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Our ref: SF/406/sf

J P O'Neill  
Senior Assistant Commissioner  
Mergers and Adjudication Branch  
Trade Practices Commission  
PO Box 19  
BELCONNEN  
ACT 2616

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| TRADE PRACTICES<br>COMMISSION<br>CANBERRA<br>- 3 MAY 1993 |
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29 April 1993

Fax: (06) 264 2803

Dear Mr O'Neill

**Trade Practices Act 1974**  
**Application for Authorisation A90549**  
**The Proprietary Medicines Association of Australia Inc (PMAA)**

Thank you for seeking our comments on the above Code of Practice. We refer to our letter dated 13 April 1993 and again apologize for the lateness of our response and any inconvenience this delay may have caused. We hope that our comments will still be taken into account by the Commission.

PIAC has had the advantage of reading and considering the submission made by the Australian Consumers' Association (ACA). We endorse the ACA's submission. Our comments should be read in addition to that submission.

We refer to pertinent guidelines developed by the Australian Federation of Consumer Organizations (AFCO). A copy of *Guidelines for Dispute Resolution Mechanisms and Industry Self-Regulation* is enclosed for your information.

## Comments on PMAA Code of Practice

### 3. OBJECTIVES OF THE CODE

We appreciate that the Code seeks to assist member companies :

*"responsibly to inform consumers about Proprietary Medicines which are available"*

This form of words does not address what information consumers are entitled to receive. We submit that consumers' right to know should be explicitly stated in these objectives.

The right to know is a term that generally means: *The rights of people to have access to information which is of concern to them.* It is often used explicitly to refer to rights in relation to information about chemicals and exposure risks, but it includes concepts of quality of information and accessibility of the form of the delivery of such information.

### 5. ADVERTISING

- 5.1.4 states:

*...information and claims must, when made, be capable of substantiation, such substantiation being provided without delay upon receipt of bona fide requests.*

We seek clarification as to how 'bona fide requests' are to be determined.

- 5.1.5 should address the problems of misleading visual representations and the improper balance of information eg benefits in large print while warnings are in small print at the bottom of the page.

### 7. ADMINISTRATION OF THE CODE

- 7.4 is not acceptable as there are no representatives of consumers on the Complaints Panel. We submit that this is a serious omission.

We note that the submission from the PMAA justifies this lack of representation on the basis that:

*The outside members are to bring to the Complaints Panel not only their technical expertise, but also their experience of consumers gained through their advisory and consulting roles and their own experience as consumers. (our underlining)*

It is inappropriate for the role of consumer representative to be subsumed in other specific roles on panels such as the proposed Complaints Panel. Consumer representation must be specifically provided and appropriately appointed.

- 7.5 is not acceptable because there is inadequate community consultation in the review process. We recommend that a Consumer Advisory Panel be established to assist the Executive Sub-Committee review the Code.

## **8. COMPLAINT PROCEDURE**

We emphasise AFCO's Guidelines for Dispute Resolution Mechanisms especially at p4:

*"Dispute resolution processes require a combination of industry commitment and resourcing, clearly identified consumer involvement, and an external independent review process."*

In addition, complaints systems should be accessible, fair, and efficient.

**Accessibility** includes:

- no cost to consumers
- clearly identifiable processes
- comprehensive coverage
- easy to use.

**Fairness** includes :

- independence
- principles of natural justice
- appropriate power and authority
- openness to public scrutiny
- comprehensive terms of reference
- ability to take on broad policy matters.

**Efficiency** includes:

- timeliness of the process
- sufficient resourcing
- regular reviewing
- ability to make binding decisions.

Given these principles, we make the following recommendations regarding the Code's complaints procedure:

### **8.1 Policy**

- 8.1 should be amended to read:

It is the policy of the Association that all complaint procedures will be administered in accordance with general principles of fairness., *timeliness and accessibility.*

### **8.2 Complaint Handling**

- A written complaint should not be required in order to initiate a complaint, but we accept that a complaint will need to be reduced to writing at some stage (8.2.3).

- There should be a time period for reply by the member company to the complainant (8.2.6).
- All notifications should be in writing (8.2.8, 8.2.9 and 8.2.13).
- Parties should be kept informed of the progress of a complaint on a regular basis (8.2.10).

**Conclusion**

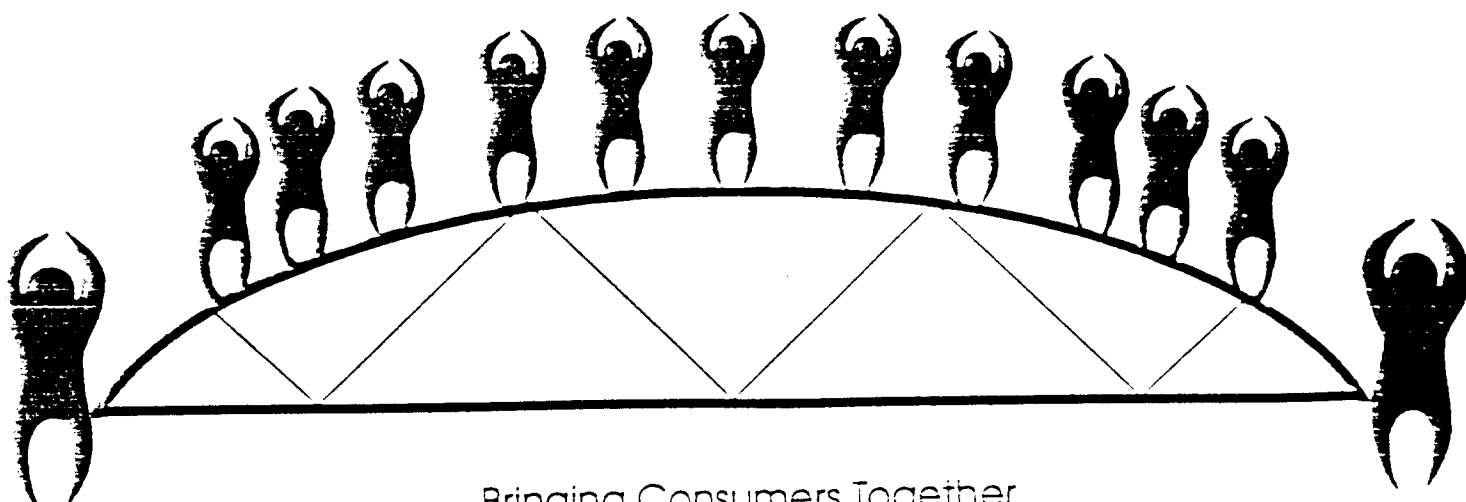
Thank you for the opportunity of putting these comments to the TPC. If there is anything further you wish to discuss in relation to this submission, please contact me or Sue Fenwick (Policy Officer).

Yours sincerely,  
PIAC - per

A handwritten signature in black ink, reading "Clare Petre". The signature is written in a cursive, flowing style.

Clare Petre  
Principal Policy Officer

encl.



Bringing Consumers Together  
Australian Federation of Consumer Organizations

## INDUSTRY SELF-REGULATION

AN AFCO POLICY PAPER  
JULY 1992



## Preamble

The Australian Federation of Consumer Organizations (AFCO) is the national peak body for consumer groups in Australia. It was founded in 1974 to provide a voice for its member groups, and other community groups with an interest in consumer issues.

The Federation is made up of member groups from around Australia and helps coordinate their activities on consumer issues of national significance. AFCO also offers support and advice for groups working on state and local issues.

AFCO puts the views of member bodies and the interests of consumers generally to government and industry. AFCO ensures that the public is made aware of these views through the media.

Industry self-regulation, including appropriate dispute resolution mechanisms, is currently an AFCO priority area.

The last decade has seen an increase in government de-regulation of industry. There has also been a concomitant rise in industry self-regulation, via voluntary codes of practice.

This self-regulation is usually based on a genuine desire to correct a problem, and to provide protection to both the consumer, and the industry sector from 'shonky' operators. In some cases however, self-regulation can be little more than a public relations exercise - enabling companies to appear responsible, and discouraging the government from maintaining existing regulations, or introducing new ones.

A voluntary code of practice that is ineffective, and does not answer consumers' problems, is of greater concern to the consumer movement than the absence of a code. The existence of a code of practice, no matter how inadequate or flawed, makes it harder to insist on better regulation - either by the industry itself, or by government.

It is of concern to AFCCO that industry sometimes develops voluntary codes of practice which provide less than satisfactory protection and redress for consumers. This appears to result from the fact that industry is not receiving clear guidance regarding —

- (i) whether a voluntary code of conduct is suitable for their industry
- (ii) the basic principles which would need to be encompassed by a voluntary code in order to protect consumers.
- (iii) the basic principles which would need to be encompassed by a voluntary code in order to have the support and participation of the consumer movement.

The Trade Practices Commission and other bodies provide some advice, but this does not result in outcomes which cover all aspects of consumer concern.

## General

A tripartite process, involving government, industry, and consumer groups, should be established to coordinate the development of voluntary industry codes of practice. This coordinating process should involve:

1. making an initial assessment as to whether it is appropriate for a particular industry to develop self-regulatory mechanisms
2. overseeing the development of the code, ensuring it embodies key general principles (see below)
3. coordinating input on specific elements of certain industry codes (eg. impact on competition policy, health etc.) in collaboration with the appropriate Government Departments and the affected sections of the community.
4. 'sanctioning' approved codes with an imprimatur, ie- "this code developed through the process of ...", which would serve to distinguish codes which have been developed through the coordinating process, therefore giving the new code some credibility, and setting it apart from the purely nominal codes.
5. conducting the random monitoring, and independent review of codes of practice, as the need arises.

A Code of Conduct should contain the following elements:

1. Appropriate regulatory mechanisms
2. Representative administration panel
3. Accountability
4. Effective complaints procedures and dispute resolution processes
5. Adequate information distribution regarding the code
6. Suitable sanctions
7. Regular evaluation

1. Appropriate regulatory mechanisms

There are four regulatory models available and industries should be assessed for the most appropriate model.

- unassisted self-regulation - there will always be industries that want nominal codes of practice that do not impact on consumers, and are not developed by the process outlined above.



- self-regulation to government standards - codes of practice developed through the coordinating process outlined above, checked by mandatory inbuilt monitoring and reporting mechanisms, and a random monitoring process by government.
- co-regulation - in some cases, the development of a code may result in industry and government 'sharing' the regulatory role.
- regulation - in cases where self-regulation is not appropriate, the regulation could be provided by government.

A major consideration that should be taken into account when deciding whether self-regulation is appropriate is the industry body's coverage of the industry - both percentage-wise, and geographically. If the coverage is not extensive enough, then no matter how comprehensive the protection afforded by the code of conduct, there will be a substantial number of businesses not bound by the code, and therefore effectively escaping any regulation whatsoever.

Industries that do require regulation by government include both those where public health and safety are involved; (eg. aviation industry, nuclear industry, superannuation industry) and those where the track-record of the industry indicates that a self-regulatory regime would be inappropriate (eg. the time-share industry).

Where self-regulation or co-regulation is considered to be appropriate, the coordinating process should have input into the development of the code to ensure that it is effective. If the industry body is not prepared to develop a strong and effective code, the coordinating process should have the option of insisting on government regulation.

## 2. Representative administration panel

The code's administration panel should have voting members, including representatives of consumer or community groups with full voting rights. These representatives should be free to report back to their sponsoring organisations. The panel should have responsibility for dealing with complaints directly, noting complaints summarily, deliberating on and enforcing sanctions, and overseeing the content and extent of advertising and public education about the industry, its members, and its code of practice. The administration procedures should be open to public scrutiny and be as transparent as possible.

## 3. Accountability

There should be provision for a written report to be produced annually by the administration panel. These annual reports should include full statistics of the use of the code by consumers, and the levels of compliance with the code by members. As a result of the analysis of these figures, the report should signal

ways in which the code can be fine-tuned. The annual report should be made available to all interested parties, and its presence advertised in the newspapers.

#### 4. Effective complaints procedures and dispute resolution processes

Any complaints procedure should have as its goal the refinement of the code, and the reform of the industry. Complaints procedures should do more than rectify or redress individual consumer problems. While it is important that complaints themselves be dealt with, they should also be logged with the administrative panel, so that they can be addressed as trends become apparent. Consumers should have direct access to the administrative panel, and be able to comment on the code itself, as well as the goods and services affected by it. AFCO's Policy on Guidelines for Dispute Resolution Processes provides more detail on effective dispute resolution schemes.

#### 5. Adequate information distribution regarding the code

The community is often unaware of the existence of codes of practice and the possible protection and redress that they may offer. The details of code itself, and its complaints procedure and dispute resolution scheme should be readily accessible by the community. Access to information should not be limited solely to complainants, nor should it be available through and monitored by code participants only.

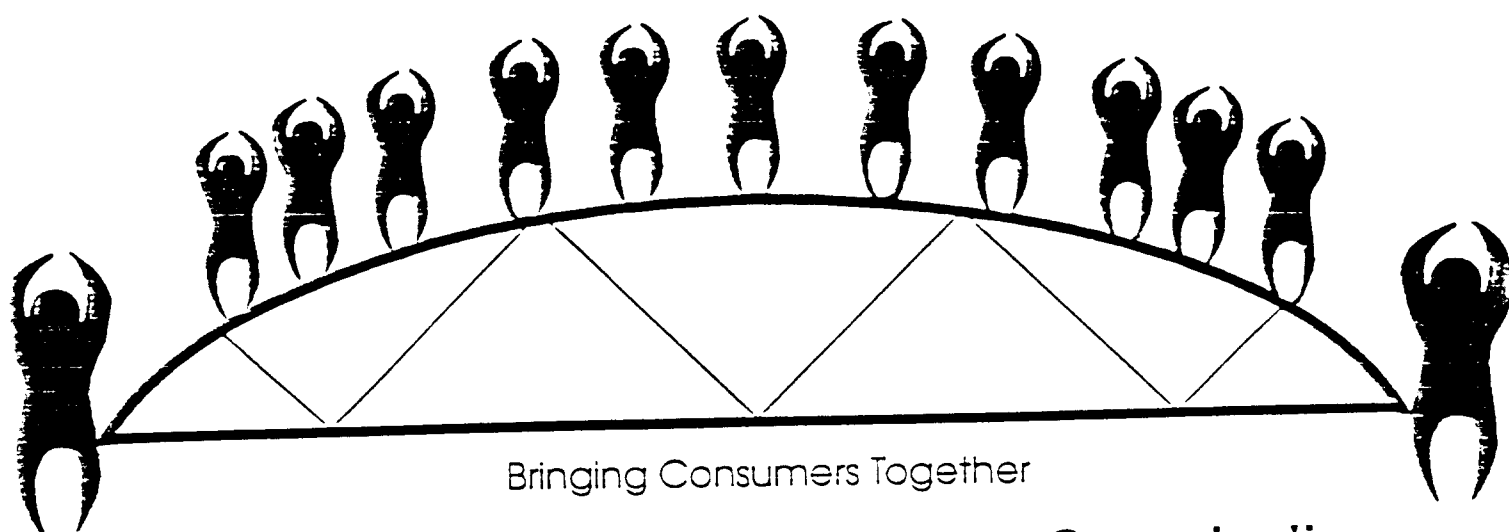
Staff training is a crucial component of information distribution. Staff should be fully aware of the existence of the code, what it offers the consumer, and the requirements of the code on the staff.

#### 6. Suitable sanctions

For a code to have any meaning, commercially significant and enforceable sanctions should be in place as a strong incentive for participants to comply with the code. There should be clear reporting and publicising mechanisms for any breaches of the code.

#### 7. Regular evaluation

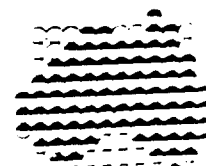
Any code of practice should be self-critical, containing performance indicators reflecting the aforementioned issues, which are regularly assessed. The code should be adjusted to comply with the results of the regular internal reviews of the code, and external reviews should also be conducted via the tripartite coordinating process outlined above.



Australian Federation of Consumer Organizations

## GUIDELINES FOR DISPUTE RESOLUTION MECHANISMS

AN AFCO POLICY PAPER  
JULY 1992



## Preamble

The Australian Federation of Consumer Organizations (AFCO) is the national peak body for consumer groups in Australia. It was founded in 1974 to provide a voice for its member groups, and other community groups with an interest in consumer issues.

The Federation is made up of member groups from around Australia and helps coordinate their activities concerning consumer issues of national significance. AFCO also offers support and advice for groups working on state and local issues.

AFCO puts the views of member bodies and the interests of consumers generally to government and industry. AFCO ensures that the public is made aware of these views through the media.

Industry self-regulation, including appropriate dispute resolution mechanisms, is currently an AFCO priority area.

AFCO has considerable interest in ensuring that consumers have access to dispute resolution mechanisms which offer a clearly equitable outcome for consumers.

Dispute resolution is the end-point of a far more extensive interaction between producer and consumer. This interaction includes advice provision, education, regulation, voluntary codes of conduct and of course, personal interactions at a number of levels. Dispute resolution is the final process in these interactions, but the consumer should be able to see clear access to the process at any of the earlier stages.

It is AFCO's policy that all companies should have an internal dispute resolution service. However AFCO distinguishes between internal company processes, and industry based dispute resolution schemes. Whilst AFCO believes that as much as possible of the key principles identified in this policy should be included in individual company dispute resolution processes, AFCO recognises that this will not always be the case. AFCO maintains that it is essential, however, that wider industry schemes embrace these principles.

The philosophical framework for addressing dispute resolution should be based on the equalising of power differences between consumers and industry. In engaging in a dispute, consumers are acting as individuals with limited financial, legal and social supports. Industry acts with the endorsement and support of well-resourced back-up, and with the strength that comes with embarking on dispute resolution as a familiar process.

Over the past twelve months, several dispute resolution schemes established by industry have been roundly criticised by the consumer movement. For example, the schemes established by both the Insurance Council of Australia and the Life Insurance Federation of Australia are not supported by AFCO because of their lack of independence and accessibility and their lack of capacity to properly investigate consumer complaints. The dispute resolution scheme proposed by the Grocery Manufacturers' Association for their voluntary code of conduct on environmental marketing allows consumers only one voice on the Management Committee, potentially requires them to pay part of the costs of having their complaint examined, and gives the complainant no right of appeal.

A major reason for consumer movement dissatisfaction about emerging dispute resolution schemes has been the fact that during the development of these schemes, input from the consumer movement has either not been sought, or has been disregarded. Genuine consultation with the consumer movement needs to occur prior to the establishment of industry-wide dispute resolution processes - and the consumer movement should be approached and resourced to take part in that consultation.

There is also a real need for consumers to have access to dispute resolution processes in new industry areas. Superannuation is one of the most glaring examples. The main regulatory body for the superannuation industry - the Insurance and Superannuation Commission - does not handle consumer complaints and the Government announced in the 1991 Budget that there was a need to develop a 'suitable low-cost dispute resolution mechanism' for superannuation. This need has been recognised by both the Senate Select Committee Inquiry Into Superannuation, and the Australian Law Reform Commission.

There is an urgent need for the consumer movement to clearly identify key elements of dispute resolution processes, and to apply these to the wide variety of industries which need such processes.

### Key principles for Dispute Resolution Processes

Dispute resolution processes require a combination of industry commitment and resourcing, clearly identified consumer involvement, and an external independent review process.

Dispute Resolution Processes should be:

- A. Accessible
- B. Fair
- C. Efficient

#### A. Accessibility

To be accessible, so that any person making a complaint is readily able to understand and use it, a dispute resolution process should ensure that it is:

##### 1. No cost

The cost of proceeding with dispute resolution processes is a major barrier to consumers taking action. Industry should bear the costs of dispute resolution, and there should be no cost to the consumer.

##### 2. Clearly identifiable

In the normal course of events, consumers are not focused on identifying dispute resolution processes. It is only when problems emerge that this becomes important. However, details of the complaints procedure should routinely be made available to consumers at the point of purchase. This general advertisement to consumers who are not actually complaining can only have the benefit of encouraging confidence in the industry concerned.

Information about available processes should be made available at the time and place where the dispute occurs, in a non-confrontative and rational way. This information should include a simple description of the process and its timing, together with directions on how to initiate a complaint, and what the consumer can do if s/he is not satisfied with the result. Complaints staff should possess excellent communication skills and be able to explain technical matters without the use of jargon.

Consumers should be able to access the complaints scheme directly and of their own initiative.

### 3. Comprehensive

As far as possible, every industry which establishes a complaints scheme should ensure that all participants in that industry join the scheme. Consumers involvement in dispute resolution needs to be as uncomplicated as possible, and the boundaries between schemes need to be well clarified. Consumers should be able to enter into the dispute resolution process as soon as it is recognised that their original complaint will not be resolved.

### 4. Easy to use

It is essential that the structure of any scheme not be unnecessarily complicated, and that consumers find it easy to use. The number of steps that the consumer has to take should be minimised, and the time period over which the process takes place should be as short as possible.

The needs of disadvantaged groups should be considered in the setting up of a scheme, and systems established to address these.

## B. Fairness

To be fair, both sides should feel that they have been treated equitably.

A dispute resolution process should ensure that it :

### 1. Is independent

Independence, and perceived independence is one of the most critical factors involved in ensuring the success of a dispute resolution process. This can be achieved by the following taking place:

- the complaints handler should be independent of the relevant industry.
- the decision-maker should be appointed by and governed by an independent management body which has the necessary administrative powers to run the scheme (although such powers would be delegated on a daily basis to the decision-maker). Consumer and industry representation on this independent body should be equitable in number, and nominations should be sought from recognised consumer bodies.
- the funding of the process should be commensurate with the tasks to be undertaken, (ie the levels of complaints expected), and sufficiently secure such that its independence will not be affected by financial vulnerability.
- the secretariat of the scheme should be independent of industry. The role of the secretariat is crucial in any dispute resolution process as the secretariat provides most of the information to the decision-maker, and independent management body.

## 2. Can demonstrate principles of natural justice

The scheme should observe principles of natural justice. Parties should have the right to argue their case, to see the evidence, and to hear the arguments put by the other party.

## 3. Is given appropriate power and authority

The decision-maker should be able to procure and consider all relevant documents and evidence and should be able to extend consideration beyond the individual complaint to address wide-spread malpractices as necessary.

## 4. Is open to public scrutiny

Public scrutiny should be easy and free of charge. In addition to the publishing of a detailed and informative annual report, there should be regular reporting of the cases being resolved, to both industry and the consumer movement. This reporting should include information as to how many complaints were received, what the main bases of complaint were, how they were resolved and how quickly they were resolved. Statements of the reasons lying behind the decisions taken should also be included, and in some circumstances, more detailed information should be published, which names the institutions involved.

This regular reporting should provide the information necessary for the regular reviews being made as to the effectiveness of the process. Where widespread malpractice is involved, the decision-maker should have the power to refer the case to appropriate regulatory bodies.

All information on which an institution is relying or which it is using when determining a complaint or responding to an inquiry, other than information which is confidential because its disclosure would entail unavoidable and unwanted identification of another customer, should be provided to the complainant as part of routine procedure.

## 5. Has comprehensive Terms of Reference

The terms of reference should be extensive enough to cover all relevant situations, with power to make monetary awards of sufficient size and other orders as appropriate.

## 6. Is able to take action on broad policy matters

The governing independent body should be able to make recommendations, at a sufficiently high level, for policy and/or procedural changes that address the underlying and structural problems that have generated complaints.

## C. Efficiency

The efficiency and effectiveness of the dispute resolution process will depend upon:

### 1. Speed of process

The established procedure should be as rapid as is consistent with the fair resolution of disputes.



**2. Sufficient resourcing**

Sufficient resources should be made available - and regular reviews of the budget allocation should take place.

**3. Regular Reviewing**

The scheme should be regularly reviewed by an independent body, and its performance judged according to objective criteria. Following the review, review recommendations should be implemented - overseen by the independent management body.

**4. Binding Decisions**

The decisions made as part of the dispute resolution process should be binding on the institutions covered by the scheme, but should not necessarily be binding on the consumers.