



**Australian Government**

**Department of Communications**

# Regulating harms in the Australian communications sector

Observations on current arrangements

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## Department of Communications Policy Background Papers

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## Context

Reducing regulation and ensuring it is fit-for-purpose is a major priority and focus in the Communications portfolio. The Government's aim is to deliver real reform in the Communications portfolio through better regulation, which lowers the cost burden on business, while maintaining necessary consumer and other safeguards<sup>1</sup>.

It is impossible to overstate the changes in the communications sector since the main pieces of legislation governing the sector were introduced in the 1990s. This legislation pre-dates the internet, VOIP, 3G mobile telephony, digital broadcasting, cloud computing and most of the products and services which are now the dominant forms of communication in the contemporary landscape. The approaches taken in existing law have been stretched and adjusted to accommodate these huge changes across the sector and been subject to regular and often extensive amendment to keep up with the pace of change.

The Government's Deregulation Agenda provides an appropriate framework to revisit current regulatory arrangements and approaches and consider whether they remain relevant in promoting competitive markets and ensuring safeguards are maintained in this new environment. Looking forward, a concerted effort in assessing current regulatory practice and approaches will also assist in deciding the most effective intervention to address new and emerging issues.

## Scope

The Department's Policy Background Paper No 1, *Deregulation in the Communications Portfolio* (November 2013), identified what may be considered as 'enduring concepts'—public policy objectives that have stood the test of time, regardless of changes in technology and where regulation may still be required. It also discussed the range of interventions available to Government to deliver 'protection from harms'—for example, national interest protections—or social 'goods'—such as Australian and local content<sup>2</sup>.

This companion Policy Background Paper No 2, *Regulating harms in the Australian communications sector*, focuses on three dominant styles of regulatory intervention in communications regulation—black letter law, co- and self-regulation—that are used to deliver protections from harms. It looks at the strengths and weaknesses of these interventions and makes some observations of their application in the Australian communications environment. In particular, the paper raises issues around a perceived preference for industry-based co-regulation—both in communications legislation and regulatory practice—to be the 'first port of call' in dealing with new consumer and/or industry concerns as they emerge in markets.

The role that regulation may play in the effective delivery of 'goods' is not explored here and will be the subject of separate consideration as different dynamics present in these arrangements. Similarly, non-regulatory interventions are not explored in this paper. That said, the value and effectiveness of non-regulatory interventions—such as

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<sup>1</sup> See *The Australian Government Guide to Regulation*, March 2014 which will assist policy makers to deliver better regulation with reduced compliance costs to business, not-for-profits and individuals.

<sup>2</sup> See Attachment A

education and awareness activities, positive incentives, information disclosure, direct funding etc—should not be underestimated, particularly where there are jurisdictional or other impediments to regulatory approaches being fully effective.

*Regulating harms in the Australian communications sector* focuses on the how of regulation rather than what is to be regulated; so necessarily strays into regulatory theory and practice which is seldom part of the mainstream communications policy debate.

However, the regulatory interventions used to deliver public policy outcomes are critical in achieving those outcomes while minimising cost to industry. As with policy development itself, the design of regulatory interventions needs to be informed by good market analysis, an in-depth understanding of the risks and preferences of, and costs to, consumers, end-users and business and the testing and validation of options.

This paper therefore asks the question:

***What is the fit-for-purpose regulatory intervention that minimises costs to industry while ensuring appropriate protection from harms in the contemporary communications sector?***

The question challenges policy makers, regulators and industry to revisit current interventions and ask whether they remain fit-for-purpose in the current environment and how protections can be ensured in the future. This is particularly challenging in communication sectors subject to rapid and dramatic change brought on by new technologies, business models and consumer expectations.

The paper also suggests a conceptual model that ascribes a range of regulatory interventions that may be more fit-for-purpose into the future for the delivery of public policy outcomes. This conceptual model challenges current regulatory arrangements, in particular in its seeming reliance on co-regulation as the preferred intervention model.

This conceptual model is provided as a discussion starter for industry, consumers, regulators and policy-makers across the communications sector. While responses or reactions to the model are welcomed, it is not intended to seek formal submissions on the issues that it raises. Instead, it is provided to help frame a conversation about regulation of the communications industries and provide a backdrop for a more specific set of consultations on a range of short, medium and long-term regulatory issues. These will necessarily involve further market analysis, examination of the enduring concepts and the testing and validation of policy and regulatory options.

# ‘Black letter’ and administered law

## What does it mean?

Black letter law includes legislation as well as regulations, standards, directions and rules made under legislation. Black letter law may apply obligations ex-post or ex-ante. Compliance is compulsory and legally binding sanctions are available to ensure compliance. Black letter law is developed, administered and enforced by Government or a Government regulator. Industry involvement is generally confined to consultation during the development phase.

Within the broad ambit of black letter law there is significant variation available for legislators to deal with issues. ‘Command and control’ models of law are prescriptive and rules-based with little flexibility to recognise different businesses sizes, models etc and limited discretion provided to regulators. By comparison, objectives-based regulation may provide greater flexibility for companies to develop different ways to achieve compliance with statutory objectives, so long as such flexibility is reflected in regulatory practice.

## When should it be used?

Black letter law is appropriate where there is a compelling policy reason for regulation, usually related to protection of the public or industry from harm, and where a legal foundation is required for enforcement measures in the case of non-compliance. It is also appropriate when industry has little interest in controlling risks (or cannot control it easily) or where industry consensus is uncertain without regulatory intervention.

Black letter law may be rules-based—identifying specific rules with which all industry participants must comply—or objectives-based—identifying the outcome to be achieved but retaining flexibility for industry (and the regulator) as to how that outcome is to be achieved.

Ofcom<sup>3</sup> provides some examples of areas appropriate for black letter law regulation in the telecommunications sector—where there are monopoly facilities that third parties require access to in order to compete or there are potentially anti-competitive practices by market participants that have market power.

Black letter law sanctions (including civil and criminal penalties) usually reflect the severity of the potential impact on the industry or the public of a breach of the law—for example where lives or property may be at risk or significant losses may result for business.

## Strengths and weaknesses

<i>Strengths</i>	<ul style="list-style-type: none"><li>&gt; Provides clear rules and expectations.</li><li>&gt; Sanctions are unambiguous and can be significant (criminal and civil penalties).</li><li>&gt; Compliance is compulsory for industry participants—but can allow for different obligations being applied to different industry sectors/companies.</li></ul>
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<sup>3</sup> [http://www.ofcom.org.uk/static/archive/oftel/publications/about\\_oftel/self0600.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/about_oftel/self0600.htm)

<i>Weaknesses</i>	<ul style="list-style-type: none"> <li>&gt; Difficult to change, may be inflexible in a rapidly changing industry environment.</li> <li>&gt; May provide a barrier to entry for innovative services or firms with limited resources to engage in the legislative development process.</li> <li>&gt; May not accommodate differences in business size and capacity to comply or be fully informed through industry engagement.</li> <li>&gt; Requires high standards of proof and evidence which adds time and costs.</li> </ul>
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## Observations

Current portfolio legislation includes a vast range of black letter law provisions, contained in legislation as well as subordinate instruments.

There is a mix of rules-based and objectives-based approaches in the existing legislation. Each of the primary pieces of legislation covering the communications sector contains a range of objectives. There is often tension between these objectives, which requires a flexible approach to making judgements on how they should be applied by the regulator. However, in most cases, existing legislation does not come with the flexibility that true 'objective-based' regulation allows for industry and the regulator. Instead, most of the objectives proscribed in the Acts are also subject to black-letter law rules that may result in little flexibility at all (see Box 1). The reasons for these differing or, in some cases, combined regulatory approaches are no longer transparent.

### Box 1: Datacasting: *Broadcasting Services Act 1992*

There is a range of objects in the Act relating to datacasting services:

- > to promote the availability to audiences and users throughout Australia of a diverse range of datacasting services
- > to provide a regulatory environment that will facilitate the development of a datacasting industry in Australia that is efficient, competitive and responsive to audience and user needs
- > to promote the provision of high quality and innovative content by providers of datacasting services.

Taking an objectives-based regulatory approach would provide discretion to the regulator to develop any rules or obligations on industry, how these were to be applied (for example, through self-, co- or direct regulation) and appropriate reporting, compliance and penalty regimes.

Instead, Schedule 6 of the Act establishes extensive black letter law rules about the definition of a datacasting service, licence conditions, genre conditions, control restrictions etc. These are directed at the 'harms' that may emerge in the provision of datacasting services.

On top of this, Schedule 6 explicitly provides the regulator with powers to impose further conditions on a datacasting licensee. The datacasting regime is therefore rules-based and black letter law, with little flexibility or scope for industry to innovate or the regulator to accommodate.

There are other parts of the current legislation which may have been relevant at the time but the harm they are directed toward no longer exists, or has diminished to the point that it can be readily handled with lighter touch or indeed no regulation. An extreme example of this is contained in provisions about what may be included in broadcasting codes of practice:

123 (2) Codes of practice developed for a section of the broadcasting industry may relate to:

....

(e) preventing the broadcast of programs that

...

(ii) depict the actual process of putting a person into a hypnotic state; or

(iii) are designed to induce a hypnotic state in the audience<sup>4</sup>

While there may have been some community concern about the ability for television to be used in these ways in the early days of its introduction in the 1950s, it is hardly credible that it remains a general community concern today, nor that a broadcaster would ever air such programming.

Current legislation also contains a range of provisions that are duplicative or partly duplicative as they place a specific regulatory obligation on licensees to comply with other acts—for example tobacco advertising and pharmaceutical advertising—for which adequate protections already exist in those other acts.

In this context, it may also be timely to reconsider whether the communications sector still requires separate competition rules and obligations rather than reliance on general competition rules. This becomes particularly relevant with the structural separation of Telstra as well as possible changes in media ownership over time. Alternatively, if competition rules alone are not considered sufficient to deliver policy outcomes in the sector, further consideration should be given to the minimum additional regulation required. Similarly, the introduction of the Australian Consumer Law 2011 may limit the need for some consumer protection obligations to be included in telecommunications regulation if it covers the field on relevant consumer issues.

In addition, there is an extensive range of reporting requirements which are spelled out in great detail in existing legislation. This may ‘freeze’ the requirements at a point in time when the obligation is new and compliance untested and limit the ability for the regulator to adjust reporting as compliance improves. By contrast the UK regulator, Ofcom, is given general reporting powers (subject to some restrictions on those powers) under the Communications Act 2003 which enables it to adjust reporting requirements over time.

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<sup>4</sup> *Broadcasting Service Act 1992*



Statutory review provisions are abundant in communications legislation. Good practice approaches would encourage the regular review of regulation. However, the inclusion of statutory timing for reviews may, perversely, mean that regulation is not reviewed as regularly as it should or that a review is not triggered if there is a substantial change in the market or issue arises. There is also no guidance in the law of the intent of such reviews, e.g. reviews should focus on deregulation, considering whether the regulation has done its work and can be removed or reduced.

Sanctions embodied in current black letter law may also need to be reviewed to ensure they reflect the real impact of any breach on the industry or the public. The Radiocommunications Act 1992 provides a wide-range of offences relating to interference or disruption of radiocommunications. The majority of these offences relate to activities which could endanger lives where criminal penalties remain appropriate. However, s.197 is a general provision that is not linked to endangering life or substantial loss but still applies a penalty of one year's imprisonment. It is not immediately apparent that a criminal penalty is appropriate in this case and whether civil penalties, for example, would provide a strong deterrent and a better remedy for non-compliance. Similarly, Criminal Code provisions apply to an offence under the Interactive Gambling Act 2001.

Reliance on criminal penalties alone may distort regulatory behaviour—by the regulator being reluctant to prosecute given the likelihood of success or requiring extensive reporting requirements in case an extensive evidence trail is needed for any potential future court action.

## Conclusion

There appear to be a range of opportunities for improving the use of black letter law in the communications sector. These range from more careful consideration of whether obligations should be rules-based or objective-based; ensuring out-dated sections and regimes are removed as a matter of course; not 'locking-in' elements in law that may need to adapt over time allowing the regulator some defined discretion; and ensuring that sanctions reflect the real potential impact of breaches on the community and industry.

# Co-regulation

## What does it mean?

Co-regulation is where the industry develops its own code or accreditation scheme and this has legislative backing. There is also usually Government, rather than industry, enforcement. In some cases, co-regulation may be more appropriate than self-regulation or preferred to black letter law. However, if extensive Government intervention is included in a co-regulatory scheme (such as negotiating core elements of the scheme directly or Government enforcement of the scheme) then it may call into question whether black letter law would be more appropriate.

In the Australian environment, co-regulation is developed at an industry-wide level, predominantly through Codes of Practice. However, co-regulation can also apply to an individual company if it chooses to put in place its own scheme to address a problem and this has regulatory backing.

## When should it be used?

Co-regulation is an effective intervention where the industry has high visibility of the problem, is willing to disclose information on performance in addressing the problem and can manage the problem themselves. Ofcom<sup>5</sup> suggests that co-regulation (or self-) would be appropriate where:

- > consumers require information
- > consumer protection benefits may be achieved without formal regulation
- > the relevant scheme encourages a 'level playing field'.

However, in its *Effective Self and Co-regulation Arrangements* (2011) the Australian Communications and Media Authority (ACMA) identified a range of factors that can impact on the effectiveness of co-regulatory arrangements (see Box 2).

### Box 2: Factors impacting effectiveness of co-regulatory arrangements

#### *Environmental conditions*

- > number of market players and coverage of the industry
- > whether it is a competitive market with few barriers to entry
- > homogeneity of products—whether they are essentially alike and comparable
- > common industry interest—whether there is a collective will or genuine industry incentive to address the problem or enhance existing provisions
- > incentives for industry to participate and comply
- > the degree of consumer detriment
- > whether it is a rapidly changing environment.

<sup>5</sup> [http://www.ofcom.org.uk/static/archive/oftel/publications/about\\_oftel/self0600.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/about_oftel/self0600.htm)

### *Features of the regulatory scheme*

- > whether the objectives are clearly defined by the Government, legislation or the regulator
- > what the law requires of the regulator
- > the existence and operation of transparency and accountability mechanisms
- > stakeholder participation in the development of the scheme; in particular, consumer input into the development of co-regulatory arrangements
- > whether the scheme is promoted to consumers.

While not all factors may be relevant in a particular case (and there may not be universal agreement that all of these factors are relevant in any event), the ACMA's work identifies that careful consideration is needed before deciding that co-regulation is the most appropriate market intervention to effectively deliver policy outcomes.

### Strengths and weaknesses

<i>Strengths</i>	<ul style="list-style-type: none"><li>&gt; Provides a structured approach to engaging industry so more likely to reflect current industry practices and may better provide for more cost-effective compliance models.</li><li>&gt; Retains legislative backing which provides greater confidence than self-regulation only.</li><li>&gt; Consensus approach can be useful in building industry buy-in to addressing the problem.</li><li>&gt; May be able to move more quickly than development of black letter law and deal with rapidly changing technologies and issues.</li></ul>
<i>Weaknesses</i>	<ul style="list-style-type: none"><li>&gt; Without care, can result in cartel-like behaviour when very few businesses are involved which increases barriers to entry for new competitors.</li><li>&gt; Industry-wide codes may impose same obligations on all businesses no matter the size or businesses model. This can discourage competition and innovative product offerings for consumers.</li><li>&gt; Compliance may be considered as voluntary by the majority of industry participants with safeguards put at risk.</li><li>&gt; Consensus may not be possible when many businesses are involved and code development reaches impasse where conflicting views are intractable.</li><li>&gt; Regulator sign-off may distort industry inputs while responses to breaches are directed towards continuous improvement rather than direct sanction.</li></ul>

### Observations

Co-regulation has been a feature of communications regulation in Australia for many years. While high level obligations are included in legislation, industry (predominantly

through industry associations) has developed codes of practice to address particular technical and consumer issues. Indeed, the *Telecommunications Act 1997* and the *Broadcasting Services Act 1992* enunciate a preference for co-regulation<sup>6</sup>. The original intent of the co-regulatory approach was to allow significant industry change to evolve (such as the introduction of competition in telecommunications) with industry increasingly picking up responsibility for its own performance, but with some legislated oversight to ensure consumer and other safeguards.

In its early years, co-regulatory approaches, particularly in telecommunications, were considered very successful, primarily in dealing with complex technical issues required to ensure that the newly-opened market operated effectively at the network level. There remain today a broad range of telecommunications industry-specific codes of practice covering network architecture and deployment rules. These may have little visibility to the public, remain uncontentious and effective and have had high levels of industry compliance for many years.

However, the ACMA's work raises issues for other areas of the current co-regulatory framework. For example, the ACMA has found that co-regulation works best when (amongst other factors) homogenous products are provided by a small number of industry players. An analysis of the broadcasting and telecommunications sector dynamics against these factors is insightful (Box 3).

### Box 3: Factors in effective co-and self-regulation<sup>7</sup>

ACMA—*Homogeneity of products—whether they are essentially alike and comparable.* Co-regulation is less effective where the products in question are varied and difficult to compare, leading to information asymmetry and product confusion. Greater product complexity may decrease the effectiveness of self-regulation...

Current state - telecommunications—Products may be reasonably homogenous but services are not. Services are increasingly complex and many consumers do not fully understand the service at the time they enter into their contract.

Current state - broadcasting—Products and services are broadly homogenous with a relatively defined range of programming—news, drama, documentary, music, talk-back—available across television and radio networks.

ACMA—*Number of market players and coverage of the industry.* Research indicates that a small number of players with wide industry coverage will facilitate effective self- or co-regulation...

Current state - telecommunications—There are more than 1,000 service providers providing retail services to consumers; these providers range from large corporations to single-person businesses.

<sup>6</sup> The *Telecommunications Act 1997* uses the term self-regulation. However, Codes and Schemes developed under the Act have legislative backing and fall within the remit of the government regulator, so have more features of a co-regulatory arrangement.

<sup>7</sup> Adapted from ACMA *Optimal conditions for effective self- and co-regulatory arrangements* September 2011

Current state - broadcasting—Six major television networks control 72 out of 73 commercial television broadcasting licenses, 11 major radio networks control 230 out of a total 273 commercial radio broadcasting licences<sup>8</sup>.

While the industry regulator has identified these issues, there continues to be an assumption (by industry, consumers and government) that industry-wide co-regulation should be a first port-of-call when new concerns emerge, particularly consumer concerns. For example, in 2011-12, a new Telecommunications Consumer Protection Code was developed by the telecommunications industry and registered by the ACMA<sup>9</sup>. This co-regulatory code, dealt with amongst other matters, consumer information and complaints handling requirements. The code development process proved protracted, costly and fraught, given the divergent views of industry and consumer representation groups involved in the process. As a result of these difficult dynamics, the Code took more than two years to be developed and agreed to by the ACMA.

Since the Code was registered, it is acknowledged that there complaints to the TIO have fallen steadily as business practice has changed. However, regulated entities have retained varying degrees of concerns about the final Code:

- > Large telecommunications players are concerned that such a detailed code specifying how every business covered by it must address consumer issues, reduces their competitive advantage as all their competitors must deliver the service in the same way to consumers.
- > Small telecommunications players argue that they cannot afford to deliver services in the way that the Code prescribes and that consumers benefit from lower cost services as long as they are fully informed of safeguards. Under existing legislation, compliance with Codes is voluntary (unless the ACMA directs a company to comply) so many small providers do not see the need to comply with the Code and consider that industry-led compliance monitoring approaches impose large costs and duplicate the ACMA's role.
- > The ACMA has indicated publicly its concerns that, given the context in which the Code operates "it is arguable that there is a need to augment current industry self-regulation mechanisms with additional regulatory measures"<sup>10</sup>.

These observations should not be taken as a criticism of any of the parties involved. Instead it raises a question as to whether too much heavy lifting was being asked of a co-regulatory approach to dealing with a range of important areas of consumer concerns, particularly given the ACMA's observations of its likely success. It also raises issues about taking a single-code approach when the sector to be regulated is made up of a small number of large players serving the bulk of consumers but with a large number of small players operating in niche markets.

Other industries appear to also face issues in using co-regulatory models. For example, there are a number of codes of conduct/practice in the electricity and gas industries.

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<sup>8</sup> ACMA *Communications Report 2012-13*, pp 36-39

<sup>9</sup> The Code was only on part of industry responses to the ACMA's *Reconnecting the Customer Inquiry* which was undertaken to address issues resulting in significant and increasing telecommunications consumer complaints.

<sup>10</sup> ACMA *Optimal conditions for effective self- and co-regulatory arrangements* September 2011, pg 23

These are typically developed by, or with the involvement of, the Australian Energy Regulator or a State/Territory regulator. However, there is a significant amount of ‘black letter law’ governing the supply of electricity/gas and the conduct of those who provide it. The large volume of regulation in this industry does not leave much space for co- or self-regulatory schemes to operate.

Compliance monitoring of co-regulatory schemes can also present challenges for industry and the regulator. Ideally, industry will collectively retain responsibility for monitoring compliance and providing sufficient information to the regulator to give it comfort of that compliance. Otherwise, there is a danger that the regulator will impose additional reporting obligations on the industry.

In terms of enforcement of co-regulatory codes, there is often a tension between community (or sectoral) expectations as to the sanctions to be applied by regulators for breaches, and the powers provided to regulators under the law. Co-regulation seeks to continuously improve industry performance rather than impose strict sanctions for non-compliance. For example, if the ACMA finds a breach of a broadcasting code of practice, it can only take limited actions under the co-regulatory framework.<sup>11</sup> For the ACMA to access additional sanctions it must firstly apply an additional licence condition formally compelling the licensee to comply with the code so that it can be dealt with under black letter law provisions. Such approaches are vigorously rejected by broadcasters given the significant sanctions available to the regulator—such as suspension or loss of licence (with a result that the television channel or radio station will go off air completely)—for issues that are, of themselves, not black letter law obligations.

## Conclusion

Drawing on the work of the ACMA, there appears to be an urgent need to reconsider the role of co-regulation in the current regulatory framework. The communications market has changed significantly since co-regulation was introduced—larger number of players (including international providers), diverse products, new business models and changing consumer preferences. Co-regulation has a range of strengths, not least of which is the strong role of industry in developing codes that are workable, reflect industry reality and minimise costs while retaining ‘last-resort’ regulatory sanctions. However, there are questions as to whether it should be the default approach to dealing with regulatory harms as it will not succeed unless a range of factors are in place. It may be that a small number of rules-based obligations would be more appropriate in some areas and greater use of self-regulation in others in the complex and ever-changing communications sector.

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<sup>11</sup> See <http://165.191.2.87/theACMA/ACMAi/Complaints/Broadcast-complaints/faqs-broadcasting-rules-and-complaints-acma#30>

# Self-regulation

## What does it mean?

Industry (or individual companies) voluntarily develops, administers and enforces its own rules and standards without any formal oversight from Government or legal backstop for enforcement. Self-regulatory measures are voluntary and do not have a legislative backstop compelling industry participants to comply. In some cases compliance can be enforced through contractual mechanisms or by making compliance a condition of a licence or membership of an industry body.

Compliance is generally enforced by an industry body or independent compliance body set up for the purpose of enforcing the regulatory scheme. Company-based self-regulation schemes set rules of behaviour which are enforced internally with compliance performance being made public.

Nearly all self-regulatory schemes exist within the 'shadow' of Government. The key driver for the establishment of a self-regulatory scheme is usually the threat that Government may intervene if industry does not implement appropriate regulations itself. Consumers and end-users will also call on Government to implement stronger safeguards as issues arise.

## When should it be used?

Theoretically, the development of a self-regulatory arrangement is a decision for industry, with no Government involvement. Practically, self-regulation approaches often emerge as a response to indications from Government that it may move to impose regulation if the industry cannot address the risk of harms itself.

Effective self-regulatory models are likely to emerge where there are strong incentives for industry cooperation, where they have a strong interest in controlling the risk and are in a position to control it and where a uniform industry approach has advantages. Self-regulation may be applied to a single issue or group of issues, or may develop into a complete self-regulatory scheme where the industry also takes responsibility for compliance and sanctions.

Observable characteristics of strong self-regulatory approaches require industry (or an individual company) to develop and independently manage a scheme that contains:

- > clear and objective rules
- > appropriate monitoring processes and independent or external auditing
- > compliance measures and agreed, meaningful sanctions for non-compliance
- > transparency of performance of the scheme and its members through annual or ad hoc public reporting
- > effective complaints handling processes and policies
- > effective measures to ensure the scheme is well publicised and developed transparently and in consultation with affected parties
- > providing Government with performance information on the scheme from time to time to maintain some transparency of its operation.

A particularly important feature of effective self-regulatory schemes is that they must contain sanctions for non-performance, in common with other forms of regulation. However, in self-regulatory schemes, sanctions must be agreed to by the members that the scheme covers, the Government in itself or through the regulator, has no role in setting or applying sanctions. Industry-agreed sanctions must be able to withstand public scrutiny of their credibility and proportionality.

### Strengths and weaknesses

<i>Strengths</i>	<ul style="list-style-type: none"> <li>&gt; More likely to reflect current industry practices and may better provide for more cost-effective compliance models.</li> <li>&gt; Drives greater industry collective responsibility.</li> <li>&gt; May be able to move more quickly than development of black letter law and co-regulatory codes to deal with rapidly changing environment.</li> </ul>
<i>Weaknesses</i>	<ul style="list-style-type: none"> <li>&gt; Often needs a credible risk of intervention before industry acts.</li> <li>&gt; Without regulatory oversight, can result in cartel-like behaviour which increases barriers to entry for new competitors.</li> <li>&gt; Industry-wide codes may impose same obligations on all businesses no matter the size or businesses model. This can discourage competition and innovative product offerings for consumers.</li> <li>&gt; Codes may also reflect big business concerns with the process being captured by self-interested large companies.</li> <li>&gt; Alternatively, codes may only include 'lowest common denominator' provisions with limited oversight, putting consumer protections at risk.</li> <li>&gt; Compliance may be considered as voluntary by industry participants.</li> </ul>

### Observations

As noted previously, while the regulatory policy incorporated in the *Telecommunications Act 1997* promotes the greatest practicable use of self-regulation<sup>12</sup>, in reality the dominant form of intervention in the telecommunications market remains through black-letter law and co-regulatory codes of practice (see latter discussion on the *Telecommunications Industry Ombudsman (TIO)* scheme). Similarly, there are currently few issues in the television and radio broadcasting sectors that are handled completely by the industry alone (although some advertising content on these mediums is handled through self-regulatory arrangements).

This is perhaps surprising given that each sector is relatively well-organised and mobilised: there are incentives for taking issues outside the co-regulatory and black letter law environment; and, in some areas, there has been a strong record of compliance over many years. The motivations of industry in seemingly preferring co-

<sup>12</sup> *Telecommunications Act 1997*, s4



regulation and black letter law are therefore not clear. It may be timely for industry to ask itself about how it could make greater use of self-regulation and engage with consumers and Government on the issue in the context of the current discussion on deregulation.

As an example, a group of issues for which self-regulation may be appropriate in Australia is telecommunication technical codes. A key driver in the establishment of technical codes is the common interest amongst industry participants to make sure common infrastructure is established and common standards are used. Otherwise, there are significant risks to their own network infrastructure or their ability to interoperate with other networks. There are therefore very strong incentives for cooperation on detailed technical codes on which a regulator would be hard-pressed to 'second guess' the industry preferred outcome. The need for a regulator to formally approve such codes would therefore appear unnecessary. That said, there are compliance costs to industry of providing the institutional structures to take on the responsibilities of collective self-regulation—whether these are more or less than the costs of co-regulation and black letter law options depends upon the approach taken. Industry would also need to provide a framework for effective consideration of emerging issues requiring technical standards without regulatory intervention.

A further advance of the use of self-regulation would be the development of a fully self-regulatory scheme. These are developed, funded and run by industry with no legislative backing and with sanctions agreed by the industry for non-compliance across a range of issues.

After recent reforms, the current TIO Scheme has many of the elements of a self-regulatory scheme in that it is funded and supported by industry but is independent of industry; covers all industry participants through mandatory membership (except where exempted by the regulator) and is aimed at effective complaint resolution. The TIO has the authority to make binding decisions (decisions the telecommunications company is legally obliged to implement) up to the value of \$50,000, and recommendations up to the value of \$100,000. In 2012-13, the TIO made one binding determination with which the company only complied after intervention by the ACMA<sup>13</sup>.

However, under the TIO Scheme the main regulatory sanctions still remain in the hands of the ACMA and underpinned by regulation—both elements more normally seen in co-regulatory schemes. There is a risk that such arrangements may be difficult for small companies, in particular, to navigate or that may impose separate and duplicative accountability mechanisms on industry.

There are similarities between the current TIO Scheme and Canadian broadcasting regulatory models. The Canadian Broadcast Standards Council (CBSC) is an independent, non-governmental organisation created by the Canadian Association of Broadcasters (CAB) to administer standards established by its members, Canada's private broadcasters. The CBSC publishes codes on a number of issues including equitable portrayal, journalistic independence and violence. The CBSC can hear complaints from members of the public and works with the complainant and member broadcasters to encourage resolution of disputes. Where this is not successful the CBSC can issue a

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<sup>13</sup> Telecommunications Industry Ombudsman Annual Report 2012-13 at <http://annualreport.tio.com.au/statistics/ombudsman-decisions>

determination. However, similar to the TIO Scheme, such determinations are not legally binding, though if a party is dissatisfied with a decision it may complain to the Canadian Radio-television and Telecommunications Commission<sup>14</sup>. By comparison, the Australian Code of Banking Practice (the Banking Code) is a true self-regulatory scheme (Box 5).

### Box 5: The Australian Banking Code

The Banking Code is a voluntary code of conduct which sets standards of good banking practice for banks to follow when dealing with individual and small business customers and their guarantors. The Banking Code is published by the Australian Bankers' Association, a national organisation representing Australian banks. It is not compulsory for members of the Australian Bankers' Association to comply with the Banking Code and not all members have agreed to do so. A bank becomes bound by the Banking Code when it announces publicly that it has adopted the Code. Twenty banks have currently adopted the Banking Code, including the four major banks.

Where a consumer or small business considers that a bank has breached the Banking Code it can:

- > raise the issue via the bank's internal complaints handling mechanism;
- > refer the breach to the Code Compliance Monitoring Committee, an independent compliance monitoring body set up to investigate possible breaches of the Banking Code; or
- > refer the breach to the Financial Ombudsman Service, an external dispute resolution scheme established by financial service providers (where a loss is suffered) which can apply sanctions.

The Banking Code was developed without a legislative basis or input from Government. The Code of Banking Practice is available at <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice>

### Conclusion

In the context of the Government's deregulation agenda, there would be significant value in the communications industry further considering whether current regulatory arrangements could make greater use of pure self-regulatory models. There may be particular issues which can move to self-regulation—particularly those where there are strong incentives for compliance already embedded in the market structure. There may also be benefit, in a mature industry, of greater use of self-regulatory schemes which puts the responsibility for performance firmly with the industry. Government's only role in these arrangements would be to ensure any problems with arrangements can be detected and verified early.

Industry itself needs to consider the way in which it could make self-regulatory arrangements effective for industry and consumers, resilient in the face of rapid change. take advantage of the opportunity to reduce overall compliance costs while maintaining effective safeguards.

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<sup>14</sup> For more information see: <http://www.cbcs.ca/english/>

## Regulatory Practice

Regulators play a central role in the monitoring and investigation of compliance with regulatory obligations, taking appropriate enforcement action and other responsibilities prescribed under legislation (such as the registration of co-regulatory codes). Regulators are often provided with delegated power and discretion to develop and impose additional regulatory, compliance monitoring or reporting obligations on the sector. They also are able to use a range of non-regulatory tools to improve industry performance—such as providing public statements of concern or providing positive incentives.

Therefore, the disposition and performance of the regulator is critical in ensuring effective industry performance while minimising compliance costs.

As recently stated by the Productivity Commission:

*...regulator behaviour can potentially have as large an effect on the compliance costs for business as the regulations themselves....Regulators can also play a role on the improving the regulation they administer where they have the discretion to do so, and through policy advice they provide to their policy department about the need for, and effectiveness of, the legislation.<sup>15</sup>*

In recognition of the important role of regulators in minimising compliance costs, the Government requested that the Productivity Commission develop a framework that can be used to evaluate the performance of Government regulators in regard to the compliance costs they impose on industry. The framework will – assuming it is approved by the Government – be used by the Office of Best Practice Regulation to audit the performance of Commonwealth Government regulators at least once every Parliamentary term.<sup>16</sup>

Regulators in the communications portfolio—the ACMA and the ACCC (in relation to Part XIB and Part XIC of the *Competition and Consumer Act 2010*)—will be reviewed through this audit process. In advance of the audit, regulators have already moved to consider and propose changes to current regulatory arrangements to reduce compliance costs without compromising safeguards.<sup>17</sup>

Alongside proposed indicators of good practice, the Productivity Commission has also highlighted that:

*The most important high level principle to minimise the cost of monitoring and compliance while achieving the objectives of the regulation is for the regulator to apply a risk-based and proportionate approach.*

Drawing on international best-practice regulatory theory and practice, the Productivity Commission provides common strategies to risk-based monitoring and compliance which

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<sup>15</sup> Productivity Commission: *Regulator Audit Framework* March 2014, pp4-5

<sup>16</sup> *Policy to Boost Productivity and Reduce Regulation*: 2013, pg 22

<sup>17</sup> See:

[http://www.minister.communications.gov.au/malcolm\\_turnbull/news/deregulation\\_of\\_communications\\_sector\\_a\\_boost\\_for\\_productivity](http://www.minister.communications.gov.au/malcolm_turnbull/news/deregulation_of_communications_sector_a_boost_for_productivity)

aims to minimise costs to industry while delivering effective consumer, and other, safeguards.<sup>18</sup> These strategies include:

- > adopting an 'expert' rather than 'legal' model of regulation where appropriate
- > using a broad range of tools and selecting those most suited to the task
- > taking an outcomes-focused rather than a program-focused approach
- > matching the regulatory structure to the types of risk being assessed
- > developing partnerships with industry, community groups and other regulators based around common risk mitigation objectives.

The Productivity Commission also recognises that a risk-based approach requires a decision by Government (on behalf of the Australian community) as to the level of risk it is prepared to accept in the market environment. This would appear to be a fruitful area for further discussion between Government and regulators, while acknowledging their varying degrees of statutory independence.

## Conclusion

The design of regulatory interventions requires an in-depth understanding of markets, supply chains and revenue flows, technical developments, expected regulatory costs and consumer and end-user expectations. Regulators play a critical role in advising policy departments on where regulatory arrangements can be improved (and costs decreased) through legislative change or exercising discretion given their unique insights into industry behaviours and market structure.

The Government's deregulation agenda will provide a framework by which the performance of regulators in regard to compliance costs can be assessed. There may also be benefit in the Government providing greater guidance to the regulator on acceptable risk levels through the ministerial Statement of Expectations which can guide its decision-making and, potentially, avoid misalignment of priorities and risk management approaches.

An open and constructive dialogue between regulators, departments and industry has the potential to reap significant regulatory cost savings while ensuring the regulator can do the job it has been given by Government in regard to compliance and enforcement.

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<sup>18</sup> Productivity Commission: *Regulator Audit Framework*: March 2014, pg 23: Adapted from work by Professor Malcolm Sparrow, Harvard university and the OECD

## A conceptual framework for regulation of the Communications sector

As indicated at the outset, this paper aims to challenge policy makers, regulators and industry to revisit current interventions and ask whether they remain fit-for-purpose in the current environment and how protections can be ensured in the future. It also asks these agents to carefully consider regulatory design as a key part of the policy development process so that they can answer the question posed earlier:

***What is the fit-for-purpose regulatory intervention that minimises costs to industry while ensuring appropriate protection from harms in the contemporary communications sector?***

Taking the ‘enduring concepts’ outlined in the Framing Paper on deregulation matters, the conceptual model at [Attachment B](#) suggests the particular regulatory interventions that may be the most fit-for-purpose into the future for the delivery of enduring public policy outcomes.

For example, it suggests that complex areas where significant analysis and weighing of issues and options is required—such as competition and media diversity—may be better dealt with through objectives-based rather than rules-based regulation. Conversely, it suggests that the certainty required by the market for the allocation of resources may be best delivered through rules-based regulation. More critically, the model illustrates that, in delivering public policy outcomes in the communications sector, the full range of regulator interventions need to be considered from a first-principles basis—that is, careful analysis of the market environment, a deep understanding of the risks to be mitigated, an informed approach to enforcement options and an appreciation of the costs to business of compliance and associated reporting.

The model presented should be considered a ‘straw man’ — a discussion starter for industry, consumers, regulators and policy-makers across the communications sector as they work together in shaping the future communications regulatory landscape.

## Attachment A: ‘Enduring concepts’ and regulatory tools

The *Deregulation in the Communications Portfolio Framing Paper November 2013* identified the current objectives contained in existing regulation in the communications portfolio. It also identified what may be considered as ‘enduring concepts’—public policy objectives that have stood the test of time, regardless of changes in technology and where regulation may still be required:

- > **Access to services / participation in society.** Citizens should enjoy reasonable and equitable access to communications infrastructure, services and the content necessary to promote their effective participation in society and the economy. Increasingly this extends to ‘digital literacy’.
- > **Competition.** Markets should be open and competitive so as to encourage investment, innovation and diversity of choice. Regulatory settings should embody competitive neutrality across platforms and among market participants and minimise potential market distortions.
- > **Efficient allocation and use of resources.** Policy settings should be coherent, appropriately calibrated and predictable so that a minimum level of service is available to all and public resources are used efficiently over time.
- > **Diversity of voices.** There should be a diversity of major sources of information and perspectives expressed in the public sphere to provide and sustain an informed citizenry and healthy democracy. It is equally important that this information be fair, accurate and transparent.
- > **Australian identity.** Australians should be able to experience Australian voices and stories when using or consuming media and communications services.
- > **Values and safeguards.** Services should reflect community standards, meet community needs and be ‘fit-for-purpose’. Users should be provided with effective and accessible avenues of complaint and redress if standards are not met. Children, in particular, should be protected from harmful material.
- > **National Interest.** The communications sector settings should reflect the national interest both domestically and through international forums (for example, radiocommunications planning is governed by treaty).

These enduring concepts include a number of areas which can be broadly described as ‘protection from harms’—such as national interest protections—as well as a number that can be described as ‘goods’ delivered by the industry—such as Australian identity outcomes.

Regulatory tools, or interventions, available to Government to deal with the enduring concepts are:

- > **Black letter law:** primary or subordinate legislation (including regulations and delegated instruments) that requires or prohibits particular actions or behaviours from industry participants.

- > **Administered law:** standards, directions or ‘service provider rules’ made by the relevant regulator (the ACMA or the Australian Competition and Consumer Commission) to affect the behaviour of participants in a particular sector or industry.
- > **Co-regulation:** a model whereby industry is given the opportunity to self-regulate in the first instance, supported by sanctions and a more explicit role for the regulator / legislation if self-regulation is found to fail.
- > **Quasi-market instruments:** for example, mandating a particular outcome via black-letter law or regulation (such as an overall target for children’s content), and establishing tradeable quotas to allow this target to be produced in the most efficient manner.
- > **Contestable funding / tax incentives:** relevant for encouraging investment in non-commercial infrastructure or services.
- > **Self-regulation:** allowing industry to establish appropriate benchmarks for the provision of services and to assess and respond to consumer complaints and concerns.
- > **Education and awareness:** informing consumers of their rights and options in relation to communications and media.
- > **Public sector provision:** Government can also directly fund activities required to achieve particular public policy outcomes, for example, as it does with content delivery through the SBS, ABC and NITV.

# Attachment B

# Conceptual Framework

Delivering against policy objectives				
Black letter Law		Co-regulation (with legislative backing)	Self-regulation (only regulatory oversight)	Education and Awareness*
Rules-based	Objectives Based			
<p><b>National Interest.</b> The sector settings should reflect the national interest both domestically and through international forums. Citizens should be confident that their use of these services is secure and they are protected, for example, from electronic attacks and fraud.</p>	<p><b>Competition.</b> Markets should be open and competitive so as to encourage investment, innovation and diversity of choice. Regulatory settings should embody competitive neutrality across platforms and among market participants and minimise potential market distortions.</p>			<p><b>Access to services / participation in society.</b> Citizens should enjoy reasonable and equitable access to infrastructure, services and the content necessary to promote their effective participation in society and the economy. Increasingly this extends to 'digital literacy'.</p>
<p><b>Values and safeguards.</b> Services should reflect community standards, meet community needs and be 'fit-for-purpose'. Users should be provided with effective and accessible avenues of complaint and redress if standards are not met.</p>				
<p><b>Efficient allocation and use of resources.</b> Policy settings should be coherent, appropriately calibrated and predictable so that a minimum level of service is available to all and public resources are used efficiently over time.</p>	<p><b>Access to services / participation in society.</b> Citizens should enjoy reasonable and equitable access to communications infrastructure, services and the content necessary to promote their effective participation in society and the economy. Increasingly this extends to 'digital literacy'.</p>			
	<p><b>Diversity of voices.</b> There should be a diversity of major sources of information and perspectives expressed in the public sphere to provide and sustain an informed citizenry and healthy democracy. It is equally important that this information be fair, accurate and transparent.</p>			

\*Education and Awareness is included as an example of a non-regulatory tool that may also be effective in delivering policy outcomes