



Review of the Australian Communications and Media Authority

Submission by the Australian Communications
Consumer Action Network to the Department of
Communications

17 August 2015

About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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ACCAN welcomes the opportunity to participate in the review of the ACMA. Our comments are focused on the impact of the current and future role of the regulator on consumer interests in telecommunications. Accordingly, our responses below are directed to Issues Paper questions that are relevant to ACCAN's scope.

1. Are there unique aspects of the communications sector that require a particular style of regulation and regulator?

Most communications services are recognised as essential to a range of activities from access to government services, paying bills, banking, employment and education. Barriers to access can have a severe impact on consumers and businesses alike. Communications have become so entwined in consumers' lives that losing access can have a serious impact on their ability to participate in the economy and society generally. An active regulator is required to ensure detriment to consumers is minimised.

The communications sector is unlikely to produce optimal outcomes for consumers without some degree of regulatory oversight. It is a highly complex area, with constantly evolving products and new technologies. This is complicated and challenging for consumers to navigate. A regulator is needed to enforce consumer protections and standards and to produce timely and well researched educational resources to help public understanding of telecommunications issues. Additionally, a regulator plays an important role in collecting and providing useful information about the telecommunications sector to inform the public and government, and increase the accountability of the industry.

Given the importance of communications to many aspects of human endeavour, the sector requires a regulator with a clear objective and the appropriate tools to achieve its goals. The regulator must be adequately resourced and equipped with a high level of expertise and experience to deal with the regulatory and technological complexities in telecommunications.

2. Do the characteristics of the communications sector mean that a sector specific regulator should be responsible for all aspects of industry regulation including economic regulation? Would switching models enable the regulator to strike the optimal balance between investment and consumer outcomes?

A key concern associated with expanding the model of the regulator to encompass the additional roles of access pricing and price regulation, is the maintenance of a steady focus on public interest and consumer concerns in the period of transition and beyond. Experience has shown that the upheavals involved in organizational structural changes are very resource intensive, resulting in a lessening focus on the core work of the organisation to the detriment of the public. For example, the merger of the Australian Communications Authority and the Australian Broadcasting Authority in 2004 occurred at the time when significant consumer detriment was occurring due to the unscrupulous practices of mobile premium service providers. The restructure led a change in approach to code development and regulation of the problem, giving rise to considerable delays in the introduction of the regulatory response that was needed to address the problematic industry behaviour. In the meantime, complaints about mobile premium services soared.

It is essential that any structural change in regulatory responsibility has minimal flow on effect on the operations of the regulator/s.

3. What developments in the communications sector over the next 5-10 years are likely to affect the role of the regulator? In what ways will that role be affected?

Regulated consumer protections

Currently, existing consumer protections in the telecommunications sector regulated by the ACMA are under review. Instruments such as the Customer Service Guarantee, the Network Reliability Framework and the Universal Service Obligation are important consumer protections, but due to technological advances and market changes they are slowly becoming less significant in their current form. However, the underlying consumer protection principles will remain, and the mechanisms for their delivery will need to be redesigned to keep pace with structural changes in the delivery of telecommunications. Consequently, the role of the regulator will change. The nbn as the near monopoly wholesale infrastructure provider will require regulatory oversight to ensure reliability of broadband services. Guarantees across wholesale and retail levels will be needed for continuity of service, timely connections and fault repairs. Regulatory oversight will be needed to ensure universality of access to voice and data services for those living in areas where the market alone will not deliver, and a basic quality of service level for essential communications. In the performance of these independent regulatory functions, a future regulator will need a strong consumer protection focus, while at the same time being sensitive to competition issues to allow the market to deliver sustainable outcomes in choice, price and quality where possible.

Co-regulatory codes and self-regulation

A challenge for the communications regulator will remain getting the balance right between demand and supply side interests, and knowing when the market has delivered sufficient sustainability to allow for an evolution from regulation to co-regulation, from self-regulation to no regulation. Flexibility in the co-regulatory and self-regulatory regime of registered codes and guidelines is a tool designed to address this. The consequences of getting the balance wrong can be serious as demonstrated in the period of record high numbers of complaints and low levels of consumer trust prior to the introduction of the current Telecommunications Consumer Protections Code in 2012¹.

The future 5-10 years will see the implementation of a restructured industry, which will require the full range of responses from the regulator. At the monopoly wholesale level, there will be little competitive pressure to shape positive market outcomes, so a more interventionist regulatory response will be required to protect the long term interests of consumers and support a stable retail market. At a retail level, in areas where healthy competition delivers a choice of accessible services at an affordable price, a co-regulatory and self-regulatory approach may be appropriate. In areas where retail profits are thin, the interests of end users will need to be protected by a suite of regulatory responses.

Increased demand for mobile services

Recent ACMA research shows the rapid take up of mobile services and reduction in fixed line voice, with mobile-only phone use increasing substantially over a four-year period from 2.2 million at

¹ <http://www.smh.com.au/technology/technology-news/record-telco-complaints-alarming-ombudsman-20111108-1n4nv.html>

December 2010 to 5.2 million at December 2014, and 12% of customers using mobile phones exclusively for both voice and data.² This trend is highly likely to continue. Currently, we have reports from a number of consumers about the interruptions to mobile signals caused by the use of illegal mobile phone repeaters. Consequently, there will be increased demand for ACMA's intervention on such radio-communications regulatory issues. Likewise the increase in demand for spectrum will have implications for the ACMA's role in spectrum management, with a likely shift from an exclusive use to a sharing model so that the finite resource is used more efficiently.

Flexibility and ability to adapt to new areas of operation

Given the dynamic and innovative nature of the communications sector, an effective future regulator will need to have the ability to swiftly adapt to new demands placed upon it triggered by government responses to the issues of the day. A recent example is the ACMA's role in the draft Copyright Notice Scheme Code³, which once finalised, will become a registered co-regulatory code under the auspices of the ACMA. This places the ACMA in a position of engaging in the complex area of online copyright, and will raise challenging issues that will need addressing if the regulator is to remain effective. For example, the ACMA is empowered under Telecommunications Act ss.121, 122 to take enforceable action against a member of the telecommunications industry, but the Code also covers the activities of rights holders. The ACMA currently has no authority to take enforcement action against this sector.

Consumer education and digital literacy

There will be an increasing need for a regulator with the function of informing, advising and educating the public about telecommunications related matters to support the delivery of government and other services online. As consumers' ability and capacity to use communications technology becomes more essential to everyday life and citizenship engagement, the need to ensure there are sufficient levels of digital literacy and capacity of citizens to interact will grow. Digital technology is set to become more complex, not less, and increasingly integrated with everyday life. There is an opportunity for the regulator to lead by forming partnerships with industry to develop information resources such as comparison tools to assist the market and guide informed choice.

Information gathering, performance monitoring and research

The ACMA currently performs an important information gathering and performance monitoring functions. While processes should always be open to review and rationalisation as appropriate, this will remain an enduring role for a communications regulator. It provides essential market intelligence to inform the educational and regulatory activities of the agency, and is invaluable from a demand side perspective in providing transparency of industry trends and the market overall.

²<http://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Australians-get-mobile>

³ http://www.commsalliance.com.au/__data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf

6. What functions are unique to the ACMA (that is, not present or relevant to other regulators or industry sectors) and will these remain relevant into the future?

The ACMA plays a crucial role in consumer protections in the telecommunications sector. It oversees the development of industry and consumer codes, it can request that a code be developed where necessary to protect community safeguards or deal with the conduct of the industry, and is able to direct compliance with registered codes⁴. Currently, the ACMA performs this function in relation to 22 registered codes. Additionally, the ACMA has an important consumer protection role in relation to industry standards, and has enforcement powers to compel compliance. It plays an important role in conducting public inquiries – significantly, the Reconnecting the Customer Inquiry in 2010/11 at a time of record high numbers of public complaints led to the development of a revamped Telecommunications Consumer Protections Code and significant improvements in industry practices.

The ACMA's role in enforcing aspects of consumer codes at times has been regarded as an alternative to litigation via other avenues. However, from an individual consumer perspective, there are significant financial barriers to litigation, as well as other access to justice issues. The alternative class action approach is slow, and dependent on the business models of litigation funders. The tools available to the ACMA mean that a less formal non-adversarial approach can be taken to reach resolution.

Telecommunications services, along with energy, are specifically exempt from the consumer guarantee provisions of the ACL.⁵ Some voice services are protected under the Customer Service Guarantee. The reliability of the standard telephone service is underpinned by the Network Reliability Framework. Both these significant consumer protection measures are administered by the ACMA. To remain relevant, customer service guarantees and reliability performance measures need to be reframed to bridge the current gap in protection for mobile and internet consumers. There is a clear role of independent oversight and enforcement where needed by a future communications regulator.

The fundamental principles of consumer protection and community safeguards will remain relevant. A regulator's efficacy in administering codes and standards will be enhanced by adequate resourcing and practices and procedures leading to swift responses to potential infringing behaviour and effective enforcement.

7. Are new functions likely to emerge over time?

It is inevitable that new functions will arise for a regulator in a dynamic sector like communications. As technology changes and new products become available to the market, community uses of communications services also changes. Such new issues will require different types of responses from a regulator. One such emerging area is the Internet of Things, which is challenging existing legislation and common law in several respects. There is the potential for new functions to arise in spectrum management due to the need to carefully manage the finite resource in the face of high demand for spectrum.

⁴<http://acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-telecommunications-industry-codes-and-standards>

⁵ Section 65 of the ACL specifically carves out telecommunications and electricity networks from the consumer guarantee provisions.

8. When should the Minister be able to give directions to the ACMA in relation to the performance of its functions?

The Minister should be able to direct the regulator to act when community interests are negatively impacted by industry practices and the market will not resolve the issue. In particular, the Minister should intervene when the regulator is slow to act in circumstances when a quick intervention is needed. This enables a swift response and shortens otherwise lengthy processes. A relevant example is the ministerial direction of 2012 to develop the International Mobile Roaming Standard at a time when there was a significant level of detriment in the high roaming charges incurred by Australians travelling overseas⁶ and little incentive for industry to self-regulate.

9. What are the optimal structure and governance arrangements for the Authority and Executive?

It is well established that good governance practice is to have interests represented on boards and at executive level that are reflective of the constituency an organisation needs to engage with in order to be effective. The regulator has a significant role to play in relation to advising the Minister on issues affecting consumers, developing public educational programs and information, providing advice to the public about the telecommunications industry. The effectiveness of the regulator would be enhanced if the skill set of a background in consumer work and understanding of consumer issues was represented on a full time basis at board and executive level. This would also ensure that the regulator was well respected by the consumer constituency, and build trust between the community and regulator. The existing model for such an arrangement is the ACCC constitution, which requires that at least one member of the commission has knowledge or experience of consumer protection.⁷ There is a strong argument for the same to apply to any regulator dealing with telecommunications, because of the large number of individual consumer transactions and contacts affected by the industry.

10. What are the optimal arrangements to support good decision –making and maintain trust (including for managing conflicts of interest for decision makers and delegating decision making?)

As above, representation of the constituencies affected by the decisions made by the regulator on the decision making body is optimal. As with any board, decision makers must be charged with a professional responsibility to act in the best interests of the aims and objectives of the regulatory body. This is necessary to maintain the integrity and independence of the regulator, to avoid any perceptions of regulatory capture, support good decision making and build public confidence in the agency.

It is the role of the board to determine which decision making powers should be delegated, but ultimately the board will retain responsibility for delegated decisions. It is therefore imperative that the board retains close oversight of delegated decision making to ensure that the regulator stays true to its functions and fulfils its responsibilities in a satisfactory manner.

11. How does the ACMA perform against the Regulator Performance Framework KPIs? Please provide examples.

The Regulator Performance Framework is focussed on the constituency of entities regulated by the ACMA. It is concerning that this focus represents only one aspect of the work of the ACMA, and

⁶ <https://www.comlaw.gov.au/Details/F2012L01776>

⁷ S.7 (4) *Competition and Consumer Act 2010*.

neglects to take account of its community and consumer interest functions. It will therefore not result in a balanced assessment of the ACMA's functions overall.

12. Has the ACMA been effective in progressing or influencing regulatory reform initiatives where there has been a change in risk or market characteristics to warrant change?

The ACMA's initiative and leadership in setting up the Reconnecting the Customer Inquiry was a highly effective way of examining the reasons for the high levels of customer dissatisfaction and complaints plaguing the telecommunications industry. This paved the way for the reforms introduced in the 2012 Telecommunications Consumer Protections Code, and subsequently industry practices have improved. New complaints to the TIO have dropped to the lowest level in 6 years.⁸ The subsequent change in industry culture is in no small part due to the intervention of the ACMA.

However, the regulator's response to the issue of high charging of calls from mobiles to 1800/13/1300 numbers has been less effective. There was a clear change in market characteristics due to the increased number of customers using mobile services over landlines, causing widespread detriment due to the high charges for calling 1800/13/1300 services from mobiles. In April 2012 the ACMA made an in-principle decision to change regulations so that all calls from mobiles to 18/1300 would be free or low cost by January 2015, it did not pursue this outcome. Instead the ACMA relied on the mobile telecommunications industry to resolve the charging issue. Consequently, 1800 numbers only became free to call from all the major mobile networks in July 2015, and zero rating arrangements have not been passed on to MVNOs by all providers to date, causing MVNOs to question the fairness of the self-regulatory approach. Call rates to 1300 numbers remain variable and confusing. The lack of leadership by the regulator after its initial resolve has been frustrating and disappointing, and three and a half years later the 1300 mobile call issue is still unsatisfactory.

18. What engagement improvements should be made to the ACMA? Engagement improvements include stakeholder engagement, contractual practices, behavioural and policy incentives to promote compliance or take up of government initiatives.

ACCAN's informal engagement with the ACMA is constructive and informative. ACMA advice, reporting and research information is very important to our work.

ACCAN also engages formally with the ACMA as a member of the Consumer Consultative Forum. While welcoming the opportunity to participate, there are a number of opportunities where changes could be made to increase the effectiveness of the Forum:

Industry members/attendees: There are some benefits to having industry in the room on some issues. It can bring experience and understanding to the engagement. However, the dynamic that tends to develop is consumer representatives raise a concern and industry will defend its position. This is not the most constructive way to engage with the ACMA. What consumer representatives are seeking information on is the ACMA's response to an issue, not that of the industry which is often well known. A further observation is that the consumer representatives sit on the Forum because they represent a certain constituency, not by virtue of their communications expertise. Having industry in the room can make these individuals uncomfortable about raising issues given their relative lack of technical knowledge. Some members of the CCF contribute very little and are rarely called upon to give feedback. In practical terms, having industry at the table also limits the range of consumers represented, due to the need to keep Forum member numbers at a manageable level.

⁸ TIO Annual Report 2013-14 <http://annualreport.tio.com.au/>

Lack of members issue register: ACCAN is often the only member bringing issues to the Forum, but without a register there is no accountability over how these issues are followed up. A register would also serve the purpose of letting other members know about the kinds of issues the ACMA can pursue. This may be a contributing factor as to why very few members bring concerns. Feedback about issues placed on the register would expose members to a dialogue about the kinds of problems the organisation is actually equipped to address, or if they might be better addressed elsewhere.

Lack of Authority Chair engagement: a timeslot for an update from the Authority Chair would be informative and establish a valuable avenue of engagement between consumers and the highest level of the organisation. This is a practice at both the ACCC Consumer Consultative Committee, and the ASIC Consumer Advisory Panel.

Frequency of meetings: the effectiveness of the Forum would be greatly enhanced by more face to face meetings. While we acknowledge the resources involved can be considerable, this would assist support the momentum of the work of the Forum.

22. How should the ACMA’s resources be allocated between functions (that is, education, facilitation, enforcement and compliance)?

The regulator’s resources would be more effectively used if there was a higher allocation towards speedy enforcement where breaches of codes and standards occur. A swift response and a preparedness to impose penalties where appropriate will lead to greater efficiencies and improve overall effectiveness. Currently it is well known that the ACMA has a limited enforcement budget allocation, and that a soft response is a likely outcome when infringement occurs.

There should be a clear distinction drawn between self-promotion by the regulator and its important and useful public education function. It should build a reputation on a solid track record of enforcement, education and facilitation, not on an advertising campaign.

24. Does the list of enduring concepts capture the policy concepts that are likely to continue to be central to the communications regulatory regime in the future? What are the most important communications sector public policy aims that are likely to require regulation?

Consumer protections will remain of central public policy importance. Without the intervention of the regulator, consumers are challenged in navigating the complexities of the telecommunications market, and can be exposed to unscrupulous and exploitative practices.

The regulator is needed to deliver important public policy objectives of universal access to reliable voice and data services at a guaranteed quality.

25. What combination of regulatory interventions might be needed in the future?

A variety of interventions will be needed – ranging from regulatory instruments, registered codes, inquiries, forums and public education initiatives. The regulator should have available regulatory tools for a graduated response, but to be effective ultimately needs power to impose penalties that are sufficiently significant to act as a deterrent to persistent or serious infringements. Underlying all regulatory interventions must be deep market intelligence so that the regulator is equipped to understand the impact of interventions, and to target regulatory responses most effectively and efficiently.

The success of a regulatory regime can be challenged by practices such as ‘phoenixing’, where an infringing entity declares itself insolvent thereby avoiding paying any penalty, then re-emerges under a different company name. This limits the regulator’s ability to undertake adequate enforcement action. This occurred in relation to infringements of the Do Not Call Register in 2014.⁹ Given demonstrated poor practice in this industry and the resultant consumer detriment the ACMA requires more robust enforcement powers to better deal with the issue of ‘phoenixing’. This may include faster enforcement action and the issuing of strict liability fines against company directors as well as working in tandem with other regulators such as ASIC and the ACCC as appropriate.

Alternative approaches that encourage positive outcomes that reward compliance should also be available to allow the regulator to engage constructively with industry and shape enduring best practice in a competitive market.

26. How should a contemporary communications regulator retain flexibility to adapt its style of regulatory intervention to reflect the changing regulatory regime?

A range of regulatory tools will be needed for the regulator to retain flexibility, but the success of regulatory intervention is measured by its outcome. The regulator must have the ability to use the tools available to it in a timely way so that it creates a clear expectation of what consequences flow from infringing behaviour.

The culture of the regulator should foster a willingness to play a decisive leadership role, such that it earns the regard and respect of regulated entities. The regulator needs to maintain a distance from both the supply and demand side in order to maintain its independence, and be perceived as independent. If this balance is not achieved, the regulator will struggle to maintain the stakeholder respect and trust needed to effectively deliver its responsibilities.

The regulator should also be prepared to publicise its regulatory activity so that regulated entities are better able to understand their obligations, and the regulator’s expectations. The benefits of this approach were evident several years ago when the ACCC educated the industry about acceptable advertising claims around broadband speed, with resultant improvement in practices across industry.

⁹ <http://www.acma.gov.au/Industry/Marketers/Do-not-call-register/How-to-comply-with-the-Do-Not-Call-Register/do-not-call-register-enforcement-outcomes>