

# Optimal conditions for effective self- and co-regulatory arrangements

Occasional paper

JUNE 2010



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# Introduction

The Australian Communications and Media Authority (the ACMA) has commenced an examination of the circumstances that are likely to lead to effective and efficient regulation, with a specific focus on self- and co-regulatory arrangements. The ACMA administers co-regulatory arrangements and promotes industry self-regulation in a number of areas of the broadcasting, telecommunications, internet and radiocommunications sectors. Industry codes are a key self-regulatory or co-regulatory mechanism in the Australian communications and media sectors.

This paper identifies a number of general factors or conditions common to the effective and efficient operation of self- and co-regulatory arrangements. It also seeks to identify the conditions where alternative regulatory mechanisms should be considered to address a particular market failure or policy issue.

Under communications and media legislation, self- and co-regulatory arrangements require industry participants to assume responsibility for regulatory detail within their own sectors, and this is underpinned by clear legislative obligations, with the regulator maintaining reserve powers. These arrangements provide flexibility for the ACMA, as the regulator, to exercise a variety of roles dependent on the nature of the concern, such as whether the issue is a policy matter or market issue. This includes the flexibility to not intervene to allow market-based solutions to develop, provide advice to government on policy issues, or encourage industry-developed solutions.

Recent experience by the ACMA in code development and review processes, (perhaps most notably through the development of the Mobile Premium Services Code and associated measures), has raised broader questions about what regulatory or self-regulatory approaches are best suited to dealing with particular kinds of issues. Some of the emerging challenges include changing industry structures and supply chains, rapidly changing technologies and service innovation and developing areas of consumer concern. Such an environment inevitably puts pressure on sector-based regulation. Against this backdrop, the ACMA commenced this work to examine the conditions for effective self- and co-regulation in the media and communications sectors.

In addition, the ACMA recognises that industry, citizen and consumer interests raise distinct issues for the development and operation of effective self- and co-regulatory arrangements, including:

- > **Industry**—the interests of industry stakeholders relate to identifying and, where possible, minimising regulatory burdens on business and clarifying the application of any regulation to new industry participants and services.
- > **Citizen**—the interests of the public as citizens relate to regulatory processes and decisions that improve citizen engagement, incorporate citizen perspectives, are transparent and accountable, and ultimately further citizens' participation in society.
- > **Consumer**—the interests of the public as consumers relate to having adequate consumer protection and safeguards, and being able to make informed choices about their purchase and the use of communications and media services.

Informed by an analysis of government literature and academic perspectives on self- and co-regulation, this ACMA occasional paper:

- > sets out the place of self and co-regulation in the regulatory toolkit

- > discusses the Australian media and communications context for self- and co-regulation
- > sets out the ACMA's proposed 'assessment framework' for examining the effectiveness of self- and co-regulatory arrangements
- > outlines a number of alternative regulatory and non-regulatory tools for consideration.

This paper also helps inform other work currently being undertaken by the ACMA, such as its inquiry into telecommunications customer service and complaint handling issues.<sup>1</sup> It therefore hopefully provides some insights to inform stakeholders about the direction of the ACMA's thinking and potential disposition towards self- and co-regulation; that is, on the matters the ACMA will take into account in the early stages of considering, where discretion exists, whether to adopt self- or co-regulatory arrangements and on whether early guidance to stakeholders is useful to identify matters that may be considered when reviewing existing codes and arrangements. For example, in recent reviews of the Telecommunications Consumer Protections Code, Commercial Television Industry Code of Practice and the Commercial Radio Industry Code of Practice and Guidelines, the ACMA identified issues that were important for consideration and amendment in the industry codes.

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<sup>1</sup> [www.acma.gov.au/WEB/STANDARD/pc=PC\\_312103](http://www.acma.gov.au/WEB/STANDARD/pc=PC_312103)

# The regulatory toolkit and the role of self- and co-regulation

## Self-regulation and co-regulation

There is a range of approaches to implementing regulation which include market-based solutions, self-regulation and direct government or statutory regulation. A range of regulatory options and tools is required to successfully address various types of policy problems, market issues and community concerns.

Principles of good regulatory process endorsed by the Australian Government, and outlined in the *Office of Best Practice Regulation Handbook*,<sup>2</sup> inform the development and choice of regulatory and non-regulatory tools. These principles include:

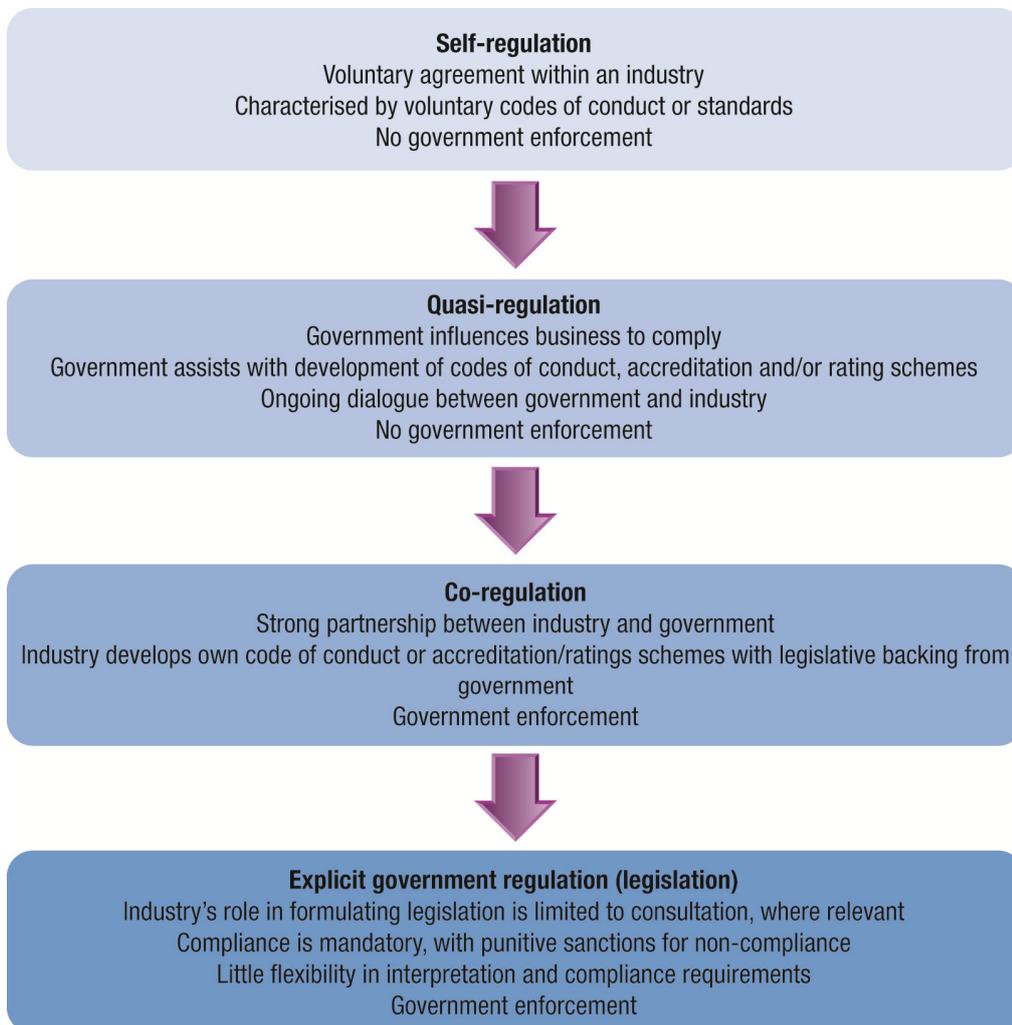
- > Governments should not act to address problems until a case for action has been clearly established. This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all problems will justify (additional) government action.
- > A range of feasible policy options—including self-regulatory and co-regulatory approaches—need to be identified, and their benefits and costs, including compliance costs, assessed within an appropriate framework.
- > Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted. The ACMA has adopted the Total Welfare Standard public interest test as a tool to conduct Regulatory Impact Assessments in accordance with these principles of good regulatory process.
- > Effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements.
- > Mechanisms are needed to ensure that regulation remains relevant and effective over time.
- > There needs to be effective consultation with regulated parties at all stages of the regulatory cycle.

The ACMA, along with all Australian government agencies, must clearly analyse the costs and benefits of undertaking regulatory action and needs to consider alternatives to formal regulatory action before deciding that regulation is necessary. This can include consideration of non-regulatory responses, including market initiatives. Once the case for regulation has been established, self- and co regulation can be seen as part of a continuum of regulatory responses. An example of this approach can be seen in the regulatory continuum developed by the Victorian Department of Treasury (figure 1). This approach can be adopted for the ACMA's purposes, such as for example, in co-regulation where the ACMA has an ability under legislation to require industry compliance, once a code has been developed by industry and registered by the ACMA.

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<sup>2</sup> See Department of Finance and Deregulation, *Office of Best Practice Regulation Handbook* (2010), April draft revision of 2009 Handbook.

**Figure 1 The regulatory continuum**



Source: Department of Treasury and Finance (2007) *Victorian Guide to Regulation*, p 9.

Since the 1990s, key international and government organisations have promoted self- and co-regulation as alternatives to direct regulation. The Australian Government has encouraged the use of self- and co-regulatory mechanisms as part of its best practice regulation agenda.<sup>3</sup>

Traditionally, self-regulation has been described as an option whereby industry voluntarily develops, administers and enforces its own solution to address a particular issue, and where no formal oversight by the regulator is mandated. Self-regulatory schemes are characterised by the lack of a legal backstop to act as the guarantor of enforcement. For example, self-regulation may involve the development of voluntary codes of practice or standards by an industry, with the industry solely responsible for enforcement.<sup>4</sup>

In practice, pure self-regulation without any form of government or statutory involvement is rare. Commentators have noted that self-regulation has become embedded in the

<sup>3</sup> See Department of Finance and Deregulation, Office of Best Practice Regulation Handbook (2010), April draft revision of 2009 Handbook.

<sup>4</sup> As defined in *Taskforce on Industry Self-Regulation Draft Report* (2000) and *Victorian Guide to Regulation 2007 – Guidelines for the measurement of change in administrative burden*, Department of Treasury and Finance.

regulatory state, reflected in the range of ‘joint products’ between the regulator and the regulated, and is now best reflected in the understanding of the term ‘co-regulation’.<sup>5</sup> Co-regulation can be understood as a combination of non-government (industry) regulation and government regulation.<sup>6</sup>

Co-regulation generally involves both industry and government (the regulator) developing, administering and enforcing a solution, with arrangements accompanied by a legislative backstop. Co-regulation can mean that an industry or professional body develops the regulatory arrangements, such as a code of practice or rating schemes, in consultation with government. While the industry may administer its own arrangements, the government provides legislative backing to enable the arrangements to be enforced.

Under co-regulation, government involvement generally falls short of prescribing the code in detail in legislation. Co-regulatory mechanisms can include legislation that:

- > delegates the power to industry to regulate and enforce codes
- > enforces undertakings to comply with a code
- > prescribes a code as a regulation but the code only applies to those who subscribe to it (prescribed voluntary codes)
- > does not require a code but has a reserve power to make a code mandatory
- > requires industry to have a code and, in its absence, government will impose a code or standard
- > prescribes a code as a regulation to apply to all industry members (prescribed mandatory codes).<sup>7</sup>

According to the OECD, when used in the right circumstances, self-regulation and co-regulation can offer a number of advantages over traditional command and control regulation including:

- > greater flexibility and adaptability
- > potentially lower compliance and administrative costs
- > an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly
- > quick and low-cost complaints-handling and dispute resolution mechanisms.<sup>8</sup>

The potential drawbacks of self- and co-regulation include:

- > the possibility of raising barriers to entry within an industry
- > unintended monopoly power gained by participants that could restrict competition
- > a danger of regulatory capture
- > the potential to increase government compliance and enforcement costs.<sup>9</sup>

## **The Australian media and communications context**

In Australia, the broadcasting, telecommunications and internet sectors operate under a broad range of regulations, from direct to self-regulatory arrangements, with the type of regulatory tool depending on the issue or problem. Codes can be described in terms of self-regulation or co-regulation, depending on the extent of government involvement and

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<sup>5</sup> OECD study by Centre for Regulated Industries, *Self-Regulation and the Regulatory State – A Survey of Policy and Practice* (2002). See also commentary from David Havyatt, *Self-regulation in telecommunications didn't fail – it was never really tried*, May 2010.

<sup>6</sup> See the definition of co-regulation contained in *Study on Co-Regulation Measures in the Media Sector* (2006), a study for the European Commission by the Hans-Bredow-Institut, p. 35.

<sup>7</sup> Department of Finance and Treasury, *Codes of Conduct – Policy Framework* 1999.

<sup>8</sup> OECD, *Alternatives to Traditional Regulation* (2009), p. 6.

<sup>9</sup> All factors drawn from Department of Treasury and Finance, *Victorian Guide to Regulation* (2007).

degree of enforceability. Attachment A of this paper lists the current 49 telecommunications, broadcasting and internet industry codes registered by the ACMA.

In the telecommunications sector, a key policy intent is that the sector be regulated in a manner that 'promotes the greatest practicable use of industry self-regulation' and 'does not impose undue financial and administrative burdens on [industry participants]'.<sup>10</sup>

Under the *Broadcasting Services Act 1992*, a key policy intent is that the broadcasting and internet sectors be regulated in a way that 'does not impose unnecessary financial and administrative burdens' on industry.<sup>11</sup> To that extent, the relevant legislative schema requires the ACMA to give industry an opportunity to develop self-regulatory solutions before other forms of intervention are considered.

Under the communications and media co-regulatory framework, industry participants assume responsibility for regulatory detail within their own sectors, underpinned by clear legislative obligations with the regulator maintaining what are essentially reserve powers to intervene where self-regulation has not adequately addressed issues of real concern.<sup>12</sup>

The Telecommunications Act 1997 and the Broadcasting Services Act 1992 confer a broad range of powers on the ACMA to protect the integrity of co-regulatory schemes where codes fail to operate effectively or are not developed by industry.<sup>13</sup> The ACMA exercises these powers using a graduated and strategic risk-based approach to compliance and enforcement. This approach recognises the role of co-regulation and engaging with the regulated community to promote voluntary compliance. It also recognises that breaches of the rules established by the Acts and instruments will be dealt with effectively and efficiently.

The ability to take a flexible approach to regulation provides significant benefits in responding to various challenges. The co-regulatory environment requires the ACMA to work closely with key stakeholders across the different communications sectors, all of which have varying market and user dynamics, supply chains and product offerings. While regulatory flexibility is critical to an increasingly converging communications environment, this flexibility poses significant challenges in ensuring that the development and operation of co-regulatory arrangements are well understood by a wide range of stakeholders.

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<sup>10</sup> Section 4 *Telecommunications Act 1997*.

<sup>11</sup> Sub-sections 4(2)(a) and 4(3)(a) *Broadcasting Services Act 1992*.

<sup>12</sup> See Part 6, *Telecommunications Act 1997* and Part 9, *Broadcasting Services Act 1992*.

<sup>13</sup> Sections 123, 124 and 123, *Telecommunications Act 1997*, section 125, *Broadcasting Services Act 1992*, Part 5, Schedule 5 *Broadcasting Services Act 1992* (online services) and Part 4, Schedule 7 *Broadcasting Services Act 1992* (content services).

# Other regulatory and non-regulatory options

## Toolkit

In undertaking its regulatory responsibilities, the ACMA is required, consistent with good regulatory practice, to identify the nature and scope of an issue that requires regulatory attention. Initial inquiries may lead to a view that no regulation is required, but this would be informed by considerations that:

- > the issue is not regarded as material
- > the issue is not clearly established
- > the issue may be solved by market based solutions over time
- > interfering with market incentives may be potentially counter-productive
- > the costs of intervention outweigh the potential benefits.

## Non-regulatory tools or levers

Once a decision is taken that intervention is required, amongst the tools available to a regulator, non-regulatory solutions may offer a flexible response to a particular market or policy problem while also developing a 'toolkit' where different issues require different regulatory responses.<sup>14</sup> Sparrow discusses the need for a regulator to use alternative tools, particularly when the legislative framework it administers remains unchanged or is outdated.<sup>15</sup> A key challenge, therefore, is choosing the right lever for the right issue. Examples of some of these levers, as discussed in government and academic literature, are set out below:<sup>16</sup>

- > **Rewarding good behaviour—positive incentives.** Traditional approaches to regulation do not acknowledge or reward compliance with regulations. Parties with good track records are often given the same penalties for non-compliance as those who frequently breach the law. Regulations may require onerous monitoring and reporting requirements for all industry players. Positive incentives may reward good behaviour while continuing to penalise bad behaviour. Incentives could include a reduction in reporting or other regulatory requirements, marketing advantages, public praise or an award.
- > **Public information and education campaigns.** This approach may be useful when the problem to be addressed results from a lack of knowledge among consumers or participants in an industry. The objective is to change the quality of the information available or better target its distribution.
- > **Information disclosure.** In this instance, the regulator may set guidelines about the type of information to be disclosed on a particular product and tries to ensure the public is aware of the pros and cons of using the products.
- > **No specific action.** This approach relies on the market to provide a solution to the problem, in conjunction with existing laws. This may be an appropriate response where the problem is considered temporary and/or will solve itself (for example, if the market is changing rapidly), or where the cost of intervention outweighs any potential benefits. The decision not to take action may comprise a forbearance approach. Forbearance is a regulatory policy position that is an objective decision not to pursue certain contraventions of the law. It is often adopted as a short-term measure while other legislative solutions or regulatory approaches are being developed, or to allow

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<sup>14</sup> Sparrow, *The Regulatory Craft* (2000), p. 24

<sup>15</sup> Sparrow, *The Regulatory Craft* (2000), p. 25.

<sup>16</sup> These examples are as discussed in *Victorian Guide to Regulation 2007*, Sparrow and APSC, 'Smarter policy – choosing policy instruments and working with others to influence behaviour' (2009).

industry time to come to terms with new obligations. There may also be other circumstances where such an approach makes common sense for reasons of proportionality, including fairness and the costs and benefits of undertaking enforcement action.

- > **Conduct research into issues of significance.** In this context, research by the regulator can develop evidence to identify matters of concern.
- > **Public statement of concerns—deterrence.** The regulator signals a willingness to use penalties to address and match compliance problems or signals a renewed focus on certain problem issues.
- > **Stakeholder management—invest in collaborative partnerships/moral persuasion.** This strategy is designed to develop effective intervention through engagement of multiple parties, collaborative agenda-setting and encouraging compliance through alignment with the self-interest of the industry participant.
- > **Transparent approach to compliance and enforcement.** The regulator may produce public guidelines about acceptable behaviour by industry players or issue public statements about its compliance and enforcement policy.
- > **Broad range of monitoring tools.** Audits, inspections, self-monitoring or third-party monitoring can be used separately or in combination as part of a comprehensive enforcement strategy.

## Alternative regulatory tools or approaches

In addition to the various types of formal regulation outlined above, other tools are available to address a problem that is identified as requiring regulatory intervention. Alternative regulatory tools can be used in conjunction with some form of government regulation to achieve a particular objective. Examples of these are outlined below:<sup>17</sup>

- > **Increased enforcement of existing provisions.** This may be appropriate when there are relatively low levels of compliance with existing provisions or where the regulator wishes to signal types of acceptable practice and behaviour. It may simply involve upgrading existing enforcement mechanisms.
- > **Extending the coverage of existing legislation.** This is likely to assist in ensuring the consistency of government action in the treatment of issues with similar issues and concerns.
- > **Removing other legislative impediments.** Achievement of a regulatory or legislative objective may be impeded by other legislative requirements. In such circumstances, consideration should be given to the deregulation or removal of the other legislative requirements.
- > **Market-based instruments** (for example, taxes, subsidies, user charges). Such tools work by altering the costs and benefits of certain actions, thereby influencing a change in the economic, social or environmental behaviour of individuals and firms. The imposition of a tax or user charge will raise the cost of engaging in a certain activity, thereby effecting a reduction in undesired behaviour, while a subsidy will lower the cost, effectively encouraging the behaviour.
- > **Regulator inquiry into systemic compliance issues.** The regulator may want to send a signal to industry participants about the type of behaviour it deems unacceptable and gather information through the inquiry to inform the development of regulatory options.

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<sup>17</sup> These examples are as discussed in *Victorian Guide to Regulation* (2007), Department of Treasury and Finance.

# Optimal conditions for effective self- and co-regulatory arrangements — An assessment framework

## The optimal factors/conditions

The ACMA has identified a number of factors that influence the effective and efficient operation of self- and co-regulatory arrangements, based on an analysis of key government and academic literature. This literature includes papers on international self- and co-regulatory frameworks, and regulatory guidelines and policy frameworks by Australian and international regulators and organisations.<sup>18</sup> The ACMA proposes to adopt a framework for initial analysis and assessment of self- and co-regulatory arrangements, based on the identified optimal conditions or factors.

It is generally acknowledged that there is no one-size-fits-all model for self- or co-regulation because each approach needs to be designed to address particular policy problems identified within the context of the market circumstances. Ultimately, the identification of a suitable regulatory arrangement should be decided on a case-by-case basis. It needs to be informed by a clear identification of the issue or problem to be solved, the scale of the problem, and consideration of possible regulatory and non-regulatory options to address the issue, including self- and co-regulation as possible regulatory responses.

There are however, several high-level principles or factors that individually or collectively underpin the effective operation of self- and co-regulatory schemes. It is important to establish critical factors that make self- or co-regulation the appropriate form of intervention; otherwise, inappropriate intervention may create new problems and costs. The majority of the literature surveyed discusses the importance of incentives or vested interests for self- or co-regulation to be effective. Settings where self- or co-regulatory arrangements are unlikely to work are also identified.

The role of the regulator and the level of engagement required to achieve successful self- or co-regulation will depend on the legislative framework, the type of issues under consideration and the range of stakeholders involved. Ideally, early decisions need to be taken about the type of public policy objectives that are to be achieved and how the requirements of those objectives are to be scoped and implemented. While industry participants will generally act to advance their commercial interests, the regulator/government must be responsible for setting the public policy objectives.

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<sup>18</sup> ASIC, 'Institutional Self-Regulation: what should be the role of the regulator?' (2001); APSC, 'Smarter policy – choosing policy instruments and working with others to influence behaviour' (2009); Australian Government Taskforce on Industry Self-Regulation (2000) Draft Report; Galexia for Choice, *Consumer Protection in the Communications Industry* (2008); Ministry of Consumer Affairs New Zealand, *Industry-led regulation* discussion paper (2005); Minister for Customs and Consumer Affairs Australian Government, *Codes of Conduct Policy Framework* (1998); Minister for Financial Services and Regulation, *Prescribed Codes of Conduct – Policy Guidelines on making industry codes of practice enforceable under TPA 1974* (1999); OECD study by Centre for Regulated Industries, *Self-Regulation and the Regulatory State – A Survey of Policy and Practice* (2002); Ofcom, *Criteria for promoting effective co and self regulation* (2008); Ofcom, *Identifying appropriate regulatory solutions: principles for analysing self and co-regulation* (2008); Tasman Asia-Pacific Report to Taskforce on Industry Self-Regulation (1999).

The proposed framework comprises conditions or factors that have been identified as being broadly applicable to the effective development, implementation and operation of self- and co-regulatory arrangements. While the factors are not exhaustive, the ACMA has identified these as probably significant influencing conditions, and the ACMA would welcome discussion on other matters that could be considered.

It is not necessarily the case that *all* factors need to be present for optimal co-regulatory arrangements, but if very few are present consideration would need to be given to as whether self- or co-regulation is the most appropriate regulatory response. The proposed framework also seeks to articulate conditions where alternative regulatory mechanisms should be looked at to address a particular market failure or policy problem.

The ten ‘optimal conditions’ or factors can be grouped into two main categories, as follows:

- > **Environmental conditions**—factors primarily relating to market and industry circumstances. Overall, do these environmental factors indicate that industry has the incentives and ability to work together effectively to address the issue?
- > **Features of the regulatory scheme**—factors to do with the content of the particular regulatory scheme, as well as aspects of its operation and enforcement.

### **Environmental conditions**

1. *Number of market players and coverage of the industry.* The research indicates that a small number of players with wide industry coverage will facilitate effective self- or co-regulatory arrangements. In a more concentrated market, industry players may have similar interests and may be more likely to agree on common rules to follow. Wide coverage is also an indicator of effectiveness, as it is vital to the majority of industry participating in a self-regulatory scheme and therefore to self-regulation delivering results to the majority of citizens and consumers.
2. *Whether it is a competitive market with few barriers to entry.* A high level of competition and few barriers to entry are likely to promote effective self- or co-regulation. Co-regulation is less effective where there is little competition or where there is one large player commanding significant market power that cannot be offset by the rest of the industry. Self-regulation is considered more likely to be effective in a competitive market as industry participants are more likely to commit to it, either to differentiate their products or for fear of losing market share. In a competitive market, there will be more commercial incentives for industry to be responsive to consumers.
3. *Homogeneity of products—whether they are essentially alike and comparable.* Co-regulation is less effective where the products in question are varied and difficult to compare, leading to information asymmetry and product confusion. Greater product complexity may decrease the effectiveness of self-regulation; while it may alert industry to the need to self-regulate to ensure the public is provided with accurate information about products, it may also make it more difficult for industry to detect if some industry players have engaged in misleading activities.
4. *Common industry interest—whether there is a collective will or genuine industry incentive to address the problem or enhance existing provisions.* This can be evidenced through the existence of an industry association that is either representative of the whole industry or gives non-members incentives to join. Ideally, there will be a degree of coincidence between the self-interest of the industry and the wider public interest; for example, where industry has a longer-term view of its relationship with the customer/shareholder/community/audience, recognising that its future viability depends on these relationships and also its responsible operation in society. Where there is little industry cohesiveness and there exists no effective industry association to facilitate self-regulation, it is unlikely to succeed. In such cases, government intervention in the form of statutory regulation may be more appropriate, whether in the form of a co-regulatory approach or direct regulation.

5. *Incentives for industry to participate and comply.* Incentives for industry participation and compliance in a co-regulatory scheme can include a product marketing value proposition or customer service advantage. Furthermore, the threat of government intervention may provide a sufficient incentive. Where a substantial gap exists between the public and private interest, it would be inappropriate to rely on industry to act in the public interest unless there is external pressure to do so.

### **Features of the regulatory scheme**

6. *Whether the objectives are clearly defined by the government, legislation or the regulator.* The research suggests it is optimal if policy-makers and regulators are clear on what objectives, outcomes and behavioural change they are trying to effect through co-regulatory arrangements. A consistent process for identifying scope, development, enforcement and review is required.
7. *Role of the regulator.* This relates to issues such as why self- or co-regulation was chosen as the regulatory tool; what self- and co-regulation requires of the regulator, industry and other stakeholders; and the regulator's ability to pursue action. Does the regulator possess the technical skills to advise on industry proposals? Does the regulator have a clear understanding of the issues? Is data and research available?
8. *The existence and operation of transparency and accountability mechanisms.* The existence and operation of appropriate sanctions to enforce compliance and penalise non-compliance are important indicators of effectiveness. Are there measureable, enforceable rules with appropriate compliance arrangements? Are scheme members adequately informed about their obligations? Self- and co-regulation is more likely to be effective if there are appropriate and credible sanctions with a clear incentive to comply.
9. *Stakeholder participation in the development of the scheme; in particular, consumer input into the development of co-regulatory arrangements.* This could be direct participation, such as through consultation processes. Or there could be indirect representation of stakeholder interests, such as through consumer or audience research. The effective operation of the scheme depends on industry and consumer organisations having a shared level of understanding of objectives and deliverables.
10. *Whether the scheme is promoted to consumers.* Scheme objectives relating to consumer protection are unlikely to be met if consumers and the community are not made aware of its operation and mechanisms for redress.

### **Proposed use of the framework**

The ACMA regularly assesses whether regulatory intervention is required to address a particular community or industry concern, in circumstances where there is regulatory discretion to do so. In some cases, the ACMA may be legislatively required to use specified regulatory tools, such as direct regulation. However, where the ACMA has discretion as to the form of regulatory intervention, staff will analyse what the right regulatory tool or mechanism will be to solve a particular problem. Without such an assessment, there is a strong risk that the process of developing the regulatory instrument may lead to use of a tool that may not be fit for purpose and ineffective.

As part of the ACMA's toolkit of regulatory and non-regulatory approaches—including direct regulation, regulatory forbearance and complementary tools—self- and co-regulation can be useful and effective tools in the right circumstances. The ACMA proposes that, prior to pursuing self- or co-regulatory options such as codes, an initial and early assessment of whether self- or co-regulation is the most appropriate tool should be undertaken using the framework outlined in this paper. The framework will be used as a high-level diagnostic tool to help guide the establishment of new self- or co-regulatory arrangements and the ongoing review of existing arrangements, although specific arrangements will be considered on their own merits in terms of their appropriateness and likely effectiveness. The 'optimal conditions' framework will provide stakeholders with information about the direction and the ACMA's thinking and potential

disposition towards the various forms of regulation, and how and when each should be applied.

The ACMA considers that the 'optimal conditions' framework provides an analytical tool for assessing whether co and self regulatory arrangements are likely to be effective or whether other options are appropriate, including consideration of:

- > the key issues to be addressed and assessing whether all or only some can be addressed through self- or co-regulation
- > whether complementary regulatory tools are needed
- > incentives and establishing a clear mandate
- > sending clear and early signals about expectations of a code development and review process
- > setting clear objectives with stakeholders, identifying problems early and developing appropriate solutions
- > implementing an innovative, flexible and well-informed approach to stakeholder management
- > using appropriate accountability mechanisms such as compliance and enforcement arrangements.

# Feedback

The ACMA invites comment and discussion on the issues set out in this paper. Written comments may be forwarded at any time to:

Project Manager, 'Optimal conditions' framework  
Regulatory Frameworks Section  
Regulatory Futures Branch  
Australian Communications and Media Authority

By mail: PO Box 13112 Law Courts Melbourne Vic. 8010

By email: [regulatory.frameworks@acma.gov.au](mailto:regulatory.frameworks@acma.gov.au)

Media enquiries should be directed to Donald Robertson, telephone (02) 9334 7980.

Any other enquiries should be directed to the Project Manager, telephone (03) 9963 6984 or email [regulatory.frameworks@acma.gov.au](mailto:regulatory.frameworks@acma.gov.au).

# Attachment A

**Table 1: Telecommunications, broadcasting and internet industry codes as at June 2010**

Industry codes	Telecommunications	Broadcasting	Internet
<p><i>Description</i></p>	<p>Telecommunications industry codes can be developed by industry bodies on any matter that relates to a telecommunications, e-marketing or telemarketing activity. Industry bodies can present codes to the ACMA for registration.</p> <p>If the ACMA is satisfied that the code meets the criteria stipulated in Part 6 of the <i>Telecommunications Act 1997</i>, it is obliged to include the code on its register of industry codes and standards.</p>	<p>Under the Broadcasting Services Act 1992, representative industry groups may develop codes of practice in consultation with the ACMA, taking into account any relevant research conducted by the ACMA. The ACMA monitors these codes and deals with unresolved complaints made against them.</p> <p>Codes are included in the register of codes of practice only if the ACMA is satisfied that it provides appropriate community safeguards for the matters covered, if it was endorsed by a majority of providers of broadcasting services in that section of the industry, and if members of the public have been given opportunity to comment. Codes developed by the ABC and SBS are notified to the ACMA, but are not registered.</p>	<p>The co-regulatory scheme for online content established under Schedule 5 and Schedule 7 to the <i>Broadcasting Services Act 1992</i> (the BSA) allows for and encourages the development of codes of practice for internet service providers (ISPs) and providers of online and mobile content. The matters that must be dealt with in the codes, and the criteria for registration, are specified in the legislation. The Internet Industry Association has developed codes, which are registered pursuant to the legislation. Internet industry codes of practice may also be developed under the <i>Interactive Gambling Act 2001</i> and the <i>Spam Act 2003</i>.</p>
<p><i>Current codes</i></p>	<p>Industry codes registered under Part 6 of the Telecommunications Act:</p> <ul style="list-style-type: none"> <li>&gt; Mobile Number Portability</li> <li>&gt; Emergency Call Services Requirements</li> <li>&gt; Cabling Requirements for Business</li> <li>&gt; Customer and Network Fault Management</li> <li>&gt; End-to-end Network Performance for the Standard Telephone Service</li> <li>&gt; Deployment of Mobile Phone Infrastructure</li> <li>&gt; Rights of Use of Numbers</li> <li>&gt; Rights of Use of Premium Rate</li> </ul>	<p>Radio:</p> <ul style="list-style-type: none"> <li>&gt; Commercial radio codes of practice and guidelines (Code 4 as registered September 2004, Codes 1-3 and 5-8 as registered Feb 2010 – 8 codes of practice)               <ol style="list-style-type: none"> <li>1. Programs unsuitable for broadcast</li> <li>2. News and current affairs programs</li> <li>3. Advertising</li> <li>4. Australian music</li> <li>5. Complaints</li> <li>6. Interviews and talkback programs</li> <li>7. Compliance with the codes</li> <li>8. Broadcast of emergency information</li> </ol> </li> <li>&gt; Community radio broadcasting codes of</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Internet Industry Spam Code of Practice</li> <li>&gt; Australian eMarketing Code of Practice</li> <li>&gt; Internet Industry Codes of Practice in Areas of Internet and Mobile Content (3 codes of practice)               <ol style="list-style-type: none"> <li>1. Hosting content within Australia</li> <li>2. Providing access to content hosted within Australia</li> <li>3. Providing access to content hosted outside of Australia</li> </ol> </li> <li>&gt; Internet Industry Code of Practice – Content Services Code</li> </ul>

	<p>Service Numbers</p> <ul style="list-style-type: none"> <li>&gt; Connect Outstanding</li> <li>&gt; Pre-selection</li> <li>&gt; Handling of Life-threatening and Unwelcome Calls</li> <li>&gt; Unconditioned Local Loop Service Network Deployment Rules</li> <li>&gt; Call Charging and Billing Accuracy</li> <li>&gt; Calling Number Display</li> <li>&gt; Priority Assistance for Life-threatening Medical Conditions</li> <li>&gt; Local Number Portability</li> <li>&gt; Telecommunications Consumer Protections</li> <li>&gt; Integrated Public Number Database</li> <li>&gt; Mobile Premium Services</li> <li>&gt; Information on Accessibility Features for Telephone Equipment</li> </ul>	<p>practice (8 codes of practice)</p> <ol style="list-style-type: none"> <li>1. Responsibilities in broadcasting to meet community interest</li> <li>2. Principles of diversity and independence</li> <li>3. General programming</li> <li>4. Indigenous programming</li> <li>5. Australian music</li> <li>6. Sponsorship</li> <li>7. Complaints</li> <li>8. Codes of Practice review</li> </ol> <ul style="list-style-type: none"> <li>&gt; Subscription narrowcast radio code of practice</li> <li>&gt; Open narrowcasting code of practice</li> </ul> <p>TV:</p> <ul style="list-style-type: none"> <li>&gt; Commercial television</li> <li>&gt; Community television code of practice</li> <li>&gt; Subscription broadcast television codes of practice</li> <li>&gt; Subscription narrowcast television codes of practice</li> <li>&gt; Open narrowcast codes of practice</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Internet Industry Interactive Gambling Industry Code</li> </ul>
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Source: The ACMA. Codes are listed on the ACMA website at >Home>For licensees & industry: Licensing & regulation>Legislation, codes & standards>Codes & standards.

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