

Productivity Commission Review of Australia's Consumer Policy Framework



Australian Mobile Telecommunications Association

May 9, 2007

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1. Introduction

- 1.1 The Australian Mobile Telecommunications Association (**AMTA**) is the Australian mobile industry's peak body. AMTA's members include mobile phone carriers, handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. AMTA's mission is to promote a socially, environmentally and financially responsible and successful mobile telecommunications industry in Australia.
- 1.2 AMTA takes a keen interest in consumer issues and regularly engages in telecommunications-related consumer policy and regulatory debates. In addition to its leading role in the development of consumer protection frameworks in areas such as mobile content, AMTA has actively sought to assist consumers of all ages enjoy the benefits of mobile phones in a financially affordable and responsible manner through its various educational initiatives. This has included producing 'consumer tips sheets' on issues as diverse as financial management, safe driving and mobile bullying. AMTA has also produced a website specifically for young people, addressing a number of mobile phone-related issues. For more details about AMTA, see <http://www.amta.org.au>.
- 1.3 AMTA welcomes the opportunity to provide comments to assist the Productivity Commission in its Review of Australia's Consumer Policy Framework.

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2. Mobile telecommunications consumer policy framework

- 1.1 The Telecommunications Act 1997 (**the Act**) establishes a framework for telecommunications regulation that "promotes the greatest practicable use of industry self-regulation"¹. The Act is administered by the Australian Communications and Media Authority (**ACMA**) and provides for the development of industry codes.
- 1.2 The Communications Alliance (**CA**), formerly the Australian Communications Industry Forum (**ACIF**), is the primary industry body which formulates such industry codes. The ACIF code development process includes consultation

¹ Telecommunications Act 1997, Section 4a.

with peak consumer organisations and other regulatory agencies, such as the Australian Competition and Consumer Commission (**ACCC**). Mobile operators have actively participated in ACIF since its inception, including chairing and membership of past and current working groups devising codes and guidelines applicable to the telecommunications industry.

- 1.3 ACMA may determine industry codes and standards in some circumstances as well as make determinations in relation to specified matters. Industry codes that are registered with ACMA are enforceable by ACMA. The majority of industry codes currently registered with the ACMA are directly or indirectly concerned with consumer protection standards.
- 1.4 Consumer protection in the telecommunications industry is further enshrined in the Complaint Handling Code (ACIF C547: June 2004) which provides processes for efficient, fair and accessible handling of consumer complaints and complaint monitoring. Requirements under this code include:
 - (a) dealing with complaints in a reasonable timeframe and with courtesy;
 - (b) complaint response charges;
 - (c) escalation processes; and
 - (d) publication of supplier complaint processes.
- 1.5 Consumers also have free access to external dispute resolution bodies such as the industry funded Telecommunications Industry Ombudsman (**TIO**). The TIO is Australia's largest ombudsman scheme and further information about the TIO is available at www.tio.com.au. The TIO reports code breach statistics to the ACMA in its annual report.
- 1.6 In addition to regulation developed by ACMA, the telecommunications industry is subject to:
 - (a) legislation developed and administered by the Attorney General's Department (**AGD**) relating to certain law enforcement provisions, such as the Telecommunications Interception Act. ACMA remains the key agency responsible for some law enforcement-related regulation, however. For example, the Telecommunications (Service Provider – Identity Checks for Pre-paid Public Mobile Telecommunications

Services) Determination 20002 (the Determination), which was made under subsection 99(1) of the Telecommunications Act;

- (b) general conduct provisions in the Trade Practices Act 1974, as well as other generic regulation, for example those relating to privacy, or corporations and financial regulation (e.g. under the Corporations Act regulated by the Australian Securities and Investments Commission); and
- (c) State and Territory fair trading laws and other state and territory-specific legislation, including privacy-related legislation. There are, for example, various rules governing workplace surveillance issues in the different jurisdictions, impacting the telecommunication industry and its customers to varying degrees.

1.7 Although the industry's policy and regulatory direction is influenced or driven to various extents by the aforementioned regulators, government agencies and bodies (ACMA, AGD, ASIC, ACCC, TIO), the Department of Communications, Information Technology and the Arts (DCITA) is the primary agency responsible for the majority of telecommunications policy development.

1.8 Finally, regulatory and policy input is provided by numerous consumer groups (both industry-specific groups such as the Consumers' Telecommunications Network (CTN) and the Australian Telecommunications Users Group (ATUG), and more bodies with a more generic focus) and various industry bodies including AMTA, Communications Alliance, and the Internet Industry Association.

3. Success and efficiency of the current regime

1.1 AMTA supports the principles of self-regulation, believing it can provide an efficient, fair and flexible framework for consumer protection.

1.2 AMTA also supports the Productivity Commission's views on good practice regulation³:

² Copies of the legislation are available at:
<http://scaleplus.law.gov.au/html/instruments/0/30/0/2004083001.htm>

To qualify [as 'good practice'], regulation needs to exhibit several characteristics, [including]:

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

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1.1 AMTA adds to this list:

- The principle of regulatory forbearance. That is, that there should only be regulatory intervention when market failure has been clearly demonstrated;
- Technology neutrality. That is, government should ensure that obligations do not inadvertently favour or hinder one form of technology over another, and are consistent and comparable with those imposed on comparable services and industry;
- Competitive neutrality. That is, obligations and enforcement should apply equally, or at least equitably, to all service providers;
- Provides incentives to invest or at least no disincentive to investment. That is, consumer policy (particularly in relation to accessibility and affordability by disadvantaged and vulnerable consumers and affordability by disadvantaged and vulnerable consumers) should empower and resource consumers to purchase their preferred solutions with in the marketplace rather than placing the cost of supply on only one industry or one service provider; and
- The principle that regulation in Australia should be consistent with regulation applied to Australia's major trading partners and in comparable economies.

³ See address by Commission Chairman Gary Banks *The good, the bad and the ugly: economic perspectives on regulation in Australia* to the Conference of Economists, Business Symposium, Hyatt Hotel, Canberra, 2 October 2003; at <http://www.pc.gov.au/speeches/cs20031002/cs20031002.pdf>

- 1.2 As illustrated in section 2 above, despite the stated aim of promoting industry self-regulation, the reality is that the telecommunications industry operates under a complex regulatory model that can more accurately be described as 'co-regulatory', with different degrees of industry and government initiation of 'self-regulatory' initiatives; significant use of government delegated legislation; overlap and inconsistency between jurisdictional and agency responsibilities; and numerous bodies developing policy without adequate reference to, or knowledge of, initiatives or regulatory responses developed by other bodies or agencies.
- 1.3 Not surprisingly, this has resulted in policy processes and/or outcomes that are less than optimal. Regulation in many areas is duplicative, which makes it inefficient and confusing for consumers and industry alike. For example, general consumer regulation is frequently augmented by industry-specific Codes. As explained above, for the telecommunications industry, such Codes could be described as co-regulation, as they can be requested, and are enforceable, by the regulator. Although it is often useful to have industry-specific guidance on meeting certain legislative requirements, it can be inefficient when one regulator is responsible for a Code and another is responsible for the primary legislation, particularly when such Codes are used to *extend* primary legislation. That is, when Codes are used to impose new regulatory obligations, outside the scope of the primary legislation, to address separate issues.
- 1.4 Further, legislative overlap, and the sheer quantity of regulation applying to the telecommunications industry, makes it difficult for suppliers or their customers to be fully aware of their obligations and rights. It can also encourage 'forum shopping', where a consumer attempts to resolve a complaint with one agency, is unsuccessful, so raises the issue with a second, third or even fourth agency. This is inefficient and undesirable for both the individual consumer and the various regulatory and dispute resolution bodies.
- 1.5 Finally, even where a good outcome is eventually achieved, when the process itself is inefficient and not based on the good regulatory practice or the principle of regulatory forbearance, it is consumers – supposedly the ultimate beneficiaries of regulation – who suffer, as when the engagement costs for industry are high, costs must necessarily be passed on to consumers.
- 1.6 Following are two examples to illustrate some of the problems and inefficiencies in regulation development experienced by the telecommunications industry in recent years. These examples are followed by some suggestions for improved processes that AMTA believes would help address the issues.

2. Illustrated examples

Mobile content services

- 2.1 The mobile telecommunication industry's experience with the regulation of mobile content provides an example of unduly complex and prescriptive regulation, with problems exacerbated by inefficient, ill-coordinated policy development.
- 2.2 In July 2004, the Minister for Communications, Information Technology and the Arts (the **Minister**) called for submissions to the discussion paper released by DCITA, *A Review of the Regulation of Content Delivered Over Mobile Communications Devices (Convergent Devices Review)*. Seventeen submissions were received in response to the examination of whether existing policy and regulatory arrangements are sufficient to manage potentially offensive or harmful content.
- 2.3 Also in July 2004, the Minister announced a Direction given to the then Australian Communications Authority (**ACA**, ACMA's predecessor) for the regulation of access to content on mobile premium services.
- 2.4 Not least because of an excessively prescriptive and impractical first draft Determination drafted by the ACA, which went well beyond the requirements of the Ministerial Determination to address other 'problems', it took 12 months for the ACA to develop the resultant *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 No. 1 (MPD)*.
- 2.5 The MPD, under which the mobile premium services industry currently operates, is regulated by ACA's successor, ACMA. It directly regulates some aspects of the supply of mobile premium services, but also requires industry to develop a self-regulatory scheme to give practical effect to other aspects of the MPD. The complexity of the co-regulatory situation is further illustrated, in ACMA's own words, in Attachment 1.
- 2.6 In response to the MPD, AMTA members developed a "self-regulatory" scheme, the Mobile Premium Services Industry Scheme (**MPSI Scheme**) which covers all aspects of mobile premium services ranging from assessment of content, complaint handling, take-down arrangements and compliance plans. Due to regulatory delays, the extreme complexity of the market and the considerable consultation and negotiation required to ensure a practical, practicable and efficient scheme, development of the MPSI Scheme took a

further 12 months, with AMTA member companies, and the AMTA Secretariat, engaging staff to work on the regulation on a near full-time basis for much of this period: a considerable investment. After approval by ACMA, the MPSI Scheme officially commenced on 29 October 2006. It is now administered by the Communications Alliance.

- 2.7 Despite all the issues along the way, AMTA believes that the MPSI Scheme provides excellent protection for consumers of mobile premium services while allowing a reasonable degree of flexibility for business to innovate and grow their mobile services businesses.
- 2.8 However, AMTA believes that public policy outcomes could have been achieved with much less regulatory effort and complexity and with greater reliance instead on principled outcomes allowing for greater flexibility in business response. AMTA notes that it had proposed to the ACA that the Minister's objectives could be achieved through updating and extending an existing regulatory scheme – the Internet Industry Association's (**IIA**) Content Code – registered by the then Australian Broadcasting Authority (now part of ACMA) under the *Broadcasting Services Act 1992*. Unfortunately, the officials in the then ACA were predisposed to regulate afresh (and extend the scope of the regulation), when in essence the issue was just another manifestation of an existing problem that AMTA believes was resolvable by applying existing regulation.
- 2.9 The unnecessary complexity is plainly more frustrating when it has always been clear that the MPD was only ever intended to be an interim measure, pending the result of the Convergent Devices Review. As AMTA clearly stated in its submissions to the ACA, its proposal to use the IIA Code would have provided robust consumer safeguards in the short-term while reducing the likelihood of regulations being overtaken by concomitant government policy reviews.
- 2.10 Despite assurances that the legislation arising from the Convergent Devices Review would be consistent with, and would not undermine the considerable investment in the MPSI Scheme, DCITA produced an exposure draft Communications Legislation Amendment (Content Services) Bill in late 2006 (**Content Services Bill**) that not only threatened to seriously undermine the MPSI Scheme, but, worse, could have crippled the burgeoning content services industry while offering *fewer* protections for consumers. It also introduced elements of regulation that were disproportionate to the issues being addressed.

- 2.11 Industry again devoted considerable time and resources, in very short timeframes, to analyse the exposure draft of the Content Services Bill and propose practical alternatives that would better meet government's objectives.
- 2.12 Considerable dialogue between the AMTA, the Minister's Office, DCITA, ACMA and other industry associations including IIA and CA, resulted in a delay to the introduction of the draft Content Services Bill and, although AMTA has not seen the revised text, it understands that substantial changes have been made to the draft to address its major concerns and better align the legislation with the existing MPSI Scheme.
- 2.13 AMTA is hopeful that the amendments to the Content Services Bill will meet the Minister's objectives of providing consumer protection for content delivered across various platforms in a reasonable, balanced manner. However, AMTA believes that the public policy outcomes could have been achieved with much less regulatory effort and complexity. It is clear that many of the problems were caused – or at least greatly exacerbated – by poor policy process. As noted above, DCITA sought input on its converged devices legislation in 2004. Little further consultation took place in the interim, despite considerable technological developments and changes to the environment in the two to three years since the initial consultation – including the development of the MPSI scheme. Further, it appears that dialogue between government agencies was inadequate. Despite ACMA's considerable experience in working with stakeholders to develop the Determination and the MPSI Scheme, DCITA appears not to have actively worked with ACMA on its draft legislation. More genuine and consistent consultation would have led to much better outcomes in a more efficient manner.

Spam

- 2.14 The mobile telecommunication industry's experience with Spam regulation again illustrates process problems with policy development in the communications consumer protection area. This example illustrates an inconsistent approach between various government agencies, enforcement problems and overlapping jurisdictional responsibilities.
- 2.15 In 2006, DCITA conducted a public review of the Spam Act. It concluded that the Spam Act did not require amendment, but did outline a number of recommendations to address a number of issues raised in submissions to the review. This included targeting education as an area for improvement. AMTA supported this recommendation as it is clear that, for example, confusing terminology is commonplace in relation to mobile spam, between and within government agencies, as well as in the general population. This creates confusion and frustration and may create the perception that 'spam' is

inadequately addressed and/or that the Spam Act is poorly enforced (clearly not the finding of the Review).

- 2.16 However, despite DCITA's conclusions and recommendations, ACMA has continued to suggest that mobile spam is a major problem that requires regulatory intervention, despite no clear evidence being presented to suggest that DCITA's conclusions and recommendations require review. For example, ACMA has written to CA on numerous occasions asking for a clause from the (now de-registered) ACIF C580 Short Message Service (SMS) Issues Code to be incorporated into another industry code. This request has been made despite agreement to de-register the Code because the Code was inconsistent with the Spam Act and that the clause in question inappropriately placed obligation on the message carrier instead of the message originator – a proposal clearly at odds with the policy intention behind the Spam Act which recognises that Carriage Service Providers (**CSPs**) should not be targeted in relation to spam activity merely because CSPs provide carriage services. ACMA has also written articles about 'the mobile spam problem' in its consumer publication and raised the issue in a recent ACMA Consumer Consultative Forum.
- 2.17 AMTA understands that ACMA has been able to report on more complaints about spam since the penalty provisions of the Spam Act commenced in 2004. However, it appears that an increase in reporting capability is being confused with an increase in the extent of the problem. It would also appear that new regulation, the Do Not Call Register, will address many of the problems that were previously being labelled as 'spam'. Moreover, it would appear that better *enforcement* of the current Spam Act would address some of the concerns that ACMA is seemingly trying to address through regulating anew.
- 2.18 Finally, there are problems and inefficiencies in the regulation of Spam caused by the overlap of the Spam Act, Do Not Call Register, Privacy Act and other state and territory legislation. For example, AMTA members report a level of confusion about certain elements of privacy protection. The quantity of privacy-related regulation and legislation applying to the telecommunications industry makes it difficult for suppliers or their customers to be fully aware of their obligations and rights.
- 2.19 For example, there is significant consumer angst in relation to unwanted or unexpected commercial messages to which customers may have consented without realising. A customer might initially contact ACMA to complain that they have been spammed. On finding that they have not been spammed, the consumer might contact the Telecommunication Industry Ombudsman (TIO) with their concerns and finally take their concern to the Privacy Commissioner if they disagree with the finding of the TIO. This is inefficient and undesirable

for both the individual and the various regulatory and dispute resolution bodies.

- 2.20 State and Territory-specific legislation and regulation further complicate the picture. There are, for example, various rules governing workplace surveillance issues in the different jurisdictions, impacting the telecommunication industry and its customers to varying degrees. Although designed to provide clarity and guidance, Industry Codes add yet another layer to the complex web of legislation and regulation.

3. How might these issues be addressed?

Regulatory versus policy functions

- 3.1 As the above cases clearly illustrate, mobile telecommunications policy is developed by various government agencies, often without comprehensive reference to, or consultation with, other agencies or regulators.
- 3.2 AMTA believes that this issue could be at least partly addressed if policy development was clearly the responsibility of the policy departments (most notably DCITA for the telecommunications industry), as opposed to the regulator. In developing policy, policy makers should clearly take advice from regulators on administration, regulation and enforcement practicalities as they affect regulatory development.
- 3.3 In addition to the inefficiencies and ineffective policy that arises from unclear agency responsibility, AMTA suggests that, if the distinction between policy and legislative development by elected governments, and independent administration and enforcement of that legislation by regulators is not maintained, the public credibility of regulators can suffer.

Regulatory impacts

- 3.4 For a regulatory system to achieve the best practice outcomes outlined by the Productivity Commission, the principles must be supported throughout the agencies responsible for policy and regulation formulation and enforcement. The attitude of the agencies' senior staff is critical to ensuring a culture that will embrace and achieve best practice.
- 3.5 For example, some agencies appear to treat required Regulatory Impact Statements (**RIS**) as supporting the regulatory policy decisions already made and developed, rather than as opportunities to gain efficiencies and

stakeholder support through rigorous and robust cost-benefit analysis. The RIS process should, except in cases of real urgency, be a substantive hurdle to be cleared *before* proposed regulation progresses to an advanced stage. It should also be transparent. This will ensure that regulators and policy makes complete 'due diligence' before, rather than as an afterthought to, making delegated legislation.

- 3.6 Agency culture must also support the other aspects of good policy formulation as articulated by the Productivity Commission. Regulatory forbearance should be the default position of a regulator and policy developer 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 to the status quo. This includes assessing whether self-regulation could be used to address the problem efficiently. In other words, test whether existing regulation can be applied to remedy a perceived issue before new regulation even reaches the RIS stage.
- 3.7 Such an approach throughout all agencies should also help with inter-agency co-ordination, and force agencies address enforcement and compliance issues before leaping to formulate new legislation.

Identification of regulatory and policy responsibility

- 3.8 AMTA suggests that it would be useful to have an overarching document that clearly identifies and illustrates who is responsible for key policy issues. As such the proposed framework document would identify:
- (a) the various policy formulators and regulations;
 - (b) how they operate together and who has responsibility for addressing which issues;
 - (c) the key agency with responsibility for addressing systemic complaints.
- 3.9 It would be useful to develop three different versions of the guide:
- (a) one for industry;
 - (b) one for the various government bodies responsible for dealing with complaints (outlining responsibilities and necessary information flows between agencies to increase efficiency and prevent 'forum shopping' by consumers); and

(c) one for consumers.

3.10 The 'consumer version' could be used as the basis of an educational campaign. It would also serve to make it clear to consumers that agencies work together to address complaints, to enable consumers to understand that their concerns are being addressed seriously and comprehensively and thereby discourage forum shopping.

Independent evaluator of regulatory performance

3.11 AMTA suggests that the Office of Regulation Review should be empowered and properly resourced to act as a 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.

4. Conclusions

4.1 The Productivity Commission clearly recognises and understands regulatory good practice and the benefits of good policy processes for consumers and businesses alike. Unfortunately, the telecommunications industry and its consumers are not yet benefiting from regulatory good practice or policy development. As this submission illustrates, the industry continues to operate under a complex co-regulatory model where overlap and inconstancy between jurisdictional and agency responsibilities, inadequate stakeholder consultation and poor enforcement of existing regulation lead to less than optimal outcomes for all stakeholders.

4.2 AMTA believes that a number of the issues could be at least partly addressed by a clear identification of lead agency responsibility, delineation of policy and regulatory functions, and a more developed due diligence process. Organisational culture must also clearly support all aspects of good policy formulation as articulated by the Productivity Commission.

4.3 AMTA would be happy to further discuss any issue raised in this paper and thanks the Productivity Commission for the opportunity to provide this input into its Review of Australia's Consumer Policy Framework.

Attachment 1

Framework for Self Regulation of the Supply of Mobile Premium Services

Excerpt from ACMA's Public Comment Draft Version 1.0, 14 November 2005

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

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

The Mobile Premium Services Determination:

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

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

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

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

- the Internet Industry Association's Codes for Industry Co-Regulation in Areas of Internet and Mobile Content, as registered by the Australian Broadcasting Authority on 26 May 2005 (the IIA Code);
- the Australian Communications Industry Forum Code relating to Customer Information on Prices, Terms and Conditions (ACIF C521:2004) (the ACIF PTC Code);
- the Telecommunications Industry Ombudsman scheme established under the Telecommunications (Consumer Protection and Service Standards) Act 1999 (the TIO scheme); and
- the Telecommunications Service Provider (Premium Services) Determination 2004 (No 1) and the Telecommunications Service Provider (Premium Services) Determination 2004 (No 2). Of these, the second service provider determination is of direct relevance to the premium services that are described in this Framework (Second 2004 Determination).