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Regulatory Burdens: Social and Economic Infrastructure Services
Productivity Commission

By email: regulatoryburdens@pc.gov.au



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Dear Sir/Madam

Re: AMTA Response to the Productivity Commission's Annual Review on Regulatory Burdens on Business: Social and Economic Infrastructure Services

AMTA is pleased to provide the attached submission in response to the Productivity Commission's Review.

AMTA provided a submission to the Regulation Taskforce on this subject in late 2005 and understands that the Commission will be reviewing that submission in the current Review. As suggested in your Issues Paper, this submission does not repeat points made, but rather builds on and updates our original submission. For your convenience, a copy of AMTA's 2005 Submission to the Regulation Taskforce is included at as a separate attachment to this submission.

If you have any questions or would like further information on any issue, please do not hesitate to contact me or my Policy Manager, Peppi Wilson, on the above number.

Yours sincerely

Chris Althaus
Chief Executive Officer

1 Introduction and overview

- 1.1 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, successful and sustainable mobile telecommunications industry in Australia. AMTA members include mobile network operators (**MNOs**), handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. For more details about AMTA, see <http://www.amta.org.au>.
- 1.2 AMTA welcomes the opportunity to provide input to the Productivity Commission's Annual Review on Regulatory Burdens on Business: Social and Economic Infrastructure Services (the Review).

Overview

- 1.3 The mobile telecommunications industry faces a raft of overlapping and duplicative regulations and requirements that provide little value to consumers, Government or regulators. It 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.
- 1.4 The stated aim of the *Telecommunications Act 1997* is to establish a telecommunications regulatory regime that *promotes the greatest practicable use of industry self-regulation*¹. This is important in a dynamic, fast-moving industry where it is desirable to be able to respond to identified problems quickly. The reality is a complex co-regulatory model with overlap and inconsistency between jurisdictional and agency responsibilities and numerous bodies developing policy without adequate reference to other agencies or industry.
- 1.5 Such duplication and complexity results in sub-optimal policy processes and outcomes. Even where a good outcome is eventually achieved, poor process increases the cost of development and compliance. These costs are inevitably passed on to consumers.

¹ Section 4a, Telecommunications Act 1997

- 1.6 AMTA therefore supports the Rudd Government's commitment to regulatory reform, including the elevation of the issue to Cabinet-level with the appointment of two Ministers (The Minister for Finance and Deregulation, the Hon Lindsay Tanner MP and the Minister Assisting, the Hon Dr Craig Emerson MP) with specific accountability for deregulation.
- 1.7 This submission builds on and updates comments made by AMTA in its submission to the Regulation Taskforce in response to its 2005 Issues Paper (copy attached).

2 Update and case studies

- 2.1 AMTA highlighted a number of issues in its 2005 submission, noting how the policy development process and its implementation falls short of the Government's own best practice standards, therefore imposing an unnecessary and avoidable burden on business. As suggested in your Issues Paper, this submission does not repeat points made, but rather builds on and updates our original submission. AMTA confirms, however, that the key points and recommendations made in that submission are still relevant.
- 2.2 AMTA provided an indicative but not exhaustive list of consumer protection regulation for the mobile telecommunications industry in its 2005 submission. An updated list is provided at Attachment A.

Key problem areas

2.3 *Mobile Content regulation*

- 2.3.1 In its 2005 submission, AMTA used the example of mobile content services regulation as a case study to illustrate the unduly complex and prescriptive regulation applying to content services delivered via mobile phones. In 2009, mobile content services regulation remains an issue, with considerable time and effort having been expended year-on-year by government and industry as new regulation has replaced 'temporary' regulation, necessitating numerous structural as well as more material changes to the related Schemes and Codes devised to meet that regulation's requirements.
- 2.3.2 More worryingly, the entire regulatory framework, which AMTA believes has now been fine-tuned to address outstanding issues now well understood by the industry and regulator alike, is currently under threat of abolishment with the Department of

Broadband Communications and the Digital Economy (**DBCDE**) currently considering regulating afresh before the most recent changes have even come into force and been given the opportunity to work.

- 2.3.3 AMTA emphasises that its comments are to illustrate where processes have gone wrong over time; AMTA and the mobiles industry accept that there are unacceptable behaviours by some in the mobile premium services market and that these issues must be addressed. The industry continues to work to overcome those aspects which are unsatisfactory from both a consumer and industry perspective. The length of time required to re-cast industry's response should not be used as rationale to seek new regulation, however. Rather, the emphasis should be on implementing and enforcing the new co-regulatory instruments and giving them time to have an impact.
- 2.3.4 Following is a brief overview of the mobile content regulation to illustrate issues noted above and provide an update to AMTA's 2005 comments on this issue.
- 2.3.5 In its 2005 submission, AMTA described in detail the complex co-regulatory processes put in place to regulate mobile premium services and the several years of time-consuming effort required to develop workable rules to replace the excessively prescriptive and impractical first draft Determination produced by the Australian Communications Authority (**ACA**, now the Australian Communications and Media Authority – **ACMA**). In June 2005 the ACA made the *Telecommunications Service Provider (Mobile Premium Services Determination)* under section 99 of the Telecommunications Act (the **Determination**).
- 2.3.6 In parallel with working to ensure a realistic and workable Determination, industry was developing a self-regulatory framework for the purposes of implementation and enforcement of the Determination. This could not be completed until the Determination was finalised, but in October 2006 the ACMA approved the Mobile Premium Services Industry Scheme (the **Scheme**), developed by industry to meet the Determination's requirements.
- 2.3.7 As noted in its original submission, AMTA believed that the public policy outcomes could have been achieved in this case with less regulatory effort and complexity and with a greater reliance instead on principled outcomes allowing for flexibility in business response. To make matters worse, however, it was known from the outset that the Determination was only temporary; the Determination was released as an interim measure pending the release of a long-term "Convergent Technologies" review by the then Department of Communications, Information Technology and the Arts (**DCITA**) –

now DBCDE. This review aimed to provide the basis for wider legislative reform across different technology platforms.

- 2.3.8 The Convergent Technology review report was not forthcoming until June 2006 - two years after it was announced and submissions were sought. Inputs to the review were dated if not meaningless by this time. Further, despite working on the same issues, the two agencies appeared to have only a basic understanding of what the other was doing or how their work would impact on the work of the other.
- 2.3.9 A number of further regulatory changes have been introduced since 2006 and more are expected, each imposing administrative and compliance costs. Notably, in 2008, the Communications Legislation Amendment (Content Services) Act was introduced. This replaced the sections of the Determination dealing with the assessment of content.
- 2.3.10 The new legislation necessitated that the Scheme and other related Codes be substantially revised and restructured, in parallel with the Scheme undergoing a scheduled review 12 months after coming into force with AMTA's member companies again engaging near full-time experts on content regulation for many months. A new Mobile Premium Services Code (the **Code**) designed to both meet the requirements of the new Act and address a number of identified problem areas, is drafted and about to be provided to ACMA for consideration. Other initiatives to target a number of identified problems were also introduced in late 2008.
- 2.3.11 AMTA appreciates the complexities of the issues and supports the need for action to address a number of identified problems. However, AMTA believes that many of the difficulties, inefficiencies and delays were unnecessary.
- 2.3.12 Moreover, AMTA is deeply concerned that nothing has been learned from the exercise; AMTA noted in its original submission that the case illustrated 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). With the new Code not even yet considered in full by ACMA and with the aforementioned initiatives not yet having been given time to prove their worth, AMTA understands that the DBCDE is already considering the drafting of new legislation to address the same issues.
- 2.3.13 AMTA also commented in its original submission that the role of the regulator should exclude policy development, which is properly the function of governments and policy departments. For the communications sector, this is usually the DBCDE. For the DBCDE

to efficiently and effectively develop policy, however, the regulator and policy department must properly consult each other to ensure they understand the status quo before making any decision to make amendments or regulate afresh. They should then be required to demonstrate that any proposed changes would more effectively achieve the regulation's objectives than the existing regulation or any other alternative regulation or policy tool.

- 2.3.14 Unfortunately, it has been apparent on a number of occasions that the DBCDE has not even a basic understanding of either the existing regulation or the structure of the mobile content services industry, suggesting dialogue between the two agencies is not optimal. ACMA now has a good understanding of the issues and, perhaps more importantly, is now in a position to enforce existing rules and has demonstrated its willingness to do so in last year or so by taking action against a number of non-compliant industry players.
- 2.3.15 AMTA members have also demonstrated their commitment with industry having put in place contractual arrangements to enforce new key code provisions back in mid-2008 – before the Code was submitted to ACMA. To date, carrier enforcement procedures against content providers who are breaching contract conditions include Telstra having suspended the services of several service providers that have been the subject of unacceptably high complaint levels (this includes 12 services in 2008 and, to date, six services in 2009); Vodafone issuing 351 Non-Compliance Notices, suspending 25 short codes, issuing six fines and sending out thousands of emails and informal notices to service providers in the past 12 months; and Optus issuing 37 breaches to Content Providers with 20 of these having incurred penalties such as taking down shortcodes/websites or requiring changes be made to websites and 17 incurring financial penalties.
- 2.3.16 AMTA also notes ACCC's recent action in relation to misleading advertising of a number of services, including mobile premium services.
- 2.3.17 AMTA repeats its concern that new legislation might be considered before a new Code is officially in operation (as noted above, key Code provisions are already being enforced by Carriers) and before *more effective enforcement* by government and industry of both the Code and of pre-existing legislation such as the Trade Practices Act has been able to prove its effectiveness against rogue operators.

2.4 *Law enforcement: pre-paid identity checks*

- 2.4.1 The regime for mobile pre-paid identity checks in Australia provides another example of inefficient, problematic regulation.
- 2.4.2 Under the Telecommunications (Service Provider Identity Checks for Prepaid Mobile Telecommunications Services) Determination 2000 (the **Prepaid Determination**), the telecommunication industry is required to collect, verify, store and, on lawful request, retrieve identity and address information about the purchaser and/or user of prepaid mobile phone services. Carriage Service Providers (**CSPs**) rely on retailers to collect and verify this information about purchases. AMTA understands the Determination's primary objective was related to security priorities: to eliminate "anonymous" pre-paid services.
- 2.4.3 AMTA is keen to work cooperatively with Government and other stakeholders to help the Government meet its law enforcement objectives and recognises the challenges for Government in developing and implementing effective legislation. In considering the Prepaid regime, however, AMTA contends that Government has ignored its own advice and has not made the effort to cost, assess or justify its legislation (or any proposed or actual changes to it) to ensure that the regulatory intervention is effective or proportional to the issues that it seeks to address. Indeed, AMTA is concerned that not only does the current regime not provide a balanced and cost-effective policy outcome for Australian consumers, the industry or the Law Enforcement Agencies (**LEAs**), but it suffers from limited effectiveness, is costing industry in the region of \$10 million a year to run and, worse, is creating social exclusion for an already socially disadvantaged section of the community.
- 2.4.4 AMTA would be happy to provide further information on the issues and suggestions for improvement, but summarises the major failings in regulatory policy making below.
- 2.4.5 In 2006, the regulator (ACMA) proposed changes to the Prepaid Determination that it hoped would improve the overall level of compliance of the regime. AMTA acknowledged that the levels of compliance were low, but was concerned that ACMA's proposals for improving identity check processes for pre-paid mobile services did not appropriately consider the likely effectiveness or cost-benefits of implementing proposed changes. The objectives were not clearly identified, there was no cost-benefit analysis conducted, no benchmark measurement of compliance by industry conducted against which to measure the effectiveness that any 'improvements' to the regime might offer and to AMTA's knowledge, no empirical evidence was ever provided by the LEAs to demonstrate the extent of the problem in the first place, or against which to consider the

effectiveness of an 'improved' regime in helping them address their objectives. LEAs had ample opportunity over preceding years to quantify the impact of prepaid services on their operations. Further, there has been no consideration given to other methods, such as use of mobile location information and old fashioned surveillance methods that could give effect to LEA objectives.

- 2.4.6 Another concern, which was ignored, relates to the equity and child safety implications of the Prepaid Identity Check requirements. Prepaid services are a viable alternative for people who are unable to meet the credit checking requirements of service providers, including young people. As noted by the Parliamentary Joint Committee on the Australian Crime Commission, "young people in particular might find tougher (prepaid) requirements difficult to satisfy, if not an outright barrier to ownership²" since they may not have financial accounts or sufficient Evidence of Identity (EIO) documents to be permitted to purchase or activate prepaid mobile phones.
- 2.4.7 AMTA believes that ACMA has taken an unnecessarily restrictive and inflexible approach in not permitting primary and secondary student identity card or public transport concession cards as acceptable forms of identification for minors.
- 2.4.8 AMTA further notes that the onerous and expensive regulatory regime may result in unnecessarily higher charges for prepaid users – users often with the lowest incomes to start with. The collection of identity and address information can be achieved at relatively low cost and are required in any event at service activation. The costs and complexity of compliance to the determination are driven by onerous requirements to verify the customer identity that is supplied.
- 2.4.9 Moreover, AMTA and other stakeholders including LEAs do not consider that any regime relying on point-of-sale enforcement could be effective in seriously deterring genuine criminals. It is not even clear how much it assists with petty crime. In addition to the problems of relying on third party providers (i.e some 30,000 retailers) for compliance (against whom no enforcement action can be taken by the regulator), the regime is fundamentally flawed in that while most customers have no motivation to provide false information, the shop assistants are not and could not be expected to validate the identification documents presented by customers at point-of-sale. Thus the whole process is subject to the simplest forms of identity fraud. Moreover, it is easy to avoid the

² Chapter 7, The adequacy of administrative and regulatory arrangements,
http://www.aph.gov.au/senate/committee/acc_ctte/organised_crime/report/c07.htm

whole regime by importing prepaid services purchased for cash with no identity³. The regime is further hindered by practices such as the lending, exchange, donation, resale or theft of prepaid services, meaning that the identity information collected at point-of-sale may bear no relationship to the identity of the user of the service.

2.4.10 Persons intent on criminal activity will have strong motivations to circumvent the prepaid identity collection and verification processes. It must be assumed that such persons will be active in concealing their identity and minimising the risk that their use of telecommunications services will be detected. The regulations are therefore least likely to be effective in dealing with the type of persons the regulations were intended to deal with.

2.4.11 The effectiveness of the regulatory regime also needs to be balanced against the level of compliance expected from industry. The ACMA Determination provides no method that enables a service provider to achieve compliance in a practical cost-effective and reliable manner. As noted above, service providers rely on staff at over 30,000 retail outlets to follow a complex and time consuming process to achieve compliance. While it is impractical for service providers to exercise day-to-day supervision of such staff, service providers are exposed to substantial penalties for each and every individual breach of the regulations.

2.4.12 Alternative compliance methods defined in the Determination are not practical:

- The Prepaid Determination permits service providers to collect and verify customer identity at activation. However, Government officials raise privacy concerns whenever industry attempts to progress this compliance method.

Verification of identity at a point of activation would rely on access to private and Government databases to enable cross-checking of information supplied by the customer. While the customer may supply information such as a passport number, Government has yet to allow service providers any means to match this information. Clearly, if Government requires information to be collected and verified, it should also make it clear that service providers and holders of the source information are permitted to undertake the necessary actions as a lawful activity under the Privacy Act.

³ Lettice, John (2000, March 2), Swiss move to bloc al-Qaeda mobile phone supply. The Register.

- Service providers may submit a Compliance Plan to ACMA for approval. There are no instances of such plans being adopted and the approval process does not require a balance of risk, cost, practicality and effectiveness.

2.4.13 AMTA and industry question why high levels of compliance are being targeted by the Regulator when the fundamental flaws in the regime have a much greater impact on its overall effectiveness. AMTA submits that the level of compliance to the regulations and the Regulator's response to non-compliance should be commensurate with the other risks that correct ID information is not supplied, or is no longer relevant due to subsequent trading of the service or, for imported services, has never been collected.

2.4.14 Compliance issues are further exacerbated because ACMA's compliance action appears to have targeted those who have made the greatest effort to ensure regulatory compliance; ACMA appears to have focused its compliance action on those mobile carriers who have participated (at great cost) in the 'AMTA prepaid scheme' – an initiative to increase compliance with identity check information at point-of-sale. The same regulatory vigour does not appear to have been applied to other mobile operators in the market. This heavily penalises those attempting to do the 'right thing'. First, they incur the costs of participating. Second, they are the focus of compliance action (and despite their best efforts will not be able to achieve full compliance because the scheme is inherently flawed). And third, they are likely to lose customers to those not 'doing the right thing' as word spreads that people can get a [name of CSP] simcard from [name of retailer] without completing a form⁴.

2.4.15 AMTA notes that internationally, six countries actively considered and rejected proposals for a prepaid registration policy following a consultation process⁵. Opposition to the requirements included cost, practicality, privacy rights and effectiveness.

2.4.16 In this context, AMTA questions whether the current Prepaid Determination brings a net benefit to the Australian society and again repeats its call for regulators and policy makers to publicly commit to best practice regulation and consultation, including ensuring that Regulatory Impact Statements and related cost-benefit analyses are understood, respected, applied and satisfied in spirit (refer further to comments in AMTA's 2005 submission to the Regulation Taskforce).

⁴ Eg AMTA has fielded inquiries from retailers 'doing the right thing' who complain that '[name of store] doesn't bother' (filing in the forms).

⁵ Canada, Czech Republic, Greece, Ireland, the Netherlands and Poland.

2.4.17 AMTA encourages relevant government agencies, LEAs and industry stakeholders to work together towards a more balanced and effective regime to meeting national security, consumer and industry needs and ensuring that any discussions are informed by empirical evidence from all sides – including the LEAs. AMTA suggests that the Anti-Money Laundering and Counter Terrorism Financing Act 2006 and associated regulation provides an example of a less prescriptive and more practical and achievable model for customer identity and verification.

2.5 *Privacy*

2.5.1 On a more positive note, AMTA notes that there has been progress in other areas with a through review of privacy regulation conducted by the Australian Law Reform Commission resulting in recommendations that, if followed through, will reduce duplication, inconsistencies and provide much-needed clarification around the interrelation of the *Privacy Act 1988* and the *Telecommunications Act 1997*⁶.

2.5.2 As noted above in relation to the prepaid regime, however, there are still problems and inconsistencies with the interrelation of the Privacy Act and other telecommunications regulation.

3 Conclusions and recommendations

3.1 The telecommunications industry operates under a complex co-regulatory model of regulation with overlap and inconsistency between jurisdictional and agency responsibilities and numerous bodies developing policy without adequate reference to other agencies or industry. The prepaid and mobile content case studies highlighted in this submission provide just two examples of the inefficiencies, ineffectiveness and other problems that this creates.

⁶ For details of ALRC review recommendations, see: <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/> and recommendations relating to telecommunications at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/3.html#Heading668>

- 3.2 Such duplication and complexity results in sub-optimal policy processes and outcomes. Even where a good outcome is eventually achieved, poor process increases the cost of development and compliance. These costs are inevitably passed on to consumers
- 3.3 In its 2005 submission, AMTA made a number of suggestions to make for a better system for making and reviewing regulation. These points are still valid.
- 3.4 Regulators should publicly commit to best practice regulation and consultation. This requires cultural support at all levels within organisations. Having Regulatory Impact Statements (**RIS**) and related procedures in place is insufficient unless they are widely understood, respected and satisfied in spirit.
- 3.5 All proposed delegated legislation should be accompanied by a RIS, and the RIS process and final documents must be transparent.
- 3.6 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 or than existing regulation. In other words, government must test whether existing regulation can be applied to remedy a perceived issue before recommending or making yet more regulation.
- 3.7 Ministers and departments must ensure that regulators are not de facto policy makers.
- 3.8 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.
- 3.9 AMTA thanks the Commission for the opportunity to provide further input to its Review and would be happy to provide further information or answer any questions on any issues.

4 Apendicies

Attachment A: Indicative List of Regulation for the Mobile Telecommunications Sector

1. **Primary legislation** includes:

- Australian Communications & Media Authority Act 2005
- Telecommunications Act 1997
- Trade Practices Amendment (Telecommunications) Act 1997
- Telecommunications (Universal Service Levy) Act 1997
- Telecommunications (Carrier Licence Charges) Act 1997 as amended in 2005
- Telecommunications (Numbering Charges) Act 1997 as amended in 2005
- NRS Levy Imposition Act 1998
- Telecommunications (Consumer Protection and Service Standards) Act 1999 as amended in 2005 regarding the National Relay Service
- 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 C522:2007 Calling Number Display
The Code was revised to clarify C/CSP use of CLI information, clarify requirements on C/CSPs to provide a per line display for unlisted entries and review code requirements in relation to VoIP providers.
- ACIF C564:2004 Deployment of Mobile Phone Network Infrastructure
The Code specifies the best contemporary practices in the areas of design, installation and operation of radiocommunications infrastructure. The Code requires the application of a precautionary approach to the deployment of radiocommunications infrastructure and contains obligations on carriers to consult.
- ACIF C570:2005 Mobile Number Portability
The Industry Code has been developed to specify the procedural arrangements required to Port a Mobile Service Number between Carriage Service Providers, where there is a

change in Mobile Carrier network. Elements of the Industry Code could be utilised by Carriers and Carriage Service Providers in other customer transfer scenarios. Carriers and Carriage Service Providers (including long distance CSPs) must fulfil their routing obligations under the Numbering Plan. This Industry Code provides for automated interfaces between Mobile Carriers/Carriage Service Providers to support Mobile Number Portability in the distribution of routing information.

- C628:2007 Telecommunications Consumer Protections (TCP)

This industry code contains service provider rules about:

- advertising of products and informing customers about the prices, terms and conditions of products on offer;
- determining when consumer contract terms may be considered unfair, including having regard to the intelligibility and accessibility of contract terms;
- billing procedures and the provision of billing information to customers;
- the credit assessment of customers, the provision of security and credit control tools, and a requirement to have a financial hardship policy to assist customers experiencing financial difficulties;
- ensuring all transfers of service that occur are authorised and verified; and
- complaint handling procedures for information provision to customers and recording of their complaints.