

## Executive summary

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The Government has an objective of lowering regulatory costs on business and improving market outcomes for consumers, by encouraging self-regulation, where this is the most effective option for addressing an identified problem. The Government also has the objective that industry should take increased ownership and responsibility for developing efficient and effective self-regulation.

Before deciding on the most appropriate regulatory response, any specific industry problems and objectives need to be clearly defined. Once the decision has been made that intervention is necessary, recognising that regulation in any form can potentially set up barriers to entry to the industry, or stifle innovation or competition amongst industry participants, then the focus can properly shift to choosing the most appropriate model of regulation to achieve the desired outcome.

In a broad sense, regulation can be considered as a spectrum ranging from self-regulation where there is little or no government involvement, through quasi-regulation which refers to a range of rules, instruments or standards that government expects businesses to comply with, to explicit government regulation.

Consistent with its Terms of Reference, the Taskforce has examined the option of self-regulation.

Australia is at the forefront of international policy initiatives to promote regulatory reform and effective self-regulation. The Taskforce has had regard to the international experience with industry self-regulation in this report. An outline of international policy and practice can also be found in Appendix D of the Taskforce's *Draft Report*.

Self-regulatory schemes tend to promote good practice and target specific problems within industries, impose lower compliance costs on business, and offer quick, low cost dispute resolution procedures. Effective self-regulation can also avoid the often overly prescriptive nature of regulation and allow industry the flexibility to provide greater choice for consumers and to be more responsive to changing consumer expectations.

The Taskforce recognised that self-regulation may not be appropriate in all circumstances. Other forms of regulation may provide more cost effective outcomes in certain cases. As well, community cynicism regarding industry regulating itself may lead to a distrust of self-regulatory schemes unless schemes operate effectively and consumers have confidence in them.

Individual firms that are not part of a self-regulatory scheme may also gain commercial advantages from avoiding the costs and sanctions involved in

participating in self-regulation. However, these problems are not unique to self-regulatory schemes and in practice can exist within regulated industries.

Self-regulation includes a host of options ranging from a simple code of ethics, to codes that are drafted with legislative precision together with sophisticated customer dispute resolution mechanisms.

The Taskforce has examined self-regulation in terms of significantly improved market outcomes for consumers with direct reference to lowering costs to industry participants, thus providing shared benefits to both businesses and consumers. This approach focuses on the efficiency and effectiveness of self-regulatory structures. The Taskforce has assessed that there needs to be a balance between minimising costs for business and the benefits to both business and consumers by looking at the market circumstances where self-regulation arose.

Good practice in self-regulation involves applying an appropriate scheme to a specific market failure or social policy objective. Ascertaining which scheme should be applied will depend on the nature and risk of the market failure and the consequences of no action. In other words, there is no one model for self-regulation. Nonetheless, it is possible to identify common characteristics of successful schemes and the Taskforce has done so in Chapter 6 of its report.

The Taskforce has applied these principles when inquiring into and reporting on its Terms of Reference. The Taskforce has reached the following conclusions which are cross-referenced to the body of the report to assist readers to locate the discussion of, and rationale for, each finding.

### **Chapter 3: Types of self-regulation in consumer markets in Australia**

There are different reasons for establishing self-regulatory schemes. Industries may self-regulate to improve the image of suppliers or to promote consumer confidence in new products or technologies. Industries may also self-regulate to avoid regulation, satisfy legislative requirements or minimise costly litigation.

Industry has an array of self-regulatory options available to address specific problems and objectives, including codes of conduct, industry service charters, guidelines and standards, as well as industry-based accreditation and complaint handling schemes.

The Taskforce examined self-regulation across a broad range of industries, including broadcasting and media, telecommunications, and financial services. The Taskforce also examined many self-regulatory schemes dealing with marketing practices generally — including advertising, direct marketing and the use of scanning equipment in supermarkets.

The Taskforce reached the following conclusions:

1. There is a broad and diverse range of self-regulation at the national level affecting consumers (page 24).
2. There is no single model for industry self-regulation as it depends on what is trying to be achieved (page 24).

#### **Chapter 4: Gaps and overlaps in the coverage of self-regulation**

Self-regulatory schemes operate in dynamic markets, which are influenced by globalisation, increasing vertical integration, and the growth of 'hybrid' products that span traditional markets or industries.

As a consequence, gaps and overlaps can emerge in the coverage of various products, services, sectors and industries. Similarly, existing self-regulatory schemes may find themselves covering the same ground where the distinction between products or services has become blurred.

It is undesirable that there be market problems that are not addressed by industry self-regulation, as consumers may find it costly and time consuming to obtain redress through the Courts. It is equally undesirable that there be inefficient duplication of self-regulatory schemes. The Taskforce is confident that self-regulation is sufficiently flexible to respond quickly to new market issues.

In short, the Taskforce concluded that:

3. Gaps and overlaps continually emerge and re-emerge in dynamic markets (page 33).
4. A 'gap' in the market does not necessarily mean that self-regulation is the appropriate solution (page 34).
5. Self-regulation is a flexible response to market failure and may fill a 'gap' quickly and efficiently (page 34).
6. Some small businesses can have difficulties in participating in self-regulatory schemes as can consumers (page 34).

#### **Chapter 5: Industry environment and market circumstances where self-regulation is likely to be most effective**

Self-regulation is not the answer to every market failure and all social policy objectives. The Taskforce was asked to provide some guidance for industry and policymakers as to where self-regulation is likely to prove most effective.

There is a general recognition that industry self-regulation is often more flexible and less costly for both business and consumers than direct government involvement.

However, it is necessary to ensure that self-regulation is the appropriate form of intervention given the particular industry environment and market circumstances.

The circumstances where self-regulation is likely to be most effective will depend on the nature and extent of market failure, the market structure, industry and consumer interests.

### ***Nature and extent of market failure***

7. Self-regulation is likely to be most effective where there are clearly defined problems but no high risk of serious or widespread harm to consumers (page 44).

### ***Market structure***

8. An industry environment with an active industry association and/or industry cohesiveness is most likely to administer effective self-regulation as industry participants are more likely to commit financial resources, consult with stakeholders and monitor the effectiveness of self-regulation (page 48).
9. Self-regulation is less effective where there is a broad spread of smaller businesses that do not communicate with each other (page 49).
10. Self-regulation is more likely to be effective in a competitive market as industry participants are more likely to be committed to it, either to differentiate their products or in fear of losing market share (page 48).
11. A more mature industry may be able to administer more effective self-regulation, as industry participants are more likely to have sufficient resources and be more committed while any 'shakeout' of rogue traders may already have occurred (page 50).

### ***Industry and consumer interests***

12. Self-regulation is likely to be most effective where firms recognise that their future viability depends not only on their relationship with their current customers and shareholders, but also on the wider community (page 50).
13. The more incentives there are for industry participants to initiate and comply with self-regulation, then the more chance a scheme can remedy specific industry problems (page 53).
14. The extent to which industry participants are prepared to sign up to a self-regulatory scheme will affect the ability of that scheme to provide effective self-regulation. Where a scheme has a high level of consumer recognition, to the point where consumers will favour scheme participants when making purchasing decisions, then the scheme is most likely to be effective. This will create incentives for non-members to join the scheme (page 55).

15. The interests of all levels of industry should be considered in the development and maintenance of a self-regulatory scheme, and particularly the level of involvement of smaller businesses where appropriate (page 56).
16. Where there are cost advantages and/or increased flexibility in self-regulatory initiatives to address specific industry problems compared with government regulation or the court system, then there is a greater chance of improving market outcomes for both business and consumers, and minimising compliance costs for businesses (page 56).

## **Chapter 6: Good practice and cost effective self-regulation methods**

There is no single 'best practice' model for self-regulation because a successful model needs to be designed to address particular problems identified in the context of particular market circumstances. Accordingly, the Taskforce considered it inappropriate to develop a 'checklist' of features of good self-regulation. Nonetheless, it is possible to identify critical elements that, individually or collectively, have underpinned effective schemes.

Good practice in self-regulation can be understood as significantly improving market outcomes for consumers at the lowest cost to businesses, and the following factors were seen as contributing to this.

### ***Consultation***

17. Consultation between industry, consumers and government can help ensure that specific problems and social policy objectives can be identified and addressed (page 63).

### ***Coverage and publicity***

18. Increased industry coverage of schemes ensures that the benefits from standards of practice in schemes flow to consumers. Wide coverage also ensures that consumers can identify self-regulatory schemes (page 65).
19. Clarity in the schemes' documentation can help industry understand their obligations and assist dispute schemes interpret legal rights. Clarity can also help consumers understand their rights (page 65).
20. Consumer awareness of schemes ensures that consumers know where to lodge complaints. Schemes are encouraged to make use of new technologies such as the Internet, make complaints cost free to the consumer, write sample letters of complaint, take oral complaints, provide personal contact and transfer complainants between schemes (page 66).
21. Industry awareness campaigns and education about schemes is needed to make sure industry participants understand their obligations and, where appropriate, understand the consequences of failing to abide by these obligations (page 68).

### ***Administration***

22. A good administrative body can identify issues, collect data, monitor the scheme, enhance credibility and ensure compliance costs are at an effective minimum level (page 69).
23. Data collection by an industry scheme is a valuable tool in identifying systemic issues and allows industry to address these problems, which in turn, can improve market outcomes for both businesses and consumers (page 70).
24. As consumers cannot guard against specific industry problems that they do not know exist, transparency in schemes is an important mechanism to ensure credibility and accountability (page 71).

### ***Dispute procedures and sanctions***

25. Industry adherence to self-regulatory schemes is essential to ensure that the benefits flowing from the standards of practice set by schemes are passed onto the consumer (page 71).
26. Where the standard of conduct has been breached, self-regulatory schemes should incorporate complaint handling and dispute resolution mechanisms to provide appropriate redress to consumers. The appropriate redress mechanism will depend on the nature of the specific problem and the consequences of non-compliance (page 73).
27. A range of sanctions can be used by industry in order to achieve compliance depending on the nature of the specific problem and consequences of non-compliance. The severity of the sanction should depend on the seriousness of the breach (page 75).
28. Industry needs to manage the risk of any anti-competitive practices in schemes, particularly where sanctions are involved (page 77).

### ***Monitoring and reviewing***

29. Monitoring of self-regulation is essential to ensure that it is still relevant to the industry addressing specific problems and improving market outcomes. In this context, reviews and annual reporting are important tools for monitoring schemes and can also assist in the transparency and accountability of schemes. Preferably, reviews should be periodic, independent and the results made publicly available (page 78).

### ***Cost-effectiveness***

30. Self-regulation comes at a cost, in administration, promotion and compliance. However, self-regulation can be cheaper (in terms of compliance costs) and more flexible than government regulation and the court system. Ultimately, the consumer bears the cost of regulation in most cases as it is part of a firm's cost structure (page 82).

31. Any funding arrangement for self-regulation should be transparent and designed so as not to put businesses at a competitive disadvantage through excessive compliance costs (page 85).

## **Chapter 7: Approaches to promoting and coordinating industry self-regulation**

There are a variety of options for designing and promoting self-regulatory schemes and what works for one industry may not work for another. It follows that the 'mix' of industry, government and consumer involvement that works well for one self-regulatory scheme may be inappropriate for another.

### ***Industry approaches to promoting self-regulation***

32. Experience has shown that industry will initiate a self-regulatory scheme in response to a clear commercial imperative to win consumer confidence and boost sales (page 89).
33. Industry may promote self-regulation as an alternative to government regulation where there is perceived to be a serious market failure or important social policy objective (page 90).

### ***Role of government in promoting and coordinating self-regulation***

34. Government involvement in self-regulation is justified when there is a public policy objective that would otherwise call for a regulatory response (page 91).
35. Government can assist in analysing systemic problems in an industry and in facilitating the design of a self-regulatory response to address those systemic problems (page 96).
36. Government can assist in integrating schemes into the regulatory framework (page 96).
37. Government is uniquely placed to promote international cooperation and harmonisation of self-regulatory initiatives (page 96).
38. The degree of government involvement will depend on the significance of the market failure or social policy objective being addressed and the consequences of self-regulation proving ineffective (page 99).

### ***Role of consumer advocates in promoting self-regulation***

39. Consumer input is important in the development and in maintaining the relevance of self-regulation. Consumer advocates can promote consumer confidence in self-regulatory schemes (page 104).
40. Consumer participation will be limited by human and financial resource constraints if there is no external financial assistance forthcoming (page 106).

### **Other conclusions**

41. Code administration authorities established by industry should take responsibility for the monitoring and review of self-regulation, in consultation with government and consumer groups.

### **Chapter 8: Options that facilitate the improvement and harmonisation of dispute resolution schemes**

Effective dispute resolution is a crucial element of industry self-regulation offering redress to consumers and it can also identify systemic problems in the industry. Dispute resolution schemes are an excellent monitoring tool increasing performance and industry standards.

42. In the future dispute resolution schemes may operate across different sectors with similar products/services, driven by changes in technology and market circumstances. Harmonisation of schemes would be less costly and less confusing to consumers and the use of umbrella-type arrangements with a single co-ordinated access point would likewise be of assistance to consumers (page 115).
43. Promotion of dispute resolution schemes to consumers raises their awareness of the availability of quick and inexpensive redress (page 116).

### **Other conclusions**

The Taskforce encourages the government, in addition to existing guidelines and benchmarks, to provide industries with further practical guidelines based on the principles flagged in this report to help inform/assist the development and review of self-regulatory schemes.

The Taskforce also encourages the government to consider up-dating its guidelines for policy makers on how to assess the range of options for addressing a particular market failure or social policy objective. The purpose of such a revision would be to incorporate the Taskforce findings on the industry environment and market circumstances that are most likely to lead to effective self-regulation.



## Chapter 1

# Introduction

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On 12 August 1999, the Minister for Financial Services & Regulation, the Hon Joe Hockey MP, who is also the Minister with responsibility for Consumer Affairs, established an independent Taskforce to advise him on a range of issues regarding industry self-regulation in Australia.

The Taskforce members to undertake this inquiry were drawn mainly from the private sector, with the emphasis placed on representation from key stakeholders, with knowledge of, and involvement in, self-regulation.

## Inquiry process

The Taskforce met for the first time on 30 September 1999, to discuss the format and direction of the inquiry. One of the most important objectives of the Taskforce was to ensure all stakeholders had ample opportunity to contribute to the inquiry. The Taskforce considered that consultations with stakeholders across industry, business, consumers groups and government were imperative to explore a variety of experiences in the field and generate an informed and comprehensive report.

The Taskforce agreed that the first step to achieving effective consultation was authorising the release of the *Issues Paper*.<sup>1</sup> The purpose of this *Issues Paper* was to provide information on the scope of the Terms of Reference and the inquiry methodology to assist stakeholders in preparing submissions to the inquiry. The call for submissions was advertised nationally on Friday, 15 October 1999 (the *Australian Financial Review*) and in *The Australian* and major metropolitan dailies in each State and Territory on the weekend of 16 October 1999.

To supplement this national advertising campaign, the Chair of the Taskforce wrote to a wide range of industry, consumer groups and government agencies (over 80 organisations) likely to have an interest in the inquiry, inviting them to make a submission and attend consultative meetings with the Taskforce. In addition, other organisations, including the Council of Small Business Organisations of Australia and the Australian Communications Industry Forum, widely distributed the *Issues Paper* to interested parties to ensure thorough saturation across Australia.

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1 *The Issues Paper* can be found at <http://www.treasury.gov.au/self-regtaskforce>.

Regional Australia was also targeted with one-page fliers, prepared by the Taskforce, for distribution to country areas with assistance from the Business and Professional Women of Australia. Letters were also sent to all regional development councils around Australia inviting them to participate in the inquiry through encouraging submissions on issues such as access to self-regulatory schemes for regional consumers and industry. A number of regional development councils took up the Taskforce's offer to receive a copy of the *Draft Report* with and participated in the second round of consultations.

In addition to this media and promotional campaign, the Taskforce set up its own webpage on the Treasury site (<http://www.treasury.gov.au/self-regtaskforce>) and electronic letterbox for lodgement of submissions and queries ([selfregtaskforce@treasury.gov.au](mailto:selfregtaskforce@treasury.gov.au)). Links were also established to the Taskforce webpage from other sites that stakeholders were likely to visit. The *Issues Paper* and *Draft Report* were published on the website, together with reference documents such as the *Codes Policy Framework* and *Grey-letter Law*.

The Taskforce was pleased at the numerous responses elicited from stakeholders throughout the inquiry. The Taskforce received 59 submissions (listed at Appendix A) which are used extensively within the body of the report.

In addition to calling for submissions, the first round of consultations was undertaken during November and December 1999 and March 2000. Public consultations were held with industry, business, consumer groups and government agencies located in Canberra, Melbourne and Sydney. The consultations were conducted in a variety of formats with a number of individual and roundtable discussions held. A list of organisations consulted during the inquiry is listed at Appendix B.

The second meeting of the Taskforce was held on 14 December 1999. The Taskforce reviewed the inquiry process to date and was enthused by the response received by stakeholders. The Taskforce examined the trends of information received. The Taskforce was also concerned at the short timeframe attributed to the inquiry considering the large amount of work that was still required to be undertaken. The Taskforce was anxious to avoid shortening the public consultation period due to a lack of time. Hence, the Taskforce applied to the Minister for a three month extension on the reporting date. The Minister granted this extension. The Taskforce also commissioned a number of special research tasks to further investigate the Terms of Reference.

The importance placed on a comprehensive and thorough analysis of market circumstances where industry self-regulation was likely to be most and least effective, became the catalyst for the Taskforce to engage a consultant. The Taskforce required the consultant to structure its research around case studies where industry self-regulation had been implemented. As part of its research strategy, the consultant met with stakeholders in each of the identified industries to gain a comprehensive insight into the market. The aim of this research was not to identify self-regulatory

success and failure in particular industries but to more broadly identify the characteristics of the environment and market that have influenced the effectiveness of self-regulation. This report can be found on the Taskforce's webpage and has also been incorporated into chapter 5 of the report.

The Taskforce was also keen to research the changing regulatory environment within the international arena, with special attention to be given to developments in industry self-regulation. To ensure Australia could potentially learn from this research, the Taskforce supported the need to focus on governments that had already implemented some form of industry self-regulation policy. The Secretariat to the Taskforce undertook this research with the view to investigate current issues and trends in the international environment.

In addition, the Taskforce Secretariat subscribed to an international on-line forum on voluntary codes, hosted by the Canadian Office of Consumer Affairs. The members of this forum come from a wide variety of government and non-government organisations throughout the world and provide invaluable information, networks and links to self-regulatory practices and voluntary codes in operation. The Terms of Reference of the Taskforce inquiry were posted on this forum and consequently generated a large amount of interest. The numerous replies provided valuable information on self-regulatory practices, from a variety of international governments, organisations and individuals. Further detail on the international work can be found at Appendix D of the *Draft Report*.

The third meeting of the Taskforce was held on 8 May 2000. As requested in the Terms of Reference for the inquiry, the Taskforce authorised the release of a *Draft Report* for comment by interested parties. The *Draft Report* drew heavily on the submissions received together with the findings from consultations and research undertaken by the consultant and Secretariat.

The purpose of this *Draft Report* was to gather feedback on the Taskforce conclusions and find out whether there were further issues it should raise in this report. The Taskforce sought both written and oral comments. In seeking comments, the second round of consultations was undertaken during June and July 2000. Public consultations were held with industry, business, consumer groups and government agencies located in Canberra, Melbourne, Sydney, Brisbane, Adelaide, Perth and in regional centres (see below for more detail). Although the focus of the inquiry was on self-regulation in consumer markets where the Commonwealth Government has constitutional responsibility or where there is a national scheme in place, the Taskforce was also keen to learn from States' experiences with self-regulation and consulted with a number of State bodies including some State Fair Trading agencies.

On 23 August 2000, the Taskforce met for the last time to finalise the report. The Taskforce was very pleased with the positive feedback on its *Draft Report* which resulted in some material being added and refined. However, the *Draft Report* forms the nucleus for this report.

## Consultation in regional areas

The Taskforce was very keen to ensure that organisations in more regional areas had an adequate opportunity to participate in the inquiry. As a result, the Taskforce travelled to Mildura, Rockhampton, Tamworth and Bunbury to enquire about the self-regulatory issues facing rural Australians. The Taskforce also offered to travel to other regional areas if there was sufficient interest.

The Taskforce heard from these consultations that rural Australians can have trouble accessing services in comparison to metropolitan residents. Accessing self-regulatory schemes was not so problematic in itself given the technology available, but problems lay with knowing how to lodge complaints with schemes, having the time to write letters of complaint, the lack of personal contact and the time associated with having complaints investigated.

During some of its regional consultations, the Taskforce also heard that rural primary industries like to have some level of government involvement as a safety net. In particular, concern was expressed over rogue traders being able to keep operating under a self-regulatory scheme and potentially undermining it.<sup>2</sup> The Taskforce acknowledges these concerns but also recognises that similar problems exist with rogue players in regulated and deregulated industries.

## Structure of report

The main body of the report addresses the six broad issues that the Taskforce was asked to inquire and report on.

In particular, chapter 2 sets out the framework for the Taskforce inquiry and discusses the steps involved in assessing whether self-regulation is the most appropriate tool.

Chapter 3 discusses the reasons for the initiation of self-regulatory schemes and the spectrum of schemes in Australia ranging from guidelines to more sophisticated codes of practice. The directory of self-regulatory schemes also lists a host of self-regulatory schemes operating at the national level in consumer markets.<sup>3</sup>

Chapter 4 then discusses gaps and overlaps in the coverage of self-regulation. There has been considerable growth in the number of self-regulatory schemes across many industries. In addition, these self-regulatory schemes operate in dynamic markets, which are influenced by globalisation, increasing vertical integration, and the growth of 'hybrid' products that span traditional markets or industries. As a consequence,

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2 For example, Taskforce consultations held in Tamworth on 28 June 2000 and Bunbury on 20 July 2000.

3 The directory of self-regulatory schemes can be found at the Taskforce's website.

gaps and overlaps can emerge in the coverage of various products, services, sectors and industries.

Chapter 5 maps out the industry environment and market circumstances where self-regulation is likely to be most effective. It is necessary to ensure that self-regulation is the appropriate form of intervention given particular industry environment and market circumstances, otherwise inappropriate intervention could create new problems. As discussed above, the consultant's report also analyses the circumstances where industry self-regulation is likely to be most and least effective.

Chapter 6 discusses good practice and cost-effective self-regulatory methods. Good practice in self-regulation can be understood as significantly improving market outcomes for both business and consumers at the lowest cost to businesses. A particular self-regulatory scheme may not be appropriate in circumstances where other forms of regulation are able to provide better outcomes at a lower cost.

Chapter 7 then discusses approaches to promote and co-ordinate self-regulation. The roles of industry, government and consumer groups are dynamic, adapting to the changing face of the Australian economy and, in particular, responding to competitive pressures, regulatory reform, new technologies and the increasing globalisation of consumer markets. This chapter first examines the role that industry has played in promoting and coordinating self-regulatory schemes. It then discusses the role of government as a stakeholder, developer, promoter, monitor and enforcer of schemes, as well as the crucial role that consumer groups have played and will continue to play in the development of industry self-regulation. Finally, the chapter analyses a number of options to co-ordinate and promote self-regulation including discussion of whether a centralised government agency, an oversight committee, or model codes would be appropriate.

Finally, chapter 8 discusses options to facilitate the improvement and harmonisation of dispute resolution schemes. Effective dispute resolution is a crucial element of industry self-regulation offering redress to consumers and it can also identify systemic problems in the industry. However, dispute resolution schemes come at a cost. In particular, they can be costly for small industry groups.



# Framework for the Taskforce Inquiry

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At the outset of the inquiry, the Taskforce considered the approach it would take to examining the matters under reference. The scope of the Terms of Reference and the inquiry methodology the Taskforce intended to adopt were set out in the *Issues Paper* released in October 1999.

The Taskforce was established to advise the government on promoting *effective* industry self-regulation. The Taskforce inquiry is occurring in the context of the government's overarching policy on 'making markets work' for the shared benefit of business and consumers. In this context, the Taskforce has defined *effective* industry self-regulation as industry initiatives that significantly improve market outcomes for consumers while reducing compliance costs for business.

Onerous compliance burdens are recognised as detrimental to business. What is less obvious but equally important is that consumers may also 'pay' for sophisticated and costly industry self-regulatory schemes — notably in the form of higher prices. Moreover, industry self-regulation can also have the purpose or effect of inhibiting competition — with serious implications for consumers.<sup>4</sup>

It follows that consumers and businesses have a mutual interest in finding simple and inexpensive mechanisms for resolving market problems.

### Principles

- The appropriate form of self-regulation will depend on what is trying to be achieved — that is the way in which it is necessary to significantly improve market outcomes for consumers. This can vary within and between industries.
- The form of self-regulation adopted by industry should be the one which effectively solves the identified problem and minimises costs for industry.

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4 Industry self-regulatory schemes that inhibit competition are at risk of breaching the restrictive trade practices provisions of the *Trade Practices Act 1974*. The Australian Competition and Consumer Commission (ACCC) has the power to authorise such schemes on public benefit grounds, giving the schemes immunity from court action. Details of the ACCC authorisation process are available from the ACCC website at: <http://www.accc.gov.au/adjudication/fs-adjudicate.htm>.

## Reviewing particular schemes

Throughout the inquiry, the Taskforce was encouraged by some stakeholders to appraise particular models of industry self-regulation, to identify problems with particular schemes and to recommend specific improvements, perhaps including underpinning in law. Some stakeholders also anticipated that the Taskforce would identify particular markets where self-regulation should be initiated or where dispute schemes should be set up.

However, while the Taskforce supports regular reviews of self-regulatory schemes, the Taskforce itself did not have the resources or timeframe to be able to conduct meaningful and fair reviews of particular schemes - nor to conduct rigorous assessments of particular market circumstances that might benefit from the development of a self-regulatory regime.

The Taskforce is aware that there have been independent reviews or audits of certain existing code and dispute resolution schemes, each of which has involved a resource commitment comparable to the Taskforce inquiry. The Taskforce was cautious not to draw any conclusions about particular schemes on the basis of a fairly superficial analysis of each scheme.

Instead, the Taskforce has attempted to develop some principles to shape the development and review of schemes in the future. The Taskforce itself was not established to initiate or review individual schemes.

## Analytical tools for identifying lowest cost effective options

Internationally, and also in Australia, in line with the drive for efficiency gains, there has been an increasing focus on regulatory reform.

Many of the analytical tools that have been developed to ensure effective regulation by governments can be adapted easily to ensure effective self-regulation by industry, and some of these are discussed below.

The Council of Australian Governments has issued *Principles and Guidelines for National Standard Setting and Regulatory Action*.<sup>5</sup> While these guidelines were framed for proposed regulatory action by governments, the general principles apply equally to industry self-regulation. Under the COAG Guidelines, the impact of proposed

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5 Council of Australian Governments (COAG) endorsed by COAG in April 1995 and amended in November 1997, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*. This document is available from the Department of the Prime Minister and Cabinet, including on the Departmental website at: <http://www.pmc.gov.au/briefing/doc/coagpg.pdf>.



regulation must be assessed to ascertain that regulation is necessary, and if so, what is the most efficient regulatory approach to use. This assessment should consider:

- the objective;
- a consideration of alternative approaches;
- the impact on affected groups of proposed approaches;
- a cost/benefit analysis;
- consistency or any proposed approach with international standards; and
- mechanisms for reviewing the proposed regulation.

The option of no action should be considered if it will produce the best outcome for consumers and industry. This option is worth pursuing if a self-regulatory scheme cannot prove that it will improve the situation.

Similarly, the guidelines prepared by the Office of Regulation Review to assist Commonwealth agencies to prepare Regulation Impact Statements (RIS), offered the Taskforce an attractive analytical framework for assessing the effectiveness of self-regulation.<sup>6</sup> The RIS Guidelines also require identification of the problem being addressed, specification of the desired objective(s), identification of options and an assessment of the costs and benefits of each option.

## **Catalysts for industry self-regulation**

Industry self-regulation is increasingly being seen as an alternative means of promoting fair trading, ethical conduct and streamlining compliance with agreed product and service standards in an industry. While industry self-regulation can advance consumer confidence in products and individual companies, it also can promote good business practices.

The Government is encouraging self-regulation because this mechanism is often more flexible and less costly for both business and consumers than direct government regulation. In the government response to the report of the Small Business Deregulation Taskforce, it was made clear that:

*The Government is keen for industry to take ownership and responsibility for developing effective and efficient self-regulatory mechanisms where this is appropriate.<sup>7</sup>*

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6 Office of Regulation Review 1998, *A Guide to Regulation*, Second Edition. Available on the Internet at <http://www.pc.gov.au/orr/reguide2/index.html>.

7 Statement by the Prime Minister, the Hon John Howard MP 24 March 1997, *More Time for Business*. Available on the Internet at: [http://www.dewrsb.gov.au/group\\_osb/smallbus/moretime.htm](http://www.dewrsb.gov.au/group_osb/smallbus/moretime.htm).

Properly conceived and drafted, industry self-regulation can be a positive tool for industry and a safeguard for consumers.

It is generally accepted that well functioning markets produce better results for the community. Competition results in greater choice and lower prices for consumers and efficient resource allocation towards more successful suppliers.

Generally with clear information flows, markets provide incentives for business and consumers to resolve many of the problems without intervention.

However, markets can 'fail' to deliver the optimal efficient allocation of resources in the economy for reasons, including the following.

- The market is characterised by imperfect competition;
- There is insufficient information available to consumers to allow them to make informed choices;<sup>8</sup> and/or
- There are high transaction costs for consumers.<sup>9</sup>

In such circumstances, there is often an incentive for industries to self-regulate.

Markets may also fail to fulfil significant social policy objectives, with the result that the relevant industry may face a choice between government intervention or industry-based initiatives to ensure the market delivers results consistent with those desired by the community.

When industry is confronted with the demonstrated failure of the market mechanism to deliver a problem in the marketplace, the nature and magnitude of that problem must be accurately assessed. Failure to understand the problem may lead to an inappropriate solution being used. Such an outcome may have unintended consequences for many sectors of the community.

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8 This form of market failure is typically referred to as 'information asymmetry' since there is an imbalance in the information available to suppliers and consumers. This does not necessarily imply that suppliers have 'withheld' information that consumers need to make decisions; it may result from the complexity of the transactions involved and the expertise required to understand all aspects of such transactions. Nonetheless, information asymmetries are often remedied by improved information disclosure to consumers. The various forms of market failure are addressed in the *Codes of Conduct Policy Framework* released by the then Minister for Customs and Consumer Affairs in March 1998; this document is available on the Internet at <http://www.treasury.gov.au> (choose Consumer Affairs/Publications/Industry Self-Regulation Publications).

9 High transaction costs refer to the costs of participating in a market and include the costs of searching for relevant information and the costs of obtaining redress if a supplier fails to honour its side of the bargain.

## Identifying and quantifying the problem

The types of factors that need to be considered include:

- the causes of the problem;
- who is affected;
- the consequences of the problem for the people affected and the wider community;
- who benefits from the situation and to what extent;
- the scale of the problem; and
- whether it is local, state, national or international.

The presence of market failure or absence of socially desirable outcomes may not be sufficient to justify industry setting up a self-regulatory regime. Inappropriate intervention could create new problems that are greater than the problems it was designed to fix. In particular, a self-regulatory scheme may have an incidental anti-competitive effect, the impact of which is more damaging to consumers than the original market problem.

For this reason, any intervention needs to be weighed up to ascertain whether the extent of the problem is sufficient to justify intervention.

The Taskforce believes that the specific problem and objectives need to be clearly defined before any decision is made about how the desired outcome is to be achieved. Once the decision has been made that intervention is necessary then the focus can properly shift to choosing the most appropriate model of regulation to achieve the desired outcome.

## Choosing the appropriate solution from the spectrum of self-regulatory options

In a broad sense, regulation can be considered as a spectrum ranging from self-regulation where there is little or no government involvement, to quasi-regulation which refers to a range of rules, instruments or standards that government expects businesses to comply with, through to explicit government regulation. Further, there is an overarching legal framework governing fair trading, contract, negligence, privacy etc underpinning self-regulation,<sup>10</sup> and the Consumer Law Centre of Victoria made the point that existing self-regulatory schemes can

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<sup>10</sup> Australian Business Limited submitted that self-regulation can enhance compliance with the law by adding detail and industry-specific guidance within a regulatory framework. (Submissions of 14 June and 18 July 2000).

sometimes simply establish mechanisms for industry participants to comply with the law.<sup>11</sup>

There is also a spectrum of self-regulatory options to address market failure and social policy objectives and the art of developing effective self-regulation is to 'customise' solutions to provide optimal outcomes.

The spectrum of self-regulatory options available to industry is a continuum.

- Towards the least costly, least interventionist end of the spectrum are industry agreements to improve the disclosure of information to consumers. Such initiatives may involve voluntary disclosure standards or guidelines, but would be a deliberate attempt to address identified market failure due to consumers making poor choices on the basis of insufficient information. The mere publication of a brochure by an industry association would not constitute 'self-regulation'.
- Somewhere on the continuum are self-regulatory options like customer service charters (that provide information on respective rights and obligations) and voluntary industry codes that provide guidance for members but do not monitor or enforce compliance.
  - Such initiatives may be effective in addressing market failure provided there are commercial incentives for industry participants to comply (or at least an absence of commercial imperatives for industry participants to rely on the market failure).
- At the most interventionist end of the spectrum are industry self-regulatory schemes that basically mirror regulation in that they incorporate industry codes drafted like legislative provisions, mechanisms to ensure compliance by all industry participants, and redress mechanisms to resolve customer disputes.

It is a basic principle of industry efficiency and public welfare that the degree of intervention should be the minimum necessary to achieve the identified objectives. The manner of intervention should be that which imposes the least cost of compliance consistent with achieving the identified objectives.

## **The advantages of industry self-regulation to address market failure**

As discussed in the *Grey-letter Law* report (1997), self-regulatory approaches can effectively remedy market problems, but can be as inefficient as any form of

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11 Submission of 24 July 2000. The Consumer Law Centre of Victoria points out that the Code of Practice for the Fruit Juice Industry is based on trade practices law.

regulation if they do not address the underlying problem.<sup>12</sup> Self-regulation is a means to an end, it is not an end in itself.

Amongst others, the Australian Information Industry Association recognised this, supporting self-regulation that enables industry to respond to rapid technological change, but warning that ‘a code that is poorly designed and improperly implemented can actually harm both its proponents and the public’.<sup>13</sup> The Consumer Law Centre Victoria also thought it was important to acknowledge that self-regulation can be detrimental to consumer interests if it lowers standards or gives an appearance of legitimacy to questionable market players or practices.<sup>14</sup>

Self-regulation is a viable option if it can improve market outcomes with direct reference to lowering costs to industry participants and providing benefits to both businesses and consumers.

Self-regulatory schemes tend to promote good practice and target specific problems within industries, impose lower compliance costs on business, and offer quick, low cost dispute resolution procedures. Effective self-regulation can also avoid the often overly prescriptive nature of regulation and allow industry the flexibility to provide greater choice for consumers and to be more responsive to changing consumer expectations.

Specific problems can be addressed on an industry wide basis, and so enhance the competitive process. However, it is also necessary to minimise the anti-competitive potential of industry self-regulatory schemes by ensuring that such schemes do not set up barriers to entry to the industry, nor stifle innovation or competition amongst industry participants. Self-regulation may not be appropriate in circumstances where other forms of regulation are able to provide more cost-effective outcomes.

As well as the costs involved in the implementation, administration, monitoring and enforcement of self-regulation, there may be other disadvantages. For example, community cynicism regarding industry regulating itself may lead to a distrust of self-regulation on some issues and the industry as a whole may be blamed for the practices of one or two disreputable firms. Individual firms that are not part of a self-regulatory scheme may also gain commercial advantages from having immunity from sanctions.

As a general guide to whether self-regulation is appropriate, the Taskforce endorses the Commonwealth Office of Regulation Review’s Regulatory Impact Statement checklist. The checklist states that self-regulation should be considered where:

- there is no strong public interest concern, in particular, no major public health and safety concern;

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12 *Grey-letter Law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation, 1997.* Available on the Internet at <http://www.pc.gov.au/orr/>.

13 Submission of 20 July 2000.

14 Submission of 24 July 2000.

- the problem is a low risk event, of low impact/significance, in other words the consequences of self-regulation failing to resolve a specific problem are small; and
- the problem can be fixed by the market itself, in other words there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements (e.g. for industry survival, or to gain a market advantage).

However, changes in the industry environment and market developments can effect the conditions underpinning self-regulation. It is important to monitor self-regulation to ensure that it is addressing what it was designed to achieve and to assess whether it is still the most appropriate form of intervention.

It is also evident that there is no one model for self-regulation. The Taskforce considers that good practice in self-regulation involves applying an appropriate scheme to a specific problem or objective. Ascertaining which scheme should be applied will depend on the nature and risk of the problem and the consequences of no action.

Chapter 5 will examine in more detail the industry environments and market circumstances where self-regulation may be appropriate and where it is not.

## Chapter 3

# Types of self-regulation in consumer markets in Australia

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*The Taskforce is to inquire into and report on the types of self-regulation in use in consumer markets in Australia.*

Within the scope of self-regulation there is a host of options to deal with specific problems and objectives ranging from a simple code of ethics, to schemes incorporating codes that are drafted with legislative precision together with sophisticated customer dispute resolution mechanisms. The various forms of self-regulation at the national level also cover a broad range of industries, including:

- advertising;
- broadcasting and the media;
- direct marketing;
- financial services sector;
- general industry schemes;
- pharmaceuticals and proprietary medicines;
- professional associations;
- retail sector schemes; and
- telecommunications.

This chapter gives a snapshot of the reasons for, and types of, self-regulation. For further detail on the types of self-regulation, see the directory of self-regulatory schemes at the national level in consumer markets.<sup>15</sup>

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<sup>15</sup> The directory of self-regulatory schemes can be found at the Taskforce's website: <http://www.treasury.gov.au/self-regtaskforce>.

## Conclusions

1. There is a broad and diverse range of self-regulation at the national level affecting consumers.
2. There is no single model for industry self-regulation as it depends on what is trying to be achieved.

## Reasons for self-regulation

The Taskforce has found that the factors behind self-regulatory schemes range from marketing exercises to legislative requirements. The following section discusses these factors.

### Raising industry standards

A common reason for self-regulation, often in conjunction with other reasons, is the desire to raise industry standards. Self-regulation is a means to exceed minimum legal requirements and can also enhance understanding and compliance with regulations. In a competitive environment there is a strong incentive for businesses to continually improve standards and exceed the benchmark service levels in order to gain market share. Various forms of self-regulation can set a benchmark for minimum service levels, and allow businesses flexibility in how these services are to be met and exceeded. For example, the Association of Superannuation Funds of Australia has produced best practice papers on appointment of policy committees, member booklets and annual report checklists.<sup>16</sup>

Raising industry standards often refers to the ability to deal with rogue players or poor reputation. The role of reputation can be very important to a business, particularly when the business is operating in a competitive environment. For example, the financial services industry is very competitive and values customer loyalty. One reason as to why the Financial Industry Complaints Scheme was established was the emphasis the industry placed on measures for customer retention and customer satisfaction.<sup>17</sup>

### Marketing tool

Using self-regulation as a marketing tool is another reason why self-regulation has been developed by industry. Membership of a recognised form of self-regulation (e.g. code of conduct) can often constitute an important selling point for businesses to

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<sup>16</sup> Submission number 22, p. 6.

<sup>17</sup> Submission number 15, p. 2.



attract new customers, and may increase the bargaining power of the business when entering new arrangements with other parties. Also, businesses can advertise the fact that they are in a self-regulatory scheme as a means of product differentiation. For example, the Australian Direct Marketing Association Code enables consumers to differentiate between marketplace players.<sup>18</sup>

Similarly, in the grains industry, since most of Australia's grain production is exported, one of the means of achieving an edge for Australian grain in the competitive world market is to stress its high quality. Under the new privatised arrangements, the Australian Wheat Board Ltd sets the standards which growers must meet.<sup>19</sup>

### **Enhancing the level of information**

Increasing the level of information on products and services is a further reason for self-regulation. By enhancing information flows, businesses can boost consumer confidence in products. The *Code of Conduct for the Provision of Information on Food Products* was introduced to complement regulations and increase consumer knowledge. It provides a degree of consistency in food companies' approaches to labelling and the use of terms to describe food products, thereby providing a greater degree of certainty and confidence to consumers about the nature of the products they are purchasing.<sup>20</sup>

Self-regulation is also a means of building consumer confidence when introducing new technology to the industry. For example, the *Australian Code of Practice for Computerised Checkout Systems in Supermarkets*.<sup>21</sup>

### **Threat of government regulation**

The actual or perceived 'threat' of government regulation, or a 'push' by government because of poor industry practices was found to be a further reason for industry to self-regulate. For example, the *Code of Banking Practice* was primarily developed by a committee of officials and implemented by Australian banks.<sup>22</sup>

### **Legislative requirements**

Self-regulation may have also been imposed via legislative requirements. For example, in the telecommunications industry, Part 6 of the *Telecommunications Act 1997* establishes a scheme of industry codes and industry standards.<sup>23</sup> Also, the

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18 Submission number 36, p. 11.

19 Submission number 28, p. 5.

20 Submission number 30, p. 15.

21 Submission number 11, p. 2.

22 *Grey-letter Law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation, 1997*, p. XIII.

23 Submission number 17, p. 1.

Act provides for the Telecommunications Industry Ombudsman Scheme which is an independent alternative dispute resolution scheme. Membership of this scheme is a legislative requirement of all carriers and eligible carriage service providers.

Similarly, under section 123 of the *Broadcasting Services Act 1992*, commercial broadcasting licensees are now required to develop codes of practice in consultation with the Australian Broadcasting Authority.<sup>24</sup>

## **Combination of factors**

The Taskforce recognises that often there will be a number of reasons to self-regulate. For instance, schemes may have been formed in part due to the threat of government regulation. However, there were probably good reasons why government was threatening to regulate in the first place such as the need to raise industry standards or to increase information flows. For example, the Australian Competition and Consumer Commission (ACCC) assisted the film industry to develop a code to avoid problems in the industry.

## **Self-regulatory options available to industry**

Industry has an array of self-regulatory options available to address specific problems and objectives. These options can range from a simple information campaign to a complex dispute resolution scheme. In addition, there is a spectrum within each type of self-regulatory option.

### **Information campaign**

At the lower end of the self-regulatory spectrum are information campaigns. As part of increasing the flow of information, the Taskforce has found that education of both industry members and the consumer is important. For example, the *Australian Cold Chain Guidelines* seek to strengthen the cold chain by recommending practices for each link, from the manufacturer to consumer to ensure the safety and quality of frozen and chilled foods.<sup>25</sup>

Also, as discussed elsewhere, self-regulation plays an important role in complementing regulation. For example, the Responsible Serving of Alcohol Program complements the liquor licensing laws. Business and Professional Women of Australia commented that it is in businesses' own interest to support the program as servers of alcohol can be charged for possible manslaughter when serving alcohol to drunken people.<sup>26</sup> Similarly, Coatings Care is a voluntary program which companies that deal with paints and coatings may follow to meet regulatory

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24 Submission number 35, p. 5.

25 Submission number 30, p. 16.

26 Taskforce consultation with Business and Professional Women of Australia, Melbourne, 22 November 1999.

requirements in a manner complementary to their operations. The Department of Industry, Science and Resources submitted that the program assists companies to comply with the diverse requirements for protecting worker health, safety and the environment.<sup>27</sup>

## **Service charters**

Related to information campaigns, 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 organisation. As discussed in the ACCC's submission, the move for service charters started in the United Kingdom in the early 1990s, but they are becoming increasingly popular in other countries.<sup>28</sup> In Australia, the Commonwealth Government and some State and local governments are implementing charters. Private companies are also starting to follow suit. For example, the AAMI insurance company has recently produced a service charter which sets out some clearly defined rights for its customers.<sup>29</sup>

## **Internal complaints handling departments and procedures**

Another form of self-regulation is the use of internal complaints handling departments and procedures. Companies are increasingly looking at ways to gain a competitive edge over their rivals in the marketplace. In particular, bigger companies have an advantage in this area by virtue of their size. Many companies are now internalising consumer protection by establishing corporate consumer affairs departments. For example, the NRMA has a Customer Relations unit that provides services for customers such as interpreters and conference call facilities.<sup>30</sup>

A further development has been the use of internal complaints handling systems. For example, the Insurance Council of Australia pointed to the *General Insurance Code of Practice* establishing internal dispute arrangements within each insurer.<sup>31</sup> Generally, before a complaint goes to an external disputes scheme, businesses will try and solve it internally as a first port of call. Standards Australia, which is a non-government body, has also developed a Standard on Complaints Handling (AS4269).<sup>32</sup>

In addition, companies have established their own internal/company-based compliance systems. Standards Australia has recently released an Australian standard on Compliance Programs (AS3806).<sup>33</sup> This standard proposes requirements

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27 Submission number 31, pp. 11-12.

28 Submission number 42, p. 31.

29 Taskforce consultation with the Society of Consumer Affairs Professionals in Business, Canberra, 7 December 1999.

30 Submission number 7, p. 4.

31 Submission number 18, p. 2.

32 Submission number 42, p. 32.

33 Submission number 42, p. 31.

and recommendations for the development, implementation and maintenance of a compliance system that can assist an organisation in its compliance with the law.

### **Accreditation, licensing and membership certification**

Accreditation, licensing and membership certifications are a means to create consumer confidence in the level of professionalism and technical competence of members of industry and professional associations. It also serves to set standards within an industry or profession. For example, the accounting profession requires prospective members to complete professional accreditation programs prior to being admitted as either a certified practising accountant or chartered accountant.<sup>34</sup>

### **Quality assurance systems**

Quality assurance systems (QAS) are another form self-regulation that aim to enhance the quality of a good or service. For example, the increasing adoption of QAS reflects the widespread recognition of the emerging role quality management is playing in world agrifood markets. In the meat and livestock industry, Flockcare is an on-farm QAS introduced by the Sheepmeat Council of Australia to provide a systematic way to ensure producers supply a safe, consistent product while reducing waste and on-farm costs.<sup>35</sup>

### **Standards**

Another common type of self-regulation is the use of standards. Many standards are developed to provide a demonstration that certain technical requirements are being met. For example, there are standards in engineering that need to be met before a professional engineer is registered. These standards of competency are measured against a benchmark at the time of first registration and are required to be progressively enhanced through continuing professional development.<sup>36</sup>

Australian standards are consensus-based voluntary documents with which compliance is non-mandatory unless incorporated into law or called up in contractual documents. For example, Standards Australia has published four toy safety standards (AS1647 series) which apply to the construction of toys so that the risk of ingestion for children less than three years of age is reduced.<sup>37</sup> Presently, only one of these standards for small parts has been declared mandatory.

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34 Submission number 33, p. 2.

35 Submission number 28, p. 2.

36 Submission number 26, p. 17.

37 Submission number 23, p. 2.

## Codes and dispute resolution schemes

By far the most common form of self-regulation is codes of conduct or codes of ethics that are usually built around membership of a professional or industry association. Codes can range from setting out general statements of principle about how an industry or business will operate, to listing specific business practices which are guaranteed. They can either contain minimum standards or standards, which are, aimed at best practice.

### *Institutional and functional codes*

Codes can also be institutional or functional in their nature. Most codes are institutionally based — that is, codes are industry based. As discussed in chapter 5 — industry environment and market circumstances where self-regulation is likely to be most effective, a major contributing factor to an effective code of conduct is the strength of industry support. However, some products/services can exist across different sectors and industries. Hence a functional self-regulatory scheme covers products/services that span more than one industry. An example of a functional code is the Australian Direct Marketing Association (ADMA) Code. ADMA represents over 400 organisations involved in information-based marketing including financial institutions, publishers, catalogue and mail order traders, Internet-based marketers and service providers, airlines and travel services, telecommunications service providers, and a host of other users and suppliers of direct marketing services.<sup>38</sup>

### *Dispute resolution*

Codes can also differ in other respects, including whether or not they provide a method of dispute resolution depending on the nature of the specific problems trying to be addressed. For example, the *National Code for the Safe Production of Enzymatic Detergents* allows the manufacture of enzymatic detergents in Australia. Following the production requirements of the code, manufacturers monitor their workplaces using the analytical procedures it specifies to ensure that employees are not exposed to enzyme dust.<sup>39</sup> Whereas, there are a number codes that have an accompanying alternate dispute resolution (ADR) scheme. Some of the biggest ADR schemes are the Australian Banking Industry Ombudsman, the Telecommunications Industry Ombudsman, and the General Insurance Enquiries and Complaints Scheme.

### *Sanctions*

Codes may also differ in their level of sanctions for non-compliance. The *Jewellery and Timepieces Industry Code* lists the types of remedial action that can apply when the code is breached such as withdrawal of, or corrective advertising, writing to

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38 Submission number 36, p. 2.

39 Submission number 27, p. 9.

consumers, offering consumers a refund, offering alternative merchandise or offering a raincheck.<sup>40</sup>

### **Compliance**

In addition, compliance by industry with a code of conduct can be mandatory or voluntary. For example, section 113 of the *Insurance Act 1973* makes it mandatory for general insurers of certain types of policies to be members of the *General Insurance Code of Practice*.<sup>41</sup> In contrast, the advertising self-regulatory scheme is voluntary in its nature and participants do not have to abide by the Advertising Board's determinations.<sup>42</sup>

In effect, there is a spectrum of different codes within the codes framework. This re-iterates the Taskforce's finding that there is no one model for self-regulation.

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40 Taskforce consultation with the Jewellers Association of Australia, Canberra, 7 December 1999.

41 Submission number 18, p. 6.

42 Submission number 12, p. 2.

## Chapter 4

# Gaps and overlaps in the coverage of self-regulation

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*The Taskforce is to inquire into and report on gaps and overlaps in the coverage of self-regulation.*

There has been considerable growth in the number of self-regulatory schemes across many industries. In addition, these self-regulatory schemes operate in dynamic markets, which are influenced by globalisation, increasing vertical integration, and the growth of 'hybrid' products that span traditional markets or industries.

As a consequence, gaps and overlaps can emerge in the coverage of various products, services, sectors and industries. For example, a specific problem may emerge from the use of new technology in an industry and may not be covered by any form of regulation. Self-regulation is one means to overcome any specific problems associated with the new technology. Similarly, some self-regulatory schemes may have a degree of overlap where the distinction between products or services has become blurred.

This chapter looks at the broad gaps and overlaps in self-regulation in Australia.

### Conclusions

3. Gaps and overlaps continually emerge and re-emerge in dynamic markets;
4. A 'gap' in the market does not necessarily mean that self-regulation is the appropriate solution;
5. Self-regulation is a flexible response to market failure and may fill a 'gap' quickly and efficiently; and
6. Some small businesses can have difficulties in joining self-regulatory schemes as can consumers.

## Converging sectors and product lines

The Taskforce considers that with increased technology and increasing merger of product lines and new products, there will always be gaps and overlaps emerging. Therefore, it is important to monitor self-regulation to ensure that it is addressing what it was designed to achieve and to assess whether it is still the most appropriate form of intervention.

The financial services industry is an example of an industry that is undergoing rapid and continuous change with new technology and new products. There is also an increasing merger of product lines. For example, some banks are now selling insurance policies under separate entities.

Similarly, in the telecommunications sector gaps and overlaps may increase as technology and discrete industries converge. Presently, separate self-regulatory arrangements currently apply to the telecommunications, Internet and broadcasting industries. The Telecommunications Industry Ombudsman stated that at the moment there are only a few and episodic instances of self-regulatory overlap, although the nature of these overlaps, driven by convergence of both technology and of previously discrete industries, suggest that they will increase.<sup>43</sup> Similarly, the Service Providers Industry Association commented that there are daily examples where such separation is proving problematic, for example in digital television, datacasting, and Internet content.<sup>44</sup> Cable & Wireless Optus also commented that as the technologies of these industries converge, there will be an increasing need for regulatory schemes to respond in a manner which enables industries to deliver market efficiencies.<sup>45</sup>

The Taskforce discusses the role of institutional and functional self-regulatory schemes whilst weighing up the importance of industry ownership in chapter 8 — Options that facilitate the improvement and harmonisation of dispute resolution schemes.

## Globalisation

The markets in which businesses operate are also becoming increasingly global, with consumers trading online with merchants all over the world. In particular, Internet use has increased global competition in consumer markets. As a result, self-regulation initiatives need to take into account international as well as domestic industry participants.

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43 Submission number 21, p. 7.

44 Submission number 25, p. 2.

45 Submission number 6, p. 5.



The Australian Consumers' Association stated that consumers are increasingly interacting across jurisdictions and finding examples of good practice. If domestic industry is going to compete in this market it will need to match these practices.<sup>46</sup>

Similarly, the NRMA considered that with the increasingly globalised nature of many markets and the growth of e-commerce, there is a need for international harmonisation of codes.<sup>47</sup> Clayton Utz stated that dialogue between industry bodies in Australia and in overseas markets should be actively encouraged and pursued to develop harmonious self-regulatory schemes which encourage bilateral trade and discourage protectionism where possible. Clayton Utz submitted that subscription to overseas self-regulation schemes by Australian organisations and subscription to Australian schemes by foreign organisations should also be encouraged. The development of international or multi-jurisdictional self-regulation schemes could also occur.<sup>48</sup>

The Australian Toy Association commented that any imposts or obligations on companies under self-regulatory arrangements should not disadvantage Australian companies via international competition.<sup>49</sup> Similarly, the National Furnishing Industry Association of Australia commented that its code is becoming a burden in terms of competing against cheap imports.<sup>50</sup> Harmonisation will help prevent Australian businesses from losing customers to overseas countries that may offer cheaper products but provide less consumer protection through industry self-regulation.

In developing and modifying self-regulatory schemes, the Taskforce considers that the impact of globalisation needs to be considered. The challenge is to implement schemes that provide choice and security for the consumer while enhancing competitiveness of Australian business.

## **Gaps in the market**

### **Is self-regulation appropriate?**

As discussed in chapter 2, the type of self-regulation (or any regulation) should depend on what is trying to be achieved. The following chapter (chapter 5) discusses the general market circumstances and industry environments where self-regulation may be appropriate.

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46 Submission number 16, p. 2.

47 Submission number 7, p. 6.

48 Submission number 43, p. 4.

49 Submission number 23, p. 3.

50 Taskforce consultation with the National Furnishing Industry Association of Australia, Melbourne, 23 November 1999.

Hence, a 'gap' in a market where there is no form of regulation may not necessarily mean that self-regulation is the answer. In fact, no regulation, or explicit government regulation could be the minimum effective solution.

The Taskforce stresses that the specific problems and/or objectives need to be clearly specified before any type of self-regulation is considered, then the benefits and costs of ways to deal with the problem can be analysed together with consultation with effected parties.

If self-regulation is the appropriate tool to deal with specific problems and/or objectives, then the Taskforce considers that self-regulatory schemes can be very flexible and responsive and to market circumstances and a changing industry environment. For example, the Telephone Information Services Standards Council was set up by industry in response to consumer complaints about primarily '0055/1900' telephone numbers. The Council has also been modified to include new competitors such as Optus and service providers.<sup>51</sup>

## **Small business**

Some small businesses can find it difficult, or may be unwilling, to be part of a self-regulatory scheme, perhaps because they do not perceive themselves as belonging to a particular industry segment. The Micro Business Network stated that those businesses that are not currently involved in an industry association would find it hard to regulate and many small businesses are anti-regulation from a general viewpoint.<sup>52</sup> Similarly, the Office of Small Business suggested that it is generally accepted that small business is less able than big business to cope with the costs of participating in a scheme such as a code of conduct, particularly when such a scheme is funded by industry levies. The Office of Small Business asserted that small businesses in many cases have no option but to pass on these costs to the consumer in the form of higher prices for goods and services. It argued that this can place small business at a competitive disadvantage to their larger counterparts.<sup>53</sup>

The Office of Small Business commented that although small businesses often have legal recourse in disputes, their access to justice can be constrained by the cost of going to court, delays before their case is heard, the disparity in the quality of representation and their need to preserve business relationships. It suggested that in many cases, neither party achieves a satisfactory result from a Court judgement.<sup>54</sup>

During its consultations, observers also noted that smaller industry players can find it difficult to influence the development and administration of self-regulatory

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51 Taskforce consultation with the Telephone Information Services Standards Council, Sydney, 1 March 1999.

52 Submission number 2, p. 1.

53 Submission number 38, p. 3.

54 Ibid.

schemes.<sup>55</sup> Australian Business Limited also commented that some small businesses prefer the certainty of regulation.<sup>56</sup>

Self-regulatory approaches can offer small business a low-cost, quick and flexible system for resolving disputes. Self-regulation can also assist small business to understand and comply with the law.

The Taskforce discusses ways in which self-regulation can be more readily accessible to small businesses in chapter 6 — good practice and cost-effective practice in self-regulation. This discussion includes items such as the funding of schemes not placing businesses at a competitive disadvantage, a transparency of fees, and possible small business representation.

**Awareness of codes**

Another issue that could be loosely termed as a ‘gap’ is that consumers may not be aware of various dispute-handling schemes. The Consumer Law Centre of Victoria, Consumer Credit Legal Service of Victoria and the Financial and Consumer Rights Council of Victoria suggested that only a small proportion of Australian consumers are empowered to be able to advocate on their own behalf within the marketplace and challenge unsatisfactory behaviour by industries.<sup>57</sup> Further, the Law Council of Australia points out that statistics often do not take into account the reasons why and how the disputes are resolved but simply state that they are ‘resolved’. The Council argues that many of the disputes are resolved through consumer frustration and ultimate abandonment of complaints.<sup>58</sup>

In addition, the *Consumer Redress Study* (1999) identified the most and least common demographic characteristics of a typical user of a redress mechanism:<sup>59</sup>

**Most Common**

Age	Sex	Education Level	Employment Status	First Language	Place of Residence
45-54	Male	At least completed high school	Full-time	English	Metropolitan
35-44	Male	Some tertiary education	Full-time	English	Metropolitan

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55 For example, Taskforce consultation in Bunbury, 20 July 2000.  
 56 Australian Business Limited, 18 July 2000.  
 57 Submission number 29, p. 12.  
 58 Submission number 19, p. 5.  
 59 Consumer Affairs Division, Commonwealth Department of Treasury 1999, *Consumer Redress Study*, released by the Minister for Financial Services and Regulation, the Hon Joe Hockey MP. This document is available on the Internet at <http://www.treasury.gov.au> (choose Consumer Affairs/Publications/Industry Self-Regulation Publications).

## Least Common

Age	Sex	Education Level	Employment Status	First Language	Place of Residence
18-24	Female	Did not complete high school	Part-time	Non-English	Remote area

While the sample data were relatively small, and therefore generalisations from the information should be made with caution, the survey outcomes reflect the experience of the Consumer Law Centre of Victoria, Consumer Credit Legal Service of Victoria and the Financial and Consumer Rights Council of Victoria. Further, the results are echoed in data collected by the Energy Industry Ombudsman of Victoria in relation to the demographics of its complainants.<sup>60</sup>

The Taskforce considers that this stresses the importance of effective consumer access to self-regulation (see further discussion on this in chapter 6 — good practice and cost-effective self-regulation methods and approaches).

## Regulatory gaps in the market

A number of organisations brought to the Taskforce's attention the existence of gaps in particular markets or industries.

The joint submission from the Consumer Law Centre of Victoria, Consumer Credit Legal Service of Victoria and the Financial and Consumer Rights Council of Victoria submitted that there are a number of gaps in markets. For example, they submitted that there are gaps in the airline industry, financial services industry, food industry and in telecommunications. They commented that there is a need for urgent and appropriate responses to maintain public faith in co-regulatory processes.<sup>61</sup>

The Australian Securities and Investments Commission (ASIC) also commented that there are gaps in the coverage of formal alternative dispute resolution schemes in the finance services industry including:

- credit (finance companies, building societies and some credit unions);<sup>62</sup>
- accountants (although accountants that provide financial advice are required to be members of an alternative dispute resolution scheme);
- real estate investments other than real estate managed investments;

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60 Submission number 29, p. 12.

61 Submission number 29, pp. 3-9.

62 The Taskforce notes that under the Uniform Consumer Credit Code, consumer credit is the responsibility of the States.

- some 'transaction only' activities (e.g. on-line share broking services); and
- some cross-border financial services.

However, ASIC commented that it does not believe that all these areas need immediate coverage, but rather that consideration should be given as to whether the absence of coverage by dispute resolution schemes is a reflection of a lack of market problems or because of the difficulties in establishing schemes in such areas.<sup>63</sup>

NSW Legal Aid also commented that there are gaps in consumer credit insurance policies.<sup>64</sup>

Further, the Consumer Law Centre of Victoria observed that interest rates have been very high in the pawnbroking industry, and there has been no push by the industry to set up a code of practice. The Centre commented that any self-regulatory scheme should look at the types of consumers using the service.<sup>65</sup>

The Taskforce re-iterates that a gap in the market where there is no form of regulation may not necessarily mean that self-regulation is the most appropriate solution, or indeed that any form of regulation is required. The type of intervention (if any) will depend on the nature of the specific problem and should be the effective minimum solution.

## **Overlap in the market**

### **Overlapping schemes**

The Taskforce believes that in the great majority of cases the nature of any consumer complaint is likely to make the appropriate code self-evident. For example, if there are concerns over an advertisement, then the consumer can complain to the Advertising Board. The Taskforce is conscious of the need for a seamless transition between and among codes for the benefit of consumers and to avoid duplication of costs. It is vital to retain the 'one stop shop' approach to complaints handling. From the consumers' perspective, a multiple complaints handling environment can be inefficient, burdensome and frequently frustrating.

However, as discussed above, the growth of different products and changing technology means that there can be multiple schemes in an industry (e.g. financial services industry). For example, ASIC commented that the Financial Industry Complaints Scheme (FICS) and Financial Services Complaint Resolution Scheme had a substantial degree of overlap in the area of complaints about licensees who provide investment advice to retail investors and about responsible entities of managed

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63 Submission number 37, p. 22.

64 Submission number 24, p. 6.

65 Taskforce consultation with the Victorian Consumer Law Centre, Melbourne, 23 November 1999.

investment schemes. These schemes were merged on 1 January 2000, and will now operate under the FICS banner. ASIC commented that this merger will deliver both cost savings to industry and more consistent complaints handling for consumers.<sup>66</sup>

In contrast, the Australian Direct Marketing Association suggested that overlapping codes is a strength rather than a weakness of self-regulatory systems.<sup>67</sup> Indeed it is arguable that some degree of overlap is necessary in order for these systems to be effective since any significant number of complaints 'falling between the cracks' would tend to bring the whole system into question.

Australian Business Limited disagreed with the notion that self-regulation 'overlaps' in coverage across products, services, sectors or industries, suggesting that the problem stemmed from the detailed and specific nature of self-regulatory schemes. Australian Business suggested that the answer lay in the development of flexible self-regulatory schemes of general application, promoting compliance with regulatory obligations.<sup>68</sup>

As a general rule, the Taskforce considers that any significant overlap between schemes should be avoided. Further, multiple schemes in the same sector can be confusing for consumers. As pointed out by the NSW Legal Aid it has the potential for members to seek out the scheme that they perceive will be most sympathetic to them.<sup>69</sup>

The Taskforce also encourages industry groups that administer complaints handling systems to have their own networks to ensure complaints are channelled appropriately. These networks need to be constantly nurtured. For example, in the financial services industry, the General Insurance and Enquiries and Complaints scheme stated that consumers are referred between schemes where necessary. This scheme and the Financial Industry Complaints Scheme (FICS), have a direct telephone line between the services so that consumers may be transferred directly when necessary. In addition, these schemes also regularly participate in roundtable meetings with other dispute resolution scheme managers and with ASIC.<sup>70</sup>

## **Multiple membership of codes**

A related issue to scheme overlap is that companies may be members of more than one code and disputes scheme, and for larger companies this can extend to three or four. For example a major finance company providing banking and insurance services directly to consumers may belong to the Banking Code, the General Insurance Code of Practice and the Code of the Australian Direct Marketing

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66 Submission number 37, p. 21.

67 Submission number 36, p. 10.

68 Submission of 18 July 2000.

69 Submission number 24, p. 7.

70 Submission number 8, p. 3.

Association.<sup>71</sup> Similarly, in the telecommunications industry, some industry players participate in multiple forums, such as the Australian Direct Marketing Association Code, or the Internet Industry Association Code.<sup>72</sup>

In addition to multiple schemes, there is also often a mix of self-regulatory and regulatory frameworks companies have to comply with, as well as national and State schemes.

In the financial services industry, to the extent that schemes continue to operate along sectoral or industry lines (e.g. general insurance, life insurance and managed investments, banking) the ASIC requirement to join an approved scheme means that there will be circumstances in which participants are members of more than one scheme. For example, a bank that is a member of the Australian Banking Industry Ombudsman will be required to join an approved scheme (currently Financial Industry Complaints Scheme) in respect of its retail advisory activities.

It can be confusing and costly for companies to comply with multiple schemes. However, it is important to recognise industry differences and tailor self-regulation to the circumstances of each industry. Also, there are other factors driving multiple schemes such as the dynamic nature of markets and companies delving into different products and services.

The Taskforce considers that better co-ordination of self-regulatory schemes may allay these concerns. Some approaches to coordinate self-regulation are discussed in chapter 7 — approaches to promoting and coordinating industry self-regulation, including the appropriate role of government.

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71 Submission number 18, p. 5.

72 Taskforce consultation with Government agencies, Canberra, 6 December 1999.





## Chapter 5

# **Industry environment and market circumstances where self-regulation is likely to be most effective**

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*The Taskforce is to inquire into and report on those industry environments and market circumstances where different types of self-regulation are likely to be most effective.*

There is a general recognition that industry self-regulation is often more flexible and less costly for both business and consumers than direct government involvement.<sup>73</sup> However, it is necessary to ensure that self-regulation is the appropriate form of intervention given particular industry environment and market circumstances, otherwise inappropriate intervention could create new problems.

There has already been some work done on the market preconditions for effective self-regulation. However, the Taskforce was keen to not only learn from other work that has analysed where self-regulation may be most effective, but also wanted rigorous analysis conducted to test hypotheses. The importance placed on a comprehensive and thorough analysis of market circumstances where industry self-regulation was likely to be most and least effective, became the catalyst for the Taskforce to engage a consultant.<sup>74</sup> The Taskforce required the consultant to structure research around case studies where industry self-regulation had been implemented. The aim of this research was not to identify self-regulatory success and failure in particular industries but to more broadly identify the characteristics of the environment and market that have influenced the effectiveness of self-regulation.

This chapter draws out the Taskforce findings based on a review of existing information, the views of stakeholders collected through the consultation process, and advice from the consultant.

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<sup>73</sup> See chapter 6.

<sup>74</sup> Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*. Its report can be located at the Taskforce webpage at <http://www.treasury.gov.au/self-regtaskforce>.

## **Conclusions**

### ***Nature and extent of market failure***

7. Self-regulation is likely to be most effective where there are clearly defined problems but no high risk of serious or widespread harm to consumers.

### ***Market structure***

8. An industry environment with an active industry association and/or industry cohesiveness is most likely to administer effective self-regulation as industry participants are more likely to commit financial resources, consult with stakeholders and monitor the effectiveness of self-regulation.
9. Self-regulation is less effective where there is a broad spread of smaller businesses that do not communicate with each other.
10. Self-regulation is more likely to be effective in a competitive market as industry participants are more likely to be committed to it, either to differentiate their products, or in fear of losing market share.
11. A more mature industry may be able to administer more effective self-regulation, as industry participants are more likely to have sufficient resources and be more committed while any 'shakeout' of rogue traders will already have occurred.

### ***Industry and consumer interests***

12. Self-regulation is likely to be most effective where firms recognise that their future viability depends not only on their relationship with their current customers and shareholders, but also on the wider community.
13. The more incentives there are for industry participants to initiate and comply with self-regulation, then the more chance a scheme can remedy specific industry problems.
14. The extent to which industry participants are prepared to sign up to a self-regulatory scheme will affect the ability of that scheme to provide effective self-regulation. Where a scheme has a high level of consumer recognition, to the point where consumers will favour scheme participants when making purchasing decisions, then the scheme is most likely to be effective. This will create incentives for non-members to join the scheme.

## Conclusions

15. The interests of all levels of industry should be considered in the development and maintenance of a self-regulatory scheme, and particularly the level of involvement of smaller businesses where appropriate.
16. Where there are cost advantages and/or increased flexibility in self-regulatory initiatives to address specific industry problems compared with government regulation or the court system, then there is a greater chance of improving market outcomes for both business and consumers, and minimising compliance costs for businesses.

## Office of Regulation Review checklist

There has already been some work done in identifying industry environments and market circumstances that are more likely to lead to effective self-regulation. In particular, a general guide to whether self-regulation is appropriate is the Commonwealth Office of Regulation Review's Regulatory Impact Statement checklist. The checklist states that self-regulation should be considered where:

- there is no strong public interest concern, in particular, no major public health and safety concern;
- the problem is a low risk event, of low impact/significance, in other words the consequences of self-regulation failing to resolve a specific problem are small; and
- the problem can be fixed by the market itself, in other words there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements (e.g. for industry survival, or to gain a market advantage).

In addition, for self-regulatory industry schemes, the checklist determines success factors to include:

- presence of a viable industry association;
- adequate coverage of the industry by the industry association;
- cohesive industry with like minded/motivated participants committed to achieving the goals;
- voluntary participation — effective sanctions and incentives can be applied, with low scope for the benefits being shared with non-participants; and

- cost advantages from tailor-made solutions and less formal mechanisms such as access to quick complaints handling and redress mechanisms.<sup>75</sup>

During the inquiry, these observations were often reinforced and expanded upon. The following sections discuss these observations and other industry environments and market circumstances where self-regulation is more likely to be effective.

## **Nature and extent of market failure**

### **Clearly defined problems and low risk of serious or widespread harm to consumers**

The Taskforce considers that self-regulation is most effective where there are clearly defined problems and low risk of serious or widespread harm to consumers. In other words, the consequences of self-regulation failing to resolve a specific problem would not seriously harm consumers. Where there are strong public interest concerns, such as major health and safety issues, and the specific problems are of high risk and/or high frequency then other forms of regulation may be more appropriate.

The Australian Food and Grocery Council commented that self-regulation is most suitable where there is no strong public interest, health or safety concern and the potential market failure would result in an event of low risk.<sup>76</sup>

Cable & Wireless Optus suggested that it is important to realise that the self-regulatory process cannot be used to resolve all competitive and public policy issues that arise within the industry. It submitted where there are significant competition issues or where the commercial interests of carriers with significant power are affected, self-regulation is relatively ineffective in driving policy change expeditiously. Therefore, Cable & Wireless Optus argued that there clearly remains a significant role for statutory bodies in regulating industries particularly those dominated by vertically integrated monopolies with significant market power.<sup>77</sup> PowerTel also commented that there are elements of regulation that must be kept outside of self-regulation such as monopoly control.<sup>78</sup>

In the agriculture, fisheries and forestry industries, the Department of Agriculture, Forestry and Fisheries Australia recognised that there will be circumstances in which self-regulation may not be the most appropriate form of regulation. It commented that the expectations of Australian consumers and customers overseas will see some form of statutory regulation in relation to food safety and in the area of import and

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75 Office of Regulation Review 1998, *A Guide to Regulation*, 2nd edition. This publication is available from the following website: [www.pc.gov.au/orr/](http://www.pc.gov.au/orr/).

76 Submission number 30, p. 3.

77 Submission number 6, pp. 2-3.

78 Submission number 9, p. 1.

export inspection and the management of agricultural and veterinary chemicals for some time to come.<sup>79</sup>

The Institution of Engineers commented that explicit regulation rather than self-regulation should regulate the engineering services that result in risk to the health, safety and welfare of the community. For the public, the risk of inadequate engineering depends on their exposure to engineering services. It submitted that every person's lifestyle is dependent on engineering via transport, communications, manufacturing and utilities.<sup>80</sup>

Standards Australia commented that a risk based approach should be taken into account when deciding whether regulations should be put into place with the level of regulation being assessed against the potential harm resulting from non-compliance.<sup>81</sup>

Similarly, the consultant's report submitted that self-regulation will be more effective where the product supplied is not essential to the welfare of individuals. The consultant's report submitted that the effectiveness of self-regulation as a means of achieving such social welfare objectives depends on the extent to which firms have both the incentive and ability to achieve them. In general, the incentive for firms to self-regulate will be greater, the greater the extent to which those firms stand to benefit from those self-regulatory activities.<sup>82</sup>

The Taskforce was interested to learn that self-regulation tends to be more effective in those markets where consumers and other individuals in the community who are adversely affected by market failure share a common interest in eliminating that market failure.<sup>83</sup>

The Taskforce considers that good practice in self-regulation involves applying an appropriate scheme to a specific problem or objective. Ascertaining which scheme should be applied will depend on the nature and risk of the problem and the consequences of no action. The Taskforce considers that self-regulation is most effective where there are clearly defined problems and a low risk of serious or widespread harm to consumers.

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79 Submission number 28, p. 18.

80 Submission number 26, p. 18.

81 Submission number 13, p. 4.

82 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. 38.

83 Ibid, p. 34.

## Market structure

### Active industry association

A major contributing factor to effective self-regulation is the strength of industry support. Evidence of industry support can be gauged by the existence of an industry association. The ability and willingness of industry to organise itself collectively demonstrates a capacity to undertake self-regulation. An active industry association is most likely to lead to industry participants meeting the schemes' objectives.

The Australian Food and Grocery Council argued that active, well resourced industry associations are critical to providing the organisational structures and processes necessary for effective management of voluntary codes including their development, monitoring and enforcement, and to ensure they provide net benefit and are not unduly restrictive of competition.<sup>84</sup>

The Victorian and Murray Valley Wine Grape Growers Council also agreed that a well-resourced industry association is more likely to provide effective self-regulation.<sup>85</sup>

Similarly, the consultant's report stated that the development of a strong industry association covering the majority of firms in a market can form a solid foundation for effective self-regulation.<sup>86</sup>

The Department of Industry Science and Resources also commented that a self-regulatory regime stands a greater chance of success if it is backed by a large and well structured industry association in a market with few industry participants. Primarily, this assists in regards to the costs associated with establishing and maintaining regimes; ensuring broad participation; and issues of enforcement, including penalties and sanctions. It noted that where no large industry association exists, costs would appear to be a prohibiting factor in developing and administering a regime.<sup>87</sup>

Australian Business Limited commented that where self-regulation operates within the context of general law such as the Trade Practices Act and the Fair Trading Acts, then it can add detail and industry-specific guidance to help market participants comply with the law and achieve competitive conduct. It commented that for this outcome to occur, strong general law is required accompanied by a group of market participants, usually organised around an industry body, who share a desire to set

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84 Submission number 30, p. 3.

85 Taskforce consultation in Melbourne, 13 June 2000.

86 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. 36.

87 Submission number 31, p. 22.

some standards of conduct to guide participants and help adjudicate or resolve disputes.<sup>88</sup>

Insurance Enquiries and Complaints Limited submitted that its scheme and the *General Insurance Code* are effective because of the Australia wide commitment from the industry and the Insurance Council of Australia. It submitted that all industry members selling personal lines insurance are involved, as are consumers, policyholders, consumer groups, Federal Government and the Insurance Council. There is a high level of industry 'ownership' of the code and the scheme, in other words a high level of participation in the setting up, funding and ongoing development of them.<sup>89</sup>

On the other hand, the Department of Health and Aged Care commented that a challenge for self-regulatory schemes is where there is a lack of effective industry associations or where industry associations misrepresent industry members, or where there is limited commitment to a Code within the industry.<sup>90</sup>

Similarly, in its regional consultations, the Taskforce heard that self-regulation is not conducive to small industries because the industry association does not have the money to promote the scheme.<sup>91</sup> However, the Taskforce notes that the type of self-regulatory scheme will depend on what is trying to be achieved and it should be the one that effectively solves the identified problem and minimises costs for industry.

Micro Business Network commented that those businesses in the micro business sector (including home-based businesses) that are not part of an industry association would find it difficult to regulate because they have few resources and work long hours with often very little capital. It commented that microbusinesses operate in every industry but are difficult to target.<sup>92</sup>

ASIC also noted that the need for a strong industry association may be reduced when the self-regulatory scheme has a 'functional' focus rather than institutional coverage. For example, a code of conduct that covers similar products or services regardless of the institutions that offer such products may provide a more commercial basis for membership than that which derives from a common industry perspective. That is, the common interest and commitment may be driven by a desire to meet appropriate market standards rather than the desire to meet the industry association's requirements.<sup>93</sup>

The ability and willingness of industry to organise itself collectively demonstrates a capacity to undertake self-regulation. An active industry association and/or industry

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88 Australian Business Limited, 14 June 2000.

89 Submission number 8, p. 3.

90 Submission number 44, pp. 12-13.

91 Taskforce consultation in Tamworth, 28 June 2000.

92 Submission number 2, p. 1.

93 Submission number 37, p. 8.

commitment is most likely to lead to industry participants meeting the schemes' objectives.

### **Cohesive industry**

An industry environment where there is a cohesive industry with industry participants committed to achieving their goals is most likely to administer effective self-regulation.

The Department of Health and Aged Care commented that a challenge for self-regulation is where there is diversity within the industry (such as the private health sector) and industry members have diverging rather than converging interests. The Department was conscious, however, that this may be addressed through structured and cooperative education strategies.<sup>94</sup>

The Association of Superannuation Funds Australia commented that in order for effective self-regulation it is important to have relatively homogeneous objectives and cultures within the industry to reach consensus.<sup>95</sup> Similarly, the Institution of Engineers commented that self-regulation requires extensive community and business education, and requires a commitment from all industry players to work effectively.<sup>96</sup>

The Investment and Financial Services Association commented that industry based complaints schemes rely heavily on the commitment of industry for their success in resolving consumer complaints and building consumer confidence. A sense of 'ownership' on the part of industry participants is essential to maintenance of this commitment and to retention by schemes of their self-regulatory character and effectiveness.<sup>97</sup>

### **Competitive market**

Competitive markets may be more conducive to more effective self-regulation. In a more competitive market, participants are most likely to be committed to it to differentiate their products, or in fear of losing market share.

For example, the NRMA commented that the combination of self-regulation and competitive market forces creates a strong incentive for companies to comply with, and in many cases exceed, the levels of customer service and other conditions that are specified in self-regulatory codes of practice. Non-compliance with the codes by a particular company could see it lose market share to competitors.<sup>98</sup>

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94 Submission number 44, p. 12.

95 Submission number 22, p. 3.

96 Submission number 26, p. 23.

97 Submission number 41, p. 4.

98 Submission number 7, p. 3.



NRMA commented that the main markets that it operates in, namely general insurance and financial services, are characterised by intense competition between a significant number of industry participants, and this creates a strong incentive for companies to use adherence to codes as a marketing tool. It submitted that competition is also becoming more intense as new distribution channels such as e-commerce emerge.<sup>99</sup>

Similarly, ASIC commented that self-regulation is more likely to be effective in a competitive market, as it will lessen the risk of such regulation becoming an anti-competitive structure.<sup>100</sup> However, as noted above, this may also mean that the achievement of industry common interest can be more difficult.

The consultant's report also commented that self-regulation tends to be more effective in those markets where there are relatively large numbers of competitive firms producing relatively homogeneous products. In such markets, firms can reap significant economies of scale by grouping together to self-regulate the activities of those firms within that group that impose costs on consumers, other firms within that group and the wider community. In addition, because of the homogeneous nature of the product there is a much greater probability that the external costs generated by one firm will adversely affect the sales of other firms producing those goods.<sup>101</sup>

On the other hand, the Australian Consumers' Association considered that self-regulation works well when there is a small number of large players (such as banking or insurance) as opposed to a large number of small players (financial planners).<sup>102</sup>

Similarly, during Taskforce consultations some industry associations commented that fewer people or strong leadership makes it easier to self-regulate as industries can get the level of detail they desire rather than having generic codes.<sup>103</sup>

The consultant's report noted that self-regulation is less likely to be effective in those markets that are dominated by a very small number of firms due to the existence of large economies of scale in production. In these markets, the firms are more likely to share a common interest in using self-regulation as a means of reducing, rather than increasing, the amount of competition between firms. In fact, in such cases, the ACCC is likely to consider such self-regulation to be anti-competitive.<sup>104</sup>

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99 Ibid.

100 Submission number 37, p. 9.

101 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. 31.

102 Submission number 16, p. 1.

103 Taskforce consultation with the Fund Raising Institute, Sydney, 30 November 1999.

104 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. 31.

The Taskforce considers that self-regulation in a competitive market with homogeneous products is most likely to produce effective self-regulation.

## **Mature industry**

Maturity in the market may be another factor underpinning the effectiveness of self-regulation. The Taskforce considers that a more mature industry with established players may be more willing and able to participate in self-regulation.

For example, the Australian Consumers' Association commented that voluntary self-regulation can have little effect where there are 'cowboys' who are not prepared to participate. It argued that in the telecommunications industry, there are some companies who participate in self-regulation and an increasing number of smaller players who do not. Again, it is a comparatively recently deregulated market. It argued that consumers using these companies have limited access to redress and do not enjoy adequate consumer protection.<sup>105</sup>

However, the Taskforce recognises that it depends on what self-regulation is trying to achieve. For example, a new industry may develop a self-regulatory scheme to develop consumer confidence.

Generally, a more mature industry with established players may be more willing and able to participate in self-regulation.

## **Industry and consumer interests**

### **Wider community awareness**

Self-regulation is likely to be most effective where firms recognise that their future viability depends not only on their relationship with their current customers and shareholders, but also on the wider community.

The consultant's report submitted that many medium to larger firms now recognise that their longer term profitability and viability, and their potential to attract new customers and investors, does not depend solely on how they are viewed by their current customers and shareholders. It also depends on how their activities are viewed by the wider community and the government, who may have a significant influence on their future sales, sources of funds, profitability and the regulatory environment. As a result, those firms are investing considerable amounts of time and money in developing their reputations as socially responsible corporations.

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105 Submission number 16, p. 1.

Introducing self-regulation can be an important factor in improving their corporate image.<sup>106</sup>

The report observed that some self-regulatory codes not only try to improve market efficiency, but also seek to achieve a number of social welfare objectives. For example, the accountants' Code of Professional Conduct not only requires that members must safeguard the interests of their clients and employers, but also that they must not be in conflict with duties owed to the community and its laws.<sup>107</sup> The Taskforce recognises that the failure of firms to act in a manner consistent with society's broad social objectives can have a damaging effect on their overall reputation and profitability, and that this provides a real incentive to implement effective self-regulation.

### **Incentives to make self-regulation effective**

For industry self-regulation to be effective, there needs to be some vested interests or incentives to make it so. In other words, generally self-regulation needs to be in the self-interest of industry to not only occur, but also to be effective. The more incentives for businesses to make self-regulation work, then the more chance that self-regulation will be effective in achieving improved market outcomes for consumers.

The Australian Food and Grocery Council commented that the strongest incentive for industry to ensure that self-regulation is effective is the imperative of the industry as a whole and individual companies, to protect their reputations in the marketplace. It submitted that once a self-regulatory measure is established, and promoted by the industry as a commitment to a set of values and a desire to meet the needs of consumers, individual companies and the industry as a whole will strive to meet the benchmarks it has set.<sup>108</sup>

The Consumers' Telecommunications Network commented that self-regulation will work when there is a substantial identity of interests with common benefit between carriers and an equal bargaining power of parties. It gave the example of 'end to end' network performance (quality of phone call of both ends will be the same) working well because everyone has a common benefit.<sup>109</sup>

During the Taskforce consultations, the Financial Services Consumer Policy Centre commented that there were three reasons why industries self-regulate, namely:

1. threat of government regulation;

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106 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. 24.

107 Ibid, p. 24.

108 Australian Food and Grocery Council, 21 July 2000.

109 Taskforce consultation with Consumers' Telecommunications Network, Sydney, 30 November 1999.

2. promotional opportunity; and/or
3. a means for product differentiation.<sup>110</sup>

The Australian Consumers' Association was of a similar mind, submitting that there may be a 'carrot', such as the opportunity to differentiate a company by adhering to a code (especially if there are 'cowboys' in the market), or a 'stick' (such as industry, media or consumer pressure).<sup>111</sup>

ASIC was of the view that common interest will usually involve a mix of 'positive' and 'negative' incentives. An example of positive common interest is a desire to improve professionalism in the industry. ASIC argued that improving consumer confidence can have both positive and negative elements. Most self-regulatory schemes also seek to improve consumer confidence where it is currently inadequate such as in areas of new technology or where there have been problematic industry practices.<sup>112</sup>

ASIC also submitted that negative self-interest can include the desire to avoid government, which may be an explicit 'threat' via direct government pressure or an implicit 'threat' arising out of the general direction of government policy reforms. At its best, this involves a genuine commitment to self-regulation that will deliver market improvements in a cost-effective manner. ASIC noted that, in the past, comprehensive self-regulatory schemes have generally been developed only where there has been a real threat of government or regulator intervention.<sup>113</sup>

The consultant's report noted that 'external' costs and benefits may not be taken into account by firms and consumers when determining how much they should produce and consume. The effectiveness of self-regulation depends on the extent to which firms have the incentive and the ability to 'avoid' external costs or 'internalise' external benefits and costs.<sup>114</sup>

Where there is no or little common interest, then it is harder to make self-regulation work. For example, PowerTel commented that one element that must be kept outside self-regulation is where significant conflicts of interest are likely to result from the self-regulatory process.<sup>115</sup>

During Taskforce consultations, it was evident that telecommunication codes that deal with commercial interest are being developed a lot faster than consumer codes, because of the self-interest by carriers.

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110 Taskforce consultation with the Financial Services Consumer Policy Centre, as part of a consumer group roundtable discussion, Sydney, 30 November 1999.

111 Submission number 16, p. 1.

112 Submission number 37, p. 8.

113 Ibid.

114 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. 18.

115 Submission number 9, p. 1.

The Service Providers Industry Association (SPAN) commented that instances abound where the rate of progress on important regulatory/self-regulatory initiatives has fallen well below industry aspirations and expectations. Examples demonstrate that a self-regulatory model is ill suited to any situation where there are conflicting commercial interests to be reconciled and particularly where the bargaining power and information available to the parties are unbalanced.<sup>116</sup>

SPAN commented that reasons for delay include the natural tendency of engineering and legal/regulatory people, who make up the self-regulatory workforce, to want to tease out all elements of technical complexity and risk in the process of code formulation. This attitude is understandable, but is tempered in normal business conduct by the imperative of targets and deadlines set by executive management to achieve goals such as time-to-market advantage over competition. That discipline is either absent or given insufficient weight within the self-regulatory framework. SPAN noted that a further reason for delay often quoted is the attitude of incumbent operators whose commercial interests are to perpetuate the status quo as long as possible.<sup>117</sup>

The Consumer's Telecommunications Network was concerned that, often, quality of service and profitability do not go hand-in-hand.<sup>118</sup> During regional consultations, the Taskforce also heard that business-to-business industry self-regulation is difficult to introduce when there is a power imbalance between producers and buyers.<sup>119</sup>

The consultant's report also noted that self-regulation is likely to be less effective in markets where firms, consumers and the wider community do not share a common interest in reducing the market failure.<sup>120</sup>

For industry self-regulation to be effective, then there needs to be incentives to make it work. The more cohesive an industry is with incentives to make self-regulation work, then the more chance that self-regulation will be effective and meet its objectives.

## **Market incentives**

The existence of market incentives to comply with self-regulatory schemes are most likely to increase the effectiveness of self-regulation. An industry environment where self-regulation may be most effective is where there is voluntary participation with effective sanctions and incentives to ensure that there is little scope for non-participants in the scheme to enjoy the benefits.

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116 Submission number 25, p. 3.

117 Ibid.

118 Taskforce consultation with CTN, Sydney, 30 November 1999.

119 Taskforce consultations in Bunbury, 20 July 2000, and with the Victorian and Murray Valley Wine Grape Growers Council, 13 June 2000.

120 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. iv.

For example, the Department of Industry, Science and Resources commented that voluntary participation—backed by strong incentives to participate—appears to provide a stronger framework and higher degree of success, independent of the size of the industry association. Whereas, it commented that mandatory participation and subsequent issues of compliance, enforcement, penalties and/or sanctions appear to depend primarily on the size and strength of the industry association.<sup>121</sup>

The Institution of Engineers also commented that effective self-regulation requires not only standards or codes of practice, but also effective mechanisms for dealing with complaints with these codes.<sup>122</sup>

The Association of Superannuation Funds Australia commented that for self-regulation to be effective industry requires effective enforcement and sanctions, for example the standards need to be well known and/or branded. If an industry member fails to meet these standards then some sanction is required (e.g. fine, 'shaming' or corrective advertising restrictions on licence to operate). It argued that such enforcement also requires/assumes that effective complaint procedures are easily accessible for consumers.<sup>123</sup>

During the consultations, one organisation commented that public shaming is like being 'dumped into custard — it is a soft landing, but it sticks'.<sup>124</sup>

Similarly, NRMA commented that self-regulation also functions effectively in industries where brand name image and customer loyalty are important determinants of market share and profitability. Any damage to brand reputation through non-compliance with a code of practice could be very costly to restore.<sup>125</sup>

On the other hand, the Motor Trades Association of Australia commented that industry self-regulation has not been effective in relation to Franchising and Oilcode because sanctions are ineffective because offending parties can simply 'drop out' of the scheme and continue the offending behaviour. It argued that if there is no penalty or detriment for non-participation, then many will question why they should join.<sup>126</sup>

The Australian Consumer's Association argued that there is need for government underpinning of self-regulation. It considered that the involvement of ASIC in approving codes and dispute schemes, as part of the new regulatory framework for the financial sector being introduced as part of the Corporate Law Economic Reform Program, will ensure that self-regulation 'best practice' principles become legislative requirements.<sup>127</sup>

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121 Submission number 31, p. 22.

122 Submission number 26, p. 15.

123 Submission number 22, p. 3.

124 Taskforce consultation with the Australian Press Council, Sydney, 1 December 1999.

125 Submission number 7, p. 3.

126 Submission number 1, p. 1.

127 Submission number 16, p. 1.

The existence of market incentives and effective sanctions is most likely to increase the effectiveness of self-regulation, where participants will comply more with schemes, which in turn, can improve market outcomes for consumers.

### **Adequate industry coverage**

An important element of self-regulation is coverage. The extent to which industry participants are prepared to sign up to a self-regulatory scheme will affect their ability to provide effective self-regulation. Where a scheme has a high level of consumer recognition, to the point where consumers will favour that scheme, then the scheme is most likely to be effective. There then may be market pressures for other industry participants to join the scheme.

A significant number of organisations commented that wide coverage was an important element of good practice. For example, the Financial Industry Complaints Service considered that self-regulation only works where the whole segment of a particular industry is covered by one scheme and rules are uniform.<sup>128</sup> Similarly, the Association of Superannuation Funds Australia commented that for self-regulation to be effective, then it is necessary to have close to 100 per cent coverage of industry participants.<sup>129</sup>

The Telecommunications Industry Ombudsman stated that its success has been due to its ability to maintain an appropriate level of consumer protection in a rapidly changing competitive environment, with more than substantial coverage of the telecommunications industry. A measure of the extent of this coverage is evident by the increase in membership from three members at its inception to over 900 members at the date of its submission.<sup>130</sup>

Further, ASIC commented that wide industry coverage may be easier to achieve in an industry with fewer and larger organisations as the problem of ‘free riders’ is less apparent. It stated that free rider problems can be of two broad types:

- Industry members may choose not to join the self-regulatory scheme at all. This can be a particular problem in those industries characterised by a large number of firms including many smaller firms or individual practitioners; and
- Industry members may join the self-regulatory scheme, but choose not to properly adhere to the agreed rules.

ASIC argued that in both cases the free riding firm may gain competitive advantages by enjoying the public benefits of self-regulation while not bearing its costs.<sup>131</sup>

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128 Submission number 15, p. 3.

129 Submission number 22, p. 3.

130 Submission number 21, p. 8.

131 Submission number 37, p. 9.

The consultant's report also submitted that self-regulation is more likely to be effective where there is limited scope for adversely affected individuals and firms to 'free ride' on the benefits of self-regulation.<sup>132</sup>

The Office of Small Business commented that a contributing factor to the success of self-regulation is the extent to which all levels of an industry participate in its development and maintenance. It asserted that it is generally accepted that smaller businesses may face proportionally higher costs, both in terms of time and resources, when seeking to provide input into regulatory regimes. It argued that this can lead to a lack of smaller business participation in and ownership of self-regulation, and a consequent lack of commitment by such businesses to the success of a scheme. Hence, the Office of Small Business commented that it is important to ensure that smaller businesses are adequately represented in the development and administration of self-regulation.<sup>133</sup>

The Office of Small Business submitted that the manner in which smaller businesses may be accommodated will vary with each particular circumstance. It commented that an industry association may actively seek the input of all industry levels, alternatively it may be necessary for bodies set up to administer a self-regulatory regime to consult with smaller businesses. The Office of Small Business also commented that it is possible the development and administration of self-regulation will by itself adequately involve all levels of industry.<sup>134</sup>

The effectiveness of any self-regulatory scheme will only be as good as the extent of its coverage. The extent to which industry participants are prepared to sign up to a self-regulatory scheme will affect the ability of them to provide effective self-regulation.

### **Cost advantages and/or increased flexibility**

An industry environment where there are cost advantages and/or increased flexibility in developing and maintaining self-regulation compared with government regulation or the court system can underpin more effective self-regulation. Cost advantages, for both business and consumers, could include less formal mechanisms such as quick complaints handling and redress mechanisms.

The Federation of Australian Radio Broadcasters stated that self-regulation is usually faster and less expensive as well as more flexible and up-to-date than government regulation because industry has a better understanding of the problems and what their realistic solutions are.<sup>135</sup>

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132 Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, p. 38.

133 Office of Small Business, 5 July 2000.

134 Ibid.

135 Submission number 35, p. 1.



Similarly with court costs, a number of organisations commented that self-regulation is quicker and cheaper. For example, the Financial Industry Complaints Service Limited stated that it is a fact that dispute schemes provide a cheaper service than the courts and hopefully greater consumer retention for the industry involved.<sup>136</sup>

Echoing these comments, the Investment and Financial Services Association stated that in the Australian financial services sector, dispute resolution schemes have evolved as cost-effective alternatives to litigation. They have reduced pressure for government intervention in the industry, especially where such schemes have entailed complete market coverage.<sup>137</sup>

The Insurance Council of Australia commented that its self-regulatory initiatives have worked effectively because of the absence of any overlay of legalism or formality (such as an appeals process) which makes the Scheme accessible and attractive to consumers.<sup>138</sup>

NRMA commented that an environment where an industry's products and distribution channels are undergoing continual change is also better suited to self-regulation rather than formal government regulation. This reflects the fact that self-regulation will generally be more flexible and adaptable to changing circumstances such as new technology and new products. The NRMA submitted that financial services is an example of an industry that is undergoing rapid and continuous change.<sup>139</sup>

Where there are cost advantages and/or increased flexibility in developing and maintaining self-regulation more effective self-regulation may be achieved.

## **Conclusion**

In the course of the inquiry, it was suggested to the Taskforce that it should draw conclusions about where self-regulation is likely to succeed and where self-regulation has a poor prognosis and 'black letter law' should be the preferred option.<sup>140</sup>

However, the Taskforce ultimately concluded that the analysis of whether self-regulation is appropriate must be on a case by case basis. In some circumstances, the way in which a self-regulatory scheme is designed and implemented may overcome inherent handicaps in industry structure or market circumstances.

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136 Submission number 15, p. 3.

137 Submission number 41, p. 2.

138 Submission number 18, p. 6.

139 Submission number 7, p. 3.

140 For example, Mr Randal Dennings, Clayton Utz, proposed that the Taskforce produce 'a matrix of factors for use as a guide by parliaments and industry bodies so as to isolate the desirable regulatory response geared to the governmental outcomes required' (Submission of 18 July 2000).

Nonetheless, the Taskforce believes that the findings of its report should be incorporated into existing guidelines for industry and policymakers.

The Taskforce encourages the government, in addition to existing guidelines and benchmarks, to provide industries with practical guidelines based on the principles flagged in this report to help inform/assist the development and review of self-regulatory schemes.

The Taskforce also encourages the government to consider up-dating its guidelines for policy makers involved in assessing options on the industry environment and market circumstances that are most likely to lead to effective self-regulation, based on the findings in this report.

## Chapter 6

# **Good practice and cost effective self-regulation methods**

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*The Taskforce is to inquire and report on best practice and cost effective self-regulation methods and approaches.*

The Taskforce believes there is no single 'best practice' model for self-regulation because a successful model depends on particular market characteristics and needs to be designed accordingly. However, it is possible to identify critical elements of schemes which individually or collectively have underpinned successfully operating schemes. A number of these elements are identified through the report.

Good practice in self-regulation can be understood as significantly improving market outcomes for consumers at the lowest cost to businesses. A particular self-regulatory scheme may not be appropriate in circumstances where other forms of regulation are able to provide better outcomes at a lower cost. For example, the costs involved with a complex customer dispute resolution mechanism may not be justified if the scheme only receives a few complaints per year. Further, the costs involved in administering such a scheme may be translated into higher prices for consumers so, in this case, would not constitute a better market outcome for either business or consumers.

## **Principles**

- Good practice in self-regulation involves addressing industry specific problems and objectives.
- The type of self-regulatory scheme should be the effective minimum solution.

## **Conclusions**

### ***Consultation***

17. Consultation between industry, consumers and government can help ensure that specific problems and social policy objectives can be identified and addressed.

### ***Coverage and publicity***

18. Increased industry coverage of schemes ensures that the benefits from standards of practice in schemes flow to consumers. Wide coverage also ensures that consumers can identify self-regulatory schemes.
19. Clarity in the schemes' documentation can help industry understand their obligations and assist dispute schemes interpret legal rights. Clarity can also help consumers understand their rights.
20. Consumer awareness of schemes ensures that consumers know where to lodge complaints. Schemes are encouraged to make use of new technologies such as the Internet, make complaints cost free to the consumer, write sample letters of complaint, take oral complaints, provide personal contact and transfer complainants between schemes.
21. Industry awareness campaigns and education about schemes is needed to make sure industry participants understand their obligations and, where appropriate, understand the consequences of failing to abide by these obligations.

### ***Administration***

22. A good administrative body can identify issues, collect data, monitor the scheme, enhance credibility and ensure compliance costs are at an effective minimum level.
23. Data collection by an industry scheme is a valuable tool in identifying systemic issues and allows industry to address these problems, which in turn, can improve market outcomes for both businesses and consumers.
24. As consumers cannot guard against specific industry problems that they do not know exist, transparency in schemes is an important mechanism to ensure credibility and accountability.

### ***Dispute procedures and sanctions***

25. Industry adherence to self-regulatory schemes is essential to ensure that the benefits flowing from the standards of practice set by schemes are passed onto the consumer.
26. Where the standard of conduct has been breached, self-regulatory schemes should incorporate complaint handling and dispute resolution mechanisms to provide appropriate redress to consumers. The appropriate redress mechanism will depend on the nature of the specific problem and the consequences of non-compliance.
27. A range of sanctions can be used by industry in order to achieve compliance depending on the nature of the specific problem and consequences of non-compliance. The severity of the sanction should depend on the seriousness of the breach.
28. Industry needs to manage the risk of any anti-competitive practices in schemes, particularly where sanctions are involved.

### ***Monitoring and reviewing***

29. Monitoring of self-regulation is essential to ensure that it is still relevant to the industry addressing specific problems and improving market outcomes. In this context, reviews and annual reporting are important tools for monitoring schemes and can also assist in the transparency and accountability of schemes. Preferably, reviews should be periodic, independent and the results made publicly available.

### ***Cost-effectiveness***

30. Self-regulation comes at a cost, in administration, promotion and compliance. However, self-regulation can be cheaper (in terms of compliance costs) and more flexible than government regulation and the court system. Ultimately, the consumer bears the cost of regulation in most cases, as it is part of a firm's cost structure.
31. Any funding arrangement for self-regulation should be transparent and designed so as not to put businesses at a competitive disadvantage through excessive compliance costs.

## **Good practice in self-regulation**

Self-regulation is very broad and covers guidelines, quality management systems, standards, codes, dispute resolution schemes etc. Although there is no one model for good self-regulation, the Taskforce considers that there are elements of good practice that are consistent amongst schemes.

## **Consultation**

### **Addressing specific problems and objectives**

The form of self-regulation adopted by industry should be the effective minimum solution to the specific problem to minimise compliance costs for business.

The Australian Chamber of Commerce and Industry argued that self-regulation allows industry to respond to concerns raised by consumers and identify solutions to problems by utilising the resources and expertise unavailable to government. It commented that under self-regulation, industry (often through associations) could assume responsibility for concerns raised by the community and is able to interact directly with stakeholders to resolve the problem.<sup>141</sup>

The Australian Chamber of Commerce and Industry also submitted that self-regulation enables commerce and industry to respond more efficiently and effectively to the changing concerns of consumers. It will also empower users, whether business or householders, through the market-mechanisms.<sup>142</sup> In the telecommunications industry, the Telecommunications Industry Ombudsman commented that good practice in self-regulation involves the ability to address specific problems which affect consumers. Reduced to the most basic issue, the problems facing consumers are those that involve the transition from a previously monopolistic environment in telecommunications to one of open, but still regulated, competition.<sup>143</sup>

The Telecommunications Industry Ombudsman commented that consumers have been faced with difficulties of choice not only amongst many more providers, but also amongst many new services and products with differing prices, as well as with relatively new technologies such as mobile communications and the Internet. These difficulties have contributed to disputes about bills — the single highest area of complaint to their scheme. It argued that it has resolved these types of complaints

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141 Submission number 27, p. 5.

142 Ibid.

143 Submission number 21, p. 9.

and has also highlighted systemic problems within industry forums and individual members.<sup>144</sup>

Similarly, the Federation of Australian Commercial Television Stations submitted that the industry considers that the code approach is more effective and efficient than regulation in achieving public interest objectives, in terms of flexibility, responsiveness to community views, transparency and ease of use by stations and viewers alike.<sup>145</sup>

## Consultation

As touched on above, although self-regulation is the responsibility of industry, both consumers and the government are stakeholders. The Taskforce considers that consultation is not only important to ensure credibility of a scheme, but consumers can help identify specific problems within an industry and government can identify social or public policy objectives.

The Australian Chamber of Commerce and Industry submitted that a key element of managing self-regulation is the establishment of structures involving stakeholders to facilitate resolution.<sup>146</sup>

The ACCC argued that if codes of conduct/self-regulation are going to be accepted by governments and the public at large, then credibility with 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. It argued that to have any credibility at all there needs to be consultation with the appropriate consumer/community/user groups and appropriate regulatory/government agencies, as well as industry members.<sup>147</sup>

During the Taskforce consultations, a number of schemes commented that they consult with consumer groups.<sup>148</sup> The Financial Industry Complaints Scheme commented that some industry associations offer forums for consumers but most meet with recognised consumer groups.<sup>149</sup>

The Australian Pharmaceutical Manufacturers Association commented that it has close relationships with the Therapeutic Goods Administration and the ACCC. In addition, it maintains close relationships with prescribers and allied organisations to monitor the code and to seek comment and suggestions for its improvement.

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144 Ibid.

145 Submission number 34, p. 10.

146 Submission number 27, p. 12.

147 Submission number 42, p. 25.

148 For example, Taskforce consultations with the Australian Banking Industry Ombudsman and Insurance Brokers' Dispute Facility, Melbourne, 22 November 1999.

149 Submission number 15, p. 4.

Consumers are also viewed by the Association as a key stakeholder with the Consumer Health Forum being represented on the Code of Conduct Committees.<sup>150</sup>

Standards Australia stated that it uses the internationally accepted principle of preparing standards that involve transparency and consensus. This includes:

- the use of committees to represent all relevant stakeholders;
- the issue of drafts for public comment (usually for 60 days); and
- approval for publication by a consensus of all relevant stakeholders.<sup>151</sup>

Similarly, the Australian Communications Authority commented that when assessing a code for registration it must be satisfied that consultation has been undertaken with the public, the industry, the ACCC, Telecommunications Industry Ombudsman, a consumer representative organisation, and for privacy codes, the Privacy Commissioner.<sup>152</sup>

However, the Taskforce recognises that consumer interests are typically diverse and highly dispersed in comparison to industry interests. ASIC commented that because of this it would usually be more difficult for consumers to independently generate sufficient resources and expertise to provide effective input to the full range of self-regulatory mechanisms without additional assistance. Importantly, ASIC argued that such input is required not only during the development of self-regulatory mechanisms, but also during the ongoing life of such mechanisms to ensure adequate accountability, appropriate independence and continuing relevance.<sup>153</sup>

Similarly, the Australian Consumers' Association commented that codes and self-regulation are drafted by the supply side of a market. Industry has the resources to create complex analysis and reports. Whereas, it argued the demand side, as represented by the consumer movement, have fewer resources to provide the same level of input. So while the opportunity to consult is there, the means are limited.<sup>154</sup> NSW Legal Aid also commented that these activities are labour intensive.<sup>155</sup>

The Office of Small Business also argued that any code of conduct or self-regulatory mechanism needs to have genuine small business representation on code councils (or similar style bodies). It argued that there is an equal need to ensure the same representation for small business as for other affected groups such as consumers.<sup>156</sup>

The Taskforce supports the proposition that self-regulation should be developed and maintained in partnership between industry, the regulator and consumer

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150 Submission number 10, p. 1.

151 Submission number 13, p. 2.

152 Submission number 17, p. 4.

153 Submission number 37, p. 13.

154 Submission number 16, p. 2.

155 Submission number 24, p. 6.

156 Submission number 38, p. 4.



organisations. This partnership is essential to identify specific problems and to arrive at effective minimum solutions. The Taskforce also recognises the important role that consumer groups can play in self-regulation development and growth.<sup>157</sup>

## **Coverage and publicity**

### **Adequate coverage**

An important element of self-regulation is coverage.<sup>158</sup> The extent to which an industry association represents the majority of industry participants affects the ability of the association to deliver effective self-regulation. If schemes do not have wide industry coverage, then fewer consumers will enjoy improved market outcomes. The Taskforce considers that the effectiveness of any self-regulatory scheme will only be as good as the extent of its coverage.

### **Clarity**

An industry seeking to self-regulate must be able to establish certain standards of conduct which members will support. This will ensure that members understand their obligations and consumers will be aware of their rights. As noted above, the standards will differ according to the specific problem and the industry concerned.

During Taskforce consultations, some organisations commented that self-regulatory schemes need to be written in a plain language that both consumers and industry can understand.<sup>159</sup>

In relation to codes, the ACCC argued that in order to be accepted by all stakeholders it is important for the code to be drafted in a technically legal sense but it is even more important for the language to be plain and understandable to all of its readers. Clarity in the document will instil more confidence and certainty whilst any ambiguity or vagueness will militate against acceptance, support and compliance. This is particularly important in the area of understanding obligations and allowing for enforcement.<sup>160</sup>

As suggested by the ACCC, the code should set out clearly stated reasons why the code was established and what are the intended outcomes. 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

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157 Chapter 7 — approaches to promoting and coordinating self-regulation, looks at the role of consumer groups and government in more detail.

158 Chapter 5 indicates that if a scheme does not have adequate coverage, then it has little chance of being successful.

159 For example, Taskforce consultation with the Society of Consumer Affairs Professionals in Business, Canberra, 7 December 1999.

160 Submission number 42, p. 25.

standards for participants. Such rules should address specific stated problems and not be written as broad general principles.<sup>161</sup>

As a general rule, the Taskforce considers that standards in a self-regulatory scheme ought to be specific and written in a plain and easy to understand manner. This will ensure that consumers understand their rights and industries understand their obligations. Clarity in the documentation will also assist dispute schemes interpret legal rights.

## **Consumer awareness**

Self-regulation needs to be promoted and consumers need to be aware of various schemes. Consumer awareness of schemes ensures that consumers know where to lodge complaints. The Taskforce believes that access to self-regulatory schemes is crucial.

The Commonwealth Consumer Affairs Advisory Council commented that codes are invisible to certain consumers. In particular:

- urban elderly women and men;
- rural and remote families;
- working parents who have no time;
- people isolated in their own homes because of poverty or ill health;
- people with low literacy and/or verbal skills;
- people of working age dependent on government support;
- young people who have never had a full time job, permanent job; and
- non-English speaking people.<sup>162</sup>

It argued that an effective code would place the onus on the provider to make consumers aware that a code exists and an easy access point to provide all necessary information about the code. The onus to advise consumers should arise during the course of a relevant transaction.<sup>163</sup>

The Australian Consumers' Association stated that empowering consumers to interact with industry in a self-regulatory environment is crucial. Consumers need easy access to dispute resolution schemes and education about the requirements of industry codes, regardless of their literacy or financial background. It argued that

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161 Ibid.

162 Submission number 14, p. 4.

163 Ibid.

one of the obvious areas that require improvement is in the provision of written evidence. For people of a low literacy level or non-English speaking background this can be difficult. The Association recommended the provision of oral evidence and the use of new technologies to facilitate greater consumer education and access to dispute schemes.<sup>164</sup>

The Law Council of Australia argued that the suggestion that self-regulation is for the benefit of consumers, as it keeps the prices of goods and services lower than would otherwise be possible, is only part of the equation. It submitted that the consumer must also have redress from an impartial umpire. Disadvantaged low income, poorly educated and foreign born consumers, who comprise a significant number of consumers, are not in a position to analyse the information or access legal and other representative systems to assess the information for them.<sup>165</sup>

Similarly, during the consultations held by the Taskforce, other organisations raised the importance of consumer awareness of schemes and suggested the schemes should be user-friendly. However, the Taskforce recognises that equality in access is not just isolated to self-regulatory schemes — similar issues of access apply to the court system for example.

The Telecommunications Industry Ombudsman scheme conducts regular two-year public awareness surveys, as well as biannual complaint satisfaction surveys. It commented that their scheme has also paid attention to consumers from non-English speaking backgrounds. There is also no cost to consumers accessing the scheme. The scheme has widely advertised 1800 Freecall and Freefax number and also accepts complaints on-line through its Website, as well as by mail and in person.<sup>166</sup>

The Federation of Australian Commercial Television Stations commented that consumers with a disability may complain via the telephone or on an audio cassette in the first instance. It stated that there has been a considerable degree of public awareness of the Code over the six years of its operation. This has been facilitated by on-air publication by stations. This has now been formalised in the revised Code. It commented that all stations must broadcast 360 on-air spots per year across all viewing zones about the code and the complaint process. In addition, they have established a national phone hotline (a 1800 number) which provides information about the code, how to make complaints and how to contact local stations.<sup>167</sup>

The Australian Subscription Television and Radio Association has also pursued avenues of promoting consumer awareness of its Code, through its website and on request from the 1300 call centre numbers of FOXTEL, OPTUS Television and AUSTAR.<sup>168</sup>

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164 Submission number 16, p. 2.

165 Submission number 19, p. 8.

166 Submission number 21, p. 10.

167 Submission number 34, p. 8.

168 Submission of 19 July 2000.

In regional areas, the Taskforce heard that consumer awareness of dispute resolution schemes is an issue. Although access is not so problematic due to modern technology, problems arise in knowing how to lodge complaints with schemes, having the time to write letters of complaint, the lack of personal contact and the time associated with having complaints investigated.<sup>169</sup> During the Bunbury consultations, there was general agreement that codes of practice for example need to be advertised to ensure that consumers are aware of their existence.<sup>170</sup> Similarly, the Mid West Development Commission in Geraldton, Western Australian, were concerned about how self-regulation is being carried out by some industry sectors in the less populated rural areas.<sup>171</sup>

Throughout this report, the Taskforce has stressed that consumer awareness is an important element of good practice in self-regulation. Consumer awareness of schemes ensures that consumers know where to lodge a complaint. The Taskforce recognises that schemes can encourage access by utilising technology such as web-sites, by making any complaints cost free to the consumer, through writing sample letters of complaint, through taking oral complaints where possible, and through transferring complainants between schemes where possible.

## **Industry awareness**

As well as consumer awareness, industry members need to be aware of what they are supposed to be doing in terms of compliance. Raising industry awareness of schemes ensures that industry participants understand their obligations to consumers.

The ACCC commented that 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.<sup>172</sup> For example, to raise industry awareness, the Australian Subscription Television and Radio Association commented that they undertake regular codes presentations to relevant staff of platforms, channels and call centres. It argued that it is of particular importance that, with the level of staff turnover in the call centres, that these presentations are conducted regularly.<sup>173</sup>

Similarly, the Australian Direct Marketing Association commented that it has undertaken a major industry education initiative to assist members in ensuring that their organisations comply with their code. It commented that this has taken the form

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169 Taskforce consultations in Mildura (14 June 2000), Rockhampton (27 June 2000) and Tamworth (28 June 2000).

170 Taskforce consultations in Bunbury (20 July 2000).

171 Mid West Development Commission, 30 June 2000.

172 Submission number 42, p. 27.

173 Submission number 39, p. 5.

of full-day Code Compliance Workshops across Australia that have, at the time of their submission, attracted over 200 of their members.<sup>174</sup>

## Administration

### Administration

Actually administering a self-regulatory scheme can be a task in itself. A good administrative body can identify specific problems in an industry, collect data, monitor the scheme and enhance its credibility.

The Department of Industry, Science and Resources commented that an autonomous body with diverse stakeholder representation should be tasked with monitoring, maintaining and enforcing the regime. It is particularly important that such a body have responsibility for establishing and undertaking a continuous review program to ensure the regime is a 'living organism'.<sup>175</sup>

The Commonwealth Consumer Affairs Advisory Council argued that codes must have a 'home' and an administration. It noted that it has been said that one of the key reasons for the success of the General Insurance Code is that not only does it have a proper administration but also a Board of Directors comprised of insurance company Chief Executive Officers together with other major stakeholders.<sup>176</sup>

The ACCC commented that industry-based code schemes aimed at delivering fair trading outcomes need to contain appropriate consumer/user representation on the administration committee. 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. It argued that such representation provides transparency to the scheme by providing a 'public window' on its operations that ensures the industry group will be acting in the broader public interest.<sup>177</sup>

The Australian Direct Marketing Association stated that the creation of its independent Code Authority brings greater transparency and accountability to complaints handling.<sup>178</sup> Similarly, Financial Industry Complaints Service commented that the scheme should be an entirely separate entity from the industry so there is no perception of bias.<sup>179</sup>

The Taskforce considers that good administration of a scheme underpins good practice. It can identify issues, collect data, monitor the scheme, ensure compliance

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174 Submission number 36, p. 4.

175 Submission number 31, p. 22.

176 Submission number 14, p. 3.

177 Submission number 42, p. 26.

178 Submission number 36, p. 11.

179 Submission number 15, p. 4.

costs are at an effective minimum level and enhance credibility and accountability. The Taskforce considers the type of administration (i.e. whether a scheme can be administered by individual firms, industry associations, or some form of independent body) will depend on the nature of the specific problem and the nature of the industry.<sup>180</sup>

The Taskforce also considers that industry self-regulatory bodies should endorse their code compliant members on the basis of continued compliance.

## Data collection

Data collection by an industry scheme is important as a valuable source of market information about the origins and causes of complaints. It also enables identification of systemic problems which need to be addressed by industry members. This, in turn, can improve market outcomes for consumers.

ASIC stated that a vital role that self-regulation can play in the broader regulatory environment is to identify emerging industry risk areas. In doing so self-regulation can serve to alert industry to potential problems before they actually materialise in market misconduct.<sup>181</sup>

The Consumer Law Centre of Victoria, Consumer Credit Legal Service (Vic) and the Financial and Consumer Rights Council (Vic) comment that systemic issues arise out of common practices by industry and/or experiences of multiple consumers. The identification of such issues provides valuable information to industry as to the effects of its processes on consumers as well as allowing solutions to be found.<sup>182</sup>

Generally, systemic problems can be identified two ways. First, an individual complaint may be such as to identify a system or process problem which has the potential to affect many consumers. Second, the accumulation of complaints and further statistical analysis will either identify or suggest the existence of a systemic problem.

For example, the Telecommunications Industry Ombudsman commented that its primary role in this context is notifying individual members, referring the issue to relevant regulators (e.g. the Australian Communications Authority or ACCC), or highlighting the issues in public forums and in the media.<sup>183</sup>

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180 For further information on administering a scheme see the Ministerial Council of Consumer Affairs Guideline 1996, *Fair Trading Codes of Conduct, Why have them, how to prepare them* available from the Consumer Affairs Division of Treasury and State and Territory Fair Trading Offices, and also see the Commonwealth's *Codes of Conduct Policy Framework* released by the then Minister for Customs and Consumer Affairs in March 1998; this document is available on the Internet at <http://www.treasury.gov.au>

181 Submission number 37, p. 18.

182 Submission number 29, p. 13.

183 Submission number 21, p. 12.

As discussed by the Consumer Law Centre of Victoria, Consumer Credit Legal Service (Vic) and the Financial and Consumer Rights Council (Vic), it is inherently difficult for industries to step back from their business to identify systemic problems, particularly where the process or practice is accepted within the industry. Further, the cost of implementing strategies to address such issues may be perceived to be contrary to a profit-making imperative.<sup>184</sup>

The Taskforce considers that data collection is a valuable tool in identifying systemic issues which need to be addressed by industry members which, in turn, can improve market outcomes for consumers. Also, depending on the nature of the specific problem being addressed, dispute resolution schemes can offer industry an effective means to identify systemic issues.

## **Transparency**

Transparency is another essential feature of schemes. As consumers cannot guard against specific industry problems that they do not know exist, transparency in schemes is an important mechanism to ensure credibility and accountability.

A number of organisations consulted discussed the importance of transparency in enhancing the credibility of schemes. For example, the Australian Toy Association suggested that any self-regulatory arrangements should be transparent and its operation open to scrutiny, and subject to a process of review after a set period (approximately 3-5 years).<sup>185</sup>

The Commonwealth Consumer Affairs Advisory Council commented that one thing that seems to be consistent amongst all codes is that consumers are not informed of who's complying and who's not. This information is clearly potentially important to consumers when choosing which company they may do business with.<sup>186</sup>

The Taskforce considers that schemes ought to be transparent and open to scrutiny to improve market outcomes for consumers.<sup>187</sup>

## **Dispute procedures and sanctions**

### **Industry adherence to schemes**

For self-regulatory schemes to achieve their objectives, compliance by industry members is a key feature. Compliance by industry ensures that specific industry

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184 Submission number 29, p. 13.

185 Submission number 23, p. 3.

186 Submission number 14, p. 3.

187 For further information on transparency see *Benchmarks for Industry-based Customer Dispute Resolution Schemes 1997*, released by the then Minister for Customs and Consumer Affairs, Senator the Hon Chris Ellison. This publication can be accessed through the Treasury web-site: <http://www.treasury.gov.au/publications>.

problems are being addressed. As noted previously, some self-regulatory schemes are voluntary in their nature whereas others are mandatory. The degree of compliance can depend on a number of factors, such as whether firms obtain marketing benefits from it, whether they are in a competitive market, or whether they risk sanctions for non-compliance.

## **In house compliance**

One means of compliance with self-regulatory schemes is through internal mechanisms.

In relation to codes, the ACCC commented that 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. It noted that, in Australia, code compliance manuals are being developed for code schemes. These manuals are based on the recently released standard on compliance programs (AS3806).<sup>188</sup>

Similarly, ASIC commented that adequate training of staff is good practice, in other words compliance officers in individual firms, staff in scheme administrators and, where appropriate, staff in external complaints resolution schemes.<sup>189</sup>

NRMA also considered that self-regulation is enhanced by establishing a specialised unit within the company to deal with compliance. This helps to ensure that all customer concerns and issues are given a high priority, are managed by the appropriate business unit and are addressed in a consistent and timely manner.<sup>190</sup>

Similarly, the AAMI customer charter sets out some clearly defined rights for its customers.

A competitive market can be another driver of compliance. For example, the Australian Food and Grocery Council commented that industry self-regulation is most effective addressing issues where individual companies can play an active role in promoting voluntary codes, monitoring compliance in the market place, and contributing to code enforcement through a complaint resolution process.<sup>191</sup>

Similarly, ADMA considered that its direct marketing code brings peer pressure to bear on members who breach the code, a powerful coercive force in the marketplace. As such, member compliance is driven by enlightened self-interest, not fear of state intervention in business affairs.<sup>192</sup>

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188 Submission number 42, p. 26.

189 Submission number 37, p. 15.

190 Submission number 7, p. 3.

191 Submission number 30, p. 13.

192 Submission number 36, p. 11.



The Taskforce considers that compliance with standards across the industry is necessary for good practice in self-regulation. It ensures that specific industry problems are being addressed and the benefits from standards of practice in schemes are flowing to consumers.

## **Complaint handling**

Depending on the nature of the specific problem, self-regulation should incorporate complaint handling and dispute resolution mechanisms to provide appropriate redress to customers where the standard of conduct was breached. Redress encourages industry members to react promptly and fairly to complaints by having internal complaint resolution mechanisms and, where appropriate, subscribing to some form of fair and independent dispute resolution scheme.

These processes are essential to ensure that dissatisfied consumers have access to cost-effective mechanisms for resolving their complaints about the conduct of members of the code. The formal legal system involving court litigation is not designed to provide quick and cheap complaints resolution.

For example, the Institution of Engineers commented that the most secure protection for the community lies in the fundamental requirement of its code that registered persons must practice within the limits of their personal and professional competence, and in the assurance that they will be subject to effective disciplinary action if they fail to observe that constraint. As such, the Institution has procedures for dealing with complaints about members including investigation of the complaint and applying sanctions where appropriate.<sup>193</sup>

ASIC stated that accessible and effective complaint resolution mechanisms serve to buttress consumer confidence. They can also provide benefits to business, for example, by enabling industry to identify and address systemic consumer problems, thereby maintaining consumer confidence and avoiding the need for government intervention.<sup>194</sup>

The Taskforce considers that businesses should establish fair and effective internal procedures to address and respond to consumer complaints and difficulties:

- (a) within a reasonable time;
- (b) in a reasonable manner;
- (c) free of charge to the customer; and
- (d) without prejudicing the rights of the consumer to seek legal redress.

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193 Submission number 26, p. 15.

194 Submission number 37, p. 16.

If a consumer is unsatisfied with the resolution process provided by the internal complaint handling mechanism, then it is good practice for the business to provide the consumer with information regarding any external dispute resolution body to which it subscribes or any relevant government body, such as a Fair Trading Agency.

NSW Legal Aid argued that any self-regulatory scheme must allow for the establishment of internal dispute resolution procedures and for the monitoring and improvement of such processes.<sup>195</sup>

The NRMA stated that an element of good practice has been to standardise the process of dealing with customer concerns. For example, NRMA adopts a three step process of, first, referring the issue to the relevant business area, second, allowing the Customer Relations area to mediate and, third, taking the matter to the independent dispute resolution body.<sup>196</sup>

At the more interventionist end of the self-regulatory spectrum where businesses may be dealing with a large amount of complaints and/or dealing with complaints of a more serious nature, an external dispute resolution scheme may be appropriate. An independent body capable of adjudicating and exercising sanctions can further strengthen an external dispute resolution scheme.

The Taskforce considers that a business should provide clear and accessible information to consumers on any independent customer dispute resolution mechanism to which the business subscribes.

Such independent customer dispute resolution mechanisms should be:<sup>197</sup>

- (a) accessible;
- (b) independent;
- (c) fair;
- (d) accountable;
- (e) efficient; and
- (f) effective.

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195 Submission number 24, p. 4.

196 Submission number 7, pp. 3, 4.

197 For more information regarding external dispute resolution schemes, businesses are encouraged to consult the Commonwealth's *Benchmarks for Industry-based Customer Dispute Resolution Schemes*, 1997. This publication can be accessed through the Treasury web-site: <http://www.treasury.gov.au/publications>. There are also a number of resources available in relation to internal complaint handling, including AS4269, the Australian Standard on complaint handling. This standards is produced by the private organisation, Standards Australia.

NRMA Limited submitted that dispute resolution schemes should also be independently audited and/or reviewed.<sup>198</sup> The Taskforce takes up this issue below.

As discussed in chapter 8, a number of industries have an external dispute resolution scheme.

Consumer representatives on dispute resolution schemes can also ensure credibility and independence. A number of organisations including industry, consumer groups and government all commented on the usefulness of consumer representatives on schemes. For example, the ACCC commented that, where appropriate, industry-based code schemes aimed at delivering fair trading outcomes need to contain appropriate consumer/user representation in complaints handling. It argued that such representation provides transparency to the scheme by providing a 'public window' on its operations that ensures the industry group will be acting in the broader public interest.<sup>199</sup>

Similarly, the Law Council of Australia argued that as effective enforcement is the only way to protect consumers' rights, a minimum condition for successful self-regulation is the provision of industry funded independent consumer representatives, so that the various uneven elements of the consumers/producer relationship can be remedied.<sup>200</sup> The Taskforce considers that self-regulatory schemes should aim to provide appropriate redress to consumers where the standard of conduct has been breached. Consumer redress is essential to ensure that dissatisfied consumers have access to cost-effective mechanisms for resolving their complaints about the conduct of members of schemes. The appropriate redress mechanism will depend on the nature of the specific problem trying to be addressed.

### **Sanctions for non-compliance**

It will generally be desirable for the self-regulatory scheme to provide for a range of enforcement options, depending on the nature of the breach. For example, immediate expulsion may not be a suitable sanction for a minor breach of the scheme. However, effective sanctions can raise the level of credibility and consumer confidence in schemes. A comment often heard during the Taskforce consultations was that schemes need to have 'teeth'.

Industry associations use a range of different sanctions. For example, the Institution of Engineers commented that all of their members are bound by their Code of Ethics. They then have procedures for dealing with complaints about members and are able to apply a range of sanctions including expulsion and suspension of membership.<sup>201</sup> Similarly, the Australian Pharmaceutical Manufacturers Association Code of Practice

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198 Submission of 14 July 2000.

199 Submission number 42, p. 26.

200 Submission number 19, p. 11.

201 Submission number 26, p. 15.

contains a hierarchy of sanctions ranging from corrective advertising, fines of up to \$30 000, or expulsion.<sup>202</sup>

The Code of Practice adopted by the Fruit Juice Industry is supervised by an Industry Compliance Committee. Ultimate sanctions are law enforcement by the appropriate government regulatory bodies should the self-regulatory scheme be ignored or flouted by participants.<sup>203</sup>

The Department of Industry, Science and Resources argued that with voluntary participation, effective sanctions and incentives can be applied, with low scope for the benefits being shared with non-participants. It submitted that voluntary participation — backed by strong incentives to participate — appears to provide a stronger framework and higher degree of success, independent of the size of the industry association.<sup>204</sup>

On the other hand, the Motor Trades Association of Australia commented that sanctions, if they exist, are usually not effective because of the voluntary nature of the regulatory scheme. For example, if a sanction is to be imposed for non-compliance, the offending party can simply ‘opt out’ of the regulatory scheme and continue with the behaviour.<sup>205</sup>

Similarly, a number of other organisations during Taskforce consultations echoed these comments. For example, the Mallee Tenancy and Consumer Advice Service expressed concern that ombudsman schemes in particular could be ‘toothless tigers’ if schemes involved a drawn out process and decisions were unenforceable. It suggested that schemes need to have ‘teeth’ in order to be effective.<sup>206</sup>

ASIC argued that the consequences of inadequate enforcement in an industry such as the financial services industry can be serious. The industry is heavily dependent on consumer confidence — if consumers suffer financial losses due, for example to intermediary misconduct in contravention of the requirements of a self-regulatory scheme, the reputation of the Australian financial markets may suffer. Accordingly, ASIC considered that it is essential that self-regulatory schemes be underpinned by effective sanctions.<sup>207</sup>

The Australian Consumers’ Association recommended a ‘toolkit’ of actions underpinned with government involvement. These include:

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202 Submission number 10, p. 3.

203 Australian Business Limited, 14 June 2000.

204 Submission number 31, p. 22.

205 Submission number 1, p. 1.

206 Taskforce consultation in Mildura, 14 June 2000.

207 Submission number 37, p. 15.

- rewriting of misleading, incorrect or false consumer information;
- corrective advertising; and
- retraining staff.<sup>208</sup>

The Department of Industry, Science and Resources also noted that the use of penalties and/or sanctions within self-regulatory regimes require careful consideration as they can lead to retaliatory action by participants.<sup>209</sup> Similarly, the Motor Trades Association of Australia noted that if sanctions are pursued by the self-regulatory scheme administrators, perhaps a peer group or industry association, then there is a question about protecting the administrators from legal action by the party affected by the sanction.<sup>210</sup>

The Taskforce considers that there should be a range of sanctions that can be used by industry in order to achieve compliance depending on the nature of the problem and the consequences of non-compliance. Sanctions can raise the level of consumer confidence in schemes. The Taskforce considers that the severity of the sanction should also depend on the seriousness of the breach.

### **Competitive implications and the authorisation process**

Where industry has the commitment to collectively sanction breaches of a self-regulatory scheme there is the possibility that such action may amount to anti-competitive behaviour. In most cases such action may not amount to anti-competitive behaviour or the benefit to the public may outweigh such behaviour. However, to avoid any threat of legal action for breach of the competition provisions of the *Trade Practices Act 1974*, a procedure exists whereby industry can have the arrangement authorised.

Prior authorisation for such a collective arrangement can be sought from the ACCC which assesses whether there is sufficient public benefit flowing from the arrangement to outweigh any anti-competitive effects. An authorisation from the ACCC gives parties involved in the anti-competitive arrangement immunity from court action taken under the competition provisions of the *Trade Practices Act 1974*.

The authorisation process can be time consuming and expensive, but it does provide industry with protection against legal action. Hence, if industry believes that there is a significant risk that their scheme has anti-competitive elements then authorisation

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208 Submission number 16, p. 2.

209 Submission number 31, p. 22.

210 Submission number 1, p. 1.

may be a prudent course of action to pursue.<sup>211</sup> It is generally up to industry to manage this risk and ensure any self-regulatory scheme encourages competition.

For example, the Australian Direct Marketing Association stated that punitive actions against members, which may otherwise be judged anti-competitive have been authorised by the ACCC.<sup>212</sup>

The Taskforce considers that industry needs to manage the risk of any anti-competitive practices in schemes, particularly where sanctions are involved. Although the Taskforce recognises that there needs to be a public benefit justification process, the Taskforce notes that there has been some criticisms of the authorisation process.<sup>213</sup>

## Monitoring and reviewing

### Monitoring

As discussed elsewhere, monitoring is an important aspect of self-regulation to ensure that agreed standards are being met. Establishing a self-regulatory scheme is only part of the equation. Industry also needs to be aware that it has a continual responsibility to ensure that self-regulation is addressing its objectives and ethical members are not being disadvantaged.

ASIC commented that the compliance monitoring mechanisms should be tailored to the particular scheme's circumstances. The appropriate compliance monitoring mechanisms will depend on the identified regulatory outcomes and the nature of the particular industry sector. There are various methods for monitoring compliance, including:

- the internal controls of the individual firm;
- annual reporting on compliance;
- independent monitoring;

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211 See Part VII — *Trade Practices Act 1974*. Aspects of a code which might require the code to be authorised include restrictions on membership, prohibitions on code members dealing with other industry participants, and imposing sanctions for non-compliance where such sanctions effect a party's ability to compete. Most applications attract a fee of \$15000. Details of the ACCC authorisation process are available from the ACCC website at: <http://www.accc.gov.au/adjudication/fs-adjudicate.htm>.

212 Submission number 36, p. 11.

213 Chapter 7 — approaches to promoting and coordinating industry self-regulation, discusses the authorisation process further.

- an external compliance audit; or
- the regulator.<sup>214</sup>

The Australian Chamber of Commerce and Industry stated that encouraging managers and employees to take responsibility for their own actions is its preferred approach.<sup>215</sup>

However, some organisations have argued that the government needs to monitor self-regulation more closely. For example, the Royal Aeronautical Society argued that self-regulation must always be accompanied by a rigorous system of dialogue with, and policing by, the government agency responsible for the safety of the public.<sup>216</sup>

The Taskforce considers monitoring is crucial to good practice in self-regulation. Monitoring ensures that the scheme is addressing specific problems within an industry. The Taskforce recognises that the role of government in monitoring will depend on the circumstances. As a general principle, if there is a public policy objective to do so (e.g. health and safety reasons), then the government may choose to be directly involved in the monitoring of schemes.<sup>217</sup>

## **Accountability**

The self-regulatory scheme should publicly report whether its standards are being met. This can improve credibility and consumer confidence in schemes.

The Australian Toy Association commented that any self-regulatory arrangement needs to be accountable in terms of the body administering the scheme.<sup>218</sup>

The ACCC commented that 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.<sup>219</sup>

For example, the Australian Pharmaceutical Manufacturers Association stated that breaches of the code are reported in their annual reports.<sup>220</sup> Similarly, the Australian Supermarket Institute stated that public reporting occurs annually on the Scanning Code's operation.<sup>221</sup>

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214 Submission number 37, pp. 15, 16.

215 Submission number 27, p. 5.

216 Submission number 40, p. 4.

217 Chapter 7 — approaches to promoting and coordinating industry self-regulation, discusses the role of government in this context further.

218 Submission number 23, p. 3.

219 Submission number 42, p. 27.

220 Submission number 10, p. 4.

221 Submission number 11, p. 2.

The Taskforce considers that accountability is an element of good practice in self-regulation. The Taskforce recognises that annual reports are a useful tool to allow a periodic assessment of the scheme's effectiveness.

## **Review**

The Taskforce considers that periodic reviews of standards should also be undertaken to ensure that they are being met and are relevant and up-to-date. This ensures that the scheme is still appropriate to the specific problems it is seeking to address and allows for other stakeholders, such as consumers and government, to be involved. Preferably, reviews should be periodic, independent and be made publicly available.

The Taskforce also acknowledges that self-regulatory schemes need the time and opportunity to evolve and rectify problems as they arise.

ASIC stated that self-regulatory schemes should be regularly reviewed for efficiency and effectiveness. Such reviews are essential to deal with market changes due to innovation and other forces which can rapidly lead to out-of-date regulation. It argued that reviews of individual schemes are usually best conducted by an independent consultant in consultation with the stakeholders involved in the development of the scheme (i.e. industry members, consumer organisations and the regulator).<sup>222</sup>

ASIC suggested that scheme reviews should be undertaken at least once every three years. This should encompass the content of the code and the operation of the external complaint resolution scheme. It argued that it is also desirable that reviews are publicly conducted wherever possible.<sup>223</sup>

Insurance Enquiries and Complaints Limited commented that their code and scheme are reviewed periodically so that a flexible approach towards a changing market place is maintained. In particular, it commented that the scheme has evolved over time with the jurisdiction being progressively widened. The company issues an annual review which reports on all aspects of the scheme, the code and now the privacy principles.<sup>224</sup>

## **Cost-effective practice in self-regulation**

Throughout this report, reference has been made to the benefits of self-regulation. However, self-regulation does come at a cost to both the industry and consumer. The costs involved in administering an inefficient self-regulatory scheme may be translated into higher prices for consumers resulting in a poor market outcome for

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222 Submission number 37, p. 19.

223 Ibid.

224 Submission number 8, p. 4.



both business and consumers. Compliance costs can also be high for business, which in turn, can be passed onto consumers. However, the Taskforce is not touting that schemes should be cost-effective at the risk of sacrificing consumer rights for example. It is necessary to ensure that the scheme is the effective minimum solution for the specific problem in hand.

### **Benefits of self-regulation over explicit regulation and courts system**

During the inquiry, the Taskforce received a lot of anecdotal evidence to suggest that self-regulation is more cost effective than government regulation and the court system.<sup>225</sup> For example, *A Guide to Regulation* (1998) commented that there are cost advantages from tailor-made solutions and less formal mechanisms such as access to quick complaints handling and redress mechanisms. However, the Taskforce recognises that self-regulation is not necessarily cheaper than government regulation. Furthermore, it is ultimately the consumer that bears the cost of any form of regulation in most cases.

NRMA stated that compared with more direct government regulation, in many cases industry self-regulation results in lower regulatory costs. For example, for general insurance claims, handling costs can be reduced by producing policy documentation in a standardised format. It also argued that self-regulation will normally have faster and simpler dispute resolution procedures, again resulting in lower regulatory costs. In competitive markets, these lower regulatory costs are generally passed onto consumers.<sup>226</sup>

The Telecommunications Industry Ombudsman also commented that its dispute scheme has provided a free and timely forum for the redress of consumer complaints in contrast to costly and time consuming action in courts or consumer tribunals.<sup>227</sup>

In addition, the Office of Small Business stated that although small business often have legal recourse in disputes, their access to justice can be constrained by the cost of going to court, the long time and delays before their case is heard, the disparity in the quality of representation and their need to preserve business relationships. In many cases, neither party achieves a satisfactory result from a Court judgement.<sup>228</sup>

In most cases, the Office of Small Business argued that self-regulatory approaches can offer small business a low-cost, quick and flexible system for resolving disputes. It submitted that this provides a viable alternative to litigation, typically achieving a success rate of around 80 per cent, without costly and time-consuming legal action. For example, the Office of Small Business quoted that some studies show that using

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225 Chapter 5 indicates that if there are cost advantages and/or increased flexibility in using self-regulation, then a scheme has a better chance of success.

226 Submission number 7, p. 2.

227 Submission number 21, p. 9.

228 Submission number 38, p. 2.

dispute resolution schemes can cost as little as five percent of the cost of going to court.<sup>229</sup>

## Cost of schemes

While a lot of the benefits and elements of good practice in self-regulation have been flagged, the schemes come at a cost. And depending on the specific problem being addressed, this cost can be significant.

As stated by the Institution of Engineers Australia any form of regulation, whether self-regulation or otherwise, requires an allocation of resources and will necessarily involve compliance costs that may or may not become onerous. It argued that effective self-regulation requires not only standards or codes of practice, but also effective mechanisms for dealing with complaints of non-compliance with those codes. Self-regulation requires extensive community and business education, and requires a commitment from all industry players to work effectively.<sup>230</sup>

Similarly, the Federation of Australian Radio Broadcasters noted that while some may see the overlay of an implementation and monitoring system as a level of bureaucracy, it is clear that there is an expectation that industries and industry bodies take responsibility for the effective operation of their systems of self or co-regulation. If there is a cost in either time or money then so be it — *'self-regulation is not meant to be cost free regulation'*, according to one observer.<sup>231</sup>

The cost of self-regulatory schemes can vary greatly. At one end of the spectrum, industry initiatives that improve the amount of information available to consumers to make informed choices can be relatively inexpensive. For example, a guideline may only involve printing and staff time costs.

Similarly, more sophisticated schemes can be fairly inexpensive depending on what is trying to be achieved. For example, the Australian Supermarket Institute stated that the cost of the Scanning Code administration includes materials, printing and distribution, and staff time handling issues. It is estimated this cost would not exceed \$40 000 per annum.<sup>232</sup>

Whereas, at the more interventionist end of the self-regulatory spectrum, schemes can cost more. For example, the Federation of Australian Commercial Television Stations estimated that the cost of its scheme to the industry is at least \$3 million annually. It commented that the industry's Code of Practice places considerable responsibility on individual stations, and is relatively resource-intensive and costly

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229 Ibid.

230 Submission number 26, p. 23.

231 Submission number 35, p. 10.

232 Submission number 11, p. 4.

to operate. However, it believed the industry supports the process because it is more efficient, simple and direct than any regulatory alternative.<sup>233</sup>

Further, the bigger dispute resolution schemes that resolve customer disputes are expensive to run. For example, the Australian Banking Industry Ombudsman, Telecommunications Industry Ombudsman and General Insurance Enquiries and Complaints schemes all cost in excess of \$3 million per year.<sup>234</sup>

## **Compliance costs**

However, the administrative costs of self-regulatory schemes is only part of the story. Compliance costs are also associated with self-regulatory schemes. It is necessary to ensure that self-regulation does not itself become a burden to industry with onerous compliance costs, particularly for small businesses.

Again, there is a spectrum of compliance costs for business. At the lower end of the spectrum, schemes that raise the level of information may simply involve preparing a disclosure document for example. Similarly, in complying with standards, there are low compliance costs involved in following the standard on work safety boots. Whereas, the quality management system standard (ISO9000) produced by Standards Australia is more expensive to implement depending on the size of the company.<sup>235</sup>

At the more interventionist end of the spectrum, codes and dispute resolution schemes can be expensive for businesses to comply with. The Financial Industry Complaints Service stated that various levels of funding are required depending on the number of disputes and the quality and expertise of staff. Generally, the costs are allocated to members by a capacity to pay, in other words the wealthier members pay the most.<sup>236</sup>

For example, Insurance Enquiries and Complaints Limited stated that its scheme is funded by a combination of a levy upon insurers and fee per case charges to insurers. Approximately 60 per cent of its budget is met by a levy upon the personal lines premium income of member companies. Companies either pay the minimum levy of \$1 600 or a levy based on their proportion of personal lines premium income. The other 40 per cent of the budget is met by a fee per case payment.<sup>237</sup>

In comparison, the Telecommunications Industry Ombudsman scheme commented that its funding mechanism is based on two principles. First, that each member pays for the scheme's complaint handling services based on the number, and relative percentage of total complaints, raised by the scheme against that member. Second,

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233 Submission number 34, p. 9.

234 Taskforce consultations with industry dispute schemes, November 1999.

235 Taskforce consultation with Standards Australia, Sydney, 29 November 1999.

236 Submission number 15, p. 4.

237 Submission number 8, p. 4.

the complaint handling fees are structured in a way as to provide a financial incentive for members to resolve complaints in a timely manner. The handling fees are \$15 for an initial enquiry, up to \$1 130 for dispute resolution.<sup>238</sup> As a corollary, a member has no financial obligation to the Telecommunications Industry Ombudsman if no complaints are made against that member. There are no membership or joining fees associated with the scheme.<sup>239</sup>

The Taskforce recognises that as businesses become more aware and familiar with a self-regulatory scheme then compliance costs can be reduced. Indeed, often during the self-regulatory scheme's first year of operation compliance costs are particularly high as businesses are training staff etc, but in the following years costs are usually reduced. However, compliance costs can also increase later down the track.

For example, the Service Providers Industry Association argued that the self-regulatory participation burden is likely to increase, rather than decrease in the telecommunications. It considered the increasing complexity of inter-working as the wholesale market and new applications develop will drive this trend, leading to calls for more and more codes and standards, as well as the need to revisit and overhaul existing codes. The accelerating take-up of e-commerce and e-business will also lead to more demands for codes and standards to meet consumer expectations and industry inter-working requirements.<sup>240</sup>

The Service Providers Industry Association argued that as more regulatory and industry bodies engage in the process of writing standards, codes and guidelines, compliance becomes an increasing burden on organisations. It commented that not only is it difficult or impossible for most organisations to participate in the creation of these instruments, it becomes very difficult to be fully aware of the range of regulatory instruments that apply to an individual organisation and its business operations. When this situation is reached, it introduces major challenges for staff trainers and compliance managers.<sup>241</sup>

### **Cost to smaller industry associations and businesses**

A self-regulatory scheme stands a greater chance of success if it is backed by a large and well structured industry association. Primarily, this assists in regards to the costs associated with establishing and maintaining regimes, ensuring broad participation, and issues of enforcement, including sanctions.

Where no large industry association exists, costs would appear to be a prohibiting factor in developing and administering a regime. As discussed by the Department of Industry, Science and Resources, in such instances, sharing of the costs between participants and beneficiaries should be considered on a cost recovery basis. It

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238 Telecommunications Industry Ombudsman, *Annual Report 1998-99*, p.10.

239 Submission number 21, p. 10.

240 Submission number 25, p. 4.

241 Ibid.

argued that such cost recovery principles would be regime specific but should encompass a clear process in determining who should pay for developing and administering the regime and how charges should be structured — preferably based on tangible outcomes.<sup>242</sup>

Similarly, the Office of Small Business argued that it is generally accepted that small business is less able than big business to cope with the costs of participating in a scheme such as a code of conduct, particularly when such a scheme is funded by industry levies. It argued that while big business is usually able to absorb such costs, small businesses in many cases have no option but to pass on these costs to the consumer in the form of higher prices for goods and services. This can place small business at a competitive disadvantage to their larger counterparts.<sup>243</sup>

The Office of Small Business also argued that the methodology for the administration of fees should be clearly established before any self-regulatory scheme is initiated. It suggested that the methodology should be as transparent as possible once in place. Small business is not likely to feel any ownership of the process of self-regulation if the funding process is not accessible to them. Transparency also ensures that charges for administering a scheme have a direct relationship to actual administration costs, and that charges are regularly reviewed to maintain this relationship.<sup>244</sup>

The Taskforce considers that any funding arrangement for self-regulation should be transparent and designed so as not to put businesses at a competitive disadvantage.

### **Minimum standards**

As discussed previously, the notion of the effective minimum solution should apply to self-regulatory schemes.

For example, the National Insurance Brokers Association does not support the imposition of best practice standards as they are not always appropriate. In many cases the standards set are in fact best practice. However, this is only where it is appropriate. It argued that where this is not the case, minimum standards apply that provide proper protection for consumers.<sup>245</sup>

The National Insurance Brokers Association also noted that depending on the resources or corporate culture of the relevant entity, they choose whether to exceed these minimum standards. Certain entities may not be able to meet the compliance costs of best practice even though minimum standards will provide consumers with appropriate service and protection.<sup>246</sup>

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242 Submission number 31, p. 22.

243 Submission number 38, p. 3.

244 Submission number 38, p. 4.

245 Submission number 3, p. 6.

246 Ibid.

Similarly, Clayton Utz argued that codes of conduct should be designed and drafted with an appropriate minimum standard in mind. Such a standard must be realistically set to ensure that it can realistically be complied with by industry participants.<sup>247</sup>

The Taskforce recognises that standards in self-regulatory schemes should be the effective minimum solution to the specific problem.

## **Summary**

The appropriate form of self-regulation will depend on what is trying to be achieved which will vary depending on the industry. Good practice in self-regulation involves improving market outcomes for consumers at the lowest cost to businesses.

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247 Submission number 43, p. 4.

## Chapter 7

# Approaches to promoting and coordinating industry self-regulation

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*The Taskforce is to inquire and report into approaches to promoting and coordinating industry self-regulation, including the appropriate role of government and the development of industry codes as well as other approaches to self-regulation.*

The key players in the promotion of industry self-regulation have always been industry, government and consumer advocates. The purpose of this chapter is to examine the respective roles of each group in the establishment of particular schemes.

The roles of industry, government and consumer groups are dynamic, adapting to the changing face of the Australian economy and, in particular, responding to competitive pressures, regulatory reform, new technologies and the increasing globalisation of consumer markets.

Industry has shown a growing enthusiasm for initiating self-regulation to engender consumer confidence in new products and new technologies. Government has increasingly promoted self-regulatory options as part of its broader commitment to regulatory reform. Consumer groups have embraced self-regulatory schemes to address consumer problems that cross jurisdictional boundaries. It is also worth noting the growth of third party certification schemes, particularly in the online environment, hinting at the commercial imperatives driving businesses to subscribe to some form of voluntary industry self-regulation to win consumer trust.

There is a variety of options for designing and promoting self-regulatory schemes and what works for one industry may not work for another. It follows that the 'mix' of industry/government and consumer involvement that works well for one self-regulatory scheme may be inappropriate for another.

This chapter first examines the role that industry has played in promoting and coordinating self-regulatory schemes. This chapter then discusses the role of government as a stakeholder, developer, promoter, monitor and enforcer of schemes, as well as the crucial role that consumer groups have played and will continue to play in the development of industry self-regulation. Finally, the chapter analyses a number of options to better co-ordinate and promote self-regulation including discussion of whether a centralised government agency, an oversight committee, or model codes would be appropriate.

## **Conclusions**

### ***Industry approaches to promoting self-regulation***

32. Experience has shown that industry will initiate a self-regulatory scheme in response to a clear commercial imperative to win consumer confidence and boost sales.
33. Industry may promote self-regulation as an alternative to government regulation where there is perceived to be a serious market failure or important social policy objective.

### ***Role of government in promoting and coordinating self-regulation***

34. Government involvement in self-regulation is justified when there is a public policy objective that would otherwise call for a regulatory response.
35. Government can assist in analysing systemic problems in an industry and in facilitating the design of a self-regulatory response to address those systemic problems.
36. Government can assist in integrating schemes into the regulatory framework.
37. Government is uniquely placed to promote international cooperation and harmonisation of self-regulatory initiatives.
38. The degree of government involvement will depend on the significance of the market failure or social policy objective being addressed and the consequences of self-regulation proving ineffective.

### ***Role of consumer advocates in promoting self-regulation***

39. Consumer input is important in the development and in maintaining the relevance of self-regulation. Consumer advocates can promote consumer confidence in self-regulatory schemes.
40. Consumer participation will be limited by human and financial resource constraints if there is no external financial assistance forthcoming.

### ***Other conclusions***

41. Code administration authorities established by industry should take responsibility for the monitoring and review of self-regulation, in consultation with government and consumer groups.



## Role of industry

Industry has initiated a host of self-regulatory schemes for a variety of reasons.<sup>248</sup> For commercial reasons, industry may develop a scheme to win consumer confidence and boost sales. Industry may also promote self-regulation as an alternative to government regulation.

The promotion of self-regulatory schemes is beneficial as a marketing tool to differentiate participants from competitors.

Industry self-regulation can also build consumer confidence when introducing new technology to the market. The *Australian Code of Practice for Computerised Checkout Systems in Supermarkets* was introduced to ease the transition away from individual item pricing to barcodes, including the provision of free items when the scanned price is higher than the shelf price.<sup>249</sup>

The Australian Chamber of Commerce and Industry commented that under self-regulation, industry (often through associations) can assume responsibility for concerns raised by the community and is able to interact directly with stakeholders to resolve the problem. It suggested that industry associations can play a key role in delivering a coordinated approach to issues thus ensuring national consistency.<sup>250</sup>

The Australian Supermarket Institute commented that the Code of Practice for the Fruit Juice Industry was developed by the Australian Citrus Industry Council to promote truth in labelling and fair trade of orange juice and other products. It has been designed to ensure that fruit juice is not adulterated and that the public is not otherwise misled about fruit juice products. The Australian Supermarket Institute commented that in taking this action itself, the fruit juice industry feels that it has enhanced both the image of the industry and the marketability of its fruit juice products.<sup>251</sup>

Similarly, the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia submitted that their commitment to self-regulation is vitally important when demonstrating to clients, the business community and governments the high degree of integrity and professionalism which members of the Accounting Bodies possess. To this end, the Accounting Bodies have sought to ensure that these groups can have confidence in the ethical standing and technical competence of our members and, in turn, in the quality of various

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248 Chapter 3 outlines reasons for self-regulation and the types of schemes adopted. The consultant's report, Tasman Asia Pacific 2000, *Analysis of market circumstances where industry self-regulation is likely to be most and least effective*, also discusses particular industry's initiating schemes.

249 Submission number 11, p. 2.

250 Submission number 27, p. 5.

251 Submission number 11, p. 4.

accounting, auditing and other assurance and advisory services which the Bodies provide.<sup>252</sup>

This pattern is also evident internationally. Indeed, international experience teaches that the actions of one national industry association may act as a catalyst for similar industries in other countries to follow suit. For example, the Canadian Chemical Producers' Association introduced its Responsible Care initiative in 1985 and it has since become a global alliance with over 40 countries participating in the scheme. Each company which subscribes to the Responsible Care ethic is required to abide by six codes of practice which contain more than 150 requirements. Verification checks are undertaken every three years on each member-company of the CCPA to ensure the codes are being followed.<sup>253</sup>

Another example of a global voluntary self-regulation is the work conducted by the International Organisation for Standardisation (ISO). The ISO is a non-governmental, worldwide federation of national standards bodies from 130 countries that formulates and implements internationally agreed voluntary standards across a variety of goods and services.<sup>254</sup>

The Taskforce considers that industry will promote self-regulation when there are reasons to do so, such as to enhance consumer confidence to boost sales or 'head off' government regulation.

## **Role of government**

Industry self-regulation by its definition, is regulation by industry. However, government involvement in self-regulation can range from general policy guidance to more interventionist models. Government is in a position to identify particular problems or social policy objectives and can assist in designing a self-regulatory response to address them.

Throughout the inquiry process, the role of government in self-regulation has been a contentious issue. Hence, the Taskforce has focused on the role of government in this chapter.

## **Spectrum of government involvement**

As with different types of self-regulation, not surprisingly there is a spectrum of government involvement ranging from little or no involvement to a more interventionist approach.

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252 Submission number 33, p. 1.

253 For more information on the CCPA and Responsible Care program please see <http://www.ccpa.ca/>.

254 For more information please see [www.iso.ch](http://www.iso.ch).

At one end of the spectrum, industry initiatives that improve the amount of information available to consumers to make informed choices might have little or no government involvement at all. For example, industry guidelines or customer service charters fall into this category.

Moving along the spectrum, standards developed by Standards Australia will often see government as a stakeholder providing comments.

'Light touch' approaches include the work of the Consumer Affairs Division in Treasury and the ACCC in advising schemes on voluntary codes. For example the ACCC has assisted industry with the *Australian Code of Practice for Computerised Checkout Systems in Supermarkets*.

Whereas, the government has incorporated codes into a regulatory framework in other cases. For example, over the last decade, the Commonwealth has established regulatory regimes for broadcasting and telecommunications that incorporate industry codes of conduct. Further, the Commonwealth is presently in the process of developing and implementing regulatory regimes in the financial services sector and privacy standards for personal information handling in the private sector. Both regimes allow for the development of industry codes and complaint handling schemes.<sup>255</sup>

Similarly, at the international level there is a range of government involvement in self-regulation. Self-regulatory policy has been promoted by the OECD as an alternative to formal regulation and is being embraced by member countries at different rates. Countries such as Australia and Canada are more actively embracing self-regulation, with each government researching and reviewing self-regulatory practice.<sup>256</sup>

The Taskforce notes that there is currently a range of government involvement in self-regulation depending on the industry and the particular scheme.

## **Public policy objectives of government**

The degree of government involvement in self-regulation will depend on the public policy objective.<sup>257</sup> Government involvement in self-regulation is justified when there is a public policy objective that would otherwise call for a regulatory response. This can include, for example, to encourage industry to develop codes that will assist in compliance with the law.

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255 During the closing stages of the Taskforce inquiry, the Australian Broadcasting Authority released its final report on the *Commercial Radio Inquiry*. The Taskforce notes that the report highlights the importance of raising awareness of schemes.

256 For further information on self-regulatory policy in Canada and the UK see Office of Consumer Affairs, 1998, *Voluntary Codes: A Guide for their Development and Use*, Industry Canada.

257 As discussed in chapter 5, self-regulation is more appropriate where there is no strong public interest concern. Examples of public policy objectives are health and safety issues.

The Institution of Engineers Australia commented that self-regulation is appropriate as applied to the provision of some, but not all, engineering services. The Institution commented that those areas of engineering practice that represent a risk to public health and safety or where there is a significant asymmetry of knowledge between the professional engineer and the consumer require a co-regulatory approach that statutorily limits the provision of certain types of services to competent practitioners.<sup>258</sup>

On the other hand, the Australian Food and Grocery Council commented that the existence of market failure does not in itself justify government intervention as the market may correct itself over time. Government intervention may not be a remedy to the failure. It commented that a fundamental principle upon which government bases its regulatory and legislative policy is that the onus of proof in determining whether regulation will correct market failure is on the proponents of the regulation. It also argued that intervention must provide the highest net benefit to consumers as individuals, and the community as a whole.<sup>259</sup>

The Taskforce also recognises that government will be involved in aspects of particular industries. For example, the scope of service delivery in telecommunications, and the proposed privacy legislation that will impact across all industries.<sup>260</sup>

As a general principle, the Taskforce recognises that government has a role in self-regulation to ensure that self-regulation targets and achieves the relevant public policy objective.

## **Government involvement**

As discussed elsewhere, the Taskforce considers that self-regulation is a three-way partnership between industry, consumers and government.

From an industry perspective, the Australian Pharmaceutical Manufacturers Association commented that an advantage of their current self-regulatory system is that it is an outward demonstration of successful partnership and trust between government and industry.<sup>261</sup> Similarly, the Australian Supermarket Institute commented that the ACCC has been of great assistance in developing their Code's provisions and ensuring that they have remained relevant and effective.<sup>262</sup>

The Financial Industry Complaints Service commented that the whole of the self-regulatory process was satisfactory. Government was quite willing to allow industry to develop the schemes. The schemes that the Financial Industry

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258 Submission number 26, p. 23.

259 Submission number 30, p. 2.

260 *Privacy Amendment (Private Sector) Bill 2000*.

261 Submission number 10, p. 5.

262 Submission number 11, p. 7.

Complaints Service has been involved with have approval from ASIC and consult with Treasury.<sup>263</sup>

Cable & Wireless Optus commented that the involvement of regulators as ‘observers’ throughout the process of code and standard development has several benefits. First, it has enabled the industry to address regulator concerns at the outset rather than address issues at the end of the process. Secondly, it has resulted in regulators being fully aware of current industry discussions and hence familiar with the context for industry decisions.<sup>264</sup>

Cable & Wireless Optus surmised that in planning for self-regulatory schemes, it is considered beneficial for the roles and responsibilities of regulators to be clearly defined at the outset of the process and actively managed to encourage a cooperative approach.<sup>265</sup>

Participants at a Taskforce meeting held in Rockhampton agreed that government consultations are an important channel for communication between rural Australians and decision-makers. Participants commented that there is a general recognition that governments cannot solve all the problems facing regional Australia, however they considered that the rural community would appreciate receiving direct feedback from government representatives about their concerns.<sup>266</sup>

The Taskforce considers that government, among other roles, is a stakeholder in self-regulation and can offer assistance in the development and in maintaining the relevance of self-regulation.

### **Government can promote and assist in the development of self-regulation**

The Government has had experience with many industries wishing to introduce self-regulation. It is therefore in a good position to advise and guide industry in different ways of approaching self-regulation.

By publicising the benefits of self-regulation to consumers, the government may also be able to help create an incentive for industry to effectively self-regulate. Maintaining the higher standards required by a self-regulatory scheme may impose costs on businesses which will be reflected in the prices charged to consumers. If consumers are not well informed about the benefits of dealing with a member of the self-regulatory scheme, there will be little incentive for businesses to incur the extra costs required to establish or join the scheme, and those businesses that do so may be at a competitive disadvantage. Once the scheme wins acceptance within the market, there should be less need for the government to maintain its involvement.

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263 Submission number 15, p.4.

264 Submission number 6, p. 3.

265 Ibid.

266 Taskforce consultation in Rockhampton, 27 June 2000.

The Insurance Council of Australia commented that it is important for government to be supportive of self-regulatory codes and schemes, and to promote and encourage consumer confidence in their use and effectiveness. The Council commented that government could assist industry in the development of self-regulation by promoting a more informed understanding of the role and scope of industry codes among consumer groups. It is particularly important to promote an understanding of the value of self-regulation when it provides a more effective alternative to legislation for both consumers and industry. The Council argued that having formally approved a code, by a sufficiently transparent process, government should become a supporter of its aims and objectives.<sup>267</sup>

The Australian Chamber of Commerce and Industry also urged government to address consumer scepticism of industry self-regulation through education and promotion of successful self-regulatory schemes.<sup>268</sup>

Further, the Australian Direct Marketing Association commented that consumer education should be pursued jointly with industry groups using the resources of government and industry.<sup>269</sup>

In other Taskforce discussions with stakeholders, it heard that the government can also help assist industries in adjusting to a self-regulatory scheme. In discussions with the Secretariat to the Queensland Red Tape Reduction Taskforce, it commented that in a recently deregulated environment, governments can assist industries by facilitating the development of a self-regulatory scheme.<sup>270</sup>

Similarly, participants at a Taskforce meeting held in Rockhampton commented that the government could assist industries more when self-regulatory schemes are being introduced.<sup>271</sup>

The Government has also promoted self-regulation through guidelines, directories and the Internet. For example, the Business Entry Point will contain a database of codes across Australia.<sup>272</sup> Similarly, the Commonwealth's *Directory of Consumer Dispute Resolution Schemes and Complaint Handling Organisations* sets out consumer

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267 Submission number 18, pp. 7-8.

268 Submission number 27, p. 12.

269 Submission number 36, p. 8.

270 Taskforce consultation in Brisbane, 26 June 2000. Established by the Queensland Government, the Queensland Red Tape Reduction Taskforce provides advice to the Deputy Premier on how to reduce the burden of regulation on Queensland business. It recently prepared Guidelines on Alternatives to Prescriptive Regulation which are available from the Queensland Department of State Development.

271 Taskforce consultation in Rockhampton, 27 June 2000.

272 The Business Entry Point site can be accessed via <http://www.business.gov.au>. The Business Entry Point provides businesses with access to resources from approximately 50 Commonwealth Government agencies, 100 State and Territory agencies and 125 industry associations.

dispute resolution schemes, complaint handling organisations and other useful contacts such as fair-trading agencies.<sup>273</sup>

As discussed in chapter 6, the government has also released a publication titled *Benchmarks for Industry-based Customer Dispute Resolution Schemes* which is a guide to industry in designing and improving such schemes.<sup>274</sup> The Benchmarks were developed to apply primarily to nationally based customer dispute schemes set up under the auspices of an industry. However, the underlying policy principles have also proven useful to smaller and non-industry schemes.

The Taskforce notes that the Minister for Financial Services and Regulation is committed to reviewing the Commonwealth's *Benchmarks for Industry-based Customer Dispute Resolution Schemes* this year.

The Australian Communications Authority has also produced its own guide, titled *Developing telecommunications codes for registration*, which addresses its approach to assessing codes for registration. The Authority commented that it has received positive feedback from ACIF and industry players about the clarity and comprehensiveness of the guide.<sup>275</sup>

Similarly, the Office of Small Business produced *Resolving Small Business Disputes*, which it commends as a resource for examining issues around self-regulatory approaches to dispute resolution.<sup>276</sup>

The ACCC has also produced guidelines to assist industry with compliance and the authorisation process.<sup>277</sup> Similarly, ASIC commented that it has also engaged in a range of activities aimed at promoting alternative dispute resolution processes in the financial services industry. This includes chairing the Complaints Scheme Roundtable which provides a forum for the promotion and support of complaints schemes in the sector.<sup>278</sup>

The Taskforce considers that government can have a role to play in the development, and promotion, of self-regulation.

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273 Consumer Affairs Division, Commonwealth Department of Treasury 2000, *Directory of Consumer Dispute Resolution Schemes and Complaint Handling Organisations*, 4th edition, released by the Minister for Financial Services & Regulation, the Hon Joe Hockey MP. This document is available on the Internet at <http://www.treasury.gov.au/publications/pubs.asp>.

274 *Benchmarks for Industry-based Customer Dispute Resolution Schemes 1997*, released by the then Minister for Customs and Consumer Affairs, Senator the Hon Chris Ellison. This publication can be accessed through the Treasury web-site: <http://www.treasury.gov.au/publications>.

275 This guide is available from the Australian Communications Authority or through the Internet at: <http://www.aca.gov.au/codes/>.

276 Available from the Office of Small Business or [http://www.dewrsb.gov.au/group\\_osb/smallbus/resolvedisp/index.htm](http://www.dewrsb.gov.au/group_osb/smallbus/resolvedisp/index.htm).

277 For more information visit the ACCC website at: <http://www.accc.gov.au>.

278 Submission number 37, p. 5.

## **Government can assist in the analysis of systemic issues**

Government can also play a role in the analysis of systemic issues. At the more interventionist end of the self-regulatory spectrum, some schemes may be handling complex and/or a large number of consumer complaints. Where appropriate, the government can assist in the analysis of systemic issues arising from these complaints. Government can also assist in facilitating the design of a self-regulatory response to address those systemic issues.

The Consumer Law Centre of Victoria, Consumer Credit Legal Service (Vic) and the Financial and Consumer Rights Council (Vic) commented that it is inherently difficult for industries to step back from their business to see systemic issues. They suggested that one of the primary strengths of a co-regulatory rather than self-regulatory approach is the ability to build in processes to identify systemic issues within an industry. Within co-regulatory models this presently best occurs through industry based external alternative dispute resolution schemes or direct regulatory oversight.<sup>279</sup>

The Taskforce recognises that, where appropriate, government can assist in the analysis of systemic issues.

## **Integration into the regulatory regime and international harmonisation**

Government also has a role to assist in ensuring that self-regulation is integrated into the regulatory framework within and outside Australia. Government is in a good position to promote international cooperation and harmonisation of self-regulatory schemes.

For example, the Australian Communications Authority stated that government consultation protects against inconsistency with legislation. For example, the *Telecommunications Act 1997*, *Trade Practices Act 1974*, *Privacy Act 1988*, *Disability Discrimination Act 1992* and State fair trading legislation may all have implications for codes, as may various instruments setting out provisions or standards that must be adhered to. The Authority argued that representation by government agencies ensures that legislative advice is available at the code development stage.<sup>280</sup>

ASIC also commented that government can assist in the process of developing schemes — this will include providing information and advice designed to ensure that the schemes are properly integrated into the regulatory framework. ASIC commented that it has extensive experience in dealing with a range of self-regulatory mechanisms that can be brought to bear during the consideration of any self-regulatory scheme.<sup>281</sup>

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279 Submission number 29, p. 13.

280 Submission number 17, p. 5.

281 Submission number 37, p. 32.



NRMA stated that an important role for government is to work with State Governments and industry to try to ensure that Federal and State based codes that apply to the same or similar products are as uniform as possible. This will reduce compliance costs, which is a particularly important issue as many companies start to market their products and services nationally. Consumers would also benefit through simpler and more standardised guidelines and codes.<sup>282</sup>

The Association of Superannuation Funds of Australia Limited commented that ad hoc or differing codes and standards or poorly designed regulations or laws can significantly increase the overheads to industry (and to final consumers). It commented that increased overheads can be the outcome where state laws apply.<sup>283</sup>

The Taskforce also recognises that Australia is part of a bigger game, and self-regulatory schemes should be aware of overseas standards. For example, Standards Australia commented that consideration of regulation versus self-regulation must be written within a framework of encouraging and facilitating global trade.<sup>284</sup>

Similarly, the Australian Toy Association commented that any imposts or obligations on companies under any self-regulatory arrangement should not disadvantage Australian companies vis-à-vis international competition.<sup>285</sup>

NRMA also stated that with the increasingly globalised nature of many markets and the growth of e-commerce, the government also has an important role to play in working to achieve international harmonisation. Consumers would then receive the same level of protection in each market. Conversely, it will help to prevent Australian businesses from losing customers to overseas countries that may offer cheaper products but provide less consumer protection through industry self-regulation.<sup>286</sup>

The Taskforce considers that government can assist industry in developing and maintaining the relevance of self-regulatory schemes by raising awareness of the regulatory framework operating within and outside Australia.

### **Is government just cost-shifting?**

Some organisations have argued that government is simply shifting the cost of regulating onto industry. For example, the Australian Food and Grocery Council commented that it does not support self-regulatory measures that are simply seeking

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282 Submission number 7, p. 5.

283 Submission number 22, p. 4.

284 Submission number 13, p. 1.

285 Submission number 23, p. 3.

286 Submission number 7, p. 6.

to shift the regulatory resource costs forcing industry to accept the contingent liability of developing and maintaining a regulatory measure.<sup>287</sup>

The Taskforce considers that self-regulatory schemes should be developed and assessed using the fundamental principles flagged in this report, in other words identification of the specific problem and objective, consultation, assessment of the benefits and costs and the application of the effective minimum solution to the specific problem.

## Regulatory creep

During the consultations, some organisations raised the issue of regulatory creep. That is, where self-regulation develops into more quasi-regulation or co-regulation.

This issue was also flagged in the *Grey-letter Law* report, which stated that ‘those consulted raised concerns that sometimes what starts out as self-regulation can become widely accepted practice, gain an imprimatur from a government agency, and then become embodied in a quasi-regulatory arrangement, and may become black letter law’.<sup>288</sup>

Similarly, the Australian Chamber of Commerce and Industry commented that it is concerned about the potential for self-regulatory schemes to become quasi-regulation. Often if a scheme appears to be working well, there has been a tendency for governments to want to formalise it thereby changing the nature of the self-regulatory industry approach. Many incidents occur and are managed under self-regulatory schemes without the need to involve the regulator. The Australian Chamber of Commerce and Industry commented that this is a difficult issue to address especially when there is a prevalent view among sections of the community that only regulation is a sufficient safeguard.<sup>289</sup>

ASIC noted that perceptions of regulatory creep may simply reflect a move towards a more coherent and less ad hoc relationship between government and the scheme, rather than representing the growth of an ‘overly formalised’ approach.<sup>290</sup>

As a general principle, the Taskforce considers that government should be involved in schemes when there is a public policy objective to do so. If self-regulation is working well, then there is no need for any, or more, government involvement. As noted above, government can assist in promoting the benefits of self-regulatory schemes to consumers.

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287 Submission number 30, p. 6.

288 *Grey-letter Law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation*, 1997, p. XIV. The report is available at: <http://www.pc.gov.au/orr/>.

289 Submission number 27, p. 6.

290 ASIC, 14 August 2000.

## Degree of government involvement in monitoring self-regulation

There is a range of options to monitor self-regulation, including some form of government involvement. To a large extent, the degree of government involvement in monitoring will depend on the industry concerned, the nature of the industry specific problem and the importance of self-regulation meeting its aims.

There are various models for government supporting and enforcing self-regulation. For example, government can underpin schemes in legislation to improve their effectiveness.<sup>291</sup>

As a broad principle, the Investment and Financial Services Association supported the view expressed in the *Grey-letter Law* report (1997, p. 81) that ‘Government should not, however, be directly involved in the monitoring and review of schemes which are self-regulatory. Otherwise, the essential character of self-regulation may be lost. Government involvement may change the character of the self-regulatory scheme to one of quasi-regulation.’<sup>292</sup>

Similarly, the Australian Chamber of Commerce and Industry noted that many incidents occur and are managed under self-regulatory schemes without the need to involve the regulator.<sup>293</sup>

However, ASIC commented that there is a role for government, in some cases, to monitor compliance with the code, and assist in the process of reviewing the operation of self-regulatory schemes, which may lead to alterations to the scheme or to other regulatory responses (e.g. regulator-issued standards to law reform recommendations).<sup>294</sup>

ASIC argued that the capacity for timely regulator intervention is especially important in the case of financial services because the industry is heavily dependent on consumer confidence. If the regulator does not possess the power to intervene in a timely fashion in the case of market failure, consumer confidence in the integrity of the Australian financial markets may be compromised.<sup>295</sup>

Similarly, PowerTel commented that any effective self-regulatory regime needs to recognise that ‘blackspots’ will emerge and government regulators must be empowered to take remedial action quickly.<sup>296</sup>

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291 For more information about underpinning codes in legislation at the Commonwealth level see Department of the Treasury 1999, *Prescribed codes of conduct — policy guidelines on making industry codes of conduct enforceable under the Trade Practices Act 1974*. See also Appendix C of the Taskforce’s draft report for further discussion about various models of government enforcement of self-regulation.

292 Submission number 41, p. 3.

293 Submission number 27, p. 6.

294 Submission number 37, pp. 32-33.

295 Ibid.

296 Submission number 9, p. 5.

The Royal Aeronautical Society also argued that self-regulation must always be accompanied by a rigorous system of dialogue with, and policing by, the government agency responsible for the safety of the public.<sup>297</sup>

The Australian Direct Marketing Association commented that there is a role for government to channel complaints to appropriate industry bodies and monitor the effectiveness of industry-based complaints handling. This will encourage a continuous dialogue between government and the private sector in the interest of consumer satisfaction.<sup>298</sup>

During its regional consultations, the Taskforce heard that rural primary industries like to have some level of government involvement as a safety net. In particular, concern was expressed over rogue traders being able to keep operating under a self-regulatory scheme and potentially undermine it. Some participants suggested that this problem needed to be addressed by government to ensure the safety of consumers and so reputable businesses were not at a competitive disadvantage.<sup>299</sup>

The Taskforce emphasises that rogue players will not necessarily disappear with more formal government regulation. There can be no guarantee that rogue traders will comply with the law.

As a general principle, the Taskforce considers that the degree of monitoring by government will depend on the degree of market failure and the consequences of self-regulation failing to achieve its objectives. The Taskforce recognises that government has an interest in the review of schemes, and can 'step up' if self-regulation is failing and can help assess whether self-regulation is the most appropriate mechanism.

## **Authorisation process**

Industry should be aware of the authorisation process.<sup>300</sup> As noted by the Australian Food and Grocery Council, government also has a role in ensuring that markets are sufficiently competitive and that firms do not enter into arrangements that lessen the degree of competition.<sup>301</sup>

The Department of Industry Science and Resources commented that self-regulatory initiatives attempt to create an informal set of industry standards of behaviour. In most circumstances this has a positive outcome, reducing circumstances of undesirable conduct and providing a better interface between an industry and its market. There is a risk, however, that self-regulatory initiatives can give rise to anti-competitive behaviour, by either suppressing competition between firms, broad

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297 Submission number 40, p. 4.

298 Submission number 36, p. 8.

299 Taskforce consultation in Tamworth, 28 June 2000 and Bunbury, 20 July 2000.

300 Chapter 6 discusses the authorisation process.

301 Submission number 30, p. 2.

agreements on prices or by forming defacto industry cartels which consolidate market power. The Department commented that during the drafting of the Oilcode, for example, considerable efforts had to be expended to avoid the code entering the area of price setting or market structure, both areas where potentially anti-competitive conduct could arise.<sup>302</sup>

Similarly, the Department of Industry Science and Resources argued that self-regulatory initiatives in the form of design standards can be used to establish effective barriers to entry in a marketplace, entrenching the position of existing market participants against the interests of new market entrants. Initiatives on product quality can, while couched in the interests of consumers, contribute to the establishment of a protected market which may not be in consumers' ultimate interest.<sup>303</sup>

The Department of Industry, Science and Resources submitted that, while the ACCC monitors anti-competitive arrangements, and acts where it can be shown that such arrangements are not in the public interest, consideration needs to be taken in the preparation of self-regulatory initiatives to minimise anti-competitive effects.<sup>304</sup>

During the course of the inquiry, some industry associations raised some concerns over the authorisation process. One industry association commented that authorisation fees are potentially a deterrent for smaller associations.<sup>305</sup> At present, there is no discretion under the *Trade Practices Act 1974* for the ACCC to waive fees. However, the Taskforce notes that under the national competition policy review process, the government is committed to reviewing fees (including the authorisation fee) charged under the *Trade Practices Act 1974* this year.

Another association that has been through the authorisation process, the Australian Direct Marketing Association, commented that the process needs to be more clearly defined. The association submitted that time limits should be placed on public consultation, that it was not the role of the process to redesign or redraft industry documents, and that the applicant should be consulted on the content and context of any public announcement regarding the application.<sup>306</sup>

The Taskforce has made the ACCC aware of these concerns.

However, overall, organisations consulted found the authorisation process useful and a necessary process for protecting competition. Indeed, the Consumer Law Centre of Victoria submitted that it was a legitimate part of the ACCC's statutory

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302 Submission number 31, pp. 19-20.

303 Ibid.

304 Ibid.

305 Taskforce consultation with the Internet Industry Association, Canberra, 6 March 2000.

306 Submission number 36, p. 9.

role to assist in the redesign of self-regulatory schemes to ensure that such schemes met the 'public benefit' test in the Trade Practices Act.<sup>307</sup>

The Taskforce considers that the authorisation process is essential in providing a public benefit justification process. However, the Taskforce considers that industry should manage the risk of having to seek authorisation in the first place.

### **Centralising government responsibility**

During the course of consultations, a number of organisations raised the issue of centralising responsibility for self-regulation into one government agency. Some organisations considered that it was confusing and bureaucratic for industry to know which regulator(s) to deal with. For example, the Service Providers Industry Association (SPAN) commented that regulatory oversight of information industries is fragmented across many agencies and organisations. It submitted that industry-specific regulation applicable to telecommunications service providers involves:

- The Department of Communications, Information Technology and the Arts;
- The Australian Broadcasting Authority;
- The Australian Communications Authority;
- The ACCC;
- The Attorney-General's Department (privacy, interception etc.);
- The Australian Communications Industry Forum (the principal self-regulatory resource for the industry);
- The Telecommunications Industry Ombudsman; and
- The Australian Communications Access Forum.<sup>308</sup>

SPAN commented that coupled with a variety of other agencies that administer generic industry and consumer codes and legislation, as well as industry association codes of conduct, the totality represents a complex web of requirements to be understood and followed by industry participants.<sup>309</sup>

SPAN argued for clear allocation of areas of responsibility to lead agencies, expressed in simple terms that are widely understood and respected by government, industry and consumer interests. Those lead agencies should set the basic regulatory principles that guide regulatory and self-regulatory activities (an example is the

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307 Submission of 24 July 2000.

308 Submission number 25, pp. 2-3.

309 Ibid.

establishment of Privacy Principles by the Attorney-General and Privacy Commissioner, consumer protection would be presumably handled by the Treasury).<sup>310</sup>

Similarly, NRMA commented that another action by government that could help to promote more effective self-regulation would be to establish a specialised Unit within a department such as Treasury to deal with self-regulatory issues. This would help to ensure a consistent approach to self-regulation by government as well as streamline the administrative process for business and consumers.<sup>311</sup>

However, government agencies argued that each agency has its own specialised area and to try to centralise this expertise would be futile.<sup>312</sup> For example, as noted above, ASIC has responsibility for the financial sector whereas the Department of Health and Aged Care oversees the health industry. The agencies argued that a centralised agency dealing with self-regulation would lead to one big, bureaucratic organisation which would be detrimental to industry.

ASIC submitted that centralising responsibility into one agency to cover self-regulatory arrangements across all industries would not be successful. It argued that it is more appropriate for government agencies and regulators with responsibilities for particular industry sectors to deal with self-regulation in that sector. ASIC considered that departmental and agency roles should be made clear and noted that the Consumer Affairs Division of Treasury provides general advice on self-regulatory issues.<sup>313</sup>

To some extent, the Consumer Affairs Division in Treasury does offer industry advice on developing codes of practice in the first instance. This advice revolves around the Codes Kit containing previously mentioned publications such as *the Codes of Conduct Policy Framework* and *Benchmarks for Industry-based Customer Dispute Resolution Schemes*.<sup>314</sup> In addition, the ACCC also assists self-regulatory schemes, particularly with compliance and enforcement.

The Taskforce considers that centralising government responsibility for self-regulation would result in a loss of expertise. However, the Taskforce considers that government needs to ensure Departmental and agency roles in self-regulation are clear.

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310 Ibid.

311 Submission number 7, p. 6.

312 Taskforce consultation with Government agencies held in Canberra, 6 December 1999.

313 ASIC, 14 August 2000.

314 *Codes of Conduct Policy Framework* released by the then Minister for Customs and Consumer Affairs in March 1998; this document is available on the Internet at <http://www.treasury.gov.au> (choose Consumer Affairs/Publications/Industry Self-Regulation Publications).

## Role of consumers

The Taskforce recognises that consumer groups play an important role in developing and maintaining the relevance of self-regulation. A number of organisations (including industry, consumer groups and government agencies) have expressed the importance of consumer participation in adding credibility to self-regulatory schemes.

### Consumer input

The Australian Communications Authority commented that consultation with consumer groups and the public is one of the most important requirements of developing a telecommunications code for registration. Consultation with these groups is assured by Part 6 of the *Telecommunications Act 1992* which requires the Australian Communications Industry Forum (ACIF) to consult with at least one consumer representative organisation, and obliges ACIF to also provide a minimum 30 day consultation period for comments from the public. In practice, ACIF usually provides a 45 day consultation on consumer codes.<sup>315</sup>

The Australian Communications Authority suggested that consumer organisations in particular have made a very significant contribution to the development of ACIF codes. Consumer representatives participate on all six Consumer Codes Reference Panel Working Committees and advise on all consumer issues which arise in code development.<sup>316</sup>

It also commented that consumer groups and representatives have been instrumental in determining the priorities and work programme of the ACIF Consumer Codes Reference Panel. The Authority commented that they have made significant research and policy contributions to the work of the Reference Panel, both in terms of sharing results of research undertaken under the auspices of other organisations and institutions, and in undertaking contracted research and policy work on ACIF's behalf. During the public comment phase consumer representatives provide advice on targeting interested groups and utilising networks to distribute information about the draft code.<sup>317</sup>

Similarly, the Department of Health and Aged Care commented that consumers are becoming sceptical when they perceive self-regulation imposed as a cheap option, and for the benefit of business. The Department argued that, overall, if self-regulation is to work effectively, there needs to be consideration of how to encourage strong community involvement to ensure it remains open to rigorous, public scrutiny. In this context it is worth noting the level of public debate involving the passage of sensitive primary legislation through Parliament. Overall, there is a need for a clearer picture, or at least guidelines, on the role of self-regulation in

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315 Submission number 17, p. 7.

316 Ibid.

317 Ibid.



supporting genuine tripartite solutions. If such developments do not occur, we risk seeing declining consumer faith in self-regulation, and other useful alternative forms of regulation (such as public health promotional activities).<sup>318</sup>

Similarly, industry bodies have acknowledged the importance of consumer input. For example, the Insurance Council of Australia recognised the necessary role to be played by consumer groups in the development and maintenance of effective industry self-regulation.<sup>319</sup> Likewise, the Financial Industry Complaints Service commented that consumer groups have been part of the working party for the development of their scheme. It suggested that it is important that the general public has confidence in the schemes and consumer groups assist in providing this.<sup>320</sup>

Insurance Enquiries & Complaints Limited also commented that both industries and consumer groups can learn and benefit from each other as schemes can improve the level of information on problems that consumers are facing.<sup>321</sup>

One observer, from the Safe Food Consumers (& Growers) Association, stressed that there is a strong need for consumer input. He submitted that underpinning industry self-regulation there must be an independent body responsive to the rights of consumers to regulate for safety, quality and fair pricing of all products and services.<sup>322</sup>

The Consumer Law Centre of Victoria, Consumer Credit Legal Service (Vic) and the Financial and Consumer Rights Council (Vic) commented that in order to deliver outcomes which serve the interests of consumers as well as industry it is necessary to include expert consumer advocacy and participation in the development and oversight of co-regulatory schemes or models.<sup>323</sup>

The Consumer Law Centre of Victoria, Consumer Credit Legal Service (Vic) and the Financial and Consumer Rights Council (Vic) endorse consumer participation in the following processes:

- Government and regulatory consultative processes;
- public hearing and enquiries;
- the development, amendment and review of industry standards and conditions of service and supply;
- the development of consumer friendly products and services;

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318 Submission number 44, p. 13.

319 Submission number 18, p. 7.

320 Submission number 15, p. 4.

321 Insurance Enquiries & Complaints Limited, Melbourne, 20 June 2000.

322 Mr Frank Ash, Safe Food Consumers (& Growers) Association, 12 July 2000.

323 Submission number 29, p. 14.

- the development of codes, charters and dispute resolution mechanisms; and
- the oversight and management of external dispute resolution schemes.<sup>324</sup>

At the international level, other countries such as the United Kingdom and Canada also acknowledge the valuable contribution that consumers can make to successful self-regulatory schemes. Canada has focussed on consumer contribution to policy development particularly in the area of voluntary codes, in conjunction with non-governmental organisations and the private sector, to ensure consumer protection.<sup>325</sup>

## Human and financial resource constraints

The Taskforce also recognises that consumer participation is constrained by limited resources. For example, the Consumer Law Centre of Victoria, Consumer Credit Legal Service (Vic) and the Financial and Consumer Rights Council (Vic) commented that consumer groups and consumers generally are largely under-resourced in terms of time and funding, both of which are necessary to meaningfully participate. This is particularly the case when compared to the resources generally available to industry participants. The Consumer Law Centre of Victoria, Consumer Credit Legal Service (Vic) and the Financial and Consumer Rights Council (Vic) argued that as part of the examination of specific industries proposing to move to a less prescriptive regulatory model, industries should be required to propose models for the inclusion of consumer representatives. That representation should be proportional with industry participation.<sup>326</sup>

Similarly, the Consumers' Telecommunications Network commented that there are resource implications in meeting the demand for consumer input arising from many different sources. Organisations such as themselves which rely substantially on volunteer contributions find it increasingly difficult to attract and retain sufficient consumer representatives to meet the needs of the various regulatory and self-regulatory bodies.<sup>327</sup>

Further, NSW Legal Aid argued that, as noted in the *Grey-letter Law* report, there needs to be effective resourcing provided to consumer groups to participate in the drafting and subsequent reviews of codes, and in the bodies responsible for overseeing the code.<sup>328</sup>

NSW Legal Aid commented that if self-regulatory or co-regulatory schemes are to work properly and deliver the benefits envisaged, then there needs to be effective

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324 Ibid.

325 For further information please see Office of Consumer Affairs, Industry Canada Fall 1999 — Winter 2000, *Consumer Quarterly*, Volume 5, Number 1.

326 Ibid.

327 Submission number 32, p. 2.

328 Submission number 24, p. 6.

participation of consumer representatives and, therefore, a commitment by government to properly resourcing those representatives.<sup>329</sup>

The Australian Consumers' Association recommended that a levy be imposed on the supply side of the market of other industries to ensure appropriate demand side input.<sup>330</sup>

The Small Enterprise Telecommunications Centre Limited (SETEL) noted that government grant funding has enabled consumer groups to adopt a broader focus on telecommunications issues and to participate in self-regulatory forums.<sup>331</sup>

SETEL commented that the 'voice' of consumers has been strengthened through this process and the involvement in the self-regulatory process has enabled the presentation of the various consumer perspectives to a wider audience in the telecommunications industry. The major discrepancy existing today is the imbalance of input into the self-regulatory process caused by restrictions in funding of consumer representation so as to be able to 'compete' with the input (and influence) of the industry representatives.<sup>332</sup>

SETEL also contended that the self-regulatory model used in the telecommunications industry in particular, pits some of Australia's most powerful corporations against consumer representatives in a frequently unequal battle. It believed that the funding of consumer representation in any self-regulating industry should be commensurate with the size and resources of the industry and the extent to which consumer representation is required in self-regulatory forums.<sup>333</sup>

In other words, SETEL argued that 'David must at least have a sling and a stone when going in to battle with Goliath'.<sup>334</sup>

ASIC also argued that consumer organisations would require access to sufficient resources if they were to contribute effectively to the process of developing self-regulatory schemes.<sup>335</sup>

The Taskforce recognises that consumer groups, and consumer participation more generally, assume an important role in the development and in maintaining the relevance of self-regulation. The Taskforce also recognises that consumer participation will be limited by human and financial resource constraints if there is no external assistance forthcoming.

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329 Submission number 24, p. 6.

330 Submission number 16, p. 2.

331 Submission number 20, pp. 2-4.

332 Ibid.

333 Ibid.

334 Ibid.

335 Submission number 37, p. 13.

## Oversight committee

During the course of consultations, the Taskforce has heard a number of organisations advocating for an oversight committee for self-regulation. For example, the Commonwealth Consumer Affairs Advisory Council commented that in a maintenance and monitoring role, the government could create a small ‘Code’ authority independently reporting annually on the performance of endorsed codes (award schemes etc), innovations and shortcomings. It would also be responsible for endorsement and public education. The Advisory Council discussed that this may be able to be achieved at effectively no cost by redirecting existing ASIC and/or ACCC funds being applied to self-regulation issues.<sup>336</sup>

Similarly, the Australian Consumers’ Association cited that while a lot of effort goes into the formation of self-regulatory standards, this diligence is rarely followed through in practice. For example, it submitted that a series of recommendations from a review have not been implemented. The Association would support the recommendation to create a tri-partisan (government, consumers and industry) oversight committee that would seek to ensure self-regulation is not only implemented but also maintained.<sup>337</sup>

Further, Clayton Utz commented that a body could be responsible for administering the codes and liaising with industry bodies to ensure that the various codes are reviewed and amended where appropriate at regular intervals. This body could also be responsible for maintaining a code register website and interacting with bodies that are proposed to perform similar functions under legislation such as the Privacy Commissioner. It commented that to ensure the regulatory burden imposed by such administration is not too heavy on code subscribers it is recommended that such an administrator’s role be ‘light handed’ and facilitative rather than compelling.<sup>338</sup>

Similarly, one participant in the Brisbane consultations with a background in regulatory policy, Mr Euan Morton, commented that there is scope for a private organisation or government body to compare and rate various codes to improve the level of information on them. He acknowledged that an oversight body would add an extra layer of bureaucracy, but he considered that the benefits in assisting consumers would outweigh the costs.<sup>339</sup>

However, the Taskforce recognises from an industry perspective, some form of oversight committee would add an extra level of bureaucracy that industry has to deal with. Hence, industries may shy away from developing self-regulatory schemes or not commit as many resources than it would have otherwise. Further, to a large extent, the government already plays a role in monitoring self-regulation and ensuring that it is still relevant.

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336 Submission number 14, p. 6.

337 Submission number 16, p. 2.

338 Submission number 43, p. 3.

339 Taskforce consultation in Brisbane, 26 June 2000.

ASIC commented that while there is a need for effective ongoing monitoring of self-regulatory schemes, it does not believe that an oversight committee is the best way to deal with issues and would unnecessarily add to existing agency structures.<sup>340</sup>

## Developing a model code of practice

As discussed elsewhere, there is no single industry model of self-regulation. However, there are elements of good practice in self-regulation that are generally consistent across schemes.<sup>341</sup> Some organisations have argued that a model code could be developed along these elements of good practice.

Clayton Utz commented that there should be uniform requirements for codes. It discussed the establishment of a register for codes of conduct, where a quality assessment procedure could be implemented to ensure that a particular code was appropriate for inclusion in the register. To this end, a set of core requirements should be developed and finalised as being necessarily evident in each code appearing in the register as well as ensuring a degree of uniformity between different codes.<sup>342</sup>

Clayton Utz suggested that such core requirements should include:

- complaint handling and dispute resolution procedures which comply with AS4269 (the Australian Standard on complaints handling);
- sanctions and penalties appropriate to the industry for deliberate and continuous breaches of the code;
- the information privacy principles (where appropriate);
- provisions dealing with transactions conducted via electronic commerce (where applicable); and
- procedures for the regular review and amendment of the code.

Clayton Utz argued that by making code provisions more uniform, industry participants which are regulated by multiple codes of conduct can achieve compliance more effectively without needing to develop multiple code compliance systems.<sup>343</sup>

Similarly, the Australian Direct Marketing Association commented that the role of government in respect of codes should be to both promote national consistency by developing model codes under the auspices of (for example) the Ministerial Council

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340 ASIC, 14 August 2000.

341 See chapter 6.

342 Submission number 43, p. 2.

343 Ibid.

on Consumer Affairs, where appropriate, and to encourage self-regulatory industry bodies to develop codes based on the model.<sup>344</sup>

Further, the Commonwealth Consumer Affairs Advisory Council suggested that there is a role for government in establishing a government endorsed 'Code' framework (developed through Australian Standards). It argued that only participants in codes who meet the requirements can advertise that fact, and participants in codes must advertise that their code does not meet the requirements. Participants in an industry with a complying code who do not subscribe should advertise the fact. The Advisory Council suggested that part of the endorsement process would involve the examination of competition issues, for example cartels of big players constructing codes which may have the effect of forcing out smaller players.<sup>345</sup>

As discussed throughout the report, the Taskforce considers there is no single industry model for self-regulation or codes. However, there are some general principles of good practice as discussed in chapter 6.<sup>346</sup>

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344 Submission number 36, p. 8.

345 Submission number 14, p. 6.

346 The Taskforce also recognises that the Ministerial Council of Consumer Affairs guideline 1996, *Fair Trading Codes of Conduct, Why have them, how to prepare them* is a useful reference tool for industry developing codes.

## Chapter 8

# **Options that facilitate the improvement and harmonisation of dispute resolution schemes**

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*The Taskforce is to inquire into and report on options that facilitate the improvement and harmonisation of dispute resolution schemes while reducing costs to industry and improving outcomes for consumers.*

Effective dispute resolution is a crucial element of industry self-regulation offering redress to consumers and it can also identify systemic problems in the industry. Dispute resolution schemes are an excellent monitoring tool increasing performance and industry standards.

However, dispute resolution schemes come at a cost. In particular, they can be costly for small industry groups. One option is for dispute resolution to operate across different sectors with similar products/services which may reduce costs to business and reduce confusion for consumers. Also, there may be scope to consolidate dispute resolution schemes.

The following chapter explores some options that facilitate the improvement and harmonisation of dispute resolution schemes.

## Principles

- The type of dispute resolution scheme, if required, should depend on the nature of the complaints and type of self-regulatory model.
- A scheme is only as effective as its broader coverage of industry participants, so it should aim for comprehensive membership.

## Conclusions

42. In the future dispute resolution schemes may operate across different sectors with similar products/services, driven by changes in technology and market circumstances. Harmonisation of schemes would be less costly and less confusing to consumers and the use of umbrella-type arrangements with a single co-ordinated access point would likewise be of assistance to consumers.
43. Promotion of dispute resolution schemes to consumers raises their awareness of the availability of quick and inexpensive redress.

## Range of dispute resolution schemes

In recent years, the growth in self-regulation has seen an expansion in the range of redress mechanisms available to consumers well beyond the traditional sphere of Small and Consumer Claims Courts and their equivalents. A number of industry-based dispute resolution schemes provide consumers with a cheap and accessible means of resolving disputes.

The form of dispute resolution schemes also varies depending on the nature and quantity of complaints. Two of the biggest dispute resolution schemes are the Australian Banking Industry Ombudsman and the General Insurance Enquiries and Complaints Scheme. These schemes have a large number of staff dealing with up to 50 000 inquiries per year.<sup>347</sup> In contrast, the Telephone Information Services Standards Council, which handles consumer complaints about primarily '0055/1900' telephone numbers, has a small number of staff and generally deals with complaints of a low monetary value.<sup>348</sup>

As discussed in chapter 6, dispute resolution schemes can be expensive. A 'Rolls Royce' dispute resolution scheme is not necessary if the complaints are minor and are of small monetary value or significance. Again, the type of dispute resolution

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<sup>347</sup> Submission number 37, p. 30.

<sup>348</sup> Taskforce consultation with the Telephone Information Services Standards Council, Sydney, 1 March 2000.



scheme should be that which imposes the least cost of compliance consistent with achieving the identified objectives.

As a general principle, the Taskforce considers that the type of dispute resolution scheme that best meets consumer needs will depend on the nature of the complaints. However, an overarching consideration that will apply to all schemes is that a scheme is only as effective as its coverage of market participants, or the extent to which consumers can factor dispute resolution participation into their purchasing decisions.

## **Convergence**

A challenge for self-regulatory schemes is that Australian markets are dynamic markets with increasing convergence and globalisation. Clayton Utz suggested that future codes will need to be more inter-industry rather than intra-industry and adaptable to take into account changing consumer relationships resulting from advances in technologies and adapting delivery systems.<sup>349</sup>

Hence, market forces may lead self-regulatory schemes being developed along more functional lines. For example, convergence of industry sectors and the rapid redrawing of industry boundaries are occurring in telecommunications. The Service Providers Industry Association commented that the telecommunications industry brings a tradition of detailed regulation and standardisation and an engineering culture that insists on industrial strength, reliability and simplicity of user interfaces. The information technology industry sector has relied on a relative absence of regulation to support decades of rapid growth and technological change. Convergence poses continuing challenges for regulators and the self-regulatory process. The Association argued that there needs to be recognition that these basic regulatory principles will need to be directed primarily at cross-industry activities rather than industry-specific transactions and processes.<sup>350</sup>

Similarly, convergence continues to occur in the finance sector, generating pressure for the merger of codes and dispute resolution schemes. However, the financial services industry is different to other industries in that there is a proliferation of dispute resolution schemes and there are other factors driving rationalisation in the industry. ASIC commented that membership of an approved scheme has become mandatory for an increasing number of industry participants, and existing complaints resolution schemes are subject to consideration under ASIC's Policy Statement 139. Further, ASIC commented that the Corporate Law Economic Reform Program (CLERP) requirements for dispute resolution scheme membership are also likely to be a key driver of rationalisation.<sup>351</sup> Convergence and the establishment of corporate composite service providers will drive fewer schemes.

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349 Submission number 43, p. 1.

350 Submission number 25, p. 2.

351 Submission number 37, p. 26.

## Potential for dispute resolution schemes to operate across different sectors with similar products/services

The Taskforce considers that it is possible for dispute resolution schemes to cover different sectors of industries with similar products/services on a shared cost basis as a means of capitalising on economies of scale. For example, the Australian Direct Marketing Association (ADMA) has a dispute mechanism that operates across a range of different sectors and industries. ADMA commented that their code binds all ADMA members and all employees, agents or subcontractors of ADMA members. It requires members to ensure their suppliers comply, by requiring that this is a condition of contracts between members and their suppliers. The Code seeks to curb behaviour by members that may be inconsistent with widely accepted best practices in direct marketing. ADMA commented that this approach has been applied consistently across all direct marketing media and direct marketing activity on both the user and supplier sides of the ADMA membership.<sup>352</sup>

In theory, there are a number of advantages for dispute resolution schemes to operate across different industries and sectors with similar products/services. The main advantage is that more rationalised schemes will benefit from lower costs overall by virtue of the economies of scale. These lower costs can be passed onto industry members and consumers. Consumers would also benefit through a less confusing and better promoted dispute resolution system. From a consumer's perspective, a 'one stop shop' with a single co-ordinated access point decreases the need for consumers to be referred from one scheme to another.

The Financial Industry Complaints Service suggested that schemes should be willing to cover different sectors of industry if it is of no cost to them. Cross industry schemes would be more effective so long as the industries have some common thread.<sup>353</sup>

However, as discussed elsewhere, industry commitment is very important in establishing and maintaining self-regulatory schemes.<sup>354</sup> Sharing schemes may lead to a loss of 'industry ownership' and therefore commitment in some schemes. During Taskforce consultations some industry bodies also commented that larger schemes would need to avoid becoming bureaucratic.<sup>355</sup> Clearly, harmonisation of schemes would require some greater formality in administration.

The Investment and Financial Services Association commented that industry schemes consistently benefit from expertise and industry knowledge on the part of those who establish them. The need for schemes to recruit directors, adjudicators,

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352 Submission number 36, p. 4.

353 Submission number 15, p. 4.

354 Chapter 5 indicated that industry commitment leads to more effective self-regulation.

355 For example, Taskforce consultation with the Insurance Brokers' Dispute Facility, Melbourne, 22 November 1999. It commented that it would be hard to point the consumer in the right direction if there was just one broad scheme covering financial services.

panel members and other personnel who have specialised knowledge will, in the case of very large schemes, translate to a need for bureaucratic processes and a consequent remoteness from both industry members and consumers.<sup>356</sup>

Further, although the Law Council of Australia recognised that there is no reason why dispute resolution schemes cannot operate across different sectors of industries, the Council commented that consumer rights must be maintained. In particular, the Law Council of Australia argued that consumers (unlike industry) are not concerned about the cost of these schemes. Any suggestions of making cross industry schemes more cost effective conjures up staff cuts and procedure cuts. To the consumer, the costs of goods and services that are perhaps slightly lower in the short run is inadequate compensation for the erosion of the rights they currently have and the rights they should have.<sup>357</sup>

The Taskforce recognises that in the future cross-sector dispute resolution schemes may be used more, driven by changes in technology and market circumstances. Harmonisation of schemes would be less costly and less confusing to consumers and the use of umbrella-type arrangements with a single co-ordinated access point would likewise be of assistance to consumers. However, the issue is whether specialised functional services can be provided by fewer schemes.

## **Shared case management/dispute resolution mechanisms**

Apart from the possibility of dispute resolution schemes covering different sectors of industries with similar products/services, it may also be possible for industries to share dispute resolution schemes. In particular, there are opportunities for schemes to share backend services to the benefit of the respective industries. For example, Insurance, Enquiries and Complaints Limited commented that it currently performs accounting, payroll, and Company Secretary functions for the Financial Industry Complaints Service scheme to the financial benefit of both organisations and their associated industries.<sup>358</sup>

Similarly, the Australian Banking Industry Ombudsman considered that sharing services between schemes is a good concept.<sup>359</sup>

ASIC commented that rationalised schemes will benefit from lower costs overall by virtue of the economies of scale arising from a single budget (e.g. for administration, property and marketing) that would otherwise have to be generated for several schemes. These lower costs can be passed onto industry members.<sup>360</sup>

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356 Submission number 41, p. 4.

357 Submission number 19, p. 10.

358 Submission number 8, p. 4.

359 Taskforce consultation in Melbourne, 20 June 2000.

360 Submission number 37, p. 25.

ASIC appreciated that an appropriate degree of flexibility in the structure of self-regulation should not be pursued at the expense of appropriate minimum standards, structural efficiencies and better market outcomes for industry members and consumers.<sup>361</sup>

However, Insurance, Enquiries and Complaints Limited stated that careful consideration must be given to the beneficial effect that a high degree of industry 'ownership' has had for its scheme and other schemes.<sup>362</sup> Also, the Law Council of Australia stated that shared case management and dispute resolution mechanisms can be viable only if consumer safeguards are maintained.<sup>363</sup>

In addition, one smaller industry association observed that there were no economies of scale to join with other schemes.<sup>364</sup>

On balance, the Taskforce recognises that sharing services is one means for smaller industry associations and smaller businesses to be involved in dispute resolution schemes.

Overall, the Taskforce considers it is important that the structure of self-regulation is flexible and does not become the site of institutional 'empire building' that will prove costly for both industry members and consumers.

## **Promoting dispute resolution schemes**

The promotion of dispute resolution schemes is both beneficial to industry and to the consumer. For industry, a dispute resolution scheme can be used as a marketing tool to differentiate themselves from competitors. Whereas, for the consumer, the promotion of dispute resolution schemes informs them of their rights.

The Taskforce heard that an United Kingdom industry association was loath to promote its dispute resolution scheme in fear that people might find out about it.<sup>365</sup> While this story is extreme, it illustrates that unless a scheme is promoted then a consumer may not even know to avail themselves of a quick and inexpensive redress mechanism. Access is very important for effective self-regulation. The Taskforce considers that the promotion of schemes is the responsibility of both industry and government, and to a lesser extent consumer groups and counselling services.

The Law Council of Australia commented that industry can improve access by providing effective, simple communication which allows the consumer to fairly present grievances and complaints. Industry should provide information packages to

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361 ASIC, 14 August 2000.

362 Submission number 8, p. 4.

363 Submission number 19, p. 10.

364 Taskforce consultation with the National Furnishing Industry Association of Australia Ltd, Melbourne, 23 November 1999.

365 Taskforce consultations in Melbourne, 22 November 1999.

consumers when goods or services are provided.<sup>366</sup> For example, Insurance Enquiries and Complaints Limited stated that consumer access to the scheme is ensured by the Code requirement that a member company inform the consumer about the external dispute resolution scheme once an internal dispute resolution decision has been reached.<sup>367</sup>

Similarly, the Telecommunications Industry Ombudsman (TIO) commented that consumers are aware of the Scheme's jurisdiction and of the limits on that jurisdiction. Apart from general media and other activities, the Scheme provides a booklet on the TIO's functions to every complainant who contacts the TIO.<sup>368</sup>

Further, for promotion to be effective for consumers it also needs to focus on the organisations that consumers go to when there is a problem, for example Fair-trading agencies or financial counsellors. There will always be insufficient resources to educate consumers of a service which is only likely to be used in a minuscule number of cases.

The Government can also contribute to the harmonisation of dispute resolution schemes. A couple of Commonwealth initiatives are discussed below.

### **Directory of Consumer Dispute Resolution Schemes and Complaint Handling Organisations**

One initiative that has been useful is the Commonwealth's *Directory of Consumer Dispute Resolution Schemes and Complaint Handling Organisations* which sets out consumer dispute resolution schemes, complaint handling organisations and other useful contacts such as fair-trading agencies.<sup>369</sup> The Directory is a practical reference guide for individual consumers and organisations that advise consumers and small business.

A number of industry associations, consumer groups and government agencies submitted that the Directory has been useful. For example, the Telecommunications Industry Ombudsman commented that there is more than anecdotal evidence that the Directory is an important initiative. The Directory is commonly used by consumer groups, legal aid workers and financial counsellors to ensure that consumers are directed to the appropriate redress mechanism.<sup>370</sup> Similarly, the

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366 Submission number 19, p. 10.

367 Submission number 8, p. 4.

368 Submission number 21, p. 11.

369 Consumer Affairs Division, Commonwealth Department of Treasury 2000, *Directory of Consumer Dispute Resolution Schemes and Complaint Handling Organisations*, 4th edition, released by the Minister for Financial Services and Regulation, the Hon Joe Hockey MP. This document is available on the Internet at <http://www.treasury.gov.au/publications/pubs.asp>.

370 Submission number 21, p. 11.

Financial Industry Complaints Service commented that the Directory is ‘most helpful’ and the scheme distributes it when presenting seminars.<sup>371</sup>

## Financial Complaints Referral Centre

As discussed elsewhere, access to schemes is very important for self-regulation to be effective and there is evidence to suggest that consumers get confused and frustrated if they have to go through multiple schemes. In February 1998, a Commonwealth initiative to overcome the problem of consumer confusion associated with a proliferation of schemes in the financial services industry was the introduction of the Financial Complaints Referral Centre, operated by ASIC.

It operated as a portal to the dispute resolution schemes in the financial services industry. The Centre’s staff advised callers to refer their complaints to the relevant service provider in the first instance and provided contact details for the appropriate dispute resolution scheme(s) if a deadlock remained.

The operations of the Centre were reviewed by ASIC in late 1998 and February 1999. ASIC commented that the reviews found that around 5 to 6 calls per day were being referred to the industry-funded complaint schemes.<sup>372</sup> For the purpose of comparison, the two largest industry ADR schemes — the Australian Banking Industry Ombudsman and the Insurance Enquiries and Complaints — each receive between 45,000 to 50,000 telephone contacts per year.

The views expressed by industry and consumer groups during the Taskforce consultations also indicated that the Financial Complaints Referral Centre has not been effective in channelling calls.

ASIC commented that during the Referral Centre’s development, industry stakeholders expressed reservations not only about the actual demand for a central gateway, but also that the promotion of the Centre might detract from the efforts of the dispute resolution schemes to effectively promote themselves. Thus, detracting from industry’s sense of ownership of the established dispute resolution processes.<sup>373</sup>

ASIC submitted that there was also resistance from existing dispute resolution schemes to devoting significant resources to the establishment and operation of a central gateway without detailed evidence that there was a sufficient level of demand for the service.<sup>374</sup>

The Taskforce notes that the Referral Centre has now been closed. The referral of complainants to those dispute resolution schemes dealing with general and life

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371 Submission number 15, p. 5.

372 Submission number 37, p. 30.

373 Ibid.

374 Ibid.

insurance, superannuation and banking is a role that ASIC's Infoline would have played in any event, and that it will continue to play in the future.<sup>375</sup>

The Taskforce understands the schemes themselves already have established referral mechanisms to assist consumers to locate the most appropriate dispute resolution mechanism.

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375 ASIC Infoline number is 1300 300 630.

