The Australian Competition and Consumer Commission's Proposed Industry Codes of Conduct - A Compliance Solution?

By Len Gainsford*

Abstract

Recently, the Australian Competition and Consumer Commission (ACCC) has promoted the endorsement of voluntary industry codes of conduct. The ACCC's 14 October 2003 draft guidelines suggest the endorsement of "industry best practice" codes separately, but related to, individual trade practices compliance programs. In public submissions, industry groups have identified problems with the ACCC's proposals. In this article, it is argued that endorsement of voluntary industry codes should not be separated from a commitment to individual trade practices compliance. Codes in themselves are not a compliance solution.

In 1994, the Australian Law Reform Commission found that codes of conduct are a form of co-regulation. It also found that there needs to be a level of mutual commitment to a code from the regulator and its regulated entities. That commitment may be lacking if businesses find that the ACCC's code endorsement process is less rewarding than their own compliance processes. Recent research data suggests that Australian businesses prefer trade practices compliance programs derived from their own compliance culture. Simple obedience by a business to an ACCC endorsed industry code is not consistent with this trend.

Key Words: Codes of Conduct, Trade Practices Compliance

1. Introduction

On 11 August 2003, the Australian Competition and Consumer Commission's (ACCC's) Chairman Graeme Samuel announced the "introduction of endorsement for high quality voluntary industry codes of conduct"[1]. The use of codes of conduct for information disclosure and alternative dispute settlement had previously been raised by then Acting ACCC Chairman Allan Asher in 1996[2]. Mr Samuel's announcement appears to be a re-kindling of this issue. Speaking at an 11 August 2003 Australian Industry Group National Industry Forum[3], Mr Samuel said that effective codes result in increased compliance and reduced regulatory costs. He also said that the ACCC's endorsement of codes should provide the consumer with some reassurance that the business they are dealing with operates in a "fair, ethical and lawful manner".

ACCC Commissioner John Martin took up his Chairman's theme in a 4 September 2003 address to the National Alternative Dispute Advisory Council[4]. Mr Martin said "codes of conduct are being used by industries as a means of self-regulation or co-regulation with government. By identifying industry members that are bound by appropriate industry standards, codes represent a public statement of fair dealing with an industry and its responsiveness to consumer needs and concerns". In conceding that there is a widespread debate over the value of codes, Mr Martin went on to promote code advantages over "prescriptive black letter law to regulate markets". He also signalled a "more pro-active approach to industry codes" which follows a "comprehensive review of codes and their relationship to the (trade practices legislation) that occurred over the previous 6 months". Draft ACCC guidelines for "developing and endorsing effective industry codes of conduct" were released for public comment on 14 October 2003[5]. The ACCC has received 33 public submissions on the draft guidelines.

The value of voluntary industry codes of conduct as a trade practices compliance solution is the subject of this article. It is debateable whether (in the words of ACCC Deputy Chair Louise Sylvan) "endorsement of a code is a quite separate process to normal industry compliance that helps businesses and industries to comply with trade practices and other governmental legislation"[6]. Rather, it is first argued that endorsement of voluntary industry codes should not be separated from a commitment to individual trade practices compliance, and second, that such compliance should reflect factors of individual risk, commercial reward and compliance culture in meeting obligations specified under the legislation. At the same time industry codes, through aggregating the risk and reward perceptions of business entities, may not sufficiently reflect individual entity compliance needs. Because of aggregation, it is also argued that the ACCC's endorsement of codes does not necessarily deliver benefits of a kind nominated by Mr Samuel, being reduced regulatory costs and reassurance that the business is operating in a "fair, ethical and lawful manner".

Regulation and compliance definitions are provided in the next section. A re-kindled interest in industry codes is then explored under the heading of the ACCC's Vision. Of particular relevance to businesses is whether the ACCC's vision now presents a trade practices compliance solution. The role of the ACCC as competition regulator and code facilitator is also discussed. To be successful, it seems that there needs to be some mutual commitment to a code by the regulator and its regulated entities. Evidence of such a commitment may lie in an actively implemented trade practices compliance program,

which is integral to the ACCC's code endorsement process.

2. Regulatory Definitions

In order to understand how the ACCC facilitates industry codes, it is necessary to consider a number of definitions. Dewing and Russell[7] cite Francis' (1993) definition of regulation as "state intervention in private spheres of activity to realise public purposes." The Macquarie Dictionary[8] definition of regulation is "a rule or order, as for conduct, prescribed by authority; a governing direction or law". The ACCC's involvement with codes fits both these definitions.

Regulation is frequently associated with the attempt to correct market failure by increasing industry and consumer awareness, clarity and transparency[9]. It may take many forms, including self-regulation[10] where rules are formulated without government involvement; quasi-regulation or co-regulation[11] which involves the development of rules or arrangements where the government has played a major role in their development and enforcement but which do not form part of explicit government regulation and lastly, the more discriminatory symmetric regulation[12] which creates a "level playing field" upon which market participants at various stages of development or market sophistication can compete. A codes process may involve one or more of these forms, although the ACCC's proposed endorsement of voluntary codes for industries such as pharmaceuticals suggests co-regulation, tending towards symmetric regulation.

Compliance focuses on target populations of regulation, the extent to which they comply with regulation and why they do so[13]. The Organisation for Economic Co-operation and Development (OECD)[14] refers to Friedrichs (1995) in distinguishing "compliance", which uses persuasion and co-operation, from "deterrence", which involves prosecution and punishment. This is sometimes conceptualised through a "compliance pyramid", which has "self regulation and co-operation" at its base, moving upwards through "assisted self regulation" to "active enforcement" at its apex. Alternatively, the distinction may be depicted as a "regulatory spectrum" on a horizontal scale with deterrence and compliance at opposite ends of the spectrum.

3. A Recent History of Industry Codes

Mr Samuel's 11 August 2003 announcement of code endorsement is the latest instalment in a codes process, described by the Australian Law Reform Commission (ALRC) in 1994 as "a form of co-regulation"[15]. The ALRC in its Report 68 said that "codes alone cannot prevent all market failure or consumer complaints. However codes can play a role in addressing these problems if there is both an incentive and a commitment to making a code work"[16]. Effective co-regulation through codes of conduct were found in ALRC 68 to have a number of advantages (such as "codes can be more flexible than legislation and more readily changed to reflect the dynamics of the market place"), and also disadvantages (such as "voluntary codes may be unsuitable where industry-wide compliance is required but not all industry participants have adopted the code"). In this light, the ACCC's recent promotion of code endorsement is worth re-visiting.

ALRC Discussion Paper 65 released in 2000 describes a number of code features. Some features could be viewed as more advantageous to individual businesses than others (such as with the prescription of standards). As the paper says at paragraph 4.63[17]:

> *"A code of practice sets out guidelines concerning business activities. Codes of practice vary in what they contain and can range from setting out general statements of principle about how a business or industry will operate, to detailed listings of business practices that require compliance with specific standards (such as the handling and disposal of hazardous chemicals). The extent to which government is involved in supporting, establishing or enforcing a code depends upon where the particular industry arrangement sits on the regulatory spectrum. However, governments in Australia are increasingly using codes in legislation to prescribe standards, technical requirements and other specifications that business must use. Codes are usually developed by industry, or industry in collaboration with government, and are said to reflect 'best practice'. Codes may or may not produce methods for dispute resolution".*

In 1994, the adoption of codes was seen by the ALRC in its Report 68 as an extension of compliance activity. The adoption of codes was not viewed as a viable alternative to regulatory enforcement. The ALRC in 1994 explained this as "the development and existence of codes of conduct can lead to improved compliance with the *Trade Practices Act* 1974 (Cth) (TPA) and other fair trading legislation by increasing industry awareness of its obligations under those laws". Paragraph 3.11 to ALRC 68 also refers to submissions received on the T*rade Practices Commission Guide to Codes of Conduct: Draft for Comment*[18]. Here it was said that "there was little support for the Trade Practices Commission (TPC - the ACCC's predecessor) initiating codes or helping to administer them. Too close an association with the development and administration of codes may affect the TPC's ability to act as an independent and impartial watchdog".

With compliance, an important recent change has been brought about via the *Trade Practices Amendment Act (No.1)* 2001 (Cth). In introducing the Bill, the government said it intended to clarify the TPA and expand the types of sanctions a Court may impose. It also said that the Bill does not change the substantive provisions of the TPA nor create new legal obligations. Rather, the amendments were designed to enable the TPA to operate more efficiently where the TPA has been contravened.

In introducing the Bill, the Minister for Financial Services, Joe Hockey, canvassed the government's four options. They were first, do nothing; second, promote voluntary codes of conduct; third, conduct an education campaign; and finally, in the preferred option, introduce legislative amendments. Reforms such as non-punitive orders were thus preferred and inserted into the TPA via a new section 86C. Probation orders were described as a form of non-punitive order. A probation order, with a maximum term of 3 years, was said to be "directed at achieving a change in the organisational or corporate *culture* to prevent a repetition of the contravention and to ensure future *self-regulation*". Examples of a probation order were given as:

- An order requiring a corporation to develop a compliance plan
- An order requiring the provision of education and training for employees and managers as to their

obligations and responsibilities under the TPA

- An order requiring the corporation to undertake a revision of their internal operations and control methods to address the contravention of the TPA.

Most notably, in the explanatory memorandum's conclusion and recommended option, it was said that "the introduction of codes of conduct, because of their voluntary nature, would not guarantee increased compliance with legislation". This was "particularly so where a company, or individual, wilfully engages in illegal conduct". The Explanatory Memorandum also said "there would be some doubt whether business, consumers and the community overall would benefit from (a code's) development". In passing the Bill, Federal Parliament rejected the promotion of voluntary codes of conduct in favour of the government's preferred option of legislative amendments. Changes were introduced via the insertion of a new section 86C TPA.

4. The ACCC's Vision

Beginning with Toni O'Loughlin's 12 August 2003 article in the *Australian Financial Review*[19] entitled "*Samuel's Grand Vision: A World Without Regulation*" , the reporting of ACCC Chairman Graeme Samuel's announcement has produced some interesting reactions. One example is Sarah Henderson's 20 August 2003 article in the Melbourne *Herald Sun*[20] , the first part of which reads:

> *"It has been a busy week for the new Chairman of the Australian Consumer and Competition Commission Graeme Samuel. That's because he spent much of the week putting out bushfires over a speech he gave in which he advocated a new system of Commission-endorsed voluntary codes of conduct as a way of improving business standards. The problem was that Mr Samuel did not make it clear enough that the codes were not intended to replace a system of vigorous law enforcement under the Trade Practices Act. And he didn't help his case by suggesting that effective codes of conduct for self-regulation would increase the chances 'that Government regulation should become, hopefully, unnecessary'. As he says, the critical factor is that industry codes of conduct are intended to impose standards of behaviour over and above the provisions of the Trade Practices Act".*

It is not clear at this time what Mr Samuel's reported "standards of behaviour over and above the provisions of the *Trade Practices Act*" may be. To overcome problems with code endorsement, a co-operative approach is suggested in Graeme Samuel's 11 August 2003 speech, when he says that the ACCC can work with industry groups to "iron out any likely deficiencies". Mr Samuel also acknowledges that there are no nationally or internationally recognised standards to identify the "core elements of a successful code".

Points made by Graeme Samuel in his 11 August 2003 speech to the Australian Industry Group Conference are:

- The industry will need to demonstrate that its code is achieving its objectives before the ACCC will provide endorsement
- Endorsement from the ACCC will be hard to obtain and easy to lose
- ACCC endorsement should provide the consumer with some reassurance that the business they are dealing with operates in a fair, ethical and lawful manner
- ACCC endorsement will provide the business operator with a degree of confidence that they are applying best industry practices
- If the ACCC assesses that an industry code is not achieving its objectives, it will recommend possible changes to that code to ensure all essential criteria are met for an effective industry code
- If the industry fails to adopt these recommendations, the ACCC will remove any endorsement
- Industry groups who receive ACCC endorsement can advertise it but the ACCC will also advertise the removal of endorsement if an industry group fails to maintain the effectiveness of the code

Both Messrs. Samuel and Martin have described their version of voluntary codes. They share a vision which contains mixture of processes and outcomes, summarised as "clarity", "transparency", "complaints handling procedures", "in house compliance", "sanctions for non-compliance" and "accountability". These processes and outcomes appear to be incorporated into the 14 October 2003 draft guidelines. It was said in the draft guidelines that "while the policy is still in a developmental stage, consideration will need to be given to the issue of authorisation for some of the codes seeking ACCC endorsement". At part E to the draft guidelines, the processes of code endorsement and authorisation under the TPA are distinguished. Anti-competitive and price fixing provisions are mentioned as "most likely to be found in a code". Bodies such as an industry "code development committee" may encourage contracts, arrangements or understandings between industry participants, and these may lead to anti-competitive practices.

In issuing draft guidelines for public comment, the ACCC is drawing upon its legislative, policy and administrative responsibilities. The ACCC's commonly accepted regulatory roles are to monitor, to investigate and to prosecute. It may authorise otherwise anti-competitive arrangements on public benefit grounds, it may enter into enforceable undertakings and it may apply to a Court for orders, such as S.86C TPA non-punitive orders covering trade practices compliance programs. The ACCC may also act as a code facilitator. The ACCC is empowered to register codes under TPA Part IVB.

To date, there have been few codes registered as final determinations. There is presently only one mandatory code (the Franchising Code, gazetted 9 April 2002) and a number of registered but not gazetted voluntary codes (such as the Film Code). Many voluntary codes operate under the risk of being made mandatory through gazettal, should processes such as complaints handling be found ineffective. With voluntary codes, there is a risk to a regulator in operating through code "rules" or "guidelines". This is because such rules or guidelines may not have the force of law. As was the case with the ACCC's 1999 New Tax System guidelines, unenforceable regulatory concepts such as "the price rule" can create confusion and otherwise diminish initiatives which were intended to benefit consumers.

Nearly 40 industry groups are said by Samuel to be discussing codes with the ACCC. These range from "informal

consultations, including working parties formed either to develop or review a code of practice such as the Car Rental Industry Code", or "to review the effectiveness of a particular code such as the Franchising Code or the Australian Direct Marketing Code". A recent example of a conditionally authorised code was given in ACCC Deputy Chair Louise Sylvan's 2 March 2004 speech[21]. In granting conditional authorisation on 14 November 2003 for the 14th Medicines Australia Code of Conduct for Pharmaceutical Manufacturers, it was found by the ACCC that:

"the code could potentially generate a public benefit by supplementing the provisions of the *Trade Practices Act* which prevent companies from making false and misleading representations. In addition, it also found a benefit resulting from preventing pharmaceutical companies from offering benefits to healthcare professionals that are banned under the code, and which may result in inappropriate prescribing by at least some healthcare professionals. However, it remained concerned about the enforcement of the code, and as such considered that in practice only a small public benefit was likely to arise".

Under the ACCC's proposals, the long term future of any endorsed code may be limited, as an authorisation obtained during the developmental stage is able to be removed at any time. Rather than encouraging co-regulation of the type mentioned in ALRC 68, the constant risk of authorisation removal provides something akin to symmetric regulation. It is thus something which is closer to the "enforcement" apex of the "compliance pyramid" than to the "self-regulation and co-operation" at its base.

The competition regulator's vision, which contains a mixture of processes and outcomes, may also be confusing to potential code participants. Sanctions for non-compliance to a code need to be clear in order to inspire confidence that they are not tools of enforcement in another guise. Of primary importance is the likelihood that the ACCC's vision is shared by those individuals and entities eligible for coverage under a code. The ACCC needs to be credible in the case it makes for code participation. Potential code participants need to understand that code membership will provide a better compliance outcome than would otherwise be the case.

5. Accountability

The ACCC's credentials for providing endorsement for industry codes on something as important as "Code essential 15: Accountability" can be questioned. As Katie Lahey, Chief Executive of the Business Council of Australia has said[22], "the accountability of the ACCC (itself) is one of the Business Council's biggest concerns". Previously, in research on the ACCC's Service Charter[23], it was difficult to discover whether the ACCC's actions were based, if at all, on the principles of transparency, certainty or consistency. It was found that the 2002 ACCC *Service Charter* was primarily focused on "quality service" and not "governance".

While there have been some recent changes to the *Charter* shown on the ACCC's web site[24], there has been no noticeable shift in focus towards governance. The ACCC now says that "we seek to be accessible, transparent, independent and fair and we perform in a professional, timely and ethical manner in accordance with the law to produce results that are in the public interest". There is no specific mention of accountability. In the code context, it is difficult to see how the ACCC could "provide the consumer with some reassurance that the business they are dealing with operates in a fair, ethical and lawful manner" when there is no published evidence of the adoption of governance principles in the *Service Charter*.

Accountability, as a concept, relies upon taking responsibility for individual behaviour. In the ACCC's draft guidelines, "code essential 15: accountability" simply says that to be accountable, a code administration committee should produce an annual report. With the Australian Stock Exchange *Corporate Governance Guidelines*[25] in mind, the ACCC's interpretation of accountability is not how most listed corporate entities would see it. There also appears to be some confusion with "code essential 15". As the Trade Practices Committee, Business Law Section of the Law Council of Australia has submitted[26], "the proposal that information about how the scheme ensures equitable access is ambiguous and uncertain in meaning in a practical context". Some of this confusion may be addressed by reviewing how individual responsibility is taken up under in-house compliance.

6. In-House Compliance

One of the criteria mentioned in Graeme Samuel's 11 August 2003 speech for voluntary code endorsement was "code essential 8: in-house compliance". This is worthy of closer examination. At its simplest interpretation, "code essential 8" could mean that evidence needs to be provided by a potential code participant of an actively implemented trade practices compliance program conforming with say, Australian Standard AS3806-1998. Armed with that evidence, a potential code participant could then ask "what additional benefits could code participation confer?" As discussed above, one benefit could be the imposition of standards of behaviour over and above provisions of the *Trade Practices Act* 1974. Potential code participants however may not see this as a benefit at all. They may wish to comply with legally enforceable compliance processes, and no more.

In Toni O'Loughlin's 15 October 2003 article "ACCC's Ethics Plan Falls Flat" in the *Australian Financial Review*[27], ACCC Commissioner Martin is quoted as saying "it remains to be seen who will take up the mantle. Many or most industry [sic] may be happy to continue as they have rather than going through the rigours of the Commission". On the contrary, many industries may not be happy at all with the ACCC's proposals and may decide not to participate in industry codes. In a November 2003 submission for instance, it was said by the Australian Chamber of Commerce and Industry[28]:

> *"ACCI members have genuine concerns about the proposal by the competition regulator to introduce a system for endorsing voluntary codes of conduct in the form proposed. It appears as if there will be few, if any, incentives for business sectors to pursue these particular ACCC codes of conduct. There are 13 key questions in the discussion paper grouped under three headings. However, left unasked were the real questions from a business perspective, which relate to the outcomes that can be achieved for business from developing and participating in ACCC endorsed codes of conduct, and whether the costs outweigh the benefits. On either question, there is little to commend the concept to business".*

Against such criticism, there may be another way of

addressing many of the code endorsement criteria. This is through the ACCC encouraging individual business entities to implement their own in-house trade practices compliance programs as part of an industry-wide co-ordinated program. Recent research conducted with senior managers in large Australian business entities[29], suggests a preference for their own trade practices compliance programs. This is where:

- There are clear legal compliance objectives emerging from statutory interpretation and case law
- Trade practices compliance is able to be incorporated into existing risk and corporate governance processes
- Organisational leadership demonstrates appropriate commitment to compliance behaviour
- A system of lateral and "bottom up" discourse on values and business-based ethics exists, which assists in the development of compliance culture
- There is education and training in trade practices compliance which incorporates "trade practices thinking" across all executive and employee levels in the organisation
- There is some compliance program benchmarking (e.g. Australian Compliance Programs Standard AS 3806-1998) and an identified need for continuous process improvement

If there is a place for Samuel's code endorsement criteria, it seems to lie embedded within a corporate codes of ethics. *Writing in the Australian Journal of Management*[30], Bruce Kaye (1996) has said that codes of ethics can "translate into instruments to achieve volitional and creative compliance, and in turn have a direct impact on transaction costs in the corporation". The active implementation of what is contained in codes of ethics may in any case help achieve Samuel's "standards of behaviour over and above the provisions of the *Trade Practices Act*". Recent research data[31] seems to bear this out. In one major publicly listed Australian company, the "ethical dimensions" of behaviour at each individual business level are reflected in an ethical dimensions reporting system. Activities such as offshore tendering are continuously compared against values shown in the system. The comparison provides guidance for individual management decisions on the level and extent of business concluded with outside parties. This behaviour is also evident in the way collusive agreements, arrangements or undertakings, which may breach the TPA, are avoided.

Results from the research also point to the increasing adoption of both "surface" and "deep" (Schein, 1992)[32] forms of trade practices compliance, with the latter reflective of ethical values and the development of a compliance culture in an organisation. A level of commitment of the kind mentioned in ALRC 68 is a "deep" concept. Kotter and Heskett (1992)[33] say that "at the deeper and less visible level, culture refers to values that are shared by the people in a group and that tend to persist over time, even when group membership changes. At the more visible level, culture represents the behaviour patterns or style of an organisation that new employees are automatically encouraged to follow by their fellow employees".

Many organisations follow surface compliance procedures such as requiring company managers to sign six monthly Compliance Certificates. The ACCC also suggests surface compliance through its "code essentials" principles and key indicators. However, organisations that turn to deep compliance may increasingly find benefits such as the enhancement of a corporate reputation for fair dealing. The sustainability of deep compliance depends on a commitment to, and development of, a compliance culture. Strong cultures seem to rely on a strong commitment to values and business based ethics. Fukuyama[34] (1995) and Tichy and Sherman (1994)[35] agree that the most effective organisations are based on communities of shared ethical values. Such communities do not require extensive contractual or legal regulation of their relations and social architecture because prior moral consensus gives the members of the group a basis for mutual trust.

7. Conclusions

As presently known, there is little to suggest that participation in the ACCC's proposed voluntary industry codes of conduct program will alone provide a compliance solution. If "anti-competitive and price fixing provisions are most likely to be found in a code", there is a significant risk that compliance with provisions of the *Trade Practices Act* 1974 will not be achieved. To alleviate this problem, the endorsement of voluntary industry codes should not be separated from a commitment to individual trade practices compliance. Such a commitment should reflect factors of individual risk, commercial reward and compliance culture in meeting obligations specified under the legislation. It should not be determined through mechanisms suggested by the ACCC, such as a "code development committee".

To be successful in both code endorsement and trade practices compliance, it seems that there needs to be accountability and a mutual level of commitment to a code by the regulator and its regulated entities. From an entity perspective, that level of commitment may already lie in its own compliance program. Recent research data points to an increasing adoption of both surface and deep forms of trade practices compliance, with the latter reflective of ethical values and the development of a compliance culture in the organisation. This could be seen as "standards of behaviour over and above the provisions of the *Trade Practices Act*".

Voluntary trade practices compliance programs, which incorporate these "surface" and "deep" features, are more likely to succeed in meeting or exceeding legal requirements. Notwithstanding the integration of individual trade practices compliance features, the deterrent effect of industry codes of practice will be less effective than say, S.86C TPA probationary orders. Such orders are "directed at achieving a change in the organisational or corporate culture to prevent a repetition of the contravention and to ensure future self-regulation."

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