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# Optimal conditions for effective self- and co-regulatory arrangements

## Occasional paper

JUNE 2015 EDITION

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facilitating  
regulating

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# Introduction

This occasional paper aims to provide to industry, citizens, consumers and other stakeholders greater transparency about the regulatory practice of the Australian Communications and Media Authority (the ACMA) in the context of industry self- and co-regulatory arrangements.

Self- and co-regulatory approaches are firmly embedded within the Australian media and communications legislative framework, and are approaches that can accommodate adaptation and therefore can offer flexible solutions to contemporary issues. The self- and co-regulatory legislative framework generally requires industry participants to assume responsibility for regulatory detail within their own sectors. This is underpinned by clear legislative obligations, with the regulator maintaining reserve powers. These arrangements provide flexibility for the ACMA to exercise a variety of roles and rely on a variety of 'levers', depending on the nature of the concern. This includes the flexibility to not intervene and allow market-based solutions to develop, to provide advice to government on policy issues or to encourage industry-developed solutions.

This is the third edition of the paper. Originally published in 2010 and revised in September 2011, this 2015 update reflects how regulatory practice has been adapting over time to address the:

- > new risks and problems arising from internet-enabled technology and service developments
- > consequential changes occurring in communication and media industry structures
- > changes in Australians' behaviour as they engage more deeply with digital communications and content.

The 'optimal conditions' framework assessment tool outlined in this occasional paper is a key part of the ACMA's problem-solving approach. It provides a consistent analytical framework for assessing the likely effectiveness of existing or proposed industry self- or co-regulatory arrangements (such as codes of practice). It also identifies the conditions in which non-regulatory responses may provide a better fit-for-purpose response to a particular issue.

Within the Australian policy context, the government's deregulation agenda gives a stronger emphasis to reducing regulatory burden for citizens and industry participants. In implementing the deregulatory agenda in media and communications, the ACMA has been examining when it is appropriate to reduce regulatory burden by shifting from direct regulation to co-regulatory solutions, and from co-regulation to a greater reliance on industry self-regulation (such as the use of industry guidelines). Across all these forms of intervention, both the regulator and industry participants in co- and self-regulatory schemes are needing to assess whether non-regulatory interventions are appropriate and can be adopted as part of the mix of problem-solving tools.

This paper, in particular, takes a deeper look at the non-regulatory interventions that have been more recently successfully implemented in the media and communications co- and self-regulatory environment. It explores the use of better practice regulatory strategies to extend or repurpose regulation, or withdraw from direct regulation where there is a case to reduce regulatory burden. It also looks at the use of facilitation

strategies by the regulator and by industry representative bodies to influence or ‘nudge’ industry participants towards desired outcomes. It also examines the use of communication strategies that mitigate the risks that may occur where there are information asymmetries occurring between the regulator, industry participants and consumers and citizens affected by media and communications regulation.

## About the research

### researchacma

Our research program—research**acma**—underpins our work and decisions as an evidence-informed regulator. It contributes to our strategic policy development, regulatory reviews and investigations, and helps us deliver on the ACMA’s strategic intent to make media and communications work for all Australians.

research**acma** has five broad areas of interest:

- > market developments
- > media content and culture
- > social and economic participation
- > citizen and consumer safeguards
- > regulatory best practice and development.

This paper contributes to the ACMA’s regulatory best practice and development research interest. It aims to inform broader public policy discussions about effective regulatory and non-regulatory mechanisms in a converged media and communications landscape. It identifies the matters the ACMA will take into account in the early stages of considering, where discretion exists, whether to adopt self- or co-regulatory arrangements, or non-regulatory or alternative tools. It is informed by government literature and academic perspectives, and:

- > discusses the Australian media and communications context for self- and co-regulation
- > identifies the place of self- and co-regulation in the regulatory toolkit
- > sets out the ACMA’s assessment framework for examining the effectiveness of self- and co-regulatory arrangements
- > outlines a number of non-regulatory and alternative tools for consideration
- > provides short case study examples of the use of various regulatory and non-regulatory tools drawn from the ACMA’s regulatory practice.

# Regulatory arrangements in the Australian media and communications context

In Australia, the broadcasting, radiocommunications, telecommunications and internet sectors operate under a broad range of regulations, from direct regulation to self-regulatory arrangements, with the type of regulatory tool or non-regulatory intervention applied varying according to the issue, problem or harm that is to be addressed.

Codes of practice can be described in terms of self-regulation or co-regulation, depending on the extent of government or regulator involvement and the degree of external enforceability. There are no radiocommunications codes, as this sector is governed largely by direct regulation, with some alternative tools such as market-based instruments.<sup>1</sup> However, spectrum management arrangements are currently under review, with a view to revising and simplifying the framework to ensure it serves Australia well into the future.<sup>2</sup>

Primary legislation has informed interventions in the broadcasting, telecommunications and internet sectors towards industry self- and co-regulatory responses. It also proscribes the extent of the ACMA's discretion to determine the most effective and efficient regulatory tool to solve a problem.

In the telecommunications sector, a key intent of policy reflected in legislation is that the sector be regulated in a manner that 'promotes the greatest practicable use of industry self-regulation' and 'does not impose undue financial and administrative burdens on [industry participants]'.<sup>3</sup> To that extent, the relevant legislative scheme requires the ACMA to give industry an opportunity to develop self-regulatory solutions before other forms of intervention are considered. The *Telecommunications Act 1997* provides for industry to develop codes that are registered with the ACMA.<sup>4</sup> Complaints under these codes are handled by industry members themselves, or the Telecommunications Industry Ombudsman (TIO), an alternative dispute resolution body set up by the industry. In addition, the ACMA has in some circumstances discretion in considering complaints and in enforcing compliance with industry codes.

A key policy intent of the *Broadcasting Services Act 1992* is that the broadcasting and internet sectors be regulated in a manner that 'enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens' on industry.<sup>5</sup> The broadcasting and internet sectors are generally governed by a co-regulatory model whereby industry develops codes of practice that are registered with the ACMA.<sup>6</sup> Complaints under these codes are handled by the broadcasting licensees in the first instance, and then by the ACMA if a solution satisfactory to the complainant is not found.

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<sup>1</sup> See the example of opportunity cost pricing in the 400 MHz band at p. 26 of this paper.

<sup>2</sup> See Department of Communications, [Spectrum review](#).

<sup>3</sup> *Telecommunications Act 1997*, section 4.

<sup>4</sup> *ibid*, section 117.

<sup>5</sup> *Broadcasting Services Act 1992*, sub-sections 4(2)(a) and 4(3)(a).

<sup>6</sup> *ibid*, section 130M.

In telecommunications and broadcasting self- and co-regulatory arrangements, industry participants assume responsibility for the regulatory detail within their own sectors, which is underpinned by clear legislative obligations. The legislative framework also confers a broad range of powers on the ACMA to protect the integrity of self- and co-regulatory schemes, where codes of practice fail to operate effectively or are not developed by industry.<sup>7</sup> The ACMA exercises these powers using a graduated and strategic risk-based approach to compliance and enforcement action.

Working within this legislative construct, the ACMA recognises that industry, citizen and consumer interests raise distinct issues for the development and operation of effective self- and co-regulatory arrangements including:

- > **Industry**—the interests of industry stakeholders relate to the ACMA identifying and, where possible, minimising regulatory burdens on business, and clarifying the application of any regulation to new industry participants and services.
- > **Citizen**—the interests of the public as citizens relate to the ACMA’s regulatory processes and decisions that improve citizen engagement, incorporate citizen perspectives, are transparent and accountable, and ultimately further citizens’ participation in society.
- > **Consumer**—the interests of the public as consumers relate to having adequate consumer protection and safeguards, and being able to make informed choices about their purchase and use of communications and media services.

As a matter of practice, the ACMA tests the application of any intervention, by considering the minimum regulatory action required to achieve policy objectives of enduring importance and by identifying the most appropriate regulatory tool to achieve the desired result.

As suggested in the Department of Communications paper *Regulating harms in the Australian communications sector*, it is important to revisit existing interventions and ask whether they remain fit-for-purpose in the current environment and how protections can be assured in the future.<sup>8</sup> Furthermore, the ACMA is guided by the principles outlined in the government’s framing paper, which provide that effective and appropriate regulation should:<sup>9</sup>

- > serve clearly identified public policy goals and be effective in achieving those goals
- > establish rules that are clear, simple and practical for all users and have a sound legal and empirical basis
- > produce benefits that outweigh the costs, including those imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, fewer services and higher prices)
- > minimise market distortions and harness competition to deliver policy outcomes by aligning market incentives with regulatory objectives

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<sup>7</sup> Telecommunications Act, sections 123, 124 and 123; Broadcasting Services Act, section 125; Broadcasting Services Act (online services), Part 5, Schedule 5; and Broadcasting Services Act (content services), Part 4, Schedule 7.

<sup>8</sup> Department of Communications, *Regulating harms in the Australian communications sector: Observations on current arrangements*, Policy Background Paper No. 2, May 2014.

<sup>9</sup> Department of Communications, *Deregulation in the Communications Portfolio*, Policy Background Paper No. 1, November 2013, p. 5.



- > be consistent with other regulations and policies
- > be as technologically neutral as possible, to avoid creating regulatory distinctions between similar services that are delivered differently.

The ACMA's response to the government's deregulatory agenda identifies opportunities to reduce the regulatory burden on industry and citizens with efforts to date directed to removing redundant regulation, reducing regulatory reporting where there are more efficient means of managing risk and assuring compliance, and implementing business process improvements to reduce transaction times and costs for business and citizens in their interactions with the ACMA.

# The regulatory toolkit

## Forms of regulation

A range of regulatory options and complementary non-regulatory tools are generally required to successfully address various types of policy problems, market issues and community concerns. These regulatory options and non-regulatory tools include market-based solutions, education campaigns or other direct appeals to consumers, self-regulation and direct government or statutory regulation.

The ACMA's enabling legislation often prescribes the form of regulation that will apply, such as self-regulation or direct regulation. Choice of regulatory and non-regulatory tools is likely to be limited and inflexible in these circumstances. The development and choice of regulatory and non-regulatory tools is also guided by principles of good regulatory process endorsed by the Australian Government, and outlined in best-practice guides.<sup>10</sup> These require that the ACMA, along with all Australian Government agencies, clearly analyse the costs and benefits of undertaking regulatory action and identifies a range of feasible options—regulatory and non-regulatory—for achieving the stated objectives. The government's deregulation agenda brings added focus to adhering to good regulatory process. The choice of regulatory and non-regulatory tools is guided by the following principles of good regulatory process:

- > **Sound analysis**—the case for action, including the fundamental question of whether regulatory action is required, needs to be clearly established. This analysis should consider: Definition of the problem to be solved, why government action is needed and what policy options are being considered?<sup>11</sup> This analysis should include the desired response, a range of alternative options to achieve the objective and an assessment of the impact of each option. It should be informed by effective consultation.<sup>12</sup>
- > **Informed decision-making**—to help decision-makers within regulatory bodies understand the implications of options for achieving the government's objectives, they should be informed about the likely impacts of their decision at the time they are making that decision.<sup>13</sup>
- > **Cost-benefit analysis**—the impact analysis should provide a comprehensive examination of the expected costs and benefits of the feasible options, and assess the net impact of each option on the community as a whole, taking into account all the impacts.<sup>14</sup> The key question is: What is the likely net benefit of each policy option?<sup>15</sup> Where consistent with legislation, the ACMA has adopted the Total Welfare Standard public interest test as a tool to conduct regulatory impact assessments in accordance with these principles of good regulatory process. This is discussed in Example 1 below.
- > **Transparency**—the information and evidence on which government regulatory decisions are based should be publicly available.<sup>16</sup>

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<sup>10</sup> Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation*, March 2014;

<sup>11</sup> *ibid* p. 21.

<sup>12</sup> *ibid*, p. 39.

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid*, p 31.

<sup>15</sup> *ibid*, p. 32.

<sup>16</sup> *ibid*, p. 7.

### Example 1: The Total Welfare Standard—digital dividend geographic and frequency bandwidth lot configurations

The ACMA adopted the Total Welfare Standard to assess the expected economic impact of alternative regulatory approaches. When a Total Welfare Standard is applied, the most appropriate regulatory option is one that generates the greatest net benefits. It is measured as the sum of the effects on consumers, producers and government, and the broader social impacts on others in the community. The Total Welfare Standard requires that to the extent possible:

- > all significant benefits and costs arising from the regulatory proposal will be given the same weight, regardless of the identity of the recipient
- > the approach expected to generate the greatest net benefits is the preferred approach.

The ACMA has employed the Total Welfare Standard in several key spectrum management decisions in the past two years. One recent example is the reallocation of radiofrequency spectrum in the 700 MHz and 2.5 GHz bands by auction (the digital dividend auction). A key decision was how to configure the spectrum to promote its efficient allocation and use. The objective of the auction was to maximise the overall public benefit derived from (the use of) the spectrum. The way lots in each band were configured had a significant impact on the value that bidders placed on the spectrum at auction and will influence the future use of the spectrum.

In considering the optimal lot configuration, the benefits of smaller geographic and frequency bandwidth lot sizes included potentially increased competition from smaller and regional bidders, and reduced risk that spectrum in any single geographic region would lie idle.

The costs included increased complexity for bidders and the auctioneer, and potential loss in technical efficiency around the geographic borders.

The options chosen were national geographic lots in the 700 MHz band, metropolitan/regional/remote disaggregation in the 2.5 GHz band and 5 MHz paired frequency bandwidth (optimum for expected uses) in both bands.

Further information is available in the [Regulation Impact Statement](#) prepared by the ACMA.

Regulations can be seen in a continuum of possible forms of regulation, rather than in distinct categories, with explicit or direct government regulation at one end of this continuum and no regulation at the other extreme. The range of different forms of regulation is discussed below; also see Figure 1, which depicts the regulatory continuum model.

Codes of practice can be developed under most points of the regulatory continuum. It is the accountability mechanisms—compliance and enforcement mechanisms—that differ most across different forms of regulation.

There is also a range of non-regulatory options or alternative regulatory levers that can replace or complement different forms of regulation. These are discussed further under *Non-regulatory or alternative regulatory tools*.

The **no regulation** option is at one end of the regulatory continuum. For example, the Australian Government and international guidance recommends that a 'no regulation' option be considered when conducting a regulatory impact assessment (RIA). The Organisation for Economic Co-operation and Development (OECD) recommends that member countries, when conducting an RIA, consider means other than regulation

and identify the trade-offs of the different approaches analysed to identify the best approach. The no regulation option or baseline scenario should always be considered.<sup>17</sup> Australian Government guidance states that RIA should include a minimum of three policy options, including at least one non-regulatory option.<sup>18</sup> In the context of the Australian Government's deregulatory agenda, it is essential that the no regulation option is considered.<sup>19</sup>

**Self- and co-regulation** are promoted by key international and government organisations as alternatives to direct regulation. The Australian Government encourages the use of light-handed regulatory options, such as self- and co-regulatory mechanisms, as part of its best-practice regulation agenda.<sup>20</sup>

**Self-regulation** is an option that involves industry voluntarily developing, administering and enforcing its own solution to address a particular issue, where no formal oversight by the regulator is mandated. Self-regulatory schemes are characterised by the lack of a legal backstop to act as the guarantor of enforcement. Typically, self-regulation involves the development of voluntary codes of practice or standards by an industry, with the industry solely responsible for enforcement via its own peak body or a complaint handling scheme (such as an ombudsman).<sup>21</sup>

Pure self-regulation without any form of government or statutory involvement is rare. Commentators have noted that self-regulation has become embedded in the regulatory state, reflected in the range of 'joint products' between the regulator and the regulated, and is now best reflected in the understanding of the term 'co-regulation'.<sup>22</sup> Co-regulation can be understood as a combination of non-government (industry) regulation and government regulation.<sup>23</sup>

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<sup>17</sup> OECD, *Recommendation of the Council on Regulatory Policy and Governance*, March 2012, p. 10.

<sup>18</sup> Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation*, March 2014, p. 26.

<sup>19</sup> *ibid.*, p. 27.

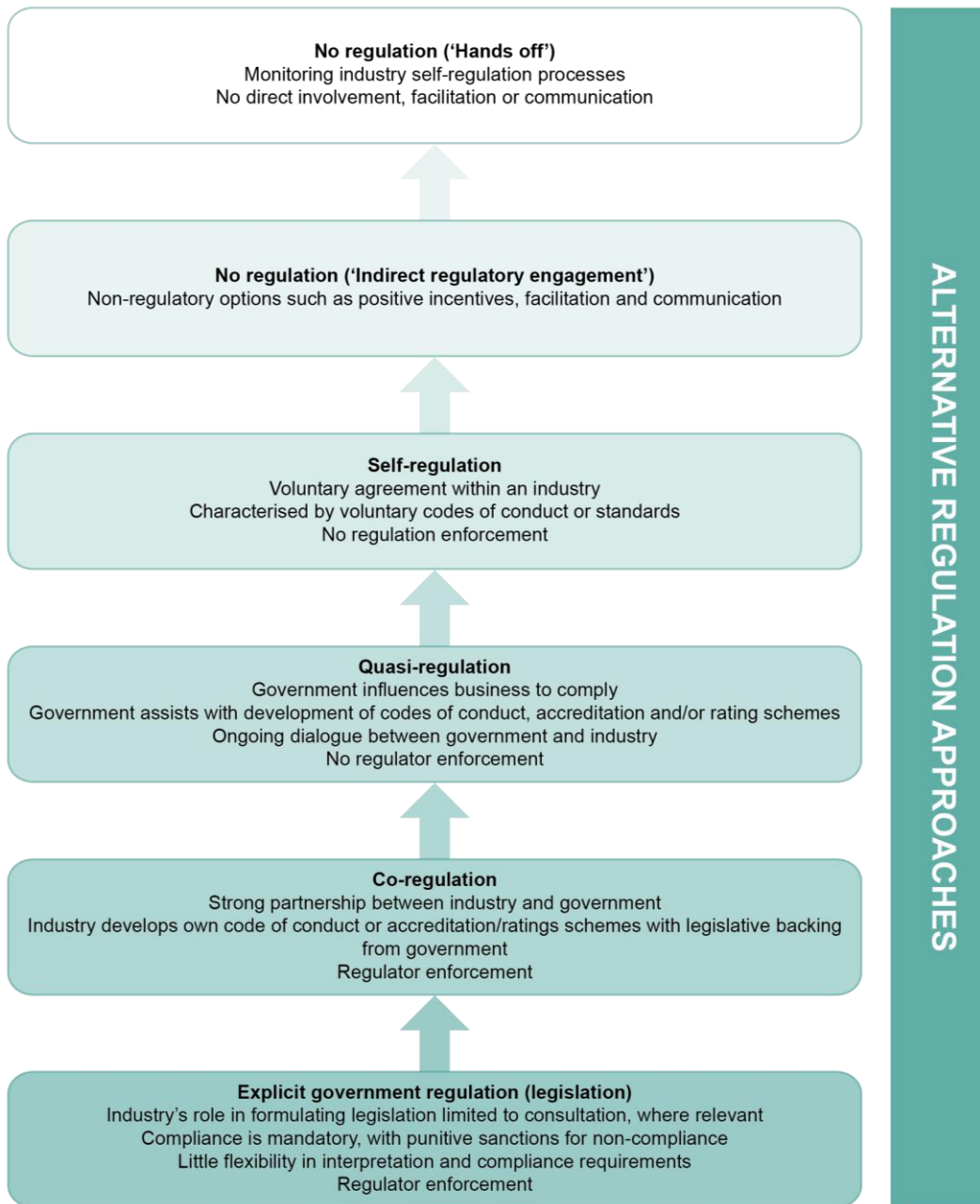
<sup>20</sup> *ibid.*

<sup>21</sup> As defined in Department of Treasury and Finance, *Taskforce on Industry Self-Regulation Draft Report*, 2000 and *Victorian Guide to Regulation*, July 2014.

<sup>22</sup> OECD study by Centre for Regulated Industries, *Self-Regulation and the Regulatory State—A Survey of Policy and Practice*, 2002. See also commentary from David Havyatt, 'Self-regulation in telecommunications didn't fail—it was never really tried', May 2010.

<sup>23</sup> See the definition of co-regulation contained in Hans-Bredow-Institut, *Study on Co-Regulation Measures in the Media Sector*, a study for the European Commission, 2006, p. 35.

**Figure 1: The regulatory continuum**



Source: Adapted from Department of Treasury and Finance, *Victorian Guide to Regulation, Toolkit 1: purposes and types of regulation*, July 2014, p. 6.

**Quasi-regulation** sits on the regulatory continuum in between self-regulation and co-regulation. Quasi-regulation refers to the range of rules, instruments and standards whereby governments influence businesses to comply, but that do not form part of explicit government regulation. It is similar to co-regulation in that both refer to situations where the regulatory role is shared between government and industry.<sup>24</sup> The regulator may help to develop industry codes of conduct under quasi-regulation; however, unlike co-regulation, the government does not have a formal enforcement role.<sup>25</sup> Examples of quasi-regulation include industry codes of practice developed with government involvement, guidance notes, industry–government agreements and accreditation schemes.<sup>26</sup>

**Co-regulation** generally involves both industry and government (the regulator) developing, administering and enforcing a solution, with arrangements accompanied by legislation. Co-regulation can mean that an industry or professional body develops the regulatory arrangements, such as a code of practice or rating scheme, in consultation with government. While the industry may administer its own arrangements, the government provides legislative backing to enable the arrangements to be enforced.<sup>27</sup> This is often referred to as the ‘underpinning’ of codes or standards.<sup>28</sup>

Under co-regulation, government involvement generally falls short of prescribing the code in detail in legislation. Co-regulatory mechanisms can include legislation that:

- > delegates the power to industry to regulate and enforce codes
- > enforces undertakings to comply with a code
- > prescribes a code as a regulation but the code only applies to those who subscribe to it (prescribed voluntary codes)
- > does not require a code but has a reserve power to make a code mandatory
- > requires industry to have a code and, in its absence, government will impose a code or standard
- > prescribes a code as a regulation to apply to all industry members (prescribed mandatory codes).<sup>29</sup>

According to the OECD, when used in the right circumstances, self-regulation and co-regulation can offer a number of advantages over traditional command-and-control regulation including:

- > greater flexibility and adaptability
- > potentially lower compliance and administrative costs
- > an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly
- > quick and low-cost complaints-handling and dispute resolution mechanisms.<sup>30</sup>

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<sup>24</sup> Department of Treasury and Finance, *Victorian Guide to Regulation*, July 2014, Toolkit 1, p. 11.

<sup>25</sup> *ibid*, p. 12.

<sup>26</sup> Australian Government, *Australian Government Guide to Regulation*, March 2014, pp. 28, 61.

<sup>27</sup> Department of Treasury and Finance, *Victorian Guide to Regulation*, July 2014, Toolkit 1, p. 12.

<sup>28</sup> Department of Finance and Deregulation, *Best Practice Regulation Handbook*, July 2013, p. 56.

<sup>29</sup> Department of Finance and Treasury, *Codes of Conduct—Policy Framework*, 1999.

<sup>30</sup> OECD, *Alternatives to Traditional Regulation*, 2009, p. 6.

The potential drawbacks of self- and co-regulation include:

- > the possibility of raising barriers to entry within an industry
- > unintended monopoly power gained by participants that could restrict competition
- > a danger of regulatory capture<sup>31</sup>
- > costs incurred by industry or government—self-regulation may impose costs that are incurred by the industry or professional association; co-regulation has the potential to transfer those costs to government, increasing government compliance and enforcement costs.<sup>32</sup>

At the other end of the regulatory continuum is **explicit government regulation** or direct regulation. This form of regulation attempts to change behaviour by detailing how regulated parties must act under the law and generally imposes punitive sanctions in instances of non-compliance with those regulations.<sup>33</sup> It is typically rigid and slow to adapt. In reducing regulatory burden, the ACMA is examining where it is appropriate to shift current regulatory settings away from explicit government regulation and co-regulatory approaches towards the self-regulation or no-regulation end of the regulatory continuum. For example, the current review of telecommunications operational codes is examining scope for some matters to be moved from codes to industry guidelines that are then administered solely by industry. The focus on reducing regulatory burden also entails consideration of where the use of non-regulatory or alternative regulatory tools may form a useful component within the overall design of direct regulation, co-regulatory or self-regulatory schemes.

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<sup>31</sup> 'Regulatory capture' has been defined as the result or process by which regulation is consistently or repeatedly deflected from the public interest toward the interests of the regulated industry, by the intent and action of the industry itself: Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, p. 13.

<sup>32</sup> Department of Treasury and Finance, *Victorian Guide to Regulation*, August 2011, Appendix B, pp. 3–4.

<sup>33</sup> *ibid*, p. 11.

# Optimal conditions for effective self- and co-regulatory arrangements— an assessment framework

## Relevant factors in effective self- and co-regulatory schemes

There are several high-level principles or factors that underpin the effective and efficient operation of self- and co-regulatory schemes. It is important to identify the factors that will make self- or co-regulation the appropriate form of intervention; otherwise, inappropriate intervention may create new problems and costs. The majority of the literature surveyed discusses the critical importance of incentives and the relevance of vested interests for self- or co-regulation to be effective.<sup>34</sup>

The 'optimal conditions' or factors can be grouped into the following two main categories:

- > **Environmental conditions**—factors primarily relating to market and industry circumstances. Overall, do these environmental factors indicate that the issue can be addressed by the market itself? Do industry participants have the incentives and ability to work together effectively to address the issue? Is it in their interest to do so?
- > **Features of the regulatory scheme**—factors to do with the content of the particular regulatory scheme, as well as aspects of its operation and enforcement.

### Environmental conditions

1. **Number of players in the market and coverage of the industry.** The research indicates that a small number of players with wide industry coverage will facilitate effective self- or co-regulatory arrangements. In a more concentrated market, industry players may have similar interests and may be more likely to agree on common rules to follow. It may therefore follow that where there is a small number of players with wide coverage of the industry, that have an agreed self-regulatory scheme, there will be greater reach of the scheme across the community.

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<sup>34</sup> Government and academic papers that informed the development of the 'optimal conditions' framework were: ASIC, 'Institutional self-regulation: what should be the role of the regulator?', address by Jillian Segal, Deputy Chair, ASIC, November 2001; APSC, *Smarter policy—choosing policy instruments and working with others to influence behaviour*, 2009; Australian Government, *Taskforce on Industry Self-Regulation, Draft Report*, 2000; Choice, *Consumer Protection in the Communications Industry*, 2008; Ministry of Consumer Affairs New Zealand, *Review of Industry-Led Regulation—Discussion Paper*, 2005; Australian Government, Minister for Customs and Consumer Affairs, *Codes of Conduct Policy Framework*, 1998; Minister for Financial Services and Regulation, *Prescribed Codes of Conduct—Policy Guidelines on Making Industry Codes of Practice Enforceable under TPA 1974*, 1999; OECD study by Centre for Regulated Industries, *Self-Regulation and the Regulatory State—A Survey of Policy and Practice*, 2002; Ofcom, *Criteria for promoting effective co and self regulation*, 2008; Ofcom, *Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation*, 2008; Tasman Asia-Pacific Report to Taskforce on Industry Self-Regulation, 1999; Cave et al., *Options for and Effectiveness of Internet Self- and Co-regulation*, report prepared for the European Commission, 2008.



2. **Whether it is a competitive market with few barriers to entry.** A high level of competition and few barriers to entry are likely to promote effective self- or co-regulation. Co-regulation is less effective where there is little competition or one large player commanding significant market power that cannot be offset by the rest of the industry. Self-regulation is considered more likely to be effective in a competitive market as industry participants are more likely to commit to it, as a marketing strategy or for fear of losing market share. In a competitive market, there will be more commercial incentives for industry to be responsive to consumers.
3. **Homogeneity of products—whether they are essentially alike and comparable.** Co-regulation is less effective where the products in question are varied and difficult to compare, leading to information asymmetry and product confusion. Greater product complexity may decrease the effectiveness of self-regulation; while it may alert industry to the need to self-regulate to ensure the public has accurate information about products, it may also make it more difficult for industry to detect if some industry players have engaged in misleading activities.
4. **Common industry interest—whether there is a collective will or genuine industry incentive to address the problem or enhance existing provisions.** This can be shown through the existence of an industry association that is either representative of the whole industry or gives non-members incentives to join. Ideally, there will be a degree of coincidence between the self-interest of the industry and the wider public interest; for example, where industry has a longer term view of its relationship with the customer/shareholder/community/audience, recognising that both its future viability and responsible operation in society depend on these relationships. Where there is little industry cohesiveness and no effective industry association to facilitate self-regulation, it is unlikely to succeed. In such cases, government intervention in the form of statutory regulation may be more appropriate, whether in the form of a co-regulatory approach or direct regulation.
5. **Incentives for industry to participate and comply.** Incentives for industry participation and compliance in a self- or co-regulatory scheme can include a product marketing value proposition or customer service advantage. For example, recent reviews of press regulation in the UK and New Zealand have considered incentive structures within voluntary self-regulation.<sup>35</sup> Proponents contend that under such a model, online and offline media that elect to adhere to ethical standards could use this as a selling point and might also be eligible for benefits such as legal privileges and exemptions.<sup>36</sup> Another incentive may be the threat of government intervention. However, where a substantial gap exists between the public and private interest, it would be inappropriate to rely on industry to act in the public interest, absent external pressure to do so.
6. **The degree of consumer detriment.**<sup>37</sup> Where there is low or moderate public interest concern, self-regulation might be appropriate. In cases of serious risk to public health or safety, direct regulation may be more appropriate; however, intervention must be proportionate to the level of detriment.

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<sup>35</sup> The Right Honourable Lord Justice Leveson, *Leveson Inquiry: Culture, Practices and Ethics of the Press*, November 2012; Law Commission of New Zealand, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, March 2013.

<sup>36</sup> Fielden, *Press Regulation: Taking account of media convergence*, July 2012, p. 6; Law Commission of New Zealand, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, March 2013, p. 11.

<sup>37</sup> Department of Finance and Deregulation, *Best Practice Regulation Handbook*, July 2013, p. 34.

7. **Whether the environment is stable or rapidly changing.**<sup>38</sup> Self-regulation can be suited to fast-changing environments that may be hindered by static systems of direct regulation. Regulation that cannot keep pace with developments will be ineffective. Such regulation may have unintended and perverse effects, become irrelevant and thus ignored by those intended to be regulated, or become an inappropriate mechanism to address its original purpose in a changed environment.

#### **Features of the regulatory scheme**

8. **Whether the objectives are clearly defined by the government, legislation or the regulator.** The research suggests it is optimal that policymakers and regulators are clear about what objectives, outcomes and behavioural change they are trying to effect through co-regulatory arrangements. A consistent process for identifying scope, development, enforcement and review is required.
9. **Role of the regulator.** This relates to issues such as why self- or co-regulation was chosen as the regulatory tool; for example, whether it was prescribed by legislation; what self- and co-regulation requires of the regulator, industry and other stakeholders; and the regulator's ability to pursue enforcement action. Does the regulator possess the technical skills to advise on industry proposals? Does the regulator have a clear understanding of the issues? Is the necessary data and research available?
10. **The existence and operation of accountability and transparency mechanisms.** The existence and operation of appropriate sanctions to enforce compliance and penalise non-compliance are important indicators of effectiveness. Are there measureable, enforceable rules with appropriate compliance arrangements? Are scheme members adequately informed about their obligations? Self- and co-regulation is more likely to be effective if there are appropriate and credible sanctions with a clear incentive to comply.
11. **Consumer and other stakeholder participation in the development of the scheme.** This might be direct participation, such as through consultation processes, or through indirect representation of stakeholder interests, such as through consumer or audience research. The effective operation of the scheme depends on industry and consumer organisations having a shared level of understanding of objectives and deliverables.
12. **Whether the scheme is promoted to consumers.** Scheme objectives relating to consumer protection are unlikely to be met if consumers and the community are not made aware of its operation and mechanisms for redress.

These factors together comprise the 'optimal conditions' framework. They are relevant to assessing the effective development, implementation and operation of self- and co-regulatory arrangements, and for identifying when alternative regulatory mechanisms may be suitable to address a particular market failure or policy problem. It is not necessarily the case that all factors need to be present for optimal co-regulatory arrangements, but if very few are present consideration would need to be given as to whether self- or co-regulation is the most appropriate regulatory response. As there is no one-size-fits-all model for self- or co-regulation, identifying a suitable intervention, whether regulatory or non-regulatory, should be decided on a case-by-case basis.

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<sup>38</sup> Cave et al., *Options for and Effectiveness of Internet Self- and Co-regulation*, report prepared for the European Commission, 2008, p. 55.

## Use of the framework

The ACMA regularly assesses whether regulatory intervention is required to address a particular community or industry concern, in circumstances where there it has discretion to do so. In some cases, the ACMA may be required by legislation to use specified regulatory tools, such as direct regulation, or may be required to allow industry self- or co-regulation to be attempted first, before putting in place direct regulation. The 'optimal conditions' framework provides an analytical tool for assessing whether self- and co-regulatory arrangements are likely to be effective or whether other options are appropriate. It entails:

- > assessing the key harms or other issues to be addressed and whether all or only some can be addressed through self- or co-regulation
- > considering whether complementary regulatory tools are needed
- > determining incentives and the existence of or ability to create a clear mandate
- > sending clear and early signals about expectations of a code development and review process
- > setting clear objectives with stakeholders, identifying problems early and developing appropriate solutions
- > implementing an innovative, flexible and well-informed approach to stakeholder management
- > using appropriate accountability mechanisms such as compliance and enforcement arrangements.

While the ACMA will consider each issue or problem having regard to its particular circumstances, and will determine suitable regulatory arrangements or non-regulatory approaches on a case-by-case basis, two general points are worth noting in the context of the ACMA's current application of the 'optimal conditions' framework. First, the ACMA operates within a rapidly evolving industry and consumer environment. With digital disruption in media and communications, the environmental conditions of the industries the ACMA regulates are subject to constant change. Second, these changes are straining existing regulatory frameworks and there is a necessary consideration of whether existing regulation remains fit-for-purpose, including whether regulation should be extended to address new 'problems', repurposed to apply to different issues or removed to reduce regulatory burden. These two themes are likely to become more apparent in future application of the 'optimal conditions' framework.

The 'optimal conditions' framework is being used by the ACMA today in a number of ways:

- > as a high-level diagnostic tool to help guide the establishment of new self- or co-regulatory arrangements
- > for the ongoing review of existing arrangements, although specific arrangements will be considered on their own merits in terms of their appropriateness and likely effectiveness
- > to inform the development of performance metrics for the ACMA as part of requirements to report on a new Commonwealth Regulator Performance Framework
- > to inform the ACMA's response to the government's deregulation agenda including where there is scope to reduce the regulatory burden on industry and citizens
- > to give stakeholders information about the direction of the ACMA's thinking and potential disposition towards the various forms of regulation, and how and when each should be applied.

# Non-regulatory or alternative regulatory tools

The ACMA sees the government's current deregulation program as an opportunity to improve existing regulation and pursue constructive regulatory reform.

As digital communications becomes more embedded across Australians' business and social life, regulatory approaches developed in a pre-internet environment are coming under strain. In this context, non-regulatory options and alternative regulatory approaches are becoming increasingly relevant as flexible responses to address risks or harms that require regulatory attention in a changing industry and user environment. It is expected that the ACMA will have greater recourse to such tools in the future, as many of the access points for regulation are becoming irrelevant or ineffective in achieving the goals regulation may seek to achieve. This is consistent with the ACMA's predisposition to be a light-touch, evidence-informed regulator that communicates and facilitates and then, only if all else fails, regulates.

Where discretion exists within its enabling legislation, the ACMA considers non-regulatory and alternative regulatory tools to address public policy and market issues. As alternatives to direct, co- or self-regulatory approaches, some of these tools may offer a different way of dealing with the regulated entities (usually industry players) without adding regulatory burden. In contrast, some alternative tools target participants other than regulated entities. For example, public information and education campaigns developed by a regulator or by an industry representative body will often target the general community, and information disclosure strategies by the regulator may be aimed at both industry and consumers. Some alternative tools, such as research, will seek to inform a broad range of interests including industry operators, citizens and policymakers. Alternative tools may be aimed at various participants and provide different ways to respond to risks or harms in media and communications. They may be used as another means of addressing issues of concern, or to complement existing direct, co- or self-regulatory arrangements.

Non-regulatory tools may offer a flexible response to a market or policy problem. There may also be the need to develop a 'toolkit' of regulatory choices for use where different issues require different regulatory responses.<sup>39</sup> The Harvard Kennedy School of Government Professor Malcolm Sparrow discusses the need for a regulator to use a range of tools, particularly when the legislative framework it administers remains unchanged or is outdated.<sup>40</sup> As the ACMA has discussed elsewhere, there are a number of ['broken concepts'](#) within the legislative framework that the ACMA administers, pointing to a need for innovative approaches to contemporary media and communications regulatory issues.

In general, a broad mix of non-regulatory or alternative regulatory tools are available for use. As depicted in Figure 2, these tools can be grouped into three categories:

- > better practice strategies
- > facilitation strategies
- > communication strategies.

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<sup>39</sup> Sparrow, *The Regulatory Craft*, 2000, p. 24.

<sup>40</sup> *ibid*, p. 25.

While better practice regulation is directed at the regulator's activities, the use of facilitation and communication strategies can be exercised by the regulator or by industry participants in the design of co- and self-regulatory schemes. Descriptions of these non-regulatory or alternative tools are set out below.<sup>41</sup> Each description is illustrated by an example of the ACMA using the tool or its use by industry participants. These examples of regulatory practice are also depicted in Figure 2.

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<sup>41</sup> Unless otherwise noted, these descriptions are adapted from *Victorian Guide to Regulation*, July 2014; Sparrow, *The Regulatory Craft*, 2000; and APSC, *Smarter Policy: choosing policy instruments and working with others to influence behaviour*, 2009.

Figure 2: Better practice regulation, facilitation and communication strategies

		2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Beyond 2015
<b>Better practice</b>	Positive incentives - reduced reporting										MPS code	Streamlined revenue assurance	
	Better use of existing provisions		Technical regulation compliance								Reduced reporting for broadcasters		
	Broad range of monitoring tools												
	Principles-based regulation										Numbering plan revision		
<b>Facilitation</b>	Outsourcing	Frequency assignments (2003)		DNC operation		Wireless Institute		Maritime College					Numbering allocation
	Market-based instruments									Digital dividend auctions	Opportunity cost pricing (400 MHz)		
	Refraining from taking action (forbearance)				VoIP numbering		Telstra NFR remediation					Prior approval for temporary breaches of media ownership transactions	
	Stakeholder management - collaborative partnerships	AISI Seoul-Melb MOU							MOUs -ComComm -TIO refresh	AFP MOU	APC MOU		
	International collaboration	INHOPE	ACFT						Microsoft imposters scam				
<b>Communication</b>	Public information & education campaigns			Cybersafety initiatives							Wireless microphones		
	Information disclosure									TCPC			
	Research into issues of significance						RTC inquiry	Broken & Enduring concepts			Connected Citizens		
	Regulator inquiry into systemic compliance issues												
	Transparent approach to compliance & enforcement										Compliance/enforcement policy update		Broadcasting concepts papers
	Public statement of concerns - deterrence											Triple zero breach	

DNC=Do Not Call; ACFT=Australasian Consumer Fraud Taskforce; TCPC=Telecommunications Consumer Protection Code; RTC=Reconnecting the Customer; AFP=Australian Federal Police; MPS=Mobile Premium Services; AISI=Australian Internet Security Initiative; NFR=Network Reliability Framework.

## Better practice strategies

These are tools aimed at refining, reviewing and recalibrating existing regulatory approaches rather than putting in place new obligations or conventional sanctions. This may involve adjusting regulatory regimes towards a risk-based approach that better targets harmful behaviour and directs resources to areas of greatest risk. Better practice strategies may also involve winding back regulatory requirements, in circumstances where industry practices have matured or regulated entities have consistently achieved high performance—that is, approaching best practice. The ACMA has identified areas where regulatory requirements such as compliance monitoring can be reduced or streamlined as part of its work responding to the government's deregulation agenda. Better practice strategies may reflect changing priorities that result from new and evolving regulatory threats, without diminishing regulatory certainty or impact. Examples of better practice strategies are discussed below.

### Rewarding good behaviour—incentive-based regulation

Traditional approaches to regulation do not acknowledge or reward compliance with regulations. Parties with good track records are often given the same penalties for non-compliance as those who frequently breach the law. Regulations typically require the same, often onerous monitoring and reporting requirements for all industry players. Positive incentives may reward good behaviour while continuing to penalise bad behaviour. Incentives could include a reduction in reporting or other regulatory requirements, marketing advantages, public praise or an award.

An example of a reduction in reporting in response to high compliance levels is the removal of reporting requirements under the Mobile Premium Services (MPS) Code, finalised as part of the ACMA's deregulation initiatives in 2014–15. The ACMA has also been exploring deregulation opportunities in the broadcasting context, including reducing reporting and record-keeping requirements. For example, the ACMA has exempted classes of commercial broadcasting licensees from the requirement to submit audited balance sheets and profit/loss accounts, in light of good compliance history. In 2015, the ACMA will be working with industry bodies to reform industry codes and streamline revenue assurance processes across the levies and fees it collects.

#### **Example 2: Mobile premium services—recognising good behaviour and changing industry circumstances**

Premium-rate SMS and MMS emerged in the early 2000s as a new platform for providing information and entertainment content to consumers via mobile devices.

Examples of premium services include mobile ringtones, mobile wallpaper, games and chat services. The MPS Code was first registered in 2009 as a key element of a package of regulatory measures introduced in response to significant increases in complaints about premium messaging services. Related regulatory measures that sought to improve compliance with the main requirements of the MPS Code were:

- > a rigorous compliance monitoring program, which established the frequency, timing, format and high-level content for reports, and involved auditing MPS providers on around 300 metrics
- > two companion service provider determinations, which provided for barring mechanisms, and the do not contract rule and do not bill rule.

In recent times it has become apparent that high compliance rates and changing industry circumstances and justify a winding back of some of these related measures, and that other pre-existing self- and co-regulatory measures would provide an adequate approach.

There is now a better understanding of the MPS market and supply chains, with the provision of third-party services now a familiar business model in the communications market. Furthermore, there has been an ongoing decline in the MPS market, with these services migrating to other platforms, such as mobile apps.

There are a variety of incentives to comply with the MPS Code. Together with the do not bill, do not contract and barring mechanisms, the ACMA's enforcement powers under Part 6 of the Telecommunications Act provide appropriate sanctions to enforce compliance and penalise non-compliance, and provide industry with a clear incentive to comply.

The degree of consumer detriment has reduced significantly. MPS Code compliance has been high, and TIO complaints about MPS have been at low levels—around one per cent of all complaints received since June 2012.

In light of the consistently high compliance rates, low complaints levels and decline in the MPS market, in 2014 the ACMA decided that the rigorous monitoring requirements were no longer proportionate to the level of risk and degree of consumer detriment. The ACMA will continue to have access to TIO data on consumer complaints about MPS, and so will still have visibility of any resurgence in consumer detriment arising from the sector. Furthermore, the ACMA's powers to investigate compliance failures and take appropriate action, including obtaining relevant information, remain in place. Under these circumstances, the removal of reporting obligations is considered reasonable.

### **Better use of existing provisions**

Where there is an existing regime prescribed in (typically rigid and slow or difficult to amend) legislation, an available option is making better use of existing provisions, such as through increased enforcement, better staff training or different management focus.<sup>42</sup> This may be appropriate when there are relatively low levels of compliance with existing provisions or where the regulator wishes to signal types of acceptable practice and behaviour. It may simply mean upgrading existing enforcement mechanisms or it may involve avoiding unnecessary duplication by extending the coverage of existing legislation to related concerns. This is likely to help ensure the consistency of government action in the treatment of matters with similar issues and concerns.<sup>43</sup>

The *Australian Government Guide to Regulation* suggests that, as part of considering the available policy options, regulators should always assess the potential for improving policy outcomes with better enforcement of the rules already in place.<sup>44</sup> This approach may involve a more nuanced application of existing provisions and shifting towards a risk-based approach. The ACMA's approach to technical regulation compliance, discussed below, is an example of making better use of an existing regime by adapting compliance approaches to better match identified areas of risk. This priorities-based compliance strategy is a shift away from an approach based on auditing identified registered suppliers to a strategy that is structured around industry activities that are analysed as higher risk and prioritised accordingly.

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<sup>42</sup> Australian Government, *Australian Government Guide to Regulation*, March 2014, p. 27.

<sup>43</sup> Department of Treasury and Finance, *Victorian Guide to Regulation*, July 2014. Toolkit 1, p. 13.

<sup>44</sup> Australian Government, *Australian Government Guide to Regulation*, March 2014, p. 27.



**Example 3: Technical regulation compliance—  
a risk-based approach involving better use of existing provisions  
and targeted priority compliance areas**

The ACMA is responsible for monitoring and enforcing compliance with technical regulation requirements. Its traditional approach to technical regulation was based on targeting a largely compliant base of registered suppliers. However, fragmented markets and complex supply chains in and online environments meant this no longer aligned with contemporary business practices.

The focus on registered suppliers and audit processes did not provide adequate information to address issues arising from the proliferation of mass-market electronic devices and online supply chains. End users can source products directly from global channels, increasing the risk that existing regulatory controls are circumvented. As a result, there is a potential increase in interference and the risk to spectrum utility and public safety, which generates significant compliance challenges for the regulator.

In response, the ACMA revised its approach by establishing priority compliance areas. Complaints about non-compliance are assessed against a set of [priority compliance areas](#) derived from an analysis of compliance data, external monitoring through web-based searches of online traders, and the collection of data from complaints and reports of non-compliance received from members of the public. This enables the ACMA to prioritise its compliance and enforcement activities to target complaints about devices and suppliers which pose the greatest risk of harmful interference, high risk to spectrum utility or network integrity, and risk to public safety. As a result, compliance audits and enforcement activity have been refocused on high-risk suppliers and target high-risk devices, distribution chains and identified non-compliant industry sectors.

**Broad range of monitoring tools**

Audits, inspections, self-monitoring or third-party monitoring can be used separately, or in combination, as part of a comprehensive enforcement strategy. The ACMA's risk-informed approach to technical regulation compliance and enforcement is an example of the use of a broad range of monitoring tools.

**Principles-based regulation**

Generally, principles-based regulation means moving away from relying on detailed, prescriptive rules to more high-level, broadly stated rules or principles that set the standards by which regulated firms must conduct business.<sup>45</sup> Principles-based regulation gives affected groups maximum flexibility as to how they achieve compliance.<sup>46</sup> While principles-based regulation has been analysed in the context of financial services regulation, there is less analysis in the literature of its utility and application in the media and communications environment.<sup>47</sup> Approaches to media and communications regulation that fall along the self- or co-regulatory end of the regulatory continuum—particularly industry codes—may embody a principles-based approach, depending on the degree of detail and prescriptiveness specified within the enabling legislative framework.

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<sup>45</sup> Julia Black and Martyn Hopper, 'Making a success of Principles-based regulation', *Law and Financial Markets Review*, May 2007, p. 191.

<sup>46</sup> Australian Government, *Australian Government Guide to Regulation*, p. 28.

<sup>47</sup> Julia Black, 'The Rise, Fall and Fate of Principles Based Regulation', *LSE Law, Society and Economy Working Papers 17/2010*, London School of Economics and Political Science.

In the context of telephone numbering, part of the ACMA's evolutionary approach to changing the Numbering Plan includes a longer term shift towards a principles-based approach. See Example 4.

**Example 4: Numbering regulation—adopting a principles-based approach**

Telephone numbering is governed primarily by direct regulation under the Telecommunications Numbering Plan 2015, which sets out the framework for the numbering of carriage services in Australia and the use of numbers in connection with the supply of those services. The framework includes some co- and self-regulatory elements, such as mandatory industry codes and voluntary industry guidelines. The industry association Communications Alliance (CA) is active in developing telecommunications industry codes and guidelines, including those relating to numbering. The ACMA manages the Numbering Plan and is responsible for planning for new numbering developments in Australia.

In recent years, fundamental changes in networks and technologies, as well as changes in consumer behaviour and services, have put significant pressure on the regulatory arrangements for telephone numbers. In response, the ACMA has undertaken an extensive examination of the numbering arrangements to identify whether changes are needed to ensure a flexible, efficient and effective framework for the future. A goal of this review was to ensure that new technologies, uses and market entrants can be readily accommodated and are not hindered by legacy regulatory arrangements.

The review culminated in the ACMA proposing a managed evolution to making changes to the Numbering Plan in the short, medium and long term. This was adopted because it minimised the short-term costs to industry and information costs to consumers, and reduced the likelihood of unintended consequences from changes to the regulatory settings. Over time, this work will transform the regulatory arrangements from complex and rigid, technology- and service-specific into arrangements that allow the flexible use of telephone numbers.

The ACMA has implemented the majority of changes outlined in its Numbering Work Program. The most recent change occurred in March 2015, with the making of a new Numbering Plan that radically simplifies the allocation and administration arrangements for numbers. The Numbering Plan was significantly simplified as a consequence of collaboration with industry and public consultation and resulted in a 150-page reduction to the Numbering Plan.

In the longer term, the ACMA is working with industry to facilitate a staged migration from procedural rules to codes and guidelines where possible within the existing legislative context. Over time, this will make the Numbering Plan a more principles-based document. Operational details would move from the Numbering Plan into industry codes—a shift from what is primarily a direct regulatory approach to greater industry self-regulation.

## Facilitation strategies

Facilitation strategies use tools that involve influencing, leading or ‘nudging’ parties towards desired outcomes. Facilitative strategies are particularly useful in circumstances where the intended outcomes are to improve service standards, understand obligations or provide incentives for behavioural change by industry participants or citizens. Facilitative strategies may offer better targeted, more timely and less intrusive means of encouraging particular behaviours or creating deterrents to risky or harmful behaviours. Examples of facilitative strategies include:

### Refraining from taking action

This approach relies on the market to provide a solution to the problem, in conjunction with existing laws. This may be an appropriate response where the problem is considered temporary and/or will solve itself (for example, if the market is changing rapidly) or where the cost of intervention outweighs any potential benefits. The decision not to take action may be called a ‘forbearance’ approach. Forbearance can be understood in two ways—first, as a regulatory policy position; and second, as a response to an individual breach of applicable law. Regulatory forbearance may be adopted as a short-term measure while other legislative solutions or regulatory approaches are being developed, or to allow industry time to come to terms with new obligations. There may also be other circumstances where such an approach makes sense for reasons of proportionality, including fairness and the costs and benefits of undertaking enforcement action. The ACMA’s response to numbering regulation to accommodate [voice over internet protocol \(VoIP\) services](#) included a limited forbearance approach.

### Developing collaborative partnerships

This approach involves investment in collaborative partnerships/‘moral persuasion’. Collaborative partnerships with industry, government, citizen or consumer stakeholders may provide an alternative means of achieving a range of different outcomes and may be initiated by the regulator or by industry participants. This strategy is designed to develop effective intervention by engaging multiple parties, undertaking collaborative agenda-setting, using moral persuasion and encouraging compliance through alignment with the self-interest of the industry participant.

The Triple Zero Awareness Working Group is a collaboration between emergency call taking agencies, government and industry that aims to promote awareness of the use of the Triple Zero emergency call service and is one such example of partnerships in practice. Recently the group developed the Emergency+app that uses the GPS functionality of smartphones to relay location information from the caller’s phone to emergency services.

Industry-led compliance initiatives are another feature in use within the co-regulatory context of communications. Communications Alliance, the communications industry peak body, established Communications Compliance as an independent compliance monitoring body to assist carriage service providers to comply with the Telecommunications Consumer Protections (TCP) Code C628:2012 and to provide an overview of industry compliance.

A regulator initiated partnership is the ACMA’s work with industry, citizens in the Australian Internet Security Initiative (AISI), discussed in Example 5. Partnerships may in some cases be formally recognised; for example, through memoranda of understanding (MOU) like that between law enforcement agencies and the ACMA Hotline for reporting illegal online content. This collaboration responds to community concerns about online child sexual abuse material by making it easier for individuals to report content and have action taken by the regulator and relevant law enforcement authorities. To date, the ACMA has signed MOUs with a range of organisations

including the Australian Federal Police (AFP), the Australian Privacy Commissioner (APC), the TIO and Communications Compliance Ltd (CommCom). It has also signed multiple MOUs with other jurisdictions on spam—such as the Seoul–Melbourne Multilateral Anti-Spam Agreement.

#### **Example 5: The Australian Internet Security Initiative— collaboration between industry, citizens and the regulator**

The Australian Internet Security Initiative (AISI) was developed with the objective of protecting Australian internet users from ‘botnets’, one of the most significant cybersecurity threats on the internet. Botnets are groups of computers infected by malware (malicious software).

As almost all internet users with ‘bot’ infections are unaware they are infected, the AISI’s objective is to inform these users they have an infection so they can remove it from their computer(s). This not only helps protect the internet user from the consequences of the infection but also prevents the infected computer from undertaking further malicious activities on the internet. For an individual consumer whose computer has been compromised, the possible detriment may be considerable; for example, fraud, identity theft, and the use of their computer to distribute pornography and spam.

The ACMA collects infection data from a variety of sources and feeds this into the AISI. Daily infection reports are then provided to participating Australian internet providers, who include internet service providers (ISPs) and other organisations such as universities that have been allocated IP (internet protocol) ranges and manage their own networks. These reports identify IP addresses on their networks that have been reported to the ACMA as infected in the previous 24-hour period.

Internet providers are expected to correlate their customer data with the IP address information provided through the AISI to determine the customers associated with the infection, and then inform them of the infection. Internet providers are also expected to advise their customers on how to remove the infection and help prevent future infections from occurring. The ACMA has no information to identify the customers with the infection—only the internet provider can determine which customer is associated with a given infection report.

The AISI has been strongly supported by Australian internet providers, with 118 ISPs and 16 universities currently participating—representing well over 95 per cent of Australian residential internet users. No other voluntary government initiative involving Australian internet providers has attracted such a high level of membership.

The AISI is an example of a different way of operating within the ACMA—international cooperation through informal networks; the unique, voluntary cooperation of Australian internet providers; and encouraging action by citizens.

#### **Outsourcing**

Industry partnerships may mature into the regulator outsourcing certain functions to industry in appropriate circumstances. To determine whether services it is responsible for could be better performed by an external provider, the ACMA assesses if there are cost savings, improved quality or other benefits to be gained by outsourcing. Prominent examples of customer services that the ACMA has outsourced to third-party providers include:

- > maritime and amateur radio operator examination and certification services, which are provided by the Australian Maritime College and the Wireless Institute of Australia, respectively
- > frequency assignments by accredited persons

- > Do Not Call Register operation and management.

Outsourcing these services has been successful in terms of the quality of service provided and in allowing the ACMA to allocate its resources to other regulatory activities. The ACMA is transferring more of its telephone numbering administration services to an external provider, discussed in Example 6.

#### **Example 6: Telephone numbering administration–outsourcing**

The ACMA's responsibilities for telephone numbering in Australia include numbering policy and allocation, education, and compliance and enforcement. Currently, the ACMA directly provides the majority of allocation services; however, a small proportion of allocation services associated with local rate, freephone and premium rate SMS numbers are outsourced to an industry-based not-for-profit company, Industry Number Management Services (INMS). This arrangement concludes at the end of July 2015.

During 2010 and 2011, the ACMA examined Australia's telephone numbering arrangements. The aim was to identify whether changes were needed to provide an effective and efficient framework for the future communications environment. One of the recommendations from this work was to further examine alternatives for the sustainable provision of numbering allocation services in the long term.

In this context, and in preparation for the expiration of the contract with INMS, the ACMA used its partnership principles to examine the four broad numbering functions:

- > number allocation and administration
- > annual numbering charge administration
- > numbering policy
- > compliance and enforcement.

This analysis allowed the ACMA to test whether outsourcing one or more of the functions would give efficiency or quality-of-service benefits. It suggested that the allocation and administrative function is the most suitable for outsourcing, with the next most suitable being the annual numbering charge administration. The analysis found that partnering with an outsourced provider for a broader range of numbering services could bring further efficiencies for government, consumers and industry.

It is also suggested that outsourcing policy functions and compliance and enforcement arrangements is less likely to produce cost efficiencies, may have negative impacts on the quality of the service and could have negative impacts on the ACMA's ability to perform key functions. As a consequence, the ACMA decided to test the market to identify a provider to outsource all numbering allocation services and the administrative functions associated with the annual numbering charge. An open tender was issued in early 2014 to identify a provider for these services. On 11 September 2014, the ACMA awarded ZOAK Solutions Pty Ltd the contract for the provision of numbering allocation and administration services from 1 August 2015.

## **International collaboration**

Global engagement has become a necessary strategic tool to identify emerging regulatory issues and coordinate regulatory responses for electronic and internet-enabled communications. There is a recognised need to share experiences, expertise and information between participants, particularly for undertaking regulatory compliance and enforcement action.

Sharing knowledge and experience with and between other regulators, law enforcement and industry groups is necessary to build cooperative mechanisms and identify best-practice approaches. There is a variety of ways regulators and industry participants can do this internationally. Many regulators are members of international organisations or signatories to cross-border agreements that facilitate cooperation between countries. Examples include the Safe Harbor arrangements between the US, European Union (EU) and Switzerland, which enables the free flow of data between those countries, and the International Association of Internet Hotlines (INHOPE), which provides a forum for exchange of hotline management and operator expertise. The ACMA is also a member of the Australasian Consumer Fraud Taskforce, which brings together government agencies in Australia and New Zealand that deal with the criminal aspects of spam, such as fraud and money-laundering. Another example is the ACMA's response to the Microsoft impostor scam, whereby the ACMA shared information and intelligence with overseas government agencies and assisted in their investigations.

Another aspect of collaboration is using purpose-specific databases to share information. Global IP networks represent an unprecedented opportunity for regulators to share information internationally and there is a proliferation of databases used for cross-border regulatory approaches. An example of a purpose-specific database is INTERPOL's International Child Sexual Exploitation Image Database.

## **Market-based instruments**

Market-based instruments include taxes, subsidies and user charges. Such tools work by altering the costs and benefits of certain actions, thereby influencing a change in the economic, social or environmental behaviour of individuals and organisations. The imposition of a tax or user charge will raise the cost of engaging in a certain activity, while a subsidy will lower the cost, effectively altering conditions for undertaking that activity. In the ACMA's context, tools such as opportunity-cost pricing or auctions are market allocation mechanisms that aim to encourage efficient allocation and use of resources. These tools are resource taxes that aim to reflect the use of a resource such as radiofrequency spectrum or telephone numbering, and send a price signal to encourage efficient allocation and use. This is discussed below in the context of opportunity-cost pricing in the 400 MHz band.

### **Example 7: Opportunity-cost pricing in the 400 MHz band— use of a market-based instrument**

The ACMA plays an important economic role in ensuring the benefits of spectrum use are maximised and that spectrum is used efficiently. This role is guided by the objects of the Radiocommunications Act for the management of radiofrequency spectrum. These objects relate to the efficient allocation and use of spectrum in order to maximise the overall public benefit derived, and an efficient, equitable and transparent system of charging for the use of spectrum.

The ACMA is transitioning towards the use of opportunity-cost pricing as a market-based tool to price administratively allocated spectrum. Previously, the ACMA had not explicitly priced spectrum based on opportunity cost. Rather, administrative prices (annual taxes) had been based on a number of mixed policy goals—principally, incentive pricing and cost recovery. The introduction of opportunity-cost pricing in spectrum pricing is intended to mimic the conditions operating in competitive markets. That is, prices determined in competitive markets reflect the interactions of demand and supply, giving market participants incentives for efficient behaviour and cost minimisation over the short and long terms. The opportunity cost of a part of the radiofrequency spectrum is defined as the value of the spectrum in the highest value alternative use that is forgone by granting access to one party rather than the alternative.

In transitioning towards the use of opportunity-cost pricing over time, the ACMA has made an in-principle decision to implement opportunity-cost pricing in the 400 MHz band.<sup>48</sup> This focus on the 400 MHz band predominantly reflects the acute congestion apparent in the high-density areas and, to a lesser extent, the lack of demand and congestion in remote-density areas. These differential demand dynamics make implementing opportunity-cost pricing in the 400 MHz band an interesting test case.

Congestion in the high-density areas of the 400 MHz band implies that intervention to limit demand and address congestion is necessary. Complementary to various regulatory measures, an increase in the licence tax level applicable in the high-density areas of the 400 MHz band would be appropriate.<sup>49</sup> This is because an increase would discourage relatively low-value spectrum users, encourage and allow currently excluded high-value users to obtain spectrum and help reduce congestion. The ACMA implemented the first of five intended increments towards a new opportunity-cost licence tax of \$199/kHz (plus CPI escalation) for these high-density areas of the 400 MHz band on 15 August 2012. The remaining increments towards the full opportunity-cost-based tax level are yet to be made. They will only be implemented after monitoring the impact on demand and congestion of the tax increase and other regulatory changes.

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<sup>48</sup> This band refers to spectrum between 403–520 MHz, including the segment 420–450 MHz that supports various Department of Defence/government applications. The band is used for narrowband land mobile and fixed services, as well as wideband rural services.

<sup>49</sup> Other regulatory measures to relieve congestion include transitioning to 12.5 MHz channelisation; requiring all operations of analog fixed point-to-point links using 25 kHz channels to cease or switch to a more efficient system; requiring all high-power, single-frequency users in segments G, H, P and in 469.9875–520 MHz to cease operation or transition to a low-power service; and transitioning all land mobile users to the height versus power conditions.

Conversely, low demand implies a decrease in the licence tax applicable in the remote-density areas of the 400 MHz band would be appropriate. The ACMA currently considers there is scope to increase the public benefit from encouraging use of spectrum across the remote-density areas of the 400 MHz band by reducing the licence tax. Moreover, such a reduction is unlikely to generate a significant increase in spectrum use such that excess supply would be removed and scarcity would emerge. Given this, the ACMA considers that lowering the licence tax is consistent with opportunity-cost principles, would encourage increased use with resultant benefit and not constrain any viable use. The ACMA has consulted with impacted stakeholders on implementing a market-based licence tax and is considering responses.

In both cases, introducing opportunity-cost pricing would result in the ACMA moving the tax to its efficient level and then letting the market reveal over time both low- and high-value uses. By adopting the economic principle of opportunity-cost pricing, the ACMA's process for setting licence taxes in the 400 MHz band aims to mimic the efficient and incentive effects of market-based pricing. This market-based approach is intended to result in more efficient allocation of spectrum.

## Communication strategies

These are tools that help to address issues where there may be information asymmetry between industry, citizens, consumer and government. Communication strategies offer a flexible response to addressing emerging issues in digital communications and content—such as managing digital identity and reputation, and digital literacy and participation—which were not areas of concern at the time existing legislative arrangements were developed. Such strategies can also help to recognise the role of citizens as problem-solvers in the online environment—assisting citizens to protect themselves where regulator intervention is likely to come too late or the harmful behaviour is difficult to target for jurisdictional or other reasons. Communication strategies are discussed below.

### Public information and education campaigns

This approach may be useful when the problem to be addressed results from a lack of knowledge among consumers or participants in an industry. The objective is to change the quality of the information available or better target its distribution. The example of the ACMA's cybersafety education activities and the *Cybersmart Digital Citizens Guide* is discussed below. Other examples include the ACMA's work in raising awareness of changes to the supply and use of [wireless microphones](#), and the Microsoft impostor scam, for which the ACMA issued consumer and media alerts.

In the co-regulatory environment, industry associations have also taken responsibility for information campaigns explaining changed service arrangements for consumer groups. For example, Communications Alliance developed consumer information tools to inform consumers about the availability of mobile calls to 13 telephone numbers.<sup>50</sup>

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<sup>50</sup> [www.commsalliance.com.au/Documents/all/guidelines/g648](http://www.commsalliance.com.au/Documents/all/guidelines/g648)



**Example 8: Cybersafety education—  
delivering education programs to increase awareness of online  
risks, and support safe and positive online environments**

Under the Cybersmart brand, the ACMA offers a suite of tailored cybersafety programs, presentations, professional development training and resources to meet the needs of teachers, students and parents. Programs and resources are built on Australian and international research, and adhere to strong education and learning principles. Key programs are evaluated and refined so they remain effective in driving behavioural change in their intended audiences.

Cybersmart features:

- > free one-day professional development workshops for teachers
- > *Connect.ed*, an interactive online professional development program for teachers
- > a cybersafety training program for final-year education students at universities
- > general internet safety presentations at schools and other convenient locations for parents, teachers and students
- > the comprehensive Cybersmart website providing advice to young people and parents about cybersafety
- > the interactive learning programs *Cybersmart Detectives*, *Cybersmart Hero* and *Cybersmart Networking*, where primary-school children work through scenarios to learn key cybersafety messages.

Cybersmart resources and programs are highly regarded within the education sector. For example, the Professional Development for Educators program is accredited or endorsed in every state and territory.

A range of related strategies and activities complement the ACMA's Cybersmart resources and programs. These include:

- > *Cybersmart Digital Citizens Guide*—a range of tools and resources to support positive engagement in the online environment, and promote the key message of understanding digital technologies and making informed choices.
- > *Safer Internet Day Radio*—a three-hour webcast radio program, including interviews with local and international experts, stakeholders and supporters and a lively panel discussion.
- > *Tagged*—an award-winning cybersafety video resource for teens designed to help young people think about how their online actions have real-world consequences.

From 1 July 2015, an Office of the Children's eSafety Commissioner will be established within the ACMA. This will replace the Cybersmart program and have a broad remit, with responsibility for advocacy, education, research, program development and a cyberbullying complaints system.

**Information disclosure**

The regulator may set guidelines about the type of information to be disclosed on a particular product and aim to ensure the public is aware of how to assess various products. For an example of information disclosure requirements, see the *Reconnecting the Customer* case study.

## Conduct research into issues of significance

Research by the regulator or by industry participants can develop evidence to identify matters of concern and where action is needed. In this context, the ACMA has an ongoing research program, [researchacma](#) that aims to inform its role in regulatory policy development, regulatory reviews and investigations, as well as help Australians to make better decisions about media and communications.<sup>51</sup> For example, the ACMA conducted significant research in support of the *Contemporary community safeguards inquiry* (see below).

Industry representative bodies can also play an important role in conducting research to highlight issues of significance from an industry perspective and to provide evidence to inform the regulator. For example, the Australian Mobile Telecommunications Association commissioned Deloitte Access Economics to conduct research into the economic impacts of mobile telecommunications in Australia.<sup>52</sup> A 2014 study by the Australian Radio Communications Industry Association noted benefits to the economy of between \$1.9 billion and \$3.7 billion from spectrum used for land mobile radio and this work has contributed to discussion about the value of spectrum to the economy.<sup>53</sup>

### Example 9: *Contemporary community safeguards inquiry*—conducting research into issues of significance

The ACMA conducted the *Contemporary community safeguards inquiry* in 2013–14 to assess how current broadcasting codes of practice can be fit-for-purpose in a converging media environment. As part of the evidence base to inform the inquiry, the ACMA commissioned and conducted:

- > community research exploring the broadcasting experience and expectations of contemporary citizens
- > economic research about the Australian content market and the identified costs to industry members of current code requirements.<sup>54</sup>

The inquiry engaged and consulted with industry and citizens about which code matters broadcasters needed to address in order to provide appropriate community safeguards. It also sought to establish which current protections may no longer be required. To inform its views about contemporary community safeguards, the ACMA relied on a broad base of contributions and evidence, including its experience from administering complaints under the current broadcasting codes.

The contributions to the inquiry suggested a high level of consensus about the enduring concepts and core matters that should be reflected in contemporary broadcasting codes. As a result, the ACMA expressed the view that there is strong support and a solid rationale for code-based contemporary community safeguards relevant to a variety of matters, including:

- > preventing the broadcast of certain content that prevailing community standards indicate should be prohibited
- > complaints-handling systems and information.

However, there was found to be a lower level of consensus around how these matters should be operationalised in codes.

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<sup>51</sup> Also see the occasional paper [Evidence-informed regulatory practice—an adaptive response](#) (April 2015) for an easy reference guide to 10 years of ACMA research.

<sup>52</sup> AMTA, [The mobile nation – driving productivity, jobs and social change](#)

<sup>53</sup> [www.arci.org.au/about-arcia/land-mobile-radio-industry.html](http://www.arci.org.au/about-arcia/land-mobile-radio-industry.html)

<sup>54</sup> This research is available on the [ACMA website](#).

### **Public statement of concerns—deterrence**

The ACMA has signalled its willingness to use penalties to address and match compliance problems or highlight a renewed focus on certain problem issues. For example, the importance of Australians having continued access to the Triple Zero emergency service is underscored by action to enforce compliance with requirements on telecommunications providers to give customers and other end users access to this service.<sup>55</sup>

### **Transparent approach to compliance and enforcement**

The regulator may produce public guidelines about acceptable behaviour by industry players or issue public statements about its compliance and enforcement policy. The ACMA updated its [compliance and enforcement policy](#) in March 2014, setting out its graduated and strategic risk-based approach to compliance and enforcement. Another approach is the documenting of regulatory practice, whereby the ACMA articulates its approach to interpreting the regulatory framework. For example, the ACMA recently published its [Investigation concepts](#) series of papers to share the insights developed through its broadcasting investigations work and help broadcasters better understand the requirements under the broadcasting codes. The objective of the series is to identify how various important principles of broadcast content regulation, such as ‘fairness’ and ‘impartiality’, have been exemplified, clarified or applied in ACMA decisions.

### **Regulator inquiry into systemic compliance issues**

The regulator may want to send a signal to industry participants about the type of behaviour it deems unacceptable and gather information through an inquiry to inform the development of regulatory options.

#### **Example 10: *Reconnecting the Customer*—inquiry into systemic compliance issues and use of information disclosure tools**

The ACMA’s *Reconnecting the Customer* public inquiry (the RTC inquiry) into customer service and complaints-handling practices in the Australian telecommunications industry aimed to tackle widely recognised and long-standing consumer issues. The RTC inquiry coincided with a review of the Telecommunications Consumer Protection Code (TCP Code) by CA.

An exhaustive information-gathering process took place, including public consultation, roundtable meetings with stakeholders, public hearings and commissioned research. The RTC inquiry found that a key customer care matter driving complaints was the lack of timely, accurate and comprehensive information available to consumers about products and service providers. In its final report (September 2011), the ACMA detailed six proposals to improve customer care. The ACMA then worked with CA to finalise a revised industry code in response to the RTC inquiry recommendations. In relation to information disclosure, the code specified that providers must offer consumers tools to monitor charges and usage. These included:

- > new information requirements for advertising—both the inclusion of standard charging information and the prohibition of potentially misleading and confusing claims
- > new requirements for telecommunications providers to provide a critical information summary

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<sup>55</sup> ACMA, ‘[TPG’s Triple Zero breach](#)’, media release, 16 April 2014.

- > new requirements for telecommunications providers to provide comparative billing information
- > new rules for spend management alerts.

The RTC inquiry process drew attention to the seriousness with which the ACMA viewed these issues, signalling to industry that it needed to improve its performance. It served to complement industry self-regulatory measures to address the issues, with the revised industry code implementing more than 95 per cent of the RTC inquiry recommendations.

Since the RTC inquiry, the market has matured. There has been a shift in industry culture, with providers now seeing greater commercial benefit in improved information disclosure to customers. Consumers are now more familiar with 3G mobile technology, data use and charging, and mobile networks have been upgraded to 4G. These developments, together with improved information provision to consumers, are contributing to reduced product complexity and fewer consumer complaints.

The ACMA followed up the implementation of the RTC inquiry recommendations with further research in 2013 to better understand outcomes from the inquiry and the implementation of a number of consumer protections under the new TCP Code.

# Conclusion

Increasingly, the ACMA needs to accommodate change within static regulatory frameworks that rely on known control points, identifiable industry participants and national jurisdictions—elements that can no longer be taken for granted in the evolving digital environment.

The ACMA, as regulator, has acted as a ‘bridge’ between ‘broken concepts’; what continues to matter on an enduring basis; and the connections of the rapidly evolving networked society. It has adapted existing tools to new purposes, extending its reach into the market using communication and facilitation techniques while extending forbearance and exercising regulatory discretion where possible. Through organisational agility and flexibility, it has operationalised ‘fit-for-purpose’ regulatory interventions to suit the times. However, these ‘work-around’ mechanisms are themselves come under strain, as the gap between the legacy legislative architecture and the complex networked environment that now characterises media and communications continues to widen.

With the emergence and dominance of IP networks in the last decade new platforms, applications, business models, value chains and forms of social interaction have appeared, with more to come. This has meant people increasingly expect to connect and communicate seamlessly—anywhere, anyhow, anytime—while content has become increasingly non-linear, interlinked and ‘uncontained’.

Challenges for traditional regulatory approaches as a result of this digital disruption mean that there is likely to be a greater need for recourse to alternative regulatory approaches, including a focus on industry involvement in response to address new and new areas of concern or emerging risks.

As the examples discussed in this paper demonstrate, working with industry participants in the co- and self-regulatory environment of media and communications, regulatory and non-regulatory interventions are being adapted to address contemporary communications and content issues. An increasing reliance on communication and facilitation techniques, along with repurposing and adapting direct regulation are key strategies in the suite of contemporary regulatory problem-solving tools.

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