Enforcing Self-Regulation in the Telecommunications Information Services Industry

Focussing on TISSC, **Simon Curtis** *examines some of the issues involved in challenging decisions of self-regulatory bodies.*

The past 30 years have seen a significant realignment in regulatory policy across a wide range of industries, as governments look to find more efficient, flexible and responsive ways to promote innovation and growth, while achieving public policy objectives.[1] Perceptions about the failure of direct forms of regulation have focused on self-regulation as a means to more effectively achieve public and industry goals.[2] When effective, self-regulation can promote good industry practice and provide flexible, cost-effective approaches that target specific problem areas.[3]

Regulatory regimes in many industries, in practice, are a combination of explicit government regulation, co-regulatory measures, and self-regulation.[4] A hierarchy of regulatory forms feature prominently in the Australian telecommunications sector,[5] most notably through the codes developed by the Australian Communications Industry Forum (ACIF), and through the work of the Telecommunications Industry Ombudsman (TIO).

The Telephone Information Services Standards Council (TISSC) is the self-regulatory body for providers of telephone information services (services on the 190 prefixes). The Council is an interesting example of a self-regulatory body that appears to work effectively for both consumers and the industry, and without the legislative backing afforded to ACIF codes registered by the ACA, or the limited powers of the TIO. The TISSC Code of Practice sets standards for message content, advertising and call costs of 190 prefixes.[6]

Self-regulatory (or co-regulatory) schemes, even those with legislative backing, cannot be said to be legally enforceable in their own right.[7] Those that are referenced and supported by legislation are legally enforceable only to the extent that the legislative provisions allow for action to remedy code breaches. It is the legislation, however, and not the codes or regimes themselves, that provide the authority to enforce decisions.

Authority to enforce provisions of the TISSC Code derives not from statute but from contract law: as part of their service agreements with Telstra (the sole carrier of telephone information services) 190 service providers are required to comply with the Code, including its decision and remedy-making procedures. Complaints under the Code are assessed by an independent Arbitrator, who decides whether a breach of the Code has occurred, and which of the remedies prescribed in the Code should apply. A determination that the Code has been breached is prima facie a breach of the contract with Telstra. Given this arrangement, the legal force of decisions by the TISSC Arbitrator is not necessarily clear, particularly the extent to which decisions made by the TISSC Arbitrator can be challenged beyond the appeals procedures provided for in the Code.

Power of self-regulatory bodies to enforce decisions

The TISSC Code of Practice is not registered with the ACA, nor are 190 service providers compelled by statute to participate in the scheme. The Code is not subject to the enforcement provisions in the *Telecommunications Act 1997* (Cth) (TA) that relate to industry codes or the TIO. There are, however, parallels with the TIO scheme, in the sense that while the Constitution of the TIO states that its decisions are "immediately binding", enforcement of decisions is obtained through another legal mechanism.

In *Australian Communications Authority v Viper Communications Pty Ltd*,[8] two internet service providers challenged the validity of the TIO scheme, claiming it vested judicial power in a non-judicial body, in contravention of Ch III of the Australian Constitution. Sackville J observed that the TA merely requires a service provider to enter into and comply with the scheme – it does not give a complainant the right to commence proceedings to enforce a determination. Part 30 of the TA provides the means by which the ACA or other relevant authorities can enforce a determination against a service provider. The Court found that, although the TIO scheme states that determinations are expressed as "immediately binding", they cannot be enforced except by the means proscribed in the TA. It also found the TIO is not required to resolve disputes or make determinations based on the application of legal principles to the facts as presented.

There is no statutory compulsion for telephone information service providers to participate in the TISSC scheme. However (as stated above) it is a condition of the service agreements between service providers and the carrier that service providers comply with the TISSC Code, including determinations and remedies made by the Arbitrator pursuant to the Code. In the case of both TISSC and the TIO, decisions of the self-regulatory or co-regulatory body are not, in and of themselves, enforceable. Remedies are enforceable only by legal mechanisms, whether public or private. The ACA and others are granted power under statute to enforce determinations of the TIO, while for TISSC, determinations that may lead to the suspension or cancellation of a service contract are enforced by the contractual relationship between the carrier and the service provider.

Contractual incorporation of non-statutory codes of practice

Contract law can be used to enforce statutory requirements. For example, under the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*, a commercial radio broadcasting licensee must require that each presenter comply with the relevant obligations imposed on the licensee by the *Broadcasting Services Act 1992* (Cth), the codes, as well as the Standard.[9] Compliance with the standard is achieved through the contract of employment between the presenter and the licensee.

An appropriate reference in a contract to an industry code of practice will enjoy the same status as any other term.[10] As unsigned collateral documents, statements contained in a code of practice may be construed as a term of a written and signed contract, especially in transactions that normally involve the use of incidental documents. This can result from an express statement to that effect in the principal document, or the parties' adoption of the statement can be inferred from the circumstances.[11] Several cases involving share transactions have held that contract terms to the effect that the validity of transactions be "subject to the rules" of the relevant stock exchange are admissible and relevant to be used in determining the terms and incidents of the contractual relationship between the parties.[12]

On the other hand, a non-statutory code of practice may expressly disavow any intention to confer contractual status upon its contents,[13] or waive any liability for breaches of a code, other than, where relevant, remedies that may arise from complaints mechanisms or dispute resolution procedures. The *Insurance Council of Australia Code of Practice*, for example, states in clause 1.2 that "... apart from the provisions for enforcement and sanctions in this Code, a breach of the Code shall not give rise to any legal right or liability."[14] There is no such provision or waiver in the TISSC Code of Practice.

Judicial review of decisions by self-regulatory bodies

The increased use of self-regulatory/non-government mechanisms to achieve public policy objectives has the potential to extend the definition of a "public body" subject to judicial review across what Allars describes as "... that contested blurred line drawn between public and private sectors."[15] The applicability of judicial review to decisions of non-government bodies is unclear from the available case law. It has been suggested that the existence of a "public purpose" can supply the requisite public element for the judicial review of the exercise of common law powers.[16] In relation to the exercise of public powers by non-government bodies, the argument for judicial review is that the source of the power or make-up of the decision-maker should not be determinative of the

parameters of public law. In *R v Panel on Take-overs & Mergers; Ex parte Datafin plc*,[17] the decisions of a non-statutory body were held to be susceptible to judicial review on the basis that it exercised de facto governmental powers backed by public law sanctions.[18]

This was followed in *Typing Centre of New South Wales v Toose*,[19] a NSW Supreme Court case concerning the decision-making process of the Advertising Standards Council (ASC). The Council held that an advertisement by the plaintiff was misleading and incorrect, in contravention of the Advertising Code of Ethics. Matthews J examined the powers, functions and composition of the ASC and concluded that it can be treated as a public body and one which, in appropriate cases, is therefore subject to judicial review. Her Honour saw the exercise of the supervisory jurisdiction of the Court as involving an examination of certain rulings of the ASC as to what the advertisement meant and whether the plaintiff had been accorded natural justice.[20] Her Honour was careful to conclude that the Court could not interfere with the ASC's findings unless those findings were "irrational" and not reasonably open to it.[21]

Similarly, in *Dorf Industries Pty Ltd v Toose*,[22] while agreeing with Matthews J in *Typing Centre* that decisions of the ASC may be subject, in certain circumstances, to judicial review, the Court held that the question of whether an advertisement contains anything which "in the light of prevailing community standards is capable of being likely to cause serious offence to the community" is one that the Court should primarily allow to be performed by the specialist tribunal established for that purpose (ie the ASC).[23]

In *Chapmans Ltd v Australian Stock Exchange Ltd*,[24] the applicant argued that a decision by the Australian Stock Exchange (ASX), made under its listing rules, was administrative in character, and thus reviewable under the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Beaumont J however found that the relationship between the applicant, de-listed as a member of the Exchange, and the ASX was purely contractual in nature, even though reference was made to the ASX rules in the *Securities Industry Act 1980* (Cth). While the legislative scheme may have placed on the ASX duties of a public character susceptible to judicial review under the Court's supervisory jurisdiction, that public character would arise as a result of the place given the ASX rules within the legislative scheme, and not because of an intrinsic "public" nature of decisions under the rules.[25]

It is not impossible to conceive that a decision made by TISSC in relation to a breach of the Code may be challenged as a decision of an "administrative character", or one in which there is a "public element". The relationship between TISSC and 190 service providers is different to that of the ASX and its members, as ASX members have a direct contractual relationship with the Exchange. Furthermore, the ASX rules are referenced in legislation, which is not the case with TISSC. The closest analogy to TISSC in the preceding cases is that regarding the ASC, where advertisers enter into a contract with commercial broadcasters, but where the screening of the advertisement is subject to classification by the ASC. As was stated in that case, however, determinations reasonably made by TISSC in relation to service providers who breach its Code will not be subject to reversal by a Court.

Conclusion

TISSC is generally regarded as a successful example of self-regulation. As a model of effective consumer protection, enforcement through contract rather than statutory backing is one that could be explored more extensively in the telecommunications and communications-related sectors. The potential of codes of practice empowered by contract is an area under-researched for its benefits and possible legal consequences. The changing technology, industry and market structures of telecommunications are challenging the capacity of Australia's regulatory framework to keep up with new services and applications.[26] Examining the applicability of more flexible, non-statute based regulatory structures may prove useful for future directions in telecommunications regulatory policy.

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Notes

[1] *Grey-Letter Law*, Report of the Commonwealth Interdepartmental Committee on Quasi-Regulation, December 1997; *Industry Self-Regulation in Consumer Markets*, Report of the Taskforce on Industry Self-Regulation, August 2000.

[2] Angus Corbett, 'Self-regulation, CLERP and Financial Markets: A Missed Opportunity for Innovative Regulatory Reform' (1999) 22(2) *UNSW Law Journal* 506 at 509.

[3] Grey Letter Law, op. cit. ACCC Chairman Graham Samuels has described good self-regulatory schemes as a kind of industry "quality control": see Graham Samuels, 'Industry regulation – can voluntary self-regulation ever be effective?' Centre for Corporate Public Affairs 2003 Oration, Melbourne, 20 November 2003.

[4] Recent commentary has criticised as false debate on the relative merits of command-and-control regulation as opposed to self-regulatory regimes: see, for example, Sinclair, 'Self-regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19(4) *Law and Policy* 529; Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

[5] See Alasdair Grant (ed.), *Telecommunications Regulation in Australia* (3rd ed), UNSW Press, Sydney, 2003; Kate MacNeill, 'Self-regulation: Rights and Remedies – the Telecommunications Experience', in Chris Finn (ed) *Sunrise or Sunset? Administrative Law in the New Millennium*, Papers presented at the 2000 National Administrative Law Forum, AIAL, 2000.

[6] With the exception of telephone sex services – whose activities are governed by Part 9A of the *Telecommunications (Customer Protection and Service Standards) Act 1999* (Cth). The TISSC Code of Practice is available at: http://www.190complaints.com.au/code.htm

[7] For a discussion of the legal status of self-regulatory schemes see Ferguson, 'The Legal Status of Non-Statutory Codes of Practice' (1988) 3 *Journal of Business Law* 12.

[8] (2001) 183 ALR 735.

[9] s.13.

[10] Ferguson, p. 15.

[11] *Fitzgerald v Masters* (1956) 95 CLR 420.

[12] *W Noall & Son v Wan* [1970] VR 683; *Bonds & Securities (Trading) Pty Ltd v Glomex Mines & Ors* [1971] 1 NSWLR 879; *Bell Group Ltd v Herald & Weekly Times Ltd* [1985] VR 613.

[13] Ferguson, p. 15.

[14] It should be noted that the ICA Code of Practice is currently under review.

[15] Margaret Allars, 'The Commercialisation of Administrative Law', in Susan Kneebone, (ed.) *Administrative Law and the Rule of Law: Still Part of the Same Package?* AIAL Forum Papers, 1998, p. 156, discussing the decision of Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1.

[16] *Victoria v Master Builders' Association* (Vic) [1995] 2 VR 121.

[17] [1987] 2 WLR 699.

[18] For discussion on this point see Michael Gillooly, 'Public Law Review of ASX Delisting Decisions' (1995) 13 *Australian Bar Review* 220. Where decisions of non-governmental bodies in the UK have been found to be reviewable, they have "generally been operating as an integral part of a regulatory system which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of government concern ...": *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; Ex parte Wachman* [1993] 2 All ER 249 per Simon Brown J.

[19] Unreported, 15/12/1988, NSWSC.

[20] Matthews J cited in *Dorf Industries v Toose* (1994) 54 FCR 350, per Ryan J at 363-64.

[21] ibid at 364.

[22] ibid.

[23] ibid at 367-68. In this case, the Commercial Acceptance Division of the Federation of Australian Commercial Television Stations (as the representative body of commercial television broadcasters was then known) initially cleared for broadcast the advertisement in question. The ad was subsequently withdrawn by the broadcaster after complaints regarding its content were upheld by the ASC.

[24] (1994) 123 ALR 215.

[25] ibid at 223-24.

[26] For example, the current uncertainty regarding content regulation for SMS/MMS services.