless this form of law making has been long been opposed by some with particular criticism attached to the notion that parliament may delegate power to make legislation to another body or individual. The principal argument is that if the executive has the power to make laws, then the supremacy of the parliament could be threatened.[4] Alternatively, if laws are made affecting the individual, then it should be submitted to the parliament for its approval.[5]

The concerns about subordinate legislation have been addressed in various ways, including improved parliamentary scrutiny of delegated legislation, greater dissemination of the legislative instruments and participation of interested parties in its making.

It could be argued that this means this form of legislation should be made according to the key principles of:

- accountability — producing a justifiable rationale for the need of the specific legislation;
- participation — by the community in the formulation of the legislation; and
- transparency — revealing the process by which the form of the legislation was decided.

The history of consultation with interested individuals in the making of subordinate legislation arises early in Commonwealth history. In 1903 the Federal Parliament passed the Rules Publication Act which provided for 60 days notice to be given of the intention to make a statutory rule, and for copies of a draft of the rule to be available to the public. Any person was able to make submissions to the agency proposing the rule and such submissions had to be taken into account before the rule became law.[6] This

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2 Pearce, DC & Argument. S, *Delegated Legislation in Australia*, Butterworths, Sydney, 1999, p. 3.

3 Douglas, R & Jones, M, *Administrative Law: Commentary & Materials*, Federation Press, Sydney, 1996, p. 213.

4 Pearce, DC & Argument. S, op cit, p. 6.

5 ibid.

6 Section 3(2) Rules *Publication Act 1903*.

provision was repealed in 1916 because there was no apparent public interest in its use.[7]

Individual Commonwealth Acts may still stipulate consultation on subordinate legislation and these include the *Broadcasting Act 1942* and the *Great Barrier Reef Marine Park Act 1975*, although provisions may be limited to consulting with sectional interests.[8]

In a report to the Commonwealth Attorney-General on *Rule Making by Commonwealth Agencies*, the Administrative Review Council expressed concerns with any consultation being limited to identified interest groups and agencies thus hearing only what they want to hear from the bodies they choose to consult. The Council recommended that statutory provisions for consultation be established under a Legislative Instruments Act.[9] It was observed that informal mechanisms run the risk of incurring 'captured consultation'. This is described as parties developing expectations about the consultation and the probable content of the consultation, with other points of view being excluded.[10]

For continuing consultation, after the initial one had been considered and used in a new draft, the Council considered the main aim of the process was to allow parties the opportunity to comment. Subsequent parliamentary scrutiny should be sufficient to address sham consultation and only 'first round' consultation should be required.[11]

The Council recommended that the procedure for consultation contained in the Legislative Instruments Act for the making of subordinate legislation, described as an instrument, should include the following requirements.[12]

- Public advertising of the proposal to make subordinate legislation in appropriate national newspapers and trade, professional and local journals.
- Publication of a draft of the subordinate legislation, with a rule-making proposal that would:
  - summarise the proposal;
  - state its objectives;
  - analyse alternatives in achieving the proposal, perhaps by non-regulatory means;
  - provide the costs of the proposal; and
  - set out reasons for the preferred approach.
- Submissions to be taken from interested parties over a minimum of 21 days, with public hearings to be held for controversial or sensitive proposals, with the agency considering all proposals before recommending a course of action.
- A memorandum to be prepared by the agency for parliament setting out the consultation procedures followed, attaching a copy of the rule-making proposal and including a drafting statement prepared by the Office of Legislative Drafting.

The Council also recommended that the Legislative Instruments Act would provide that if there was no consultation or it was exempt pursuant to the Act, then the memorandum would state why.[13] The Office of Legislative Drafting would have to send the memorandum to the parliament when the instrument was forwarded for tabling.

The Bill embodying these recommendations was subsequently drafted and introduced into the Commonwealth Parliament in 1994. Over the next four years the Bill was closely scrutinised and debated by the parliament, resulting in amendments by the Senate that were unacceptable to the Government. The Bill

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[7] Hon. F Tudor, 2nd Reading Speech, Rules Publication Bill, House of Representatives, 23 May 1916, Hansard, p. 8371.

[8] Administrative Review Council, Report No. 35, *Rule Making by Commonwealth Agencies*, AGPS, 1992, para 5.7.

[9] ibid, Recommendation 11.

[10] ibid, para 5.28.

[11] ibid, para 5.41.

[12] ibid, Recommendation 11.

[13] ibid, Recommendation 12.

provided for consultation to be mandatory only for some subordinate legislation.

Concerns raised by the House of Representatives committee considering the Bill included the absence of detail set out in the Bill on consultative processes and the limited consultation needed for some cases.[14] The committee recommended that a cost–benefit analysis be provided for subordinate legislation.[15] The committee also believed that when consultation was required the proposal should be advertised. This would cost more but the committee considered this was outweighed by the benefits of wider community knowledge.[16]

The Senate sought to expand the list of subordinate legislation requiring mandatory consultation to include instruments likely to have a direct, or substantial indirect, effect on any sector of the community or on the natural, aboriginal, cultural or built environment, or which conflict with human rights legislation.[17] The Government opposed these amendments. It considered they overly extended the ambit of the legislation and could pre-empt any review of the Act that could follow under clause 72 of the Bill.

In 1998 the Bill lapsed on the dissolution of parliament. It has been observed that this was unfortunate since it aimed to bring some much-needed discipline to the area of delegated legislation.[18]

National standard setting

In its report to the Council of Australian Governments (COAG) in February 1994, the Committee on Regulatory Reform reported on key aspects of the setting of national standards in Australia.[19] Review of this matter originally arose from a paper released by principal business organisations in 1992 which argued for a major overhaul of Australian regulatory practice. The report had observed that the regulatory environment was unnecessarily complex and generated delays, inconsistencies and costs for business, as well as inhibiting risk taking and enterprise.

In developing guidelines for the best processes for determining if national standards and their associated laws and regulations are the appropriate vehicle, COAG considered it was crucial to:

- scrutinise the need for a standard so as to avoid unnecessary regulation;
- avoid imposing excessive requirements on business;
- achieve a minimum necessary standard, consistent with economic, environmental, health and safety concerns;
- have performance-based rather than prescriptive-based standards;
- avoid duplicating impact assessment procedures between jurisdictions;
- monitor the appropriateness of proposed standards; and
- adopt procedures to encourage compliance.

These principles of good regulatory practice apply to decisions of ministerial councils and intergovernmental standard-setting bodies, however they are constituted, and include those bodies established by statute or under administrative direction.[20] The principles also apply to those agreements or decisions that are given effect through the various forms of subordinate legislation. Ministerial councils and other regulatory bodies can agree on standards that can then be given effect through subordinate legislation.

Regulators therefore must identify the need for regulation and quantify its potential benefits and costs. Regulatory Impact Statement Guidelines are used in deciding if it is needed. The Regulation

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[14] Williams, D, *The Legislative Instruments Bill: How will it work?* Paper presented at the 1995 Administrative Law & Public Administration: Form & Substance forum, AIAL, 1995, p. 106.

[15] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill 1994*, February 1995, para 4.10.

[16] ibid, para 4.12.

[17] Legislative Instruments Bill 1996 [No. 2], Bills Digest No. 148, 1997–98, pp. 13–14.

[18] Pearce, DC & Argument, S, op cit, p. 13.

[19] Council of Australian Governments, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, November 1997.

[20] COAG, op cit, p. 4.

Impact Statement (RIS) is prepared by the agency responsible for a regulatory proposal after it has consulted affected parties. It aims to clarify how accountability, participation and transparency can be achieved in formulating policy. In addressing these goals the regulator must ask the following.

- Is regulation needed?
- Is there regulatory failure?
- Are there alternative strategies to regulation?
- What are the benefits of regulation?
- What are the costs of regulation?
- Has there been public consultation?
- Is there support for regulation?
- What is the impact on competition?

Consultation is an integral part of an RIS. It will occur when the course of regulatory action is being considered and the draft impact assessment is being developed. It will enable interested parties to consider firm proposals and will include, at the very least, those most likely to be affected by regulatory action (e.g. consumer and business organisations).[21] Also, government efforts to solve a public issue should be developed and adopted in an open and transparent way.[22]

Consultation should provide valuable feedback on the costs and benefits of regulation, on the impact analysis and on the support for any proposed regulation. This feedback can improve the quality of the solution by:

- providing perspectives and suggestions on alternative solutions from affected parties;
- helping regulators balance competing interests;
- providing a check on the regulator's assessment of costs and benefits and whether/how the proposed option will work in practice, thus reducing the risk of unforseen circumstances if the option is adopted;
- identifying interactions between different sets and types of regulations; and
- possibly enhancing voluntary compliance through greater understanding and acceptance of a proposal, thereby reducing reliance on enforcement and sanctions.[23]

The consultation process is not prescribed although the *Guide for Regulation* includes examples of public forums, consultative/discussion papers and working groups. Regardless, the problem and any constraints that apply should be described clearly to the participants.

As public consultation is usually only with 'interested parties', any new regulatory measures should be advertised to the wider community.

The RIS must then outline who has been or will be consulted and who will be affected by the proposed legislation. This will require consulting a range of stakeholders and perhaps repeatedly consulting other government agencies, interest groups, industry, and standard setting bodies, both domestic and international.

While it is a COAG requirement for an RIS to be produced for regulatory proposals, one will not be needed when the subordinate legislation is:

- not likely to have a direct, or a substantial indirect, effect on business and is not likely to restrict competition; or
- of a minor or machinery nature and does not substantially alter existing arrangements; or
- to consider specific government purchases; or
- needed for national security; or
- primary or subordinate legislation that merely meets an obligation of the Commonwealth under an international agreement by repeating or adopting the terms of all or part of an instrument for which the agreement provides; or
- excluded from consultation in the Legislative Instruments Bill 1998.

An RIS may also be unnecessary if regulation reflects a specific election commitment and there is no scope to consider alternative ways to meet that commitment.

Consumer product safety and information standards

The Treasury's Consumer Affairs Division provides policy advice to the Government on mechanisms and goods and services designed to support and advance consumer and business

[21] COAG, op cit, p.12.

[22] Office of Regulation Review, *A Guide to Regulation*, 2nd edition, December 1998, D13.

[23] ibid.

interests in a well-functioning marketplace. The increasing complexity and variety of new goods result in unsafe products entering the Australian marketplace. This can be caused by inadequate quality control, inappropriate supplier behaviour, unfair trade practices or insufficient consumer product safety information. An estimated 650 000 injuries per annum in Australia result from either a design problem or mafunction of a good.[24]

These statistics show why the Government needs an active policy program that may include regulatory action to enhance the safety of goods.

The Trade Practices Act provides the Minister for Financial Services and Regulation with a range of product safety powers that include one to prescribe consumer product safety and information standards.[25]

It empowers the Minister to prescribe by way of gazette notice or regulation consumer product safety standards for particular goods, if the standard is reasonably necessary to prevent or reduce the risk of injury to any person. And it allows regulations to be made that prescribe a consumer product information standard such that persons using the goods will understand the quantity, quality, nature or value of the goods.

All or part of an existing Australian standard published by Standards Australia or another prescribed body can be declared mandatory by a notice in the Australian Government Gazette. The Minister can also make a mandatory product standard by regulation. This approach may be used in the following circumstances.[26]

- There is no existing Australian Standard and the Minister may wish to adopt an international or another country's standard. For disposable cigarette lighters and the cosmetic ingredient labelling regulations the mandatory product standard is based on overseas standards as there are no equivalent Australian ones.
- There are no standards at all for a product and the Minister can determine one. When labelling requirements were first introduced for elastic luggage straps there was no Australian standard or any overseas ones.
- Both the Australian standard and an international/overseas one are assessed as providing the minimum necessary safety requirements for a good. For the pedal bicycle helmet mandatory product safety standard, both the relevant Australian standard and the Snell Memorial Foundation standard, a USA one, were adopted by way of regulation.

There are 23 Trade Practices Act product safety and information standards. All but six are based on Australian standards. By contrast there are thousands of Australian standards published by Standards Australia, many of which specify safety requirements.

Standards Australia publishes Australian Standards®. It develops the standards through technical committees that comprise industry, consumer, government and other stakeholder representatives. Compliance with these standards is voluntary, unless mandated under State or Territory legislation.

The Commission is responsible for enforcing the consumer protection provisions contained in Part V of the TPA. It checks compliance with consumer product safety and information standards and bans and can take action under the TPA against suppliers of goods that do not comply.[27] As part of its enforcement of standards and bans, the Commission can seek orders in the Federal Court for companies to recall unsafe goods.

The Commission also has an educative function and provides information and advice to suppliers and consumers on the requirements of the mandatory product standards (for example, through their compliance guides on product safety and information standards).

The Safety Policy Unit of the Consumer Affairs Division of Treasury is responsible for administering these product safety and information standards. This includes:

- developing policy and providing advice to the Minister for Financial Services and Regulation on mandatory consumer product safety standards and mandatory consumer information standards;

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[24] The Treasury, *Product Safety Policy Review*, May 2000, p.7.

[25] Sections 65C, 65D 65E *Trade Practices Act 1974*.

[26] The Treasury, op cit, p.12.

[27] ibid, p.14.

- investigating the effectiveness of safety standards;
- contributing to Standards Australia committees dealing with consumer product safety;
- promoting a national uniform approach to product safety through Commonwealth leadership and information flow among regulators, in particular State/Territory consumer agencies; and
- promoting cooperation with overseas safety regulators.

The consultation process for developing or reviewing a mandatory product standard is outlined below.

Initial Consumer Products Advisory Committee (CPAC) consideration to see if goods require regulatory action

CPAC is the main forum for addressing product safety issues nationally and is comprised of officers responsible for product safety in Commonwealth, State, Territory and New Zealand consumer affairs agencies.

CPAC is a committee of the Standing Committee of Officials of Consumer Affairs (SCOCA) which advises the Ministerial Council on Consumer Affairs (MCCA). The MCCA considers consumer affairs and fair trading matters of strategic national significance. MCCA is one of 21 Ministerial Councils established by COAG in 1993. SCOCA members are the heads of Commonwealth, State, Territory and New Zealand government agencies responsible for consumer affairs policy.

CPAC will consider the safety of the good, any available injury data, the requirements of an RIS and whether there is a need to proceed with its development. In recommending explicit regulatory action, CPAC bears in mind whether:[28]

- the problem is high risk or of high impact/ significance, for example a major public health and safety issue;
- the government needs the certainty of legal sanctions — universal application is required (or at least when coverage of an entire industry sector or more than one industry sector is judged necessary);
- there is a systematic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles and no possibility of effective sanctions being supplied; and
- existing industry bodies or their codes lack adequate coverage of industry participants, are inadequately resourced or do not have a strong regulatory commitment (thus making self-regulation not a viable option).

The mutual recognition arrangements between States and Territories allow for goods that can be supplied in one jurisdiction to be supplied in all the others, whether or not they are subject to a product standard in another jurisdiction. CPAC provides the mechanism for all jurisdictions to agree on uniform national action.[29]

In making mandatory product standards, there is also the need to consider the impact of trans-Tasman trade with New Zealand. Under the *Trans-Tasman Mutual Recognition Act 1997* products that can be legally supplied in New Zealand can be supplied in Australia and vice versa.[30] This Act makes provision for product safety standards to be considered for permanent exemption from mutual recognition.

CPAC agreement, then the draft RIS

When the mandatory product safety standard for pedal bicycle helmets was reviewed the process was started in December 1997 by asking safety organisations for information. Then, in April 1998, industry, consumer and government organisations were asked to comment on the terms of the review. Comments were combined with other research material into a preliminary impact analysis (PIA) of the options for ensuring that bicycle helmets sold in Australia continued to afford a high level of safety. The issues included:[31]

- industry self-regulation;
- maintaining the status quo;
- the role that education and information played; and
- the options for a revised standard, including a discussion of the new Australian Standard and comparing overseas ones.

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[28] Office of Regulation Review, op cit, p. D5.

[29] The Treasury, op cit, p.16.

[30] ibid.

[31] Department of Industry, Science & Tourism, *Preliminary Impact Analysis Protective Helmets for Pedal Cyclists*, August 1998.

Consulting stakeholders

For pedal bicycle helmets the stakeholders consulted included these.

Representatives on the relevant committee of Standards Australia
Members of CPAC
Industry organisations
Local and international manufacturers
Distributors
Retailers
Medical experts in academia
Testing laboratories
Engineering professionals
Consumer organisations
Pedal bicycle consumer organisations
Interested consumers
International standards representatives

Comment was sought on:

- industry self-regulation
  - the effectiveness of self-regulation;
  - the likelihood of total industry commitment to voluntary compliance;
  - the likely costs of industry self-regulation; and
  - whether there would be any benefits to the consumer or relevant industry associations in not having a mandatory standard.
- status quo
  - whether the current mandated standard is sufficient to meet the ongoing needs of Australian consumers and industry alike.
- education/provision of information
  - the role of information and education in the overall helmet safety regime.
- new mandatory standard
  - the balance between technical performance specifications and the overall acceptability of helmets to users;
  - the key safety and performance specifications in the Australian standard that are necessary for meeting the safety needs of helmets users;
  - whether a mandatory standard ought to include second-hand helmets;
  - any key issues concerning second-hand helmets that a mandatory standard might need to address;
  - appropriate ways to verify the comparative performance requirements of different standards;
  - potential impact on the domestic market of recognition of overseas standards; and
  - acceptability or otherwise of overseas certification of helmets.

Responses of stakeholders[32]

Manufacturers and wholesalers:

- considered the mandatory standard should continue; and
- welcomed overseas standards providing they did not impose unreasonable changes to current compliance.

Retailers believed:

- it was not feasible for consumers to judge the product safety of an item when judgment requires specialised knowledge; and
- overseas standards are only acceptable if they are equal to or exceed Australian standards.

Medical authorities believed:

- mandatory requirements are necessary, but must be backed by effective but gentle enforcement;
- there are behaviour-related user compliance problems that put individual users at risk; and
- the use of overseas standards usually lowers Australian standards, and any shift towards harmonisation needs to be strictly monitored.

State consumer affairs organisations:

- supported the standard being updated to reference the new Australian standard;
- doubted the effectiveness of self-regulation;
- considered that there is little likelihood of total industry commitment to voluntary compliance; and
- submitted that low industry compliance costs would result in higher personal and social injury costs.

[32] The Treasury, *Regulation Impact Statement: Protective Helmets for Pedal Cyclists*, January 1999, pp.11–13.

The ACCC:

- stated that voluntary compliance is an unproven alternative;
- believed that a current Australian standard is preferable to an older Australian standard;
- submitted that consumer education is not an alternative to a standard;
- stated that effective enforcement requires that there be no ambiguities in the standard; and
- requested a transition period to allow time for industry to adjust.

Views of a safety organisation

Kidsafe Australia considered that the mandatory standard should be maintained because:

- it is designed to prevent severe injury;
- it is impossible to know whether a helmet will perform in advance of an accident;
- there is no marketplace method of ensuring consumers can distinguish between effective and ineffective helmets;
- there are consumer expectations that a personal safety product is safe to use; and
- there is a high level of inefficiency and waste in relying on marketplace remedies to repair damage after the event of death or long-term crippling injury.

Views of bicycle organisations

The Bicycle Federation of Australia submitted that:

- an adequate range of sizes of helmets must be available. They submitted it is a mistake to compensate for a badly fitted helmet by adding thick pads, and tests ought to be carried out on varied head sizes compensated for with extra padding; and
- more detailed instructions ought to be mandated.

Cyclists Rights Action Group (CRAG), an organisation concerned about State and Territory laws requiring the wearing of helmets by bicyclists:

- argued that Commonwealth endorsement of a helmet standard carries a high level of importance because of the existence of mandatory helmet wearing;
- challenged the effectiveness of helmets under the current standards; and
- considered that the Commonwealth should ensure that helmets provide sufficient protection from injury to validate the existing mandatory helmet wearing regime in Australia.

Outcome of the review

From the consultation process, it was concluded that a mandatory product safety standard was appropriate.

The aims of the regulations would be to:

- reduce the risk of serious head injury and death from bicycle related accidents;
- exclude from the Australian market bicycle helmets that do not adequately protect the head from impact;
- ensure appropriate marking and labelling for the care, fitting and use of bicycle helmets, thus maximising the effectiveness of government action; and
- ensure that the standard is performance-based and does not unduly impede the flow of goods between Australia and other nations, paying due heed to relevant safety considerations.

As the main aim of the proposed regulation is to set minimum safety requirements for the testing and performance of protective helmets for pedal cyclists, in line with COAG principles, it was determined that:[33]

(i) the joint Australian and New Zealand Standard for pedal cycle helmets, subject to certain variations, would be called up in Trade Practices regulations; and

(ii) as the United States Snell Memorial Foundation 1995 Standard for pedal bicycle helmets was a comparable international standard, it would also be available in the same regulations as the alternative helmet standard.

The future

The way mandatory product safety standards are reviewed shows there is a strong commitment to the principles for the development or review of subordinate legislation identified by the Administrative Review Council.

[33] The Treasury, *RIS*, op cit, pp.10–11.

Developing the effectiveness of the process is constrained by resources, timeliness and knowledge.

Resources

The resources available for the agency in the conduct of any consultative process are necessarily finite. The challenge is to make the best use of available resources to improve the communication process between stakeholders and the agency.

An example is improving consultation by using the Internet through *Government Online*[34] which aims to provide a seamless national approach to the provision of online services. Agencies will consult their stakeholders as part of preparing action plans and in designing services.

Timeliness

The consultative process depends on a commitment to ensuring stakeholders have time to prepare effective submissions. But the agency must see that standards are being developed and reviewed as fast as possible. This potential conflict can be addressed by having a firm and continuing commitment to sponsoring independent research on product safety and identifying alternatives within standards development.

Knowledge

Education of stakeholders in the development of mandatory product standards will prove to be a continuing challenge for the agency. Initiatives being pursued include individual consultation with stakeholders on the aims of the agency in a review. Regular meetings with stakeholders to address concerns with current and proposed standards, have improved agency understanding of technical and market issues and provided stakeholders with information on countervailing perspectives.

Having stakeholders help prepare mandatory product standards clearly addresses most concerns about the use of subordinate legislation. The direct participation of the citizen in government improves the legitimacy of laws and the commitment to the political process — the best antidote to cynicism is to endow the cynic with power.

Social responsibility in government marketing

The following is an edited version of a presentation by Brendan Bailey, the Operations Manager of the Commission's Small Business Unit, to the Government Marketing Conference in Canberra on 27 July 2001.

Introduction

Providing information to business and consumers about their rights and obligations under the Trade Practices Act, in effect marketing its role and functions, is an important part of the Commission's work. In doing this it places strong emphasis on ensuring that its publications and announcements are accurate. Information must be useful, comprehensive and readily accessible by all.

Any government business activities may fall within the provisions of the Trade Practices Act, particularly representations about services and products. Even if a government marketing activity is not covered, social responsibility comes into play and marketing should comply with the principles that underpin the legal provisions of the Act.

Government marketing: is it a business for the purposes of the TPA? The JS McMillan case

The Trade Practices Act applies to the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth. Likewise, some activities of State government business enterprises fall within the Act. This means that government marketing can attract the attention of the Commission or private litigation.

JS McMillan Pty Ltd & Ors v Commonwealth of Australia (1997) is an example of private litigation.[1] McMillan, as a consortium of print firms, was a tenderer for the purchase of five separate packages comprising the assets and printing operations of the Australian Government Printing Service. There were some core elements in one of the packages on the continued servicing of various departments. To prepare a suitable tender McMillan needed to inspect government

[34] Department of Communications, Information Technology and the Arts, *Government Online*, April 2000.

[1] *JS McMillan Pty Ltd & Ors v Commonwealth of Australia* (1997) ATPR (Digest) 46–175.