Australian Competition and Consumer Commission

Promoting Competition and Fair Trading

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Industry regulation – can voluntary self-regulation ever be effective?

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INTRODUCTION

Thank you for inviting me to make the 2003 Centre for Corporate Public Affairs Oration. As your previous speakers over the years have noted, public affairs play a crucial role in corporate strategic thinking, helping to effectively manage the changing relationship between business and government and businesses and the community.

As the Chairman of the Australian Competition and Consumer Commission, I have a lead responsibility in promoting compliance with the *Trade Practices Act 1974* which provides a framework for effective industry regulation. However, I believe that in addition to having an independent statutory authority, such as the Commission, guarding over fair and vigorous competition, business should have the opportunity to raise the bar of corporate behaviour over and above the black letter law through a process of co-regulation that meets community standards and expectations.

Tonight, I would like to address the need for effective industry regulation and the various options available to the Commission to achieve its objective. I will frame my presentation this way.

First, I will briefly talk about the objectives of the Commission.

Then, I will discuss the various options of industry regulation available to the Commission to achieve our objectives.

I will make some detailed remarks on why the Commission views the proposed Commission endorsement process of effective voluntary industry codes as an effective tool to achieve its objectives.

Finally, I will explain the point that all options are underpinned by effective enforcement action by the Commission.

THE COMMISSION'S OBJECTIVES

The objectives of the Act are to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers (and business when they are a purchaser) in price, quality and service; and to safeguard the position of consumers in their dealings with producers and sellers, and business in its dealings with other businesses.

The Act itself applies generally to the business and commercial activities of:

- corporations;
- sole traders or partnerships whose activities:
    - cross State boundaries; or
    - take place within a Territory; or
    - are conducted by telephone or post, or use radio or television (Parts IVA and V only); and to the
- commercial activities of the Commonwealth.

As a result of the National Competition Policy reforms of the mid-1990s, the competition provisions (contained in Part IV of the Act) now apply universally to all business organisations and their activities throughout Australia.

It should be emphasised that the fundamental purpose of competition policy and competition law is to promote and protect competition in the interests of consumers.

Competition law is not about preserving individual competitors or protecting specific sectors of business from the rigours of honest, vigorous competition.

REGULATORY OPTIONS AVAILABLE TO COMMISSION TO ACHIEVE ITS OBJECTIVES

Industry self-regulation

The term "self-regulation" is viewed by many, including the Commission, 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.

Historically there have been attempts by many sectors of industry to overcome market failure or issues by self regulation by means of establishing codes of conduct.

Unfortunately many of these codes of conduct have not succeeded in achieving their objectives. This may not have been necessarily because codes as a tool per se was inappropriate but rather that many of them may not have been up to the world's best practice. In other words they did not contain all the essential criteria required by effective industry codes. We believe that effective codes have many advantages over government regulation.

Some of the advantages that effective codes of conduct offer include:

- 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 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 (e.g. 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 or action for remedies when there is a breach of the code.

Only effective industry codes of conduct are able to deliver the benefits outlined before. It is the Commission's view that industry self-regulation in the traditional context has not delivered the desired benefits to industry or consumers. This experience is not unique to Australia but also has been the experience in the US and the UK. The UK has moved away from the traditional self-regulatory model to a co-regulatory model.

In some circumstances mandatory regulation may be the only option available to the Commission to rectify systemic issues or market failure.

I will address this in a little more detail later.

Co-regulation

The preferred approach adopted by the Commission represents a move away from the traditional self-regulatory model to a co-regulatory approach to industry codes. Co-regulation in this context refers to a supported form of self regulation. This support will be in the form of providing advice and endorsement of an effective industry code and a framework to monitor ongoing compliance with the Code. This will ensure that all stakeholders in an industry code are the beneficiaries of an effective industry code.

Effective codes result in increased compliance and reduced regulatory costs. In contrast, ineffective codes not only fail to provide real benefits to business, but may put business at a clear competitive disadvantage by adding compliance burdens on business without providing clear benefits to either business or consumers.

Effective voluntary codes whether in the context of industry self regulation or co-regulation carry substantial benefits for government, the regulator, the industry and the consumer. It is in the interests of all concerned to ensure that voluntary industry codes are developed, implemented, administered and maintained as an effective tool to achieve compliance with laws, best industry practice and maintaining consumer sovereignty.

Effective codes have the potential to significantly reduce levels of complaints to the Commission as the industry deals with and satisfactorily resolves its own disputes.

Codes that fail to meet their objectives are deemed ineffective and if left unchecked do not only have little value to industry and consumers but are likely to be counterproductive. If such ineffective codes are endorsed by regulators and are allowed to continue to be ineffective, the regulator is likely to come under criticism by the very people the regulator and the code are trying to protect. Consumer and industry loss of confidence in self or co-regulatory measures are likely to follow.

Currently, the Commission is actively discussing industry codes with nearly 40 industry groups - ranging from informal consultations, including working parties formed either to develop or review a code of practice such as the Car Rental Industry Code, or to review the effectiveness of a particular code, such as the Franchising Code

or the Australian Direct Marketing Code. Some other industry codes in which we are involved include the Australian Communication's Industry Forum, Cinemas, the Furniture Industry Association and the Retail Grocery industry.

Indeed, continued requests from industry for assistance with code development demonstrate the ongoing interest by industry in developing effective codes of conduct to address industry concerns.

With this in mind the Commission in August this year announced plans to introduce a scheme whereby we will endorse effective voluntary industry codes of conduct. We recently circulated our discussion paper and draft guidelines for comment. The Commission has received more than 30 submissions from industry associations, consumer representatives and other interested parties who are to discuss this initiative.

A system of endorsing voluntary codes of conduct has the potential to provide effective industry codes of conduct that deliver real benefits to businesses and consumers with the least possible compliance cost placed on consumers or business.

By providing endorsement, we can work with industry groups that approach us to iron out any likely deficiencies. The role of the Commission will be to assist industry groups in ensuring the success of their codes. The industry will need to demonstrate that its code is achieving its objectives before the Commission will provide endorsement.

Be aware, however, endorsement from the Commission will be hard to obtain and easy to lose.

Commission endorsement should provide the consumer with some reassurance that the business they are dealing with operates in a fair, ethical and lawful manner. As well, Commission endorsement will provide the business operator with a degree of confidence that they are applying best industry practices.

However, if the Commission assesses that an industry code is not achieving its objectives, it will recommend possible changes to that code to ensure all the essential

criteria are met for an effective industry code. If the industry fails to adopt these recommendations, the Commission will remove any endorsement.

Industry groups who receive our endorsement can advertise it, but rest assured, we will also advertise the removal of endorsement, if an industry group fails to maintain the effectiveness of the code.

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The guidelines set out the criteria that we believe are essential elements for effective voluntary industry codes of conduct. They are:

1. Addressing stakeholder concerns

The code should set out clear reasons for its establishment and the intended outcomes. To effectively address stakeholder concerns, a code should have rules that focus on common complaints and concerns about industry practices and that set performance standards for participants. It should address specific problems and not broad general principles.

2. Consultation

If codes of conduct/self-regulation are to be accepted by governments and the general public, credibility with stakeholders is vital. To continue to have credibility there has to be consultation with the appropriate stakeholder/community/user groups and appropriate regulatory/government agencies. It goes without saying that the industry members themselves need to be consulted.

Sometimes the use of a reference committee can be a cost-effective way to bring all relevant interest groups together to reach consensus on appropriate standards.

3. Clarity

For all stakeholders to accept the code, it should be legally accurate and easy to understand. Using plain English will prevent ambiguity and vagueness and will instil confidence and certainty. This is particularly important in the area of understanding obligations and allowing for enforcement.

4. Code administration

Unless someone is responsible for ensuring the implementation and the ongoing administration of the scheme, 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 so that it becomes part of the overall code.

5. Transparency

Industry-based code schemes aimed at delivering fair trading outcomes need to have appropriate stakeholder representation on the code administration committee and, where appropriate, in complaints handling. In some instances, representation by the appropriate regulatory authority on the committee can serve as a means of putting forward a public interest view. Such representation provides transparency to the scheme by providing a 'public window' on its operations.

6. Coverage

The effectiveness of any code will only be as good as the amount of coverage it has of the relevant industry for which it is written. When codes are used as an alternative to government legislation some form of mandating legislation may be required to ensure industry-wide coverage if it cannot be achieved voluntarily.

7. Effective complaints handling

The code should include provisions:

- to allow for complaints to be lodged and then to be handled by signatories.
- in the event complaints are not resolved by signatories, for complaints to be lodged with the administration committee or an independent decision-maker appointed by the committee.

Performance criteria for effective complaints handling should form part of the industry code. Standards Australia has developed a benchmark type standard for effective complaints handling (AS4269).

8. In-house compliance

The code administration committee 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, based on the Australian standard on compliance programs (AS3806) which may be revised from time to time.

9. Sanctions for non-compliance

Commercially significant sanctions will be necessary to achieve credibility with and compliance by participants, and also engender stakeholder confidence in the industry code.

10. Independent review of complaints handling decisions

The code should also provide for a review mechanism when 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 in the first instance.

11. Consumer awareness

The United Kingdom Office of Fair Trading (the UK OFT) has stated that even the most effective code will not be of real benefit to consumers and business unless they are made aware of it. The UK OFT believes that the level of knowledge of industry codes can often be quite low among consumers. If they are not aware of a business abiding by the code, it will not result in increased business. This leads to the costs of adhering to the high standards set by the code putting the business at a competitive disadvantage.

If consumers are unaware of the code and its contents, the code will not achieve its fair trading aims. The code provisions should incorporate mechanisms designed to

ensure that consumers and other relevant groups are made aware of the terms of the code including its complaints handling provisions.

A code gives consumers some measure of assurance that a trader tries to operate by established standards of conduct, so there could be a benefit in publishing a list of traders that are signatories to an industry code and are abiding by it. The code should also require the traders to inform consumers about the code and how to access it in cases of disputes or complaints.

12. 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 an ongoing task because of staff changes and turnover in firms and needs to be overseen by the code administration body.

13. Data collection

Data collection is important from a reporting point of view, as a valuable source of market information about the origins and causes of complaints, and to identify systemic and recurring problems which need addressing by industry members.

14. Monitoring

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

15. Accountability

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

16. Review

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

17. Performance indicators

Performance indicators should be developed by the code administration committee and implemented as a means of measuring the effectiveness of the code.

Industry sectors are required to implement the code and operate under the code for 12 months before they are able to seek the Commission's endorsement of the code. They need to keep in mind that if their code does not continue to meet the high standards set by the Commission, we will remove endorsement. Just as businesses will be able to advertise the fact that they have the Commission's endorsement, we will just as easily be able to advertise disendorsement of the code.

We also recognise that some codes of conduct might contain anti-competitive elements. For example, provisions punishing businesses for breaching a code might be anti-competitive in some circumstances. These provisions would need to obtain authorisation from the Commission before the code could be considered for endorsement. Authorisation protects anti-competitive provisions or conduct from legal challenge under the Act and may be granted where anti-competitive provisions or conduct generate offsetting public benefits.

REGULATION AND ENFORCEMENT

Let me now turn to the role of government regulation which in this context refers to mandatory regulation in the form of an Act or regulation, or a mandatory Code of Conduct.

The proposed endorsement of voluntary codes of conduct should be distinguished from the existing mechanism for prescribing codes under the Act. The purpose of prescribing industry codes of conduct is to underpin or strengthen a voluntary industry

code of conduct that has failed to meet its objectives. The effect of prescription is, of course, government regulation in a different form as the code becomes quasi-law. While there is a role for prescribed codes of conduct we should be careful about what we add to the statute book through the prescription of codes under the Trade Practices Act.

However, although this is not the preferred option of regulation either by industry or government, it nevertheless may become necessary where all other forms of voluntary means have been exhausted to curb market failure or address systemic issues.

An example of this is the introduction of the mandatory Franchising Code of Conduct in 1998. The growing use of franchises gave people an opportunity to run their own business. But initially some business operators were burned by the franchise process and attempts at addressing market concerns through voluntary means were exhausted and failed.

Thus, the Government prescribed a mandatory code of conduct under the Act which bound all members of the franchising industry to common standards of practice.

The franchising industry has become more transparent and is continuing in its growth nationally and internationally in a competitive market.

As mentioned earlier, all forms of regulation are underpinned by effective enforcement. A misperception by some is that the Commission will forget about those that deliberately disregard the law simply because they are signatories to an industry code. Nothing could be further from the truth. Irrespective of whether a person is a signatory of an industry code or not, if they deliberately disregard the law they will be subject to enforcement action by the Commission. The ACCC's approach in support of good codes is not in any way a substitute for its firm enforcement of the competition and consumer protection provisions of the Act.

The Commission has a keen interest in ensuring compliance with the Trade Practices Act while also wanting to make sure that the regulatory burden on business is minimised. Included in this is our desire to ensure that consumers are protected.

However, while firm enforcement (including through the process of litigation) provides a fundamental signal, what most benefits business and consumers is a culture of compliance and good practice.

Compliance with the Act is not an option. Consumers and other businesses have the right to be protected from unfair practices. Those in business who do not comply with the law will face enforcement action by the Commission.

The Commission acknowledges that responding to unlawful behaviour by seeking remedies is a second-best approach to full compliance.

For despite the Commission's best endeavours, and those of the courts, there are individuals, and perhaps society at large, who are made worse off by the unlawful conduct of others – even if the conduct was stopped and penalties have been obtained.

By taking enforcement action the Commission reiterates its determination to seek compliance with the Act. If individuals and companies believe that the Commission will take action for a breach, they are more likely to think twice before breaking the law.

As I have already told a number of senior executives, they should not consider compliance can be achieved through a tick-a-box approach. Compliance must be part of the culture, the fabric of their company, starting with them as leaders of their organisations.

I would hope that business leaders generally, view compliance and a strong collaborative working relationship with the Commission as an essential part of normal business practice.

However, the Commission is not so naïve as to believe that compliance is regarded by all business as an altruistic nicety to be pursued in the public interest. For the reality is that regulation does exist to deal with misconduct. Its strength flows directly from the effectiveness of the Commission's enforcement regime.

Our enforcement action will be directed towards breaches of the Act where there is widespread consumer detriment, deliberate breaches of the law, emerging trends of misbehaviour in particular industries, or recidivist behaviour.

Our approach will be aimed at stopping unlawful conduct and sending a strong message to those who would consider similar breaches, that the Commission will be swift and firm in its reaction.

Whilst we look at matters on a case-by-case basis, we also seek to identify systemic problems within particular industries. Decisive action against one company can be a shot across the bow for an entire industry. But we will not hesitate to take follow up action if transgressions reoccur.

Our priorities will be to stop the behaviour and damage to the consumer as soon as possible. We want to ensure, where legally possible, that where consumers have suffered loss or damage, there is restitution. Finally, we want to prevent the behaviour reoccurring in the future.

Litigation is an essential weapon in our armoury and will be pursued where it meets our objective of a timely and effective response to misconduct. But we are conscious that the process of litigation, from the institution of proceedings through to the completion of all appeal processes, can be time consuming and costly. It may not be the most effective strategy to bring about the desired outcomes in protecting consumers from the harm that can be wrought by business misconduct. Where appropriate, alternative strategies will continue to be used to bring about desired outcomes.

CONCLUSION

I have discussed a number of key issues here tonight, and given you an indication of how I view the application of competition policy and the future role of the Commission in industry in bringing about compliance.

I want the Commission to promote lawful, vigorous, honest, and fair competition between all businesses, small and big. If we can be successful in achieving this objective, we will have contributed to ensuring the continued growth, stability, and international competitiveness of the Australian economy, with attendant benefits to all sectors of business, consumers, and the Australian community as a whole.

The proposal by the Commission to endorse effective voluntary industry codes of conduct, forms part of the spectrum of regulation and is an important element in achieving the Commission's objectives.

Importantly, by working with industry to develop appropriate Codes of Conduct, I anticipate a more efficient and more effective regulatory regime.

The measure of regulation of industry sectors is largely dependent on markets, that is to say industry participants, delivering the Commission objective to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers (and business when they are a purchaser) in price, quality and service; and to safeguard the position of consumers in their dealings with producers and sellers, and business in its dealings with other businesses.