or national development. The majority of other delegations were in principle in favour of the proposal, but the delegates from states members of the the European Patent Convention expressed reservation with respect to the patentability of certain biotechnological inventions, and considered that the article should be re-examined in the light of the outcome of the current meetings of the WIPO Committee of Experts on Biotechnological Inventions. The United States delegation was in favour of the deletion of the transitional provisions in this article, and also in article 305.

Article 201 — Grace Period

In the time available, this article was discussed only very briefly. A number of the European delegations which had previously objected to the concept of the grace period, indicated that their objection might be modified in the context of an overall package of harmonization provisions. There was division of opinion on whether the grace period should be six months or 12 months.

The meeting concluded with a re-statement by the delegations from Brazil and Argentina, of their objection to certain substantive provisions of the Treaty and the need for the Treaty to recognize the necessity to accommodate countries of different stages of development. The delegate from Brazil specifically referred to the objection of the Latin American countries to articles 203 and 303, and the reservations which they had expressed with respect to articles 302, 304 and 305, and rule 304.

Much progress has been made towards the preparation of a coherent draft Treaty. There remain however, substantial differences of opinion and interest between the developed countries and the Latin American countries. As noted earlier, many of the developing countries and the newly industrialized countries of the Asian region were not represented at the June meeting. The Session stands adjourned to a further meeting to be held in Geneva from 12th to 16th December.

Industry Codes of Practice: Market Regulation For the 1990s

by John Tamblyn
First Assistant Commissioner
Fair Trading and Consumer Protection,
Trade Practices Commission

Introduction

Several years ago it became apparent that the debate on the question of alternatives to government regulation (in an environment where there are strong budgetary constraints on governments) would focus on the efficiency of government regulation over other means of securing desirable public outcomes.

2. For present purposes I am talking about that alternative that is represented by self regulation — commonly industry codes of practice — in Australian industry. This is what the TPC sought to examine in its study which was reported on earlier this year.

3. The main environment of the self regulation analysis is where governments are seeking to remove government regulation and the bureaucracy that travels with it, in favour of other alternatives. My message is that this can be a positive direction in which to head but there are dangers if it is not properly handled. It was interesting to note recently that when the New South Wales Minister for Consumer Affairs suggested that Motor Trader Regulation should be turned into Self Regulation, emotive catch cries went up such as "putting Dracula in charge of the blood bank". A case like that indicates the pitfalls that can emerge if real care is not taken in terms of how the proposition is framed and ultimately sold.

The TPC Study

4. The TPC undertoook its self regulation research study with considerable support from industry and consumer organisations.

5. It canvassed 2300 identifiable trade and industry associations to discover what, if any, self regulatory functions they performed.

6. Of the 1300 to respond, 480 from a wide range of industries reported that they had self-regulation schemes.

7. The most common self regulatory functions reported were: complaint-handling, service standards, standards of advertising or promotion, costing information or recommended prices/fees/rates.

8. Detailed case studies were then undertaken of 1. schemes, representing a cross-section of important goods and services, a variety of industries and functional levels, wide geographic spread and both large and small associations.

9. The full report is in three volumes, available from Commonwealth Government bookshops.

10. Volume 1 — the main report — discusses the subject broadly, covering overseas approaches, State and Commonwealth government initiatives, and the TPC's own experience and views.

11. Volume 2 analyses the case study schemes and Volume 3 is a compendium of data on the overall

incidence of self-regulation in Australia.

Desirable Elements in Self Regulation Schemes

12. The Commission's report identified desirable elements that would assist in facilitating industry based codes of practice as an alternative for government regulation. It noted that **accountability** was the key to community acceptance. Starting from the point of view that no scheme would be acceptable if it attempted to substitute self regulation for competition such as by way of pricing arrangements or barriers to entry, the report noted that the desirable features that could be included turned on this question of accountability. The features were:

- **Coverage**

Where self-regulation is intended to replace or pre-empt legislation its coverage will need to encompass a large proportion — perhaps all — of the industry concerned.

However, it is important that standards not be reduced to the lowest common denominator for the sake of increasing membership numbers.

- **Sanctions**

The TPC believes that voluntary industry codes cannot expect to enjoy the confidence of either the public generally, or of legislators, unless they incorporate commercially significant incentives to comply.

Moreover, they should be seen to do so.

- **Complaint handling and reporting**

Quick, informed complaint resolution procedures are essential for the credibility and effectiveness of self-regulation schemes. Intra-firm and industry association arrangements can deal with the majority of complaints with recourse to independent arbitration procedures with appropriate public representation when conciliation has failed.

Such complaint handling arrangements can provide commercial advantages for business, including:

— market intelligence on the reactions of customers to the industry's products/services — appropriate responses to customer complaints can eliminate the cost of responding to them and provide competitive advantages;

— visible and effective complaint handling arrangements can enhance the reputation of the industries concerned and can expand demand by reducing the cost and perceived risks of trading in their products.

- **External participation**

There is strong support for the principle of public participation in the Trade Practices Tribunal's recent decision on the Media Council of Australia's codes. Self-regulation schemes designed as alternatives to legislation require a window for public input.

The TPC believes that an industry which wants to pre-empt or minimise externally imposed regulation cannot realistically expect to run its own scheme as a 'closed shop'.

However, proposals for public participation should be tempered by the desired results and the association's rights to independence. For example, there may well be a case for external involvement in a particular association's complaint-handling, code formulation or publicity procedures — but not in determining its eligibility criteria.

It is also important that public participants represent a broad cross-section of community views and bring to the task both objectivity and relevant experience.

Qualifications and Implications of the TPC's Approach

13. Given the nation's well-established trade association infrastructure, and a climate receptive to keeping regulation to a minimum, there is considerable scope for an expansion of business self-regulatory activity.

14. That broad observation is subject to a number of qualifications.

- Self-regulation will not always be a satisfactory or complete alternative to government intervention, but it may limit or pre-empt the need for it or co-exist effectively with it.

- From a public interest viewpoint, the scope for self-regulation varies considerably industry by industry. It depends on the extent of existing regulation, the degree of consumer dissatisfaction and the potential for self-regulation to deliver real benefits.

- To be effective, self-regulation schemes need to be tailored to individual industry circumstances. There is no universally appropriate formula.

15. Governments intervene where they believe the public interest demands that they do so. Obviously self-regulation is not an end in itself. Any form of regulation adds to costs.

16. So the issue turns on whether or not in any given market there is opportunity for self-regulation to replace or augment government regulation in a way that makes a net contribution to public benefit.

17. In this context, it is important that 'public benefit' not be narrowly defined. It may, for example, often encompass factors beyond the redress of consumer problems. Consideration should also be given to the capacity of self-regulatory organisations to deliver such broad benefits as the fostering of competition and fair trading, enhancement of industry efficiency or protection of the environment.

18. As I said earlier, self-regulation should be explored as one of the options in the available regulatory 'mix'. Its advantages over legislative forms include flexibility, the speed with which it can be introduced and subsequently modified if necessary, and its capacity for reflecting marketplace realities.

19. In this connection the approach of both the United Kingdom and New South Wales governments to provide statutory backing in industry codes, without resort to specific legislation, is of particular interest.

20. Any test to determine the potential for self-regulation in a given market should be based on specific desire outcomes in terms, for example of increased competition, enhanced industry efficiency and consumer benefit.

Application of These Ideas

21. The Trade Practices Commission has agreed with State and Territory Consumer Affairs agencies that where codes of practice are being encouraged as an alternative to government regulation, or generally, we should endeavour to seek to include some or all of these features in those self regulatory schemes and that Federal and State agencies should co-operate in their actions on industry codes. By that method we would hope to achieve a degree of uniformity of approach across Australia.

22. It has been properly observed that what we are suggesting is not strictly self regulation. And although that is the term the Commission has used, it is shifting away from that to the word 'co-regulation' or merely industry codes of practice. That is because it is saying louder and louder that if community acceptance for this type of approach is to be gained, then the community is entitled to a berth on these matters. In my view it is no longer useful for the industry to say a shift to self-regulation means regulation by industry alone. If they want to retain that view, more particularly in sensitive community matters, then they can expect to still be regulated by govenrments because governments are not going to hand over 'the blood bank to Dracula' — as the detractors will see it. Why should they? Is it not bad politics?

23. Common-sense is beginning to prevail. For example the Australian Pharmaceutical Manufacturers' Association has for some time had its own self regulatory scheme for the screening of complaints about advertisements which are included in magazines and the like directed towards medical practitioners. This has long been a point of contention with some younger doctors in public hospitals complaining that the advertisements were misleading and were misrepresenting the medical value of some of the products concerned. Since this type of advertising is important in terms of knowledge within the medical profession, misleading statements in that environment could cause real problems. What the Australian Pharmaceutical Manufacturers' Association has done is to have its complaints tribunal chaired by an independent lawyer and to include a number of independent medical and consumer representatives to ensure the impartiality of the tribunal. It is my understanding that this has enhanced both the reputation of that body and its decision-making.

24. What is important about that is that it is a commercially oriented tribunal but can impute a strong degree of independence and integrity. Being a commercially based tribunal it can act quickly to overcome difficulties that have arisen. It is not a government bureaucracy which has set procedures and which is removed from the marketplace; it is close to the "coal face". So that if there is a problem it can seek to act quickly to remedy those problems. That is a benefit both for the companies concerned and for those who are complaining or otherwise affected by the practice concerned. This in my view is the real benefit to be had from this type of regulation — expedition, low cost for governments because in effect it passes the responsiblity back towards the industry.

25. As I said, the other side of the coin is the accountability and impartiality.

Deregulation, Self-Regulation and Consumer Welfare

26. In the current deregulatory environment, appropriately designed and administered codes of industry practice may offer, in appropriate circumstances, an acceptable compromise between public sector regulation and unrestrained competition, a compromise which offers tangible benefits for business and consumers alike.

27. Elimination or simplification of many industry or product specific regulations and removal of associated barriers to competition and structural change can reduce unnecessary private sector costs and provide business with the freedom and incentive to innovate, to develop new products, processes and technologies and to adapt quickly to changing market realities. In this way, business deregulation can enhance consumer welfare by facilitating improvements in the structure, technical efficiency and international competitiveness of Australian industry.

28. These are undoubted benefits. However, more aggressive competition, rapid development of new technologies and products, concentrated economic and market power and continuing deregulation of business behaviour must also be viewed from the consumer perspective. They may well expose many ordinary consumers to unfair business practices, insufficient or misleading market information, reduced choice of alternative suppliers and products or weaken their bargaining position relative to a few dominant suppliers.

29. Thus, while reduction or elimination of regulatory controls over business activity can deliver public benefits through enhanced competition and efficiency, care should be taken to ensure that industries identified for deregulation have market structures and other characteristics which will be conducive to effective competition and to post-regulation market conduct which is likely to result in net benefits for the community at large.

30. Industry codes of practice which incorporate appropriate public participation in their design and administration can be cost-effective means of achieving widespread, voluntary fair trading practices and consumer safeguards in deregulated domestic markets. In appropriate cases, regulation of market behaviour by means of industry codes of conduct can provide consumer protection equivalent to (or better than) that from direct government regulation while offering the advantages of efficiency, flexibility and economy for business compared to the costs and inefficiencies which are often inherent in public sector regulation.

31. It must be recognised, however, that tension is developing between the trend toward business deregulation

in pursuit of economy and efficiency and the growing perception of accompanying adverse consequences for consumer welfare.

32. If business deregulation and industry rationalisation are to be generally accepted as good for ordinary Australians, they will need to be accompanied by appropriate safeguards and remedies for consumers. Such mechanisms must protect, and be seen to protect, their interests in cost-effective ways and at the same time be consistent with the continuing pursuit of efficient structures and methods of production and distribution.

Unresolved Issues

33. Naturally there still are some issues to be resolved. the most difficult of these is the question of public participation. Who represents the public?

34. Elements of industry are heard to say that the organised consumer movement is not representative of the public and therefore they should not be entitled to be represented on these industry regulatory schemes. Those criticisms may become deserved if some in the consumer movement display preconceptions and closed minds on particular issues. Our experience with consumer complaints clearly indicates that one has to have a fairly open mind because issues are never as clear as they might seem to be up front. But there are many responsible people active in consumer affairs who in my view stand well to be included in some of these industry-based regulatory schemes.

35. The Commission is looking to see whether there is some way by which one can construct a panel of possible representatives of the public or consumers on these types of schemes. This is not entirely a new thought; in New Zealand for example there is an attempt to achieve such a listing through relevant government and other organisations.

36. Whatever happens in Australia, a way must be found; it is no use for industry to just look for its own "tame" nominees; that does not impute the degree of accountability that the TPC has been suggesting. What needs to be done is to achieve some open process where those who merit inclusion on the basis of experience, knowledge and the like, will gain inclusion. As I say, this is the difficult issue that in my view is yet to be fully exposed and resolved.

37. But if we just try to deal with that issue by the old fashioned "Mexican stand-off", the thrust of what the TPC is putting will gradually lose its sharpness. We don't intend to idly stand by and let that happen.

TPC — merger investigations — the practical process

by H. R. Spier

First Assistant Commissioner, Restrictive Trade Practices, Trade Practices Commission

The purpose of this paper is to provide the reader with an overview of the TPC's internal practice and procedure — the "nuts and bolts" — of merger investigation, and to provide an understanding of the types of issues with which the TPC wrestles with daily, and of the steps that one can take to expedite the process of merger investigation.

The paper covers the various stages involved in this process, ranging from information gathering and assessments to settlement proposals, applications to the Court and adjudication applications.

Merger Investigations

The TPC looks in detail at more than 100 mergers each year. Given this volume of activity, and the potential impact that the TPC's decision may have on a transaction, it is essential that the TPC obtain knowledge of mergers on a timely basis.

The TPC becomes aware of most mergers from a variety of private and public sources. In terms of public sources, press and media reports relating to potential or actual mergers are the main source.

With respect to private sources of information, the TPC often becomes aware of a merger by contact with the merging parties themselves, through voluntary disclosure. This is the most important source and the most appropriate.

In addition, TPC staff have, in the process of examining various industries over the years, developed industry contacts which are used to keep up-to-date on developments and merger activity in particular industries. Another important source of information in relation to foreign takeovers is the FIRB. Finally, the TPC receives from time to time complaints from customers, suppliers or competitors of the merging parties, and, of course, from firms who are subject to a hostile takeover.

It is possible that some mergers will go undetected. However, it is unlikely that the TPC will not find out eventually about a merger, particularly if there is a competition problem, because a complaint is likely to be received from a customer, supplier or competitor.

The statutory test for mergers under the Trade Practices Act is whether or not the merger is likely to