ENGAGING THE PUBLIC IN CODES OF PRACTICE

KAREN LEE and **DEREK WILDING** examine mechanisms for public engagement and consider whether industry self-regulatory schemes are performing better than government co-regulatory schemes in the communications sector

As governments around the world struggle to find appropriate ways of regulating the activities of digital platforms, a form of "guided self-regulation" seems to be emerging, with voluntary codes governing aspects such as the spread of disinformation as well as commercial relations between publishers and platforms.

Reliance on industry schemes is not a new phenomenon. In Australia, as in other jurisdictions, governments have long recognised that in the right circumstances, self-regulation offers a pragmatic and effective alternative to the various forms of government regulation.[1] However, an aspect that has received little attention is the extent to which self-regulatory schemes involve consumers and citizens in the development of codes of practice and other rules.

As one of the authors has previously argued, consultation with citizens and consumers is expected of industry regulators; it should be regarded as a feature of legitimacy and responsiveness on the part of industry schemes, especially when governments effectively delegate rule-making responsibility to them.[2]

In new research completed at the end of 2019,[3] we surveyed the engagement practices - a collective term we use to describe various forms of consumer and citizen involvement[4] - of 19 industry schemes operating in the advertising, media, telecommunications and online sectors in Australia. Our research produced an interesting result: at least some of the self-regulatory industry schemes perform better when engaging consumers and citizens in rule-making than the co-regulatory schemes.

LANDSCAPE

Among the 19 schemes we examined, 11 were self-regulatory, eight co-regulatory.

● Self-regulatory schemes are schemes that are free to establish their own procedures for adopting and amending code rules; and their rules are not enforced by a government regulator.

● Co-regulatory schemes are those which have a statutory basis; while industry participants (often, representative bodies) formulate the rules, the codes themselves are notified to, or registered by, a government regulator, which has responsibility for enforcing them.

◀ **Self-regulatory schemes.** The 11 self-regulatory schemes we examined included six that deal with various aspects of advertising practice, ranging from the cross-industry regulation administered by the Australian Association of National Advertisers (AANA) to industry-specific rules such as those administered by the Alcohol Beverages Advertising Code (ABAC) scheme. In addition, there were three schemes dealing with news media standards, with the Australian Press Council (APC) having the greatest reach; two self-regulatory schemes administered by the cross-industry standards body, Standards Australia; and the Australian domain name administration scheme known as auDA. The self-regulatory schemes are shown in Table 1.

Co-regulatory schemes. In Australia, industry bodies representing sections of the broadcasting and telecommunications sectors develop co-regulatory codes of practice that are registered with the regulator, the Australian Communications and Media Authority (ACMA). For example, Free TV Australia administers a code for commercial television. Other codes are developed by (for example) Commercial Radio Australia and the Community Broadcasting Association of Australia. Telecommunications codes are developed by one organisation, Communications Alliance. The broadcasting codes are registered under Part 9 of the Broadcasting Services Act 1992 while the telecommunications consumer codes are registered under Part 6 of the Telecommunications Act 1997. Certain internet codes are also registered by the ACMA or its offshoot, the eSafety Commissioner.[5] In addition, there are codes of practice notified to the ACMA by Australia's two state-funded broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS).[6] The co-regulatory schemes are shown in Table 2.[7]

The statutory basis for registering co-regulatory codes is significant; the ACMA or eSafety Commissioner must be satisfied (among other things) that certain minimum consumer or public consultation standards have been met. For the broadcasting codes, the ACMA must be satisfied that "members of the public have been given an adequate opportunity to comment on the code"; whereas for the telecommunications codes, the ACMA must be satisfied that "at least one body or association that represents the interests of consumers has been consulted about the development of the code".[8]

OUR RESEARCH APPROACH

To document the engagement activities of the various self- and co-regulatory schemes, we compiled summaries based on publicly available material, amended these in response to comments from 15 of the schemes, then invited representatives to attend a round table meeting in Sydney. We ran parallel round table meetings with regulator representatives and with representatives from consumer and public interest groups to obtain their views on the ways in which industry schemes engage them when formulating rules.

Our review led to a list of 22 different mechanisms used by one or more of the schemes over a number of years. Table 3 below incorporates all of these mechanisms. The most commonly used mechanisms were written submissions and data collection.

After completing our own consultation activities and reviewing the international academic literature that classifies consultation mechanisms, we developed a matrix of these mechanisms.

Form of engagement. We classified them first according to the form of engagement. By this we mean the mode of communication or interaction that in some way enables consumer or citizen views to be taken into account. For example, we separated the act of collecting existing data on consumer or citizen views from the act of seeking input via a mechanism such as written submissions.

Rule-making function. But then we also classified them according to the rule-making functions of the scheme. Here, for example, we separated the function of identifying issues from the function of drafting rules.[9]

The four forms of engagement and the four rule-making functions we identified are set out in the matrix in Table 3.

We used the matrix, and the observations of industry, government and consumer representatives, to make some observations on the extent to which the schemes were able to promote and embrace engagement, as well as the limitations of some of these mechanisms.

WHAT WE FOUND

There was wide use of both written submissions and data collection, but other mechanisms were used selectively. Some organisations favoured certain mechanisms which had never been used by others.

The factors influencing decisions about which mechanisms to use were as follows:
● the importance of the proposed rule or the change to existing rules
● the number of proposed rules or changes to existing rules
● the complexity of the underlying subject matter
● the anticipated receipt of competing consumer or citizen viewpoints on specific issues
● government scrutiny
● the expectations of relevant regulatory bodies
● cost and other resource-related implications.
A count of the number of mechanisms used ➡

TABLE 1: SELF-REGULATORY SCHEMES

INDUSTRY BODY OR SCHEME	FUNCTIONS	RELEVANT RULES
Alcohol Beverages Advertising Code scheme (ABAC scheme)	Scheme consists of ABAC Alcohol Marketing Code, the Alcohol Advertising Pre-vetting Service and a complaints adjudication process.	ABAC Responsible Alcohol Marketing Code
.au Domain Administration Limited (auDA)	Administers the .au domain and associated second-level domains.	21 policies
Australian Association of National Advertisers (AANA)	Represents advertisers.	Code of Ethics; AANA Code for Advertising and Marketing Communications to Children; AANA Food and Beverages Advertising and Marketing Communications Code; AANA Environmental Claims Code; AANA Wagering Advertising and Marketing Communications Code
Australian Direct Marketing Association (ADMA)	The "principal industry body for data-driven marketing and advertising"; one of four organisations of the Australian Alliance for Data Leadership Limited.	ADMA Code of Practice
Australian Food and Grocery Council (AFGC)	Represents Australia's food, drink and grocery manufacturing industry. Members include Coca-Cola, Kellogg and Arnott's.	Responsible Children's Marketing Initiative for the Australian Food and Beverage Industry; Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children
Australian Press Council (APC)	"The principal body with responsibility for setting standards and responding to complaints about material in Australian newspapers, magazines, their associated digital outlets, as well as a growing number of online-only publications."	The Statement of General Principles; The Statement of Privacy Principles; Specific Standards (Coverage of Suicide; Contacting Patients) and 13 non-binding Advisory Guidelines
Federal Chamber of Automotive Industries (FCAI)	The peak industry organisation representing the manufacturers and importers of passenger vehicles, light commercial vehicles and motorcycles in Australia.	Voluntary Code of Practice for Motor Vehicle Advertising
Independent Media Council (IMC)	Established by Seven West Media in 2012 to address reader complaints by publisher members.	Code of Conduct
Interactive Advertising Bureau Australia (IAB)	Administers the relevant rules (see next column), which are developed by members of the Australia Digital Advertising Alliance.	Australian Best Practice Guidelines Interest Based Advertising (or online behavioural advertising) (September 2014); Social Advertising Best Practice Guidelines 2013
Media, Entertainment and Arts Alliance (MEAA)	Union representing journalists and other media workers.	Journalist Code of Ethics
Standards Australia	Responsible for the development of Australian standards, including standards relating to communications, information technology and e-commerce services.	Various standards

TABLE 2: CO-REGULATORY SCHEMES

INDUSTRY BODY OR SCHEME	FUNCTIONS	RELEVANT RULES
Australian Broadcasting Corporation (ABC)	Various functions, including providing within Australia innovative and comprehensive broadcasting services of a high standard.	ABC Code of Practice
Australian Community Television Alliance (ACTA)	Represents free-to-air community television channels.	Community Television Broadcasting Codes of Practice
Australian Narrowcast Radio Association (ANRA)	"Peak industry body representing Low Power Open Narrowcast (LPON) Radio services and the High Power Open Narrowcast (HPON) Radio services located across all States and Territories of Australia."	Open Narrowcast Radio Codes of Practice
Australian Subscription Television and Radio Association (ASTRA)	Represents the Australian subscription media industry in Australia.	Subscription Broadcast Television Codes of Practice 2013; Subscription Narrowcast Code of Practice 2013; Subscription Narrowcast Radio Codes of Practice 2013
Communications Alliance (Comms Alliance)	The primary industry body and industry co-regulatory body in the Australian communications sector.	Various, including the Telecommunications Consumer Protections Code
Community Broadcasting Association of Australia (CBAA)	Represents the interests of community radio broadcasters.	Community Radio Broadcasting Codes of Practice
Commercial Radio Australia (CRA)	Represents Australia's commercial radio industry.	Commercial Radio Code of Practice (15 March 2017)
Free TV Australia (Free TV)	Represents all of Australia's commercial free-to-air television licensees.	Commercial Television Industry Code of Practice 2015
Special Broadcasting Service (SBS)	Its principal function is to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.	SBS Codes of Practice

by each scheme does not provide much insight into the depth of engagement undertaken, but it provides some useful information:

● Among the self-regulatory schemes, at least two of the advertising schemes appear to have no mechanisms for public engagement, whereas the most prominent advertising scheme, operated by AANA, has used seven mechanisms of engagement, as has auDA.

● Among the broadcasting co-regulatory schemes, several used three or four mechanisms, but the telecommunications co-regulatory scheme operated by Communications Alliance used 13 different mechanisms.

More significantly, our classification scheme allowed us to identify some mechanisms that provide a more expansive opportunity for dialogue with consumers or citizens, compared to those which gather pre-existing data or which engage with consumers or citizens only after rules have already been formed:

● Among the co-regulatory schemes, the most prominent broadcasting scheme, operated by Free TV Australia, reported using information dissemination (for example, issuing discussion papers on proposed changes, as well as media releases and social media posts), complaints data and regulator research, all of which fall into the first two forms of engagement (data collection and public communication), but perhaps the main mechanism it uses is written submissions on draft rules, which falls into the third form of engagement (public input).

● In contrast, the telecommunications scheme operated by Communications Alliance uses a wide variety of mechanisms covering all four forms of engagement. These include appointing consumer representatives to working committees that draft code rules - one of the few examples we found of the fourth type of engagement (public participation).

● Among the self-regulatory schemes, auDA and AANA demonstrated the most variation in the mechanisms used, with each using mechanisms from three of the four forms of engagement. In the case of auDA, this involved information dissemination; focus groups; public fora; meetings with a rule-maker; surveys of consumers or the public; written submissions on both an issues paper and draft rules; and appointing a consumer or public interest representative to a working committee. For AANA (in some cases through its associated complaints-handling body, Ad Standards) these mechanisms were complaints data; a sentiment index; information dissemination; meetings with a rule-maker; surveys of consumers or the public; and written submissions on an issues paper.

Limitations on access to information prevent us making definitive statements about the schemes overall, but our classification matrix does allow us to compare the schemes' selection of engagement mechanisms, as some mechanisms are likely to require more investment of resources and to provide a richer insight into consumer and citizen views. To make this comparison, we distinguish the first two forms of engagement (data collection and public communication) from the second two (public input and public participation). Mechanisms that fall within the public input and public participation categories are likely to provide more meaningful opportunities for engagement. When we analyse our results using this approach, we see that some schemes stand out from others:

● Communications Alliance far exceeds all other schemes in the use of the third and fourth forms of engagement. Ten of the 12 mechanisms it uses are of these kinds, and include two forms of public participation (working committees and consumer views sought by a consumer body);

● both auDA and the Community Broadcasting Association of Australia use six such mechanisms, including working committees, while SBS and AANA both use four.

One of the most significant aspects of variation occurred in relation to comment on draft rules, and how this occurs. Of the 20 schemes we identified, seven self-regulatory schemes do not publish their rules in draft and/or provide an opportunity to make written submissions. These are the schemes operated by ABAC, AANA, the ABC, the APC, the Federal Chamber of Automotive Industries, the Interactive Advertising Bureau, and the Independent Media Council. The other 13 schemes (a mix of self- and co-regulatory schemes) permit written submissions of some kind – whether at proposal stage, on an issues paper, or on draft rules.

Written submissions are the most popular engagement mechanism in our sample, and a number of our round table participants said they are helpful. However, we found – in the literature as well as in feedback from our round table meetings – that this mechanism has some limitations. For example, the auDA representative said "we've averaged between 20 to 50 submissions over the length of policy review processes, which is in no way reflective or has any great scalability and probably doesn't influence the process to any great extent". And although the Free TV representative noted that over 2,000 written submissions had been received during one consultation, almost all of these were in similar terms as part of a consumer campaign, with only 11 other substantive submissions.

Perhaps more significantly, consumer representatives drew attention to "motivational barriers" and other problems that arise when a scheme relies on written submissions.[10] Some obstacles cited were: "submission fatigue"; the perception that consumers were commenting on something that was "already a done deal"; the lack of "trust that if you're going to put time into doing a submission … that anything is going to come out of it"; and the absence of feedback from industry following submission of written comments. Expecting written submissions from "missing stakeholders", for example, those from vulnerable communities often missing from regulatory activities, was particularly problematic. Our participants cited the following examples of people whose interests may not be represented in the regulatory environment: homeless people, women escaping domestic violence, and people living in geographically remote communities (which in the Australian environment includes remote indigenous communities).

TABLE 3: MECHANISMS OF CONSUMER AND PUBLIC ENGAGEMENT

		FORMS OF CONSUMER/PUBLIC ENGAGEMENT		
		Data collection	**Public communication**	**Public input**	**Public participation**
RULE-MAKING FUNCTION	**Fact-finding**	Audience feedback Sentiment index Complaints data Review of research by regulator Review of previous submissions	None identified	Meeting with scheme's staff Focus group Survey Advisory committee Advisory council	None identified
	Identifying and describing issues	None specifically used	Information dissemination (media, reports & other communication) General call for proposal stage input Publication of issues paper	Written submission at proposal stage Written submission in response to issues paper Advisory committee Advisory council	None identified
	Formulating regulatory approaches and rules	None specifically used	Information dissemination (media, reports & other communication) Publication of draft rules	Public fora Round tables Focus groups Meeting with rule-maker Written submission on draft rules Phone submission Meeting with scheme's staff to discuss proposed rules	Working committee Consumer organisation consults with its members (views fed into committee)
	Monitoring and assessing operation	Audience feedback Sentiment index Complaints data Review of research by regulator Review of previous submissions	Information dissemination (media, reports & other communication)	Advisory committee Advisory council Focus group Round table Meeting with rule-maker Survey	None identified

CONCLUSIONS

While our research shows considerable variation in engagement among the various schemes we examined, one of the co-regulatory schemes (Communications Alliance) is the stand-out performer in terms of the number and type of engagement mechanisms it uses. However, a surprising outcome was the extent to which some of the self-regulatory schemes seem to exceed the efforts of their co-regulatory counterparts. auDA and AANA both use a variety of mechanisms, while the APC includes public representatives on the body that makes decisions about codes; the Media Entertainment and Arts Alliance uses a working committee that involves public members; and ABAC conducts focus groups and surveys.

Use of these mechanisms, which require schemes to proactively engage with consumers or citizens, stands in contrast to the standard mechanisms of complaints data and written submissions routinely used by some of the broadcasting bodies. It is particularly surprising that the long established and publicly funded national broadcaster, the ABC, does not offer the public the opportunity to comment before it adopts new rules.

This positive finding about some of the self-regulatory schemes does need to be set in context. Other self-regulatory schemes appear to conduct no consumer or citizen engagement, or conduct very minimal engagement, using mechanisms that are unlikely to provide much consumer or citizen insight.

In terms of improvements that could be made, our research leads us to conclude that more is needed of some of the established co-regulatory schemes, while some of the self-regulatory schemes may need encouragement from government to improve their engagement practices if they are to be regarded as effective alternatives to government regulation.

REFERENCES 1 In Australia, a government review of the communications regulator restated this view, recommending the "reinvigoration of self-regulation" and citing the pace of change and innovation within the sector as reasons for using co- and self-regulation. See Department of Communications and the Arts (2016). Review of the Australian Communications and Media Authority: Final Report, October. p90. bit.ly/3culHkv **2** See Lee K (2018). The Legitimacy and Responsiveness of Industry Rule-making. Hart Publishing, p230. **3** See Lee K & Wilding D (2019). Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making. Australian Communications Consumers Action Network. bit.ly/3a8W1t7 **4** We use the term "citizen" to refer to the civil, political and social aspects that attach to regulation concerning content, for example. We use the term "public" in specific contexts such as "public interest group" or in relation to surveys of public opinion, as well as in a more general and collective sense to cover both citizen and consumer interests. **5** The ACMA is responsible for enforcing a code relating to interactive gambling developed under the Interactive Gambling Act 2001, while the eSafety Commissioner enforces internet and mobile content codes registered under Schedules 5 and 7 of the Broadcasting Services Act 1992. **6** These "national broadcasters" operate under their own acts of parliament; although the ACMA must hear complaints about alleged breaches of the codes, the enforcement options available to the ACMA are much more limited than those for other broadcasters. **7** Table 2 lists nine schemes, although our analysis is based on eight. This is because we were unable to obtain information on the code arrangements, including engagement activities, relating to the Community Television Broadcasting Codes of Practice. **8** See Broadcasting Service Act 1992, s123(4)(b)(iii) and Telecommunications Act 1997, s117(1)(i). **9** Chapter 4 of our report reviews a number of classification schemes, the most significant of which for our research was that developed by Gene Rowe and Lynne J. Frewer in "A typology of public engagement mechanisms" (2005). Science, Technology, & Human Values. Vol 30, no 2, Spring: 251-90. It also explains in more detail how we arrived at the rule-making functions used in the matrix. **10** For a detailed analysis of barriers to participation in administrative rule-making, see Farina C, Kong H, Blake C, Newhart M, & Luka N (2014). Democratic Deliberation in the wild: The McGill online design studio and the regulation room project. Fordham Urban Law Journal. Vol 41, no 5: 1527-80.