



Australian
Mobile Telecommunications
Association
ABN 98 065 814 315
First Floor
35 Murray Crescent
Griffith ACT 2603 Australia
PO Box 4309
Manuka ACT 2603 Australia
Ph +61 2 6239 6555
Fax +61 2 6239 6577
Web www.amta.org.au

ACA's New Regulatory and Compliance Policy AMTA Comments

The Australian Mobile Telecommunications Association (AMTA) is the peak industry body representing Australia's mobile telecommunications industry. AMTA's mission is to promote an environmentally, socially and economically responsible and successful mobile telecommunications industry in Australia. AMTA members include mobile phone carriers, handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. For more details about AMTA, see <http://www.amta.org.au>.

1. Background

AMTA welcomes this opportunity to respond to the Australian Communications Authority (ACA) request for comments on its proposed new Regulatory and Compliance Policy released in draft form on 19 October 2004. At the same time, we are uncertain as to the continuing relevance of the Policy given that the ACA is to be subsumed into a proposed Australian Communications Management Authority (ACMA) during 2005.

AMTA's members have contributed significantly in recent years to "self-regulatory" measures such as the Australian Communications Industry Forum (ACIF) codes, in designing new systems for delivering restricted content in a socially responsible way, and in responding in practical ways to ACA and Telecommunications Industry Ombudsman (TIO) criticism of the mobile industry's credit management processes. AMTA wants to ensure that the products of these efforts are allowed to operate, and be monitored and assessed, without undue and duplicative regulatory intervention.

In designing a rational and cost-effective approach to regulation and its administration, regard should be had to the fact that mobile communications devices are increasingly becoming platforms for receiving multiple services, often bundled by the same CSP, utilising several communications technologies.

AMTA now wishes to comment on the proposed revised ACA Regulatory and Compliance Policy against established criteria for good regulation and administration.

2. Regulatory Good Practice Principles

The Productivity Commission reminds all regulators that regulation and its administration involves a careful and consultative weighing of its net cost-benefit compared with any other governmental or non-governmental action. This approach might be regarded as “regulatory forbearance”.

To quote from the Office of Regulation Review (ORR):

Government policy aims to ensure that regulation is not only effective, but is also the most efficient means for achieving relevant policy objectives. To help meet this objective, the Government has introduced reforms to the way regulation is made or reviewed, by requiring cost-benefit analysis for regulation that is likely to affect business or restrict competition. The costs and benefits of regulation are to be weighed carefully to ensure that expected benefits are not outweighed by excessive economic and financial costs.

Good Practice Regulation

Any review of ACA regulatory practice should have regard to the Productivity Commission’s views on good practice regulation¹, excerpts from which follow:

To qualify, regulation needs to exhibit several characteristics:

- *It must have a sound rationale and be shown to bring a net benefit to society, requiring costs as well as benefits to be brought into account.*
- *It must be better than any alternative regulation or policy tool.*
- *The regulatory appraisal process should take explicit account of the likely outcomes if the regulator turns out to be wrong about aspects of the effects of the regulation.*
- *It should state (ex ante) what it is going to do and, as far as possible, establish verifiable performance criteria. This tests a regulation for precision and relevance, and provides a basis for assessment of ex post effectiveness.*
- *It should be clear and concise. It should also be communicated effectively and be readily accessible to those affected by it.*
- *It must be enforceable. But it should embody incentives or disciplines no greater than are needed for reasonable enforcement, and involve adequate resources for the purpose.*

¹ See address by Commission Chairman Gary Banks *The good, the bad and the ugly: economic perspectives on regulation in Australia* to the Conference of Economists, Business Symposium, Hyatt Hotel, Canberra, 2 October 2003; at <http://www.pc.gov.au/speeches/cs20031002/cs20031002.pdf>

- *Finally, it needs to be administered by accountable bodies in a fair and consistent manner.... important features of good governance include clear statutory guidance, transparency of both process and judgement, and public accessibility.*

In summary, the making and administration of regulation needs to be cost-beneficial and cost-effective, pro-competitive, pro-innovation, and accountable. The degree and cost-benefit of intervention needs to be commensurate with an accurate assessment of the public policy issues at stake.

Accountability of Regulators

When applying and enforcing regulation, all regulators should be accountable and be seen to be so. Notwithstanding the ACA's reports to the ORR when justifying new regulation, the ORR cannot alone be expected to operate in a sector-specific and stakeholder-sensitive way. This is one reason why AMTA suggests a high level consultative body of community and industry representatives which would advise ACA's top management (see below *A More Strategic Level of Consultation with Stakeholders*).

3. Principles for a Revised ACA Regulatory and Compliance Policy

Regulatory versus Policy Functions

AMTA contends that the proper role of any regulator including the ACA should *not* extend to significant policy development. Policy development is properly the function of governments and policy departments, most notably in the communications sector the Department of Communications, Information Technology and the Arts (DCITA). (We accept of course that Ministers or policy Departments may wish to take advice from regulators on administration, regulation and enforcement practicalities as they affect regulatory development). Policy involvement could prejudice the ACA's independent regulator status, because of a perceived conflict of interest when it is seen to be both the maker and enforcer of policies and rules and the licensing authority as well.

"Self-Regulation" versus the Real Nature of the Regulatory Regime

The term "self-regulation" is used to characterise much of the current telecommunications regulatory regime. For AMTA, there is a significant distinction between "self-regulation" and "co-regulation" because, in reality, what the mobile industry often faces is much denser "co-regulation", with high engagement costs. For example, the ACA sometimes prematurely imposes or threatens to impose its own regulation such as ACA Standards and Determinations on top of self-regulatory efforts such as ACIF codes.

The industry invests very significant resources in developing and complying with ACIF codes and in funding and responding to the TIO's office. AMTA believes

that, in a regulatory environment truly focused on self-regulation, the proper role for the regulator is to allow the industry to apply its own codes in the first instance and to monitor the effectiveness of those codes. A regulator working in an environment of self-regulation can inadvertently slow rather than accelerate changes in industry behaviour, if it adds new regulation instead of ensuring appropriate compliance action against non-compliant players. In competitive markets, such players learn that unethical or non-compliant conduct does not pay.

A More Strategic Level of Consultation with Stakeholders

AMTA believes that the ACA's consultations with industry and the community would benefit from being placed on more systematic and transparent basis. While consultation in specialist committees and in ad hoc operational situations is generally adequate, industry usually finds itself in a position of responding (sometimes at short notice) to a wider ACA agenda which industry has little ability to influence.

In the interests of fuller consultation and accountability to stakeholders, as well as helping the ACA plan its medium and longer term priorities, AMTA would suggest a high level consultative body of community and industry representatives which would periodically be consulted by ACA top management on emerging issues and operational directions. This should help ensure that those representatives are informed about the proposed ACA programme and that key issues are shared. Other regulators such as the Australian Competition and Consumer Commission (ACCC) include such best practice mechanisms. Such a consultative body could be incorporated into the proposed merged ACMA.

Technological Neutrality

AMTA is concerned that tying consumer protection regulations to specific technologies could inhibit the introduction of innovative and competitive products and services. The rapid growth in delegated legislation (eg Regulations and ACA Determinations) pursuant to the 1997 telecommunications consumer legislation may be seen in hindsight as an unduly complex and confusing regulatory response to the socio-economic implications of successive waves of new consumer products like mobile phones.

4. Consistency of the Current Regulatory Regime with these Principles

AMTA suggests several difficulties exist with the current regulatory scheme and its administration. We recognise that not all of these are within the ACA's power to correct. Major issues include:

- Multiple layers of regulation – legislation (both sector-neutral Trade Practices Act and telco-specific legislation at the Commonwealth level, as

well as State fair trading and laws, all administered by different regulators), subordinate legislation/regulation (including ACA Directives and Standards); as well as a wide array of ACIF Codes which are often given the force of law when registered with the ACA.

- Industry engagement costs are high and these inevitably must be passed on to customers as much as the very competitive market allows.
- Reviews of both legislation and code performance invariably seem to lead to further regulation, leading to overlap and confusion for both industry and consumers.
- ACA sometimes appears to want to intervene before the size and shape of problems are defined. For example, ACA's credit management proposals are being promoted in the absence of any robust survey of the extent and severity of high bills, and at a time when carriers are responding in a very competitive market with an array of expenditure-limiting products and services.
- ACA size and costs appear excessive, especially compared with regulators of other sectors of comparable or larger size². AMTA members contribute via industry specific taxation, fees and charges at a level that is equal to or greater than the size of the ACA's budget.

For more information about this submission, please contact Mr Graham Chalker at AMTA on (02)6239 6555.

AMTA 24 November 2004

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