Deregulation: Initiatives in the Communications Sector

AIIA Response

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Introduction

The Australian Information Industry Association (AIIA) is the peak national body representing Australia's information technology and communications (ICT) industry. Since establishing 35 years ago, the AIIA has pursued activities aimed to stimulate and grow the ICT industry, to create a favourable business environment for our members and to contribute to the economic imperatives of our nation. *Our goal is to "create a world class information, communications and technology industry delivering productivity, innovation and leadership for Australia".*

We represent over 400 member organisations nationally including hardware, software, telecommunications, ICT service and professional services companies. Our membership includes global brands such as Apple, EMC, Google, HP, IBM, Intel, Microsoft, PWC, Deloitte, and Oracle; international companies including Telstra; national companies including Data#3, SMS Management and Technology, Technology One and Oakton Limited; and a large number of ICT SME's.

AIIA is pleased to respond to the Minister for Communication's request for comments regarding the reduction of regulation/red tape in the Communications sector.

Overview

As the peak organisation representing Australia's ICT sector our priority is to stimulate and grow the ICT industry, to create a favourable business environment for our members and more broadly, to contribute to Australia's economy.

In providing a response to the Government's recent Commission of Audit, AIIA encouraged the Government to consider measures that stimulate broad and sustainable economic activity in a fiscally constrained environment. While there are many factors that combine to drive economic investment, productivity and growth, regulatory burden is arguably a major impediment and one that our members advise is both costly and an inhibitor to innovation - a point emphasised by the 2012 World Economic Global Competitive Index ranked Australia 96th out of 144 nations for regulatory burden.[1]

This current review of regulatory red tape in the Communications sector is therefore critical to enabling business to operate more effectively and in a robust competitive environment. While regulation plays an important role in managing issues such as market failure and consumer/user protection there is a balance that must be struck between (i) ensuring regulation remains current, appropriate and relevant, (ii) providing appropriate certainty for operators, consumers and investors, and (iii) its cost and complexity. Regulation must not be the default; it must perform a specific public policy role where tangible benefits clearly outweigh the 'cost' to operators, government and consumers. Where regulation is deemed necessary, AIIA strongly supports 'light touch' remedies that do not undermine the market operating competitively and effectively which are developed in co-operation with industry.

[1] World Economic Forum. *The Global Information Technology Report* 2013, http://www.weforum.org/reports/global-information-technology-report-2013

Specific Comments

In general AIIA supports the approach and suggestions proposed by the Communications Alliance in their *Submission Federal Government Red Tape Reduction/Deregulation Process*.[2] In the area of communication products and services, we share many of the same members and common sentiments. We would reinforce the following key issues.

Duplication of privacy obligations

- The duplication and inconsistency of privacy obligations across various legislative instruments (e.g. Part 13 of the Telecommunications Act, the Privacy Act, and the Telecommunications Consumer Protection Code 2012 etc.) is burdensome and confusing.
- Current requirements, particularly those of the Telecommunications Act and the Privacy Act need to be reviewed to ensure obligations are aligned and duplication removed.

Rationalisation of current institutional arrangements

- There is overlap between the industry specific consumer protection functions and programs administered by Australian Communications and Media Authority (ACMA) and broader consumer protection functions administered by the Australian Competition and Consumer Commission (ACCC) under the Australian Consumer Law framework. It should be noted that the scope and functions of the ACMA were designed prior to implementation of the national approach to consumer protection law that was brought about through COAG.
- Current institutional and regulatory arrangements result in a lack of clarity regarding the respective roles, responsibilities and precedence of various regulatory bodies; and additional costs – most of which is ultimately borne by consumers.
- AIIA believes duplication of scope and function across regulatory bodies needs to be addressed as a matter of priority, including if this requires that a body such as ACMA is disbanded with its functions, if demonstrably necessary, taken up by the ACCC and the Department of Communications.

Reduction of reporting requirements

- Obligations imposed by the ACCC and ACMA mean Australian telecommunications service providers are subject to a broad range of monitoring and reporting obligations. This is notwithstanding the former Review of the Trade Practices Act and the subsequent updating of the Competition and Consumer Act 2010.

[2] Copy of Submission shared with AIIA by Communications Alliance

- On the understanding that the Competition and Consumer Act is to be reviewed in 2014, AIIA strongly recommends that the Review specifically address the overly burdensome reporting requirements imposed on telecommunications providers. It is important that the Review ensure regulators demonstrate the need for reporting data, the purpose of the collection and how reporting data will be used. How data will be collected and the cost and imposition on providers should also be considered.

Short Term Regulation Reform

The following specific proposals are provided.

Lodgement of access agreements for declared services

		Response
1.	Description of relevant regulation	Sections 152BEA and 152BEB of the Competition and Consumer Act 2010 require that carriers or carriage service providers (CSPs) lodge Access Agreements, Variation Agreements and Notifications of Termination of Access Agreements with the ACCC. Access agreements must be lodged with the ACCC within 28 days after the day on which the agreement was entered into, or the service was declared, as relevant.
2.	Policy underlying regulation	This regulation is intended to support various regulatory frameworks under which the ACCC sets price and non-price terms for access to declared services and infrastructure. The rationale is that by having visibility about the access agreements (and terms within) established in the market, the ACCC will be able to set prices for declared services which approximate those observed in competitive markets.
3.	Reasons regulation is no longer needed/could be amended	Under the regulation access agreements have to be lodged within 28 days after the day on which the agreement was entered into, or the service was declared. The price determination aspect of the associated regulatory frameworks, however, is updated every three years. Thus in excess of 36 returns are provided by each designated CSP for a single price determination — it is suggested that the frequency and manner of reporting could be amended. It is not clear whether or not the ACCC actually uses all of the information which is reported to it, as no disclosure occurs.
4.	Proposal to remove or amend (if amend, please describe amendment)	The frequency and manner of reporting required under this regulation could be amended. • Options for amending include reporting in a six month window prior to price determinations, reporting on certain routes or reporting on or above certain dollar thresholds only. • CSPs currently provide the actual contracts or standard form offer agreements under which services are provided. This is burdensome, as in practice only three to four data points are required (i.e. the type of service, the A and B points, the contracting party and the price paid). It is suggested that ACCC develop a simple, secure web-based portal for reporting

		purposes.
5.	What impact amendment	The proposed amendments would reduce regulatory burden.
6.	What impact amendment will have on consumers/individuals	The proposed amendments would have no impact on consumers/individuals, as the overall intent of the regulation would still be achieved, but in manner which was less costly to industry.

***Telecommunications Code of Practice 1997*, made under Schedule 3 of the *Telecommunications Act 1997*.[3]**

		Response
1.	Description of relevant regulation	Under the *Telecommunications Act 1997* authorised carriers are permitted to enter land and exercise powers such as inspection and the installation and/or maintenance of facilities. The Telecommunications Code of Practice sits underneath the Act, and sets out conditions which carriers have to comply with in exercising the powers afforded to them under the Act. Specific concerns exist in relation to the practicality of the Code in terms of enabling access and the establishment of facilities in a timely manner, especially in relation to 'low impact facilities' (Chapter 4).
2.	Policy underlying regulation	The rights of land and building owners need to be recognised where use of their assets to support the provision of communication services is proposed – to this end there are various 'best practice' matters which carriers need to comply with, such as notification requirements, noise considerations, protecting the safety of persons and property and the actual management of any equipment installation/maintenance activities.
3.	Reasons regulation is no longer needed/could be amended	It is suggested that certain provisions of the code could be amended to improve overall workability; current issues mainly derive from the objection provisions (Chapter 4, Part 5, Division 4 — page 61), whereby the owner or occupier of the land/building in question can object to a carriers proposal. While the ability to object is reasonable it is noted that: - the actual reasons for objection are not always reasonable; - the objections reasons simultaneously overlap and provide too much flexibility for land owners; and - the process for resolution can be drawn out at significant cost to the carriers. Throughout the 'objection' process carriers have little in the way of certainty about potential/likely outcomes. Part of the issue, as outlined above, resides in what is commonly known as a split incentive problem; in this case the incentives of the land/building owner and the person seeking communication services may not align, with carriers having to wear the downside of any such difference in perspectives.

[3] The Code can be located at: http://www.accc.gov.au/system/files/Legislative%20Instrument%20Compilation%20-%20Facilities%20Access%20Code%20-%2024%20Sept%202013.pdf

4.	Proposal to remove or amend (if amend, please describe amendment)	As the code places reasonably stringent 'best practice' type requirements on carriers it is suggested that the objection and resolution processes should be revisited in order to prevent or limit spurious objections, support more timely outcomes and provide greater certainty for carriers. This could include revision of the acceptable dispute reasons (Clause 4.35(2)) and/or streamlining the involvement of the Telecommunications Industry Ombudsmen (Division 5) such that more timely outcomes can be achieved.
5.	What impact removal/amendment will have on industry	The suggested amendment has the potential to reduce timeframes, improve certainty and improve productivity in the telecommunication sector, as applicable to the installation of telco services in commercial and private buildings. This includes increased capacity to install fibre optic services (i.e. NBN related infrastructure) in a timely and efficient manner.
6.	What impact removal/amendment will have on consumers/individuals	The suggested amendment has the potential to improve consumer welfare by enabling the timely and efficient installation of communication services.

Additional Comments

The following comments and observations are also made.

Competition Policy

- Given the wholesale role assigned to NBN Co, the issue of 'Competition Policy' remains important for the telecommunications sector. AIIA strongly believes it is imperative that NBN Co avoid the creation of any distortions in the telecommunications sector by seeking to expand into sub-sectors where competitive markets already exist. These distortions could have the form of reduced competition , diminished incentives for investment, stranded assets and/or sovereign risk (an issue for consideration in the context of the review of Competition Policy announced by the Government).

Measures to introduce additional social media regulation

- AIIA members are concerned about the Government's intention to legislate for a complaints system to 'get harmful material down fast' from large social media sites. In our view this is an unnecessary regulatory burden particularly on the providers of innovative, online collaborative tools that are at the heart of a thriving, dynamic digital economy.
- Technology leaders with social networking functionality in their products committed to a voluntary complaints handling protocol under the previous Government, which by all reports is working well. In our view legislation will be fraught with complexity. For example how will Government define what constitutes a 'large social media site' or 'harmful material'; who will determine and administer such requirements; and realistically how will Government avoid the perception of political censorship of social media?

Possible regulatory impediments to cloud adoption in Federal Government

- AIIA supports the Federal Government's requirement for strong protective security policies and practices, particularly in relationship to sensitive and classified information assets.
- However, we also believe that agencies should be able to leverage security guidance to make their own risk-based assessments on whether to utilise cloud services. To this point, the *Australian Government Policy and Risk management guidelines for the storage and processing of Australian Government information in outsourced or offshore ICT arrangements* released earlier in 2013 has added an additional hurdle for agencies considering cloud computing services. These guidelines, released in June 2013, added the requirement for agencies to seek both the approval of portfolio Ministers and the Attorney-General before entering into arrangements for the hosting offshore of any information that is privacy protected.

- This guidance has not only added a procedural barrier into the consideration of offshore hosted cloud services for non-security classified data; it has created confusion around the privacy requirements of agencies. It has also put the Federal Government's internal guidance on cloud services at odds with the more constructive guidance of the Office of the Australian Information Commissioner.

Government Procurement

- As we identified in our submission to the Federal Government's Commission of Audit, government procurement processes can also create a significant compliance burden for business and in some instances hamper competitive dynamics through overly restrictive tender frameworks. We make the point again that it is important that government procurement processes are as streamlined and transparent as possible. For example a one-stop pre-qualification or certification process, where matters such as insurance certificates, company ownership details and ABN's (common to all tenders) are collated so that the same information does not need to be repeated every time a tender is submitted, would greatly improve current arrangements. This would also address the issue of the multiplicity of government panel arrangements – some 50 panels alone related to ICT issues across government.