

**COMMUNICATIONS
ALLIANCE LTD**



Consumer Safeguards Review

Part C

COMMUNICATIONS ALLIANCE SUBMISSION

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About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

EXECUTIVE SUMMARY

Communications Alliance and its members welcome the opportunity to respond to the observations and proposals put forward in the Government's Consumer Safeguards Review: Part C – Choice and Fairness Consultation Paper.

This submission responds to that paper, and takes into account both industry's experience and a broad evidence base in considering the topics that need to be covered in telecommunications safeguards and the most appropriate regulatory framework to support the effective and efficient delivery of telecommunications to consumers.

Our submission also advocates – as we have done since this review originally commenced in 2016 – for the development of a clear set of underlying principles to guide the future of consumer safeguards, and puts forward such proposed principles.

The goal of the consumer safeguards structure is to protect consumers in their access to and use of what is an increasingly essential service – telecommunications.

The analysis in this paper establishes that this is best achieved through balancing targeted, mandated, consumer protections with achieving an efficient competitive market and the consumer benefits it generates. In order to do so, safeguards should be adaptable, efficient, and promote competition as the most effective way to achieve results for consumers, while the regulatory framework should aim to create a culture of compliance and make the best possible use of Government resources.

This analysis draws on the current state of Australian telecommunications, which is delivering consistently decreasing real prices and improved value and affordability, increasing control and choice for consumers, and world-leading connectivity.

In summary the current telecommunications regulatory framework in Australia – including as it relates to consumer safeguards – is robust.

Direct regulation and co-regulation are core components of that framework and should remain so – leveraging their respective strengths. Both forms of regulation feature significant consumer and regulator control over their outcomes.

Both forms of regulation can and should be streamlined and improved – made more flexible, agile and more effective at delivering safeguards to telecommunications consumers.

We make four key recommendations to improve the framework and processes:

- Increasing the focus on problem identification and options analysis, in line with recommendations from the Office of Best Practice Regulation.
- Adding an additional 'enhanced co-regulatory' process to the framework, to improve and accelerate the creation and revision of industry Codes.
- The introduction and use of 'outcomes-based regulation.'
- A clear requirement that a review of an instrument of specific rule must consider the drivers that originally gave rise to the rule and revisit the assessment to see if regulation would be justified on balance if it were introduced today.

Communications Alliance and its members would welcome the opportunity to work with Government, consumers and the ACMA on streamlining the Code development process, to make it more agile and flexible, while maintaining its key attributes and advantages.

INTRODUCTION

Communications Alliance welcomes the opportunity to comment on the Part C Discussion Paper of the Consumer Safeguards Review.

As with the previous stages of the Consumer Safeguards review, we agree with the Department that the structure of telecommunications safeguards needs to be reviewed, as it has – often by necessity – been developed in a piecemeal manner as technology evolves and consumer behaviour changes.

In light of significant changes to communications technology and use, it is now an appropriate time to consider whether the current safeguards remain appropriate and to examine the structure of developing and enforcing telco specific safeguards.

Unfortunately, many of the current duplicative and complex regulations drive up costs, don't promote consumer choice, and do not provide the most effective protections for consumers. It is important to consider how these problematic regulations have been developed, in order to avoid repeats of these consequences in the future.

The goal of the consumer safeguards structure is to protect consumers in their access to and use of what is an increasingly essential service – telecommunications. This is achieved through combining well-targeted, mandated consumer protections with the benefits that accrue to consumers from the operation of an efficient, competitive market.

Balancing these two approaches is important, because the delivery of telecommunications through a competitive market ultimately serves consumers by increasing their access, lowering cost, and incentivising innovation.¹ Examples of direct consumer benefits we have seen due to a competitive market include the increase in flexibility and choices on contracts, the consistently decreasing real cost of telecommunications, and the advanced level of mobile connectivity in Australia.²

While they are entirely different services, there is a tendency by some to compare telecommunications with other 'essential' services, such as energy and finance. If we choose to follow that line of thinking, the success of competitive market benefits to telecommunications consumers is particularly notable, considering the recent dramatic problems seen in the finance space and the rising costs of electricity and gas.³

There are tensions inherent in delivering an essential service through competition, and it is important that all parties in the regulatory framework acknowledge this. Given that understanding, two key questions arise:

- What specific areas/topics should be considered 'essential' parts of telecommunications consumer protections – i.e., should be ensured either through a competitive market, or, if that fails, through regulatory safeguards?

¹ Competition, Innovation and Productivity in Australian Businesses, Australian Bureau of Statistics and Productivity Commission. <https://www.pc.gov.au/research/completed/business-innovation>

Why is competition policy important for consumers?, European Commission. https://ec.europa.eu/competition/consumers/why_en.html

² Communications Market Report 2018-19, ACCC. <https://www.accc.gov.au/publications/accc-telecommunications-report/accc-communications-market-report-2018-19>

Australia tops GSMA mobile connectivity ranks for sixth straight year, ITWire. September 2020. <https://www.itwire.com/mobility/australia-tops-gsma-mobile-connectivity-ranks-for-sixth-straight-year.html>

³ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. <https://financialservices.royalcommission.gov.au/Pages/default.html>

Australian's National Electricity Market after Twenty Years, Alan Rai and Tim Nelson. <https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-8462.12359>

- What regulatory framework best delivers on the aforementioned balance for those topics?

Although the consultation paper to an extent considers these questions in combination, we will address them separately. Overall, we find that ***safeguards should be adaptable, efficient, and promote competition as the most effective way to achieve results for consumers, while the regulatory framework should aim to create a culture of compliance and make the best possible use of Government resources.***

In the section on “**Safeguards Topics**” we address what essential matters need to be covered, including considering how the economy-wide safeguards in the Australian Consumer Law should interact with telecommunications-specific principles.

The second section, on “**Regulatory Framework**” is significantly more extensive. It looks at the impacts of the current framework as a whole, then analyses each step in regulation for current performance and possible improvements. While we do find that there are improvements to be made, the broader framework remains appropriate.

It is important to note that no regulatory framework – either in Australia or elsewhere – delivers perfection, or is able to prevent any and all cases of consumer harm. The ultimate goal is to appropriately balance the need to efficiently deliver services with the importance of protecting consumers.

Our recommendations from this section align with the Government's de-regulatory agenda and focus on Best practice regulation. Best practice identifies regulation as a last resort option, focusing on a competitive market to produce results, with government intervention only when there is a clearly identified market failure.

Finally, we address the specific question raised about “**Legacy Obligations**” in the consultation paper.

Throughout the submission, we also address some concerns industry has with information presented in the discussion paper. While it raises valuable questions for consideration, we are concerned that some of the background information included does not provide an accurate context for this consultation.

Finally, it is important to note that in a healthy competitive landscape, various Industry members will have differing views. There are some topics raised in the consultation we have not addressed in detail here, including views on the complex supply chain and low-income measures. As with all topics, Communications Alliance encourages the Department to consider submissions from our individual members.

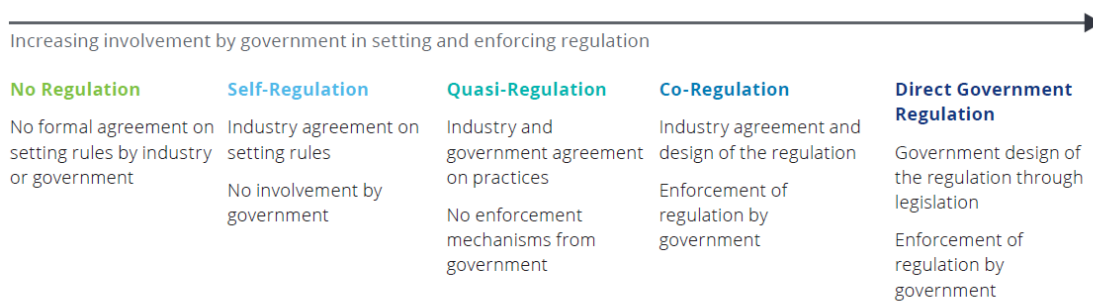
CONTEXT

In considering how to design Australia's telecommunications consumer safeguards for the future, it is important to consider the process that led to the framework we have today.

The Telecommunications Act 1997 (the Act) established an overall regulatory policy that the industry "be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants in the...industry, but does not compromise the effectiveness of regulation in achieving the objects mentioned in Section 3." This policy ultimately led to the development of a complex regulatory system that employs a combination of self-regulation, co-regulation and direct regulation, with some quasi-regulation for specific operational aspects.

The Consultation paper uses the term 'self-regulation' to describe what is, in fact, 'co-regulation'. It is important to recognise that these are very different concepts, as illustrated in the following chart from Deloitte Access Economics. Beyond the regulatory policy referenced above, the Act does not, in fact, use the term 'self-regulation'.⁴

Figure 1.1: Different regulatory approaches



Source: Deloitte Access Economics, Australian Law Reform Commission (2012).¹⁰

While the Code structure described in Part 6 of the Act provides for the possibility of self-regulation, the majority of telecommunications regulations – particularly those related to consumer safeguards – have been put in place through co-regulation and direct regulation.

The telecommunications industry and its underlying technology have both undergone significant change in the two decades since the Act was passed and the subsequent Telecommunications (Consumer Protection and Service Standards) Act 1999 (TCPSS) was introduced. The underlying flexibility in the framework – providing for the various regulatory options outlined above – has been vital in allowing the regulations to evolve as they have.

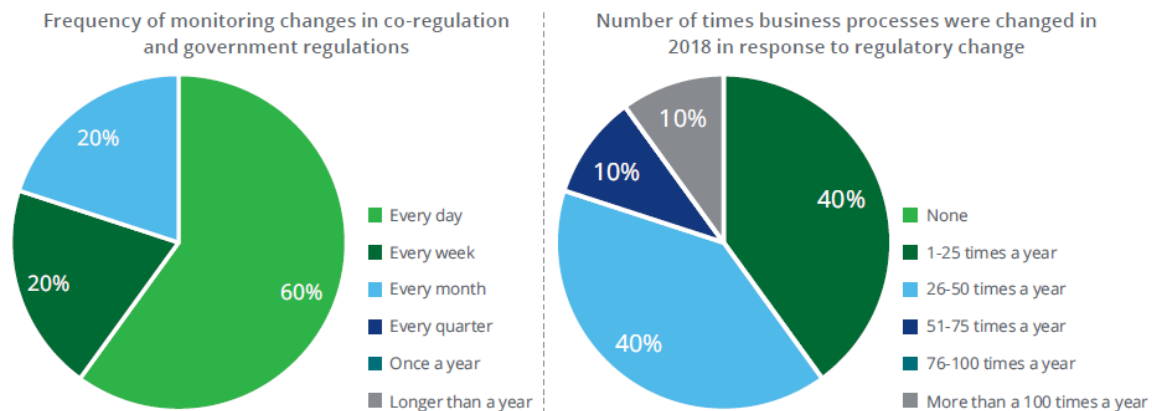
Despite this flexibility, safeguards and other rules have regularly been added in a piecemeal manner over the years to deal with the increasing importance of telecommunications in our lives. This has been done without a clear overarching vision or strict practice of removing outdated regulations, creating a confusing and, at times, duplicative regulatory environment.

This complexity has impaired the efficiency of telecommunications regulations, creating an unnecessarily heavy burden on industry. Survey results from Deloitte's Connected Nation report show that businesses are having to expend significant and ongoing efforts just to keep track of and keep up with regulations.⁵

⁴ Connected Nation, The Regulatory Ecosystem. Deloitte Access Economics. p5. https://www.commsalliance.com.au/_data/assets/pdf_file/0008/69515/RITM0410497-Communications-Alliance-Digital-2.pdf

⁵ Ibid, p 16.

Chart 2.1: Survey results about the efficiency of co-regulation and government regulations



Segments reflect proportion of survey respondents that selected each option
Source: Deloitte Access Economics

These survey results reflect the experience of Communications Alliance members.

The complexity and constant change of telecommunications regulation has meant that provider efforts must be disproportionately focused on deciphering and applying rules, instead of refining the culture of compliance that better protects consumers.

Part of this complexity is also due to the tiered system of consumer safeguards in telecommunications. This space underwent a fundamental change with the introduction of the Australian Consumer Law in 2010, but the necessity and appropriateness of telecommunications-specific consumer safeguards have not been genuinely re-evaluated since the ACL's passage.

From this brief overview, it appears evident that:

- The telecommunications market and technology will continue to evolve, and the regulatory framework must be able to respond to these changes.
- There needs to be a clear structure for safeguards to increase regulatory efficiency, including a mandate for outdated rules to be removed or sunsetted.
- Telecommunications will continue to play an essential role in Australians' lives.
- Telecommunications consumer safeguards need to be considered within the broader structure of consumer safeguards in Australia.

Telecommunications as an essential service

The concept of telecommunications as an essential service has underlined many of the discussions around regulatory expectations in recent years. Many stakeholders have stated or made the assumption that it is an essential service. However, there are two key questions to consider, and the answers to both need to be kept in mind at all times.

Is telecommunications an essential service?

At a basic level, yes – some aspects of telecommunications, particularly regarding public safety and emergencies – is essential.

However, telecommunications has become significantly more complex than one connection. There are levels of service – whether that be speed of connection or type of

device – that may not be essential. For example, it may not be appropriate to assume that access to the most recent and expensive mobile device is essential.

This question is partially being addressed through the government's Universal Service Guarantee process, and it is not appropriate to address here. However, when considering arguments about telecommunications as an essential service, the diversity of services, access networks and goods within telecommunications does need to be kept in mind.

Should telecommunications be regulated as an essential service?

This question is addressed in more detail throughout this paper, but we offer a brief overview here.

Telecommunications is often compared to other 'essential' services – however, there is no clear definition of essential service, and this question has become even more confused in recent months with COVID-related restrictions.

If we consider, for example, the coverage of Victoria's Essential Services Commission, they include electricity and gas, water, local government and transport.

When considering telecommunications against these services, it is clear that **telecommunications is the only 'essential' service that is delivered through a highly competitive market.**

The benefits of this have been demonstrated by the constantly decreasing prices (and increasing real value) of telecommunications versus the steep and controversial price rises in the energy sector.⁶ Additionally, consumer experience of telecommunications is significantly more complex than that of electricity, considering the range of plans and quality to be considered. Finally, the 'direct' model of regulation used in electricity has not, for example resulted in credit assessment requirements, and has led to such a complex pricing structure that governments have had to create services to help customers understand their bill and compare offers,⁷ whereas Critical Information Summaries offer clear and comparable information to customers about telecommunications services.

Stakeholders also often raise the banking sector as a comparative service. Some of the key problems with that regulatory framework can be seen through the findings of the Royal Commission and the complexity drove the Government's recent decision to simplify the credit rules to strengthen the economy.⁸

Both of these sectors are also facing significant disruption – often not by the established providers. In fact, most of the banking and finance 'disruptors' offering innovative and/or low-cost services don't hold standard banking licenses (and thus don't have to abide by some of the underlying consumer protection rules).

This is all to say – while every regulatory framework offers lessons we can apply, **regulating telecommunications in a way similar to other 'essential' services could result in consumer detriment.**

⁶ Higher energy prices are here to stay – here's what we can do about it, Lucy Percival, The Conversation. July 2018. <https://theconversation.com/higher-energy-prices-are-here-to-stay-heres-what-we-can-do-about-it-99187>

Electricity prices on the rise despite reregulation of the market, Stephen Letts, ABC News. July 2019. <https://www.abc.net.au/news/2019-07-15/energy-prices-on-the-rise-depite-reregulation-of-the-market/11299192?nw=0>

Rising energy prices create affordability problems, Australian Energy Regulator. December 2018. <https://www.aer.gov.au/news-release/rising-energy-prices-create-affordability-problems>

⁷ Energy Switch, Service NSW. <https://energyswitch.service.nsw.gov.au/>

⁸ Simplifying access to credit for consumers and small business, Josh Frydenberg MP. September 2020. <https://joshfrydenberg.com.au/latest-news/simplifying-access-to-credit-for-consumers-and-small-business/>

Challenges

In all industries, striking the balance of regulatory goals (particularly consumer protection and a competitive marketplace) and the negative impacts of regulations (such as business costs and stifling innovation) is an ongoing challenge. In particular, services essential to the economy such as telecommunications, electricity and banking attract a range of other obligations such as critical infrastructure and security rules that they must take into consideration when applying consumer safeguards.

Regulating consumer safeguards in telecommunications has presented some specific additional challenges to this balance, and there is one emerging challenge that needs to be considered.

Speed of change

The adoption and creation of telecommunications technologies is vital for the Australian economy. When designing consumer safeguards, it is important to do so in a way that does not slow this progress. However, as noted above, constantly changing regulations to adapt to new technologies is inefficient. In light of this, **safeguard regulations need to be written and implemented in a way that allows for new technologies** – instead of requiring constant change.

'Long-tail' and diverse industry

Unlike many of the industries telecommunications is often compared to in discussions of consumer safeguards (such as electricity or banking), there are hundreds of retail service providers (RSPs) in Australia, varying in size from one to many thousands of employees, with extremely diverse operational structures.

Additionally, RSPs provide offer many different types of technologies, services and value propositions to different sections of the consumer market (including to small businesses), and sit at different places on the supply chain.

Finally, providers have different levels of resources available to understand, interpret and apply regulations. While some may be able to employ or outsource legal resources to determine if their approach complies with a regulation, others would prefer clear step by step guidance. Unfortunately, that step-by-step guidance would severely stifle innovation – e.g., it may not directly address a newly developed technology, a creative pricing offer, or the introduction of a different type of contract. It would also lessen competitiveness in the marketplace by prescribing operational processes and offering types, which is in opposition to the ultimate goal – competition to offer value and innovation to consumers.

These challenges mean that **one size fits all regulation does not work well for telecommunications.**

Technological regulations

In addition to consumer safeguards and the aforementioned privacy and security requirements, there are extensive operational regulations – a combination of quasi, co, and direct regulatory – in place that ensure the interoperability and ongoing functioning of telecommunications.

When analysing both the need for and the business impact of consumer safeguards regulations (whether they be new or existing), there needs to be stronger consideration of the extensive operational regulations already in place.

Consumer understanding

Delivering telecommunications requires a delicate and complex mix of technology and commercial services, from the fibre-optic cables that connect our world to the modems and routers in our homes – and the connective elements between the two.

The majority of consumers do not have an extensive understanding of this technology, nor the numerous factors that can influence its delivery and performance. Unfortunately, this complexity does not align well with our 'always-on' world, or the consumer expectations of 'immediate satisfaction' that have evolved over the past few decades.

This misalignment can lead to dissatisfaction, with a consumer – understandably – expecting their retail service provider (RSP) to be able to fix any problem quickly and cleanly, while the RSP may be prevented from doing so by a range of factors – or may simply require time to investigate and resolve the problem.

This key driver of dissatisfaction is often not being taken into account when Government or regulators are considering problems in the telecommunications space.

While we acknowledge that our industry can – and should - do better in communicating with consumers about their service, ***all parties in the co-regulatory framework – Government, regulators, consumer advocates and industry – need to collaborate to set appropriate expectations, and they must also fully investigate dissatisfaction to understand if it is a compliance problem or if it is being driven by unreasonable expectations.***

Balancing consumer interests

Regulation that makes an operational change to benefit one group of consumers, or address a specific problem, can have broader (negative) impacts on other groups or areas.

While there are additional complexities that must be considered for vulnerable consumers – which we raise in a recommendation in the section on Safeguards Topics - this challenge is not only about protections for vulnerable consumers.

We have also seen safeguards put in place in response to a technical or other problem that has affected a small proportion of consumers – with negative impacts to cost, convenience or service delivery for larger cohorts.

Our experience in the telecommunications space has been that consumer advocates often focus on specific subsets of consumers.

While we absolutely support the importance of protecting vulnerable consumers or preventing a problem from recurring that is only impacting a small number of consumers, there is concern consumer advocacy focused on the needs of specific groups will not give sufficient weight to the needs of the vast majority – the 'average' consumer.

While this challenge is not unique to telecommunications, it has created significant complications in developing consumer safeguards. ***Government, regulators, and consumer advocates should give more balanced consideration to the broader impacts of proposed changes.***

Merging of industries

There are two current trends introducing additional complexity to telecommunications regulation.

The first is the increase in connected devices. Whether it be as simple as a 'smart fridge' or as complex as automated vehicles, telecommunications is evolving towards a ubiquitous presence in consumer goods and services. Many companies outside of the telecommunications industry will be providing telecommunications-adjacent services – but will only be obliged to comply with the ACL, not telecommunications-specific safeguards. This will create imbalance in two ways – the first by resulting in a confusing and uneven protection regime for consumers to navigate, the second by preventing telecommunications providers from fully competing in these spaces.

The second trend is that of 'utility' companies providing bundled services, such as telecommunications and electricity. The detail of safeguards in each of these spaces means – for example - that one company may have to produce two different bills for the one service.

These challenges have recently been raised through the review of the Telecommunications Industry Ombudsman's (TIO) Terms of Reference, and we anticipate that this confusion and potential overlap will only increase in the next few years.

This evolution means that there ***needs to be a stricter framework for considering telecommunications-specific consumer safeguards, including a rigorous gaps analysis of economy-wide protections.***

Additionally, it may be beneficial for the ***Government to convene a cross-sectoral consumer safeguards roundtable for consideration of and planning for this evolution.*** This is particularly relevant for the emerging overlap of consumer redress avenues (state tribunals, electricity and water ombudsman and the TIO).

The pursuit of perfection

Finally, we often see the expectation that an appropriate consumer safeguards framework will prevent any errors from happening.

No regulatory framework – whether in telecommunications or elsewhere – can create a perfect system without errors. While it is important to have a system that protects consumers from the output and attempts to avoid all possible errors, perfection is not possible for a range of reasons, including the complex technology, the reality of human error, and the unfortunate existence of bad actors.

The tendency to add regulation to avoid errors often leads to more consumer harm by over-complicating the purchase process, significantly increasing cost of the product, and halting innovation. ***The goal of a 'no-error' system does not protect consumers – instead, prevention should be balanced with appropriate redress and enforcement.***

SAFEGUARDS TOPICS

This section addresses proposal 1, that *telecommunications-specific consumer protection rules should cover essential matters between consumers (including small businesses) and their communications providers.*

We agree with the idea that there should be expected safeguard principles that cover essential matters. However, rules should only be put in place when those principles are not being delivered on by other levers – this is addressed in Step 2: Options Analysis. That being said, those questions cannot be considered without the establishment of principles/essential matters.

As raised in our previous submissions to Parts A and B of the Review, we consider that this would have been a beneficial question to address as the first step of the overarching safeguards Review.

Industry developed some agreed principles that we have used for each stage of the Review, and consider an appropriate starting point for this section.

Access

- All Australians should be able to access telecommunications to enable participation in a digital society;
- A 'basic essential service' should be available to all Australians; and
- Communications infrastructure should be functional and reliable.

Choice

- Communications markets should be open and competitive so as to encourage investment, innovation and diversity of choice.

Rights

- Consumers should have access to information to allow them to make informed choices, based on their preferences;
- Consumers should have appropriate avenues for redress; and
- Consumers should be confident that their personal information is protected appropriately.

Purpose of principles

Policy principles are key drivers for success – in fact, Chair of the ACMA, Nerida O'Loughlin said "the role of policy and regulatory principles are critical...indeed, it may be that only principles can keep up with the pace of change in a sector such as this one."⁹

Consumer safeguards in telecommunications need to balance the protections required for access to an essential service with the consumer benefit created through a competitive market. In order to do so, they need to fulfill some specific goals:

- be flexible and adaptable to ongoing change;
- create the right incentives for industry participants to innovate technology and offers to better service their customers;

⁹ Nerida O'Loughlin speech at Telecommunications and Media Forum, IIC, 2018
<https://www.acma.gov.au/publications/2018-07/nerida-oloughlin-international-institute-communications-telecommunications-and-media-forum-2018>

- balance the protection of specific groups with the broader importance of telecommunications to all Australians;
- work in conjunction with (instead of duplicating) the protections that exist across the economy; and
- set appropriate expectations, taking into account a strong redress and enforcement framework.

What are the essential matters?

Here we consider the paper's issue for comment 1: *What are the essential consumer protection matters that should be covered by the rules? Part 6 (section 113) of the Tel Act lists a range of matters that may be dealt with by industry codes and standards. The TCP Code covers some but not all of those matters. Are these the right starting points?*

Although the paper's principles unfortunately conflate the goals of regulation with the underlying consumer protection principles, we hope that following further consultation the Review process will result in Government setting clear telecommunications consumer protection principles that can then guide the question of when/if intervention is needed. We put forward some points for consideration here – noting that in Appendix A, we have also provided notes against each of the relevant matters listed in 113 of the Act.

While the paper's use of 'principles' doesn't align with the 'essential matters' or 'principles' we are considering here, it does put forward the idea of "Choice and Fairness" as guiding concepts.

For choice, it states that "consumers need accurate, relevant and usable information about products and services so they can confidently choose those that meet their needs," which we agree with as a principle.

Fairness is a more nebulous and difficult concept to consider. The paper interprets it as "consumers should be treated honestly and reasonably by their provider. This includes ethical selling practices, even-handed and easily understood contracts, accurate and timely billing, services that perform as described, and providers who respond promptly and effectively when a consumer experiences problems with the product or service, or financial hardship."

We agree that "consumers should be treated honestly and reasonably by their provider"¹⁰ and that most of the 'sub-topics' listed beneath establish a reasonable starting point for a principles-based framework. However, the subset about prompt and efficient responses goes above and beyond the purpose of safeguards, as there should be a difference between consumer protection and customer satisfaction. Effective responses should be expected about 'essential' telecommunications services (see earlier section in this paper on 'Is telecommunications an essential service') and on hardship, but that expectation should not go beyond those clear topics.

Telecommunications in Australia has an extremely low barrier to transfers, ensuring consumers are able quickly and easily change providers if they are dissatisfied. While there may be a need for further education of consumers on their ability to do so, this competitive market is the best method by which to increase customer satisfaction.

The paper also puts forward *Principle 2: Consumers should be treated fairly and in good faith by providers*, which we agree with, but are concerned it may be too broad to be useful for this discussion.

¹⁰ Consumer Safeguards Review, Part C Choice and Fairness Consultation Paper (herein "Part C"). p 7.

From the discussion above, we would consider the following to be appropriate for further consideration as potential 'essential matters' – noting that many are already addressed in the ACL (or the competitive market), so identifying them as essential matters will not necessarily mean that there is a need for telecommunications-specific rules.

- Communications markets should be open and competitive so as to encourage investment, innovation and diversity of choice.
- Accurate, relevant and usable information must be provided to consumers.
- Providers cannot engage in misleading or deceptive conduct at any stage, including in selling.
- Contracts must be fair and reasonable.
- Providers will be held to account for agreed service commitments, and goods and services delivered are of a reasonable quality.
- Consumers can expect accuracy and transparency in billing.
- Consumers can expect effective and timely responses to requests for financial hardship assistance.
- Consumers are able to easily transfer providers to ensure a competitive and open market.
- Consumers should be confident that their personal information is protected appropriately.

Government should look at broader supports for vulnerable consumers

In addition to the above principles, we acknowledge that there may be specific protections that are needed for some consumers. While there should be further consideration of how to balance these protections with ensuring an open and efficient market, we consider ***it may be more effective for Government to consider broader supports that will allow these consumers to be appropriately protected across all services and sectors – for example the provision of translators or the TTS Service, refinements to the NDIS or the work on expanding support for financial counselling across the economy.***

We also note that the eSafety Commissioner is doing extensive work on increasing digital inclusion, which is a key part of empowering all consumers. Technology has increased consumer power across the economy, and it is important that all consumers are able to benefit from this.

Telecommunications Specific Rules Are Needed

Many of the above principles are already addressed by the ACL, which raises the question of how telecommunications specific rules should fit with the existing and economy-wide ACL.

Industry agrees that telecommunications-specific rules are needed to set out expectations for industry behaviour in a way that reflects the operational realities of telco and addresses identified issues particular to our industry.

The increasing convergence of telco and some other sectors, however, calls for consideration of how any telco-specific rule will interact with broader protections or other industry-specific protections. This question should be key in the first 2 steps of the regulatory process discussed in the following section.

REGULATORY FRAMEWORK

Delivering an essential service via a truly competitive market will invariably be a balancing act for all parties.

The paper acknowledges that “there is an inherent tension in a process that requires industry to formulate its own consumer protection rules,”¹¹ and we do not disagree with that statement. However, the existence of that tension is a necessary trade-off to achieve the beneficial outcomes we have seen. We must resist the urge to overregulate for simplicity – that would not be in the long-term interests of end-users, and would negatively impact Australians and our economy.

A balanced consumer safeguards regulatory system protects consumers in the most efficient and effective way possible, while still providing avenues for redress and correction when errors are made. Paper A of this process addressed those avenues for redress, and the TIO's dispute resolution services in combination with the ACMA's enforcement powers are appropriate fail-safes.

The historical combination of co- and direct-regulatory tools offers the opportunity to learn from each to improve both, and the overall system. Analysing the current telecommunications safeguards regulatory framework – and how it can be improved – is a multi-step process.

Unfortunately, we have seen some misconceptions, both in the consultation paper and in the broader narrative, on how the framework currently works. Thus, we will first outline how the current overarching framework operates, including the significant power held by regulators and consumers in all stages, including in co-regulatory rulemaking.

We then look at its impact as a whole, concluding that the balanced and combined structure remains appropriate – noting that there are improvements to be made.

Finally, we examine the framework at each stage of the regulatory process (problem identification, options analysis – including the balance of co and direct regulation, rulemaking – including the types of rules and process, enforcement and sunset), making recommendations along the way. The questions, principles and proposals from the consultation paper are addressed in the relevant sections.

Overview

At present, consumer safeguards in telecommunications are set and enforced by three main regulators.

The ACL – enforced by the ACCC – sets the overarching consumer safeguards that are applied industry wide, while a range of co- and direct-regulatory instruments specific to telecommunications are enforced by the ACMA. Finally, the Australian Privacy Principles (APP), enforced by the Office of the Australian Information Commissioner (OAIC) set a range of protections for handling consumer information. On top of this, the Telecommunications Industry Ombudsman (TIO) has legislative authority to act as the independent dispute resolution body for telecommunications services.

The telco-specific instruments enforced by the ACMA are developed through either a direct or co-regulatory process. However, the co-regulatory structure has developed in such a way that the ACMA has ultimate control over the process, outcomes and enforcement, while

¹¹ Part C, p 12.

Industry does the bulk of the consultation and drafting work.¹² Additionally, there are high levels of consumer involvement in the development of co-regulatory rules.¹³ This will be further discussed in the rulemaking analysis.

The co-regulatory Telecommunications Consumer Protections (TCP) Code touches on most of the consumer safeguards topics. The ACMA also uses direct regulation, most recently with the NBN Consumer Experience rules and uplifting of the Complaints Handling Standard from the TCP Code.

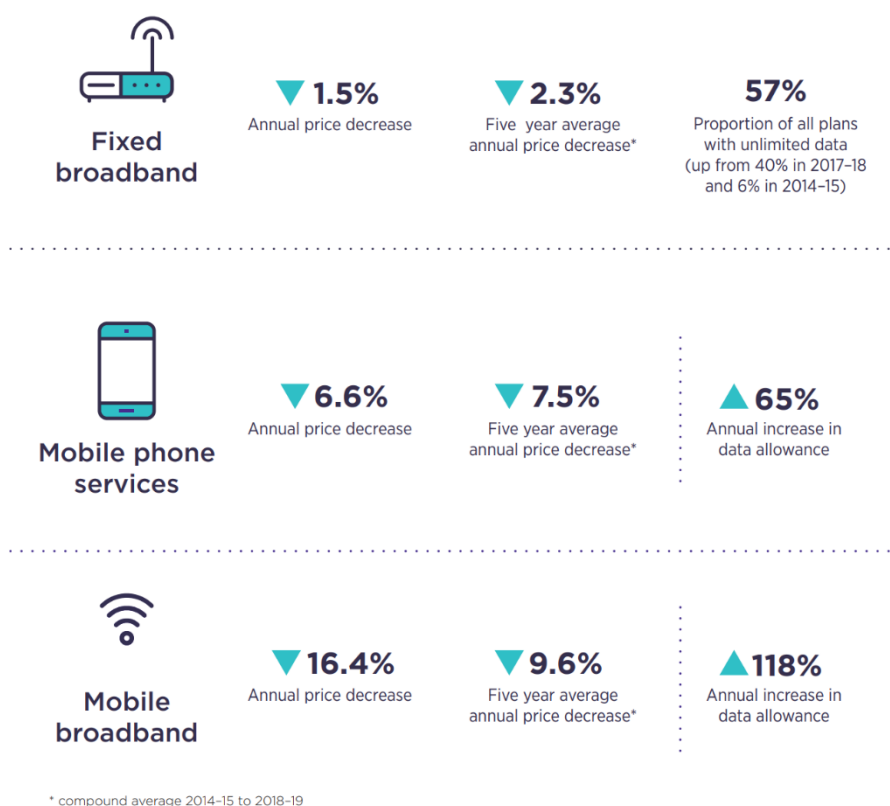
Impact

There are significant challenges in impartially and factually analysing the impacts of any policy or regulatory system – and this is particularly true for a unique market such as telecommunications. Any analysis must examine a range of indicators. The consultation paper focuses on ‘customer satisfaction’ as a key indicator, which we have addressed in the following section.

Outside of the question of customer satisfaction, there is a range of factors we can examine to consider if the telecommunications industry – and thus the regulatory structure that underpins it – is working.

First and foremost, telecommunications is a truly competitive market for an essential service, creating significant value for consumers.

The ACCC's Communications Market Report has found that the real price of telecommunications has consistently decreased in the past years.¹⁴



¹² The active involvement by the regulator in co-regulation is a key differentiator between self and co-regulation. Unfortunately, this distinction is not taken into account in the companion background paper by PricewaterhouseCoopers published with the consultation paper, where in comparing different countries, industry-led protections are grouped together regardless of enforcement by a regulator. While a detailed review of that paper indicates that Australia's telecommunications consumer safeguards are generally more extensive than the other included countries, that omission means that it is important to not draw conclusions from the summarised table or overviews provided in the background paper.

¹³ Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making, Karen Lee and Derek Wilding. November 2019. <http://accan.org.au/Responsive%20Engagement%20Involving%20Consumers%20and%20Citizens%20in%20Communications%20Industry%20Rule-making.pdf>

¹⁴ Communications Market Report 2018-19. p 2.

This has been backed up by findings from the Productivity Commission (PC)¹⁵ and the Bureau of Communications and the Arts Research¹⁶, with the PC noting that prices have fallen “in absolute terms and even more so relative to other essential services. Over that time, quality has also continued to improve.”¹⁷

As the PC report states, these price decreases have been accompanied by increasing quality and accessibility to communications. For the last 6 years, Australia has been ranked number one globally for Mobile Connectivity by the GSMA Mobile Connectivity index.¹⁸ This is particularly interesting, given that the mobile market has been less regulated than that of fixed voice or broadband.

We are also seeing the industry move “towards simpler pricing structures with more inclusions,”¹⁹ with an increasing number of providers offering month-to-month contracts and additional control and flexibility such as adding data or increasing speed for specific time periods based on need.

The aforementioned low barriers to customer churn – creating a highly competitive market – have been key in creating this value for customers.

Where there have been difficulties – either market failures or otherwise - the co-regulatory system has responded well, such as with the 2012 revision of the TCP Code and consequent fall in complaints to the TIO. The consultation paper uses examples of ‘buttressing’ – direct regulation being put in place to reinforce or strengthen existing self- or co-regulatory instruments – as an example of an ‘issue’ with co-regulation, when it is in fact a demonstration of exactly what a balanced co-regulatory system is meant to do.

However, this system has also led to a heavy and confusing regulatory burden.

There are widespread reports of smaller providers ceasing operation due to the costs of the regulatory burden, or choosing to stop providing services to ‘consumers’ and focus only on businesses, as this significantly narrows the number of regulations they need to consider. By decreasing the number and type of providers who can compete, regulation has in this instance acted against the interests of consumers.

Additionally, high numbers of simultaneous priorities from varying Government agencies and regulators has led to an – at times – preposterous burden of consultations, regulatory changes to implement, and compliance efforts to focus on. This has meant that providers and other participants in the co-regulatory framework are not able to focus efforts on key consumer protections or service delivery.

While this analysis demonstrates that there are clearly opportunities to learn and improve on regulation and service delivery, more importantly, it shows that the overarching structure has successfully delivered a highly competitive market offering increasing value and innovative solutions to consumers. From this, it is reasonable to focus on specifically what aspects we can improve, instead of ‘throwing the baby out with the bathwater.’

¹⁵ Telecommunications Universal Service Obligation, Productivity Commission Inquiry Report Overview & Recommendations. April 2017.

<https://www.pc.gov.au/inquiries/completed/telecommunications/report/telecommunications-overview.pdf>

¹⁶ Communications affordability continues to improve, Bureau of Communications and Arts Research. April 2020.

<https://www.communications.gov.au/departmental-news/communications-affordability-continues-improve>

¹⁷ Productivity Commission USO Report, p 3.

¹⁸ ITWire, September 2020.

¹⁹ Part C, p 5

Customer Satisfaction

One of the indicators the paper looks at is customer satisfaction – which raises two key issues. The first is that it uses some very questionable data to draw a conclusion about the levels of customer satisfaction in the industry. The second, and larger issue, is if customer satisfaction is an appropriate barometer of suitable consumer safeguards.

We will address the issues with data first. The consultation paper and broader discussions about telecommunications regulation often draw comparisons to energy. While there are lessons to be learned from energy, there are some significant differences that impact the relevance of direct comparisons.

Particularly regarding customer satisfaction, the first key difference is in the type of service provided. While both industries can have complex billing and pricing structures, ultimately, electricity is a matter of 'on/off, meaning both the industry and its customers do not face the challenges – and related complaints – about speed or quality of the service delivered.

The second is the simple number of services provided. As of 2019 there were 11 million electrical connections and 5 million gas connections in Australia²⁰, versus over 43 million internet services²¹ plus 8 million fixed line voice services.²²

While the consultation paper is accurate that there is a slightly higher percentage of telecommunications customers that made a complaint directly to their provider in 2018-19, it neglects to mention that the rate of complaints to energy external dispute resolution schemes (ombudsman) was nearly double that of telecommunications in 2017-18.²³

These factors taken in addition to the consistently increasing real value in telecommunications vs rising prices in energy bring into serious question the paper's implication that a comparison to the energy industry demonstrates problems with consumer safeguards and satisfaction in telecommunications.

The paper also relies on the Roy Morgan Trust and Distrust survey to support its assertion of low customer satisfaction in the telecommunications industry – without actually considering how that survey is undertaken. Australians are asked to randomly name companies they trust or distrust (regardless of if they're a customer of that company), so it is unsurprising that many came up with either the name of the prior Government provider that all Australians are familiar with or the currently much-discussed politically hot topic major infrastructure provider – without any reflection on their actual experience with their providers. Also, considering the long tail nature of the industry, even if respondents gave strong trust responses for their providers who were small to mid-sized, that wouldn't compile into a reflection on the industry because the report is by brand. This simply is not an appropriate survey or measure to use in a factual policy paper.²⁴

Additionally, the consultation paper flags that the TIO's data typically lists 'customer service' as a top issue of complaints. Considering that most customers who choose to go to the TIO are dissatisfied with the experience they have had with their provider, this information does not offer much insight to the consideration of the customer experience.

That being said, TIO complaints do provide some helpful objective statistics to consider – when done so in context. The Complaints in Context report calculates the ratio of services

²⁰ Guide to Australia's Energy Networks, Energy Networks Australia. Sep 2019.

<https://www.energynetworks.com.au/resources/fact-sheets/guide-to-australias-energy-networks/>

²¹ Communications Market Report 2018-19, p 43.

²² Ibid, p 42.

²³ Connected Nation, Deloitte Access Economics. p 21.

²⁴ Roy Morgan Net Trust Score, Roy Morgan. February 2018. <http://www.roymorgan.com/findings/7521-roy-morgan-net-trust-score-nts-201802270643>

that result in a complaint to the TIO (for the top 10 complaint recipients). For the past year, that number has varied between .062% and .071% - or, 1 out of every 1,351 - 1,613 services has resulted in a complaint.

Ultimately, there is no perfect indicator of customer satisfaction. Complaints to the TIO and the data from the ACMA's Complaints Handling Record Keeping Rules (RKR's) - when taken as a proportion of services - do provide valuable data over time, but there is no universally accepted baseline - across industries or countries - about how an industry 'should' perform. So, while we absolutely acknowledge that the industry needs to continue improving the consumer experience, customer satisfaction data does not necessarily indicate need for extensive changes to regulation.

This raises the second question, of if customer satisfaction is an appropriate indicator of consumer safeguard effectiveness.

Customer satisfaction can be influenced by and reflect a range of factors - many of which are not related to safeguard principles. These include some of the issues raised in the earlier section on 'challenges,' such as the complexity of telecommunications services. Another factor to consider is if customers are taking full advantage of the choices presented by a competitive market. If customer satisfaction is uneven across providers, but customers are not choosing to move despite there being clear information and appropriate safeguards for transfers, then it may reflect more on the opportunity to educate consumers about their choices.

While customer satisfaction can be a useful tool to indicate the industry's performance as a whole, if there are concerns raised via customer satisfaction, further analysis needs to be done on what those concerns reflect about the specific protections.

Step 1: Problem identification

The goal of consumer safeguards regulation – whether it be co or direct regulation – should be to enact the principles where there is clear and direct evidence of the market failing to fulfill them - with the lowest possible impost on industry and thus consumers.

The key initial step required for any efficient policy intervention – established both by the Office of Best Practice Regulation (OBPR) and widely accepted in global policy development – is to identify evidence of a problem, then analyse that problem to understand the drivers. If not, intervention often does not solve the initial problem and/or creates unintended consequences that can be worse than the original concern. This step has often been ignored in telecommunications regulation, as evidenced by the extensive number of overlapping instruments and cases of regulations that have been introduced but not achieved the desired outcome.

This differs somewhat from Principle 1 put forward in the paper, that *'Rules are needed to drive customer-focussed behaviour where market/commercial incentives are weak.'* While addressing market failure is a standard basis for consumer protection law in Australia, this principle assumes a problem due to 'weak incentives' instead of necessitating evidence, and does not directly connect back to established consumer safeguards principles.

Best Practice Regulation is not a solution in search of a problem. It instead looks at problems – existing consumer detriment – and develops solutions to address those.

The paper puts forward that direct regulation "is appropriate when there is a compelling policy reason for regulation,"²⁵ and then touches on a range of circumstances when that is true. However, some of those circumstances do not even fulfill the initial requirement of determining if there is a problem to be solved (we address those here, and the others in the next section on 'Options Analysis.')

The most concerning is the idea that intervention is needed when "industry has fewer incentives to control risks (or cannot control them easily)." This is a very broad statement. Risk is inherent to the operation of a competitive market, and it is not appropriate to regulate for all risk. There is no connection between this statement and consumer safeguards.

Instead, what needs to be examined is whether there is evidence of consumer or industry harm, in particular against the established determined consumer safeguards principles. These principles provide a clear framework against which to analyse occurrences in the industry, to ensure that intervention is not considered for every possible circumstance, but instead prioritised to address pre-established necessary principles of protection.

For example, the consultation paper claims that "market/commercial incentives are likely to be weak where a customer has already signed up to a contract," without providing clear evidence for this claim. There is extremely high mobility in telecommunications space – and this is increasing with the expansion of month-to-month contracts. This is not a direct identification of consumer harm.

Issue for Comment 3 is another example of this exact concern: *To what extent should third parties such as communication 'apps' providers be captured by any new rules, and why?* There is no evidenced problem with communications apps providers at this time. There has been no discussion of what consumer protection might be being infringed upon and no evidence of a market failure or consumer detriment.

²⁵ Part C, p 13.

Once evidence of consumer or industry harm is established, there must be review of the size of the problem – analysing the consumer and industry impact. Then a policy decision needs to be made if this matter falls under the principles that should be addressed by consumer protection.²⁶

Finally, the regulator needs to undertake an examination of the drivers of that problem. This is vital, as it is the step which will ensure any solutions considered actually address the problem itself. It is not uncommon for policies to use levers to address one aspect of a problem, but ultimately miss the underlying driver and thus only shift the consequences of that problem elsewhere.

While these steps must be done in consultation with all stakeholders,²⁷ including industry, it is appropriate for the regulator (or the Department) to undertake this policy development work.

The first step – currently lacking in the telecommunications safeguards regulatory process - in determining whether there is a need for intervention is to establish whether the consumer safeguards principles are not being upheld, and then to analyse the problem – per the Office of Best Practice Regulation's guidance, that 'the starting point of your policy journey' should be to 'clearly identify and define the problem you are trying to solve.'²⁸

²⁶ This addresses the second step under OBPR's guidance – why is government action needed?

Source: The 7 Regulation Impact Statement (RIS) Questions. <https://www.pmc.gov.au/sites/default/files/files/7-ris-questions.pdf>

²⁷ This aligns with OBPR's recently updated guidance on consultation. Source: Best Practice Consultation, OBPR. March 2020. https://www.pmc.gov.au/sites/default/files/publications/best-practice-consultation_0.pdf

²⁸ The 7 RIS Questions.

Step 2: Options Analysis

Once the above analysis is undertaken, both the current protection framework and a range of policy options need to be considered.²⁹

First the regulator (or Government) must consider the rules that are already in place, and examine if industry education or enforcement could be increased instead of revising or putting new rules in place. This would result in a lower burden on all participants in the policy process, while generating improved consumer outcomes. This model has been applied by the ACCC, which develops guidance on how the existing rules apply to a specific situation, as opposed to continually creating new rules.

If the rules already in place are being appropriately applied and enforced but remain insufficient, consideration of the protections offered by the market should be the next step. This is because low barriers for customers to transfer providers (which currently exist) create significant commercial incentives for high standard of customer service, low costs, high quality service delivery, and innovation.

Consumer education is another option to be considered. Increasing consumer understanding and empowerment – both in terms of their ability to make informed choices, but also to ensure they are able to identify when a problem is a failure in service delivery vs a complication – allows consumers to take advantage of the competitive market to drive outcomes across the industry.

These actions need to be considered equally against the option of retaining the status quo and any regulatory action – whether it be direct or co-regulatory.³⁰

Finally, if it is determined that regulatory intervention is required, there is the question of whether self, co, or direct regulation is most appropriate.

Considering that the consultation paper focuses largely on the question of co-regulation³¹ vs direct regulatory instruments created by the ACMA and/or Minister³², those are the options addressed here.

Issue for Comment 1 under Proposal 2 raises the question of *What role should direct regulation, industry codes and guidelines play in a revised safeguards framework?*

Overall, we consider that the balance should continue as it has today, with additional opportunities for co-regulation presented by a proposed 'enhanced co-regulatory' process.

Industry Codes should remain the main form of regulation, per the Act and the Government's current deregulatory agenda, with direct regulation only developed when necessary.

We note that the consultation paper puts forward the idea of confining self-regulation "to second order safeguards or situations where Minister or regulator-developed rules could usefully be supported by technical or process requirements."³³ However, this makes an

²⁹ This the third step per OBPR - 'identifying a range of genuine and viable alternative policy options.' Source: The 7 RIS Questions. <https://www.pmc.gov.au/sites/default/files/files/7-ris-questions.pdf>

³⁰ Per OBPR guidance. Source: Regulation Impact Statement Policy Options, Office of Best Practice Regulation, March 2020. <https://www.pmc.gov.au/sites/default/files/publications/ris-options-guidance-note.pdf>

³¹ Noting that true self-regulation has been effectively used in telecommunications. See examples from Connected Nation, pages 5 and 7.

³² While legislation was initially used for most consumer safeguards, in recent years instruments have been more prevalent. Legislation is fairly broadly accepted to be a long and slow process. While in balance it brings a high level of transparency, the timing means that is likely not appropriate for the majority of consumer safeguards going forward. Thus, this evaluation will focus on the experience with direct regulatory instruments.

³³ Part C, p 23.

inaccurate assumption about the nature of consumer safeguards. Consumer safeguard regulations are technical, as they interact with and are entirely dependent upon highly technical and process requirements. This approach would be extremely inefficient.

While neither the direct or co-regulatory rulemaking processes have worked optimally at all times, we examine the goals of safeguards regulations against the inherent aspects of each (i.e., when they are working as intended) to arrive at this conclusion.

Goals

Following on from the analysis of 'Challenges' laid out in the Introduction and the other points raised throughout this paper and the consultation paper, there are key principles that should drive rulemaking for consumer safeguards, split into two categories:

Process:

- Regulatory activity should be prioritised to allow for proper focus and planning.
- Implementation of new rules and regulations must be done in a way that does not negatively impact customers, with reasonable time expectations.
- The process needs to strike the appropriate balance between timing/flexibility and participation.

Outcomes:

- Rules should be clear for industry to understand and follow.
- Rules should clearly fit into a clear broader framework of protections – both telecommunications specific and within the broader economy.
- Safeguard regulations need to be written and implemented in a way that allows for new technologies and contract types.
- 'One size fits all' regulation does not work for telecommunications.
- Business impact analysis of safeguards need to keep technical regulations, security/critical infrastructure and other rules in mind.
- Regulation needs to balance differing consumer interests.

Comparison of process

One of the key strengths of the co-regulatory process is using industry's expertise to develop workable rules, which increases compliance and reduces the cost and time needed for implementation. Industry's involvement in the detailed drafting means that most outcomes take into consideration operational realities.

Additionally, the co-regulatory process inherently shares decision-making with more stakeholders, with an ACCAN-funded research paper finding that the telecommunications co-regulatory structure has an extremely high level of consumer participation.³⁴ As transparency and consultation are key to OBPR best practice, this is another benefit of co-regulation.³⁵

Direct regulation, on the other hand, creates higher costs for government due to the workload of developing and drafting the instruments

³⁴ Responsive Engagement, Lee and Wilding.

³⁵ Best Practice Consultation, OBPR.

As currently implemented, one of the major differences between the two is time in drafting. Direct regulation has offered the benefit of having only one party drafting the rules, while the committee process can take longer. However, many of the timing issues have been due to the implementation of the co-regulatory process and are thus resolvable – these are addressed in the following section on rulemaking.

The paper's statement that co-regulation is preferable for 'existing vs emerging problems'³⁶ due to a lack of speed and flexibility is not only untrue because those problems are resolvable, it neglects the fact that an industry-led process is in fact more able to identify and address emerging problems. Industry is in a better position to quickly identify what is happening in the marketplace and modify existing instruments in a way that both ensures consumer protections and does not require unnecessary changes to systems and processes. When industry is involved in the detail of drafting, they can see connections between the instrument development and emerging technologies or business models, and ensure that the regulation is drafted in a way to not inhibit that innovation.

One example of a successful implementation of co-regulation is the number portability system in Australia, which was world leading when established and delivers significant consumer protection through diversity of choice and ease of switching providers.

The paper's assertion that "ultimately, industry decides the form of the code brought for registration" is not entirely accurate. The draft code submitted to the ACMA for consideration for registration also reflects compromises and positions jointly developed by the Working Committee members (including consumers) and observers. It also reflects changes generated by discussions with ACMA staff along the way and refinements generated by the public comment process.

Comparison of outcomes

According to the paper, the two key benefits of direct regulatory outcomes are clarity and enforcement, which we do not find to be supported by the evidence.

There is a false equivalence in the paper between direct regulation and specificity that does not wholly align with industry experience. For example, there has been significant confusion about the NBN Consumer Experience Rules, such as drafting issues leading to confusion about the overlaps between the Service Migration Determination and the Continuity of Service Standard.

While there could be improvements to the co-regulatory process (some of which would prevent the issues with clarity raised by the consultation paper), there are many instances of it working well. For example, there was a period of rising complaints leading to the ACMA's *Reconnecting the Customer* (RTC) inquiry in 2010. This resulted in the significant 2012 revision to the TCP Code, following which complaints to the TIO decreased to the lowest level of complaints in six years for the 2013 – 2014 financial year. In fact, the TIO's annual report from that year stated that "the results indicate that a number of the recent co-regulatory initiatives to protect consumers are working."³⁷

Another example of co-regulatory success is the high level of compliance with the Critical Information Summary (CIS) requirements of the TCP Code raised in the consultation paper.³⁸

³⁶ Part C, p 11.

³⁷ Annual Report, 2013 – 2014, Telecommunications Industry Ombudsman. p 3.
https://www.tio.com.au/sites/default/files/2019-05/TIO-complaints-the-year-in-review-2013-14_WEB_0.pdf

³⁸ Part C, p 16.

We can compare these outcomes to the recent enforcement activity required for the direct regulatory NBN service continuity rules,³⁹ regarding which industry has continually raised concerns that they are unclear and overly complex.⁴⁰

On the whole, enforcement outcomes are mixed for both co-regulatory and direct regulatory instruments, and industry experience is that co-regulatory and direct-regulatory instruments are equally enforceable. Our view is that the first step to increasing compliance is to ensure that rules are clear and appropriate, and that they include reasonable implementation timeframes. These aspects are best ensured through a co-regulatory rulemaking process.

When should direct regulation be used?

Considering the above analysis, co-regulation typically results in the most appropriate outcomes, due to its process. However, there will be circumstances in which direct regulation is needed. The consultation paper puts forward some possible circumstances⁴¹:

- “where a legal foundation is required for enforcement of measures in the case of non-compliance”: Considering that both co-regulation and direct regulation provide legal foundations for enforcement measures, this is not accurate.
- “protection of the public or industry from harm.”: We agree that if there is evidence of harm, some form of intervention is needed, but evidence of harm does not mandate that direct regulation is the best or only solution.
- “where industry consensus is uncertain about regulatory intervention”: In cases where there is an established market failure in consumer protection and industry is unable to develop a solution, we agree that direct regulation is an appropriate response.

Overall, direct regulation should only be used if and when co-regulation is unable to provide a solution to the drivers identified in step 1, problem identification, per OBPR guidance.

Proposal: Enhanced co-regulation

In addition to the options of co-regulation and direct regulation outlined above (and currently used), we propose the addition of a ‘middle-ground’ approach.

There are circumstances in which the regulator may, following problem identification and the initial options analysis, determine that regulatory intervention of some type is required, but industry does not agree in principle.

In those circumstances, the regulator could direct industry to develop a co-regulatory instrument to address the specific problem and established outcomes, within a specific timeframe.

This would allow industry to develop an instrument that is appropriate considering operational and technical realities, which will create increased compliance.

If, during this process, industry is unable to agree on an instrument, they can present the ACMA with the options and reasoning discussed, and the regulator can then take that information to develop a direct regulatory instrument.

³⁹ Telstra, Optus, TPG and Dodo breach NBN service continuity rules, ACMA. September 2020.

<https://www.acma.gov.au/articles/2020-08/telstra-optus-tpg-and-dodo-breach-nbn-service-continuity-rules>

⁴⁰ Response to the ACMA Discussion Paper: Post-Implementation review of the NBN Consumer Experience Rules, Communications Alliance. September 2019.

https://www.commsalliance.com.au/_data/assets/pdf_file/0006/66291/190905_CA-submission-NBN-consumer-experience-rules_FINAL-v2.pdf

⁴¹ Part C, p 13.

Step 3: Rulemaking

The rulemaking process – and its outcomes – has a significant impact on compliance. While we address enforcement under the following proposal, this is an important fact to keep in mind when considering the importance of getting rulemaking right.

We support the intention behind Proposal 2 - *The telecommunications consumer protection rulemaking process should be reformed to improve its effectiveness*. Improvements can and should be made to the rulemaking process, but 'reformed' implies a more significant overhaul than is needed.

In evaluating both the co and direct regulatory rulemaking processes, we have identified a range of ways in which they can be improved to be more efficient and result in better outcomes, and a first step that needs to be used regardless of the type of instrument.

These outcomes mostly align with Principle 3 - *The rule-making process should be timely, efficient, enable a wide range of views to be considered and produce clear, targeted rules*.

However, it is important to note that some of these goals create tensions with each other that cannot be resolved by any process. Those tensions are an acceptable part of a transparent and consultative regulatory framework.

Additionally, we have considered how best to address the competing needs for flexibility and clarity in such a diverse industry, and proposed a new structure for all instruments.

Finally, we have considered the question in Issue for Comment 2 about redesigning the current rules, and proposed an overall evaluation to create a clear structure of rules.

First step

Regardless of which method (co or direct) is used, clear goals and outcomes should be set for any instrument. This supports the ACMA's finding that "the research suggests it is optimal that policymakers and regulators are clear about what objectives, outcomes and behavioural change they are trying to effect through co-regulatory arrangements. A

Case study: IPND

This is an excerpt from the case study "Efficiency and the Integrated Public Number Database" in Deloitte's Connected Nation: The Regulatory Ecosystem paper.

"...businesses found the regulation extremely difficult, if not impossible, to comply with. ...data providers need to extract their entire customer database and then compare this with the IPND database.

As the IPND has file size and transaction processing limitations, data providers are unable to send a file with more than 100,000 records at a time, and only three files of such size can be processed per day...Undertaking a comparison of IPND data against a data provider's own...may require many days of processing to compare, compile and create updated records.

As IPND data is not static, early file comparisons and subsequent records created to update IPND data do not account for activity that may have occurred between the date of the extract, the date of the comparison of data and the date that a file record was sent to the IPND to 'correct' an error.

This demonstrates that regulation and systems designed in another time, in a different market with different technologies cannot necessarily be kept current and relevant by adding additional regulatory compliance requirements over the top of the underlying regulation and systems. Such an approach risks creating unintended inefficiencies that undermine the original intended purpose."

Direct link:

https://www.commsalliance.com.au/_data/assets/pdf_file/0008/69515/RITM0410497-Communications-Alliance_Digital-2.pdf#page=20

consistent process for identifying scope, development, enforcement and review is required."⁴²

This is something we have previously found lacking, but which would more efficiently and effectively drive rulemaking. **Before an instrument is developed through either co or direct regulation, the ACMA should work with all stakeholders to clearly established the goals and expected outcomes.**

Direct regulation

Evaluation

Industry's experience with direct regulation is that improvements could be made in the process of development and the clarity and appropriateness of outcomes.

We note the paper's statement that direct regulation can be delivered quickly. This is true in some (but not all) cases, but our experience is that speed is not necessarily balanced by clear or appropriate outcomes. While we appreciate that the regulator can – and does – respond to concerns by revising regulations, we think all parties agree that it would be more effective for these concerns to be considered and addressed during initial development stages.

The level of consultation for direct regulation has varied significantly, which at times has resulted in outcomes that don't reflect industry practice, requiring significant time and expense to implement with minimal consumer benefit. Transparency on the process of consultation could also be improved.

Industry finds that the outcomes of direct regulation are often significantly more prescriptive or unclear, at times using a one-size fits all approach that can inequitably impact different parts of the industry.

Case study: International Mobile Roaming (IMR) Standard

In recent years, there has been significant innovation in mobile roaming options and offers, such as \$5/day plans, or being able to use 'normal' plan data overseas.

However, the prescriptiveness of the IMR Standard meant that requirements did not align with those new plans. For example, providers had to send consumers alert messages including pricing information that did not correlate to the inclusion in their plan or the travel pack they signed up for, or they had to send alerts when a consumer crossed country borders, even if there was no change in the rate applicable.

This prescriptiveness ultimately caused significant confusion for consumers, instead of supporting innovative and improved offerings.

More detail is available in Communications Alliance and AMTA's submission to the 2018 review of the Standard:

https://www.commsalliance.com.au/_data/assets/pdf_file/0017/61442/AMTACA-submission-IMR-Standard-Review-11-Sept-2018-.pdf

⁴² Optimal conditions for effective self- and co-regulatory arrangements, ACMA. June 2015.
<https://www.acma.gov.au/sites/default/files/2019-08/Optimal%20conditions%20for%20effective%20self%20and%20co%20regulatory%20.pdf>

Recommendations

In the circumstances when direct regulation is necessary, experience has shown that early consultation with industry on the cause of a problem and viability of solutions leads to better outcomes.⁴³

Once the problem and solution have been consultatively identified, then there needs to be further consultation earlier in the drafting process to ensure the rules are written in a way that is both operable and clear for industry.

Additional transparency on the timing and development would be extremely helpful to ensure all parties are able to respond appropriately and so that industry can be prepared for implementation.

Responses to the consultation paper

The paper puts forward the idea that the ACMA needs additional powers to make Standards. However, these recommendations do not reflect the experience of the current framework.

Communications Alliance and industry has worked closely with the ACMA on a range of topics. If and when the ACMA has informally raised the need for a co-regulatory instrument, we have worked with them to create or revise instruments to address the problem. To our knowledge, the ACMA has rarely used the powers they already have in this space and has not previously expressed any need for additional powers.

In response to the issue for comment 3, *Are current constraints on ACMA's power to make industry standards regulating consumer safeguards appropriate?*, we consider that yes, they are appropriate and there is no evidence provided for a need to expand them.

Co-regulation

Here we address issue for comment 2: *How could the code-making process be strengthened to improve consumer outcomes and industry compliance?*

Evaluation

Co-regulatory rulemaking creates a more transparent and consultative process – however, this has come with its own unique challenges for timeframes and clarity, particularly in recent years.

The time taken to develop and register Codes has varied. There have certainly been times when a faster process would have been preferable – but the delays have typically been due to complications added by ACMA expectations. The extensive requirements for consulting with the ACMA at all stages – despite their presence on the committees – including having to take these steps with both staff and then Authority members (due to lack of alignment) and finally, delays in registering codes, have also been a significant factor in timing.

Additionally, government and consumer representatives on committees are often not empowered to make decisions in the room, necessitating significant time between meetings for consideration and preventing efficient and effective committee work.

The number of conflicting priorities that all participants have had to handle due to constant regulator and government activity has been another driver of timeframes, which could be resolved by clearer and more reasonable priorities and expectations from regulators.

⁴³ This aligns with OBPR recommendations.

As to oversight, the ACMA's active involvement throughout the process and high levels of consumer participation⁴⁴ mean that all parties have significant influence at each stage of development.

In considering outcomes, the paper claims that Codes result in "unclear and ambiguous rules."⁴⁵ While this has been the case for some specific provisions, it is the result of a combination of factors that can be addressed through the recommendations below.

The paper also claims that language such as 'take reasonable steps or 'use reasonable endeavours/efforts'⁴⁶ is part of this lack of clarity. However, this does not align with the evidence. 'Reasonable' is language with significant precedent in direct regulation. Both the ACMA's NBN Consumer Experience Rules and the ACL itself use reasonable in multiple places, and neither regulator has raised concerns in those circumstances. Where needed, the ACCC has undertaken extensive consultation to develop further guidance on the meaning of 'reasonable,' which is a practical step for outcomes/performance-based regulation.

Recommendations

As noted, making power available to many different stakeholders with diverse viewpoints will inevitably lead to a less orderly process. While transparency and consultation should continue to be keystones of the co-regulatory process, they can be handled in better ways.

First, as noted earlier in this section, there should be a clear established goal for the instrument. Then, there should be a consultative process with consumers and government to determine the appropriate form of and outcomes within the instrument.

Following, this, Communications Alliance and its members should draft the instrument in its entirety, and then return to that original consultation group to get feedback on whether the drafted instrument meets the agreed objectives. This would be an iterative process prior to the required 'public consultation' stage. Clearly established timeframe and participation expectations for all participants would significantly accelerate the drafting process and improve the challenges with clarity raised in the section on 'evaluation'.

There are also detailed requirements for the Code process that significantly slow it. The ACMA's requirement for ballots may no longer be appropriate, considering the previously raised inherent tension in such a process, and that the ACMA would be aware of all viewpoints and concerns by participating in the guidance group.

As to ACMA participation, there needs to be clear expectations from the beginning on Authority expectations for what is required for the instrument to satisfy the previously established goals.

There could also be established timeframes for industry to complete a draft instrument and consequences for failing to do so. Equally, there should be established timeframes for the regulator to consider and (if approved) register the instrument.

To further improve clarity of the instruments, Government and the regulator should clearly establish that instruments are meant to instruct industry on their requirements, and are not intended as consumer education documents. If consumer education based on those documents is required, it can be developed separately.

⁴⁴ Responsive Engagement, Lee and Wilding.

⁴⁵ Part C, p 12.

⁴⁶ Ibid., p 12.

Responses to the consultation paper:

We have rarely seen the ACMA use its current powers (such as triggers to request a Code, setting timeframes, or requesting that code deficiencies be remedied). Neither do we see clear evidence that the ACMA needs additional powers.

The assertion in the consultation paper that “the test for registering codes is low and subjective”⁴⁷ is not accurate, in our experience.

The ACMA sets stringent expectations throughout the Code development process and negotiates Code clauses in detail, even once initially submitted to the Authority. The Authority is extremely involved – to the level of discussing specific words in clauses – and there are multiple stages of negotiation with ACMA staff and Authority members before a Code is formally submitted to the Authority. The most recent TCP Code revision underwent significant changes due to directions from the ACMA that it would not be registered without certain clauses being added or revised.

Proposal: Outcomes based regulation

Outcomes-based regulations should be used wherever possible, and can be developed through co or direct regulatory rulemaking.

Outcomes based regulations would work by setting the requirement in a policy document, Code or direct regulatory instrument (i.e. – a requirement for consumers to be able to verify billed charges), then through Industry Guidance Notes or similar instruments provide specific examples on how that could be achieved for clarity, while still allowing providers to use other methods to achieve those outcomes.

This would strike the balance “between providing clarity/avoiding ambiguity and reducing prescription” sought in the paper.⁴⁸ It would make it clear what compliance ‘looks like’ without setting only one method of achieving compliance.

The benefits of this model include:

- Allows for innovation/evolving products and the market
- Increases competition in the market
- Provides more detailed guidance for small providers (that they are asking for) while not increasing regulatory burden, addressing the challenge of not having a one-size fits all approach.

The UK’s Department of Business has stated that “the flexibility of the GBR [goals-based regulatory] approach is also argued to create incentives for regulates to experiment and seek out better and more innovative methods of achieving a regulatory goal. To the extent to which this reduces costs, this can have impacts on competition, as each regulatee seeks out methods and practices which can reduce compliance costs and improve its position relative to its competitors.”⁴⁹

Additionally, the ACCC’s statement of expectations says “the Government’s preference is for principles-based regulation that identifies the desired outcomes, rather than prescribing how to achieve them. An outcomes-based approach is more likely to accommodate change within the economy, allow for innovation and enterprise and reduce compliance

⁴⁷ Ibid., p 12.

⁴⁸ Ibid., p 24.

⁴⁹ Goals-Based and Rules-Based Approaches to Regulation, UK Department for Business, Energy & Industrial Strategy. May 2018. p 22.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714185/regulation-goals-rules-based-approaches.pdf

costs by allowing regulated entities to determine the best way of meeting regulatory objectives."⁵⁰

Proposal: Structure of Rules Should Be Clear

Issue for comment 2 asks: *Do the existing consumer protection rules governing the retail relationship e.g. in the TCP Code and various standards and service provider determinations need to be redesigned, or are new rules required, to address increasingly complex supply chains? If so, why?*

While we do not see that there needs to be an entire 'overhaul' of the system, and any changes should be planned with reasonable timeframes, there is an opportunity to update the rules to align with the above proposal "outcomes-based regulation."

Additionally, as the paper notes, there should be "an opportunity for greater consolidation of the rules so that they are set out in fewer instruments and locations."⁵¹ In this process, the Complaints Handling Standard should be rolled back into the TCP Code structure.

While these changes will be beneficial, they should be done at an appropriate pace and through stepped revisions – with a larger plan to create a clear and effective overarching structure for consumer protection.

This process should also take into consideration a clearer structure of rules and enforcement between the ACCC and the ACMA. There is a preference for a single set of rules and a single regulator or clearer guidance accountability between regulators on specific matters, and we recommend further consultation on this specific topic.

⁵⁰ Government Statement of Expectations – ACCC. p 1.
https://www.accc.gov.au/system/files/ACCC_Statement_of_expectations.pdf

⁵¹ Part C, p 24.

Step 4: Enforcement

The enforcement of safeguards regulation should focus on outcomes for consumers.

This is best delivered through a culture of compliance in the industry that encourages consideration of consumer protection throughout the business, from product design through to delivery. Industry's experience is that this culture is best encouraged by education and compliance work from a responsive regulator, with enforcement used where and when appropriate.

The paper puts forward the statement that "A number of changes to ACMA's powers to enforce compliance with codes appear to be needed"⁵² without supporting arguments. The paper does not accurately examine the enforcement and compliance experience for the different regulatory tools. We are concerned that this assumption has framed the proposals in the paper, while the case is that the ACMA's enforcement powers are currently flexible and used in a variety of ways by the regulator.

Industry is not aware of instances when the regulator has been unable to enforce due to a lack of appropriate powers.

Challenges

There are some challenges to both compliance and enforcement to be considered:

- In the last few years, we have seen unreasonable – and in some circumstances impossible - implementation timeframe expectations.
- The ACMA has sometimes changed (or pushed for change to) rules that have not been fully enforced, or where there has not been extensive educational work done with industry. This has meant industry has had to focus on constantly changing processes to adapt to new rules, instead of being able to focus on implementing and growing the culture of compliance for the existing rules.
- Parts of industry feel that there has been limited guidance education from the ACMA, including an unwillingness to answer good faith questions about specific circumstances or products that may not be clearly aligned with (or outside of) the existing rules. This is addressed more in the next section.
- The paper claims ACMA compliance/enforcement is constrained by number/nature of providers, in particular the number of small providers. While we acknowledge this is a challenge, it is not because the ACMA lacks sufficient power.⁵³

Education and Compliance

The ACMA has a role to educate and to encourage a compliance culture within the industry.

Despite the ACMA's Compliance and Enforcement policy stating that "a significant amount of [it's] work is aimed at encouraging voluntary compliance," that has not always been the experience of telcos. We genuinely appreciate the ACMA's engagement with Communications Alliance on a range of matters. However, the formal and informal consultation mechanisms listed – "discussions, seminars, consultation papers and advisory committees" – could be used more thoroughly, particularly to reach parts of the industry not heavily engaged in the regulatory process, such as tier 3 or smaller providers.

⁵² Ibid., p 25.

⁵³ We understand some stakeholders will be proposing a 'register' of providers to address this challenge. We did not become aware of this proposal until late in the process of developing this submission, so have not had the opportunity to consider it. We would encourage further consultation if this is to be considered.

Providers should be able to engage with the ACMA in good faith when considering product, offer or process changes. At times, however, the ACMA has been unwilling to provide guidance, perhaps so as not to compromise its ability to take later enforcement action.

Finally, we agree strongly with the paper's suggestion that the ACMA should continue to communicate compliance and enforcement priorities with industry and the public, should work towards consolidating and simplifying how it communicates these.

TCP Attestation

The TCP Code attestation process is particularly relevant to this consultation. This process creates a direct link from all providers bound by the Code to Communications Compliance, an independent body with both industry and consumer representation on its board.

Last year, Communications Compliance significantly increased the detail and complexity of the attestation process, and have unofficially reported to the ACMA and Industry that this has already created significant opportunities for education and they are seeing increased engagement with the Code and attestation process, and through this, increased compliance culture.

We understand they are also considering developing additional guidance for telcos on matters that have arisen as points of confusion out of this attestation process.

The impact of Communications Compliance's additional engagement and education activities make it clear that education and engagement are extremely valuable and effective tools for the regulator.

Enforcement of Codes

Proposal 3: The essential telecommunications-specific consumer protection rules should be mandatory and directly enforceable by ACMA, and the enforcement options available should encourage compliance.

The implication throughout the paper that industry does not consider Codes to be of equal import to direct regulations is false, in our view. Registered Codes – although they are technically voluntary in the absence of a direction to comply - clearly apply across the industry and are viewed as mandatory once in place.

The step of directing a provider to comply with a Code is not a weakness in this system – it instead is an opportunity for graduated compliance. Providers take these directions seriously, and as past examples have shown, take remedial actions to come into compliance with the Code.

In the limited circumstances where a provider is actively or intentionally breaching its obligations, it is unlikely to comply with that Direction, and the ACMA can and should proceed with its next regulatory tools.

Finally, the ACMA does have the ability to provide a direction to comply to participants without any evidence of infringement. If the direction to comply was creating significant delays in enforcement, it would be reasonable to assume that the ACMA would be pre-establishing these directions to comply – which it is not.

There is no evidence in the paper where this two-step process has caused a lack of compliance. This is a flexible and proportionate structure for enforcement.

Other Enforcement Powers

Issue for Comment 1: What additional regulatory and/or enforcement tools should be made available to ACMA?

None. As addressed above, the ACMA already has extensive powers, and there is no evidence presented that there has been any negative impact from 'missing' powers.

That being said, when applying its current enforcement powers, it should use a graduated and proportionate approach that considers both the nature of the breach and the level of consumer detriment. In this, there should be a clear delineation between determining a breach and deciding whether to impose a remedy (and if so, what the remedy should be).

The ACMA should have flexibility in the tools that it chooses to use – for example, the ability to not impose a remedy if it is a minor breach and the party has clearly taken steps to achieve future compliance, and/or if the provider was acting in an attempt to comply but was unclear on the requirements.

Penalties

Issue for Comment 2: Are the currently available civil penalty and infringement notice maximums appropriate?

Yes, and there is no evidence that they have not acted as effective deterrents.

In the highly competitive telecommunications market, the brand damage resulting from public exposure of regulatory enforcement action is significant incentive for improved behaviour. Additionally, increased penalties would disproportionately impact smaller providers.

If we consider the infringement notice maximums in comparison to the Australian Energy Regulator's powers, there is not a significant difference - the AER can issue infringement notices of up to \$4,000 for a natural person or \$20,000 for a body corporate.⁵⁴ It also appears that the \$13,320 infringement notice maximum discussed in the consultation paper aligns with the ACCC's stated penalty notice for private corporations.⁵⁵

Risk Based Approach

Principle 4: The regulator should have appropriate powers and actively enforce consumer protection rules based on risk.

A risk-based approach is common across all regulators, but can be interpreted in different ways.

In recent years, it has appeared that this has been enacted by the ACMA by focusing on larger providers in the market. While errors by these providers may impact more customers, this focus is creating an imbalance in the market, and leaving smaller players with little access to the ACMA for queries and education.

⁵⁴ AER Compliance and Enforcement Policy, Australian Energy Regulator. July 2019. p 9. https://www.aer.gov.au/system/files/AER%20Compliance%20%26%20Enforcement%20Policy%20-%20July%202019_1.pdf

⁵⁵ Fines & Penalties, ACCC. [https://www.accc.gov.au/business/business-rights-protections/fines-penalties#:~:text=\\$13%20320%20for%20a%20corporation](https://www.accc.gov.au/business/business-rights-protections/fines-penalties#:~:text=$13%20320%20for%20a%20corporation)

Step 5: Review

While principle 5 in the paper is directly related to the discussion of legacy obligations, it has direct relevance to the overarching regulatory framework: *Consumer protections should remain in place where they are of enduring importance but be removed or phased out if they no longer serve a purpose.*

We agree wholeheartedly with this principle. However, the process thus far has not taken a structured approach to the removal or phasing out of older obligations.

It is reasonable to assume from the Government's deregulation agenda that this not a problem unique to the telecommunications space, and that a responsive regulatory framework would be in alignment with expectations across the economy.

There should be a clear requirement that a review of an instrument of specific rule must consider the drivers that originally gave rise to the rule and revisit the assessment to see if regulation would be justified on balance if it were introduced today.

This is important because there will always be reluctance to get rid of something that exists, but that approach ultimately leads to the inefficient regulatory regime we have today.

It is reasonable to expect the ACMA, or the Department if necessary, to support this process on an ongoing basis.

LEGACY OBLIGATIONS

We welcome the consideration of legacy obligations. The existence of rules that are significantly out of date – and the confusion and overlap sometimes created by them - is a key example of why a well-managed regulatory space is necessary.

We generally agree with what has been put forward in the consultation paper about the ongoing importance (or not) of the obligations identified in the table, but also see this as an opportunity to introduce a stricter ongoing process of review and sunseting.

While we agree with Proposal 4 - *The legacy obligations of declining relevance should be removed or adjusted as Telstra's legacy copper network is phased-out* – the existence of legacy obligations are not just relevant to the copper network. There have been changes to the market and technology which mean there is a range of legacy obligations that should be removed, and this needs to be an ongoing process.

To answer the 'issues for comment' 1-3, we have provided comments against the obligations identified in the consultation paper in Appendix B.

However, question 2 (*If obligations are not mandated, would these services continue to be provided by the market?*) is problematic, as there may not be an established need for these services if they were put in place today, as they may not be related to consumer protection principles.

Copper safeguards

Issue for Comment 4: Which obligations, if no longer mandated, should be subject to transitional or grandfathering arrangements? What form should such arrangements take and how long should they remain in place?

The paper raises the question about legacy obligations if "the specific regulatory rule remain[s] the best way of securing that aim."

It may be appropriate to undertake a detailed consultation on simplifying and combining any protections specific to services delivered over a legacy network that need to be subject to transitional/grandfathering arrangements to ensure these are as streamlined as possible.

Low-income measures

Principle 6: Services should be available, accessible and affordable for all people in Australia.

We agree with this principle, as it aligns with our previously proposed principles on access and support Government's continued work on digital participation and inclusion. However, we do not have specific comments to offer on Issue for Comment 5 or general pricing.

CONCLUSION

Reconsidering the telecommunications consumer safeguards regime for Australia is an extensive undertaking.

While the Review process thus far has raised some interesting questions and outcomes, we are concerned it has not appropriately addressed what the underlying consumer protection principles should be. As discussed in 'Safeguards Topics,' we hope the Government will take the steps to consult on and establish clear underlying principles for the future.

We believe that both the co-regulatory and direct regulation processes can be improved. We would welcome the opportunity to work with Government, consumers and the ACMA on streamlining the Code development process, to make it more agile and flexible, while maintaining its key attributes and advantages.

The analysis in this paper and the competitive, innovative and low-cost telecommunications services being provided to Australians demonstrate, we believe, that on the whole, the balanced regulatory framework we have today is appropriate.

We look forward to further discussions with all stakeholders on the specific improvements that can be made.

We will also take this opportunity to address the 'General issues for comment' raised at the end of the consultation paper:

Do the proposals in this paper address the major issues of concern around choice and fairness and consumer safeguards?

We have addressed most of our major issues of concern above.

However, we are concerned that the consultation paper did not address two key points:

- The negative impacts of inappropriate regulation on consumers, particularly considering the evidence we have seen that typically the best protection for consumers is an innovative and competitive market.
- What protections are appropriate for vulnerable consumers, and how to balance those against the ongoing and effective delivery of services.

Are there any unforeseen issues or unintended consequences of the proposals?

We have addressed each of these within the consultation paper, but importantly – the consultation paper is high level. If any proposals are to move forward, we welcome further consultation on the shape and consequences of these.

Are there any other issues that should be brought to the Government's attention?

We greatly appreciate the Department's active and open engagement with all parties throughout Consumer Safeguards Review, and look forward to further considering how this work can support the Government's deregulatory process.

APPENDIX A: Matters raised in the Act

We have considered each of the consumer safeguards matters identified in the Act as examples of those that may be dealt with by industry codes and industry standards, and briefly categorised each as falling under one of three categories:

- Possible overlap - for further consideration: While we are not advocating to remove these specific rules at this time, these topics' overlap with the ACL should be the subject of ongoing consideration, particularly in light of the increasing merging of industries and products.
- Telco-specific guidance: These topics are also addressed in the ACL, but co-regulatory guidance on exactly how the protections should be applied in telecommunications can be beneficial. This guidance may be best developed and managed through what is effectively a co-regulatory process – but there should be further discussion on how to prevent regulatory overlap.
- Telco-specific: As these are unique to telecommunications they should remain as possible topics for telco-specific rules – noting that this does not necessarily mean that they need to be addressed through rules.

We did not extend to commenting on the rules around telemarketing, but do note that 'fax marketing' may no longer be relevant.

a) telling customers about:	Possible overlap - for further consideration
i) goods or services on offer; and	
ii) the prices of those goods or services; and	
iii) the other terms and conditions on which those goods or services are offered;	
b) giving customers information about performance indicators customers can use to evaluate the quality of services;	Telco-specific guidance
c) regular reporting to customers about performance against those performance indicators;	
d) the internal handling of customer complaints;	Possible overlap - for further consideration
e) reporting about customer complaints;	
f) privacy and, in particular:	These are addressed by the OAIC (not ACCC), but also benefit from telco-specific guidance.
i) the protection of personal information; and	
ii) the intrusive use of telecommunications by carriers or service providers; and	
iii) the monitoring or recording of communications; and	
iv) calling number display; and	
v) the provision of directory products and services;	Telco-specific
g) the "churning" of customers;	
h) security deposits given by customers;	Possible overlap - for further consideration
i) debt collection practices;	
j) customer credit practices;	
k) disconnection of customers;	Telco-specific
l) ensuring that customers have an informed basis on which to enter into agreements of a kind mentioned in paragraph 22(2)(d) or (e) or (4)(a) (which deal with boundaries of telecommunications networks);	Telco-specific
m) the quality of standard telephone services;	

n) the accuracy of billing of customers of carriage service providers in relation to the supply of standard telephone services;	Possible overlap - for further consideration
o) the timeliness and comprehensibility of bills;	
p) the procedures to be followed in order to generate standard billing reports to assist in the investigation of customer complaints about bills;	

APPENDIX B: Analysis of Legacy Obligations

Obligation(s) and associated Guideline(s)	Purpose/Outcome	Technology/sector?	Ongoing importance, needed updates?	Will market replace if removed?
Emergency call services TCPSS Act, Part 8 Telecommunications (Emergency Call Service) Determination 2019 C536:2011 Emergency Call Services Requirements	Enables callers to make free calls to emergency services Facilitates the Emergency Call service	C/CSPs, Standard telephone service	Yes, has ongoing importance for public safety.	N/A (should not be removed)
Calling line identification Tel Act, Part 18 G522:2016 Calling Number Display	Enables call management and routing, also associated with privacy issues.	C/CSPs, Standard telephone service	Yes, this has ongoing operational and privacy importance, but we note some members propose further consideration of this topic.	N/A (should not be removed)
Numbering	Beyond the specific 'number portability' protection below, there are a range of rules and consumer protections in the numbering system, including the Rights of Use of Numbers Code. While this has continued importance, there should be consideration of how to best clarify and/or update this system.			
Number portability Tel Act, Part 22 C540:2013 Local Number Portability C570:20019 Mobile Number Portability	Facilitates competition and consumer choice – enables consumers to take their phone number(s) when changing services.	C/CSPs, All telephone services	Yes, has ongoing importance – enables consumer choice and a competitive market.	N/A (should not be removed)
Consumer Contracts, Billing, Customer Service, and related topics				
Standard Terms and conditions Tel Act, Part 23 Australian Consumer Law TCP Code	Requires SFOAs to be in plain language, clear and consistent and available on websites.	All RSPs	It is of ongoing importance. However, there should be further consideration on the number of instruments (Tel Act, ACL, TCP Code) the obligation is spread across, and the possibility of streamlining.	N/A (should not be removed)
Pre-selection Tel Act, Part 17	ACMA may make determination requiring C/CSPs to provide pre-selection – enabling customers to choose different providers for	C/CSPs	We would direct the Department to the submissions made to the ACMA's recent review on this topic: https://www.acma.gov.au/publications/2020-05/publication/acma-announces-outcome-pre-selection-review	See note re ACMA review.

	local, long distance, int'l and mobile calls			
Directory Assistance Services Tel Act, Sched 2, Part 3	Requires telcos to provide customers a directory service (can be charged).	C/CSPs, Standard Telephone Service	As noted in consultation paper, there are significant non-regulated services available that have largely replaced the benefit of this obligation (many of which are free, such as online search engines). Agree these need to be reviewed.	There may be telcos who still supply this on a commercial basis. On the whole, other solutions for obtaining this information – most notably internet search functions and stored personal contacts – now meet this need.
Operator Services Tel Act, Sched 2, Part 2	Requires telco to provide operator services where customer can report a fault.	CSP, Standard telephone service	No longer relevant – has been replaced by obligations for complaints handling.	The ability is still regulated through complaints handling obligations.
Itemised Billing Tel Act, Sched 2, Part 5	Requires telco to provide itemised billing for calls	Standard telephone service	TCP Code has extensive requirements on Billing details and ability to verify charges that apply across all services (not just telephone) – this is a more appropriate place for this requirement. This also allows the requirement to evolve over time (as noted in the Consultation paper, OTT, VOIP and unlimited plans means itemisation becomes less relevant).	Availability of billing details and verification of charges remain regulated.
Access to service and Pricing				
Price controls – overall	The ACCC has powers to set terms of access to declared services (wholesale level) and the Minister has powers to make standards, rules and benchmarks in relation to eligible services provided by SIPs and service provider rules on the whole.			
Untimed local calls TCPSS Act, Part 4	Enables customers to pay a flat rate for calls in local zone.	Telstra	No longer required as plans transition to unlimited and most calls are no longer made on PSTN.	The market already provides this with the new technologies.
Telstra Price controls TCPSS Act, Part 9	Enables price caps to be set for some Telstra services	Telstra	As the price caps have been repealed, this legislative control is no longer relevant.	N/A



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