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AMTA Response to Regulation Taskforce Issues Paper 2005

Introduction

The Australian Mobile Telecommunications Association (AMTA) is the peak industry body representing Australia's mobile telecommunications industry. AMTA's mission is to promote an environmentally, socially and economically responsible and successful mobile telecommunications industry in Australia. AMTA members include mobile phone carriers, handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. For more details about AMTA, see http://www.amta.org.au.

AMTA welcomes this opportunity to respond to the Australian Government's Regulation Taskforce's Issues Paper. The mobile telecommunications industry operates in an environment that is subject to both generic business regulation and industry specific regulation. Industry specific regulation is administered through both government legislation and regulations and self-regulatory processes. An indicative but not exhaustive list of regulation for the mobile telecommunications industry is provided at Attachment 1.

AMTA's submission is divided into four parts:

1. why AMTA supports the Productivity Commission's Good Practice Principles;
2. case studies of duplication of consumer protection regulation within the mobile telecommunications industry;
3. major areas where regulatory practices fail the Government's own best practice standards; and
4. a list of recommendations for better regulation.

and addresses the key Taskforce's question; namely, whether and how the regulation and/or its implementation imposes an unnecessary, and therefore avoidable, burden on business.

1. The Regulatory Framework for the Mobile Telecommunications Industry

AMTA notes that the *Telecommunications Act 1997* (the Act) establishes a framework for the telecommunications regulatory regime that states at section 4 (a) that it *promotes the greatest practicable use of industry self-regulation.*

However, the 'self-regulatory' model envisaged in the Act has more accurately become a 'co-regulatory' approach (as defined in the Taskforce Issues Paper). It is co-regulatory because it involves different degrees of both industry and government initiation and enforcement and because of the significant, continuing, extent of government delegated legislation.

The industry is subject to a wide range of Commonwealth and State regulatory mechanisms including 'black letter law', and co-regulation involving government enforcement. An indicative, but not exhaustive, list of statutory instruments relevant to the mobile sector is at Attachment 1.

The subordinate instruments listed at Attachment 1 are confined to consumer protection, which AMTA believes is subject to significant regulatory duplication and overreach.

Additional to the telecommunications-specific examples of regulation listed at Attachment 1 are generic consumer protection and competition legislation – notably the Trade Practices Act; and State and Territory fair trading laws.

Many statutory instruments that apply to the mobile sector form part of quasi- or co-regulatory schemes. For example, there are many industry Codes (listed in Attachment 1), which generally acquire legal effect when registered with the main regulator body – the Australian Communications and Media Authority (ACMA). These Codes are generally developed by the Australian Communications Industry Forum (ACIF) which is fully funded by the telecommunications industry, and incorporates demand- and supply-side participation.

2. Regulatory Good Practice Principles

AMTA supports the Productivity Commission's views on good practice regulation[1]:

> *To qualify* [as 'good practice'], *regulation needs to exhibit several characteristics,* [including]:
>
> - *It must have a sound rationale and be shown to bring a net benefit to society, requiring costs as well as benefits to be brought into account.*
> - *It must be better than any alternative regulation or policy tool.*
> - *It should be clear and concise. It should also be communicated effectively and be readily accessible to those affected by it.*
> - *It must be enforceable. But it should embody incentives or disciplines no greater than are needed for reasonable enforcement, and involve adequate resources for the purpose.*
> - *Finally, it needs to be administered by accountable bodies in a fair and consistent manner…important features of good governance include clear statutory guidance, transparency of both process and judgement, and public accessibility.*

AMTA advocates regulatory forbearance – refrain from regulatory intervention in the absence of evidenced market failure. Regulatory forbearance should be the default position of a regulator until such time that it can be clearly demonstrated that a durable market failure exists, and that regulatory intervention will actually deliver a superior outcome compared with market delivered outcomes.

If there is evidence that a regulatory response is necessary, that regulatory intervention must be proportional to the issues to be addressed.

[1] See address by Commission Chairman Gary Banks *The good, the bad and the ugly: economic perspectives on regulation in Australia*[*] to the Conference of Economists, Business Symposium, Hyatt Hotel, Canberra, 2 October 2003; at http://www.pc.gov.au/speeches/cs20031002/cs20031002.pdf

The interests of consumers must also be considered as the ultimate beneficiaries of regulation. When the regulatory impact and engagement costs for industry are high, these costs are passed to customers.

3. Specific Problem Areas in the Telecommunications Regime

This section responds to the Taskforce's appeal for views on:

- Regulatory requirements on business that are unnecessary; and
- Alternative approaches, such as less complex regulation, government information campaigns or industry self-regulation, satisfactorily achieve the underlying goals, at less cost to business.

AMTA considers that the rise in the volume and complexity of regulation of consumer protection regulation has led to duplication and high industry compliance costs. Over the past three years large volumes of regulation have been developed in three main areas – credit management, content services, and standard form consumer contracts for mobile services.

While AMTA members are keen to assist consumers enjoy the benefits of mobile phones in a financially affordable and responsible manner, the combination of 'black-letter' and 'self-regulation' is producing 'co-regulation' of inordinate volume and detail.

Case Study of Mobile Content Services

An example of unduly complex and prescriptive regulation is that which applies to content services delivered via mobile phones. These services are regulated by the.*Telecommunications Service Provider (Mobile Premium Services) Determination 2005 No. 1*, made by the Australian Communications Authority (ACA, the predecessor to the current Australian Communications and Media Authority). The industry's self-regulatory Mobile Premium Services Industry Scheme was developed by AMTA members in response to this Determination (Attachment 2 explains, in the ACA's own words, the complexity of the co-regulatory processes).

It is important to note that due to regulatory delays, industry liaison with the ACA about the proposed Determination required several years of time-consuming effort. Moreover, following the ACA's publication of an excessively prescriptive and impractical first draft Determination, each of AMTA's five carrier member companies engaged a near full-time expert on content regulation (for around six months) to develop workable rules and submit those to Government.

AMTA believes that public policy outcomes could have been achieved in this case with much less regulatory effort and complexity and with greater reliance instead on principled outcomes which allow for flexibility in business response.

This case study also illustrates that officials can be predisposed to regulating afresh for apparently new situations when in essence the issue is just another manifestation of an existing problem (and resolvable applying existing regulation).

AMTA notes that it proposed to the ACA that the Internet Industry Associations' existing Content Codes (a regulatory scheme registered by the then Australian Broadcasting Authority under the *Broadcasting Services Act 1992)* be updated to provide for the regulation of mobile content. The Department of Communications, Information Technology and the Arts commenced and has yet to complete a long-term review of content services delivered via convergent devices.

AMTA's proposal that the regime rely on the Internet Industry Content Codes would have provided robust consumer safeguards in the short term while reducing the likelihood of regulations being overtaken by concomitant government policy reviews. Currently, while the industry-at-large is developing a Scheme in response to the detailed *Mobile Premium Services Determination*, it is unclear whether the Government (including the ACMA) will require substantially different or fewer rules.

Regulatory versus Policy Functions

AMTA contends that the role of the regulator should exclude policy development. Policy development is properly the function of governments and policy departments, most notably in the communications sector the Department of Communications, Information Technology and the Arts (DCITA).

Policy makers take advice from regulators on administration, regulation and enforcement practicalities, as they affect regulatory development.

Several examples exist where the Australian Communications Authority (ACA) exceeded its proper role as regulator under a predominantly self-regulatory charter (the 1997 Act):

- *Standard Form Of Agreement* for consumer mobile telephone services – draft ACA Determination over-rode the ACIF Consumer Contract Code (which itself had approved), deleting many of the exemptions in that Code and inappropriately imposing equal customer notification obligations on all telecommunications service providers - regardless of the different levels of consumer risk attached to those services;

- *Content available on mobile services* – ACA made policy on chat services, which was in fact inconsistent with the Government's existing policy on chat services (see mobile content services case study in this Section); and

- *Credit Management* – ACA went beyond giving advice to government to providing value judgments on industry's intentions and proposed a completely impractical proposal.

If the distinction between policy and legislative development by elected governments, and independent administration and enforcement of that legislation, is not maintained, the public credibility of regulators can suffer.

Attitude and Efficiency of Regulators

No system of regulation – even best practice – is alone sufficient to ensure the outcomes outlined by the Productivity Commission. The attitude of regulators' executive and management is also important. For example, some agencies appear to treat required Regulatory Impact Statements (RIS) as supporting the regulatory policy decisions already made and developed rather than as opportunities to gain efficiencies and stakeholder support through rigorous and robust cost-benefit analysis. The RIS process should, except in cases of real urgency, be a substantive hurdle to be cleared *before* proposed regulation progresses to an advanced stage. This will ensure that regulators and policy makers complete 'due diligence' before rather than as an afterthought to making delegated legislation.

Some regulators seem predisposed to promulgating further subordinate legislation, rather than trying to apply existing regulation, as an outcome of reviews of legislation and industry code performance. This can result in regulatory overlap and confusion for both industry and consumers. This is often accompanied by a tendency to intervene before the issue is

identified, and the drafting of unduly complex and prescriptive instruments – concentrating on process rather than outcomes.

"Self-Regulation" versus the Real Nature of the Telecommunications Regulatory Regime

AMTA believes that a regulatory environment truly focused on self-regulation, will empower and entrust the industry to apply its own codes in the first instance and to monitor the effectiveness of those codes. Therefore, the term 'self-regulation' is wrongly used to characterise much of the current telecommunications regulatory regime. While industry-specific rules are often assumed to be in the nature of 'self-regulation', in fact the telecommunications industry is subject to dense 'co-regulation'.

AMTA's members invest very significant resources in developing and complying with Australian Communications Industry Forum codes and in funding and responding to the Telecommunication Industry Ombudsman's office. AMTA believes that, in a regulatory environment truly focused on self-regulation (as is the intent of the 1997 telecommunications legislation), the proper role for the regulator is to allow the industry to apply its own codes in the first instance and to monitor the effectiveness and enforcement of those codes.

AMTA notes that unduly complex, duplicative or otherwise poorly designed co-regulation can bring several adverse outcomes:

- high engagement costs for industry;
- duplicative and confusing rules (including for consumers);
- distracts effort from ensuring practical, self-regulatory, measures and solutions;
- firms not adequately learning the market consequence when the regulator is inclined to add regulation rather than enforce existing rules and publicly report unethical players.

Technological Change and Need for Technological Neutrality

Mobile communications platforms, services and devices are converging. The challenge for regulators and industry alike is whether and how to regulate these applications, without succumbing to the assumption that these are all new problems requiring new solutions.

In an ideally simplified world regulation would be truly "technologically neutral" - in the form of generic fair trading and consumer protection laws applicable to all sectors, goods and services. Sectoral self-regulatory responses would guide corporate conduct and consumer remedies in specific sectors.

At present, there is a tendency for reactive regulatory development to new socio-economic challenges – including mobile services. What is needed, in the interests of avoiding confusion and inconsistency across multiple sectors and services, is to preserve or revert to a principled and technologically neutral approach to regulation.

AMTA is concerned that tying consumer protection regulations to specific technologies will stifle the development and delivery of innovative products and services.

In hindsight, the rapid growth in delegated legislation (eg Regulations and ACA/ACMA Determinations) pursuant to the 1997 telecommunications consumer legislation may be seen as an unduly complex and confusing regulatory response to the socio-economic implications of successive waves of new consumer products like mobile phones. The regulation of mobile content (case study above) provides an example of such a complex and confusing response.

4. Recommendations for Better Regulation

AMTA has several suggestions to make for a better system for making and reviewing regulation, as follows:

- Regulators publicly commit to best practice regulation and consultation. This requires cultural support at all levels within organisations. Having RIS and related procedures in place is insufficient unless they are widely understood, respected and satisfied in spirit.

- Regulatory forbearance should be the default position of a regulator until such time that it can be clearly demonstrated that a durable market failure exists, and that regulatory intervention will actually deliver a superior outcome compared with market delivered outcomes. In other words, test whether *existing* regulation can be applied to remedy a perceived issue *before* recommending or making yet more regulation.

- Ministers and departments must ensure that regulators are not *de facto* policy makers.

- The Office of Regulation Review should be empowered and properly resourced to act as regular evaluator of regulator performance, including receiving and reviewing complaints from national industry representative organisations about inadequacies in RIS and consultative processes where those have proved irresolvable with regulators. Such reviews should ideally occur *before* new regulation takes effect.

- All proposed delegated legislation should be accompanied by a RIS, and the RIS process and final documents must be transparent.

- The RIS process should entail a rigorous pre-justification of proposals for regulation (with a fast-track option for cases where demonstrated need and urgency means the justification/cost-benefit is obvious); so that in industries intended to be mainly self-regulated like mobile telecommunications, formal regulation is only warranted where there is demonstrated market failure.

Australian Mobile Telecommunications Association
28 November 2005

Attachment 1

Indicative List of Regulation for the Mobile Telecommunications Sector

1. Primary legislation includes:

- the *Australian Communications & Media Authority Act 2005*
- the *Telecommunications Act 1997*
- the *Trade Practices Amendment (Telecommunications) Act 1997*
- the *Telecommunications (Universal Service Levy) Act 1997*
- the *Telecommunications (Carrier Licence Charges) Act 1997* as amended in 2005
- the *Telecommunications (Numbering Charges) Act 1997* as amended in 2005
- the *NRS Levy Imposition Act 1998*
- the *Telecommunications (Consumer Protection and Service Standards) Act 1999* as amended in 2005 regarding the National Relay Service
- the *Spam Act 2003*

2. **Delegated Legislation made by ACMA - Consumer Protection Examples**

Performance Standards

Telecommunications (Performance Standards) Determination 2002

Premium Services

- Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)
- Telecommunications Service Provider (Premium Services) Determination 2004 (No.2
- Telecommunications Service Provider (Premium Services) Amendment Determination 2004 (No.1)
- Telecommunications Service Provider (Premium Services) Determination 2004 (No.1)

Standard Form of Agreement

- Telecommunications (Standard Form of Agreement Information) Determination 1999
- Telecommunications (Standard Form of Agreement Information) Determination 2003
- Telecommunications (Consumer Protection and Service Standards) (ATS Marketing Plans) Determination 2001 (No.1)
- Telecommunications (Customer Service Guarantee) Standard 2000 (No.2)
- Telecommunications (Customer Service Guarantee) Amendment Standard 2001 (No. 1)
  Telecommunications (Customer Service Guarantee) Standard 2004 (No. 1)
- Telecommunications (Customer Service Guarantee) Amendment Standard 2004 (No.1)

3. Industry Codes in Consumer Protection Area – adopted by the Australian Communications Industry Forum (not exhaustive)

ACIF C513:2004 Customer and Network Fault Management

Specifies the minimum requirements to manage Customer and Network faults across networks

ACIF C518:2000 Call Charging and Billing Accuracy

Defines the minimum required level of call charging and billing accuracy. Note: C518:2000 is not relevant to individual billing complaints.

ACIF C521:2004 Customer Information on Prices, Terms and Conditions

Specifies minimum requirements for suppliers in advertising their goods and services and in informing customers about the prices, terms and conditions of goods and services on offer.

ACIF C523:2001 Protection of Personal Information of Customers of Telecommunications Providers

Provides principles and standards for the handling of customer personal information based on the National Privacy Principles.

ACIF C525:2002 Handling of Life Threatening and Unwelcome Calls

Provides a standard industry procedure for the cooperative handling of calls across multiple networks and which are connected with life threatening calls or repeated unwelcome calls.

ACIF C536:2003 Emergency Call Services Requirements

Specifies the obligations of carriers and carriage service providers to customers, emergency service organisations and emergency call persons.

ACIF C541:2003 Credit Management

Specifies minimum standards for suppliers' credit assessment of customers, and procedures for the restriction, suspension and disconnection of a customer's service.

ACIF C542:2003 Billing

Specifies minimum requirements for billing procedures and the provision of billing information to customers. The Code covers bill content, the timeliness and frequency of issue, terms of payment and credit.

ACIF C547:2004 Complaint Handling

Provides minimum standards on complaint handling procedures including complaint recording and customer information.

ACIF C570:2005 Mobile Number Portability

Specifies the arrangements required to change between mobile networks and keep one's number.

ACIF C620:2005 Consumer Contracts

Specifies the rules to determine when consumer contract terms may be considered unfair, having regard to both the unfairness of the terms and their intelligibility and accessibility.

Attachment 2

Framework for Self Regulation of the Supply of Mobile Premium Services
Excerpt from ACMA's Public Comment Draft Version 1.0, 14 November 2005

On 29 June 2005, the Australian Communications Authority made the *Telecommunications Service Provider (Mobile Premium Services) Determination* 2005 (Mobile Premium Services Determination**)** under section 99 of the Telecommunications Act.

The Mobile Premium Services Determination followed the Ministerial direction to the Australian Communications Authority dated 13 May 2004 (contained in the *Australian Communications Authority (Service Provider Determination) Direction* 2004), and the circulation of a draft service provider determination for public comment.

The Mobile Premium Services Determination:

- prohibits the supply of a Mobile Premium Service that enables a Consumer to access Prohibited Content;
- regulates what telephone numbers may be used by Mobile Carriage Service Providers and Content Service Providers to provide Age-restricted Services; and
- regulates how Mobile Carriage Service Providers may provide access to Age-restricted Services and Chat Services, including the development of age verification compliance plans.

The Mobile Premium Services Determination also requires Content Service Providers and Mobile Carriage Service Providers to comply with a self-regulatory scheme when they supply Mobile Premium Services. The Mobile Premium Services Determination states that self-regulatory scheme that applies to a particular service provider will be:

- the MPSI Scheme; or

- another self-regulatory scheme that has been approved by the ACMA and which applies to the relevant service provider.

The Mobile Premium Services Determination and the MPS Code expand upon the following statutory schemes and self-regulatory codes that presently regulate the supply of mobile premium services:

- the Internet Industry Association's Codes for Industry Co-Regulation in Areas of Internet and Mobile Content, as registered by the Australian Broadcasting Authority on 26 May 2005 (the IIA Code);

- the Australian Communications Industry Forum Code relating to Customer Information on Prices**,** Terms and Conditions (ACIF C521:2004) **(**the ACIF PTC Code**);**

- the Telecommunications Industry Ombudsman scheme established under the Telecommunications (Consumer Protection and Service Standards) Act 1999 (the TIO scheme); and

- the Telecommunications Service Provider (Premium Services) Determination 2004 (No 1) and the Telecommunications Service Provider (Premium Services) Determination 2004 (No 2). Of these, the second service provider determination is of direct relevance to the premium services that are described in this Framework **(**Second 2004 Determination).