

Regulatory Burdens: Social and Economic Infrastructure Services
Productivity Commission

Via email: regulatoryburdens@pc.gov.au

April 2009

Re: Annual Review on Regulatory Burdens on Business: Social and Economic Infrastructure Services

Thank you for the opportunity to provide input to the Productivity Commission's Annual Review on Regulatory Burdens on Business: Social and Economic Infrastructure Services.

About CTN

The Consumers' Telecommunications Network (CTN) is a national peak body of consumer and community organisations, and of individuals representing community interests, who participate in developing national telecommunications policy. CTN's members are national and state organisations representing consumers from non-English speaking backgrounds, deaf consumers, indigenous people, low income consumers, people with disabilities, young people including children, pensioners and superannuants, rural and remote consumers, women and consumers in general.

As of July 1 2009, CTN will become part of the Australian Communications Consumers Action Network (ACCAN). The purpose of ACCAN is to enhance consumer advocacy, reduce duplication, maintain and enhance existing skills and diversity of representation, undertake research and analysis from a consumer perspective. The overarching objective guiding this new body is to ensure effective and equitable communications for all Australian citizens.

Introductory comments

CTN has been involved in telecommunications regulatory debates for 20 years. Telecommunications is subject to a significant amount of industry-specific regulation, particularly self-regulatory codes of practice, with very precise specifications. The self-regulatory regime reflects a government policy preference based on a belief this is the most expedient approach to regulation in this industry. It is certainly not, in our view, reflective of a mature industry with the ability to successfully deal with its own issues.

As we discussed at length in our Consumer Policy Framework Review submission, we are strongly of the view that what constitutes “unnecessary regulation” is often contentious. We do not endorse a large-scale repeal of “unnecessary” telecommunications regulation. We agree that telecommunications is subject to complex regulation, but do not think it is necessarily redundant or part of the reason telecommunications providers have so much difficulty adhering to the self-regulation regime that has developed over the past decade. It is important to note that much of this complexity is a result of industry driven processes that have produced industry codes of practice.

The introduction of a new consumer protection law currently being developed by the Treasury will impact heavily on the telecommunications industry. Several key proposed areas of legislation are covered in the over-arching Telecommunications Consumer Protection Code (TCPC), the key self-regulatory consumer protection instrument. Clearly the new legislation will take precedence over the TCPC and the Code will have to be amended accordingly. We believe that Codes should not be repealed until the new consumer law is enacted and the impact on industry practices can be observed over time, to ensure existing consumer protections are not lost.

Industry specific regulation is prescriptive - but necessary

It is true that self regulatory Codes of practice contain detailed, prescriptive guidance for industry about how they must deal with their customers. Many of the requirements are essentially interpretations of the broad provisions contained in the Trade Practices Act (TPA). This does not mean that the TPA should be sufficient and the Codes, guidelines and other subordinate instruments are irrelevant.

The purpose of self regulation in telecommunications is to fill gaps that the TPA, appropriately, does not detail. Telecommunications is an innovation-based industry; regulation thus needs to be sufficiently flexible to be able to ensure consumer rights are safeguarded. When industry practices necessitate it, the regulator needs a framework that gives it the power to undertake swift enforcement action. However, over the past 10 years rules have been developed in direct response to industry behaviour that should have been adequately covered by the TPA. For example – Codes have explicit rules pertaining to the use of ‘free’; credit assessing customers instead of offering services with unlimited credit limits; not misrepresenting the company a salesperson is working for; and providing basic information to a customer about the item they are buying.

The level of detail is sometimes extraordinary, but reflects the divergence between what a telecommunications service provider thinks it needs to tell their customer, and what the customer wants to know about what they are purchasing. The level of prescriptive regulation has been a direct response to a disregard for the high level principles contained in the TPA. For that, the industry can only look to itself for responsibility.

Complaint statistics reflect lack of compliance, not problematic regulation

Ultimately, it is consumers who are paying for a fairer relationship between themselves and their service providers through regulation. Whilst CTN has continues to participate in the self-regulatory arena, we have long had reservations about the overall effectiveness of the regime as a means of adequately ensuring consumer protection regulation is fair and balanced. The over-reliance on addressing consumer problems by creating new regulation, rather than enforcing existing regulation, has contributed to the expansion of consumer complaints.

The telecommunications industry generated nearly 150,000 complaints last year; around 30% of all complaints were, to quote the TIO “about very simple process and service issue[s]”¹. The TIO’s complaint categories reflect clauses contained in Codes of Practice; essentially, the complaint statistics reflect a breakdown between what is required by a Code, and the business conduct between the service provider and their customer.

In light of the industry’s ongoing inability to comply with self-regulatory codes of practice, we see no grounds for repealing any of the consumer protection provisions contained in self regulatory instruments. We ask that the Commission recognise that business costs alone are not the only factor that needs to be considered, particularly where access to essential services such as telecommunications products are involved. The costs of complaints and their impact on the consumer and small business also need to be considered.

Our Consumer Policy Framework submission argued at length for greater enforcement as a means of ensuring regulatory compliance. In our view, more punitive enforcement, as opposed to less regulation, is a far more appropriate response to this combination of more regulation and less compliance. We note that the Australian Communications and Media Authority is currently reviewing consumer-related industry code processes, which may also impact on the Commission’s work.

Repealing regulation won’t resolve problem of spiralling consumer complaints

Depending on the content of the new consumer law, we expect there will be a need to reconsider the role and scope of self-regulation in telecommunications. In principle, CTN does not support the repeal of regulation that functions to protect and empower consumers. We have fought hard to secure these protections for consumers.

We do recognise, however, that there may be some redundant regulation that could be repealed without negatively impacting consumers. This could occur after only *after* the new consumer law has been introduced and a full

¹ <http://www.tio.com.au/Members/MemberPublications/MNews/connect-resolve.htm>; accessed 24-4-09

exploration of overlaps and redundant regulation could be considered in full consultation with consumer groups. We believe this needs to be facilitated by the Australian Communications and Media Authority as an independent body, not an industry group like Communications Alliance.

Any decisions to repeal would have to be part of an inclusive process between consumers, government and industry representatives with in-depth knowledge of the issues and a good understanding of the impact such changes could have. The expertise required for a detailed analysis lies within the existing industry. We believe that the regulator ACMA should provide the forum for this work. We will be discussing this in greater detail in our forthcoming submission to the Department of Broadband, Communications and the Digital Economy's review of Consumer-code related processes.

We also ask that the Commission specifically ensure that any recommendation of work delegated to the industry explicitly requires adequate consumer representation in any work undertaken to review self-regulatory instruments. This is important because currently the self-regulatory body Communications Alliance has no consumer representation on the Board, no functional consumer advisory bodies (both having been abolished on the grounds it will engage with ACCAN in the future), and a recent history of refusing to undertake proper consumer consultation on matters of critical importance to consumers (the Mobile Premium Services Code).

Cost-benefit analyses and a minimalist approach aren't always applicable

CTN agrees that regulation should be targeted and effective. We don't, however, agree that regulation should necessarily be minimal 'to achieve objectives', as outlined in Box 3 of the Issues Paper. Often regulation has multiple objectives, and can be aimed at setting the ground rules for better practices – for example requiring financial hardship policies or regulating to ensure information about accessibility features of telecommunications equipment. These regulations have significant social benefits that are difficult to quantify – and would doubtless be even more beneficial were the regulations fully implemented and complied with.

It is important to acknowledge that a cost-benefit analysis is not the only policy tool that should guide regulatory decisions, and that it has only limited validity where consumer protection and essential services are involved. The only attempts to measure the benefit of telecommunications for consumers in telecommunications policy that we are aware of sits in the ACMA Communications Report, however this is very general assessment of the benefits to consumers, only mentioning price savings, faster internet services, and improvements in the quality of those services. The report² gives dollar estimates of the benefits to small business, GDP and employment, but

² See Chapter 10 Economic benefits resulting from changes in telecommunications services, online at: http://www.acma.gov.au/WEB/STANDARD/pc=PC_100932

nothing about how life-changing, for example the impact of a financially ruinous telephone bill can be for someone on a fixed income.

Time and again consumer groups try to get issues on the agenda only to be asked for proof about the severity of the detriment, yet this often cannot be quantified particularly given the lack of funding for research projects and the split jurisdictions for many telecommunications complaints.

Similarly, when we ask for consumer protection the responses are always couched in terms of the cost to industry, rather than the benefit to the consumer. This cost versus benefit dichotomy is a problem raised by many consumer advocates and this Productivity Commission review could be a good opportunity to implement better processes that try to find a more balanced way of dealing with issues, rather than simply claiming it will cost too much to fix it.

Whilst efficiencies can be gained through the reduction of regulatory burdens, we are mindful that anticipated impacts are always possible. We are wary that removing 'unnecessary' regulation can have unintended consequences for disadvantaged and vulnerable consumers, and think due care needs to be taken in rushing to repeal regulation or replace it with something lesser, for the sake of reducing regulatory burden.

Rebalancing the onus of proof

There is also a related issue about the need for a mechanism by which policy makers can give consumer issues priority when necessary over the needs of industry, rather than always relying on industry to self-regulate. The ability to "prove" that problems really have to be dealt with is one discussed elsewhere in greater detail, but essentially there needs to be a rebalancing of the onus of proof. A mechanism needs to be developed and built into the self-regulatory framework which requires industry to demonstrate why they are reluctant to regulate on an issue raised by consumer groups.

A recurring issue for consumer groups is how to encourage legislative action when the industry is unable to deal effectively, with a consumer issue via self-regulation. There are many reasons that self regulation does not work: the amount of resources required to support the regime; the disproportionate power of industry groups which results in codes that are not as consumer-oriented as they should be; and the fact that competitively charged issues often cannot be resolved with consensus driven processes. Attention needs to be given to developing a better way to identify instances when industry processes cannot deliver appropriate protections for consumers. There needs to be a trigger point at which an issue of consumer protection can be escalated beyond the realm of self-regulation. This is essential to protect the interests not only of consumers but smaller providers who do not have a strong voice in industry bodies like Communications Alliance.

CTN has commented in great detail to the Commission previously about our belief that self-regulation is relied upon as the only policy tool in

telecommunications, when other regulatory approaches would be more appropriate. The development of a self-regulation checklist would assist in determining if the area is appropriate to be self-regulated, or if there is a general need to enact a consumer protection due to the benefits it will provide. A draft version of a self-regulatory checklist is attached.

Concluding remarks

Burdensome and/or unnecessary regulatory obligations on telecommunications service providers cannot be addressed by simply removing regulation; the problems of this industry are more complex than having to meet multiple, inconsistent regulatory requirements across multiple jurisdictions. We seek the Commission's support for a review of the applicability and relevance of the self-regulatory regime to begin after the implementation of the national consumer law.

We also ask that the Commission recognise that the needs of consumers are not subordinate to industry preferences for light-touch regulation. A prudent approach to regulatory repeal and a better enforcement regime that encourages compliance is a far better outcome than allowing industry to remove regulations for their own convenience.

Should you wish to discuss this submission in more detail, please contact myself or Sarah Wilson at the Consumers' Telecommunications Network on 02 9572 6007 or at ctn@ctn.org.au.

Yours sincerely,

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CTN Chief Executive Officer

This submission was prepared by Teresa Corbin, CTN Chief Executive Officer, and Sarah Wilson, CTN Policy Advisor. It has been approved out of session by the CTN Board.

SELF-REGULATION CHECKLIST

(Version One)

Introduction

Since the introduction of Self-Regulation in telecommunications there have been significant questions raised, from time to time, about assumptions around the efficacy of a self-regulation regime.

As a part of CTN's ongoing work and responsibilities in telecommunications self-regulation, we have produced a self-regulation checklist, to be applied at least by the regulator, to assess the efficacy of the process for particular issues.

A likely trigger for the application of the self-regulation checklist would be significant delays on, or complaints about, the progress on a code or guideline.

Aim

The aim of this checklist is to ensure that better decisions about regulatory tools can be made before limited resources are wasted. The first step is to get the various stakeholders to answer a survey independently, by the regulator, so an assessment can be made on the likelihood of a positive outcome from the self-regulation process.

NOTE: This checklist provides suggestions and is not exhaustive, nor is it definitive

INITIAL STAKEHOLDER SURVEY (conducted by the Regulator)

A. **OUTLINE** THE ISSUE NEEDING POSSIBLE REGULATORY RESPONSE:

B. WHAT **PROCESS** HAS THE ISSUE ALREADY UNDERGONE?

C. LIST THE **OUTCOMES** THAT YOU, AS A STAKEHOLDER, WANT:

D. HOW DO YOU THINK THESE **OBJECTIVES** CAN BE REASONABLY ACHIEVED?

Identify if the matter can be resolved through a self-regulatory response

Key Factor	Question	YES	NO	General comments opportunities, problems, issues or limiting factors.
1. General Agreement	a. Is there General agreement among all stakeholders about the objective of the proposed regulation?	<input type="checkbox"/>	<input type="checkbox"/>	
2. Open dialogue	a. Is there obvious common ground for all the stakeholders?	<input type="checkbox"/>	<input type="checkbox"/>	
	b. If not, is it deemed possible to reach common ground before any activities are committed to or begun ?	<input type="checkbox"/>	<input type="checkbox"/>	
	c. Are the parties likely to be able to reach a consensus within a reasonable time frame?	<input type="checkbox"/>	<input type="checkbox"/>	
	d. Is there, or has there been, constructive dialogue conducive to finding negotiated solutions?	<input type="checkbox"/>	<input type="checkbox"/>	
2. Competition Effects	a. Is the matter to competitively charged due to the nature of the current market environment?	<input type="checkbox"/>	<input type="checkbox"/>	
	b. Does the industry require a level playing field in order to do business?	<input type="checkbox"/>	<input type="checkbox"/>	
	c. Could the objective be undermined by just one participant withdrawing from the self-regulatory processes?	<input type="checkbox"/>	<input type="checkbox"/>	
3. Commitment to solution	a. Is there a genuine desire on behalf of the industry to resolve the issue?	<input type="checkbox"/>	<input type="checkbox"/>	
4. Resourcing	a. Do all the stakeholders have enough resources to develop a code?	<input type="checkbox"/>	<input type="checkbox"/>	