

Regulatory Burdens: Social and Economic Infrastructure Services
Productivity Commission

Via email: regulatoryburdens@pc.gov.au

July 2009

**Re: Annual Review of Regulatory Burdens on Business: Social and Economic
Infrastructure Services – Draft Report**

Thank you for the opportunity to provide input to the draft report.

About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is Australia's new communications consumer watchdog. The purpose of ACCAN is to improve consumer advocacy, undertake research and analysis from a consumer perspective and to make the market work for communications consumers. The operations of ACCAN are made possible by funding provided by the Australian government.

List of Recommendations

1. A review of approaches to telecommunications regulation with a specific focus on ensuring regulation is delivering outcomes to the market;
2. Any regulatory reviews specifically require negotiation with consumer groups, including ACCAN;
3. That the Commission recognise that in some cases the regulator ACMA may have a role in brokering policy development and not make recommendations that may effectively hinder this outcome;

4. That the proposed self-regulation checklist be identified in the final report as a tool for deciding whether self-regulation is the best tool for addressing an identified market failure;
5. That the Commission recommend that regulatory agencies (ACCC, ACMA) prioritise rigorous enforcement and fully utilise the range of penalties at their disposal to address spiralling complaint trends;
6. That the Commission seek comparable information on costs of creating regulation in order to make meaningful comments on costs of Code development;
7. That the Commission recommend that ACCAN be a central stakeholder in the proposed review of customer information with the DBCDE and ACMA;
8. Any regulation identified for repeal must occur in partnership with consumer groups and avoid resulting in asymmetric regulation.

Introductory Comments

The predecessor of ACCAN, the Consumers Telecommunications Network, provided a late submission to the initial discussion paper. We anticipate that the Commission will be taking the contents of that submission into account. This submission is in addition to the CTN submission, and addresses some of the view set forth in Chapter 4 of the Draft report. It pertains specifically to telecommunications regulation. We expect to be able to comment on other communications issues in subsequent reviews.

What constitutes “unnecessary regulation” is often contentious. We have some concern that the Commission has accepted many unsubstantiated claims by industry in their initial submissions that don’t recognise steps already taken to streamline regulation to make it easier to implement for industry. Communications Alliance concluded in their initial submission to the review that:

Some of this regulation was developed in a piecemeal fashion accompanied with a failure to acknowledge or adequately take into account regulatory measures that had gone before. That means that the industry has been straddled with many regulations that are unnecessarily burdensome, complex, and/or duplicative. As a result, there is significant scope to simplify and rationalise these regulations and effect a real reduction of the regulatory burden on the industry. This can be achieved

while ensuring that the objective of the various regulations continues to be met¹.

In 2008 the 6 key consumer protection Codes were consolidated into a single Telecommunications Consumer Protection (TCP) Code to, in the words of Communications Alliance, “simplify code compliance and ensure consistency of interpretation”² so service providers could better understand and meet their regulatory obligations. And yet, the TIO’s 2008 Annual Report noted a 46.1% increase in complaints on the previous year³. Another example is the creation of the Mobile Premium Services Code in 2009, which has rules about (amongst other things) advertising, information provision, and complaint handling – which are all covered in great detail in the aforementioned TCP Code. Despite having an existing Code which could have been amended to incorporate MPS, the industry chose to create a new piece of regulation.

The evidence suggests that the issue at hand is not necessarily the claimed “failure to acknowledge” or “take into account” existing regulation which has created what is widely believed to be burdensome regulation, but widespread lack of adherence to regulation – even when it has been consolidated and efforts have been made to ensure it is consistent and implementable. It is not acceptable to simply accept that regulation is burdensome, complex, and so forth without recognising that the problem is not so much with the regulation but the willingness of industry to be regulated and adhere to regulation they’ve created.

ACCAN would like the Commission to recommend some ‘bigger picture’ reviews of the extent to which regulation in telecommunications actually works for industry or consumers and how it can be improved – and to finally develop strong frameworks around how to develop regulation that can work, and a commitment to enforcement. Repeals of regulation need to take into account consumer issues, and we ask that the Commission ensure all its recommendations explicitly require consultation with ACCAN, to ensure that negotiated repeals will not disadvantage consumers.

Recommendation: A review of approaches to telecommunications regulation with a specific focus on ensuring regulation is delivering outcomes to the market

Recommendation: Any regulatory reviews specifically require negotiation with consumer groups, including ACCAN

¹ Communications Alliance submission, p7

² “ New ‘one-stop’ telecommunications consumer protections code to greatly assist telecommunications consumers”

http://www.commsalliance.com.au/data/assets/pdf_file/0013/913/MR94-07-TCP-Code.pdf

³ TIO Annual report 2007/8,

http://www.tio.com.au/publications/annual_reports/ar2008/annual_2008_1.html

Development of regulation

Role of ACMA: We note that other respondents have made claims about ACMA's 'interventionist' approach to regulation. This is most certainly not the view of consumer advocates working in the telecommunications space; ACMA is often criticised for inaction, particularly in the face of repeated breaches of self-regulatory Codes year after year, suggesting systemic industry-wide non-compliance. We urge the Commission to recognise that ACMA has different approaches depending on the sector it is seeking to regulate, and to be more specific in conclusions about ACMA's regulatory approach and the consequences.

ACCAN's predecessor, CTN, and other consumer groups have written countless submissions to government inquiries about the lop-sided and ineffective self-regulatory regime which fails to genuinely meet the needs and expectations of consumers. One of the solutions identified to progress consumer issues is through using ACMA as a neutral forum where consumer issues are not structurally blocked and there is intent to genuinely engage with consumer issues, so clearly missing in Communications Alliance. This was one of CTN's key recommendations to the Department of Broadband, Communications and the Digital Economy in their review of Consumer-Code related processes, from May 2009⁴.

We have found industry is often unwilling or unable to genuinely negotiate on Code provisions where there is a perceived commercial cost involved. The disproportionate number of industry members makes it incredibly difficult to garner support for proposals to deal with consumer issues, particularly as a 'consensus-based approach' is used. This imbalance seriously inhibits the capacity of self-regulation to develop Codes that are a genuine attempt to address consumer protection issues. Given the inherent conflict of interest, consumers argued that Code development should occur in a neutral forum where the power of all parties is equal.

Accordingly, we strongly recommended moving Code development processes under the auspices of the Australian Communications and Media Authority's Consumer Consultative Forum (the ACMA CCF). We argued that ACMA is the appropriate body for future regulation for the following reasons:

- It has an existing Consumer Consultative Forum, consisting of high-level consumer, industry, and regulatory agency representatives. It has the expertise around the table to consider issues and agree on the way forward, therefore cutting out much of the delay which occurs in industry-dominated forums

⁴ Available online at:
http://www.dbcde.gov.au/data/assets/rtf_file/0004/116446/Consumers_Telecommunications_Network.rtf

- It has the oversight of the industry as a whole, and can therefore share information in a way that will facilitate a full scoping of issues and solutions
- It can play a role in deciding the best regulatory or policy tool for the issue at hand in a neutral and even handed manner. This will solve the perennial problem of industry arguing for low level, non interventionist guidelines and Codes and ensure a vigorous, evidence-based approach is used in a transparent and accountable forum
- It will promote efficiencies and timeliness of consumer protection development. For example, the “ping-pong” effect of sending Codes back when issues have not been addressed to ACMA's satisfaction, or where multiple regulatory instruments are employed to get a certain outcome
- Consumer confidence in the regulator is far higher than for industry dominated bodies
- ACMA has much greater genuine accountability and transparency of its actions and decisions. High standards that are not abandoned on an ad hoc basis will reinforce confidence in both the outcomes and the quality of the policy response
- ACMA is also better placed to recognise when a proposed regulatory response is not suited to the issue – it can apply more balance than either supply or demand side on their own
- It is not hampered by a poor reputation and outcomes
- The telecommunications industry has shown itself incapable of developing Codes in a manner that is consistent with inclusive practice – they regularly exclude consumer input and have ignored multiple opportunities to engage consumer interests.
- ACMA has access to information that can be injected into issue identification. We presently have a circular situation where consumers are asked to provide proof of the extent of a detrimental consumer issue, when it is service providers who are the most likely to be in receipt of that information and unwilling to share it
- A co-operative forum where all parties have an interest in getting a satisfactory outcome has a much greater opportunity to succeed
- It is in a position to monitor compliance arrangements and act when necessary. This will address the fundamental problem of having Codes of practice which generate complaints and yet compliance is never required. This will require a new enforcement culture within ACMA
- It will encourage efficiencies by allowing quick registration of Codes – several in recent years submitted by CA have not met ACMA's requirements, and thus delayed the implementation of consumer protections.

It may be that the ACMA CCF sets the broader terms of reference and scope of a work project and directs a working group to undertake the actual work. The important thing is that a high level consensus is achieved, and that accountability lies with a forum that can genuinely deliver an outcome that satisfies all the stakeholders, not just the industry.

The DBCDE is still considering the submissions on this issue. Our suggestion is not that ACMA develop policy as such, but provide a forum to undertake the work which Communications Alliance is incapable of delivering. We urge the Commission to

recognise that consumer groups see a role for ACMA in regulatory development, and not to unduly influence the outcome of that inquiry which has a much deeper understanding of issues in telecommunications policy development that has been presented to the Commission as part of this particular review.

Recommendation: That the Commission recognise that in some cases the regulator ACMA may have a role in brokering policy development and not make recommendations that may effectively hinder this outcome

Self-regulatory checklist: In 2007, ACCAN's predecessor CTN developed a Self-Regulation Checklist. The aim of the 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 for the regulator, so an assessment can be made on the likelihood of a positive outcome from the self-regulation process. A likely trigger for the application of the self-regulation checklist would be significant delays on, or complaints about, the progress on a Code. If Code development were auspiced by ACMA, a neat process of appeal to ensure progress was made could be initiated.

SELF-REGULATION CHECKLIST

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? | * | * | |
| 2. Open dialogue | a. Is there obvious common ground for all the stakeholders? | * | * | |
| | b. If not, is it deemed possible to reach common ground before any activities are committed to or begun ? | * | * | |
| | c. Are the parties likely to be able to reach a consensus within a reasonable time frame? | * | * | |
| | d. Is there, or has there been, constructive dialogue conducive to finding negotiated solutions? | * | * | |
| 2. Competition | a. Is the matter too competitively charged | * | * | |

| | | | | |
|----------------------------------|--|---|---|--|
| Effects | due to the nature of the current market environment? | | | |
| | b. Does the industry require a level playing field in order to do business? | * | * | |
| | c. Could the objective be undermined by just one participant withdrawing from the self-regulatory processes? | * | * | |
| 3. Commitment to solution | a. Is there a genuine desire on behalf of the industry to resolve the issue? | * | * | |
| 4. Resourcing | a. Do all the stakeholders have enough resources to develop a code? | * | * | |

This checklist is an important step toward ensuring relation can be developed in a timely and targeted way, ensuring outcomes for consumers and that industry resources aren't wasted by creating regulation that is superfluous and unenforceable.

Recommendation: That the proposed self-regulation checklist be identified in the final report as a tool for deciding whether self-regulation is the best tool for addressing an identified market failure

Enforcement: We recognise the issues raised by industry, restated in the draft report, about the processes for developing regulation including industry Codes. In particular we note the preference for new regulation rather than enforcement. The level of prescriptive regulation is sometimes extraordinary, but is a response to consumer detriment that has arisen due to 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. 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.

ACCAN would be extremely pleased for the Commission to recommend a much more rigorous approach to enforcement of existing regulation, as opposed to creating new regulation, which has effectively allowed telcos to shift responsibility for their poor regulatory compliance. We have long believed that enforcement is the missing link in telecommunications regulation. The provisions of the existing TCPC contain broadly agreed principles that, if adhered to, would go a long way to empowering consumers to make choices and would address many of the 150,000 complaints made to the Ombudsman every year.

Recommendation: That the Commission recommend that regulatory agencies (ACCC, ACMA) prioritise rigorous enforcement and fully utilise the range of penalties at their disposal to address spiralling complaint trends

Costs

The Commission should not confuse the claimed industry costs of the development of the Consumer Contracts Code with the usual costs of Code development and review. It would be grossly incorrect to assume that other Code development has incurred similar costs, with perhaps the exception of the TCP Code were anywhere near as onerous.

The standard Code development/review process undertaken by Communications Alliance does not incur costs such as the employment of legal drafters, an independent chair, and so on, which resulted in large costs quoted in the draft. The costs for developing that Code were incurred because a strict timeframe had been imposed by the then Minister, Senator Helen Coonan, under the threat of more onerous regulation as an alternative. This occurred because a Code of practice to deal with unfair contract terms was many years overdue.

We suggest the Commission seeks out the real average costs of Code development and review, in order to make meaningful comments on costs, so as to ensure a meaningful assessment can be made about costs of creating Codes can be made.

Recommendation: That the Commission seek comparable information on costs of creating regulation in order to make meaningful comments on costs of Code development

Consumer information

We support the Commission's recommendation 4.1 pertaining to a review of customer information requirements. This is a key work area for ACCAN, and we ask that the Commission specifically recommend that the review be undertaken in direct consultation with consumer groups. We suggest that the recommendation be

adjusted so that the central purpose is ensuring information required by regulation demonstrably meets the needs of consumers, rather than just cuts back the regulatory burden. We need to ask what the goal of consumer information provision is and set some quantifiable benchmarks for this regulation to be worthwhile for consumers and industry.

In a 2009⁵, CTN proposed that before any further, significant policy work is done on information disclosure and consumer education in the ICT market, a landmark research effort must assess the existing customer information, including: what are the relevant Codes and legislation currently in play; what's working and not working; what are the key principles (including consumer rights); what domestic and international work has been done; identification and evaluation of options (regulated information, public information campaigns, communication through trusted intermediaries, public sector networks, public or private advice services, internet groups/advice sites); evaluation of all presentation options available; evaluation of monitoring options, and more. This research must engage all stakeholders (consumers, community organisations, Government, industry, media outlets). It may be part of or separate from a national effort to evaluate the state of consumer information.

The culmination of the research should be a coordinated strategy of information disclosure and consumer education that delivers outcome-based goals for consumers. The strategy should be well resourced and should describe the roles of all stakeholders. The strategy should also focus on delivering consumers with summarised information on their rights using the most appropriate methods, and must contain a practical strategy for providing advisory services to consumers without access or capacity to navigate the market.

Recommendation: That the Commission recommend that ACCAN be a central stakeholder in the proposed review of customer information with the DBCDE and ACMA

Prepaid mobile phone identity checks

Consumer groups submitted comments to the pre-paid identity check scheme when ACMA issued a discussion paper in 2006. ACCAN's predecessor, CTN, expressed concern about how the proposed pre-paid identity check regime would deliver any national interest outcomes that could not be achieved through other means, in much the same way as other industry stakeholders noted in the draft report. It was further argued that the potential for mobile location information technology in the future to give law enforcement agencies information that is far more relevant (and current)

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than what was collected when a pre-paid mobile service was activated⁶. Now the regime has been implemented, doubts have also been expressed by law enforcement agencies about how effective this has been⁷.

It is perhaps not the role of the Commission to recommend that government policy decisions be rigorous, evidence based, and have a clear idea of what is to be achieved by a particular regulation. However, if the Commission intends to recommend a review of the pre-paid ID checks scheme, it would be wise to ensure that the review also ensures that asymmetric regulation does not result. Again, we ask the commission to ensure that repeals are done on an issue by issue basis in full consultation with consumer groups.

Recommendation: Any regulation identified for repeal must occur in partnership with consumer groups and avoid resulting in asymmetric regulation

Captioning

We believe that this issue is being dealt with by the DBCDE review into Access to Electronic Media. We agree with Free TV that there should be a single regulatory arrangement covering captioning, and that the appropriate way to implement this would be an amendment to the *Broadcasting Services Act*. This amendment should also cover captioning on subscription TV. This would bring Australia into line with the US and UK, where captioning levels are covered by legislation, and no distinction is made between free-to-air and subscription television.

⁶ Full submission online at: http://ctn.org.au/admin/ktmlpro/files/uploads/Submissions/2006-04_CTN_submission_to_Improving_Identity_Check_Processes_for_Pre-paid_Mobile_Services.pdf

⁷ To quote a recent news article:

In evidence to the Federal Parliamentary Joint Committee on the Australian Crime Commission, senior WA police in 2007 described how outlaw motor cycle gangs and other criminals used multiple SIM cards to evade surveillance and tracking.

"Most of the people who are involved in drug dealing or any other criminal activity, where they are aware that we might be trying to track them through telephone intercepts or whatever, will change their cards two, three, four times a day," Detective Superintendent Kim Porter told the committee during its probe into the impact of organised crime.

"They might change them every second conversation."

Superintendent Porter also told the committee there was evidence that criminals were buying mobile service retailers so they had a ready supply of untraceable SIM card

<http://www.watoday.com.au/wa-news/bad-to-the-phone-20090420-abwm.html> accessed 28-4-09

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 and potential reform 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. Consolidation or repeal of regulation needs to be done in partnership with ACCAN.

Should you wish to discuss this submission in more detail, please contact myself or Sarah Wilson on 02 9288 4000 or via info@accan.org.au

Yours

Chief Executive Officer