

THE UNUSUAL PLACE OF INDUSTRY CODES OF CONDUCT IN THE REGULATORY FRAMEWORK

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The comment of Commissioner Hayne in his Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – that ‘industry codes ... occupy an unusual place in the prescription of generally applicable norms of behaviour’ – was directed to voluntary industry codes. The term is nevertheless used indiscriminately, and industry codes inhabit each regulatory strategy – self-regulation, quasi-regulation, co-regulation and explicit government regulation. The term ‘industry code of conduct’ is not a term of art with a settled meaning and is widely used as a convenient term to describe a diverse range of industry rules – from aspirational ethical statements of industry associations with no effective coverage, content or enforcement, to legislated prescriptions in various forms which are imposed by, and attract, the full majesty of the law. This article examines the role, operation, and legal effect of industry codes under each of the regulatory strategies and proposes a more rigorous taxonomy.

I INTRODUCTION

‘Industry codes of practice occupy an unusual place in the prescription of generally applicable norms of behaviour’.

– Commissioner Kenneth M Hayne, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*¹

Commissioner Hayne’s comment as to the ‘unusual place’ occupied by industry codes was directed to voluntary industry codes – ‘a form of “self-regulation” by which industry participants “set standards on how to comply with, and exceed, various aspects of the law”’.² The term ‘industry code’ is nevertheless applied and

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1 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 105 (emphasis added) (‘Hayne Report’).

2 Ibid, citing Treasury (Cth), Submission to Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (2018) 9 [56] (‘Treasury Submission on Interim Report’).

routinely used beyond the voluntary industry code context. Industry codes span the entire regulatory spectrum – self-regulation, quasi-regulation, co-regulation and explicit government regulation. Industry codes of conduct, or industry codes of practice – the terms are used interchangeably – may occupy an unusual place, but it is an increasingly common place.³ Codes are, in the words of the fourth estate, ‘sprouting like weeds’:⁴ ‘when in doubt, recommend more codes’.⁵

The common law may not have embraced the civil law concept of codification, but it has enthusiastically embraced the term ‘code’, particularly in the context of industry codes of conduct. The term ‘code’ has become a convenient label for a variety of regulatory initiatives. Its indiscriminate use is far removed from its origin and meaning in civil law jurisdictions where codification – the process that receives expression in codes – originated.⁶ *The Oxford Companion to Law* explains that:

From the fifteenth century onwards the term [‘code’] came to be applied to a more or less comprehensive systematic statement in written form of major bodies of law, such as the civil law or the criminal law of a particular country, superseding the mixture of customs, decisions, and bits of legislation which had previously applied.⁷

The French *Civil Code* of 1804, among the first modern codifying instruments, is ‘often advanced as the prototype of codification’,⁸ but even within the civil law, there is a great diversity of codes, and it would ‘greatly oversimplify the exercise to label as codes only those instruments that match the French *Civil Code* in content and style’.⁹ ‘Codification’ and ‘code’ are ‘terms capable of taking on a great many different meanings’,¹⁰ but a widely cited definition of the latter is that proposed by Catherine Skinner:

[A code is] an instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both

- 3 See Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-Letter Law* (Report, December 1997) (‘*Grey Law Report*’) 32, which reported ‘upwards of 30,000 codes, standards and specifications covering all levels of government ... includ[ing] self-regulation and mandatory codes as well as quasi-regulatory schemes’. A recent report of the Victorian Commissioner for Better Regulation surveyed 57 state regulators and recorded that 56% of them identified codes of practice as part of the regulatory mix in their jurisdiction: Victorian Commissioner for Better Regulation, *Victorian Regulators: An Overview 2016–17* (Report, February 2019) 6. One regulator, Worksafe, administered 7 Acts, 8 Regulations, 13 legislated Codes of Practice and ‘approx[imately] 700’ not legislated Codes of Practice: at 86. Two other regulators, the Environment Protection Authority and VicRoads reported, respectively, ‘many’ legislated and not legislated codes of practice: at 42; and 5 legislated and many not legislated codes of practice: at 66.
- 4 Janet Albrechtsen, ‘That’s Code for “Conduct Yourself as We Tell You”’, *The Australian* (online, 24 April 2019) <<https://www.theaustralian.com.au/nation/politics/thats-code-for-conduct-yourself-as-we-tell-you/news-story/3f966dea26aba72171c3e81c5e1ac043>>.
- 5 Adam Creighton, ‘ACCC Now Speaking in Codes as It Grapples with Big Tech’s Powers and Reach’, *The Australian* (Sydney, 29 July 2019) 25.
- 6 *The Code of Hammurabi* promulgated by Hammurabi, King of Babylon, circa 1750 BC, which contains 282 rules establishing standards for both commercial and social behaviour, is widely accepted as the earliest and most complete written code: see generally Kathryn E Slanski, ‘The Law of Hammurabi and Its Audience’ (2012) 24(1) *Yale Journal of Law and the Humanities* 97.
- 7 David M Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) 234.
- 8 Catherine Skinner, ‘Codification and the Common Law’ (2009) 11(2) *European Journal of Law Reform* 225, 228.
- 9 *Ibid.*
- 10 John Eldridge, ‘Codifying Contract Law in Australia: Issues and Obstacles’ (PhD Thesis, The University of Adelaide, 2019) 5.

judge-made and statutory law in a particular field. And codification is the process of drafting and enacting such an instrument. A code by this definition is distinct from an ordinary statute because it is designed to be a comprehensive and coherent presentation of the law.¹¹

The industry codes that have sprung up in Australia are very different from the orthodox concept. The term has been enthusiastically appropriated – and in the process devalued – by its common use far removed from its antecedents. There are very few examples in Australia of codes in the classical sense – the vast majority are either not legislated or, if legislated, then by subordinate legislators under delegated powers. In the industry codes context, few can be regarded as comprehensive statements of law: they supplement – even go beyond – the law but do not fit within even the most modest definitions of codes.

There are of course isolated examples of successful codification in the common law world,¹² but it is beyond the scope of this article to address the relationship between codification and the common law,¹³ or to consider the opportunities for, and limitations of, the civil law concept of codification in Australia.¹⁴ The aim is more modest – to make some sense of the widespread use of the term ‘code’ in the particular context of industry codes of conduct which can be developed under all points of the regulatory continuum with widely differing accountability, compliance and enforcement mechanisms. This article addresses misunderstandings in the current terminology and suggests a more rigorous taxonomy. It examines the role, operation, and legal effect of industry codes under each of the regulatory strategies. It explores, in particular, the inappropriateness of quasi-regulated industry codes as an appropriate regulatory strategy, the development of prescribed industry codes under part IVB of the *Competition and Consumer Act 2010* (Cth) (‘CCA’), and the reforms relating to the enforceability of financial services industry codes which give effect to the Hayne recommendations. It argues that stakeholders are not well served by the proliferation of codes whose legal effect is disguised by use of the generic term ‘code’ and proposes a simpler and more direct terminology.

II CODES WITHIN THE REGULATORY FRAMEWORK

An efficient regulatory system is of course ‘essential for the proper functioning of society and the economy’.¹⁵ The meaning of ‘regulation’ is nevertheless elusive, and Julia Black comments that ‘definitional vagueness is seen by those who write about regulation to be at best a rather quaint feature and at worst an occupational hazard’.¹⁶ The narrowest view of regulation is ‘the promulgation of an authoritative

11 Skinner (n 8) 228.

12 Ibid 232–42.

13 See generally Skinner (n 8).

14 For a discussion of proposals to codify Australia’s contract law, see Dan Jerker B Svantesson, ‘Codifying Australia’s Contract Law: Time for a Stocktake in the Common Law Factory’ (2008) 20(2) *Bond Law Review* 92 <<https://doi.org/10.53300/001c.5519>>.

15 Office of Best Practice Regulation, Australian Government, *Best Practice Regulation Handbook* (2007) 1 (‘BPRH 2007’).

16 Julia Black, ‘Critical Reflections on Regulation’ [2002] (27) *Australian Journal of Legal Philosophy* 1, 11.

set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules'.¹⁷ The broadest view encompasses 'all mechanisms of social control – including unintentional and non-state processes – to be forms of regulation'.¹⁸ Between the extremes of government regulation and no government regulation, there is a range of options for 'shaping and influencing the behaviour of market actors'.¹⁹

The 'command-and-control' regulatory model comprising primary and subordinate legislation is the 'pre-eminent instrument used today for developing and implementing norms of acceptable and unacceptable individual and corporate conduct'.²⁰ It provides clarity, certainty and predictability but imposes high enforcement and compliance costs. Regulation is therefore increasingly viewed as a spectrum as governments and businesses seek to 'address economic and social problems by using instruments that are more cooperative than adversarial in nature, and that have elements of shared responsibility for achieving results'.²¹ In the words of the Australian Communications and Media Authority ('ACMA'), policy frameworks should 'incorporate flexibility to adopt co-regulatory, self-regulatory and direct-regulation mechanisms as appropriate'.²² Given the more expansive view of regulation today, it is surprising that government publications continue to define regulation narrowly as 'any rule endorsed by government where there is an expectation of compliance'.²³ At least in the business context, a more realistic definition is that proposed by the Administrative Review Council: 'Any "business rule" endorsed by government or by an industry group or other non-government entity where there is an expectation of compliance'.²⁴ The

17 Robert Baldwin, Colin Scott and Christopher Hoods, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 1, 3 <<https://doi.org/10.1093/acprof:oso/9780198765295.001.0001>>.

18 Ibid 4.

19 Balázs Muraközy and Pál Valentiny, 'Alternatives to State Regulation: Self- and Co-regulation' in Pál Valentiny, Ferenc László Kiss, Krisztina Antal-Pomázi, and Csongor István Nagy (eds), *Competition and Regulation* (Institute of Economics, 2015) 54, 55. At page 54, Muraközy and Valentiny observe an upsurge in the interest in the alternatives to governmental regulation of markets in recent years, which they suggest can be explained by

a withering faith in the omnipotence of the modern regulating state that was established in the second half of the 20th century, intention to improve the quality of regulation, need for better governance, reduction of administrative burdens, and new solutions generated by regulatory failures.

20 Kernaghan Webb, *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and the Environment, 2004) 3.

21 Public Management Service ('PUMA'), Organisation for Economic Co-operation and Development, *Choices of Policy Instruments*, Doc No PUMA97(1), 15th session, 20–21 March 1997, quoted by Sue Holmes, 'Some Lessons from the Use of Environmental Quasi-regulation in North America' (Working Paper, Office of Regulation Review Staff, December 1997) 1.

22 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (Occasional Paper, September 2011) 10 ('Optimal Conditions Paper').

23 Department of Finance and Deregulation, Australian Government, *Best Practice Regulation Handbook* (2013) 12 [2.12] ('BPRH 2013'); Department of the Prime Minister and Cabinet, Australian Government, *Australian Government Guide to Regulatory Impact Analysis* (2nd ed, 2020) 61 ('Guide to Regulatory Impact Analysis').

24 Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* (Report No 49, November 2008) 4 ('Administrative Accountability'). The definition provided here 'builds on' the definition in *BPRH 2007* (n 15) xiii, which is in similar terms to the definition provided in the *Guide to Regulatory Impact Analysis* (n 23).

Commonwealth Government's *Best Practice Regulation Handbook* ('BPRH') notes that governments around the world, including Australia, are moving from prescriptive approaches to 'more innovative methods of dealing with identified problems' which 'can be less costly, more flexible, and therefore more effective than prescriptive regulation'²⁵ – an acknowledgement which sits uneasily with the BPRH's narrower definition of regulation.

In 1997, the *Grey-Letter Law Report* ('*Grey Law Report*') described a 'simplified spectrum of regulation':²⁶

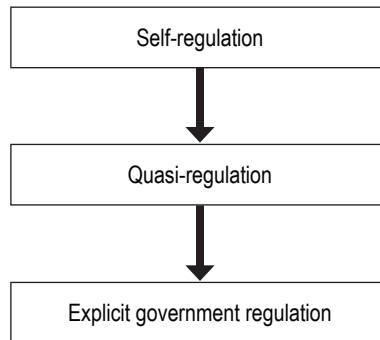


Figure 1: Spectrum as per the *Grey Law Report*

A decade later, in 2007, the BPRH tweaked the 'simplified spectrum':²⁷

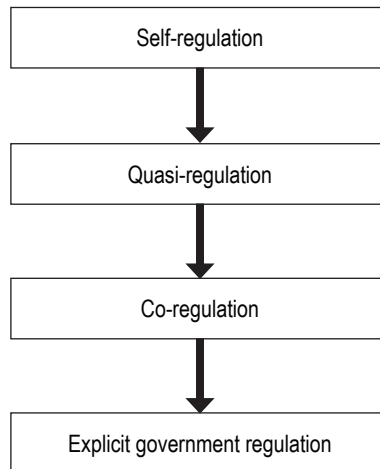


Figure 2: Spectrum as per the BPRH

²⁵ *BPRH 2007* (n 15) 95, which notes a range of 'alternative instruments' including no specific action, information and education campaigns, market-based instruments, pre-market assessment schemes, post-market exclusion measures, and standards.

²⁶ *Grey Law Report* (n 3) ix.

²⁷ *BPRH 2007* (n 15) 96.

It is the *BPRH*'s simplified spectrum, and explanation of the strategies within it, that are the most widely cited today.²⁸ The regulatory strategies are described in the *BPRH* in these terms:

- *Self-regulation* 'is generally characterised by industry formulated rules ... and codes of conduct, with industry solely responsible for enforcement'.²⁹
- *Quasi-regulation* describes those 'arrangements where government influences businesses to comply, but which do not form part of explicit government regulation'.³⁰
- *Co-regulation* typically refers to situations 'where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced'.³¹
- *Explicit government regulation* 'comprises primary and subordinate legislation' and is 'the most commonly used form of regulation'.³²

While regulation at the extremes is well understood, it is the intermediate levels that confuse. Ayres and Braithwaite suggest that

[p]erhaps the greatest challenge facing regulatory design is not at the apex of the pyramid of regulatory strategies ... where a variety of well-tested punitive strategies exist. Nor is it at the base of the pyramid, where there is experience of the successes and failures of the free market and of self-regulation in protecting consumers. The need for innovation is at the intermediate levels of the pyramid of regulatory strategies.³³

It can be accepted that, in the words of the *Grey Law Report*, the 'principal forms of regulation should not be regarded as mutually exclusive groups ... [but] should be viewed as gradations on a continuous regulatory spectrum' with various characteristics, advantages and disadvantages – cost-effectiveness, flexibility, responsiveness, accessibility, level of scrutiny – which are all important in assessing which form might be best for addressing a particular problem.³⁴ Regulation 'may not fit neatly within theoretical labels but may be situated along a continuum',³⁵ but the inconsistent and even interchangeable use and application of the 'labels', particularly at the intermediate levels – quasi-regulation and co-regulation – to describe the alternative regulatory strategies, unnecessarily confuses all regulatory stakeholders.

28 See generally Australian Law Reform Commission, *Classification: Content Regulation and Convergent Media* (Final Report No 118, February 2012) 304–5; *Guide to Regulatory Impact Analysis* (n 23) 30–1.

29 *BPRH 2007* (n 15) 96.

30 *Ibid* 98.

31 *Ibid* 100.

32 *Ibid* 66.

33 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 101.

34 *Grey Law Report* (n 3) 10. The *Grey Law Report* includes a 'more comprehensive spectrum of regulation' with 13 points on the spectrum: at 34; although each point can be regarded as examples of the principal regulatory models rather than new models.

35 Ann Wardrop, 'Co-regulation, Responsive Regulation and the Reform of Australia's Retail Electronic Payment Systems' [2014] (30) *Law in Context* 197, 226.

III INDUSTRY CODES OF CONDUCT

A The Terminology of Industry Codes of Conduct

The term ‘industry code of conduct’ is not a term of art. The 2017 Industry Codes of Conduct Policy Framework (‘2017 Framework’) described an industry code in broad and general terms – ‘a set of rules or standards of conduct for an industry, including the relationship between industry participants or their customers.’³⁶ A more precise definition is elusive, which is not surprising given the wide and inconsistent use of a term applied in a variety of formal and informal contexts. The Australian Financial Markets Association has commented that ‘code of conduct’ is ‘a generic term which is used in various ways for a range of purposes’,³⁷ that there is a ‘lack of clarity about the nature of an industry code ... and what it is meant to do’,³⁸ and that it has ‘a range of understandings in the community and the law’.³⁹ The Australian Securities and Investments Commission (‘ASIC’) has attempted to impose some discipline on the loose terminology. In its view, ‘there is an important distinction between industry codes and other self-regulatory arrangements’:⁴⁰ codes of conduct ‘lie at the top of the hierarchy of self-regulatory instruments, and provide a greater degree of consumer protection outcomes than other self-regulatory instruments’.⁴¹ ASIC considers a code ‘to be a body of rules that sets enforceable standards across an industry (or part of an industry), and delivers measurable consumer benefits’;⁴² the rules must be binding on subscribers through contractual arrangements, the code must be developed and reviewed in a transparent manner, and it must have administration and compliance mechanisms.⁴³ These comments were made in the context of ASIC’s power to approve industry codes within the financial services sector which requires appropriately high threshold criteria to be

36 Treasury (Cth), ‘Industry Codes of Conduct Policy Framework’ (Framework, November 2017) 1 (‘2017 Framework’).

37 Australian Financial Markets Association, Submission to Financial System Reform Taskforce, Treasury (Cth), *Financial Services Royal Commission: Enhancing Consumer Protections and Strengthening Regulators* (28 February 2020) 9.

38 Australian Financial Markets Association, Submission to Financial Services Reform Taskforce, Treasury (Cth), *Enforceability of Financial Services Industry Codes* (18 April 2019) 2 (‘AFMA Submission on Enforceability of Financial Services Industry Codes’).

39 Ibid.

40 Australian Securities and Investments Commission, *Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct* (2013) [RG 183.22] (‘Regulatory Guide 183’).

41 Australian Securities and Investments Commission, ‘Approval of Codes’ (Consultation Paper No 21, June 2001) 9 (‘Approval of Codes Paper’).

42 *Regulatory Guide 183* (n 40) [RG 183.19]. [RG 183.22] states the Australian Securities and Investments Commission (‘ASIC’) considers that effective codes offer a greater degree of consumer protection than other self-regulatory arrangements because:

- (a) they are enforceable;
- (b) they are developed in a consultative fashion to address a broad range of issues of real concern to consumers;
- (c) they set standards that elaborate on, exceed or clarify the law ...
- (d) compliance with these standards is monitored; and
- (e) remedies and sanctions are available for breaches of the code.

43 Ibid [RG 183.20].

satisfied but, beyond this context, there are no threshold criteria which must be satisfied for dignifying a self-regulatory instrument with the term ‘code’.

Although the most common understanding of the term is in the context of voluntary self-regulated codes, the label is not determinative of its legal effect, and codes span the entire regulatory spectrum. The issue is further complicated because, not only is there a lack of general understanding as to the nature and effect of an industry code of conduct, but there is also little consistency in the terminology. Each of the elements of the term – ‘industry’, ‘code’ and ‘conduct’ – have alternative nomenclature.

While ‘code’ is the most common term, it is not the exclusive term. The *Drowning in Codes* study, which examined 16 ‘codes of conduct’ relevant to consumers when they engaged in online activity, used a ‘fairly broad’ definition of codes of conduct.⁴⁴ The report was trying to capture the number and nature of self-regulatory and co-regulatory instruments intended to cover online activity, and the word ‘code’ did not have to appear in the title. Terms used included ‘rules’, ‘guidelines’, ‘program’, ‘best practice’ – which, with the term ‘code’, are terms which the Australian Law Reform Commission (‘ALRC’) has noted are used also by Commonwealth regulators in relation to informal guidelines.⁴⁵

Despite ‘code’ being the most common term, it is not always used in association with ‘of conduct’. Australia’s best-known voluntary code uses the term ‘ethics’: the Australian Association of National Advertisers (‘AANA’) *Advertising Code of Ethics*, which is the cornerstone of the industry’s self-regulatory system. The usual alternative to ‘code of conduct’ is nevertheless ‘code of practice’ and the terms are used interchangeably⁴⁶ by industry and government.⁴⁷ The Industry Codes regime of part IVB of the *CCA* is agnostic, referring only to industry codes,⁴⁸ but section 1101A of the *Corporations Act 2001* (Cth) (‘CA’) uses the term ‘codes of conduct’ in relation to ASIC’s power to approve voluntary industry codes. ASIC’s website nevertheless expressly states that a code of conduct is ‘[o]ften ... referred

44 Chris Connolly and David Vaile, *Drowning in Codes of Conduct: An Analysis of Codes of Conduct Applying to Online Activity in Australia* (Final Report, March 2012) 1 (‘*Drowning in Codes*’).

45 The ALRC has noted that there is no consistency in the names given to informal guidelines developed and published by Commonwealth regulators which include ‘Guide’, ‘Charter’, ‘Manual’, ‘Code’, ‘Policy Statement’, ‘Policy’, ‘Principles’: Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, December 2002) 244 [6.133] (‘*Principled Regulation*’).

46 An online note posted on 12 August 2013 by Emma Baker from Latus suggests that while a code of conduct is a ‘set of guides that recommend voluntary actions that members may or are advised to follow’ a code of practice is ‘more rigorous, in that the guides become mandates and those who wish to comply with the Code of Practice must follow exactly what is set down within the code, in order to comply with and be covered by it’: Emma Baker, ‘Codes of Practice or Code of Conduct’, *Latus* (Web Page, 12 August 2013) <latus.edu.au/codes-of-practice/>. There nevertheless seems to be little support for this proposition.

47 See Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Life Insurance Industry* (Report, March 2018) 53 [4.4], which expressly noted that during the inquiry, submitters and witnesses used the terms ‘code of practice’ and ‘code of conduct’ interchangeably but that the report used the term code of practice except where evidence referring to a code of conduct was quoted.

48 See ‘2017 Framework’ (n 36) 3, which, nevertheless, refers to part IVB industry codes as ‘industry codes of conduct’.

to as a “code of practice”, which has the same meaning as a code of conduct’.⁴⁹ Commissioner Hayne also used both terms although, with the exception of the term ‘code of practice’ in the passage that prefaces this article, the term ‘code of conduct’ was otherwise used.⁵⁰

It is only the third limb – the description ‘industry’ – that is relatively settled although the Industry Codes regime of part IVB of the *CCA* expressly provides that ‘to avoid doubt’, it is declared that franchising – usually regarded as a ‘sector’ because of its massive diversity which spans most industry sectors – is an ‘industry for the purposes of this Part’.⁵¹ Corporate or organisational codes of conduct/practice/ethics which usually set out general standards of ethical conduct within an organisation are not industry codes and are not addressed in this article.

Except in the case of prescribed ‘industry codes’ under part IVB of the *CCA*, and ‘mandatory codes of conduct’ under part 7.12 of the *Corporations Act 2001* (Cth) (‘CA’) and part 5.5 of the *National Consumer Credit Protection Act 2009* (Cth) (‘NCCPA’) in relation to the financial sector (where the term has a defined meaning), the use of the term ‘industry code’, or any variation thereon, does not govern the instrument or determine its effect. The term is applied to regulatory instruments across the entire regulatory spectrum.

B A Taxonomy of Industry Codes of Conduct

Given the widespread, even random, use of the term ‘industry code of conduct’, it is hardly surprising that classification is not without challenges. ‘Codes of conduct can be described in terms of any of [the regulatory] options depending upon the extent of government involvement, community perception about the need to comply with a code and the presence or absence of public enforcement’.⁵² In too many cases they have been described in terms of multiple regulatory strategies. The *Grey Law Report*, for example, suggests that the AANA *Advertising Code of Ethics*, clearly a self-regulatory code under the accepted definition as it has no legislative underpinning and the industry is solely responsible for its enforcement, may be described as an

49 ‘Codes of Conduct’, *Australian Securities and Investments Commission* (Web Page) <<https://web.archive.org/web/20190401023638/https://asic.gov.au/for-consumers/codes-of-conduct/>>.

50 With the exception of the use of the term ‘industry codes of practice’ in the passage cited and reference to the three insurance industry codes titled codes of practice (the *General Industry Code of Practice*, the *Life Insurance Code of Practice*, the *Insurance in Superannuation Code of Practice*), the term ‘code of conduct’ was used throughout the *Hayne Report* (n 1).

51 *Competition and Consumer Act 2010* (Cth) s 51ACA(3)(a) (‘CCA’). While general rather than industry-specific regulation is usually the preferred regulatory approach, there are often sound reasons for legislated industry-specific approaches: see generally Consumer Affairs Victoria, ‘Choosing between General and Industry Specific Regulation’ (Research Paper No 8, November 2006); and for self-regulated approaches to improve on standards of conduct provided for by legislation, see the comments on the contemporary role for codes of practice by David Knott, former ASIC Chairman, appointed by the Insurance Council of Australia to independently review submissions on a revised draft General Insurance Code of Practice: Gail Pearson, ‘The Place of Codes of Conduct in Regulating Financial Services’ (2006) 15(2) *Griffith Law Review* 333, 359–360 <<https://doi.org/10.1080/10383441.2006.10854577>> citing David Knott, ‘Review of Submissions to the Insurance Council of Australia in Respect of a Draft Code of Practice’ (2004).

52 Consumer Affairs Division, Department of Industry, Science and Tourism (Cth), ‘Codes of Conduct Policy Framework’ (Framework, March 1998) 8 (‘1998 Framework’).

example of either quasi-regulation, self-regulation or co-regulation.⁵³ Understanding and analysis is not assisted by such loose and careless classification.

The name chosen by the regulator, public or private, is not decisive and, as the ALRC has noted in the context of informal policies and guidelines but that is also relevant in relation to industry codes, ‘what is determinative is the function and use to which a guideline or policy, however named, is put’.⁵⁴ Industry codes of conduct, in whatever form, are all regulatory in the sense that they are intended to influence or control behaviour, but understanding and analysis demands a more rigorous taxonomy.⁵⁵ This article suggests that an appropriate taxonomy for industry codes of conduct comprises the following categories:

- *Voluntary codes* – self-regulated voluntary industry codes.
- *Prescribed voluntary codes* – self-regulated voluntary industry codes prescribed by regulations under part IVB of the *CCA*.
- *Approved codes* – self-regulated industry codes developed by industry but with formal regulator endorsement under a legislative scheme.
- *Co-regulated codes* – self-regulated industry codes developed by industry but with legislative underpinning and regulator enforcement.
- *Mandatory codes* – *mandatory industry codes* prescribed by regulations under Part IVB of the *CCA* and *mandatory codes of conduct* for the financial sector to be prescribed by regulations under part 7.12 of the *CA* and part 5.5 of the *NCCPA* under the proposed amendments to give effect to the Hayne recommendations.

This taxonomy excludes industry codes under two of the points on the simplified spectrum – explicit government regulated codes and quasi-regulated codes – as well as the inappropriate and unnecessary category of quasi-legislated codes.

With the exception of the dedicated regime for prescribed industry codes under part IVB of the *CCA* (and, in relation to the financial sector, part 7.12 of the *CA* and part 5.5 of the *NCCPA*), ‘explicit government regulated codes’ fit uneasily into the taxonomy. Parliament, and its delegates, can make laws which can be given the name ‘code’ or ‘industry code’ or ‘industry code of conduct’ or ‘industry code of practice’ or any other variation thereon, and outside the prescribed mandatory codes regimes, there is no dedicated regime for legislating industry codes or the use of the terminology.

Quasi-regulated codes also do not sit well in an industry codes taxonomy. It is suggested below that many codes are misclassified as ‘quasi-regulated’ codes when they are not: they are usually, and more accurately, classified as either self-regulatory, co-regulatory or legislated codes. Codes of conduct are either law, or underpinned by law, or they are not law. The classification ‘quasi-regulated industry’ code is undoubtedly confusing, generally inappropriate, and arguably unnecessary. This classification ‘quasi-legislated industry code’ is excluded from the taxonomy for similar reasons: it describes delegated legislation which, despite being prescribed by a delegate of Parliament rather than the Parliament itself, is

53 *Grey Law Report* (n 3) 17.

54 *Principled Regulation* (n 45) 243–4 [6.131].

55 Webb (n 20) 11.

nevertheless legislation. The concern in relation to such codes is not their legality but rather the appropriateness of the delegation and of the Parliament's effective scrutiny of the laws made.

IV VOLUNTARY INDUSTRY CODES

A The Role and Operation of Voluntary Codes

Commissioner Hayne's comments in relation to industry codes occupying an 'unusual place in the prescription of generally applicable norms of behaviour' were made in relation to voluntary industry codes:

They are offered as a form of 'self-regulation' by which industry participants 'set standards on how to comply with, and exceed, various aspects of the law'. They are offered, therefore, as setting generally applicable and enforceable norms of conduct. Industry codes pose some challenge to the understanding that the fixing of generally applicable and enforceable norms of conduct is a public function to be exercised, directly or indirectly, by the legislature.⁵⁶

Although self-regulation has been described as 'a term with multiple meanings, no one of them being authoritative',⁵⁷ it is '[g]enerally characterised by industry-formulated rules and codes of conduct, where industry is solely responsible for enforcement'.⁵⁸ ASIC has defined it as 'regulation where there is substantial industry-level involvement in the development or implementation of the regulation, and where the regulatory arrangement is adopted and funded by industry'.⁵⁹ An Australian Government report acknowledged that within the scope of self-regulation there is 'a host of options to deal with specific problems and objectives ranging from a simple code of ethics, to schemes incorporating codes that are drafted with legislative precision together with sophisticated customer dispute resolution mechanisms'.⁶⁰ It concluded that there was a 'broad and diverse range of self-regulation' with 'no single model for industry self-regulation as it depends on what is trying to be achieved'.⁶¹ Self-regulation is 'like a chameleon, taking its colour from its surroundings'.⁶² But if industry codes aspire to be more than 'public relations puffs' – to use Commissioner Hayne's words – then 'the promises made must be made seriously'.⁶³ From a regulatory perspective, the key consideration is their efficacy in delivering increased consumer protection and reduced regulatory burdens for business. The Australian Competition and Consumer Commission's

⁵⁶ *Hayne Report* (n 1) 105, citing 'Treasury Submission on *Interim Report*' (n 2) 9 [56].

⁵⁷ Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 26.

⁵⁸ *BPRH 2013* (n 23) 107.

⁵⁹ Jillian Segal, 'Institutional Self-Regulation: What Should Be the Role of the Regulator?' (Speech, National Institute for Governance Twilight Seminar, 8 November 2001) 3.

⁶⁰ Taskforce on Industry Self-Regulation, Parliament of Australia, *Industry Self-Regulation in Consumer Markets* (Report, August 2000) 23 ('*Industry Self-Regulation Report*'). See generally Nicola J Howell, 'Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?' (2015) 38(2) *University of New South Wales Law Journal* 544.

⁶¹ *Industry Self-Regulation Report* (n 60) 24.

⁶² Ian Enright, *General Insurance Code of Practice Independent Review 2012–13* (Final Report, May 2013) 38.

⁶³ *Hayne Report* (n 1) 12.

(‘ACCC’) *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* refer to the key factors in this assessment:

Effective codes potentially deliver increased consumer protection and reduced regulatory burdens for business. To achieve this they must be well designed, effectively implemented and properly enforced. In contrast ineffective codes may place compliance burdens on business without any realisable benefits and potentially making signatories to it less competitive.⁶⁴

Voluntary industry codes – more pedantically but more accurately labelled non-prescribed voluntary industry codes to distinguish them from those prescribed under part IVB of the *CCA* – are more likely to be effective when the self-regulatory body ‘has widespread support of industry’, ‘comprises representatives of the key stakeholders, including consumers, consumer associations, the government and other community groups’, and ‘operates an effective system of complaints handling’.⁶⁵ An example is the AANA self-regulatory *Advertising Code of Ethics*, of which a recent Deloitte Access Economics report stated that the system ‘appears to be working effectively and in the best interests of Australian consumers’ and was a better choice than direct regulation by government.⁶⁶

Given the real, and ‘well-rehearsed’,⁶⁷ benefits of self-regulation for government, for industry, and for consumers compared with explicit government regulation,⁶⁸ it is not surprising that this regulatory strategy has strong government support. An August 2000 report by the Taskforce on Self-Regulation cited then Prime Minister John Howard – ‘[t]he Government is keen for industry to take ownership and responsibility for developing effective and efficient self-regulatory mechanisms where this is appropriate’ – adding that self-regulation is encouraged by the Government because ‘this mechanism is often more flexible and less costly for both business and consumers than direct government regulation’.⁶⁹ The *BPRH* indeed requires that self-regulation be one of the first options considered in reviews of regulation and in Regulation Impact Statements.⁷⁰ Its place in the matrix of legal

64 Australian Competition and Consumer Commission, *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (2011) 1.

65 Ibid 4.

66 Deloitte Access Economics, *Assessing the Benefits of a Self-Regulatory Advertising Complaints Handling Scheme* (Report, August 2017) 42. This report found that in five dimensions of regulatory effectiveness – cost, efficiency, responsiveness, compliance, effectiveness – self-regulation was more effective than government regulation in relation to the first three dimensions and not less effective in the other two.

67 Gail Pearson, ‘Business Self-Regulation’ (2012) 20(1) *Australian Journal of Administrative Law* 34, 36.

68 The Organisation for Economic Co-operation and Development has summarised the benefits as ‘greater flexibility and adaptability; potentially lower compliance and administrative costs; an ability to address industry-specific and consumer issues directly; and quick and low-cost complaints handling and dispute resolution mechanisms: Glen Hepburn, Organisation for Economic Co-operation and Development, *Alternatives to Traditional Regulation* (Report, 2009) 6. *BPRH* 2007 (n 15) 102 notes the following benefits:

[L]ower government administration costs, because such arrangements are developed and often administered by business; lower compliance costs for business; innovative inducements for compliance and sanctions for non-compliance; rules that are tailored to specific needs and thus better targeted; improved credibility because rules are developed by business, not imposed by governments; enhanced flexibility, responsiveness and speed of implementation and modification; and greater responsiveness to consumer demands based on additional information gained from, for example, the complaints mechanism.

69 *Industry Self-Regulation Report* (n 60) 17.

70 *BPRH* 2007 (n 15) 97.

and government agency regulations is nevertheless ‘both blurred and fragile’.⁷¹ This is particularly so when the government itself drafts a voluntary code (as in the case of the *ePayments Code* written by ASIC in consultation with stakeholders).⁷² The government’s footprint does not change the code’s legal status as voluntary.

B The Limitations of Voluntary Codes

The franchising sector provides a good example of the promise, and the limitations, of self-regulatory codes as an effective regulatory strategy. In 1993, the Australian franchise sector introduced a government-sponsored voluntary self-regulatory *Franchising Code of Practice*, which the government, in laudatory and self-congratulatory terms, described as

[t]he most progressive industry/government franchising initiative undertaken in the world ... [which has attracted] strong interest in its development from the franchising community overseas. This Code of Practice and the self-regulatory regime which will support it, provides an excellent model for how the business community and government can work in partnership to promote business development.⁷³

Unfortunately, the reality did not match the hyperbole. Fourteen months into its two-year trial, the government, prompted by increasing concerns as to the effectiveness of the Code, initiated an independent review of its operation and effectiveness. The *Review of the Franchising Code of Practice* identified two major weaknesses – its lack of coverage across the franchise sector and the failure of the ‘standards of conduct’ provisions to address serious franchise sector problems.⁷⁴ The hope that the voluntary code would provide an effective regulatory response for franchising in Australia, and a model for other jurisdictions, eventually – indeed very quickly – proved unrealistic. The voluntary code failed within three years – unable to withstand vigorous criticism of its coverage and its content in combination with reduced government funding for its administration and internal dissension among its governing council.⁷⁵ That about 65% of franchise systems in such a large and diverse sector paid for the privilege of being regulated by the Code was no doubt admirable – but the stark reality which exposes the limitations of voluntary codes was that about a third of franchisors declined to participate.

The limitations and difficulties with voluntary codes were of course central to Commissioner Hayne’s recommendations in relation to financial services sector industry codes: ‘the standards set may not be adequate; not all industry participants may subscribe to, and be bound by, the code; monitoring and enforcement of compliance with the code may be inadequate; and the limited consequences for breach of the code may not be enough to make industry participants correct and

71 Enright (n 62) 9.

72 See, eg, Australian Securities and Investments Commission, ‘Review of the *ePayments Code*: Further Consultation’ (Consultation Paper No 341, May 2021).

73 Franchising Code Administration Council, ‘Franchising Code of Practice: Information Brochure’ (1993), reproduced in Robert Gardini, *Review of the Franchising Code of Practice* (Report, October 1994) 45, 61.

74 Gardini (n 73) v.

75 See Andrew Terry, ‘Franchise Sector Regulation: The Australian Experience’ [2003–04] *LAWASIA Journal* 57, 64.

prevent systemic failures in its application'.⁷⁶ The ability to enforce the code on the part of those whom the code is intended to protect was a particular concern:

Industry codes are expressed as promises made by industry participants. If industry codes are to be more than public relations puffs, the promises made must be made seriously. If they are made seriously (and those bound by the codes say that they are), the promises that are set out in the code, and are intended to govern the particular relations between the provider and the acquirer of a financial product or financial service, must be kept. This must entail that the promises can be enforced by those to whom the promises are made ...⁷⁷

The two main types of arrangement used to ensure the enforceability of voluntary codes are explained by ASIC in these terms:

The first is where code subscribers enter into contractual arrangements with a central body that is vested with the power to administer and enforce a code. The central body has the power to enforce the standards in the code on those industry participants who become members of the code ...

The second type is where code subscribers incorporate their agreement to abide by a code in individual contracts that they enter into with consumers to whom they provide their services. By doing so, industry participants become contractually bound by the standards in the code, and consumers can directly enforce those standards against the service provider, particularly when dispute resolution procedures are associated with the code.⁷⁸

The enforceability of the current Australian Banking Association's ('ABA') *Banking Code of Practice*, approved by ASIC under section 1101A of the *CA*,⁷⁹ is assured by the condition of ABA membership that member banks are required to sign up to the Code, which provides that written terms for banking services and guarantees to which the Code applies will include a statement to the effect that the relevant provisions of the Code apply to the banking service or guarantee. An earlier iteration of the Code, for which ASIC approval was not sought and which was stated to be simply 'a voluntary code of conduct which sets standards of good banking practice',⁸⁰ nevertheless contained a similar provision⁸¹ and was held to have contractual effect.⁸²

There may be other quasi-enforcement possibilities. Misrepresentation as to compliance may constitute misleading conduct actionable by the aggrieved party or the regulator (the ACCC for misleading conduct in trade or commerce under

76 *Hayne Report* (n 1) 105, citing 'Treasury Submission on *Interim Report*' (n 2) 9–10 [58].

77 *Ibid* 12.

78 'Approval of Codes Paper' (n 41) 9–10.

79 See Part XII of this article.

80 Australian Bankers' Association, *Code of Banking Practice* (2013) cl 1.

81 *Ibid* cl 12.3.

82 In *National Australia Bank Ltd v Rice* [2015] VSC 10, [143]–[14], Elliott J noted that, in closing, National Australia Bank ('NAB') retreated from its opening contention – that the Code 'imposed no contractual obligation but merely provided "a desirable code of practice" ... [which] was of no legal effect' – and 'conceded that the Code was contractually binding'. Elliott J commented that '[I]f it be thought that the concession made by NAB as to the applicability of the Banking Code may have altered the outcome of this case, I would have found that the relevant provisions of the Banking Code relied upon in this proceeding applied with contractual force in any event': at [145]. This was approved on appeal in *National Australia Bank Ltd v Rose* [2016] VSCA 169. See also *Doggett v Commonwealth Bank of Australia* (2015) VR 302; *Tomalak Pty Ltd v Westpac Banking Corporation* [2020] VSC 79.

section 18 of schedule 2 of the *CCA* ('*Australian Consumer Law*'), or ASIC for misleading conduct in financial services under section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth)). Further, in determining statutory unconscionability, the discretionary unconscionability factors include 'the requirements of any "applicable industry code"' (defined as the prescribed provisions of any relevant mandatory industry code or voluntary industry code binding the corporation) or 'the requirements of any other industry code if the customer acted on the reasonable belief that the supplier would comply with that code'.⁸³ Similarly, the Australian Financial Complaints Authority's *Complaint Resolution Scheme Rules* require regard to be had to, inter alia, 'applicable industry codes or guidance'.⁸⁴

There are potential drawbacks with voluntary codes which extend beyond limitations of content and coverage and extend to structural issues – the possibility of raising 'barriers to entry within an industry', 'unintended monopoly power gained by participants that could restrict competition', and a 'danger of "regulatory capture"'.⁸⁵ Voluntary codes enshrine collective conduct that may constitute substantially anti-competitive conduct, which may nevertheless be authorised by the ACCC if the public benefit flowing from the arrangement outweighs the anti-competitive effects.⁸⁶ As part of the authorisation process, the ACCC may require conditions which address structural issues.⁸⁷

V PRESCRIBED VOLUNTARY INDUSTRY CODES

Part IVB of the *CCA* provides for the prescription of mandatory and voluntary industry codes. The background to part IVB and its operation is discussed in detail below, in Part X of this article, in connection with prescribed mandatory industry codes. Prescribed voluntary codes are given the force of law and are enforceable by the ACCC, and by those protected by the code under the internal dispute resolution provisions, against those parties who agree to become and remain signatories to the code. The incongruity of the idea of mandating compliance with a voluntary code

83 *CCA* (n 51) sch 2 ss 22(1)(g), (h); *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CC(1)(g), (h).

84 Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (2021) r A.14.2(b).

85 See Department of Treasury and Finance (Vic), 'Victorian Guide to Regulation: Purposes and Types of Regulation' (Toolkit No 1, July 2014) 12.

86 *CCA* (n 51) pt VII.

87 A current example is the ACCC's authorisation, on 19 November 2020, of the Clean Energy Council's *Solar Retailer Code of Conduct*. As a condition of authorisation, the ACCC proposed a condition requiring the Council to include an independent appeals process for retailers who apply to become signatories to the Code but are rejected – a process that is 'especially important because many retailers consider that being a signatory is critical for them to operate in the market, as it is generally necessary to access government financial incentives': Australian Competition and Consumer Commission, 'Appeals Process Needed in Solar Retailer Code' (Media Release 167/20, 13 August 2020). The authorised code introduces an appeal mechanism for unsuccessful applicants which will be heard by an independent Code Review Panel.

has been noted.⁸⁸ However, it is not compulsory for industry participants to sign up and assume the obligations imposed by the code and, for this reason, prescribed voluntary codes are referred to as ‘opt-in’ codes: there is an option whether to be bound or not. For those who opt-in, the voluntary code is binding and operates as a mandatory code. Regulations made under section 51AE prescribe specific industry codes or specific provisions of an industry code, declare whether the industry code is to be mandatory or voluntary, and specify the method by which parties agree to be bound and cease to be bound.⁸⁹ The consequences of contravention of a voluntary code for those who have opted-in is the same as for those who contravene a mandatory code. Once a corporation has opted-in, it is legally obliged to adhere to the code requirements and is subject to enforcement action for contravention in the same way as if the code was mandatory.

Prescription of an industry code, whether mandatory or voluntary, by the government is subject to a high threshold and will be implemented only in ‘very limited circumstances – when it is absolutely necessary for supporting the efficient operation of markets or the welfare of consumers ... and where such intervention is likely to result in a net public benefit’.⁹⁰ To date there is only one part IVB-prescribed voluntary industry code – the *Food and Grocery Code of Conduct* prescribed in 2015.⁹¹

Despite the potential advantages of voluntary codes over mandatory codes – greater flexibility, greater scope for the parties to compromise in order to arrive at mutually acceptable terms, the fostering of a stronger commitment for signatories to comply with the spirit and substance of a code, the cooperative nature leading to more robust and enduring behavioural changes that can strengthen business relationships within the supply chain – they are likely to be rare. The *Food and Grocery Code of Conduct* stands in splendid isolation. The bottom line is that voluntary codes are voluntary. This reality was emphasised in the ACCC’s submission to the 2018 *Independent Review of the Food and Grocery Code of Conduct* and its response to the Final Report, in which the ACCC argued strongly that the Code should be made mandatory:

Under a voluntary Code, there is an ongoing risk of withdrawal by signatories and insufficient coverage of new entrants or existing major participants that refuse to sign up. This reduces the Code’s effectiveness and utility, including because suppliers cannot rely on it consistently and in full confidence. Making the Code

⁸⁸ ‘AFMA Submission on Enforceability of Financial Services Industry Codes’ (n 38) 7.

⁸⁹ ‘Industry code’ bears its normal meaning as a ‘a code that regulates the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry’: see *CCA* (n 51) s 51ACAA. A ‘voluntary industry code’ for the purposes of part IVB is ‘an industry code that is declared by regulations under section 51AE to be voluntary’: at s 51ACA(1). A voluntary industry code ‘binds a person who has agreed, as prescribed, to be bound by the code and who has not subsequently ceased, as prescribed, to be bound by it’: at s 51ACA(2).

⁹⁰ ‘2017 Framework’ (n 36) 8.

⁹¹ As schedule 1 in the *Competition and Consumer (Industry Codes: Food and Grocery) Regulation 2015* (Cth) (*‘Food and Grocery Code’*). The Code regulates, inter alia, standards of business conduct, ensures transparency and certainty in commercial transactions, supports good faith in the grocery supply chain, and provides an effective, fair and equitable dispute resolution process.

mandatory would remove these risks and provide greater certainty to both suppliers and to new entrants.⁹²

The Final Report nevertheless recommended that the Code remain a prescribed voluntary code.⁹³ It captured most of the market, around 75%, by virtue of the three largest retailers in Australia becoming signatories. It featured an effective dispute resolution mechanism – private arbitration – which may not be available under a mandatory code for constitutional reasons. Further, as a voluntary prescribed code, it has presented a ‘unique opportunity for the ... industry to take responsibility for finding a solution to its own problems’ and ‘fostered strong cultural change’ which may not be achieved under the ‘more government interventionist approach’ of mandatory codes.⁹⁴

Despite the identified benefits of prescribed voluntary codes, the ‘opt-in’ reality is a very real limitation on their viability. The ACCC’s acceptance of this reality expressed in its submissions did not prevail in the Final Report but, and not surprisingly, was influential in the inquiry into the dairy industry conducted by the ACCC at about the same time at the direction of the Treasurer. The *Dairy Inquiry Final Report* published in April 2018 acknowledged the improvements that a recently developed voluntary ‘Dairy Code’ had introduced but noted that ‘the voluntary code is not enforceable and processors can choose not to participate or comply with the code at any time’.⁹⁵ The ACCC considered that a voluntary code would not ‘adequately address the structural bargaining power imbalance, and the associated contracting practices in the longer term’.⁹⁶ For similar reasons, the ACCC did not support a prescribed voluntary code as processors are not obligated to become signatories. The ACCC’s recommendation for a prescribed mandatory code was accepted by the government and the *Dairy Industry Code of Conduct* came into effect on 1 January 2020.

The rhetoric at the time of the introduction of the prescribed codes regime in 1998, essentially a strategy to give legislative underpinning to self-regulatory schemes,⁹⁷ has been replaced by a more practical reality that sees prescribed codes, whether mandatory or voluntary, ‘[d]eveloped by Government, in consultation with industry participants and the public’.⁹⁸ But given the very real limitation of voluntary codes – whether prescribed or non-prescribed – it is not surprising that the *Food and Grocery Code* remains the only prescribed voluntary industry code.

92 Australian Competition and Consumer Commission, Submission to Treasury (Cth), *Food and Grocery Code of Conduct Review: Final Report* (28 November 2018) 3.

93 Despite the *Food and Grocery Code of Conduct* (n 91) surviving as a voluntary code, the Independent Review’s confidence in this regulatory strategy is nevertheless compromised by its recommendation that the Government consider introducing a separate targeted mandatory code if recalcitrant industry participants do not sign up to the voluntary code: Graeme Samuel, *Independent Review of the Food and Grocery Code of Conduct* (Final Report, September 2018) 23.

94 Ibid.

95 Australian Competition and Consumer Commission, *Dairy Inquiry* (Final Report, April 2018) xxiii (‘*Dairy Inquiry*’).

96 Ibid.

97 See Part X of this article.

98 *Dairy Inquiry* (n 95) 165 [9.4.2] table 9.1.

VI QUASI-REGULATED INDUSTRY CODES

Reference was made above to the unhelpfulness of the quasi-regulation category in relation to industry codes of conduct. It is quasi-regulation, which sits on the regulatory spectrum between self-regulation and co-regulation, that is the source of the greatest confusion. The expression is ‘capable of covering multiple edicts’.⁹⁹ The use of the terms ‘soft’ or ‘grey’ law, which are commonly used to describe quasi-regulation,¹⁰⁰ highlight the ambiguous or uncertain nature of this regulatory tool.¹⁰¹ A recent report of the Institute of Public Affairs refers to ‘regulatory dark matter’ – ‘regulatory actions taken by departments and agencies that are subject to little scrutiny or democratic accountability’.¹⁰² Definitions and examples of quasi-regulation invariably include codes of conduct/practice which are ‘probably the best known examples of quasi-regulation’.¹⁰³ However, most examples of quasi-regulation in the context of industry codes are not convincing. Although quasi-regulation defies precise definition, the accepted definition adopted by Australian governments and set out in the Glossary in the *Australian Government Guide to Regulatory Impact Analysis* is ‘rules or arrangements that are not part of explicit government regulation, but nevertheless seek to influence the behaviour of business, community organisations and individuals’.¹⁰⁴ It is not the definition itself but the accompanying examples that introduce unnecessary confusion. The definition includes as examples ‘industry codes of practice’ (which may or may not be quasi-regulation under the given definition) and, more surprisingly, ‘industry-government agreements (co-regulation)’ (which confusingly equates quasi-regulation and co-regulation). A similar definition in the body of the document provides as an example ‘government involvement in development’ of industry codes of practice.¹⁰⁵ Codes of conduct/practice are claimed to be ‘probably the best known examples of quasi-regulation’,¹⁰⁶ but many examples are not convincing and are better categorised as either self-regulation if there is no legislative underpinning, or co-regulation or explicit government regulation if there is. While the quasi-regulatory classification may be appropriate in some instances, it is unlikely ever to be a helpful categorisation for industry codes of conduct which should not exist in some regulatory half-life.

99 Robin Creyke, ‘“Soft Law” and Administrative Law: A New Challenge’ (2010) 61 (Jan) *Australian Institute of Administrative Law Forum* 15, 15.

100 *Administrative Accountability* (n 24) 5.

101 See generally Stephen Argument, ‘Quasi-legislation: Greasy Pig, Trojan Horse or Unruly Child?’ (1994) 1(3) *Australian Journal of Administrative Law* 144.

102 Kurt Wallace, ‘Regulatory Dark Matter: How Unaccountable Regulators Subvert Democracy by Imposing Red Tape without Transparency’ (Research Paper, Institute of Public Affairs, June 2019) 3.

103 *Grey Law Report* (n 3) 11.

104 *Guide to Regulatory Impact Analysis* (n 23) 30.

105 *Ibid* 17.

106 *Ibid* 11. The *Grey Law Report* (n 3) accepted that ‘[q]uasi-regulatory codes are very difficult to identify and maintain. There is no formal mechanism by which government announces the adoption of a quasi-regulatory instrument ... [which] makes identification, collection and monitoring extremely difficult’ and identified ‘upwards of 30,000 codes, standards and specifications’: at 32.

If codes of conduct are not part of explicit government regulation either in their formulation or, in the case of co-regulation, through underpinning legislative machinery for their recognition or enforcement, the factor of ‘government involvement’ is not particularly relevant. ‘Involvement’ is a clumsy instrument which is devoid of any real content. The extent of the government’s ‘involvement’ before the quasi-regulation label can be applied is uncertain. The *Grey Law Report* suggests that ‘while some codes are self-regulation, other industry-based codes of practice may qualify as quasi-regulation because of significant government involvement and/or pressure on business to comply’.¹⁰⁷ The *Grey Law Report* suggests that if an industry develops and implements a code of practice ‘in response to government suggestions that there is a need for such a code, its essential characteristics may move away from self-regulation towards quasi-regulation’.¹⁰⁸ This view is supported by the ALRC which suggests that the self-regulatory system for advertising through the AANA *Advertising Code of Ethics* ‘might equally be characterised as quasi-regulation’ as ‘governments may have regulated this area if a self-regulatory regime did not exist – and may regulate [it] in the future if this regime does not demonstrate its responsiveness to community expectations’.¹⁰⁹

Measuring the extent of such influence is a futile and impossible exercise.¹¹⁰ Government influence, to a greater or lesser extent, is often present in the background and, in some cases, such as the recently introduced *Code of Practice: Securing the Internet of Things for Consumers* (*IoT Code*), may indeed be front and centre. The *IoT Code* was developed by the Department of Home Affairs in partnership with the Australian Signals Directorate’s Cyber Security Centre following nationwide engagement with industry and the public. This Code nevertheless constitutes a voluntary set of principles, compliance with which is ‘encouraged but optional’.¹¹¹ Applying the description ‘quasi-regulation’ to this Code is not helpful or necessary.

Even less convincing is the suggestion in the *Grey Law Report* that ACCC authorisation of a voluntary code bears ‘some resemblance’ to quasi-regulation: ‘To the extent that an authorisation may be instrumental in determining that a self-regulatory code containing anti-competitive elements is allowed to operate, it can be seen as having an effect on the behaviour of the businesses subject to the code.’¹¹² The *Grey Law Report* argued similarly in relation to the ACCC’s power to accept written enforceable undertakings: ‘they resemble quasi-regulation in that

107 *Guide to Regulatory Impact Analysis* (n 23) 11.

108 *Ibid* ix.

109 Australian Law Reform Commission, *Classification: Content Regulation and Convergent Media* (Final Report No 118, February 2012) 305 [13.12].

110 The ACCC is an independent statutory authority and thus independent of government, but its advice that it ‘may be able to assist your industry in developing a voluntary code by providing general guidance’ can be regarded at least as a form of quasi-government involvement: ‘Voluntary Codes’, *Australian Competition and Consumer Commission* (Web Page) <<https://www.accc.gov.au/business/industry-codes/voluntary-codes#how-is-a-voluntary-code-developed->>; Australian Competition and Consumer Commission, *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (n 64) 2.

111 Department of Home Affairs, Australian Government, *Code of Practice: Securing the Internet of Things for Consumers* (2020) 2.

112 *Grey Law Report* (n 3) 29–30.

unless a business offers an undertaking acceptable to the Commission the business is aware that it may face legal proceedings'.¹¹³

Ultimately those responsible for regulating must choose the most efficient and effective regulatory tool. In the context of industry codes of conduct, this is unlikely ever to be a quasi-regulatory code of indeterminate status. If an industry code is developed, controlled, and administered by the industry itself without any explicit government regulation, it is properly categorised as self-regulation. If government introduces mechanisms to enable enforcement of the voluntary code, it can properly be categorised a co-regulation. If a code is prescribed by legislation, either primary, secondary or tertiary, the code is explicit government regulation to use the language of the simplified spectrum. While quasi-regulation may be an appropriate label for some regulatory 'interventions',¹¹⁴ it is never likely to be appropriate for a viable industry code of conduct.

VII QUASI-LEGISLATED INDUSTRY CODES

The quasi-regulation category is further confused by the use of the term 'quasi-legislation' – described by Scott Hickie as the 'lesser-known cousin' of delegated legislation.¹¹⁵ While the traditional form of delegated legislation is to the executive government – by conferring on the Governor-General (or, in the states, the Governor) the power to make regulations by Order-in-Council – the delegation can be, and often is, wider. The term 'tertiary legislation' is sometimes used to describe the increasing practice of Parliament delegating its lawmaking power to somebody other than the Governor-General in Council – such as to a minister, an official or an agency. It is not helpful to classify such delegated legislation as 'quasi-legislation' or quasi-regulation. Delegated legislation is law whether it is made by the traditional delegate, the Governor-General, or by another person or agency to whom Parliament has delegated legislative power. To describe the effect of prescription of an industry code under part IVB of the *CCA* as 'of course, government regulation in a different form as the code becomes quasi-law' is unhelpful.¹¹⁶ Industry codes under part IVB in fact represent the most traditional and conventional form of delegated legislation. A regulatory proposition is either law or it is not law, and 'quasi-legislation' is law. As John Burrows has written:

[S]ome people argue that rules made by such bodies are not really law at all: that they are simply rules to regulate a closed community or a particular profession or industry. But these bodies do make law. They are authorised by an Act of Parliament which delegated power to the relevant agency.¹¹⁷

113 Ibid 31.

114 For example, guidelines issued by the ACCC which may be regarded as soft law, grey law, or quasi-law but are neither laws nor industry codes.

115 Scott Hickie, 'Diminishing the Efficacy of Disallowance Motions: Quasi-legislation in State Jurisdictions' (2012) 27(1) *Australasian Parliamentary Review* 91, 92.

116 Graeme Samuel, 'Industry Regulation: Can Voluntary Self-Regulation Ever Be Effective?' (Speech, Centre for Corporate Affairs, 20 November 2003) 12.

117 John Burrows, 'Legislation: Primary, Secondary and Tertiary' (2011) 42(1) *Victoria University of Wellington Law Review* 65, 72 <<https://doi.org/10.26686/vuwlr.v42i1.5408>>.

A greater concern in relation to quasi-legislation reaches to the heart of our constitutional system – that it is the constitutional role and responsibility of Parliament to make laws. The justifications for delegating legislative power are nevertheless soundly based, and the business of government could not operate otherwise.¹¹⁸ The High Court has accepted that ‘whilst the Parliament may delegate legislative power it may not abdicate it’.¹¹⁹ There is, however, concern as to the expanding range of delegates, beyond the Governor-General or Governor, whose legislative prescriptions may not be subject to regulatory impact analysis and to the full process of parliamentary scrutiny and disallowance enshrined federally in the *Legislation Act 2003* (Cth) in relation to legislative instruments. There is concern that government agencies may use the rules and the description ‘code’ to avoid the procedural rigours of legislative rule-making.¹²⁰ Scott Hickie has written that

Australian parliaments have responded to the concern of executive overreach achieved through delegated legislation with the development of legislative safeguards such as publication and tabling requirements, powers to disallow regulations, preparation of Regulatory Impact Statements and establishment of delegated legislation parliamentary review committees. However, in some jurisdictions increased use of quasi-legislation in the form of codes, guidelines and protocols has enabled executives to circumvent these traditional safeguards. With the introduction of the *Legislative Instruments Act 2003* (Cth)¹²¹ imbalance caused by quasi-legislation, between executive administration and parliamentary sovereignty, is largely prevented.¹²²

A recent June 2019 report of the Senate Standing Committee on Regulation and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, acknowledged that ‘[u]nlike many other parliaments, the Australian Parliament has considerable control over delegated legislation (through its power to veto, or disallow, legislative instruments made by the executive)’. The report nevertheless pointed out that

in practice, it is difficult for parliamentarians to keep abreast of the hundreds of instruments tabled each year, and all too often significant matters of policy are left to be determined by delegated legislation (despite the warnings of the Senate Standing Committee for the Scrutiny of Bills). While the committee draws its technical scrutiny concerns about delegated legislation to the Senate’s attention, there is no consistent scrutiny of its policy implications.¹²³

The label ‘code of conduct’ cannot, and certainly should not, disguise the reality which is ultimately whether the document has legal effect. John Burrows has commented in relation to tertiary legislation that ‘a variety of instruments with such a variety of effects can in the end blur our very understanding of what law is ... A document either has legal effect or it does not, and the legal effect it has is

118 See generally Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) ch 17 (‘*Traditional Rights and Freedoms*’).

119 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 373 (Barwick CJ).

120 See generally Robert A Anthony, ‘Interpretative Rules, Policy Statements, Guidances, Manuals and the Like: Should Federal Agencies Use Them to Bind the Public?’ (1992) 41(6) *Duke Law Journal* 1311, 1327 <<https://doi.org/10.2307/1372817>>.

121 Now the *Legislation Act 2003* (Cth) which renamed, and strengthened the scrutiny requirements of, the *Legislative Instruments Act 2003* (Cth).

122 Hickie (n 115) 92.

123 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) x.

determined by the Act under which it was made'.¹²⁴ It is not legality but process that is the issue. The problem is better addressed as it is under the federal *Legislation Act 2003* (Cth), albeit to a lesser extent in state and territory equivalents,¹²⁵ rather than by questioning the status of the instrument by use of the term 'quasi'.

VIII APPROVED CODES

It was suggested in the taxonomy that it is appropriate to recognise a category of self-regulated industry codes, albeit invariably developed with stakeholder consultation and regulator engagement, which may be approved by a regulator under a legislative scheme. ASIC's current power to approve industry codes of conduct in the financial services sector under section 1101A of the *CA* is an example.¹²⁶ Contravention of an ASIC approved code will not for that reason alone breach the law but will attract the consequences provided for in the code. For this reason, enforceability is a key threshold criterion for approval.

Approved codes which exist under a legislative scheme must be distinguished from the quite different, informal and regulatorily confused practice of code 'endorsement' – an unfortunate example of quasi-regulation. An example of the confusion as to the regulatory effect was the former practice of the ACCC in 'endorses[ing]' what were referred to as 'effective' and 'appropriate' voluntary codes of conduct.¹²⁷ The 1997 *Grey Law Report* records that the then Trade Practices Commission ('TPC') allowed the Australian Retailers' Association to use the TPC logo on the *Supermarket Scanning Code* and to include the words 'this code has been drawn up in consultation with the TPC in the interests of fair competition in the industry and of fair trading with its customers'.¹²⁸ This apparently informal process later moved to be placed on a more formal footing, with the ACCC's 2003–04 *Annual Report* announcing the introduction of an endorsement system.¹²⁹ The then Chair, Graeme Samuel, explained that:

124 Burrows (n 117) 77.

125 See generally Hickie (n 115); Chris Angus, 'Delegated Legislation: Flexibility at the Cost of Scrutiny?' (E-brief No 5/2019, Parliamentary Research Service, Parliament of New South Wales, July 2019); Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 5th ed, 2017). In a 2020 report, the Regulation Committee of the Parliament of New South Wales addressed 'executive overreach' and recommended that the Regulation Committee be empowered to consider all instruments of a legislative nature and not just regulations, as well as draft delegated legislation: Regulation Committee, Parliament of New South Wales, *Making of Delegated Legislation in New South Wales* (Report No 7, October 2020) 43 ('*Making of Delegation Legislation in NSW*').

126 In the case of workplace health and safety, the federal *Work Health and Safety Act 2011* (Cth) ('*WHS Act*') expressly provides, in section 275, that an approved code of practice is admissible in a proceeding for an offence against the *WHS Act* as evidence of whether or not a duty or obligation under the *WHS Act* has been complied with.

127 Samuel (n 116) 15.

128 *Grey Law Report* (n 3) 12.

129 Australian Competition and Consumer Commission, *Annual Report 2003–04: Fostering Competitive, Efficient, Fair and Informed Australian Markets* (Annual Report No 9, 15 September 2004) ('*ACCC Annual Report 2003–04*').

A system of endorsing voluntary codes of conduct has the potential to provide effective industry codes of conduct that deliver real benefits to businesses and consumers with the least possible compliance cost placed on consumers or business ... The industry will need to demonstrate that its code is achieving its objectives before the Commission will provide endorsement. Be aware, however, endorsement from the Commission will be hard to obtain and easy to lose. Commission endorsement should provide the consumer with some reassurance that the business they are dealing with operates in a fair, ethical and lawful manner.¹³⁰

The ACCC issued guidelines setting out 17 essential elements for effective voluntary codes which had to be satisfied for ‘endorsement’.¹³¹ While there can be no issue with setting out the elements for assessing the efficacy of a voluntary industry code – as does the ACCC’s current *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* – there is clearly an issue with moving self-regulatory codes into some regulatory half-life. Although Samuel referred to the move as one ‘away from the traditional self-regulatory model to a co-regulatory approach’,¹³² this was not a move to ‘co-regulation’ in the usual sense of that strategy providing legislative backing to enable industry arrangements to be enforced. It was more properly described as a move to ‘quasi-regulation’ and provides a good illustration of the confusion thereby generated by the use of that term. A self-regulatory code is a self-regulatory code even if it is endorsed by the regulator. If it is not an effective self-regulatory code, the government has a range of legislative options available to it. The practice of ‘endorsing’ a ‘high-quality’ code is unnecessary, confusing and unhelpful and provides a good example of why ‘quasi-regulation’ is not an appropriate strategy for industry codes. It is not surprising that the ACCC’s ‘endorsement’ strategy has sunk without trace.¹³³ The practice of formal code approval under a legislated scheme, such as ASIC’s power to approve codes in the financial services sector under section 1101A of the *CA* discussed below, is quite different.

130 Samuel (n 116) 6.

131 The guidelines are not available online but are set out in an address by Samuel (n 116). The guidelines covered stakeholder concerns, consultation, clarity, code administration, transparency, coverage, effective complaints handling, in-house compliance, sanctions for non-compliance, independent review of complaints handling decisions, consumer awareness, industry awareness, data collection, monitoring, accountability, review and performance indicators: at 7–11. See generally Len Gainsford, ‘The Australian Competition and Consumer Commission’s Proposed Industry Codes of Conduct: A Compliance Solution?’ (2004) 3(2) *Journal of Law and Financial Management* 8.

132 Samuel (n 116) 5.

133 The one-line reference to the ACCC introducing a ‘system of endorsement for high quality voluntary industry codes of conduct’ in the *ACCC Annual Report 2003–04* (n 129) appears to be the only public reference to the endorsement system: at 105. Media Release 22/03 (14 October 2003) in relation to the draft guidelines in connection with the proposed endorsement system is also not available in the ACCC’s otherwise comprehensive online archive of media releases. Draft Guidelines were published, and submissions received, but despite the Chair’s announcement of the scheme and the 2003–04 *Annual Report* announcing its introduction, it appears to have been quietly dropped with little fanfare and is unavailable.

IX CO-REGULATED INDUSTRY CODES

Co-regulation has been described as ‘arguably the most important and at the same time the least understood of the regulatory strategies’.¹³⁴ It sits on the regulatory spectrum between the extremes of explicit government regulation and self-regulation and typically refers to the situation where, as explained in the *BPRH*, the ‘industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced’.¹³⁵ It offers the same benefits as self-regulation but with the important advantage of legislative underpinning. Co-regulation seeks to combine ‘the advantages of the predictability and binding nature of legislation with a more flexible self-regulatory approach ... [permitting the] harnessing of stakeholder expertise beyond the reach of most government agencies’.¹³⁶ The underlying philosophy of co-regulation is that industry, not government, is best placed to determine the appropriate regulatory scheme which the legislative framework supports.

Definitions of co-regulation are nevertheless ‘diverse’,¹³⁷ and the term has been used in Australia to describe regulatory approaches at the extremes of the regulatory spectrum: for example, the description of a self-regulatory scheme as co-regulatory when it involves substantial regulator consultation with industry which adopts a voluntary agreement without the need for the regulator to exercise its powers to mandate change,¹³⁸ or the description of part IVB industry codes prescribed by regulation under the *CCA* with provisions for their enforcement by the regulator as co-regulatory codes.¹³⁹ Perhaps even more confusing is the statement in the *New South Wales Government Guide to Better Regulation* that co-regulation is a ‘non-regulatory approach’ – an ‘[option] to deal with a policy problem, that [does] not involve government intervention’.¹⁴⁰

Given the breadth of the concept, it is not surprising that there are a variety of co-regulatory mechanisms under which legislative support for industry-based codes is provided. The 2013 *BPRH* notes that ‘[s]ometimes legislation sets out mandatory government standards, but provides that compliance with an industry code can be deemed to comply with those standards. Legislation may also provide for government-imposed arrangements in the event that industry does not meet its own arrangements’.¹⁴¹ The 2007 *BPRH* suggests there are a variety of ways in which government may provide legislative support to industry-based codes, including delegating power to industry to regulate and enforce codes, enforcing

134 Greg Moore, ‘A Theory-Based Description of Australian Franchising Regulation’ (PhD Thesis, The University of New South Wales, 2008) 53.

135 *BPRH* 2007 (n 15) 103.

136 *Administrative Accountability* (n 24) 9.

137 See generally Wardrop (n 35); Howell (n 60).

138 See Wardrop (n 35) in relation to the introduction of Australia’s retail electronic payment systems.

139 See, eg, Explanatory Statement, *Competition and Consumer (Industry Codes: Food and Grocery) Regulation 2015* (Cth), describing part IVB industry codes as ‘co-regulatory measures’: at 1.

140 Treasury (NSW), ‘Guide to Better Regulation’ (Policy and Guidelines Paper No TPP19-01, January 2019) 26.

141 *BPRH* 2013 (n 23) 56 [7.32].

undertakings to comply with a code, incorporating a reserve power to have a code, requiring industry to have a code (but, in its absence, government may impose a code), and prescribing industry codes as voluntary or mandatory.¹⁴²

If the standard categories on the spectrum of regulation are to have any real meaning it is helpful to reserve the meaning of co-regulation for what is sometimes referred to as ‘enforced self-regulation’ – self-regulatory arrangements ‘underpinn[ed]’ by legislation – the expression used in the 2013 *BPRH*.¹⁴³ ‘Co-regulation’ may be a convenient term to describe self-regulatory arrangements characterised by close regulator consultation with consumer and industry groups – but this has the potential to make the term so broad that it loses any real meaning. Similarly, co-regulation may be a convenient term to describe a number of the implementation strategies outlined above, but when code content is legislated and enforcement responsibilities are conferred on regulatory agencies, then it is suggested that the regulatory strategy has progressed beyond co-regulation.

Although it may be described as a co-regulatory model, ASIC’s current statutory power to approve voluntary financial services sector codes is better described as an approval model. Approval does not give legislative effect or legislative underpinning to the approved code but simply, in the words of ASIC, ‘is a signal to consumers that this is a code they can have confidence in’.¹⁴⁴ With the enactment of the Hayne recommendations, the inclusion of enforceable code provisions which attracts ASIC enforcement moves such codes to a co-regulatory model. Co-regulatory codes are a feature of the communications and media regulatory framework: ‘industry participants assume responsibility for regulatory detail within their own sectors, underpinned by clear legislative obligations, with the regulator [ACMA] maintaining what are essentially reserve powers to intervene when self-regulation has not adequately addressed issues of real concern’.¹⁴⁵

142 *BPRH 2007* (n 15) 100. See also ‘1998 Framework’ (n 52), cited in *Optimal Conditions Paper* (n 22) 5.

143 *BPRH 2013* (n 23) 56 [7.32].

144 Treasury (Cth), *ASIC Enforcement Review: Industry Codes in the Financial Sector* (Position and Consultation Paper No 4, 28 June 2017) 5.

145 *Optimal Conditions Paper* (n 22) 8. The fair-trading Acts of the states and territories include the power to prescribe, by regulations, industry codes which are designed to provide a minimum standard of protection for consumers in particular industries. Although such industry codes are, in the words of Fair Trading NSW, usually ‘put together’ through consultation with representatives of a specific industry and the community, they are enshrined in legislation and have the force of law – as such, they are better described as explicit government regulation rather than co-regulation: ‘Codes of Practice and Service Charters’, *NSW Fair Trading* (Web Page) <<https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/acceptable-business-conduct/codes-of-practice-and-service-charters>>. An example of pure co-regulation is the New South Wales Government’s decision in 2007 to prescribe under the *Fair Trading Act 1987* (NSW) a voluntary national code, the *Industry Code for Motor Vehicle Repairers and Insurers*, as an ‘applicable industry code of conduct’ with which insurers or repairers must comply. The Act’s enforcement provisions will apply only if the dispute resolution procedures under that Code have not been followed and, in any event, enforcement action may not be taken if this is considered not in the public interest. In other states and territories, the Code remains voluntary, and it is only those parties who sign up to the Code who are bound by it.

X PRESCRIBED MANDATORY INDUSTRY CODES

A The Background to and Operation of Part IVB Industry Codes

Part IVB of the *CCA*, which provides for the prescription of mandatory and voluntary industry codes by regulations under the Act, has its origins in the 1997 *Fair-Trading Report*,¹⁴⁶ which addressed the disadvantages faced by small businesses in their dealings with bigger businesses. The particular focus of the report was the franchising sector, and the report recommended industry-specific primary legislation, complemented by a voluntary code of practice, to secure fair trading outcomes. The government acknowledged that although industry codes can offer flexible and efficient mechanisms to address issues of business practice, ‘experience has shown that for some codes of practice legislative underpinning is necessary to ensure the effective operation of the code and to achieve the desired change in industry sectors’.¹⁴⁷ The government’s preferred option was to amend the *Trade Practices Act 1974* (Cth), replaced in 2010 by the *CCA*, to provide a system for prescribing industry codes of practice:

The system would involve prescribing, through regulation, the conduct provisions of a code ... This approach would address many of the fundamental problems inherent in industry codes whilst retaining the positive aspects associated with codes-based approaches.¹⁴⁸

The Regulatory Impact Statement (‘RIS’) identified the benefits of a prescribed codes system as:

- the provision of ‘enforceable protections against unacceptable business conduct reducing the societal cost of business failure’;
- the provision of ‘two new mechanisms (mandatory underpinned codes and voluntary underpinned codes) for the regulation of business-to-business conduct’ which will ‘provide for more targeted solutions to business conduct issues, thereby reducing the risk of inappropriately pitched regulation’;
- allowing for ‘a staged transition to self-regulation of a sector once behavioural change has been secured through enforceable codes’;
- ‘advantages over primary legislation in terms of flexibility and ease of amendment’; and
- retaining ‘industry involvement in developing codes and in their continuing operation’.¹⁴⁹

The government concluded that a prescribed codes system would provide ‘a coherent framework for the future regulation of business conduct issues whilst retaining most of the benefits of industry codes of practice’.¹⁵⁰

146 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance: Towards Fair Trading in Australia* (Report, May 1997).

147 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1997, 8799–802 (Peter Reith, Minister for Workplace Relations and Small Business).

148 Regulation Impact Statement, Trade Practices Amendment (Fair Trading) Bill 1997 (Cth) 4.

149 Ibid 6.

150 Ibid 8.

By regulations under section 51AE of the *CCA*, an industry code may be prescribed and the code declared to be a mandatory industry code or a voluntary industry code.¹⁵¹ A corporation must not, in trade or commerce, contravene an ‘applicable industry code’, which means the prescribed provisions of any mandatory code or of any voluntary code that binds the corporation.¹⁵² Seven mandatory industry codes have been prescribed.¹⁵³ The codes may be enforced by the ACCC through the wide range of remedies available under the *CCA*, as well as specific provisions which apply to part IVB industry codes, or through private legal action for damages.¹⁵⁴ The ACCC therefore has a wide range of enforcement tools available to it. Under the *CCA*, a mandatory or voluntary code may contain a civil penalty provision, which is enforceable by the ACCC, but the code sets out who is subject to those civil pecuniary penalties. Currently only the *Franchising Code of Conduct* and the *Horticulture Code of Conduct* contain civil penalty provisions.¹⁵⁵ The 2017 Industry Codes of Conduct Policy Framework notes that ‘not all industry codes need penalties in order to be effective [and] codes should focus on providing an effective framework for industry to resolve their issues with minimal regulatory intervention’.¹⁵⁶ Penalties should only be considered in necessary and appropriate circumstances – where there is ‘systematic or egregious misconduct occurring in the industry that is unlikely to be effectively addressed by a code without the threat of penalties for non-compliance’.¹⁵⁷

The process for imposing an industry code, whether voluntary or mandatory, is set out in the 2017 Framework.¹⁵⁸ The Minister’s foreword explains that ‘[t]he Government does not take a decision to regulate a specific industry lightly and is well aware of the red tape burdens imposed on business ... the Government will

151 An industry code is defined for the purposes of part IVB simply to mean ‘a code that regulates the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry’: *CCA* (n 51) s 51ACAA(1).

152 *CCA* (n 51) ss 51ACA, 51ACB.

153 The *Franchising Code of Conduct*, the *Horticulture Code of Conduct* (first introduced in 2006), the *Oil Code of Conduct* (first introduced in 2006), the *Unit Pricing Code*, the *Wheat Port Code of Conduct*, the *Sugar Code of Conduct*, and the *Dairy Industry Code of Conduct*: see ‘Industry Codes’, *Australian Competition and Consumer Commission* (Web Page) <<https://www.accc.gov.au/business/industry-codes>>.

154 The remedies available under part IV include infringement notices (div 2A), public warning notices (div 3), orders to redress loss or damage suffered by non-parties (div 4), investigation powers, and compliance checks (div 5). A private action for damages is provided by *CCA* (n 51) section 82. In *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101, the High Court overruled the decision of the New South Wales Court of Appeal. The High Court held that non-compliance with a prescribed code gives rise to the remedies under the Act rather than attracting the ‘harsh consequences provided by the common law’, having the effect that a contract made in contravention of the Code would ‘render void every franchise agreement entered into where a franchisor had not complied with the Code’, which ‘would be to give the franchisor, the wrong-doer, an opportunity to avoid its obligations and, at the same time to place the franchisee in breach of obligations to third parties. A preferable result, and one for which the Act provides, is to permit a franchisee to seek such relief as is appropriate to the circumstances of the case’: at 117 [38]–[39] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefel JJ).

155 *Competition and Consumer (Industry Codes: Franchising) Regulation 2014* (Cth); *Competition and Consumer (Industry Codes: Horticulture) Regulation 2017* (Cth).

156 ‘2017 Framework’ (n 36) 7.

157 *Ibid.*

158 *Ibid.*

only prescribe a code in very limited circumstances where there is a compelling case for intervention, supported by robust evidence'.¹⁵⁹ Under the 2017 Framework, prescribed codes will only be supported where they are absolutely necessary for supporting the efficient operation of markets or the welfare of consumers; for example, to address problematic behaviour arising from an imbalance of bargaining power or information asymmetry, which may lead to poor outcomes for consumers or certain industry participants.¹⁶⁰ The formal process is outlined in the 2017 Framework.¹⁶¹ The regulations prescribing industry codes are legislative instruments and are subject to the protocols laid down in the *Legislation Act 2003* (Cth) – including the opportunity for parliamentary scrutiny and disallowance.

B The Evolution of Prescribed Industry Codes

The experience over the two decades since the introduction of the prescribed codes regime in 1998 suggests that there will always be a limited role for prescribed voluntary codes – their voluntary opt-in nature is a real limitation on their efficacy. The particular benefit of the codes regime stated in the RIS – allowing for a staged transition to self-regulation of a sector once behavioural change has been secured through enforceable codes – was as unconvincing and unrealistic in 1998 as it is now. While it is no surprise that mandatory codes dominate the prescribed codes regime, the extent to which mandatory codes have evolved, from a strategy to give legislative effect to industry codes to more conventional delegated legislation, is surprising. The RIS for the introduction of part IVB stressed the retention of industry involvement in developing codes and in their continuing operation. The Minister's Second Reading Speech expressly referred to the dual advantages that the introduction of part IVB would provide to small business: 'the benefit of participation in the design of industry regulation addressing unfair conduct and meeting best practice and the security that mandated codes or provisions of codes may be directly enforced under the *Trade Practices Act* itself'.¹⁶²

The experience with the first mandatory code – the *Franchising Code of Conduct* – is instructive. The first iteration of that Code bore a close resemblance to the voluntary *Franchising Code of Practice* it replaced. A nine-member Franchising Policy Council – comprising three franchisees, three franchisors, two advisers, and an academic – was appointed to provide independent advice on relevant franchising matters. The Minister responsible for the prescription of the Code recorded that the

¹⁵⁹ Ibid iv.

¹⁶⁰ See '2017 Framework' (n 36) 11–12, which sets out five relevant criteria to be considered when prescribing codes. (1) 'Is there an identifiable problem in the industry?' (2) 'Can the problem be addressed using existing laws or regulations?' (3) 'Has industry self-regulation been attempted?' (4) 'Is an industry code the most suitable mechanism for resolving the problem?' (5) 'Is there likely to be a net public benefit?'.

¹⁶¹ The formal process involves the preparation of a draft RIS and public consultation prior to the preparation of a final RIS and government approval, the release of an exposure draft code for public consultation prior to submission to the Federal Executive Council, and the prescription of the code by regulations made by the Governor-General by Order-in-Council: '2017 Framework' (n 36) 14–15.

¹⁶² Commonwealth, *Parliamentary Debates* (n 147) 8801–2 (Peter Reith, Minister for Workplace Relations and Small Business).

Council had ‘consulted widely with all sectors of franchising to ensure the code addresses the issues in the most appropriate manner’ and had made an ‘invaluable contribution to the development of the Code through their expertise and experience in the franchising sector’.¹⁶³ The Council was empowered to continue its role of monitoring the Code and advising government and to review the Code and the effectiveness of its operation within two years. Despite its legislative effect, the original Code retained the ‘look and feel’ of the self-regulatory regime it replaced – it was published by the sponsoring department¹⁶⁴ in booklet form and included a foreword by the Minister and a preamble which summarised the main features of the Code.

The original 1998 Code had been amended on several occasions to accommodate recommendations resulting from the regular review cycle,¹⁶⁵ and was replaced by a new 2014 Code to accommodate the recommendations of the 2013 *Review of the Franchising Code of Conduct* (*‘Wein Report’*).¹⁶⁶ Today, the Code operates very much as a traditional form of delegated legislation. Prescribed codes have evolved from voluntary codes being given legislative force to a more conventional regulatory tool. Although the franchising industry has the opportunity to contribute to code development, its voice is today no greater than it would have been in conventional delegated legislation as part of the consultation process demanded by regulatory impact analysis. The trend is very much from legislative recognition of an industry scheme to a government-imposed scheme.

The Minister’s Second Reading Speech introducing the part IVB reform stated that the new provision will ‘allow industry designed codes of practice, in full or part, to be prescribed as mandatory or voluntary codes, and enforced under the Act’.¹⁶⁷ It is perhaps not surprising that the original aspirations for the Code – simply to give legislative effect to a voluntary industry code – have evolved. Business regulation today is more complex than in 1998. The franchising sector is a massively more complicated sector than it was even two decades ago and does not speak with one voice. The current rhetoric as expressed in the 2017 Framework is more measured – ‘they offer industry participants with an opportunity to become highly involved in the process including – initiating the code, shaping the rules and educating their members once the code is in place’.¹⁶⁸ The ACCC’s acknowledgment that both prescribed voluntary codes and prescribed mandatory codes are ‘developed by Government, in consultation with industry participants and the public’ is a more realistic statement of part IVB code development today.¹⁶⁹

163 See Peter Reith, Minister for Workplace Relations and Small Business, ‘Foreword’ in Department of Employment, Workplace Relations and Small Business (Cth), *Franchising Code of Conduct* (July 1998) 4, 4.

164 That is, the Department of Employment, Workplace Relations and Small Business (Cth).

165 A comprehensive summary of the previous major reviews of franchising policy is contained in Alan Wein, *Review of the Franchising Code of Conduct* (Report, 30 April 2013) app A (*‘Wein Report’*).

166 Ibid.

167 Commonwealth, *Parliamentary Debates* (n 147) 8800 (Peter Reith, Minister for Workplace Relations and Small Business).

168 ‘2017 Framework’ (n 36) 4.

169 *Dairy Inquiry* (n 95) 165 [9.4.2] table 9.1.

Another element in the evolution of mandatory industry codes is increasing penalties – both the range and the quantum – that can be imposed in respect of code breaches. The ACCC has been a strong advocate for both initiatives. Its 2014 submission responding to the *Draft Report* of the Competition Policy Review stressed the importance of having effective deterrents to ensure code compliance and agreed with the Review Panel’s view that the introduction of civil penalties and infringement notices for breach of industry codes strengthens the enforcement options.¹⁷⁰ The ACCC’s submission to the 2018 *Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* argued strongly for the need for appropriate penalties for all code breaches and for increasing penalties to make them a more meaningful deterrent.¹⁷¹ This proposition was accepted by the government in its August 2020 Response to the Joint Committee Report.¹⁷² The *Treasury Laws Amendment (2021 Measures No 6) Act 2021* (Cth), which was assented to on 13 September 2021, brought the maximum pecuniary penalty for particular corporate breaches of the *Franchising Code of Conduct* in line with the formula for competition and consumer law breaches – the greater of \$10 million, three times the benefit obtained from the contravention of the Code, or 10% of annual turnover.¹⁷³ The legislation also increased the maximum civil penalty for other *Franchising Code of Conduct* breaches, and for industry codes of conduct generally, from 300 to 600 penalty units (\$133,200).¹⁷⁴ A further stage in the evolution of part IVB codes is increasing ACCC involvement in their development. The prescribed codes strategy was designed to give ‘small business the capacity to influence the type of industry regulation by participation in code development, as well as the security of legal recognition of codes and the remedies that flow from that’.¹⁷⁵ The reality today is that the ACCC has assumed a much more proactive role in code development beyond the giving of general advice. The proposition in the Treasury’s submission to the *Hayne Interim Report* – that part IVB Codes are ‘in effect rule-making by the regulator’ and ‘in effect, they represent regulation-making power by the ACCC’ – is not legally correct but is nevertheless prescient.¹⁷⁶ In 2016, the government directed the ACCC to conduct

170 Australian Competition and Consumer Commission, Submission to Competition Policy Review Panel, *Competition Policy Review* (26 November 2014) 36, 79, 113.

171 See recommendation 1 in Australian Competition and Consumer Commission, Submission No 45 to Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (11 May 2018) 4.

172 Australian Government, ‘Response to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct Report: *Fairness in Franchising*’ (August 2020) 15. Code amendments which took effect on 1 July 2021 doubled the current civil pecuniary penalty for an extended range of breaches of the Code from 300 to 600 penalty points (from \$66,600 to \$133,200).

173 *CCA* (n 51) s 51AE(2A), as inserted by *Treasury Laws Amendment (2021 Measures No 6) Act 2021* (Cth) sch 2 item 1(2A).

174 *CCA* (n 51) s 51AE(2), as inserted by *Treasury Laws Amendment (2021 Measures No 6) Act 2021* (Cth) sch 2 item 1(2).

175 Peter Reith, Minister for Workplace Relations and Small Business, ‘Legal Recognition of Codes under the *Trade Practices Act*’ (Press Release, 30 September 1997), quoted in *Grey Law Report* (n 3) xxiii.

176 ‘Treasury Submission on *Interim Report*’ (n 2) 12 [65], 13 [73].

an inquiry into the dairy industry. Its comprehensive Final Report released in April 2018 concluded that the non-enforceability of the then current voluntary industry code was an inherent weakness and a prescribed voluntary code would also be ineffective as it would not cover processors who chose not to opt in.¹⁷⁷ The ACCC recommended a mandatory code of conduct which has since been prescribed.¹⁷⁸ Although the report acknowledged that ‘ultimately, it is the Commonwealth Government’s decision whether to implement a mandatory code, and to determine what should be included in such a code’,¹⁷⁹ the exercise demonstrates a much more intimate ACCC relationship with prescribed code development than previously.

The most recent example is the government’s direction to the ACCC to draft a *News Media and Digital Platforms Mandatory Bargaining Code* which confers on the ACCC a direct role in code development. The Final Report of the ACCC’s *Digital Platforms Inquiry* recommended that designated digital platforms each implement a code of conduct to govern their relationships with news media businesses.¹⁸⁰ On the failure of the digital platforms to negotiate voluntary codes, the government directed the ACCC to draft a *News Media and Digital Platforms Mandatory Bargaining Code*. However, the code has not been prescribed as a mandatory industry code under part IVB but legislated as primary legislation under the new part IVBA of the *CCA*.¹⁸¹ No explanation has been given for legislating the code as an Act of Parliament rather than as a regulation under part IVB, but it presumably reflects not only complexity of the regulation and the limited penalties available for contravention of part IVB codes but also the ground breaking and pioneering nature of this initiative – the first in the world – and the international significance of and interest in it. These considerations are nevertheless not as compelling in the case of the proposed *Mandatory Scheme for the Sharing of Motor Vehicle Service and Repair Information*. The government’s stated intention in its February 2019 Consultation Paper¹⁸² to introduce the scheme through a part IVB mandatory code of conduct was changed in its October 2019 Consultation Update to progressing the scheme using primary legislation.¹⁸³ The government noted the general support of stakeholders to the use of a part IVB code which despite ‘some limitations to using a code in comparison to primary legislation [could be] quicker to implement’ and concluded that primary legislation ‘allows greater flexibility for the scheme’s design’.¹⁸⁴ Those who argue that Parliament and not the executive is the appropriate forum for legislation will take some comfort from these developments.

177 *Dairy Inquiry* (n 95) 168–9 [9.4.4].

178 *Competition and Consumer (Industry Codes: Dairy) Regulations 2019* (Cth), effective 1 January 2020.

179 *Dairy Inquiry* (n 95) 162 [9.1].

180 See recommendation 7 in Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, July 2019) 17.

181 Part IVBA, inserted into the *CCA* (n 51) by the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth) sch 1 pt 1, took effect from 3 March 2021.

182 Treasury (Cth), *Mandatory Scheme for the Sharing of Motor Vehicle Service and Repair Information Consultation* (Consultation Paper, February 2019) 3 [3.1].

183 Treasury (Cth), *Mandatory Scheme for the Sharing of Motor Vehicle Service and Repair Information* (Consultation Update, October 2019) 2 [1.6].

184 *Ibid* 2 [1.5]–[1.6].

The part IVB regime is a useful and versatile scheme and has the advantages of a defined protocol for legislating industry codes of conduct. It is likely that legislated industry codes of conduct will be increasingly implemented through this protocol – or, as in the case of the financial sector, an equivalent regime modelled on part IVB – rather than through ad hoc delegated legislation. Consideration of alternative regulatory strategies, consultation, and parliamentary oversight is provided for by regulatory impact analysis and parliamentary scrutiny requirements – thus removing some well-documented problems with some other categories of delegated legislation.¹⁸⁵

XI EXPLICIT GOVERNMENT REGULATED CODES

‘Explicit government regulation’ is not a particularly elegant term but is widely used in ‘spectrum of regulation’ literature to describe command and control regulation or black-letter law. It is also not a particularly accurate term. The *Australian Government Guide to Regulatory Impact Analysis* explains that explicit government regulation, ‘so called black-letter law, comprises primary and subordinate legislation and is probably the most common form of regulation’.¹⁸⁶ The highest form of law in our system – and the most formal regulatory strategy – is parliamentary law: Acts of Parliament. The government is invariably the instigator of the legislative proposal but is not the law maker – the power to make laws for the Commonwealth of Australia being vested by section 1 of the *Australian Constitution* in the Parliament. The *Constitution* neither expressly authorises nor expressly prohibits the Commonwealth Parliament delegating the power to pass laws, but the justification for the delegation of legislative power for reasons of ‘[p]ractical necessity’,¹⁸⁷ scarcity of parliamentary time, flexibility and responsiveness, complexity of legislation,¹⁸⁸ is well established. Despite concerns as to the ‘new despotism’,¹⁸⁹ delegated legislation has been accepted by the High Court

185 See below n 189.

186 *Guide to Regulatory Impact Analysis* (n 23) 31.

187 *Traditional Rights and Freedoms* (n 118) 449.

188 Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 26 March 1992) 3–4. See generally Pearce and Argument (n 125).

189 See Lord Hewart, *The New Despotism* (Ernest Benn, 1929). Lord Hewart described delegated legislation as ‘disrupting the roles demarcated by the separation of powers and undermining the democratic legitimacy of parliament by allowing zealous executives to overextend their administrative mandate without sufficient parliamentary oversight’: Hickie (n 115) 91–2. The Senate Standing Committee for the Scrutiny of Bills regularly records its view that ‘significant matters ... should be included in primary legislation, unless a sound justification for the use of delegated legislation is provided’ noting that ‘a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bring proposed changes in the form of an amending bill’: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 17 of 2020, 2 December 2020) 9, 13. Parliamentary scrutiny of delegated legislation was the subject of a 2019 report of the Senate Standing Committee on Regulation and Ordinances: see above n 123. In a 2020 report, the Regulation Committee of the Parliament of New South Wales addressed ‘executive overreach’ and recommended that the Regulation Committee be empowered to consider all instruments of a legislative nature and not just regulations, as well as draft delegated legislation: see *Making of Delegation Legislation in NSW* (n 125) 43.

as not contravening the separation of powers enshrined in the *Constitution*. In the words of Dixon J:

[A] statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law.¹⁹⁰

The term ‘explicit government regulation’ may be appropriate to describe industry codes made by the executive government under delegated legislative authority, but this provides an incomplete picture of command-and-control legislation. A legislated industry code of conduct is more likely to be prescribed by delegated legislation, but Parliament can, and does, legislate using the terminology of codes, particularly in the context of the introduction of uniform national legislative schemes.¹⁹¹ The *National Credit Code* prescribed by Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth) is an example, as is the introduction of the *News Media and Digital Platforms Mandatory Bargaining Code* and the proposed *Mandatory Scheme for the Sharing of Motor Vehicle Service and Repair Information*, by primary rather than delegated legislation.

Another criticism of the ‘explicit government regulated’ description is that legislative powers to prescribe industry codes delegated to persons or bodies or authorities or agencies beyond the executive government are not encompassed in that term.¹⁹² This category of delegated legislation, confusingly referred to a ‘quasi-legislation’ or ‘tertiary legislation’ – the ‘lesser-known cousin’ of delegated legislation – is authorised by a wide range of legislation and was addressed above.¹⁹³ Those who argue that fundamental to our democratic system is the basic premise that Parliament legislates, not that the executive regulates,¹⁹⁴ will be even more concerned with the ‘burgeoning increase’ in tertiary legislation over the last

190 *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73, 101 (Dixon J).

191 In the case of the *National Code of Conduct for Commercial Tenancies*, the National Cabinet prescribed a mandatory code of conduct enshrining good faith leasing principles in response to the COVID-19 pandemic which was not legislation having the force of law but with which state and territory governments committed to legislate in their own jurisdictions: National Cabinet, ‘National Cabinet Mandatory Code of Conduct: SME Commercial Leasing Principles during COVID-19’ (3 April 2020) 1 <<https://web.archive.org/web/20200413213630/https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>>.

192 See generally Chief Justice David Malcolm, ‘The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate’ (1992) 66(5) *Australian Law Journal* 247; Gerald Ng, ‘Slaying the Ghost of Henry VIII: A Reconsideration of the Limits upon the Delegation of Commonwealth Legislative Power’ (2010) 38(2) *Federal Law Review* 205 <<https://doi.org/10.22145/flr.38.2.2>>; Andrew Edgar, ‘Administrative Regulation-Making: Contrasting Parliamentary and Deliberative Legitimacy’ (2017) 40(3) *Melbourne University Law Review* 738.

193 See Hickie (n 115) 92; Part VII of this article above.

194 See generally Warren Pengilly, ‘The Franchising Code of Conduct: Does its Coverage Address the Need?’ (1999) 3(2) *Newcastle Law Review* 1, 3: ‘the changing of vast tracts of commercial law by executive fiat must be of concern to those who still believe that it should be Parliament which legislates basic changes to our laws and not Ministers who proclaim them, without debate, in the Government Gazette’.

few decades.¹⁹⁵ It is nevertheless an inevitable reality today, and the more practical issue is that of the application of the controls, checks and balances, scrutiny and parliamentary oversight not only in relation to this particular legislative strategy but to delegated legislation more generally.¹⁹⁶

XII INDUSTRY CODES IN THE FINANCIAL SECTOR

A Financial Sector Regulation and the Role of Industry Codes

The law governing the financial sector is, in the words of the Treasury, ‘undoubtedly complex’.¹⁹⁷ Although used less extensively than explicit government regulation, codes of conduct are important parts of the regulatory matrix being used to ‘draw industry into the regulatory system’.¹⁹⁸ ASIC draws an ‘important distinction between industry codes’,¹⁹⁹ which ‘sit at the apex of industry self-regulatory initiatives’,²⁰⁰ and ‘other self-regulatory arrangements’.²⁰¹ An industry code – ‘essentially a set of enforceable rules that sets out a progressive model of conduct and disclosure for industry members that are signed up’ – raises standards and improves consumer confidence.²⁰² ASIC has the power to approve codes in the financial services sector under section 1101A of the *CA*.²⁰³ It is not mandatory for any industry in the financial services sector to develop a code (and which, if one exists, is binding only on those who voluntarily subscribe to it), and it is not mandatory for an industry to seek ASIC approval of an industry code. But, as ASIC explains, ‘where approval by ASIC is sought and obtained, it is a signal to consumers that this is a code they can have confidence in’.²⁰⁴ ASIC’s approach to approving codes of conduct is currently set out in *Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct* (‘*RG 183*’) and is designed to ensure that the term ‘code’ is reserved for self-regulatory instruments satisfying ASIC’s threshold

195 Burrows (n 117) 70.

196 See generally above n 189, 192.

197 ‘Treasury Submission on *Interim Report*’ (n 2) 2 [8]. See generally Pamela Hanrahan, ‘Improving the Process of Change in Australian Financial Sector Regulation’ (2008) 27(S1) *Economic Papers* 6, 9 <<https://doi.org/10.1111/j.1759-3441.2008.tb00438.x>>.

198 Pearson, ‘The Place of Industry Codes in Regulating Financial Services’ (n 51) 333.

199 *Regulatory Guide 183* (n 40) [RG 183.22].

200 *Ibid* [RG 183.2].

201 *Ibid* [RG 183.22].

202 *Ibid* [RG 183.2].

203 Instruments made under section 1101A of the *Corporations Act 2001* (Cth) (‘*CA*’) are disallowable legislative instruments under section 42 of the *Legislation Act 2003* (Cth).

204 *Regulatory Guide 183* (n 40) [RG 183.3].

criteria for what is considered to be a code,²⁰⁵ the general statutory criteria for code approval,²⁰⁶ and other relevant criteria.²⁰⁷

B The Hayne Recommendations and the Government's Response

Commissioner Hayne's comments in relation to the 'unusual place' occupied by industry codes and the limitations and difficulties of self-regulation through industry codes have been addressed above. Hayne noted the recommendations of ASIC's December 2017 *Enforcement Review Taskforce Report*.²⁰⁸

- ASIC approval should be required for the content of and governance arrangements for relevant codes.
- Entities should be required to subscribe to the approved codes relevant to the activities in which they are engaged.
- Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body.
- An individual customer should be able to seek appropriate redress through the subscriber's internal and external dispute resolution arrangements for non-compliance with an applicable approved code.
- The code monitoring body, comprising a mix of industry, consumer and expert members, should be required to monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters.

Hayne considered it necessary to 'go one step beyond' the ASIC recommendations. He cited the Treasury's submission – that '[f]or codes to be meaningful rather than tokenistic, there needs to be reasonably effective mechanisms in place to ensure adherence'.²⁰⁹ Hayne nevertheless did not favour a course floated by the Treasury – the consideration of whether similar aims could be achieved by providing ASIC with rule-making powers generally similar to those under part IV of the *CCA*.

Hayne was not prepared to discard the benefits of the code approval scheme, which '[harnesses] the views and collective will of relevant industry ... [which]

205 ASIC's threshold criteria are that there must be binding and enforceable rules, transparent processes for developing and reviewing the rules, and effective monitoring and compliance mechanisms: *Regulatory Guide 183* (n 40) [RG 183.13]–[RG 183.27].

206 Under the statutory criteria laid down in section 1101A(3) of the *CA*, ASIC must be satisfied that the code is not inconsistent with the *CA*, that the applicant can ensure compliance, and that codes are harmonised to the greatest extent possible: *Regulatory Guide 183* (n 40) [RG 183.28]–[RG 183.41].

207 ASIC is empowered by section 1101A(3)(b) of the *CA* (n 199) to consider any other matters deemed relevant which, ASIC advises, will include matters relating to development, content, enforceability (whether the code provides for adequate dispute resolution processes, remedies and sanctions), administration and review: *Regulatory Guide 183* (n 40) [RG 183.42]–[RG 183.85]. There are currently 12 codes in the financial services industry, with only the *Banking Code of Practice* and the *Financial Planning Association Professional Ongoing Fees Code* being formally approved by ASIC.

208 See recommendations 18–22 in Australian Securities and Investments Commission, *Enforcement Review Taskforce Report* (Report, December 2017) 33–5.

209 *Hayne Report* (n 1) 107, citing 'Treasury Submission on *Interim Report*' (n 2) 12 [65].

is essential to the creation of an industry code',²¹⁰ by giving ASIC the entire responsibility for the creation of industry norms. He accepted that ASIC 'can and should encourage industry to develop the ideas that are to be reflected in enforceable industry code provisions, and should more broadly continue to engage with industry about its codes' but concluded that 'it is now time to give certainty and enforceability to key code provisions that govern the terms of the contract made or to be made between the financial services entity and the customer or a guarantor'.²¹¹ He accommodated these positions by recommending that the law be amended to provide for enforceable provisions of industry codes that would be enforceable through existing internal or external dispute resolution mechanisms or through the courts, and for the establishment of and imposition of mandatory industry codes.²¹² In particular, Hayne recommended that the law should be amended to provide:

- that industry codes of conduct approved by ASIC may include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law;
- that ASIC may take into consideration whether particular provisions of an industry code of conduct have been designated as 'enforceable code provisions' in determining whether to approve a code;
- for remedies, modelled on those now set out in Part VI of the *Competition and Consumer Act*, for breach of an 'enforceable code provision'; and
- for the establishment and imposition of mandatory financial services industry codes.²¹³

A key feature of the recommended approach was to allow industry codes approved by ASIC to include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law,²¹⁴ and which would provide 'certainty and enforceability to key code provisions that govern the terms of the contract'.²¹⁵ Making promises in codes enforceable by statute would ensure that individuals could rely on these provisions and would allow for judicial decisions to set precedents that can be enforced. Industry should identify the provisions of its codes that govern the terms of the contract made between the financial services institution and the customer, and should seek ASIC's approval of the proposed enforceable code provisions. If industry did not put forward its proposed enforceable code provisions in a timely manner, 'consideration would have to be given to whether it is desirable to establish and impose a mandatory industry code' under the same process as for mandatory industry codes prescribed under part IVB of the *CCA*.²¹⁶

210 *Hayne Report* (n 1), citing *Regulatory Guide 183* (n 40) 4 [RG 183.1].

211 *Hayne Report* (n 1) 108.

212 See recommendation 4.9: *ibid* 33.

213 See recommendation 1.15: *ibid* 24.

214 *Ibid* 24.

215 *Ibid* 108.

216 *Ibid* 110.

Hayne expressly commented that his recommended model for enforceable code provisions was not intended to ‘interfere with the broader development of, or operation of, industry codes’ or to ‘modify or limit ASIC’s powers to approve the non-enforceable provisions of industry codes’.²¹⁷

The government has moved quickly to implement the recommendations of the *Hayne Report*. The Final Report was submitted to the Governor-General on 1 February 2019 and was made public three days later along with the government’s response, *Restoring Trust in Australia’s Financial System*, which committed the government to taking action on all 76 recommendations.²¹⁸ In relation to recommendation 1.15, relating to enforceable code provisions, the government expressed its continuing support and encouragement for industry to develop voluntary codes going beyond the requirements of the law but agreed with the report’s recommendations to amend the law to provide ASIC with additional powers to approve and enforce industry code provisions, to establish an approved codes regime that includes enforceable code provisions, and to provide that breach of an enforceable code provision would constitute a breach of the law. The government’s response was silent on the recommendation for the establishment and imposition of mandatory financial services industry codes, but this particular recommendation was addressed in the Treasury’s Consultation Paper,²¹⁹ released for comment on 18 March 2019, and was included in the Exposure Draft of a bill to give legislative effect to recommendation 1.15.²²⁰ The proposed amendments have now been implemented by the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth). The new law strengthens the existing voluntary code of conduct framework to allow ASIC to designate enforceable code provisions in approved codes of conduct and establishes a mandatory code of conduct framework for the financial services and consumer credit industry through regulations, with the ability to designate certain provisions as civil penalty provisions. Breach of both enforceable code provisions and mandatory code provisions may attract civil penalties including pecuniary penalties and/or other administrative or enforcement action from ASIC.

The Explanatory Memorandum notes that the enhanced code of conduct framework allows for a graduated level of industry engagement and government regulation.²²¹ Under the new framework, codes of conduct may be developed by industry, voluntary and not approved by ASIC; developed by industry, voluntary

217 Ibid 111.

218 See generally Treasury (Cth), *Restoring Trust in Australia’s Financial System: The Government Response to the Royal Commission into Misconduct in the Bank, Superannuation and Financial Services Industry* (Report, February 2019).

219 Treasury (Cth), *Enforceability of Financial Services Sector Codes: Taking Action on Recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission* (Consultation Paper, March 2019).

220 Treasury (Cth), ‘Financial Sector Reform (Hayne Royal Commission Response: Protecting Consumers (2020 Measures)) Bill 2020: FSRC Rec 1.15 (Enforceable Code Provisions)’ (Exposure Draft Explanatory Materials, 2020) <https://treasury.gov.au/sites/default/files/2020-01/c2020-48919f-explanatory_memo.pdf>.

221 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response: Protecting Consumers (2020 Measures)) Bill 2020 (Cth) 18 [1.21].

and approved by ASIC; or developed and mandated by government. The second option may not sit neatly with the suggested taxonomy. If ASIC-approved codes do not contain ‘enforceable code provisions’ in terms of proposed reform, they are properly categorised as approved codes. But the inclusion of enforceable code provisions, which attract formal regulator enforcement, categorises them as co-regulated codes. Given that it appears highly unlikely that ASIC will approve codes that do not contain enforceable code provisions, co-regulation in the formal sense of legislative underpinning to enable industry developed codes to be enforced is likely to assume much greater significance in the financial services sector.

XIII CONCLUSION

Business today operates in a dynamic environment of innovation and constant change which the regulatory toolkit must accommodate. There is a need for flexibility in dealing with contemporary issues, and traditional regulatory strategies as well as alternative regulatory approaches which incorporate industry involvement have an important role. It is critical that the most effective and efficient regulatory tool is chosen, and this tool will frequently be an industry code of conduct in some iteration.

Industry codes of conduct ultimately fall into two broad categories – those that are not law and those that either are law or, in the case of co-regulatory codes, are legislatively underpinned. Voluntary industry codes have a role, but the underlying reality is that they are voluntary. They are not law. Laws, not voluntary codes, are the proper expression of basic norms of conduct. Commissioner Hayne made this point forcefully in relation to codes of ethics, but it also applies to voluntary codes of conduct more widely:

Codes of ethics are not laws. Codes of ethics are important to fostering public confidence and practitioner integrity in a profession. They are composed by industry practitioners according to agreed industry processes. Laws, by contrast, are the product of a public process conducted under the authority of democratic institutions. It is laws, and not codes of ethics, that are the proper repositories for basic norms of conduct.²²²

ASIC’s strong advocacy for codes of conduct which can deliver real benefits to both consumers and subscribers is balanced by the acknowledgement expressed by its former Chair, Greg Medcraft, that codes ‘should not be considered a substitute for strong legislative obligations, backed by a strong regulator’.²²³ The increasing reliance on the Part IVB prescribed industry codes regime and, within this regime, the much greater reliance on mandatory codes over voluntary codes are important developments in the appropriate prescription of basic norms of conduct. The increasing government and regulator involvement in the Part IVB regime, which has morphed from giving legislative underpinning to a voluntary industry code to

²²² *Hayne Report* (n 1) 211.

²²³ Greg Medcraft, ‘Codes of Conduct and the Widening Perimeter of Regulatory Intervention’ (Speech, Australian Centre for Financial Studies Workshop, 14 September 2017) 1.

something which much more closely resembles traditional delegated legislation, and the imminent move to greater reliance on co-regulated codes and legislated mandatory codes in the financial services sector under the Hayne reforms are also significant.

When it comes to industry codes of conduct, it is the substance of the instrument rather than its terminology that determines its operation and legal effect. It is ‘what an instrument does, not what it is called, that is important’.²²⁴ However, in the words of Professor Chapman Gray recently cited by the High Court, ‘a loose vocabulary is a fruitful mother of evils’.²²⁵ Industry codes of conduct undoubtedly exemplify a loose vocabulary which is not helpful and is indeed potentially harmful in suggesting a veneer of protection which may be illusory. The various regulatory strategies which are applied in industry codes of conduct have quite different consequences, and understanding is not assisted by the indiscriminate use of a convenient term to describe industry rules of various shapes and sizes – from aspirational ethical statements of industry associations with no effective coverage, content or enforcement, to legislated prescriptions which are imposed by, and attract, the full majesty of the law.

Our use of the term ‘code’ is so entrenched that it may be too late to put the code genie back in the bottle, but a more rigorous nomenclature is critical for all stakeholders in the regulatory domain, and there is merit in the attempt. The simplest strategy would be to mandate the use of an appropriate prefix before the term ‘code’. Legislated or co-regulated codes could be identified as *Mandatory Codes* (as mandatory part IV CCA codes are indeed described). Voluntary codes that are enforceable, either directly or by an industry body, could be identified as *Enforceable Codes*. Voluntary industry codes that do not set enforceable standards – those that Hayne described as no more than ‘public relations puffs’ – could be identified as *Best Practice Codes*. This terminology would simply and directly clarify the legal status of the code for the benefit of all stakeholders.

224 Robin Creyke and John McMillan, ‘Soft Law versus Hard Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377, 380.

225 John C Gray, ‘Some Definitions and Questions in Jurisprudence’ (1892) 6(1) *Harvard Law Review* 21, 21, cited in *Mann v Paterson Constructions Pty Ltd* (2019) 167 CLR 560, 618 [150] (Nettle, Gordon and Edelman JJ).