Telstra Submission

Review of the Australian Communications and Media Authority issues paper - July 2015

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1 Executive Summary

Telstra welcomes this opportunity to respond to the *Review of the Australian Communications and Media Authority (ACMA)* issues paper.

Opportunity for reform

Telstra recognises that the ACMA has played a key role, since its inception in 2005, in delivering regulation for the communications and media sectors. It is now timely to review the future role and operation of the ACMA in light of the significant impact that rapidly evolving new technologies are having on these complex sectors. Additionally, the existing regulatory regime within which the ACMA operates has not kept pace with technological, behavioural and competitive changes in the sectors and is now presenting significant challenges to customers, industry and to the ACMA itself. The entry of over-the-top content and service providers in the communications and broadcasting markets is an example of the type of change that is disrupting the current regime. For these reasons Telstra believes this review needs to consider both the future form of the regulatory framework and the ACMA's role in that framework.

The review needs to be underpinned by a best practice view of regulation

Regulation is often necessary to protect customer interests and ensure that public resources (e.g. spectrum and telecommunications numbers) are used in a way that maximises their value to society. However, it is important to adopt a best practice approach to regulation in which the most efficient and least market distorting approach is adopted to resolve clearly identified problems. This approach requires an assessment of the problem to be addressed by all relevant stakeholders, and consideration of all the relevant non-regulatory and regulatory options (including their costs and benefits) to ensure that an effective solution with the least cost is introduced. This benefits consumers by maximising the ability of competitive markets to drive differentiation and investment in additional infrastructure, new technologies and improved customer experience. By contrast, regulation that reduces competition or adds to industry costs without commensurate benefits is not in the interests of consumers. Telstra believes that best practice regulation, which is already embodied in the Government's own regulatory policy framework, is the basis upon which the regulatory framework and the ACMA should be reviewed.

Make better use of industry self-regulation and co-regulation options

The current regime falls short of best practice and can be improved by making greater use of co-regulation and self-regulation options. In co-regulation the regulator still has a role (typically enforcing the requirements) while in self-regulation the requirements are either voluntary or subject to consequences under an industry compliance framework. Compared to "black-letter" regulatory solutions administered by regulators, Telstra considers these options can often solve problems and deliver policy outcomes more efficiently as well as making the regulation more flexible and fit-for-purpose. They offer the opportunity for at least some of the functions currently undertaken by the ACMA to be transferred to industry over time, subject to suitable compliance arrangements being established.

Industry co-regulation

Some co-regulatory arrangements (in the form of industry codes registered by the ACMA) already exist between Communications Alliance and the ACMA, but these arrangements do not provide sufficient flexibility for industry to respond to the rapidly changing technology and market environments within

which industry operates. The role of the regulator in these co-regulatory arrangements can be made more flexible and streamlined.

Industry self-regulation

Communications Alliance already delivers some examples of effective self-regulation through its publication of unregistered industry codes, guidelines, specifications and guidance notes. However, these examples are typically limited to the regulation of certain types of technical and operational matters where the ACMA and industry have not seen a need for additional compliance measures. It appears that self-regulation has not been used more generally due to an apparent preference for stricter forms of regulation and a lack of confidence in industry being able to deliver and comply with self-regulation, which is most likely driven by the lack of an accepted framework for engendering such confidence.

Confidence about expanding the use of industry self-regulation in Australia can be drawn from the New Zealand experience where the industry (via the New Zealand Telecommunications Carrier Forum) operates a self-regulation model that includes an industry administered compliance framework and covers a wider range of regulatory matters.

Telstra is also pleased to see the Government supporting a recent Communications Alliance proposal for industry to make greater use of self-regulation in the management of the numbering resource. This provides a useful opportunity for industry to demonstrate that self-regulation can be effective and applied more broadly across the sector.

Telstra seeks reforms that are aimed at building more confidence in and encouraging greater use of self-regulation.

Role of Government

For industry regulation to be effective, it is important that the Government does not undermine industry regulatory arrangements by introducing government administered regulation to address the same problem or policy objective. Government regulation should only be applied to that same problem or policy objective if Government finds that the industry arrangements are manifestly inadequate. This approach gives industry an incentive to develop its own regulatory solutions and ensure they are effective, in order to avoid the additional cost and burden of government regulation, while still giving Government the option of applying such regulation if the industry arrangements fail.

Coverage issues

The greater use of industry regulation will require suitable arrangements to be in place to ensure that all relevant service providers are captured and that they all make a fair contribution to the costs of developing and implementing regulations. Telstra suggests that this could be achieved by expanding the current carrier licensing regime to cover all carriage service providers. Each provider would be expected to pay a small annual licence fee to cover the ACMA costs of administering the licensing scheme and to also make a contribution to the overall cost of regulation. It would be important for these changes to be consistent with the principle of being light-handed and proportionate.

As well as ensuring that regulation and the costs of regulation are shared more equally across all service providers, an expanded licensing scheme would have the benefit of giving consumers increased awareness and confidence by allowing them to check the legitimacy of particular providers on a public register.

Funding

Although industry regulation is expected to be more efficient, suitable arrangements will still need to be established to fund the costs of the additional regulatory activity undertaken by industry. While industry may directly fund some of the activity, it would seem reasonable that industry receives the benefit of savings achieved through any transfer of regulatory responsibility.

Reshaping the ACMA for the future

The objectives of the regulator

The objectives the ACMA should be refined to include promoting the long term interest of end users; promoting investment in the communications and broadcasting sectors that facilitates the social and economic development of Australia; promoting the efficient use of public resources (e.g. spectrum); supporting Government policy for the communications and broadcasting sectors; and facilitating industry's contribution to the Australian economy.

The role of the regulator

The Government should apply best practice regulation principles to undertake a detailed review of the current functions of the ACMA and assess whether they are most efficiently undertaken by the regulator or elsewhere – e.g. by the industry, Department of Communication or other organisations. This decision should focus on efficiency in order to reduce costs on industry, consumers and the Government itself. However, where a function is moved to an alternative body, there needs to be adequate attention to the funding arrangements associated with the transfer of the function.

The ACMA should continue to manage and administer the telecommunications sector licensing regime, but seek to apply it to all service providers, and it should also continue to assign and manage licences for spectrum. The regulatory environment would be made more efficient and agile if a number of existing ACMA functions were fully or partially devolved to industry under self-regulation or co-regulation models - subject to industry establishing a suitable framework to promote compliance. Examples of functions that could potentially be transferred include numbering (already being considered), customer protection, technical standards, the Integrated Public Number Database and Do Not Call Register requirements, SPAM and cyber security requirements, and some aspects of spectrum technical coordination for radiocommunications services.

Overall, Telstra expects that the future ACMA would be smaller, taking advantage of a better balance between Government regulation, industry co-regulation and industry self-regulation. It would continue to have a substantial role in specific areas, such as managing radiocommunications licensing, but in other areas it would either have no role or be limited to approving industry codes and assisting industry to enforce compliance with codes.

The structure of the regulator

The review also questions whether there should be a single regulator in the communications sector, incorporating responsibility for economic regulation. Telstra sees little benefit in Australia adopting the structure of the Ofcom (Office of Communications) regulator in the United Kingdom. Moving economic regulatory functions into the ACMA would result in overlap and inefficiencies between the ACMA and the Australian Competition and Consumer Commission (ACCC), and create additional complexity and costs due to industry having to engage with two regulators. There is already duplication between regulators in the area of customer protection and privacy, which adds to industry costs. Such duplication needs to be unwound, not exacerbated. Additionally, a large sector-

specific regulator model would enshrine sector-specific regulation into the ACMA, which would be difficult to scope and resource due to ongoing convergence blurring the boundaries of the sector.

Governance

Telstra supports a governance model where Authority members are appointed on a full time basis only and are able to work with the CEO and senior management team to make timely and efficient decisions. There may also be merit in splitting the Authority Chair role from the CEO role so the Chair can focus on longer term strategy and the CEO can give greater focus to administration and performance.

Enhancing the performance of the regulator

Telstra welcomes the ACMA's positive engagement with industry to agree meaningful metrics to assess its performance. It is too early to make an assessment of the ACMA's achievements against the performance framework but Telstra encourages the Government to ensure the ACMA remains accountable for its agreed performance.

There is opportunity to improve the timeliness and efficiency of the spectrum management function by fully automating all spectrum and apparatus licensing transactions through a single on-line self-help portal. Telstra understands that the ACMA's new licensing system (Project Helm) is a useful step in this direction but it is not yet clear that this system will fully automate the licensing environment.

Improving enforcement

The ACMA should be given greater flexibility in determining the best remedy to achieve compliance where a breach has been identified. The overarching principle in enforcement should be 'proportionality' in terms of whether any enforcement action is required at all and the nature of the remedy to be imposed.

The risk of interference to licensed services in the spectrum environment is expected to continue to increase as demand for spectrum use grows, especially with the anticipated proliferation of wireless devices associated with the Internet of Things. Such interference has a negative impact on the experience of firms and consumers using these services. Other factors contributing to this risk include the growth in online importation of mobile repeaters and other types of unauthorised wireless devices, and the growing number of electrical devices that are emitting excessive levels of radio emissions. Telstra believes the radiocommunications compliance and enforcement capability of the ACMA must be strengthened to address this risk.

2 Introduction

The communications sector is undergoing structural, behavioural and competitive changes. It is becoming clear that the legacy regulatory framework has not kept up, and is now presenting significant challenges to customers, industry and to regulators. The Government's issues paper on the ACMA review recognises this, and invites feedback on the broader communications regulatory regime as well as on the structure, governance and role of the ACMA.

Identifying the optimal longer term approach to regulation in the communications sector is critical to delivering better outcomes for customers and industry, and is required before making final decisions on the future structure and role of the ACMA.

Rather than seeking to answer each of the specific questions in the issues paper, this submission focuses on the broader challenges facing the regulatory framework and the ACMA, and outlines a suggested high level approach to address these challenges.

The remainder of this submission is structured as follows:

- Section 3 presents Telstra's views on the benefits of adopting a best practice approach to regulation, regardless of whether the regulation is initiated by industry or Government. Consistent with the Government's own principles, there is a need for a structured analysis of the problem or policy objective before a regulatory solution is proposed. The analysis should take a graduated approach when considering the options, with industry co-regulation and self-regulation options being considered before black-letter regulation. Customers and industry are better off in the long term when there is an optimal use of co-regulation and self-regulation, as well as black-letter regulation. Telstra also suggests that the scope of the current carrier licensing requirement should be extended to capture all suppliers of telecommunications services in Australia so that consumers can be better informed and, where appropriate, regulation applied in a way that supports a more level playing field across all service providers.
- Section 4 presents Telstra's views on changes to the role and responsibilities of the communications regulator in a future-focussed regime. The economic regulation responsibilities of the ACCC should not be moved to the ACMA to avoid the potential for overlap and inconsistency with the ACCC's powers. The ACMA should have an ongoing role in the communications sector but over time the role would become smaller representing a more appropriate balance between co-regulation, self-regulation and black-letter regulation. This section also identifies some specific opportunities to improve the efficiency of a future-focussed regulator. In particular, the compliance and enforcement powers should be reviewed to provide the regulator with a wider range of options to achieve compliance, and its capability for enforcing compliance with the radiocommunications regulatory framework should be strengthened.
- Appendix 1 outlines examples of functioning co-regulation and self-regulation models operating in New Zealand, the United Kingdom and in Australia.

3 The future regime must be based on best practice regulation

Government, industry and regulators aspire to the standard of best practice regulation because it is generally recognised as being in the best interests of customers as it provides the most efficient and least distortionary means to achieve policy outcomes. This standard, embodied in the Governments

own regulatory policy framework is the basis upon which the regulatory framework, and the regulator, should be reviewed.

The Government has a well-established set of principles for best practice regulation. In 2007, the Council of Australian Governments (COAG) agreed that all Governments will ensure that regulatory processes in their jurisdictions are consistent with their principles of best practice regulation.[1] The Department of the Prime Minister and Cabinet developed and maintains a guide to regulation. This is an important document that establishes ten principles for Australian Government policy makers.[2] The Department of Communication has also published its own principles of regulation to achieve effective and appropriate regulation.[3] These principles are summarised in Table 1 below.

Table 1: Summary of best practice regulation principles

Council of Australian Governments	Department of Prime Minister and Cabinet	Department of Communications
Establishing a case for action before addressing a problem.	Every substantive regulatory policy change must be the subject of a Regulation Impact Statement.	Regulation should serve clearly identified public policy goals, and be effective in achieving those goals.
Government action should be effective and proportional to the issue being addressed.	Regulators must implement regulation with common sense, empathy and respect.	Regulation should be consistent with other regulations and policies, including those relating to competition, trade and investment.
Adopting the option that generates the greatest net benefit for the community.	Regulation should be imposed only when it can be shown to offer an overall net benefit.	Regulation should produce benefits that outweigh the costs, including those imposed on industry (compliance), Government (enforcement) and consumers (reduced innovation, fewer services, and higher prices).
Ensuring that regulation remains relevant and effective over time.	The cost burden of new regulation must be fully offset by reductions in existing regulatory burden.	Regulation should be as technologically neutral as possible, to avoid creating regulatory distinctions between similar services that are delivered differently.
Consulting effectively with affected key stakeholders at all stages of the regulatory cycle.	All regulation must be periodically reviewed to test its continuing relevance.	Regulation should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical basis.
A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed.	Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option.	Regulation should minimise market distortions and harness competition to deliver policy outcomes by aligning market incentives with regulatory objectives.

[1] Council of Australian Governments, 2007, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, https://www.dpmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf.
[2] Department of the Prime Minister and Cabinet, 2014, *The Australian Government Guide to Regulation*, http://cuttingredtape.gov.au/sites/default/files/files/Australian_Government_Guide_to_Regulation.pdf.
[3] Department of Communications, *Deregulation in the Communications Portfolio*, November 2013, page 5, https://www.communications.gov.au/file/628/download?token=pil6pYe7.

Council of Australian Governments	Department of Prime Minister and Cabinet	Department of Communications
Providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear.	The information upon which policy makers base their decisions must be published at the earliest opportunity.	
In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that: a) the benefits of the restrictions to the community as a whole outweigh the costs, and b) the objectives of the regulation can only be achieved by restricting competition.	Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals.	
	Policy makers must work closely with their portfolio Deregulation Units throughout the policy making process.	
	Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens.	

These principles indicate that best practice regulation requires an assessment of the problem or objective, consideration of all the relevant non-regulatory and regulatory options including their costs and benefits, to ensure that an effective solution with the least cost is introduced. Only through such rigor can regulators and industry deliver the most efficient outcomes for customers.

To promote best practice regulation, the future regulatory framework needs to include a defined process for solving problems, along with developing and promoting effective industry co-regulation and self-regulation options. These proposals are discussed further below.

3.1. The need for a defined process

The following steps represent a best practice process for developing and implementing regulatory solutions:

- Problem identification
- Option analysis (of regulatory and non-regulatory options)
- Decision on the preferred option
- Draft regulatory instrument
- Implement regulation
- Review regulation

These steps in the process should be applied to all situations where consideration is being given to solving a problem through regulation – whether it be Government, a regulator or industry making the decision. Further detail about each of the steps is provided below.

3.1.1. Problem identification

Describing and defining the real problem affecting the welfare of consumers or industry in the telecommunications sector is critical in establishing whether there is a role for regulators and a need for a regulatory solution. This requires substantive stakeholder consultation to assess the reality,

nature and extent of the problem. Analysis of the causes, impacts and likely longevity of the problem should be performed in consultation with stakeholders. The analysis of the problem should also be available to stakeholders to promote transparency of the processes and outcomes.

3.1.2. Regulatory options analysis

Stakeholder consultation on the relevant options is required. These options include the following (in order of impact on industry):

- No specific action (status quo).
- Non-regulatory measures (e.g., customer education).
- Industry self-regulation where industry is responsible for developing the requirements in an industry document and takes on primary responsibility for compliance and consequences for non-compliance.
- Industry co-regulation where industry usually develops the requirements in an industry document but a regulator has a responsibility for enforcement.
- Black-letter regulation where the relevant regulator is responsible for developing and implementing the requirements in regulations and is also responsible for compliance and enforcement.
- Legislation where the responsible Department/Minister is responsible for developing and implementing the requirements by making changes to legislation (often with compliance and enforcement delegated to a regulator).

These options should be considered in the order outlined above, e.g., give preference to non-regulatory measures before industry self-regulation or co-regulation, and only consider black-letter regulation after the non-regulatory and industry options have been considered.

The analysis needs to include a review of the costs and benefits of each of the potential solutions to identify the minimum necessary intervention to meet the solution. The analysis should also be made transparent to all stakeholders with an explanation of the proposed solution and how the efficacy of the solution will be measured and monitored.

As discussed in section 3.2 below, Telstra believes there is an opportunity to develop and make better use of the industry self-regulation and co-regulation options.

It is important that 'no regulation' options are actively considered in the process. Any form of regulation – whether industry self-regulation, industry co-regulation or black-letter regulation – creates costs and potential inefficiencies. There should be a threshold requirement for alternatives to regulation to be considered before heading down the path of any form of regulation. Alternatives could include an education campaign undertaken by industry or the regulator, or by asking individual operators to improve their publication of customer information. The requirement to consider less intrusive alternatives to regulation should discipline industry- based decision makers (including Communications Alliance and industry itself) as much as decision makers in formal regulatory processes (such as the Minister, ACMA or ACCC).

3.1.3. Decision on the preferred regulatory option

The decision should be made in consultation with stakeholders to ensure they are well informed and that the workability of what is proposed has been tested with stakeholders. Again, the decision making process should be transparent to all stakeholders.

3.1.4. Draft regulatory instrument

After determining the most efficient regulatory option, stakeholders should be consulted on the scope, drafting, duration, workability and efficacy of the proposed instrument to minimise regulatory impact. The focus of the consultation should be to ensure that appropriate industry behaviour is most likely to result from the regulation and that overall customer experience is improved - not in absolute terms, but relative to lighter handed approaches to regulation that have been initially discounted.

The regulatory instrument should be refined and an impact analysis developed on the basis of the stakeholder consultation. This would ensure that all stakeholders have a common understanding of the regulatory requirement and the expiration or sunset provisions and associated review timetable as set out in 3.1.6 below.

3.1.5. Implement regulation

The final regulatory instrument should then be issued along with a clear statement of the reasons for the regulation and the expected effect, including costs and benefits. A full Regulatory Impact Statement should be produced for material regulations, and a cut-down version should be produced for regulations that do not meet the Government's materiality threshold but are still material for industry and customers. Where compliance with regulation will require significant investment in capital, resources, and training by industry participants, the regulator should articulate a timetable for implementation.

The impact of regulation should be monitored through a range of measures that include a strong focus on changed industry behaviours and improved customer experiences. The learning from key stakeholders regarding implementation costs and benefits should also be captured.

3.1.6. Review regulation

The responsible body should commence a review of the regulation well ahead of its expiration or scheduled review date and ensure that all key stakeholders are given the opportunity to contribute to the review process.

The review process should focus on changes in relation to those aspects of customer demand or industry behaviour that gave rise to the problem identification in the first step of this process. Critically, the review process should seek out feedback from all stakeholders on costs and benefits of regulation to date. Those same stakeholders should also be asked for their forward-looking costs and benefits if the regulation was to remain. Where it is clear from the review process that the costs of the regulation exceed benefits (or are likely to in the future) then prima facia the regulation should be removed or changed in accordance with the existing provisions in the regulation.

3.2. Develop and make better use of co-regulation and self-regulation options

The principles of best practice regulation set out in Table 1 above identify the need for black-letter regulation to be considered and assessed against alternative regulatory options including co-regulation and self-regulation. In particular, COAG, the Federal Government and the Department of Communication's respective principles state:

- "A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed."
- "Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option."
- "[Regulation] should minimise market distortions and harness competition to deliver policy outcomes by aligning market incentives with regulatory objectives."

Consistent with these principles, a future-focussed regulatory framework should have a built-in requirement or predisposition toward co-regulation or self-regulation, and it should avoid black-letter regulation to the greatest extent possible to achieve the desired outcome efficiently.

Efficiency in the choice of regulation is a critical step for ensuring customers and industry gain the most benefits from regulation. Choosing a regulation that is too 'strict' for the circumstances results in:

- additional cost for Government, as Government's involvement is significantly increased;
- delays in new products and services for customers and, in the worst case, new products and services not being supplied, because of less flexibility or restrictions being placed on industry;
- outcomes being distorted further over time by regulations that are inflexible and out of date with changed circumstances; and,
- additional cost for industry – costs that are ultimately passed on to the prices paid by customers.

However, the existing regulatory framework does not sufficiently support co-regulation or self-regulation, nor does it allow confidence to be built in co-regulation and self-regulation as a reliable means of meeting policy objectives. Government and regulators are often left with little choice but to adopt black-letter regulation, leading to an overreliance on that form. This has meant that Government and its agencies have faced the higher costs of administering black-letter regulation, and customers and industry are more exposed to the risk of black-letter regulation distorting efficient outcomes in the market. Overall, the economy and customers are worse off as the regulatory regime does not deliver the most efficient means of solving issues and delivering policy objectives.

There are some examples of co-regulation and self-regulation in other industries and outside Australia, including the framework administered by the New Zeeland Telecommunications Carrier Form (TCF), the UK premium rate services industry, and the regime administered by the Advertising Standards Board in Australia. Information about these examples is provided in Appendix 1.

The Government, and ultimately customers, will benefit by giving the industry a reasonable chance to show it can take responsibility for issues and policy objectives through self-regulation and co-regulation, without the Government spending the resources it requires to create, administer and enforce direct regulation. The issues paper notes the increasingly difficult task faced by the ACMA to establish and promote compliance with telecommunications regulations including industry codes as a result of the number of industry players, diverse services and products and changing customer expectations.

Telstra is pleased to see Government support for a recent Communications Alliance proposal for industry to use self-regulation in the management of the numbering resource. This numbering initiative provides a useful opportunity for industry to develop and implement a self-regulation model to demonstrate that such an approach can be effective.

There will always be a need for some black-letter regulation. The ACMA and other regulators should only be involved where there is evidence of systemic breakdown or failures that are not being adequately addressed and fixed by industry. As a general principle, industry should be given every opportunity to develop and implement practical solutions within a co-regulation or self-regulation framework.

The rest of this section identifies the current challenges with the co-regulation and self-regulation framework and identifies reform priorities to make these more attractive solutions for Government, regulators, industry and customers.

3.2.1. Challenges with the existing co-regulation and self-regulation frameworks

There are several challenges associated with the existing industry co-regulation framework which is based on industry codes being prepared by Communications Alliance and then approved and enforced by the ACMA:

- **Industry code coverage**: It is difficult to ensure that industry codes developed by Communications Alliance under the existing co-regulation framework are applicable to all industry participants, particularly those that are not registered with the ACMA. It is important for codes to have appropriate coverage to ensure the objectives are being met by all relevant parties, that customers have confidence in the coverage, and in the interests of achieving regulatory neutrality across industry. The licensing regime should be reformed to address this issue, as explained in section 3.4.1.
- **Disincentive for industry compliance**: In addition to the coverage issue raised above, industry faces strong disincentives to embrace its own compliance framework and to build in consequences for non-compliance. For example, the Telecommunications Industry Ombudsman investigates individual escalated complaints and systemic complaint issues for individual suppliers with regard to specific codes. In addition, the ACMA proactively monitors and enforces compliance for individual suppliers across a wide range of codes. Both factors result in the crowding out of industry-led compliance, considering that industry is already paying the costs for compliance undertaken by these other bodies.
- **Industry codes are inflexible and un-responsive to market change**: Industry codes created under the co-regulatory framework need to be responsive to changes in technology, the market and the broader environment. However, current processes to amend codes are inflexible and time consuming. While in some cases this might reflect the many Government and regulator interests, it is also a symptom of the Government and agencies having overlapping responsibilities but being independent of one another, and also having an inherent inclination towards black-letter regulation rather than co-regulation or self-regulation.
- **Industry codes can be over-prescriptive, which reduces transparency and awareness for customers**: The existing co-regulatory framework requires the ACMA to register a code, but to also enforce that code once it is registered. In some cases, this can drive a level of prescription and detail in codes that is not necessarily efficient. Over-prescription can be counterproductive as it reduces transparency and awareness to customers, complicates

industry compliance, and makes the code less flexible to future changing circumstances. It also fundamentally reduces competition, by impeding differentiation.

In regard to self-regulation, there is a lack of confidence by industry, Government and consumers that industry can deliver effective self-regulation without the need for black-letter regulation or co-regulation. Communications Alliance already has examples of effective self-regulation through its publication of unregistered industry codes, guidelines, specifications and guidance notes. However, these examples are typically limited to the regulation of certain types of technical and operational matters where the ACMA and industry have not seen a need for additional compliance measures. There is little transparency in terms of compliance, and no consequence for non-compliance.

The role of Communications Compliance[4] in the context of the Telecommunication Consumer Protection code is currently the best example of an industry solution for promoting compliance. Telstra suggests this solution could be a useful foundation upon which to build a more comprehensive industry compliance framework which can be applied more broadly to industry self-regulation.

There is also no recognition of a safe harbour for compliant behaviour. Thus, firms that invest in effective self-regulation still fund regulator activity and face the risk and additional cost of future regulatory action, notwithstanding. There is little incentive for industry to use self-regulation in the current regime, except for certain operational and technical matters where there is little risk of other forms of regulation being applied.

3.2.2. Prioritise industry co-regulation and self-regulation to promote more efficient outcomes

Telstra recommends developing the industry co-regulation and self-regulation options so they become more attractive alternatives to black-letter regulation for policy makers, regulators, industry and customers. For co-regulation and self-regulation options to be effective alternatives to black-letter regulation, the following framework should be considered:

- **The need for a clear policy objective**: Proposals for regulation should be accompanied by a clear policy objective that is formulated after a substantive and transparent review, in accordance with the best practice process discussed above.
- **Industry should have the option to use co-regulation or self-regulation**: It should be the decision of industry to use co-regulation or self-regulation to meet a policy objective, rather than be directed to use them by the Minister or the regulator. While the Minister or regulator may have a preference for self-regulation or co-regulation, the decision to adopt those forms should rest with industry. If industry chooses not to introduce self-regulation or co-regulation, or if these measures fail, then the Minister or regulator could still decide to use black-letter regulation.
- **Features of industry self-regulation codes**: If industry choose to use self-regulation to meet a policy objective, then:
    - An industry body (e.g., Communications Alliance) should develop a suitable code, and decide whether that code would be voluntary or mandatory (through the industry

[4] Communications Alliance established Communications Compliance as an independent Code monitoring and enforcement body under the TCP Code to monitor and report on code compliance by suppliers. The TCP Code also required suppliers to set up their own code compliance framework to support the Code rules and so improve the levels of customer service to consumers. Suppliers are required to produce a compliance plan which is consistent with the Australian Standard for compliance frameworks and provide an annual self-attestation to Communications Compliance of code compliance. Communications Compliance reserves the right to enforce non-compliance via name and shame powers or alternatively via powers of referral to the ACMA. Communications Compliance is now in its fourth year of operations and has been a successful venture with over 300 CSP's supplying self-attestations for 2015.

compliance process). This is similar to the approach to industry self-regulation used by the Telecommunications Carrier Forum (TCF) in New Zealand.

  - Minimum standards would need to be applied to a self-regulation code. These would provide confidence the code is likely to meet policy objectives and to provide industry an opportunity to prove that self-regulation can work. Such minimum standards might include: transparency of outcomes, monitoring and compliance testing and consequences for lack of compliance. However, the nature and content of those standards would be decided by industry in the development of the code.

- **Self-regulation requires effective compliance processes and enforcement mechanisms that are determined by industry**: For voluntary or mandatory self-regulation codes, firms would have their compliance tested in accordance with arrangements set out in the relevant code compliance framework. This is important to engender trust that self-regulation can effectively resolve issues and meet policy objectives. Firms that do not comply would be subject to the consequences set out in the code itself.
- **Co-regulation codes would be mandatory**: As is the case today, co-regulation codes would be mandatory. Non-compliance of a co-regulation code would result in consequences determined in the relevant code compliance framework. To ensure the positive outcomes from co-regulation are not undone by the actions of few, it might also be helpful for industry to have a backstop option of being able to refer parties to the regulator for possible enforcement if they persistently fail to adequately comply with a co-regulation code.
- **Co-regulation and self-regulation may be approved, but should not necessarily require approval, by the regulator**: If industry chooses to use co-regulation or self-regulation to meet a policy objective, the existing code process could be used, but the role that the regulator is given in that process should be reviewed to ensure codes are flexible to respond to market changes. In particular, codes should not be required to be approved by a regulator before they can be effective. The regulator should be consulted, have the option to endorse codes and may be given roles by codes (including approval), but industry should ultimately decide on whether and how a co-regulation or self-regulation code is to be approved and adopted, appreciating that Government and the regulator will take further action if the industry's chosen approach is ineffective.
- **Industry needs assurance that self-regulation will not be duplicated with black-letter regulation**: If industry has embarked on self-regulation to address an issue or policy objective, then black-letter regulation should only be applied for that same issue or policy objective if the Minister concludes that the self-regulation is manifestly inadequate. If the Minister did decide that self-regulation was manifestly inadequate, the Minister would need to consider whether the concerns with self-regulation could be addressed through co-regulation before deciding upon black-letter regulation. This will provide industry with an incentive to develop self-regulation and ensure it is effective, in order to reduce the costs and burdens of black-letter regulation, while retaining a backstop of black-letter or co-regulation if self-regulation fails.
- **Co-regulation and self-regulation needs to be funded**: The costs associated with greater use of co-regulation and self-regulation should be met from the savings that Government and regulators would achieve by moving functions to industry, and by having more efficient co-regulation and self-regulation processes that lead to less black-letter regulation.

Under the above framework industry would have an incentive to make greater use of co-regulation and self-regulation to solve problems and meet policy objectives. While this would mean that

industry faces greater consequences for non-compliance, it would also have greater assurance that investment in self-regulation would not be undermined by less efficient black-letter regulation. Notwithstanding, stricter forms of regulation may be required where self-regulation is found to be manifestly inadequate.

The ACMA review also calls for consideration of existing regulations. There should be a systematic review of all current areas of black-letter regulation to assess whether they are more appropriately addressed by co-regulation or self-regulation. Where there is an opportunity to adopt an alternative to black-letter regulation, the Minister should articulate the policy objective and an intention to remove that black-letter regulation, once industry has developed an effective co-regulation or self-regulatory instrument.

To the extent that increased accountability is given to industry to assume implementation of Government policy via the application of industry self-regulation or co-regulation rather than black-letter regulation, then a mechanism will be required to redirect funding to this additional workload on industry. This would not involve an increase in the overall 'cost' of regulation for industry, given the change in form of regulation should be based on efficiency, but should provide for a re-direction of some of the existing funds previously allocated to regulators. This could be undertaken in a transparent manner via, for example, increased use of the existing Grants process with associated checks and balances agreed to between Government and the relevant industry association, and/or reduced industry licence fees

3.3. Coverage issues

The greater use of industry regulation will require suitable arrangements to be in place to ensure that all relevant service providers are captured and that they all make a fair contribution to the costs of developing and implementing regulations. As explained below, Telstra suggests that this could be achieved by expanding the current carrier licensing regime to cover all carriage service providers. Each provider would be expected to pay a small annual licence fee to cover the ACMA costs of administering the licensing scheme and to also make a contribution to the overall cost of regulation. It would be important for any these changes to be consistent with the principle of being light-handed and proportionate.

As well as ensuring that regulation and the costs of regulation are shared more equally across all service providers, an expanded licensing scheme would have the benefit of giving consumers increased awareness and confidence by allowing them to check the legitimacy of particular providers on a public register.

3.4. Difficulties with the current licensing regime

The current regulatory licensing and associated funding regime is, in general terms, based around the concepts of carriers, carriage service providers and content service providers. Carriers are required to be licensed by the ACMA under Section 56 of the Telecommunications Act 1997 and then listed on a public register. Under the existing regime, carriers must pay a contribution to Carrier Licence fee and also contribute to the cost of the Government's USO policy objectives (via the Telecommunications Industry Levy).

Carriage service providers (CSPs) are not required to be individually licensed but must comply with relevant service provider rules.

All suppliers are required amongst other things to become members of the Telecommunications Industry Ombudsman (TIO) Scheme.

While this approach has served Government policy objectives well for some time, it is not a sustainable model for the future. The key challenges with this approach are summarised below.

- The current telecommunications sector is complex and dynamic which makes it impossible for consumers, policy makers and regulators to have confidence all firms are acting consistently with policy objectives and are compliant with codes and guidelines. By way of example, the TIO Annual Report for 2013/14 indicates that it had 1,384 members while in 2012/13 it had 1,360 members. During the intervening year 145 members joined the scheme and 121 left it. In practice, whether codes and guidelines are applied to all firms is not known.
- Regulators, like the ACMA, cannot be certain their industry monitoring and enforcement activities are being applied across all of industry. This often leads to a focus on larger, more visible suppliers that is disproportionate when those suppliers are highly committed to compliance.
- The ACMA cannot be satisfied that their efforts are effective for all suppliers when it cannot identify who all of the relevant suppliers are. Currently, it only becomes obvious that some suppliers are not being effectively targeted unless there is a public display of customer detriment, often via escalated customer complaints to the TIO and often too late to protect customer interests.
- With the NBN becoming the dominant infrastructure supplier to the Australian market, the current reliance on Carrier Licence Fees needs to be re-assessed to ensure that competitively neutral outcomes and equitable funding arrangements are put in place.

Accordingly, Telstra suggests the ACMA be given legislative power to seek (via an amended service provider rule) a requirement that all CSPs be individually registered. All registered CSPs should then have their names subsequently placed on an ACMA public register. However, it is important that any such re-adjustment to this aspect of policy is consistent with the principle of being light-handed and proportionate.

3.4.1. Benefits of an expanded licensing scheme

The benefits of such an approach would be to ensure customers have increased confidence in their choice of suppliers. For example, the public register would set out the name and registered location of the CSP. A customer does not make the distinction between carriers and CSPs when exploring purchasing options and, and a customer may consider services from a number of suppliers.

An annual process could be facilitated via an on line function that would require basic company information. Registration could be accompanied by a small licence registration fee. This fee would seek to recover the ACMA's administrative costs of the licensing scheme and would also seek to make a small contribution to the overall cost of regulation. However, licence fees should be kept to a minimum and consistent with the Government's focus on reducing regulator red tape, it is not recommended that the eligible revenue approach to determining CSP contribution be applied. Instead the CSP fee would be standard across industry and the ACMA would be required to provide a forward estimate of proposed CSP licence fees from year to year. This would ensure that any changes are transparent and made in advance in order to assist CSPs with cash flow management.

4 The communications regulator in a future-focussed regime

4.1. The structure of the regulator

The review questions whether a sector specific regulator (e.g. the ACMA) should be responsible for all aspects of industry regulation including economic regulation.

Telstra considers that the ACCC (and whatever bodies arise out of the recent review of the ACCC's structure) should continue to have responsibility for the economic regulation of the communications sector.[5]

Moving competition and access functions of the ACCC to the ACMA is undesirable as it would create overlap and inefficiency between the two regulators. It would inevitably lead to competition issues being dealt with or considered by both the ACMA and the ACCC as the latter would still have broader economy competition responsibilities. Telstra is not at all confident that there would be clear delineation of responsibilities, particularly given the rapidly changing scope of the communications sector. Incorporating sector specific economic regulation into the ACMA is unlikely to be sustainable due to the ongoing convergence of sectors which is blurring their boundaries. Such an approach would also create additional complexity and cost for industry by requiring industry to engage with two regulators on economic regulatory matters.

4.2. The objectives and role of the regulator

The objectives or purpose for the ACMA should include: promoting the long term interest of end users; promote investment in the communications sector that facilitates social and economic development of Australia; promotes efficient use of resources (e.g. spectrum); promote/support Government's online economy and community; facilitate industry's contribution to the Australian economy.

The Government should apply best practice regulation principles to undertake a detailed review of the current functions of the ACMA and assess whether they are most efficiently undertaken by the regulator or may be more efficiently undertaken elsewhere – e.g. by the industry, Department of Communication or other organisations. This decision should focus on efficiency in order to reduce costs on industry, consumers and the Government itself. However, where a function is moved to an alternative body, there needs to be adequate recognition of the funding arrangements associated with the transfer of the function.

Examples of functions that could potentially be transferred include numbering (already being considered) , customer protection, technical standards, the Integrated Public Number Database and Do Not Call Register requirements, SPAM and cyber security requirements, and some aspects of spectrum technical coordination for radiocommunications services.

The ACMA's role in relation to industry codes for co-regulation would be limited to registering codes and endorsing its specific role in the administration of those codes (this role would be typically be limited to one of enforcement). The industry may seek the involvement of the ACMA in other aspects

[5] Telstra notes that the challenges facing the regulatory framework administered by the ACMA are also evident in the parts of the regulatory framework that are administered by the ACCC. For instance, some co-regulation (e.g., the Telecommunications Consumer Protection code) overlaps with the ACCC's powers, there is no reliance on industry co-regulation or self-regulation but a heavy tendency toward black-letter regulation, there is regulation of markets that are competitive, and there is no ability or inclination for the ACCC to commit to deregulate or regulate in a particular way. Many of the suggestions that Telstra makes in this submission in relation to the ACMA should also be considered in relation to the ACCC's regulation of the telecommunications market.

of industry regulation and would build such involvement into any relevant codes as required, after consulting with the ACMA.

Overall, Telstra expects that the future ACMA would be smaller overall, reflecting the Government policy objective of reduced regulatory costs. A reformed ACMA should represent a more appropriate balance between black-letter regulation, co-regulation and self-regulation.

The ACMA would continue to have a substantial role in specific areas, such as managing broadcasting safeguards, administering the telecommunications sector licensing regime (but apply it to all suppliers), and managing radiocommunications.

The ACMA should continue to assign and manage licences for spectrum – but there is opportunity to devolve the development and management of some technical documents associated with interference management and coordination to industry (e.g., Radio Assignment and Licensing Instructions).

4.3. Governance arrangements

Telstra supports a governance model where all Authority members are appointed on a full time basis. Such a model should enable more efficient decision-making as it would give members greater opportunity to actively engage with staff working on particular matters. A committee structure similar to that used by the ACCC might be useful for facilitating this engagement. The expected result is improved predictability and transparency of Authority decisions for both the ACMA staff and external stakeholders.

The future model should also support greater accountability to the CEO and the senior management team to make timely and efficient decisions, which will give industry increased confidence and earlier certainty about regulatory outcomes.

There may also be merit in splitting the Authority Chair role from the CEO role – to reduce the risk of conflict between the two roles and so the Chair can focus on longer term strategy and the CEO can give greater focus to administration and performance. It would also be important for the CEO to have specific efficiency targets and be measured against those to give them some greater prominence.

4.4. Enhancing the performance of the regulator

The complexity of the existing regulatory regime is a key factor that often results in protracted ACMA decision making. A focus on transparent timeframes for specific projects with achievements against those timeframes linked to the ACMA's Regulatory Performance Framework will assist in the short term. Continued effort by Government and regulators to reduce unnecessary duplication and red-tape regulation is also required to enhance longer term outcomes.

Telstra welcomes the ACMA's positive engagement with industry to agree meaningful metrics to assess its performance. However, Telstra believes it is too early to make an assessment of the achievements against the Regulatory Performance Framework but encourages the Government to ensure the ACMA remains accountable for its agreed performance

While the ACMA's existing issues based approach to industry engagement is acknowledged, consideration should be given to the creation of a peak ACMA/industry forum to drive efficiency for engagement, especially for forward looking strategic issues. At a functional level, regular industry engagement against specific milestones should become a core element in relation to all projects undertaken by the ACMA.

The ACMA should also adopt system or process changes which require it to impose and deliver against firm deadlines for key activities such as code registration.

There is also opportunity to improve process efficiencies by fully automating all spectrum and apparatus licensing transactions through a single on-line self-help portal. The ACMA's new licensing system (Project Helm) is a useful step in this direction but it is not yet clear that this system will totally automate the licensing transaction environment.

4.5. Improving enforcement

4.5.1. Greater flexibility is required

The ACMA's enforcement powers, and its approach to the exercise of those powers, should be given more flexibility. To achieve this, Telstra proposes a clearer delineation between the powers to determine a breach and the decision about whether to impose a remedy and what that remedy should be. The overarching principle in enforcement should be 'proportionality'. If a breach has been established, 'proportionality' needs to be considered at two levels:

- Whether any enforcement action is required at all - -it should be clear that the ACMA is not axiomatically required to impose a remedy if it establishes a breach. Enforcement action may not be a proportional response where the breach is of a minor nature, where the party which was in breach has clearly taken steps to achieve future compliance or where the impact was relatively minor. A clearer, more structured discretion around enforcement action by the ACMA would itself provide an incentive for parties in breach to promptly take remedial steps if they knew there was a possibility of no enforcement action where they took the initiative to fix the problem.
- The nature of the remedy which is imposed - the focus of enforcement should be on achieving compliance with the relevant regulatory obligation. The ACMA's 'tool kit' could usefully include more incentive-based remedies to provide alternatives to the traditional punitive enforcement model. The ACMA should not be in a position where it has to impose a fine because the statutory framework requires that outcome.

Some ideas for improved enforcement powers are:

- Before taking enforcement action, the ACMA should consider whether the breach should be addressed through an industry based process for promoting compliance. This gives the industry based process greater credibility. A suitable industry framework needs to be developed but it is expected that the remedies available at the industry level are likely to be more flexible and focused on achieving compliance, as the New Zealand TCF experience demonstrates (see Appendix 1 for more detail);
- The scope of infringement notices could be extended beyond specifying a fine to include other actions or conduct which, if the party in breach agreed to, would avoid the ACMA undertaking further action. This would allow the ACMA to specify outcomes to be achieved in remedying the breach or dealing with the damage caused to consumers. The Hong Kong Competition Ordinance includes a model along these lines[6]. If the ACMA is proposing to take enforcement action, there could be a requirement for the ACMA to issue warning notices where it has reason to believe a party is in breach, specifying a period within which the party served with the notice has to cease the conduct. If the party complies with the warning notice, no further enforcement action would

[6] section 67, Competition ordinance, Cap 619.

be taken. Warning notices may not be appropriate for repeat breaches or more serious breaches, but they serve as an incentive to achieve compliance. Again, the Hong Kong Competition Ordinance has a similar model[7].

4.5.2. Strengthen the capability of the ACMA to enforce spectrum compliance

The risk of interference to licensed services in the spectrum environment is expected to continue to increase as demand for spectrum use grows, especially with the anticipated proliferation of wireless devices associated with the Internet of Things. Such interference has a negative impact on the experience of firms and consumers using these services. Other factors contributing to this risk include the growth in online importation of mobile reporters and other types of unauthorised wireless devices, and the growing number of electrical devices that are emitting excessive levels of radio emissions. Telstra believes the radiocommunications compliance and enforcement capability of the ACMA must be strengthened to address this risk.

[7] section 82, Competition ordinance, Cap 619.

Appendix 1 Comparative regulatory models

Other models of co-regulation and self- regulation overseas and in other industry sectors in Australia give the industry body its own powers of enforcement. These powers tend to be less intrusive or punitive than the powers of the sectoral regulator because imposing significant penalties is more appropriately treated as the exercise of power by the State. Remedies at the industry level tend to be focused on incentives for compliance, such as 'name and shame' or requirements for more effective internal compliance programs. In co-regulatory regimes, cases of serious or repeated breaches can be referred to the regulator to consider sanctions.

The UK communications regulator, Ofcom, has recognised the importance of compliance powers at the industry level to the effectiveness of self-regulation and co-regulation. In its submission to the 2012 Leveson Inquiry into press regulation, Ofcom endorsed an enhanced industry association for the press industry and that:

…the entity could hold powers to access information and powers to launch own initiative investigations. Such a model would give any new regulatory powers commensurate with Ofcom's broadcasting powers (but not necessarily as strong as Ofcom's wider investigatory powers in relation to competition). This should include penalties for failure to cooperate with investigations.

Ofcom proposed that:

[a] self-regulatory regime could potentially confer powers to enforce sanctions, including:

- Strong rules in relation to equal prominent apologies and corrections, with determination straightforwardly by the regulator…;
- Proportionate but effective financial penalties; and
- Full publication of decisions.

The CEO of Ofcom has separately said that, amongst other things, an effective regulator requires "effective powers of enforcement and sanction" which might include the "ability to issue warnings, power to require appropriate redress, power to levy meaningful fines and potentially to remove the ability to operate".

Set out below are some examples of self-regulatory and co-regulatory schemes with compliance functions at the industry level.

New Zealand telecommunications regulation[8] - self-regulation

The New Zealand counterpart of CA is the Telecommunications Industry Forum (**TCF**). The TCF has a graduated layer of industry regulation. It can decide to make "industry regulation" in the form of:

- voluntary guidelines;
- mandatory codes enforceable by the TCF (but not subject to approval or enforcement by the Commerce Commission, which is the telecommunications sector regulator). The enforceability of the code does not depend on a statutory imprimatur but on the contractual commitment made by the members of the industry association to comply with codes which are designated as mandatory; or

[8] NZ Telecommunications Forum Inc, *Code Compliance* (22 January 2015) < http://www.tcf.org.nz/content/f2ebbe55-48c5-4141-bff8-b1dc6675d913.html>;

- codes registered with the Commerce Commission, which ultimately are enforceable by the Commission, which mainly deal with the New Zealand counterpart of declared services under Part XIC of the CCA.

The wide variety of issues which can be addressed through an industry process do not need to be treated with the same degree of formality nor justify the same level of compliance monitoring and cost. The New Zealand approach provides a set of options that allows an industry association to better find a balance between the expected benefits and burdens of regulation for the range of issues with which it is dealing.

The TCF also has a robust enforcement framework independent of the Commerce Commission. In 2012, the TCF developed the Code Compliance Framework. This Framework requires an annual self-certification process by which TCF members certify that they comply with the key metrics of the relevant code of practice.

The TCF has established an investigation and compliance process which operates at arm's length from the TCF board and individual members. There is an investigation or compliance officer who will undertake an investigation of an alleged breach. If the investigation officer considers that there could be a breach, the matter is referred to an Enforcement Agent drawn from a pool of independent experts, who then determines whether there is a breach and the appropriate remedy.

If the Enforcement Agent finds a breach, he or she has the power to impose the following series of escalating sanctions:[9]

- Announcement of breach on TCF website (member's only and public section);
- Announcement of enduring breach on TCF website (public section);
- Sending copy of notice of potential breach to Commerce Commission;
- Imposition of further requirements to self-report on compliance with relevant TCF code;
- Announcement of breach to TCF members after a failure to resolve the breach;
- Announcement of breach to the public via TCF media release censuring breaching organisation; and
- Escalation of a serious breach to the Commerce Commission for action.

The Code Compliance Framework deals with both mandatory codes (i.e. those which have not been registered by the Commerce Commission) and registered codes. In effect, the New Zealand approach is to have as options industry self-regulation with enforcement powers and co-regulation where initial enforcement responsibilities sit at the industry level.

UK premium rate services industry – co-regulation

In the UK, there is a legislative framework for co-regulation of premium rate services (**PRS**) industry, being services that provide information or entertainment, such as directory, horoscope or adult services, over a phone line.[10] The industry regulator, Ofcom, has regulatory powers over the PRS industry under s 120 of the *Communications Act 2003* (UK), however, the legislation also specifically

[9] NZ Telecommunications Forum, *Code Compliance Framework* (2 March 2012) < http://www.tcf.org.nz/library/ac863c29-8c5f-4b04-9bae-3d92dcc8b335.cmr>.
[10] The Smart Cube, *The future of premium rate services: not so premium anymore* (22 December 2014) <http://www.thesmartcube.com/insights/blog/blog-details/insights/2014/12/22/the-future-of-premium-rate-services-not-so-premium-anymore>.

allows for a co-regulatory model such as the one in force. The legislation also provides for enforcement of the PRS industry code at the industry level, rather than through Ofcom, but the investigation and enforcement process has to be sufficiently independent of the providers of PRS.

Ofcom has approved a code made by PhonepayPlus,[11] an independent body with which all providers of PRS must register.[12] PRS providers must all agree to uphold the conditions of this approved Code of Practice.[13] Where PhonepayPlus suspects there has been or has received a complaint regarding a failure to comply with these conditions, it has the power to open an investigation.[14]

A tribunal made up of three members drawn from the nine person PhonepayPlus Code Compliance Panel may then be convened to hear the allegations and the findings of PhonepayPlus's investigations.[15] These tribunals have the power to impose the following sanctions, amongst others:[16]

- Issuance of a formal reprimand;
- Requiring a party to submit categories of service or promotional material to PhonepayPlus before launching them for compliance advice for a specified period;
- Imposition of a fine;
- Barring of access to a provider's services for a specified period or until compliance advice has been implemented;
- Prohibition of individuals or certain parties from involvement in provision of specified types of services;
- Requiring providers to pay refunds to specified groups of consumers; and
- Requiring providers to submit to a compliance audit carried out by a third party approved by Phonepay Plus.

There is also an Independent Appeals Body that parties may appeal to after adjudication by the tribunal.[17]

UK advertising industry – self-regulation

The Advertising Standards Authority (**ASA**) is the UK advertising industry's self-regulatory body for non-broadcast media.

ASA has written an advertising code for industry participants and also enforces these rules.[18] ASA has the power to deem whether or not an ad published by a participant is in breach of these codes.[19] If it

[11] PhonepayPlus, *Memorandum of understanding between the Office of Communications and PhonepayPlus* <https://www.phonepayplus.org.uk/~/media/Files/PhonepayPlus/News-Items/PhonepayPlus-Memorandum-of-Understanding-MoU-with-Ofcom.pdf>. See also Ofcom, *A new framework for premium rate services regulation* (Media Release, 5 December 2007).
[12] PhonepayPlus, *Setting up a premium rate service* <https://www.phonepayplus.org.uk/for-business/setting-up-a-new-premium-rate-service>.
[13] PhonepayPlus, *Setting up a premium rate service* <https://www.phonepayplus.org.uk/for-business/setting-up-a-new-premium-rate-service>.
[14] PhonepayPlus, *Code of Practice 2015* (13th edition, 1 July 2015), 4.2.
[15] PhonepayPlus, *Code of Practice 2015* (13th edition, 1 July 2015), Part 4, and Annex 3. See also PhonepayPlus, *Code Compliance Panel* <https://www.phonepayplus.org.uk/about-us/code-compliance-panel>.
[16] PhonepayPlus, *Code of Practice 2015* (13th edition, 1 July 2015), 4.8.
[17] PhonepayPlus, *Code of Practice 2015* (13th edition, 1 July 2015), Annex 4.

deems it to be in breach, then the ad must be withdrawn or amended.[20] Where a determination is made on a breach by the ASA Council, advertisers or complainants have the power to request a review of the Council's decision to an independent reviewer.[21]

The sanctions imposed where ASA adjudications are not followed are coordinated by an industry body overseen by ASA: the Committee of Advertising Practice.[22] The Committee of Advertising Practice's members are trade associations representing advertisers, agencies and media.[23] It may impose industry sanctions, such as the following:[24]

- Issuing alerts to members, advising them to withhold services from certain parties such as access to advertising space;
- Withdrawal of trading privileges by fellow members; e.g., "the Royal Mail can withdraw its bulk mail discount, which can make running direct marketing campaigns prohibitively expensive";
- Disqualification of advertisements that break the codes from industry awards, denying advertisers and the agencies that created the ads the opportunity to showcase their work; and
- Requiring mandatory pre-vetting of marketing material of certain persistent offenders.

Ofcom also has some enforcement powers over participants in ASA which hold telecommunications or broadcasting licences or which are within other sectors regulated by Ofcom, such as postal services. The CEO of Ofcom has commented that "members almost always comply with ASA" but that "cases can be referred to Ofcom to sanction licensees."[25]

Australian advertising industry – self-regulation

Australia's advertising industry operates partly under a self-regulatory model. The Advertising Standards Board (**ASB**) is an independent body that monitors compliance of ads with the Code of Ethics. Where there has been a complaint about an ad, the ASB can consider the complaint and publish a case report of its determination.[26]

The ASB has some sanction powers; upon finding an ad offensive to the code, it can:[27]

- Request the advertiser to remove or amend the ad;

[18] Advertising Standards Authority, *About regulation* < https://www.asa.org.uk/About-ASA/About-regulation.aspx>.
[19] Advertising Standards Authority, *About regulation* < https://www.asa.org.uk/About-ASA/About-regulation.aspx>.
[20] Advertising Standards Authority, *About regulation* < https://www.asa.org.uk/About-ASA/About-regulation.aspx>.
[21] Advertising Standards Authority, *Independent Review process* < https://www.asa.org.uk/Rulings/Industry-Independent-review-process.aspx>.
[22] Committee of Advertising Practice, *Who we are* <https://www.cap.org.uk/About-CAP/Who-we-are.aspx>.
[23] Advertising Standards Authority, *Non-broadcast sanctions* <https://www.asa.org.uk/Industry-advertisers/Sanctions/Non-broadcast.aspx>.
[24] Advertising Standards Authority, *Non-broadcast sanctions* <https://www.asa.org.uk/Industry-advertisers/Sanctions/Non-broadcast.aspx>.
[25] Ed Richards, *Models of Media Regulation* (5 October 2011) <http://media.ofcom.org.uk/files/2012/02/Teach-in-presentation-by-Ed-Richards-05-10-11.pdf> , slide 21.
[26] Advertising Standards Bureau, The complaint process <http://adstandards.com.au/complaint-process>.
[27] Advertising Standards Bureau, *Notification of the outcome* <http://adstandards.com.au/complaint-process/notification-outcome>.

- Include the advertiser / marketer's failure to respond in the case report;
- Forward the case report to media proprietors;
- Post the case report on the ASB's website; and
- If appropriate, the ASB can refer the case report to the appropriate government agency.