

Optimal conditions for effective self- and co-regulatory arrangements

Occasional paper

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Introduction

The Australian Communications and Media Authority (the ACMA) is examining the circumstances that are likely to lead to effective and efficient regulation, which includes consideration of 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 is a revised edition of the ACMA's occasional paper *Optimal conditions for effective self- and co-regulatory arrangements*. It identifies a number of general factors or conditions common to the effective and efficient operation of self- and co-regulatory arrangements, setting out an assessment framework for analysing these proposed arrangements. It also seeks to identify the conditions where alternative regulatory mechanisms should be considered to address a particular market failure or policy issue. This edition includes updated material, and case studies demonstrating the application of the ACMA's assessment framework in an environment of continuing change and convergence.

The self- and co-regulatory framework for media and communications generally requires industry participants to assume responsibility for regulatory detail within their own sectors. 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 depending 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 and allow market-based solutions to develop, to provide advice to government on policy issues, or to encourage industry-developed solutions.

Current policy and regulatory review activities are considering the appropriate mechanisms for addressing new and emerging issues. Such mechanisms may be regulatory or non-regulatory. 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 the ability of sector-based regulation to deliver on policy objectives of enduring importance. Against this backdrop, the ACMA is continuing its work to examine the conditions for effective self- and co-regulation in the media and communications sectors, and to identify the lessons learnt from its experience in administering co-regulatory arrangements in the telecommunications, broadcasting and internet 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 use of communications and media services.

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

- > sets out the place of self- and co-regulation in the regulatory toolkit
- > outlines a number of alternative regulatory and non-regulatory tools for consideration
- > discusses the Australian media and communications context for self- and co-regulation, including the pressures on existing arrangements
- > sets out the ACMA's assessment framework for examining the effectiveness of self- and co-regulatory arrangements
- > provides case studies illustrating the application of the ACMA's assessment framework for self- and co-regulatory arrangements and reflecting on lessons learnt by the ACMA in administering current co-regulatory arrangements.

This paper aims to inform broader public policy discussions about effective regulatory mechanisms in a converged media and communications landscape. It identifies 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. It also discusses whether early guidance to stakeholders is useful in identifying matters that may be considered when reviewing existing codes and arrangements.

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*¹, inform the development and choice of regulatory and non-regulatory tools. These principles include:

- > Sound analysis—the case for action, including the fundamental question of whether regulatory action is required, needs to be clearly established. This analysis should include the desired response, a range of alternative options to achieve the objective, and an assessment of the impact of each option, and should be informed by effective consultation.²
- > Informed decision-making—to help decision-makers understand the implications of options for achieving the government’s objectives, they should be informed about the likely impacts of their decision, at the time they are making that decision.³
- > The impact analysis should provide an adequate analysis of the costs and benefits of the feasible options, and should assess the net impact of each option on the community as a whole, taking into account all the impacts. Where consistent with legislation, 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.⁴
- > Transparency—the information on which government regulatory decisions are based should be publicly available.⁵

The ACMA, along with all Australian government agencies, must clearly analyse the costs and benefits of undertaking regulatory action and needs to identify a range of feasible options—regulatory and non-regulatory—for achieving the stated objectives. This can include consideration of 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, 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.

¹ See Department of Finance and Deregulation, *Office of Best Practice Regulation Handbook*, June 2010.

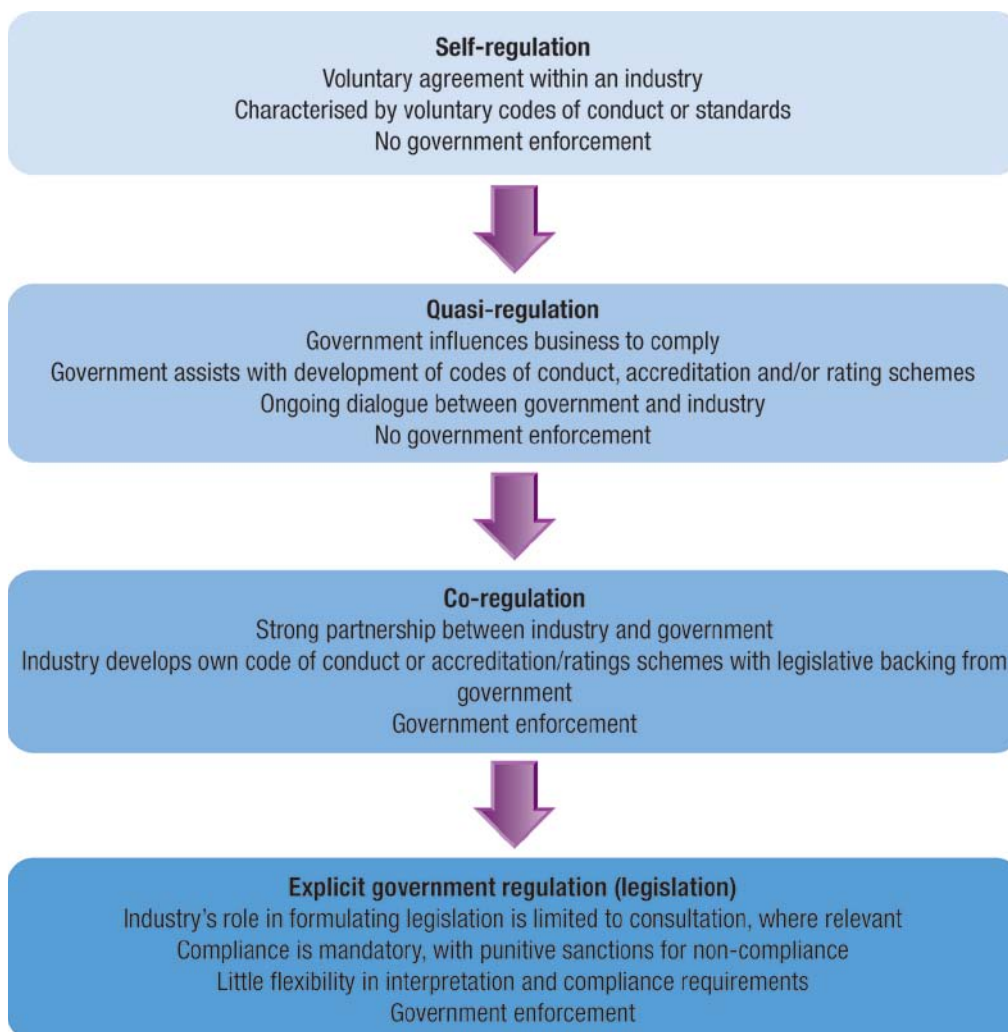
² *ibid.*, p. 7.

³ *ibid.*

⁴ *ibid.*, p. 17.

⁵ *ibid.*, p. 7.

Figure 1: The regulatory continuum



Source: Department of Treasury and Finance, Victorian Guide to Regulation, April 2007, 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.⁶

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.⁷

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 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

⁶ See Australian Government, *Best Practice Regulation Handbook*, June 2010, pp 33–34.

⁷ As defined in Department of Treasury and Finance, *Taskforce on Industry Self-Regulation Draft Report*, 2000 and *Victorian Guide to Regulation*, April 2007.

‘co-regulation’.⁸ Co-regulation can be understood as a combination of non-government (industry) regulation and government regulation.⁹

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).¹⁰

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.¹¹

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.¹²

⁸ 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.

⁹ See the definition of co-regulation contained in *Study on Co-Regulation Measures in the Media Sector*, a study for the European Commission by the Hans-Bredow-Institut, 2006, p. 35.

¹⁰ Department of Finance and Treasury, *Codes of Conduct—Policy Framework*, 1999.

¹¹ OECD, *Alternatives to Traditional Regulation*, 2009, p. 6.

¹² All factors drawn from Department of Treasury and Finance, *Victorian Guide to Regulation*, 2007.

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 counterproductive
- > the costs of intervention outweigh the potential benefits.

Non-regulatory tools or levers

Once a regulator decides to intervene, the tools available to it include non-regulatory solutions. These tools may offer a flexible response to a particular market or policy problem. There may also be the need to develop a ‘toolkit’ where different issues require different regulatory responses.¹³ Sparrow discusses the need for a regulator to use alternative tools, particularly when the legislative framework it administers remains unchanged or is outdated.¹⁴ 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:¹⁵

- > **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.
- > **Refraining from taking 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 can be understood in two ways—first, as a regulatory policy position, and second, as a response to an individual

¹³ Sparrow, *The Regulatory Craft*, 2000, p. 24

¹⁴ Sparrow, *The Regulatory Craft*, 2000, p. 25.

¹⁵ 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.

breach of applicable law. Regulatory forbearance may be adopted as a short-term measure while other legislative solutions or regulatory approaches are being developed, or to allow 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 and non-regulatory tools 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:¹⁶

- > **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 matters 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.

¹⁶ These examples are as discussed in Department of Treasury and Finance, *Victorian Guide to Regulation*, April 2007.

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. Non-regulatory tools, such as public education campaigns, are also available options. Codes can be described in terms of self-regulation or co-regulation, depending on the extent of government involvement and degree of enforceability. Attachment A lists the 66 telecommunications, broadcasting and internet industry codes currently 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]'.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ The ACMA exercises these powers using a graduated and strategic risk-based approach to compliance and enforcement.

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.

The challenges and opportunities of convergence

Technology, service and industry convergence is creating challenges for the ongoing effectiveness of media and communications co-regulatory arrangements. Convergence can be understood as the merging of the previously distinct platforms by which content and services are delivered, and the blurring of the historical distinctions between the telecommunications, broadcasting and information technology sectors. Convergence is raising questions about the effectiveness of current co-regulatory arrangements that are sector-specific and assume that relevant industry participants are readily identifiable.

For example, the emergence of providers of broadcasting-like services over the internet raises questions about the scope of the co-regulatory arrangements established under Part 9 of the *Broadcasting Services Act*, which focus on traditional broadcasting industry participants. Another example is the evolution of mobile premium services into mobile-phone-based payment services. With these services, the utility of maintaining technology- and sector-specific consumer protection

¹⁷ section 4 *Telecommunications Act 1997*.

¹⁸ sub-sections 4(2)(a) and 4(3)(a) *Broadcasting Services Act 1992*.

¹⁹ See Part 6, *Telecommunications Act 1997* and Part 9, *Broadcasting Services Act 1992*.

²⁰ 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).

arrangements is debatable. This is further discussed in the case study in Attachment B.

However, in the right conditions, self- and co-regulatory arrangements may provide a more responsive and flexible mechanism for addressing issues in a convergent environment, in comparison with direct regulation. It has been observed that '[c]onvergence brings new stakeholders into market contact and can energise self- and co-regulation, which *may* outperform unaided statutory regulation'²¹ for a number of reasons, such as lower compliance costs and a better grounding in expert information or market realities. It has been argued that in a convergent environment, media content should be regulated via a system that allows for self- and co-regulatory approaches and emphasises citizen participation and digital media literacy.²²

The government's Convergence Review is examining fundamental questions relating to the media and communications regulatory framework. This includes consideration of the appropriate regulatory approaches in a converging media and communications environment, and the critical factors in determining which approach is most suitable.²³

Lessons learnt in administering the co-regulatory framework—ACMA case studies

The ACMA has undertaken a number of case studies to illustrate some of the current and emerging issues for self- and co-regulation in an environment of convergence. The case studies are intended to highlight lessons learnt by the ACMA in administering the co-regulatory framework for media and communications.

The case studies consider self- and co-regulatory arrangements in the context of:

1. *Reconnecting the Customer* inquiry
2. mobile premium services and mobile-phone-based payment systems
3. video-sharing websites such as YouTube
4. the icode.

The *Reconnecting the Customer* case study illustrates that few factors are present for effective co- and self-regulatory arrangements in the area of telecommunications customer care. Factors relating to market conditions and features of the regulatory scheme informed the ACMA's proposals to augment industry self-regulatory arrangements either by stronger industry code rules or industry standards.

Learnings from the ACMA's experience in regulating mobile premium services are informing its current approach to the evolution of mobile premium services (MPS) as mobile-phone-based payment systems. The ACMA's experience with MPS has highlighted the likely need to buttress self- and co-regulatory arrangements with direct regulation and robust accountability measures in the case of mobile-phone-based payment systems. The MPS experience also highlights the presence of other factors which will inform the ACMA's approach to consumer protection in the area of mobile-phone-based payment systems.

The YouTube and icode case studies highlight the existence of a number of factors that suggest co- or self- regulation may be effective. However, both case studies identify significant challenges in regulating the online environment that were not envisaged at the time that co- and self-regulatory arrangements were established for telecommunications and broadcasting.

²¹ Oranje-Nassau et al., *Responding to Convergence: Different approaches for Telecommunications regulators*, RAND Europe, report prepared for OPTA, 2008, p. 29.

²² Crawford and Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia*, Journalism and Media Research Centre, UNSW, 2011, p. 50.

²³ Department of Broadband, Communications and the Digital Economy, *Convergence Review—Emerging Issues Paper*, p.16.

The case studies are in Attachment B.

The ACMA's experience in administering co-regulatory arrangements shows that regulatory flexibility, proportionality and enforceability are important elements in effective self- and co-regulatory arrangements. Based on this experience, any new policy framework should:

- > not presuppose the style of any regulation which is appropriate, but should incorporate flexibility to adopt co-regulatory, self-regulatory and direct-regulation mechanisms as appropriate
- > make available a suitable regulatory toolkit, including an enhanced set of mid-range powers to allow proportionate, flexible and enforceable responses
- > recognise that greater flexibility will be needed for operating in an environment of innovation and constant change.

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 developed by Australian and international regulators and organisations.²⁴ The ACMA has adopted 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.

However, there are 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.

²⁴ 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 Draft Report, 2000; Choice, *Consumer Protection in the Communications Industry*, 2008; Ministry of Consumer Affairs New Zealand, *Review of 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; Cave et al., *Options for and Effectiveness of Internet Self- and Co-regulation*, report prepared for the European Commission, 2008.

The 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 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 framework also seeks to articulate conditions where alternative regulatory mechanisms should be looked at to address a particular market failure or policy problem.

The 'optimal conditions' or factors can be grouped into the following two main categories:

- > **Environmental conditions**—factors primarily relating to market and industry circumstances. Overall, do these environmental factors indicate that the issue can be addressed by the market itself? Do industry participants have 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 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.
6. *The degree of consumer detriment.*²⁵ Where there is no strong public interest concern, self-regulation might be more feasible. In cases of serious risk to public health or safety, direct regulation may be more appropriate; however, intervention must be proportionate to the level of detriment.
7. *Whether it is a rapidly changing environment.*²⁶ Self-regulation can be suited to fast-changing environments that may be hindered by static systems of direct regulation. Regulation that cannot keep pace with developments will be ineffective, and may have unintended and perverse effects, become irrelevant and thus ignored by those intended to be regulated, or become an inappropriate mechanism to address its original purpose in a changed environment.

Features of the regulatory scheme

8. *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.
9. *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?
10. *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 measurable, 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.
11. *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.

²⁵ New condition added to framework in 2011. Sourced from Australian Government, *Best Practice Regulation Handbook*, June 2010, p. 34.

²⁶ New condition added to framework in 2011. Sourced from a synthesis of good practice guidelines in Cave et al., *Options for and Effectiveness of Internet Self- and Co-regulation*, report prepared for the European Commission, 2008, p. 55.

12. *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.

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 required by legislation to use specified regulatory tools, such as direct regulation, or may be required to allow industry self-regulation or co-regulation to be attempted first, before putting in place 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 or effective.

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 considers 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 is being 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 provides stakeholders with information about the direction of 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 self- and co-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

Media enquiries should be directed to the Media Manager, telephone (02) 9334 7719.

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

Attachment A—Industry codes

Table 1: Telecommunications, broadcasting and internet industry codes as at September 2011

Industry codes	Telecommunications	Broadcasting	Internet
<i>Description</i>	<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 <i>Broadcasting Services Act 1992</i>, 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 a code 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</i> 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>
<i>Current codes registered by the ACMA</i>	<p>Industry codes registered under Part 6 of the <i>Telecommunications Act</i>:</p> <ul style="list-style-type: none"> > Mobile Number Portability > Emergency Call Services Requirements > Cabling Requirements for Business > Customer and Network Fault Management > End-to-end Network Performance for the Standard Telephone Service > Deployment of Mobile Phone Infrastructure 	<p>Radio:</p> <ul style="list-style-type: none"> > Commercial radio codes of practice and guidelines (eight codes of practice) <ul style="list-style-type: none"> > Programs unsuitable for broadcast > News and current affairs programs > Advertising > Australian music > Complaints > Interviews and talkback programs > Compliance with the codes > Broadcast of emergency information 	<ul style="list-style-type: none"> > Internet Industry Spam Code of Practice > Australian eMarketing Code of Practice > Internet Industry Codes of Practice in Areas of Internet and Mobile Content (three codes of practice) <ul style="list-style-type: none"> > Hosting content within Australia > Providing access to content hosted within Australia > Providing access to content

	<ul style="list-style-type: none"> > Rights of Use of Numbers > Rights of Use of Premium Rate Service Numbers > Connect Outstanding > Pre-selection > Handling of Life-threatening and Unwelcome Calls > Unconditioned Local Loop Service Network Deployment Rules > Call Charging and Billing Accuracy > Calling Number Display > Priority Assistance for Life-threatening Medical Conditions > Local Number Portability > Telecommunications Consumer Protections > Integrated Public Number Database > Mobile Premium Services > Information on Accessibility Features for Telephone Equipment 	<ul style="list-style-type: none"> > Community radio broadcasting codes of practice (eight codes of practice) <ul style="list-style-type: none"> > Responsibilities in broadcasting to meet community interest > Principles of diversity and independence > General programming > Indigenous programming > Australian music > Sponsorship > Complaints > Codes of practice review > Subscription narrowcast radio code of practice > Open narrowcasting code of practice <p>TV:</p> <ul style="list-style-type: none"> > Commercial television industry code of practice > Community television codes of practice (eight codes of practice) <ul style="list-style-type: none"> > Governance arrangements > Representing the community interest > General programming principles > Classification of programs > Children's programming > Sponsorship and other announcements > Handling of complaints to licensees > Code administration > Subscription broadcast television codes of practice (five codes of practice) <ul style="list-style-type: none"> > Program codes > Program classification code 	<p>hosted outside of Australia</p> <ul style="list-style-type: none"> > Internet Industry Code of Practice—Content Services Code > Internet Industry Interactive Gambling Industry Code
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		<ul style="list-style-type: none"> > Subscriber code > Complaints code > Advertising code > Subscription narrowcast television codes of practice (four codes of practice) <ul style="list-style-type: none"> > General guidelines for programming > Handling complaints > Classification and placement of programming > Customer service > Open narrowcast codes of practice (three codes of practice) <ul style="list-style-type: none"> > General guidelines for programming > Handling complaints > Classification and placement of programming 	
<i>Other industry codes</i>		<ul style="list-style-type: none"> > ABC Code of Practice > SBS Codes of Practice 	<ul style="list-style-type: none"> > Internet Industry icode—for industry self-regulation in the area of cyber security

Attachment B—Case studies

This section sets out four case studies about:

- > *Reconnecting the Customer* inquiry
- > mobile premium services (MPS) and mobile-phone-based payment systems
- > video-sharing websites such as YouTube
- > the icode

Each case study sets out a discussion of the issue or service being examined, the applicable self- or co-regulatory arrangements, and a broad analysis of the circumstances of the situation against the 12 optimal conditions discussed earlier in this paper.

The choice of case studies is intended to provide perspectives on the application of co- and self-regulation:

- > to current regulation (*Reconnecting the Customer* inquiry)
- > to issues where the regulatory boundaries are being stretched (MPS and mobile-phone-based payment systems)
- > to issues that sit largely outside the boundaries of current regulation (video-sharing websites, the icode)

While few conditions for effective self- and co-regulatory arrangements are present in the *Reconnecting the Customer* case study, several conditions are present in the YouTube and icode case studies, although these case studies highlight some of the challenges associated with regulating the online environment.

1. *Reconnecting the Customer* inquiry

Context: High numbers of consumer complaints, increased complexity and poor customer care in the telecommunications industry.

Key assessment factors: Complexity of products; existence of common industry interest; incentives for industry to participate and comply; transparency and accountability mechanisms; role of the regulator; stakeholder participation.

Driven by technology and service innovation, the Australian telecommunications market has in recent years experienced rapid growth in consumer adoption of a wide range of products and services. Consumers are generally satisfied with the quality and service reliability of the communications services provided. However, during this period there has also been a high level of consumer complaints to the telecommunications dispute resolution body, the Telecommunications Industry Ombudsman (TIO). Many of these complaints are about telecommunications providers' poor customer service and complaints-handling practices, that is, poor customer care.

In 2010, the ACMA launched its *Reconnecting the Customer* strategy to deliver material improvements for consumers. *Reconnecting the Customer* comprised three elements—a public inquiry to examine customer service and complaints-handling practices; the ACMA's involvement as an observer in the industry's review of its main consumer protection code; and facilitating discussion with the Australian Competition and Consumer Commission (ACCC) and government about the current regulatory arrangements for consumer protection in the telecommunications sector. It involved an examination of the quality of customer care in the Australian environment.

Regulating customer care

Under the relevant co-regulatory framework, the main industry code which is relevant to customer care in the telecommunications industry is the Telecommunications Consumer Protections Code 2008 (TCP Code). The TCP Code is currently being reviewed by the industry peak body, Communications Alliance (CA), in consultation with industry and consumer representatives. The ACMA, the ACCC and the Department of Broadband, Communications and the Digital Economy (DBCDE) each have observer status on the review's steering committee.

The TCP Code contains rules dealing with:

- > customer information on prices, terms and conditions
- > customer contracts
- > billing
- > credit management
- > customer transfer
- > complaints-handling.

The TCP Code also contains a chapter on general rules for service providers that includes matters such as establishing standards for ensuring that quality information is accessible, and dealing appropriately with customers and their authorised representatives and advocates. However, it does not currently contain rules that relate directly to customer service performance.

The TIO scheme is an integral part of the telecommunications consumer protection regulatory framework. It is an industry dispute resolution scheme, which carriers and carriage service providers are required to enter into under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The TIO can investigate and make determinations relating to complaints made by consumers about carriage services.

Analysis

The telecommunications market has been open to full competition since 1997. At that time, and in order to promote competition, a self- and/or co-regulatory framework was established whereby some key consumer protections were expressly included in the legislation,²⁷ but other consumer protections were to be developed through codes, standards and service provider rules.

Over time, however, the industry has changed and the market and industry conditions appear no longer optimal for current self- or co-regulatory arrangements. These conditions include:

- > The product offerings available in the market are very similar, but many consumers face difficulties in comparing telecommunications products due to the lack of information that is available about products and about usage of products. Products and services are increasingly complex and many consumers do not fully understand the product at the time they enter into their contract. Given the asymmetric information between customers and providers, and natural limits on a consumer's ability to process large amounts of information, such complexity makes it difficult for consumers to make informed decisions when purchasing telecommunications services. There appears to be little incentive for industry members to improve those practices and provide information to consumers that is less complex.
- > The size and diversity of the Australian telecommunications sector makes it less likely for current self- or co-regulatory arrangements to be effective. There are

²⁷ For example, the Universal Service Obligation, a right to untimed local calls, and the Customer Service Guarantee.

more than 1,000 service providers providing retail services to consumers; these providers range from large corporations to single-person businesses. In such a market, industry players are likely to have different interests and are less likely to agree on common rules to follow. CA is the main industry association. It takes the lead role in drafting and reviewing industry codes and other industry initiatives. Its membership currently comprises about 70 providers, including many of the larger providers. However, there are some key providers, including Dodo and TPG, that are not members and a number of ISPs have not joined CA.

- > While the market has been open to full competition since 1997 with few barriers to entry, Telstra remains a major provider. This impacts on the willingness of industry participants to fully commit to the self-regulatory framework.
- > There is no widespread culture of code compliance among service providers, which further undermines the effectiveness of the co-regulatory framework. Currently, there is only one signatory to the TCP Code²⁸, and some industry members have admitted they had not signed the code because they were not satisfied they were fully compliant. Many smaller providers have little or no awareness of the code or of their obligations under it. Many consumers are also not aware of the code or their rights under it.
- > Industry self-interest and the public interest do not appear to coincide in relation to customer care in the current telecommunications market. This is especially apparent in the provision of information about the services provided, which is one facet of customer care. In presenting marketing information to consumers, service providers tend to emphasise the immediate, short-term attractions of a service in order to gain market share—rather than highlighting the longer-term aspects of the service, such as customer care. It is in service providers' interests to present this information in a way that will attract new customers rather than enable them to make clear comparisons with competitors' service offerings.

In addition to the market-related factors discussed above, there are certain features of the regulatory scheme for customer care that point to the likelihood that telecommunications customer care cannot be addressed by self- or co-regulation alone. These features are:

- > There are limited transparency and accountability mechanisms within the current scheme. While CA has a code compliance scheme in place to deal with TCP code breaches by members, this only applies to signatories that are CA members and has not resulted in one code breach being identified. In practice, industry has taken limited responsibility for ensuring compliance with its Code.
- > The ACMA's code enforcement options are indirect. They are limited, initially, to giving providers a formal warning or a direction to comply. However, these enforcement options cannot result in a penalty being imposed directly in response to a breach. It is only in the case of a further breach—after a direction to comply has been given—that court action can take place and pecuniary penalties can be imposed. Furthermore, some provisions of the TCP Code are not easily enforceable. Many of the existing provisions do not impose obligations that can be assessed objectively, making enforcement difficult. Additionally, the large size of the industry means that breaches are not detected easily and industry-wide compliance checks are resource-intensive and time-consuming.
- > The TIO scheme also has difficulties relating to enforcement. While service providers overwhelmingly abide by TIO decisions, in rare cases where service providers fail to do so, the TIO is unable to enforce its determinations. Instead, in a departure from other external dispute resolution schemes, the TIO's only enforcement mechanism is to refer the matter to the ACMA, who may then elect to take litigation to the Federal Court to enforce the TIO's ruling. This is time-

²⁸ SingTel Optus signed the TCP Code on 29 March 2010.

consuming and inefficient as it will generally require the ACMA to undertake a new investigation before it can take action.

- > The ACMA has acknowledged that a key focus of its compliance activities relating to the TCP Code has been on code education and engagement, rather than enforcement action. The risk of court proceedings, and the attendant adverse publicity and pecuniary penalties, may well have motivated some service providers to improve their code compliance.
- > Stakeholder participation in the regulatory scheme is limited, as is promotion of the scheme to consumers. While stakeholder interests are represented in the TCP Code review and development processes, large telecommunications companies are generally well-represented whereas smaller providers are not. Questions have been raised previously, for example in DBCDE's 2009 discussion paper on code development, about the adequacy of consultation with consumers during code development and reviews.

Conclusion

The analysis indicates that few of the factors which generally need to be present for effective self- and co-regulatory arrangements are currently present in the area of telecommunications customer care. Product complexity, the lack of a common industry interest, the lack of incentives for industry to participate and comply in regulatory arrangements, and limited enforcement and accountability mechanisms are key factors indicating that customer care issues in the telecommunications industry may not be amenable to self- and co-regulatory arrangements. Accordingly, it is arguable that there is a need to augment current industry self-regulation mechanisms with additional regulatory measures.

The ACMA's *Reconnecting the Customer* inquiry details a number of recommendations which are aimed at making current conditions more conducive to effective self- and co-regulation. As part of the inquiry, the ACMA has proposed a suite of measures to improve telecommunications customer care. Such measures involve setting minimum expectations for matters to be included in industry code rules and, in the event that industry should fail to reach agreement on revised code rules, direct regulation by the ACMA in the form of an industry standard or service provider rules. The ACMA will proactively monitor the effectiveness of any code measures that seek to implement the recommendations of the inquiry to make sure that the intended objectives are achieved.

2. Mobile premium services and mobile-phone-based payment systems

Context: The regulation of mobile premium services and how this is informing the approach to mobile-phone-based payment systems.

Key assessment factors: Market structure; existence of common industry interest; incentives for industry to participate and comply; transparency and accountability mechanisms; objectives of the regulatory scheme.

The evolution of mobile premium services from content services to potential payment mechanisms—and the consumer protection issues associated with these services—is an effective illustration of the pressure that convergence is placing on the telecommunications regulatory framework.

Premium-rate SMS and MMS emerged in the early 2000s as a new platform for provision of information and entertainment content to consumers via mobile devices. To date, these services have operated mainly for the purpose of providing text-based and digital content services which are ‘consumed’ on mobile devices. Consumer protection has been provided by industry-specific regulatory schemes developed under the *Telecommunications Act 1997* and administered by the ACMA. A 2005 ministerial determination gave the then Australian Communications Authority (ACA) the power to make rules for these services. This power is confined to services that use specific number ranges or services provided on carriers’ proprietary networks.

Analysis

As consumer complaints about premium messaging services increased significantly from 2005 onwards, it became evident that the self-regulatory consumer protection framework in place at that time was not effective.

Analysis of the premium messaging industry and market against the optimal conditions for self- and co-regulation suggests that this section of the telecommunications industry is not amenable to self- and co-regulatory arrangements, for a range of reasons:

- > The business models were new and many services were unfamiliar to consumers, causing confusion about which entities were responsible for different stages of a transaction.
- > Problems which arose with the services were also new and there was a lack of timely data about the size and shape of emerging problems. A lack of information about underlying causes made it initially difficult to define the problem and tailor appropriate regulatory measures. Greater clarity around problem and regulatory options (under the *Telecommunications Act*, *Telecommunications (Consumer Protection and Service Standards) Act* and the *Trade Practices Act*) for all participants would have assisted.
- > The complex market structure and supply chain (including CSPs, content service providers and aggregators based both in Australia and internationally) made it difficult for consumers, regulators and other parts of the supply chain to identify players. This frustrated attempts to provide appropriate incentives, address the market problem and develop effective compliance arrangements.
- > Industry incentives and interests varied, with no collective interest to solve market problem, and strong commercial incentives for non-compliance.
- > Accountability measures in the initial self-regulatory arrangements were non-existent or ineffective. Issues of consumer concern were difficult/impossible to address through industry-agreed action, leading to significant, publicly expressed consumer frustration.

- > The need to use alternative regulatory tools (comprising companion determinations and enhanced monitoring and compliance arrangements) to augment code content and reach was identified in the later stages of the code development process. While this demonstrates regulatory flexibility, it also introduced significant delay and costs into the code development and registration process.

The experience gained from addressing the failure of traditional self- and co-regulatory arrangements to deal with consumer protection concerns in this sector of the telecommunications industry is instructive as new types of mobile-phone-based payment systems begin to emerge.

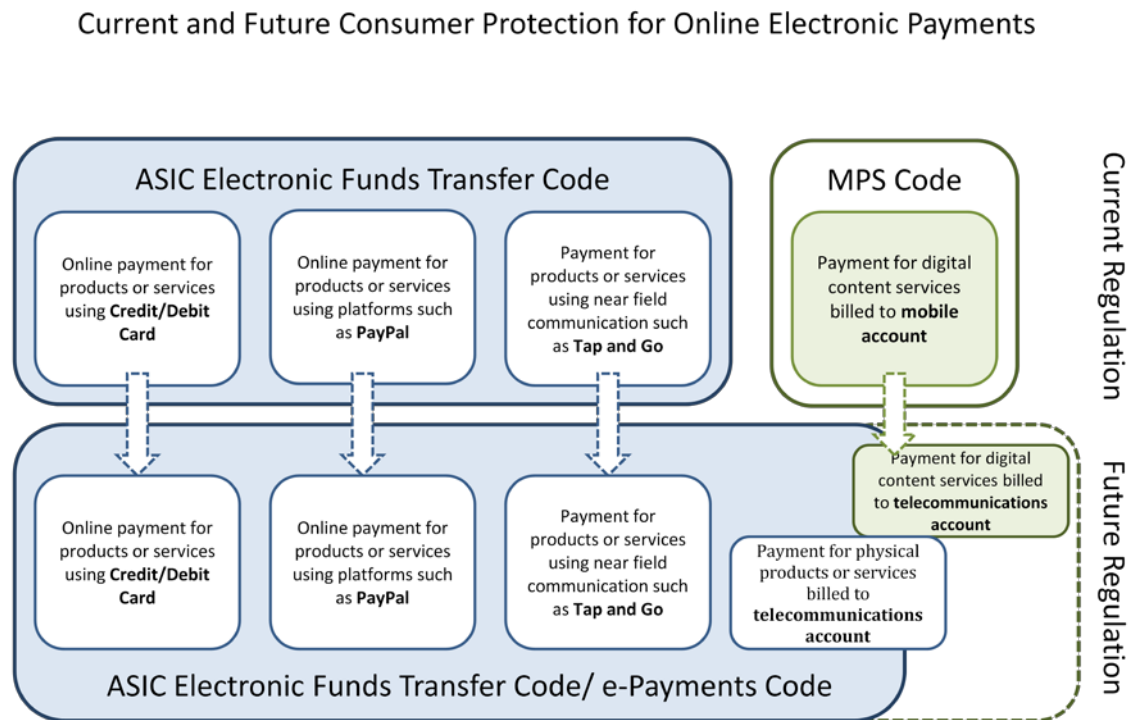
Evolution of MPS to mobile-phone-based payments

While consumer protection for mobile premium services has been regarded as a telecommunications regulatory problem to date, the evolution of a broader range of mobile-phone-based payment technologies and systems calls into question the sustainability of this definition and the desirability of maintaining technology- and sector-specific consumer protection arrangements for these services.

The underlying functionality which allows a third-party service provider to trigger a charge to a consumer's mobile telephone account means that the premium messaging services potentially can be used as payment mechanisms, in addition to (or instead of) delivering content. To date, there has been limited use of premium messaging services to charge consumers for physical products and services. However, there is increasing industry interest in the possibilities of such business models as potential sources of revenue that would augment revenues in the highly competitive voice and text services markets.

In parallel with these developments, a range of alternative electronic payment technologies are being developed, including several which involve the use of a mobile device to facilitate payments, with or without the involvement of the consumer's telecommunications carrier.

Figure 2: Regulation of mobile-phone-based payment systems



- A telecommunications-specific consumer protection framework may continue to apply to online digital content purchases which are billed to a telecommunications account (mobile or fixed). However, some or all such purchases may also be regulated as online electronic payments.
- The case for applying a telecommunications-specific consumer protection framework to online purchases of *physical* goods and services is unclear. It would be desirable to regulate these transactions as online electronic payments, regardless of whether the purchases are billed to a telecommunications account or not.

Source: ACMA

The evolution and convergence of telecommunications and financial services, which mobile-phone-based payments represents, will increasingly put pressure on the sector-specific consumer protection measures that have applied to premium messaging services to date. In the near future, consumers are likely to have the choice of traditional card-based EFTPOS, online provision of card details, a payment-enabled mobile device or a mobile premium service-type mechanism when paying for goods and services electronically. As mobile-phone-based payment systems emerge to complement and perhaps replace some traditional types of electronic payment, it is likely that they will facilitate purchases of a broad range of goods and services which may have no connection to the device used to purchase them. It is likely that consumers and retail merchants will benefit from having a single regulatory framework which regulates electronic payments, regardless of the specific technology that may be used.

In general, electronic payments are subject to a range of financial services regulation. Consumer protection is provided by the self-regulatory Electronic Funds Transfer Code of Conduct administered by the Australian Securities and Investments Commission. These arrangements already apply across a range of electronic payment systems. They are well understood by industry and consumers and are likely to remain the appropriate mechanism for protecting consumers. Maintaining multiple consumer protection frameworks for electronic payments is likely to increase compliance costs for industry and confusion for consumers. In any event, the ACMA's power to expand its consumer protection activities in this area is unclear, bearing in mind the terms of

the 2005 ministerial determination which gave the ACA the power to make rules about mobile premium services.

Analysis

The experience of implementing consumer protection measures for mobile premium services and considering the optimal conditions for self- and co-regulation suggest that a number of factors will need to be taken into account and addressed in ensuring that consumer safeguards for new types of mobile-phone-based payments are effective:

- > The value chain for some forms of mobile-phone-based payments, particularly those in which telecommunications carriers and content aggregators act as intermediaries, is potentially more complex than that for existing forms of electronic payment. The resulting diffusion of responsibility for consumer protection may jeopardise the effectiveness of self- and co-regulatory arrangements, unless these are reinforced by direct regulation and robust accountability and compliance measures.
- > A proliferation of payment service business models may give rise to information asymmetry and consumer confusion and undermine the effectiveness of self- and co-regulatory consumer protection arrangements.
- > The potential spontaneity and convenience of mobile-phone-based purchases may encourage a range of questionable business practices and there may be strong disincentives to comply with consumer protection requirements, particularly for entities located outside Australia.
- > The consumer safeguards for electronic payments are well understood by industry and consumers. However, the initial novelty of new forms of mobile-phone-based payment systems may cause consumer confusion about what the consumer safeguards are and who is responsible for dealing with complaints and enquiries about different stages of a transaction. It will be important to promote the applicable safeguards to consumers.

Conclusion

Telecommunications devices and services are enabling a broader range of consumer and business activities. These developments are likely to place pressure on sector-specific telecommunications consumer protection measures which were developed for the limited range of voice, data and content services traditionally provided by telecommunications companies. In considering the consumer protection arrangements that are likely to be appropriate in a convergent media and telecommunications environment, it would be desirable to ensure that consistent arrangements apply across the broad range of technologies and may enable online, mobile-phone-based and other electronic payments. It will also be important to ensure that these arrangements are effective in managing the risks which new and unfamiliar services, complex value chains and the ability to make spontaneous purchases may pose to consumers. With these objectives in mind, the ACMA has been engaging with a range of stakeholders who have an interest in and responsibility for payment services, with a view to ensuring that potential gaps or loopholes in consumer protection regulation are identified and addressed.

3. Video-sharing websites

Context: Video-sharing websites, such as YouTube, and the regulation of online content.

Key assessment factors: Industry interest; incentives for industry to participate and comply; rapidly-changing environment; transparency and accountability mechanisms; promotion of scheme to consumers; stakeholder participation.

Video-sharing websites provide online platforms for people worldwide to upload, watch and comment on audiovisual content. The top-ranking video-sharing websites are YouTube, Vimeo, Megavideo and Google Video.²⁹ This case study focuses primarily on YouTube, with some discussion of other video-sharing websites. Established in 2005, YouTube is the most popular video-sharing website³⁰, and is the third-most-visited website in Australia, the US and the UK, after Google and Facebook.³¹ Approximately 5.3 million Australians accessed YouTube from home during December 2010.³² YouTube reports that 48 hours of video are uploaded to it every minute—the equivalent of nearly eight years of content uploaded every day—and over 3 million videos are viewed a day.³³ YouTube is based in the US and is owned by Google, which is also US-based. Both companies have staff in offices around the world, including Australia.

A wide range of content is posted on YouTube, including entertainment, educational and instructional content, and news and politics-related content.³⁴ According to YouTube's CEO, 'YouTube isn't about one type of device or one type of video. Content from traditional media partners, made-for-web and personal videos all co-exist on the site.'³⁵ YouTube content partners include major Hollywood studios, aspiring filmmakers and vloggers.³⁶ YouTube also offers YouTube rental, a pay-to-view movie rental service available directly from its website. In April 2011, YouTube announced a major overhaul of its site that would create channels aimed at competing with broadcast and cable TV.³⁷ Originally a platform primarily for user-generated video content, YouTube has been adding professionally produced content such as full-length television shows and movies in a bid to attract advertisers.³⁸

A variety of approaches is apparent in the different video-sharing websites. Some form part of a search engine, for example Google Video and Yahoo! Video. Some may be aimed at a particular user base. For instance, Vimeo has a creative emphasis—it was

²⁹ Alexa, Top Sites as at August 2011,

http://www.alexa.com/topsites/category/Computers/Internet/On_the_Web/Web_Applications/Video_Sharing

³⁰ According to Alexa top sites.

³¹ Nielsen Online, June 2010, top 25 websites accessed in Australia, UK and USA during June 2010 by users of a home broadband service; also see Alexa, Traffic Rank, <http://www.alexa.com/>, as at August 2011.

³² Neilson Online, December 2010, reported in the ACMA, *The internet service market and Australians in the online environment*, July 2011.

³³ YouTube statistics, http://www.youtube.com/t/press_statistics, viewed 19 July 2011.

³⁴ See for example, YouTube's 'Citizentube' channel at <http://www.youtube.com/user/citizentube>.

³⁵ Salar Kamangar, Head of YouTube, The Official YouTube Blog, 'Welcome to the future of video. Please stay a while', 9 May 2011, <http://youtube-global.blogspot.com/2011/05/welcome-to-future-of-video-please-stay.html>

³⁶ Chad Hurley, co-founder of YouTube, The Official YouTube Blog, 'YouTube & the Online Video Revolution', 14 February 2010, <http://youtube-global.blogspot.com/2010/02/youtube-online-video-revolution.html>. Note that 'vlogger' is short for video blogger.

³⁷ *The Age*, 'Google to reorganize YouTube channels', 7 April 2011, <http://news.theage.com.au/breaking-news-technology/google-to-reorganize-youtube-channels-20110407-1d6b2.html>

³⁸ Glenn Chapman, 'YouTube adds thousands of movies for rent online', *The Age*, 10 May 2011, <http://news.theage.com.au/breaking-news-technology/youtube-adds-thousands-of-movies-for-rent-online-20110510-1eg50.html>

established by filmmakers and video creators who wanted to share their creative work, along with intimate personal moments of their everyday life.³⁹

Issues relating to inappropriate content may arise for video-sharing websites. For example, recent Australian news items illustrate some of these issues for YouTube:

- > In July 2011, a video of former *Playschool* presenter Noni Hazelhurst reading the profanity-ridden, spoof children's book *Go the F--- to Sleep* was removed from YouTube.⁴⁰ According to Text, the Australian publisher of the book, YouTube had removed the video, stating that, 'This video has been removed as a violation of YouTube's policy on depiction of harmful activities.'⁴¹ Hazelhurst's video was removed on 13 July (and was re-posted the following day) while other recordings of the book, including one by American actor Samuel L. Jackson, remained available.⁴²
- > In March 2011, a video showing a bullying attack and retaliation in a western Sydney high school was posted on YouTube and Facebook. The video became an instant hit on both sites before eventually being taken down.⁴³

The ACMA did not receive any complaints that would result in it taking action on these two matters.

Regulating online content

The ACMA administers the online content co-regulatory scheme established under schedules 5 and 7 to the *Broadcasting Services Act 1992*. Under this scheme, the ACMA is required to investigate valid complaints made about online content. When conducting investigations, the ACMA assesses content against the criteria within the National Classification Scheme. The scheme requires assessment of material on the impact of the classifiable elements of sex, violence, nudity, themes, language and drug use. If the content is found to be 'prohibited' or 'potential prohibited'⁴⁴, the ACMA must either:

- > for content hosted in, or made available from, Australia—issue an interim or final notice directing the content service provider to remove or restrict access to the content
- > for content hosted overseas—refer the content to industry-accredited family friendly filter makers, which means that it will be blocked for people who have filter software installed on their computers.

Regardless of where the content is hosted, if it is prohibited or potential prohibited, and is also of a sufficiently serious nature, the ACMA must notify an Australian law enforcement agency, except where the ACMA has a service-level agreement that it may notify to another body. Content that the ACMA deems 'sufficiently serious' includes child abuse material, content that advocates terrorist acts, and content that

³⁹ Vimeo website, <http://vimeo.com/about>

⁴⁰ Nino Bucci, 'YouTube brainless: Noni Hazelhurst hits back over storybook blue', *Brisbane Times*, 14 July 2011, <http://www.brisbanetimes.com.au/entertainment/youtube-brainless-noni-hazelhurst-hits-back-over-storybook-blue-20110714-1het2.html>

⁴¹ Ibid.

⁴² Ibid.

⁴³ Robinson et al., 'Viral spread of bullying video may encourage more acts, says expert', *Sydney Morning Herald*, 16 March 2011, <http://www.smh.com.au/technology/technology-news/viral-spread-of-bullying-video-may-encourage-more-acts-says-expert-20110315-1bv1.html>

⁴⁴ 'Prohibited content' is content classified by the Classification Board that falls within a certain classification category and, in some cases, meets or fails to meet other requirements in relation to access restriction and content delivery. 'Potential prohibited content' is content that has not been classified by the Classification Board, but is assessed by the ACMA as substantially likely to be prohibited if it were classified. Further information is available on the ACMA website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_310147#6, '6. What online content is prohibited?'

promotes or incites crime or violence. In the case of child abuse material, and in accordance with the service-level agreement between the Australian Federal Police and the ACMA, such content is reported through the International Association of Internet Hotlines (INHOPE). INHOPE member countries then refer the content to the appropriate enforcement agency within their jurisdiction.

Content on many video-sharing websites is often hosted overseas. If complaints about such content are made to the ACMA, and the content is found to be prohibited or potentially prohibited, it would be referred by the ACMA to makers of industry accredited family friendly filters under the industry code of practice. If appropriate, it would also be referred to a law enforcement agency or other body.

Video-sharing websites can have their own policies and systems in place about inappropriate content and behaviour. In the case of YouTube, these policies form part of the terms of service that users must agree to upon signing up to the site, and are set out in plain English as 'YouTube Community Guidelines'. The guidelines ask that users 'respect the YouTube community' and be responsible in using the site.⁴⁵ They state that users should not post pornography, animal abuse, drug use, bomb making, gratuitous violence, or content intended to shock. Hate speech and behaviour that is predatory, harassing or an invasion of privacy are not permitted. Users should respect copyright, and should not post spam. Vimeo also has 'Community Guidelines' which include requirements that users must have all necessary permissions to upload the video, that in most cases users only upload videos that they created or closely participated in creating, and that videos comply with Vimeo's other content restrictions.⁴⁶ These restrictions state that users must not upload certain videos such as pornography and other types of content, similar to the YouTube guidelines.

YouTube acts on these policies by enlisting its user community to notify it of inappropriate content via the site's reporting tools. Users can flag content, which is then reviewed by YouTube for compliance with its terms of service. YouTube explains that each flagged video is reviewed quickly, and if it is found that a video violates the rules, it will be removed, usually within an hour.⁴⁷ Users can also report matters like privacy violations, harassment and other online safety issues to YouTube for action, using the 'Help and Safety Tool' on the site. Multiple breaches of the community guidelines may result in a user being suspended or permanently removed from YouTube.⁴⁸ Vimeo also has provision for users to flag videos of concern, for review by its staff.⁴⁹

Furthermore, YouTube works with law enforcement bodies by reporting child exploitation content and providing online channels for law enforcement and interest groups to promote online safety. Other sites such as Google Video provide information for users to report such content to the appropriate authorities in their countries.⁵⁰

YouTube provides information to educate its users on matters such as privacy and copyright, and technology tools to help them manage these issues. The YouTube website provides cybersafety information tailored for an Australian audience. Technology tools allow users to share their videos with a selected audience, block other users and filter comments. YouTube's copyright education includes the YouTube

⁴⁵ YouTube Community Guidelines, http://www.youtube.com/t/community_guidelines.

⁴⁶ Vimeo Community Guidelines, <http://vimeo.com/guidelines>.

⁴⁷ YouTube FAQs, 'I discovered a video that I think is offensive, how do I get YouTube to remove it?', <http://www.youtube.com/t/faq>

⁴⁸ *ibid*.

⁴⁹ Vimeo FAQs, 'I have concerns about something I've seen on the site. What can I do?', http://vimeo.com/help/faq#concerns_about_content

⁵⁰ Google Help articles, 'Report content that is abusive of minors', <http://www.google.com/support/websearch/bin/answer.py?hl=en&answer=148666>

Copyright School—users who receive a copyright notification are required to watch a copyright tutorial and pass a quiz before uploading more content.⁵¹ YouTube's Content ID technology tools assist copyright holders to find their content on YouTube, with the option of flagging content for review by YouTube on the basis that it infringes copyright.

Other approaches to regulating online content include Google Video's SafeSearch feature, which can be used to eliminate sites that contain pornography and explicit sexual content from a user's search results.⁵²

In summary, online content hosted on YouTube or on other video-sharing websites hosted overseas is subject to self-regulatory mechanisms and, to the extent that it applies to content hosted overseas, to the online content co-regulatory scheme under schedules 5 and 7 of the BSA and industry codes of practice.

Analysis

A preliminary analysis of video-sharing websites, such as YouTube, against the ACMA's optimal conditions assessment framework identifies some environmental conditions that may be favourable for self- and co-regulatory approaches. These suggest that operators of video-sharing websites, such as YouTube, may have the right incentives to address the issue of online content management. However, this an indicative analysis only—video-sharing websites are a nascent development and conditions may change over time.

- > There is some willingness to address online content issues, as demonstrated by the user guidelines and flagging tools that YouTube and Vimeo have each put in place.
- > For some video-sharing websites, there may be some alignment between self-interest in managing content and the public interest. For example, it is in YouTube's commercial interests to promote appropriate online content and behaviour on its website and maintain a good reputation for the quality of content it hosts, so as to attract a broad base of users, viewers and content partners from which it might derive revenue.
- > The rapid pace of change in the online content environment suggests that industry might be better placed to develop approaches for addressing problems in the sector. An example of this is YouTube's development of technology tools for content management.
- > Accountability measures may apply to users of video-sharing websites under self-regulatory arrangements. For instance, there are accountability measures that apply to users of YouTube. Repeated non-compliance with YouTube's terms of service will result in suspension and eventually removal from the site.
- > Video-sharing websites may provide information about their self-regulatory processes, in the form of guidelines and FAQs. For example, YouTube promotes its content management policies and processes to its users, and involves them in implementing those policies and processes. User participation is central to YouTube's policing of its policies for online content.

While the above analysis identifies some positive developments, there are fundamental challenges in regulating online content. As discussed above, the online content co-regulatory scheme has limited reach for the removal of content hosted overseas. Furthermore, the global nature of the internet means that content issues will

⁵¹ Official YouTube Blog, 'YouTube Copyright Education (remixed)', 14 April 2011, <http://youtube-global.blogspot.com/2011/04/youtube-copyright-education-remixed.html>

⁵² Google Video Help, <http://video.google.com/support/bin/answer.py?hl=en&answer=66500>

be multi-jurisdictional. This creates challenges for the scope, nature and implementation of appropriate regulatory responses. For example, standards for assessing the appropriateness of online content vary from jurisdiction to jurisdiction around the world or even nationally. Australia's national classification scheme is currently the subject of a review by the Australian Law Reform Commission.

In addition, the ease with which online content can be reproduced and distributed poses difficulties for implementing solutions that are effective in controlling content distribution and access. The viral nature of online distribution means that once material has been posted, it can be distributed rapidly and made available elsewhere on the internet.

Conclusion

The approaches of video-sharing websites such as YouTube provide an insight into industry self-regulation in the area of online content. Online content is also subject to the online content co-regulatory scheme, although the scheme has limited reach for the removal of content hosted overseas. The preliminary analysis in this case study indicates that some of the conditions for effective self-regulation may be present for video-sharing websites. However, it also highlights the significant regulatory challenges posed by the online environment.

4. The icode

Context:

Informing, educating and protecting consumers in relation to cyber security risks.

Key assessment factors: Common industry interest; incentives for industry to participate and comply; consumer detriment; fast-moving environment; role of the regulator; transparency and accountability mechanisms; stakeholder participation; promotion of scheme to consumers.

Promoting cyber security

Developed by the Internet Industry Association (IIA) in conjunction with the government, the icode is a voluntary code of practice for Australian Internet Service Providers (ISPs) which aims to instill a culture of cyber security within Australian ISPs and their customers. By following the code, ISPs will contribute to reducing the number of compromised computers in Australia and enhance the overall security of the Australian and international internet. The icode commenced on 1 December 2010 and is designed to provide a consistent approach for Australian ISPs to help inform, educate and protect their customers in relation to cyber security. It also identifies potential escalation approaches ISPs can adopt for customers who do not take remedial action when they are notified of an infection on their computer. The IIA describes the icode as delivering a standard set of best practices for ISPs to follow to preserve the integrity of their networks. The icode comprises a:

- > notification/management scheme for compromised computers
- > standardised information resource for consumers about better protecting themselves online
- > resource for ISPs to access the latest threat information
- > reporting mechanism in cases of extreme threat.

The icode complements the Australian Internet Security Initiative (AISI). Under the AISI program, the ACMA collects infection data from various sources to identify IP addresses that have been detected as exhibiting 'bot' behaviour on the Australian internet. Using this data, the ACMA provides daily reports to participating Australian ISPs about 'compromised' computers residing on their networks in the previous 24-hour period. The ISPs are then expected to contact their customers to inform them that their computers are compromised and assist them in restoring correct operation. The icode encourages all Australian ISPs to participate in the AISI and to take steps to respond to AISI reports.

The promotion of cyber security is becoming increasingly important as more Australians embrace online activities in their daily lives. An emerging cyber security issue is that of compromised computers, sometimes referred to as 'zombies', 'bots' or 'drones'. These are computers that have become compromised through the surreptitious installation of malicious software (malware) that enables them to be controlled remotely without the knowledge of the computer owner, for illegal and

harmful activities including the dissemination of spam, hosting of 'phishing' sites⁵³ and distributed denial of service attacks⁵⁴ on internet infrastructure.

Analysis

As the icode has been in effect for only eight months, the following discussion provides an early, indicative analysis against the optimal conditions framework.

- > There is a collective industry will to work towards minimising the risks inherent in using the internet, demonstrated by industry through its development of the icode. Furthermore, Australian ISPs have strongly supported the AISI, with 115 ISPs currently participating.⁵⁵ These ISPs represent well over 90 per cent of Australian residential internet users.
- > There is some alignment between industry interest and the public interest in promoting cyber security. ISPs have a commercial motivation for addressing 'bot' malware, as recognised in principle 5(h) of the icode. This states that the development of the Code is predicated on a recognition that compromised computers represent a threat to the integrity of networks. For example, IP address ranges that have been identified as sources of spam are often placed on blacklists, preventing the delivery of email from these addresses. Consumers whose computers have been blocked often object strongly to this action, and are likely to contact an ISP's customer contact centre to have this situation remedied, tying up the ISP's front-of-house resources. However, a potential challenge is that there is also a cost implication for ISPs acting on AISI reports.
- > The possibility of government intervention provides an incentive for industry to band together to address the issue of cyber security.
- > For an individual consumer whose computer has been compromised the possible detriment may be considerable, for example, fraud, identity theft, use of computer to distribute pornography and spam.
- > It is a fast-moving environment, in that security technologies continue to develop, as do cyber security risks such as new computer viruses.
- > The role of the regulator is a positive factor—the ACMA has technical expertise in the area of cyber security and it has access to relevant data and research. The ACMA is well-regarded in the field, with the AISI considered best practice internationally.
- > Both the icode and AISI are voluntary initiatives.
- > Australian internet industry stakeholders were actively involved in developing the icode. Consumer participation is called upon in acting on the icode. The role of consumers is recognised in principle 5(f) of the icode, which states that there is a shared responsibility for internet security; end users must accept some responsibility for securing access to their home computers and internet connections, for example by installing and keeping up-to-date anti-virus software, and securing their wireless networks. There is some promotion of the icode to consumers, for example via the icode website.

⁵³ 'Phishing' is a technique used to gain personal information for purposes of identity theft, using fraudulent e-mail messages that appear to come from legitimate businesses. These authentic-looking messages are designed to fool recipients into divulging personal data such as account numbers and, passwords and credit card numbers. Consumers are lured into providing their account details by deceptive emails that look like they have been sent by a financial institution or other company, but which are in fact clever copies sent by a 'phisher' hoping to deceive and defraud.

⁵⁴ Distributed denial of service (DDOS) attacks can take various forms; however they generally involve multiple computers generating a high volume of traffic to a website in order to prevent or limit access to that website.

⁵⁵ Current ISP participants are listed at: http://www.acma.gov.au/WEB/STANDARD/pc=PC_310317

Conclusion

The icode aims to promote a 'security culture' among ISPs and consumers, and complements measures undertaken by the ACMA and ISPs under the AISI to protect consumers from cyber security risks. The icode case study shows industry and government working together to develop and implement cyber security initiatives through a co-regulatory approach.

The icode has been operational for only eight months and outcomes will take time to consolidate. Furthermore, there are few parallels with the icode internationally and there are unlikely to be many precedents for an initiative of this kind. This case study therefore provides a preliminary analysis against the optimal conditions framework. It indicates that there are several factors that may be likely to positively influence effective co-regulatory arrangements, although there may also be some potential challenges for cyber security regulation.

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