



Australian Competition & Consumer Commission

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***THE NEW REGULATORY REGIME IN THE
PRIVATISED STATE – CHARTERS AND CODES OF
CONDUCT***

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INTRODUCTION

The increased reliance on market mechanisms by governments, to gain fair trading outcomes, has resulted in a greater reluctance, at least in some areas, to introduce detailed statutes and regulation, but instead to rely on market based or market sensitive means of intervention, for example, guidelines, codes of conduct, charters, standards, dispute resolution mechanisms etc, whose focus is on better market information disclosure and providing consumers with private means of gaining redress.

While governments are turning to these market based means of gaining fair trading outcomes in their *own* markets, these market mechanisms are also of increasing importance for consumer transactions carried out across national borders where domestic laws are largely irrelevant and private enforcement of legal rights is not a viable option.

THE SHIFTING PARADIGM FROM CONSUMER RIGHTS TO MUTUAL INTERESTS

One of the major challenges flowing from this changing environment is to assess how consumer welfare can be maintained and enhanced. For a start, the amount and type of regulation needs be influenced by the level of contestability in a market and identified serious market failure problems.

If an informed, contestable market is seen as delivering choice in price and quality then regulatory intervention on behalf of consumers needs to be strategically targeted so that there is little, if any, impact on the competitive process which is delivering such results. Additionally, enforcement of consumer protection laws may only be needed to ensure that market failures which have a serious detriment on consumers are dealt with so as to “draw a line in the sand” to demonstrate to the market when the regulatory authorities will act against what they regard as unacceptable market behaviour.

In circumstances where there is little or no contestability in the market (eg. in a natural monopoly situation such as a utility) there may be greater justification for intervention to ensure that consumer welfare is maintained because consumers are not driving the market.

Contestability in a marketplace can be affected by a number of matters, including:

- the structure of the market itself;
- the amount of information about all aspects of the product (eg. price, quality, service) available to consumers in the market;
- regulation, which has either the intended or unintended effect of making it difficult for consumers to move from one trader to another;
- matters such as switching costs, ease of entry into the market, and transaction costs for consumers in any particular market; and
- a “club” or cartel type mentality within the industry which acts as a brake for product and service innovation.

In short, the amount and type of regulation should be dependent upon a “contestability spectrum” where at one end there is a highly contested market where regulation should be only introduced with great circumspection and at the other end where there is little or no contestability and some form of regulation may be more readily justified.

Many governments are now turning to more flexible and market sensitive means of regulation to deal with consumer issues / market failure. One of the problems with government legislation is that it is often seen as being not flexible enough to meet rapidly changing market situations. Even with “black letter” laws there is a trend nowadays for governments to draft performance based laws as opposed to detailed prescriptive laws so as to not unduly stifle innovation and to better accommodate changes in the market. This approach and more market sensitive, flexible means of regulating the markets include guidelines, charters, standards and codes are being used increasingly by governments to regulate the market.

This use of market sensitive means of regulating the market is even going to be more pertinent where consumers decide to buy goods in the global market, as legal remedies, in many cases, will not be available under domestic laws and other remedies, amongst other reasons will not be realistically available, for cost and accessibility reasons.

If the global market for consumers is to work, then it will need the development of “quality” companies and “quality” industries where consumers can have confidence that the companies they deal with will deliver value for money goods and remedies if things go wrong. The market sensitive mechanisms discussed in this paper will be the principal means of protecting consumers and giving them the necessary confidence to deal in the global market.

“Self-Regulation and Codes of Conduct

The term “self-regulation” has to be viewed with great circumspection. It is very subjective, meaning all things to all people including, for some, the facade and not the reality of addressing consumer concerns.

As governments have been moving away from prescriptive “black letter” law to regulate markets, they have increasingly turned to codes of conduct as one of a number of means of regulating the market, particularly on an industry-specific basis. Codes of conduct are being used by a number of industries as a means of self-regulation or co-regulation with government. By identifying industry members that are bound by appropriate industry standards, codes represent a public statement of the industry’s responsiveness to consumer needs and concerns.

Codes of conduct are increasingly being used by government and industry as an alternative means of promoting fair trading and promoting ethical conduct within an industry. While they advance consumer confidence in products and individual companies, they also promote good business practices.

Advantages of Codes

Codes are often a more cost-effective and flexible form of regulating an industry than a regulatory regime involving licensing or trust accounting requirements.

Developed voluntarily on the initiative of an industry, they can provide a flexible cost effective approach to problem areas. Market failure problems can be addressed on an industry wide bases, and so enhance the competitive process.

Codes developed by industry in consultation with government and consumer groups can set agreed quality standards of work which can serve as a benchmark in settling disputes between industry members and consumers. They can provide public access to quick and informal complaint handling and redress mechanisms. However, for codes to be of real value, they

need to have industry commitment and be widely publicised so that consumers and suppliers are aware about their rights and obligations under the code.

The Fair Trading Inquiry noted that when adhered to, codes of conduct can produce high industry standards and additional safeguards for consumers.

- Another issue raised by the Inquiry is whether any code should be mandatory or voluntary. A voluntary code could provide more flexibility and allow businesses which have subjected themselves to the code to advertise themselves as having higher standards than businesses not covered by the code. Market failure problems can be addressed on an industry-wide basis, and so enhance the competitive process. Also, by addressing recurring or structural problems, codes can establish a form of industry quality control. They offer the flexibility and sensitivity to market circumstance necessary for product innovation, diversification and development.
- They can address industry specific problems and practices and consumer needs and can respond more readily to the dynamics of the market place.
- Members of an industry can feel some ownership over the regulation of that industry.
- Codes developed by industry in consultation with consumer affairs agencies and consumer/user groups can set agreed quality standards of work which can serve as a bench mark in settling disputes between industry members and consumers. They can provide public access to quick and informal complaints handling and redress mechanisms.
- They can provide a positive guide for ethical traders on agreed best practice benchmarks - going further than outlining minimum legal behaviour. They provide a sector of an industry wishing to gain a competitive advantage with the means to contend that it meets higher standards of fair trading than others in the industry (eg. the use of “quality trader” logos which can give consumers, particularly those buying through the Internet, some degree of confidence).
- Adherence to a code of conduct written as a condition of a contract allows for a private right of action for remedies when there is a breach of the code.

However, in the case of self-regulatory codes there runs a risk that such codes will have limited impact in raising the actual standard of the industry. The advantage of creating a mandatory code of conduct is that it can be prescribed in terms of the *Trade Practices Act 1974* (the Act), which, by virtue of section 51AD, gives legislative backing to prescribed industry codes, and provides for the Australian Competition and Consumer Commission (the Commission) or a private litigant to take action against breaches of the prescribed codes. It also guarantees total coverage.

There is currently a debate about the effectiveness of codes of conduct in gaining enduring fair trading/ consumer protection outcomes. The UK Office of Fair Trading (OFT) has recently produced a paper in which it eschewed its previous policy of “all the way with self-regulation”. Instead they are opting for a standards-based approach.

I have also observed that in the United States also there is widespread scepticism of the value of codes. There are codes, and there are codes, and I believe that it is very much a “horses-

for-courses” approach. It may well be that for many years there have been cogent grounds to be sceptical, but perhaps the codes that have been experienced simply have not been up to world’s best practice.

It is our experience in Australia that black letter enforcement no longer works by itself. Instead, there is a role for both codes of conduct and standards in gaining fair trading outcomes, with the latter underwriting the former.

Criteria for effective codes

In Australia we have not opted for the “list of vague/ motherhood statements of good intent” type codes, but a co-regulatory approach, which has to meet a number of essential criteria. These criteria include:

- **Addressing consumer concerns**

To be effective in addressing consumer concerns a code needs to have rules which address common complaints and concerns about industry practices and which set performance standards for participants. Such rules should address specific stated problems and not be written as broad general principles. The code should set out in its objectives clearly stated reasons why the code was established and what intended outcomes it sets out to achieve.

- **Consultation**

If codes of conduct/self-regulation are going to be accepted by governments and the public at large, then credibility with these stakeholders is absolutely vital, because only with such credibility will there be public acceptance of the code or an industry-based scheme and commitment to it by the appropriate regulators. To have any credibility at all there needs to be consultation with the appropriate consumer/ community/ user groups and appropriate regulatory/ government agencies. It goes without saying that the industry members themselves need to be consulted.

- **Code administration**

Unless there is some body responsible for ensuring the implementation and the ongoing administration of the scheme then its success in delivering fair trading outcomes is severely limited. A code administration body needs to be established and its existence and operations written into the code document itself so that it becomes part of the overall code.

- **Transparency**

Industry based code schemes aimed at delivering fair trading outcomes need to contain appropriate consumer/user representation on the administration committee, and where appropriate, in complaints handling. In some instances, representation by the appropriate regulatory authority on the code administration body can serve as a means of the regulatory body putting forward a public interest view. Such representation provides transparency to the scheme by providing a “public window” on its operations which ensures that the industry group will be acting in the broader public interest.

- **Coverage**

The effectiveness of any code will only be as good as the amount of coverage the code has of the relevant industry for which it is aimed. Where codes are being used as an alternative to

government legislation some form of mandating legislation may be required to ensure industry wide coverage where this can not be achieved by voluntary means.

- **Complaints handling**

The code should include provisions to allow for complaints to be lodged and then to be handled by signatories. Performance criteria for effective complaints handling should form part of the self-regulatory scheme. Standards Australia has developed a benchmark type standard for effective complaints handling (AS4269).

- **In-house compliance**

The code's administration body needs to ensure that each participant has some form of in house compliance system to ensure compliance with the code. It can also assist compliance at this level with advice and training. In Australia, code compliance manuals are being developed for code schemes. These manuals are based on the recently released standard on compliance programs (AS3806).

- **Sanctions for non-compliance**

Commercially significant sanctions will be necessary to achieve credibility with, and thus compliance by participants and also engender consumer confidence in the code/ self-regulatory scheme.

- **Independent review of complaints handling decisions**

The code should also provide for a review mechanism where a member of the public or an industry member is dissatisfied with the outcome or the way the complaint was dealt with or the sanctions imposed at first instance.

- **Consumer awareness**

Unless consumers are aware of the code and its contents the code will be ineffective in achieving its fair trading aims. The code provisions themselves should incorporate mechanisms designed to ensure that consumers and other relevant groups are made aware of the terms of the code and its complaints handling provisions.

As codes give consumers some measure of assurance that a trader strives to operate by established standards of conduct, there could be benefit in publishing a list of traders that have adopted a consumer code/charter are deemed to abide by it.

- **Industry awareness**

In many cases a code fails to operate effectively, not because its principles and procedures are inadequate, but because employees or industry members are either unaware of the code or fail to follow it in day to day dealings. A provision in the code requiring employees and agents to be instructed in its principles and procedures is therefore essential. This is a task which needs to be overseen by the code administration body.

- **Data collection**

Data collection is important, not only from a reporting point of view, but as a valuable source of market information about the origins and causes of complaints, and therefore to enable identification of systemic and recurring problems which need addressing by industry members.

- **Monitoring**

Regular monitoring of codes for compliance is essential, not only to ensure the desired outcomes, but to ensure that ethical members complying with the code are not disadvantaged.

- **Accountability**

Annual reports on the operation of the code should be produced by the code administration committee, allowing for periodic assessment of the scheme's effectiveness.

- **Review**

A code should provide for regular reviews to ensure that the standards incorporated are meeting current community expectations and that the code is working effectively.

- **Competitive implications**

Codes should avoid being written in such a way that they have a negative impact on competition. Where it is considered necessary for the success of the operation of the code to include anti-competitive provisions, there needs to be a transparent public benefit justification process.

- **Performance Indicators**

Performance indicators should be developed and implemented as a means of measuring the effectiveness of the code's operation. Examples include:

- a high level of awareness of the code amongst participants and consumers;
- easy accessibility of the code to consumers;
- decreased level of complaints received on issues the code is designed to address;
- otherwise meeting the stated objectives of the code;
- high visibility and easy accessibility of complaints handling mechanisms, including quick response times; and
- effective in-house code compliance mechanisms are in place by participants.

Since the release of its report on Self Regulation in 1988, the Commission has set down and further developed these essential elements. The Commission has produced a number of guides to the development, implementation and essential criteria for fair trading codes of conduct, which also discuss the practical aspects of setting up and administering codes. Recently, the Commonwealth, State and Territory consumer affairs agencies, through the Ministerial Council of Consumer Affairs (MCCA), released a similar guide to codes of conduct.

It is my hope that these essential criteria for codes can also be prescribed at the international level, for governments to use as a recipe for developing successful codes of conduct. I think there is a role for the OECD and ultimately ISO in the development of this international statement of codes criteria, which can bring benefits to countries around the world that many OECD countries take for granted.

An additional feature of many codes in Australia is that the Commission underwrites these codes by not only being involved in their development, but also backing them up with strong

enforcement action against those who choose not to participate in the code scheme. In short, there is no regulatory void.

A few case studies will demonstrate what I mean. A few years ago, the Commission was receiving a number of complaints from an academic biologist complaining that advertising of prescription drugs to doctors by pharmaceutical companies was misleading. The Commission undertook a review of the code of conduct being used by the Australian Pharmaceutical Manufacturers' Association (APMA) and recommended a number of changes to the way it operated. The APMA adopted the Commission's recommendations. The main features of this code are:

- Complaints are considered by a independent sub-committee, which is chaired by a lawyer with trade practices experience, and which includes representatives of the Consumers' Health Forum, the primary health regulator (the Therapeutic Goods Administration), and nominees of relevant professionals associations.
- Sanctions are imposed for breaches and can include:
 - cessation or withdrawal of promotion;
 - corrective letter;
 - corrective advertising;
 - financial penalties (up to A\$20,000);
 - suspension of APMA membership; and/or
 - expulsion of member company.

At one stage, well-known pharmaceutical company, Smith, Kline and French, indicated that they would not comply with a sub-committee ruling under the code. The Commission sent them a letter indicating that if they did not abide by the self-regulatory scheme, then we would take appropriate action under the Trade Practices Act. The company decided very promptly that it would abide by the code ruling.

Another successful example of an Australian code is in the fruit juice industry. The Commission for some time was having problems with the adulteration and dilution of fruit juices, particularly orange juices. The industry developed a code of conduct whereby it undertakes random independent testing and has a complaints committee with outside representation which applies warnings and sanctions. There have been a couple of instances where parties found to be in breach of the code have indicated their unwillingness to abide by the industry's complaints committee. The Commission has moved swiftly in those instances to extract enforceable undertakings from these offenders of their compliance in the future.

These examples indicate that by and large, in certain circumstances industry can be left alone to regulate behaviour, but it is important that the appropriate regulator is both seen to be and actually underwriting compliance with the codes through necessary enforcement action.

A final example of codes of conduct that I would like to bring to your attention is the new co-regulatory scheme that is currently being developed in Australia for the telecommunications industry. Since the deregulation of the industry in July 1997, new telecommunications legislation has been in place to encourage new and old industry participants to develop codes of conduct to achieve and maintain good consumer protection standards.

Provisions in the Telecommunications Act encourage industry sectors to develop codes of conduct for specific areas of concern, including customer information, selling practices, billing and privacy issues that are not content-related. These codes can then be registered with the Australian Communications Authority (ACA). If an industry participant refuses to comply with a code, the ACA can direct compliance under penalty of breach of the Act. The ACA also has the power to direct an industry sector to develop a code, and if unsatisfied, can impose its own industry standards.

I regard the Australian telecommunications codes regime, which incorporates all of the essential criteria listed in this paper, to be state-of-the-art co-regulation. In fact, the Commission is keen to adopt this type of co-regulatory scheme itself in order to set consumer protection standards for content related telecommunications services, such as Internet commerce.

Major Parts of Codes of Conduct

The Commission experience has shown that effective codes should not only follow the criteria but should contain three parts:

- An introduction which sets out the background, objects and scope of the code;
- A section setting out the code rules and principles. To be effective these must address common consumer complaints or other complaints about the industry (eg. those coming from small business such as common and legitimate allegations against large business partners). The Commission experience is that the effective way to draft rules is to ensure that all potentially interested parties are involved in the pre-drafting discussions (eg. complainants, complained against, regulatory authorities etc.) so that everybody's ideas can be identified; and
- A section setting out the rules that will govern the Code Administration Committee. This should take into account all relevant interests of interested parties. It must ensure that the Committee is implemented and that it operates in a relevant manner. It must also set out dispute handling mechanisms that are cost effective and efficient.

Consumer Charters

While codes have been used as an instrument for gaining fair trading outcomes at the industry, corporation and professional level, consumer charters are seen as a means of gaining consumer responsive outcomes from the public sector or privatised utilities which are in a monopoly situation.

A service charter is a simple and short plain-language document which sets out the quality of service standards customers can expect to receive from that body. Service charters also outline any avenues for taking up complaints, means of commenting on the charter, and the way the charter is kept up to date.

The move for citizen charters started in the United Kingdom in the early 90s, but they are becoming increasingly popular in other countries. In Australia, the Commonwealth government and some state and local governments are implementing charters.

Reasons for establishing consumer charters include:

- they act as a mechanism to be more consumer responsive;
- they are a means of displaying quality standards from the consumer's perspective;

- they are a means of creating a service culture; and
- they are a compliance mechanism for fair trading.

Again the Commission has identified certain essential elements of charters if they are to be effective in the market place. These include:

- Standards - A set of well defined, measurable and achievable performance benchmarks aimed at best practices and service delivery.
- Visibility - Service standards and penalties for non-compliance and other information about service, including how and where to complain, are at all times highly visible to, and easily accessed by, agency users.
- Changing the organisational culture - Commitment from the top and an implementation strategy aimed at changing corporate culture and ensuring that practices are changed to deliver agreed service outcomes.
- Employee involvement - Views of employees sought as to the service standards, their achievability, and what practices need to be changed to meet service outcomes. Without employee acceptance, charters are less likely to be effective because these are the people who ultimately deliver the service. Appropriate training undertaken to ensure that staff are aware of standards and how these can be achieved.
- User consultation - Users of the service identified and their input sought as to their service requirements. Such consultation to be done systematically, regularly, and publicly.
- Information - Consumers of the services to have access to readily available, easily understood, and easily accessible, information to know what standard of services they are entitled to expect, how and where to complain, and where to receive more detailed information about the product or service.
- Reporting - Standards are publicised and a public reporting procedure on whether standards are met.
- Complaints handling/information distribution - Adoption and implementation of standards on complaints handling (eg. in the Australia, the Standard on Complaints Handling AS4269-1995.)
- Redress - Where standards are not met customers are entitled to pre-determined compensation and, where appropriate, further compensation.
- Monitoring - Regular monitoring undertaken by the agency to ensure that standards are being met.
- Review - Periodic reviews of service standards implementation undertaken by an independent body to ensure that the standards are being met and are still relevant and up-to-date.
- Implementation - A consumer affairs unit within the agency with responsibility for negotiating service standards and ongoing liaison with stakeholders and implementing monitoring programs.

Enforcement of consumer protection laws

While the trend is for governments to use more market sensitive means, this does not mean that there is a need to do away with the basic consumer protection laws developed since the 1960s. They still serve as an important underpinning or safety net for consumers. Many need further strengthening and tougher enforcement. What is needed to make these more market sensitive means for consumer welfare to work is to have a strong and active consumer protection and competition infrastructure and enforcement so that the risk-takers who choose not to use these more market-sensitive mechanisms will not disadvantage either consumers or the ethical traders who are willing to commit themselves to these approaches.

If, as it is argued, contestable markets produce consumer welfare and need less government intervention, then the obvious *quid pro quo* is that there should be a strong competition enforcement body with adequate penalties and remedies in its armoury and the willingness to use them to ensure that there is a high degree of contestability in the marketplace.

What the consumer movement needs to do

Having taken to task business and governments for their attitudes to the consumer movement, I think it is important that the consumer movement itself needs to be reflective and see how it can better equip itself for the role of demand-side advocacy.

Politicians, bureaucrats and businesspeople are more likely to listen and to accept the consumer case where skilled advocates can make a coherent well-argued and justified case for change. They must be able to speak the “lingua franca” of the marketplace, and get business to recognise where consumer and business interests converge. At the same time these skilled advocates need to listen to the message from the grass-roots constituencies, but also have the necessary where-with-all to translate these into cost-justified changes in the marketplace.

The sort of qualities that a consumer advocate should have include:

- an ability to be well informed and objective and an ability to exercise sound and balanced judgment on issues;
- an ability to see short and long term implications and outcomes resulting from actions and decisions;
- an ability to present an argument objectively and convincingly and to negotiate and make appropriate compromises to achieve an acceptable outcome; and
- relevant community/business experience and technical/professional skills.

CONCLUSION

The final objective of the consumer movement will always remain the same, that is to maximise consumer welfare from the marketplace. What has changed is the marketplace and the methods that need to be employed to achieve this objective. Yesterday’s paradigms and mindsets are totally inadequate in achieving the objective today.

The role of the consumer movement today is to identify and promote the ways that business can do this, and to work with business in the development, implementation and maintenance of these approaches.

