



CENTRE FOR MEDIA TRANSITION

Improving consumer outcomes through more effective engagement in industry rule-making

Submission to Department of Infrastructure, Transport, Regional Development and Communications

**Consumer Safeguards Review
Part C – Choice and Fairness
Consultation Paper, July 2020**

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About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.

This submission was prepared by:

- Dr Karen Lee, Senior Lecturer, Faculty of Law
- Dr Derek Wilding, Co-Director, Centre for Media Transition

Contact

Centre for Media Transition
Faculty of Law, University of Technology Sydney
Building 2, Level 15
UTS City Campus, Broadway
PO Box 123, Broadway NSW 2007

cmt@uts.edu.au
+61 2 9514 9669

cmt.uts.edu.au

1. Introduction and summary

Thank you for the opportunity to contribute to this consultation on Part C of the Consumer Safeguards Review, Choice and Fairness.

As our submission is based upon recent research relating directly to an aspect of the review, we address only the following issue raised in the Consultation Paper:

Proposal 2—The telecommunications consumer protection rulemaking process should be reformed to improve its effectiveness.

Aspects of our research are discussed at some length below as they directly address a core element of Principle 3: ‘The rule-making process should be timely, efficient, **enable a wide range of views to be considered** and produce clear, targeted rules’.

Responses to the Issues for Comment relating to Proposal 2 are presented in section 7 below. In summary, we support the continuation of co-regulation, but in an improved form that ensures adequate public and consumer engagement in the development of consumer codes of practice, with enhanced registration criteria applied by the regulator. We do not support a reversion to government regulation with secondary matters assigned to industry self-regulation.

2. Overview of our research

In November 2019, we completed an 18-month research project, funded by the Australian Communications Consumer Action Network (ACCAN), examining public engagement in industry rule-making in a converged communications environment.¹ Our report [Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making](#)² was published by ACCAN. A supplementary report, [Industry Bodies and Schemes in the Communications Sector](#),³ which provides detailed summaries of the industry bodies and schemes (referred to below as ‘industry schemes’) we examined, was published by the Centre for Media Transition. A summary article appeared in the December 2019 edition of the [Communications Law Bulletin](#) published by the Communications and Media Law Association. A further article, comparing the self-regulatory schemes to the co-regulatory schemes, was published in the April 2020 edition of [InterMedia](#) published by the International Institute of Communications.

In our report, *public engagement* refers to all forms of *public communication*, *public consultation* and *public participation* (represented in Figure 1 below).

Public communication involves an industry scheme conveying information about a rule-making initiative to consumers or citizens.

Public consultation consists of consumers or citizens being offered an opportunity to supply information relating to, or an opinion about, a rule-making initiative to an industry scheme at the invitation of or following a request made by an industry scheme. Unlike public participation, public consultation does not involve any dialogue between the industry scheme and consumers and members of the public. The industry scheme solicits (or refers to) information or opinion that

¹ The operation of the ACCAN is made possible by funding provided by the Commonwealth of Australia under section 593 of the *Telecommunications Act 1997*. This funding is recovered from charges on telecommunications carriers.

² Lee, K. & Wilding, D. 2019, *Responsive Engagement: Involving Consumers and Citizens in Industry Rule-making*, Australian Communications Consumers Action Network, Sydney. This report is referred to below as ‘*Responsive Engagement*’ or ‘our report’. Some of the text in this submission is taken from that report.

³ Lee, K. & Wilding, D. 2019, *Industry Bodies and Schemes in the Communications Sector: Rule-making Frameworks and Consumer and Citizen Engagement*, UTS Centre for Media Transition, Sydney. This report is referred to below as ‘*Rule-making Frameworks and Consumer and Citizen Engagement*’.

originates from, or is generated by, consumers and members of the public.

Public participation means an exchange between an industry scheme and consumers and members of the public (relevant to a rule-making initiative) to the extent that it involves dialogue or conversation between them. This may consist of some involvement in the crafting of rules and/or acts of decision-making.

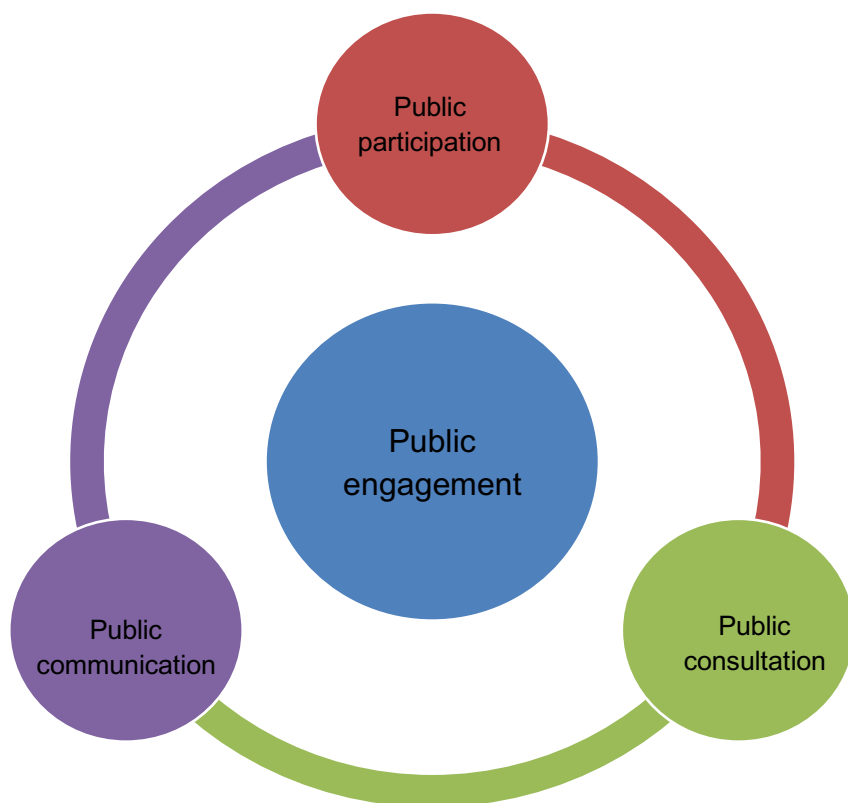


Figure 1: Components of Public Engagement

As part of the project, we identified 20 self- and co-regulatory schemes operating in the advertising, media, and online telecommunications sectors (collectively referred to as the ‘communications industry’).⁴ The schemes included the co-regulatory codes of practice administered by the telecommunications and broadcasting peak bodies, Communications Alliance and Free TV Australia; the self-regulatory press and advertising schemes operated by the Australian Press Council and the Australian Association of National Advertisers; the domain name registration scheme operated by .au Domain Administration Limited (auDA); and the cross-sector rule-making of Standards Australia. Our main focus in the research was the mechanisms these schemes use to engage with consumers and citizens during rule-making.

Of the 20 bodies and schemes we examined in this research, 11 were subject to some form of direct statutory regulation. Only one of these – Communications Alliance (Comms Alliance) – is within scope of the Consumer Safeguards Review. However, Comms Alliance figured prominently in our research as it is responsible for the Australian telecommunications consumer codes and it (in part as its precursor

⁴ We located sufficient information to prepare summaries of the activities of 19 of the 20 schemes, then received comments or other feedback from 16 of the schemes.

organisation, Australian Communications Industry Forum) has been a part of industry rule-making since the introduction of open competition with the *Telecommunications Act 1997* (Tel Act).

In addition, our research is informed by the parallel industry rule-making processes under Part 9 of the *Broadcasting Services Act 1992* (BSA). The framework under which telecommunications and broadcasting codes are registered under Part 6 of the Tel Act and Part 9 of the BSA is similar. However, there are important differences in aspects of registration and, as we found in our research, there are very significant differences in the ways in which consumers and the public are consulted in these rule-making processes.

For the most part, it is this aspect of our research that we draw on for this submission on ways in which the code-making process can be strengthened to improve consumer outcomes.

Table 1 below provides an outline of the statutory frameworks for consumer consultation under the Tel Act and the BSA, as well as the *Interactive Gambling Act 2001* (IGA).⁵

⁵ See p. 17 of *Responsive Engagement*.

Table 1: Statutory requirements of consumer and public engagement in development of co-regulatory codes of practice in Australian media, online and telecommunications sectors

Framework	Part 6, Tel Act	Part 9, BSA	Schedule 5, Part 5, BSA	Schedule 7, Part 4, BSA	Part 4, IGA
Consumer Consultation	One body or association that 'represents the interests of consumers' must be 'consulted' before registration by ACMA	N/A	N/A	N/A	N/A
Public Consultation	Yes	'Members of the public' must be given 'an adequate opportunity to comment' before registration by ACMA	Yes	Yes	Yes
- Place/form of publication	Website	None specified	None specified	None specified	None specified
- Specified period	Min 30 days	None specified	Min 30 days	Min 30 days	Min 30 days
- Publication of submissions	Yes	No	No	No	No
Relevant Industry Bodies	Comms Alliance	ANRA, ACTA, ASTRA, CBAA, CRA, Free TV	Comms Alliance (previously IIA)	Comms Alliance (previously IIA)	Comms Alliance (previously IIA)
Relevant codes	Various, including the Telecommunications Consumer Protections Code	Various codes, including Commercial Television, Subscription Broadcast Television, Commercial Radio, Community Radio, Open Narrowcast Radio	Code for Industry Co-Regulation in Areas of Internet and Mobile Content	Content Services Code	Interactive Gambling Code
Relevant Regulator	ACMA	ACMA	eSafety Commissioner	eSafety Commissioner	ACMA

3. Current requirements under the Telecommunications Act and other legislation

Part 6 of the Tel Act – like Schedules 5 and 7 of the BSA and Part 4 of the IGA – requires industry bodies and associations to publish a draft of the proposed code of practice; to invite members of the public to make submissions within a specified period (ie, not less than 30 days) and to consider any submissions received.⁶ It also requires ACMA to be satisfied that ‘at least one body or association that represents the interests of consumers has been consulted about the development of the code’.⁷

In contrast, Part 9 of the BSA states that ACMA must be satisfied that ‘members of the public have been given an adequate opportunity to comment on the code’.⁸ In 2000, the Productivity Commission recommended that guidelines on the meaning of ‘adequate opportunity to comment’ be developed by the Australian Broadcasting Authority, one of ACMA’s predecessors, but none was ever adopted. The meaning of an ‘adequate opportunity to comment on the code’ is determined by relevant industry bodies and associations in conjunction with ACMA on a code-by-code and case-by-case basis.⁹ However, in the past the ACMA has indicated that any decision is informed by the six general principles of consultation outlined in *Effective Consultation: The ACMA’s Guide to Making a Submission*, published by ACMA in November 2015.¹⁰

Under the Tel Act, draft Part 6 codes must be published on the website of the industry body or association concerned; and since 2014, subject to some exceptions, any submissions made concerning a draft Part 6 code must be published on the website. These requirements are not imposed on codes developed in accordance with Part 9 and Schedules 5 and 7 of the BSA or Part 4 of the IGA, although some broadcasting industry bodies publish submissions made concerning draft Part 9 codes as a matter of practice.

Only Part 6 of the Tel Act includes the requirement for consultation with a consumer body or association.

As a matter of practice, ACMA requires industry bodies and associations to provide a certificate of mandatory consultation signed by a consumer representative body or association to substantiate that they have consulted a consumer representative body or association.¹¹ In addition, industry bodies and associations typically consult with and ask the Australian Communications Consumer Action Network (ACCAN) to sign mandatory consultation certificates. ACCAN receives Commonwealth funding pursuant to s 593(1) of the Tel Act to represent the interests of consumers in relation to telecommunications issues.

Industry bodies and associations are not limited to the forms of consumer and public consultation specified in the legislation. The Explanatory Memoranda for Schedule 5 of the BSA and Part 4 of the IGA state explicitly: ‘The public comment requirements are additional to any opportunities the industry may provide for the involvement of the public or consumer representatives in the code development process’.¹²

⁶ Tel Act pt 6 s 117(1)(f); BSA sch 5, pt 5 cl 62(1)(e), sch 7, pt 4, cl 85(1)(e); IGA pt 4 s 38(1)(e).

⁷ Tel Act s 117(1)(i).

⁸ BSA s 123(4)(b)(iii).

⁹ Interview with ACMA employees (names withheld) (Karen Lee and Derek Wilding, by phone, 22 November 2018).

¹⁰ The document was published on the ACMA website until October 2019 but appears to have been removed as part of a website restructure. It was summarised by ACMA in a document archived by AustLII:

<<http://www5.austlii.edu.au/au/journals/AUCMASphereNlr/2010/34.pdf>>.

¹¹ See, eg, ACMA, Certificate of Mandatory Consultation on an Industry Code under Part 6 of the Telecommunications Act 1997 available at <<https://www.acma.gov.au/register-telco-industry-codes-and-standards>>.

¹² Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999 (Cth) 51; Revised Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999 (Cth) 57; Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth) 52.

4. Current engagement practices used in code development under the Telecommunications Act

The schemes we examined in our research have used one or more of the following 22 mechanisms of public engagement in their rule-making activities:

- Advisory committee
- Advisory council
- Audience feedback
- Complaints data
- Consumer views solicited by consumer body
- Discussion at proposal stage
- Focus group
- Information dissemination
- Meeting with person conducting review
- Meeting with scheme's staff during proposal stage
- Meeting with scheme's staff to discuss draft rules
- Phone submissions
- Public fora
- Review of research by regulator
- Review of previous submissions
- Round table
- Sentiment index
- Surveys of consumers or public
- Working committee
- Written submissions at proposal stage
- Written submissions on issues paper
- Written submissions on draft rules

Thirteen of these were used by Comms Alliance in developing codes under Part 6 of the Tel Act, technical standards and other documentation including industry guidance notes, guidelines and specifications – the highest number of any of the schemes we examined in our research. Below we explain (in alphabetical order) each of these mechanisms used by Comms Alliance and provide examples of when each has been used to develop consumer codes, network and/or operational codes that have an effect of consumers, and related (usually voluntary) guidelines.¹³

More generally, it emerged from our research that specific public engagement mechanisms were determined by the 20 schemes on a 'case-by-case' or 'needs' basis. Often, one of the mechanisms was used in conjunction with one or more of the others. Moreover, some bodies and schemes used other consumer and public engagement mechanisms outside of their rule-making activities that may have indirectly influenced their rule-making activities.

In the case of Comms Alliance, working committees are a key feature of its code-making activity but, until 2008-2009 it also allowed consumer and/or public interest organisations to become members of its organisation.¹⁴ In addition, the CEOs of Comms Alliance and ACCAN meet quarterly. ACCAN and Comms Alliance's Industry Consumer Advisory Group meet annually. Comms Alliance also participates in ACMA's Consumer Consultative Forum, which is an advisory group that consists of ACMA, up to

¹³ Comms Alliance develops three types of codes that have been registered under Part 6 of the Tel Act ('consumer', 'operational' and 'technical' codes). A more comprehensive explanation of the work of Comms Alliance can be found at pages 40-46 of *Rule-making Frameworks and Consumer and Citizen Engagement*.

¹⁴ Consumer and public interest organisations who were members of Comms Alliance were represented on the Comms Alliance board until 2006.

eight representatives from Australian consumer organisations, Comms Alliance, the Australian Mobile Telecommunications Association and the Telecommunications Industry Ombudsman (TIO). Until 2008, Comms Alliance appointed consumer organisations to its Reference Panels and Advisory Groups – standing bodies responsible for specific areas of industry activity.

4.1 Advisory committee

An advisory committee is comprised exclusively of consumer and/or public stakeholder representatives who provide advice about rule development to the scheme itself, its managing director or board or a working committee.

Until 2009, Comms Alliance had two advisory bodies – the Disability Advisory Body (DAB), later known as the Disability Advisory Council (DAC), and the Consumer Advisory Council (CAC), which subsequently became the Consumer Council (CC). The function of DAB and DAC was to advise on the likely impact of proposed rules on disabled end-users and the appropriate methods of consultation with these individuals and those organisations representing their interests.¹⁵ DAB/DAC was comprised of nine members, including a chair, and included organisations such as the Australian Association for the Deaf and Blind Citizens Australia.¹⁶

CAC and CC were responsible for providing consumer ‘input’ into the work of Communications Alliance.¹⁷ CAC was comprised of up to 15 members, which consisted of the chair of DAB/DAC and organisations representing a variety of consumers.¹⁸ When CAC became the Consumer Council, its membership was reduced to 12 members, and included Comms Alliance’s CEO and the chair of the Disability Council.¹⁹

4.2 Complaints data

This mechanism – the second most commonly used public engagement tool employed by the schemes discussed in our report – involves the use of complaints data to inform the development and revision of rules. Complaints are made by consumers and audiences or readers. These complaints may be made to an arm of the scheme itself or to its industry members or to a regulatory body, such as the ACMA or the TIO, each of which resolves disputes and compiles information about them. The data is then given to the relevant rule-makers for consideration. The mechanism was used by Comms Alliance as well as 12 other schemes we examined.

4.3 Consumer views solicited by consumer body

In addition to its other public engagement mechanisms, Comms Alliance expects ACCAN to consult (and ACCAN has consulted) its members when Comms Alliance working committees draft Part 6 consumer codes of practice. For example, as part of the review of the *Telecommunications Consumer Protections Code* (C628:2015 (incorporating variation no 1 2016)) (TCP code), ACCAN consulted its members at two stages: (1) during the (informal) ‘chapter by chapter’ consultation, initiated by the relevant Comms Alliance working committee, on the then current version of the TCP code; and (2)

¹⁵ See, eg, ACIF, *Annual Report 1999* (1999); ACIF, Industry Guideline: Consumer Participation in ACIF and ACIF Processes (2002) 7; DAB, Terms of Reference (28 October 2002).

¹⁶ See, eg, ACIF, *Annual Report 2003* (2003) 82; ACIF, *Annual Report 2004* (2004) 76.

¹⁷ Industry Guideline: Consumer Participation in ACIF and ACIF Processes, above n 15, 11.

¹⁸ *Ibid* 8.

¹⁹ ACIF, Consumer Participation Framework (July 2006) cl 3.1.

during the 'formal' public consultation, required under Part 6 of the Tel Act, on the draft of the revised code.

ACCAN determines how best to consult with its members, and the methods it uses vary depending on the circumstances. During the 'chapter by chapter' consultation on the TCP code in 2018, ACCAN sent an email to its members for whom the code was most relevant. The email included a brief explanation of each chapter of the TCP code, a link to *Telecommunications Consumer Protections Code (C628:2015 (incorporating variation no. 1 2016))*, ACCAN's 'top concerns' and its suggestions as to how each chapter should be amended; and a request to comment on ACCAN's suggestions and provide any additional comments. Where necessary, ACCAN made follow-up calls. ACCAN then generated a single submission informed by member feedback that was made to the Comms Alliance. During formal public consultation on the TCP code, after sending an initial email, ACCAN contacted the members it had previously identified to explain ACCAN's outstanding issues and concerns and encouraged them to make written submissions. ACCAN also made a number of posts about the TCP code to ACCAN's social media accounts (ie, Facebook and Twitter) and created a blog for its website.

4.4 Focus groups with consumers or members of the public

The results of focus groups have been used by Comms Alliance to inform reviews of, and decisions about whether to revise, its codes.

Comms Alliance conducted three focus groups with consumers on Critical Information Summaries²⁰ when revising the *Telecommunications Consumer Protections Code (C628:2015 (incorporating variation no. 1 2016))*.

4.5 Information dissemination

Comms Alliance was one of a number schemes we examined that provided information to the public. Here we treat publication of written submissions as a form of public communication.

We found Comms Alliance has used the following types of information for public dissemination:

- Draft rules
- Explanatory statement
- Issues paper
- Names of rule-makers
- Submissions

Comms Alliance publishes draft codes and standards (and notices of them) on its website.²¹ It also publishes copies of written submissions, received during public consultation, on draft Part 6 codes and related guidelines.

4.6 Meetings with person conducting review

This mechanism involves an individual appointed by the scheme to review rules, or one or more members of the scheme's rule-making committee, interviewing or meeting with consumer organisations and/or interest groups after the rule-making process begins. The interviews or meetings may be requested by the rule-making committee, consumer organisations, or members of the public.

²⁰ Critical Information Summaries include essential information for every product and service offered by a telecommunications provider. They are required under the Telecommunications Consumer Protections Code.

²¹ If Comms Alliance elects to publicly consult during the development of Guidelines and Specifications, the draft Guidelines and Specifications will also be published.

Comms Alliance has held meetings about its consumer, network and operational codes with members of ACMA's Consumer Consultative Forum.

4.7 Meetings with scheme's staff during proposal stage

Schemes that use this mechanism discuss and/or seek input from consumer and/or public interest organisations about the problems and issues that should be addressed by proposed rules *before* internal approval to develop rules is obtained or code development by the rule-making schemes occurs. They discuss the problems and issues that are identified with consumer and public interest organisations.

Among the schemes we studied, Comms Alliance was the only scheme that appears to have regularly used this mechanism.

Comms Alliance advised us that before a consumer Code is developed or revised, ACCAN is notified by the Industry Consumer Advisory Group (ICAG), the Advisory Group of Comms Alliance responsible for 'representing and advancing the interests of Communications Alliance members involved in the delivery of services to end users'.²² ACCAN is also asked to identify its Code-specific concerns and express its views on what needs to be done to address them.²³ Similarly, when a network or operational Code is determined by the relevant Reference Panel or Advisory Group to have an effect on consumers, ACCAN is notified during the proposal phase and its input is solicited. Examples of such Codes include Handling of Life Threatening and Unwelcome Communications,²⁴ Emergency Call Service Requirements,²⁵ Integrated Public Number Database (IPND)²⁶ and Mobile Phone Base Station Deployment.²⁷ While ACCAN may or may not formally be contacted during the proposal phase, depending on whether a Reference Panel or Advisory Group determines a proposed network or operational Code has an effect on consumers, ACCAN is made aware of the proposal or work undertaken by Communications Alliance through quarterly meetings between Communications Alliance and ACCAN.

4.8 Round tables

Round tables have been used on occasion by Comms Alliance. For example, it convened a round table with consumer and advocacy organisations when it developed its *Industry Guideline on Assisting Customers Experiencing Domestic and Family Violence* (G660:2018).

4.9 Surveys of individual consumers or members of the public

Surveys involve the relevant scheme asking individual consumers or members of the public to answer pre-prepared questions. They may be distributed by mail or online.

Comms Alliance was among the schemes we examined that have commissioned, relied upon and/or used surveys to inform the development of their rules. For example, Comms Alliance surveyed

²² However, ACCAN indicated that ICAG does not always notify ACCAN before consumer Codes are developed. Sometimes ACCAN's input is sought only during the public comment phase. Email from ACCAN representative to Derek Wilding and Karen Lee, 11 April 2019.

²³ Regulatory bodies such as the ACMA, the Telecommunications Industry Ombudsman and the Australian Competition and Consumer Commission are also contacted at the outset.

²⁴ Communications Alliance, Industry Code C525:2017 Incorporating Variation No. 1/2018: Handling of Life Threatening and Unwelcome Communications (2018).

²⁵ Communications Alliance, Industry Code C536:2011: Emergency Call Service Requirements Incorporating Amendment No 1/2015(2015).

²⁶ Communications Alliance, Industry Code C555: Integrated Public Number Database (IPND) (2017).

²⁷ Communications Alliance, Industry Code C564: Mobile Phone Base Station Deployment (2011).

consumers about their experiences with Critical Information Summaries when it revised the *Telecommunications Consumer Protections Code* (C628:2015 (incorporating variation no. 1 2016)).

4.10 Working committees, advisory committees or code review bodies

This mechanism allows one or more consumer and/or public interest organisations to serve on an industry working committee, advisory committee or code review body. The committees or body draft recommendations relating to rules, and in some cases may also vote on whether to adopt the changes.

One or more consumer organisations are invited by the ICAG of Comms Alliance to sit on all Comms Alliance working committees developing consumer codes of practice to be registered under Part 6 of the Tel Act. They are also invited by Comms Alliance Reference Panels and Advisory Panels to sit on working committees drafting network and operational codes they believe have an effect on consumers.

Some aspects of the operations of Comms Alliance working committees are explained below.

Recruitment: Comms Alliance directly approached the consumer and/or public interest groups that participated.

Decision-making framework: Members of Comms Alliance working committees draft rules by consensus.

Financial support for participation: Comms Alliance provides travel and accommodation assistance to consumer and/or public interest organisations which participate in working committees. Comms Alliance recoups, from ACMA, money paid to consumer and/or public interest organisations who serve on working committees developing consumer-related industry codes.²⁸

4.11 Written submissions on an issues paper

Comms Alliance has occasionally published issues papers related to the development of consumer codes on which consumers and members of the public may comment. For example, Comms Alliance published an issues paper in 2010 (Comms Alliance 2010) when it reviewed the first version of the *Telecommunications Consumer Protections Code* (C628:2007).

Opportunities for the public and consumers to make written submissions on issues papers have been advertised using multiple methods by the schemes we examined, with Comms Alliance advertising them on its website.

4.12 Written submissions on draft rules

Providing consumers or members of the public with an opportunity to make written submissions on draft rules was overwhelmingly the most common method we found for engaging with the public, with Comms Alliance being one of these.²⁹ As noted above in section 3, under Part 6 of the Tel Act, ACMA must be satisfied that a 'body or association representing a particular section of the telecommunications industry [such as Comms Alliance]' has published a draft code on its website and invited members of the public to make submissions within a specified period before it can register any code under the Act.³⁰

²⁸ See Tel Act ss 136A-136E; ACMA (December 2014), Reimbursing Costs of Developing or Varying Consumer-Related Telecommunications Industry Codes: A Guide for Industry Bodies.

²⁹ When Comms Alliance develops Guidelines, it has the option of providing an opportunity to submit written comments, but such an opportunity is typically given when Guidelines relate to or are incorporated into a Code. See *Rule-making Frameworks and Consumer and Citizen Engagement* (2019, p. 41).

³⁰ Tel Act s 117(1)(f)(1).

Neither the Tel Act nor the BSA (which incorporates similar provisions) refers to written submissions, but as a matter of practice, ACMA has, in part, been satisfied that an adequate opportunity has been provided if industry bodies seeking to register codes allow the public to make written submissions on their draft codes. Comms Alliance voluntarily invites the public to make written submissions when adopting Guidelines.

Procedural aspects of written submissions on draft rules

(i) Means of publicising opportunity to make submissions

Comms Alliance has advertised the opportunity to submit written comments on its websites and has also used social media to advertise opportunities.

Comms Alliance has also invited submissions on its draft codes and other rules in its newsletter *We Communicate*, which is emailed to subscribers. Anyone may subscribe for free.

Comms Alliance has placed notices in national newspapers, such as *The Australian* and *The Sydney Morning Herald*.

It should also be noted that ACMA has supported the publicity efforts of Comms Alliance as well as those of other schemes which require ACMA's approval before the codes they draft can be registered under applicable legislation. ACMA has issued press releases about, and advertised, opportunities to make written submissions to the relevant schemes concerned on its website and social media channels.

(ii) Languages in which opportunity is advertised

Comms Alliance has advertised the opportunity to make written submissions on draft rules only in English.

(ii) Means of submission

Comms Alliance has accepted written submissions by email. It has also accepted written submissions by fax.

(iv) Duration of consultation

The amount of time given by the schemes we examined has varied, depending on the draft rule in question. Comms Alliance provides all interested parties with a minimum of 30 days in which to make a submission on draft Part 6 codes of practice (as is required by the Tel Act)³¹

(v) Multiple opportunities to make written submissions

Most schemes we examined provide only one opportunity to make written submissions on draft rules, but some schemes have occasionally provided two opportunities. Comms Alliance's *Operating Manual* permits the initiation of a second Public Comment Process if an amendment to a Code at the first Public Comment Phase has 'significant impact' (December 2019, s 6.5(b)).

(vi) Publication of written submissions

Since 2014, subject to requests for confidentiality, Comms Alliance will publish written comments if they relate to draft Part 6 codes and related guidelines.³²

(vii) Requirements when accepting or rejecting public comments

³¹ TA ss 117(1)(f)(i), 117(3). See also s 11.3 of Comms Alliance Ltd, *Operating Manual for the Establishment and Operation of Advisory Groups and the Development of Codes, Standards and Supplementary Documents* (December 2019).

³² Publication of comments on draft Part 6 codes is required as a result of the *Telecommunications Legislation Amendment (Consumer Protection) Act 2014* (Cth).

Comms Alliance (when developing Codes and, if it elects to undertake public consultation, when developing Guidelines) has imposed certain requirements if its policy and rule-makers accept and/or reject written comments. Comms Alliance's *Operating Manual* states, 'Reasons for not incorporating certain comments in amended draft document shall be recorded in meeting minutes, and advised to the author of the feedback in writing (unless the author is a member of the Working Committee and has not requested such advice' (s 114(a)).

(viii) Acknowledgement of written submissions

None of the schemes we examined requires its rule-makers to acknowledge and/or provide comments in response to submissions made by individuals and other organisations.

Nevertheless, as a general rule, when Part 6 codes of practice are developed, Comms Alliance has provided a response to all consumer organisations and other private individuals who submit comments. By contrast, all individuals and organisations which submit written comments in response to draft standards receive an acknowledgement of their written comments and a brief explanation of whether their comments were accepted or rejected and for what reasons.³³

5. Comments on these engagement practices

As part of our research we gathered publicly-available information about 20 industry schemes, prepared summaries of their rule-making processes and their mechanisms of public engagement, obtained feedback on the summaries from many of the schemes, conducted interviews with representatives of some of the schemes (including Comms Alliance) and held three separate Round Table consultations for the consumer, industry and government stakeholders. These data gathering activities helped us to gain a richer understanding of the engagement practices used for the development of Part 6 consumer codes. Although Comms Alliance has used a number of different engagement practices, three have been particularly important: (1) written submissions on draft rules; (2) working committees; and (3) consumer views solicited by a consumer body. Therefore, it is worth providing some observations on stakeholder experiences with each of these.

5.1 Stakeholder experience with written submissions

In the consultations for our research, several consumer representatives drew attention to 'motivational barriers' and other obstacles to participation that made it difficult for individual consumers, consumer organisations and members of the public to make written submissions.³⁴ One such barrier was 'submission fatigue', which ACCAN later suggested to us was closely connected to the limited resources available to consumer organisations. In its experience, the costs of preparing submissions were disproportionately higher for small consumer organisations relative to the benefit they obtain from making written submissions (than they are for larger industry organisations), and it is these costs that contribute to submission fatigue.

Other barriers mentioned by consumer representatives at the Round Table included: the lack of 'trust that if you're going to put time into doing a submission ... that anything is going to come out of it' and the absence of feedback from industry following submission of written comments. Several consumer representatives also agreed with this statement made by one such representative:

³³ See *Rule-making Frameworks and Consumer and Citizen Engagement*, p.45

³⁴ Barriers to participation, including 'motivational barriers' are discussed more fully in section 5.4 below where we mention the work of Farina et al (2012). See Farina, C., Newhart, M., Heidt, J. & CeRI (2012), 'Rulemaking vs. democracy: judging and nudging public participation that counts', *Michigan Journal of Environmental & Administrative Law*, vol. 2, no. 1, pp. 123-172.

the main downfall of written submissions is that often you get the impression that it's already a bit of a done deal, because something's already been drafted by people who think they know what we need and ... you're not always convinced that a written submission is going to be heard ...

A regulator representative acknowledged, 'Written submissions have got a lot of weaknesses if you rely on that as your only method of getting consumers or the public to consider a matter, but if you combine that with various other [public engagement mechanisms] it actually creates a stronger edifice.' Another regulator representative suggested industry calls for written submissions on draft rules, if made during investigations undertaken by public regulators, such as ACMA's *Reconnecting the Consumer* inquiry (September 2011), can significantly increase the number of submissions received because of the publicity regulatory investigations generate.

5.2 Stakeholder experience with working committees

Comms Alliance stated having a body such as ACCAN serve on its consumer code working committees was:

invaluable ... despite numerous disagreements and everything else The complexity of any rule-making that any of us go through is such that the history of the conversations, the different debates, the different opinions – having an organisation that has the technical and historical knowledge to engage in those conversations makes them much more efficient.

An ACMA representative also saw the value in consumer delegates serving on working committees and saw them as a 'superior tool' for consumer and public engagement. He stated:

the benefit of a working committee is that it can really tease out issues quite extensively ... if there's a really complex issue that's not easy to solve... The benefit of a working committee is it can pull issues apart, get different perspectives on them and then try to put something back that makes sense.³⁵

However, participation on working committees requires a 'significant time commitment', especially when issues are complex and contentious, and few organisations can afford to put in the time and resources needed. It was also suggested that the power balance on industry working committees, which formulate rules by consensus, may affect the dynamics of issues under discussion.

TIO representatives submitted that it might be possible to reduce the time and resources required by consumer organisations to participate on working committees by involving them in discussions on 'high level' matters at different stages rather than 'looking at each individual line of a very complex code'. Consumer organisations might 'bow out' when drafting is undertaken and return when principles need to be agreed. However, ACCAN told us:

While this suggestion would alleviate the resource demands placed on ACCAN, much of the substance of code reforms turn upon the specific drafting of code clauses. As a consequence, if [it were not] involved in the discussions on the drafting of code protections, it is very unlikely that codes would provide much if any substantive protections for consumers where there are divergent interests between consumers and industry.

Among other consumer representatives, there were mixed views about whether consumer participation on working committees improves the development of Comms Alliance codes of practice. One representative was quite positive. The representative from Women's Legal Service NSW said Comms Alliance had become more responsive to its input 'when it's about the consumer information, but when it's about actually changing what they do, to meet our needs, that door's as shut as it ever was.' The Consumer Action Law Centre representative referred us to the Consumers' Federation of Australia's *Good Practice Principles: Consumer Advocate Involvement and Expectations of Development and Reviews of Industry Codes and External Dispute Resolution (EDR) Schemes*, which recommends

³⁵ This individual's views may not necessarily represent ACMA's position on this matter.

(among other things) an ‘independent person or reviewer [ie, a person with no direct relationship with the relevant industry] to develop or review a code of practice’ (23 April 2018, p. 2).

After the Consumer Round Table, ACCAN also told us it would prefer an equal number of industry and consumer representatives appointed to working committees drafting significant consumer codes such as the *Telecommunications Consumer Protections* code. In its view, equal representation would strengthen the voice of consumers and enable vulnerable consumers to be better represented. We were advised Comms Alliance has appointed an equal number of representatives in the past, but no longer follows this practice. The cost of appointing additional consumer representatives to working committees could be funded through the ACMA code reimbursement scheme.³⁶

In addition, ACCAN suggested that one of the reasons why current participation arrangements on working committees may not lead to effective consumer protection measures is because ACMA is not required to assess consumer harm when determining if a code should be registered under Part 6 of the Tel Act.³⁷

5.3 Stakeholder experience with representative bodies soliciting consumer views

The Comms Alliance representative told us that Comms Alliance ‘rel[ies] so heavily on ACCAN’ and ‘trust[s] them to get that word out [about the drafting of codes] for several reasons. First, ACCAN has ‘more direct consumer relations in the media [and] in their work’. Second, Comms Alliance is not particularly well equipped to engage directly with consumers. Its role is ‘to engage with industry’ and its social media presence is targeted to that end. For example, whereas the Comms Alliance website may be difficult for a consumer to use, the ACCAN website is ‘well built. It’s easy to access. It’s easy to read and understand. It doesn’t have jargon.’ Third, Comms Alliance is ‘very shy of engaging directly with consumers, because as soon as we start to do that we will receive every complaint ever ... and that’s not [its] role.’ Fourth, ACCAN is able to ‘take a lot of diverse viewpoints and then amalgamate them’. It presents Comms Alliance with a ‘decision’. Unlike Comms Alliance which does not have ‘the remit or knowledge to make those decisions’, ACCAN is ‘comfortable playing that role of mediator between those different community organisations that are making the decision’. However, it was also acknowledged that the drawback to relying on ACCAN meant Comms Alliance does not ‘get all of the information out of the different debates’.

The ACCAN representative stated a body such as ACCAN makes it ‘easy for industry’ because it is ‘much more efficient to talk to one organisation than 50.’³⁸ However, she strongly rejected our suggestion that ACCAN might perform the function of an intermediary in this context:

we consult with our members to respond, but ... that doesn’t mean consumer organisations can’t respond ... We want them to respond as much as possible. It’s just the reality is people have very limited resources. It’s really hard for them to respond. We keep an eye on what’s going on. We try to let people know what’s going on. We try to let people know what we think are the important issues and support them if possible, to respond ...

She later added, ‘it’s very hard [engaging with vulnerable groups]. I mean in terms of when we formulate positions, we consult with our members, but we go beyond our members, too. We consult with lots of consumer organisations and also with experts.’

³⁶ See ACMA (July 2019), *Reimbursing Costs of Developing or Varying Consumer-Related Telecommunications Industry Codes: A Guide for Industry Bodies*.

³⁷ The question of whether the Part 6 code registration process needs to be amended to empower consumer representatives on working committees was outside the scope of our report, but we believe it merits further consideration. We address this issue in section 7 below. On consumer harm generally, see Department of Communications (May 2014), *Regulating Harms in the Australian Communications Sector: Observations on Current Arrangements: Policy Background Paper No 2*; DOCA (October 2016), *Review of the Australian Communications and Media Authority: Final Report*.

³⁸ The person representing the Council of Small Business Organisations Australia (COSBOA) also agreed a single organisation such as ACCAN was more efficient.

Nevertheless, the representative from the Consumer Action Law Centre (which represents ‘vulnerable consumers and those experiencing disadvantage’ and is a member of ACCAN) stated industry does view ACCAN as a ‘funnel’. She said, ‘We’ve felt that we’ve had trouble sometimes in providing direct feedback on that to the industry body, even when they have asked for public submissions, for example, on public consultation.’ She also observed:

ACCAN does a really good job of bringing together everyone’s views, but they also have to bring them together into one cohesive view, so if other groups were more permitted by the industry to be involved from the earlier – from the start, then there probably would be a wider diversity of views and maybe particularly from vulnerable people ...

Other representatives of consumer organisations (all of whom were members of ACCAN) suggested ACCAN was successful because it could be ‘trusted’ to accurately represent the views of their members to Comms Alliance. ACCAN was also seen as particularly useful because it created a ‘space’ where ‘a lot of different organisations but with similar issues ... could compare notes’. The CWA representative stated, ‘the actual gathering together of people not only adds weight to their voices, but it also provides a better space to bounce those ideas around.’ Similarly, it is much easier for industry ‘outsiders’ to approach ACCAN. As one representative said, ‘industry fragmentation, the code, the regulatory fragmentation is a huge part of the problem and it burns off probably more than everybody’.

5.4 Observations on achievements and failings in current engagement practices

Our review of participant views enables us to draw some conclusions about the performance of engagement practices undertaken for Part 6 consumer codes, even though problems in accessing data prevents us from making any comprehensive assessment.

In general, the following aspects appear to be particular problems encountered in public engagement on telecommunications consumer codes.

- **Missing stakeholders.** Consumer, industry and government representatives all acknowledged that stakeholders from some communities have been missing from consumer engagement activities. As well as vulnerable communities like homeless individuals and women escaping domestic violence, they include stakeholders such as small businesses and individuals residing in regional, rural and remote areas of Australia who are missing from industry public engagement exercises. They do not participate even though they have ‘information [known by them] about impacts, problems, enforceability, contributory causes, [and] unintended consequences’³⁹ of rules proposed by industry that affect them. Similar problems have been experienced in other industries and other jurisdictions, as we discuss at some length in our report.⁴⁰ In addition, it can be difficult to obtain participation from ‘the average consumer’. Instead, Comms Alliance has relied on representative bodies.
- **Reliance on written submissions.** These missing stakeholders confront a number of barriers to participation, including technical complexity and motivational barriers such as competing demands for their time and attention, distrust of the rule-maker and cynicism about the likely effect public engagement will have on the final outcome. However, one of the most significant barriers is a lack of awareness about the opportunities to submit written comments. As noted in section 4.12(i) above, Comms Alliance publicises invitations to make written submissions via different means, and relies on ACCAN to consult its members, but many individual consumers and citizens, including those living in regional, rural and remote areas, are unlikely to know who Comms Alliance is.

³⁹ Cynthia R Farina, Mary Newhart, Josiah Heidt and CeRI, (n 34) 148.

⁴⁰ See pp 72-80 of *Responsive Engagement*.

- **Timing.** Consumer representatives emphasised that public consultation often occurs too late, especially if Comms Alliance and other schemes are genuinely interested in reaching vulnerable people and obtaining ‘a wider diversity of views’. For consumer representatives, earlier involvement had the advantage of increasing the likelihood that relevant issues were brought to the fore; creating trust and making the rule-making process more credible.

The following aspects appear to enhance the prospects of consumer-focussed outcomes.

- **Multiple engagement practices.** In addition to three mechanisms considered in some detail in sections 5.1-5.3 above, Comms Alliance has used a number of other engagement practices on an ad hoc basis and appears to be open to considering other options. This is important in avoiding the situation that arises with broadcasting codes where often the single engagement opportunity constitutes written submissions on draft code amendments posted on an industry website. That approach exacerbates the problems associated with barriers to participation and with consultation commencing too late in the code development cycle.
- **Working committees.** Among the 20 schemes we examined, the formation of working committees was the only example we could find of the more comprehensive engagement practices described by leading regulatory scholars Rowe and Frewer as ‘participatory’, meaning a two-way practice that differs from the one-directional nature of ‘communication’ or ‘consultation’ activities.⁴¹ Comms Alliance has used this mechanism far more widely than other industry schemes, and while some reservations have been expressed by consumer groups, the inclusion of consumer representatives on working committees appears to lift the telecommunications consumer codes above others in terms of meaningful consumer input.
- **An active consumer body.** The role of ACCAN as an organisation funded to participate in telecommunications consumer code development is another distinguishing aspect of the telecommunications sector. This allows for the time commitments involved in participating in working committees, but more generally, the membership base of ACCAN means it can draw on diverse consumer experience, in some cases offering the only way of addressing participation barriers.

6. Measures to assist consumers

In this section we offer some recommendations on how engagement practices could be improved. The 14 recommendations are taken directly from Chapter 6 of our report, where they are all explained in more detail. As these comments are based on the findings of research that includes industry schemes other than Comms Alliance, some are more relevant than others to the terms of the Consumer Safeguards review. For example, Recommendations 13 and 14 relate specifically to the circumstances that could arise if a ‘Converged Communications Act’ is developed, and are not addressed further in this submission. However, we reproduce all of our recommendations here because the Consultation Paper indicates that the Department is specifically interested in the ‘post-2020 environment’. Aspects of communications convergence, as well as the need to seek, where possible, efficiencies in regulatory practices of related sectors, means that a coordinated approach may be of more value than a strictly segmented approach.

Recommendation 1: Industry schemes could consider adopting the following range of measures to facilitate the participation of consumers and citizens in their rule-making processes:

⁴¹ These terms are defined on p. 13 of *Responsive Engagement*, based on Rowe and Frewer (2005). In Chapter 4, we review this and other approaches; propose a variation to Rowe and Frewer’s scheme; and classify the engagement mechanisms we observed in the Australian communications industry schemes. See Rowe, G. & Frewer, L.J. (2005), ‘A typology of public engagement mechanisms’, *Science, Technology & Human Values*, vol. 30, no. 2, pp. 251-290.

- publishing all consultation documents on a single website hosted by a government regulator such as ACMA which should also publicise these engagement opportunities (via its communication channels)
- issuing marked-up (redline) versions of proposed rules
- publishing statements explaining how consultation processes have shaped the rules they have adopted and writing directly to individuals explaining if their comments were accepted or rejected, and if rejected, why
- involving consumers and citizens during the ‘formative stage’ of rule-making by seeking their input into issue papers, including the formulation of any questions they pose
- soliciting customer participation by advertising opportunities to comment on draft rules in bill messages and/or via email
- using information layering and plain English explanations of terminology.

Recommendation 2: If industry schemes experience difficulties reaching a critical mass of individual consumers or citizens, they could tailor their consumer and public engagement practices so that an adequate range of consumer and citizen views is solicited.

Recommendation 3: Industry schemes could provide consumer and public interest organisations with easily accessible, plain English summaries of proposed rules and related background for distribution to consumer and citizen stakeholders.

Recommendation 4: Industry schemes could develop libraries of submissions made by consumer and public interest organisations, and a regulator such as ACMA or the eSafety Commissioner could develop an electronic repository, accessible by all industry schemes, of submissions made by consumer and public interest organisations.

Recommendation 5: Industry schemes could seek the input of consumer and public interest organisations during the ‘formative stage’ of rule-making by seeking their input into issue papers, including the formulation of any questions they pose.

Recommendation 6: Schemes could make greater use of surveys and focus groups, compensating participants for their time, and consider making use of citizen juries and/or deliberative polling.

Recommendation 7: All industry schemes could consider appointing consumer and public interest representatives to their working committees when drafting and/or revising rules with a significant impact on consumers and citizens.

Recommendation 8: Industry schemes could seek to engage consumer and public interest organisations when they identify and frame issues.

Recommendation 9: All industry schemes should (at an absolute minimum) be expected to publish their rules in draft and provide consumers, citizens and related organisations with an opportunity to make written submissions.

Recommendation 10: The legislative frameworks that underpin co-regulatory rule-making in the media, online and telecommunications sectors should be harmonised through the setting of standard, minimum requirements for consumer and citizen consultation.

Recommendation 11: When developing codes of practice under a co-regulatory legislative framework, industry schemes could seek to build on the input from representative bodies by conducting some form of direct engagement with consumers and citizens where this might address known gaps in representation.

Recommendation 12: The extensiveness of industry public consultation for co-regulatory codes should turn on the impact the proposed rules are likely to have on consumers and the wider public; ACMA could set expectations of industry to assist in this.

Recommendation 13: ACCAN’s remit could be expanded to include customer-related aspects of content service provision; the Government should then provide ACCAN with the additional funding it needs to perform this new function.

Recommendation 14: ACCAN’s remit could be expanded or a similar body could be funded to provide representation of citizen interests in the communications industry, including in their interaction with digital platforms.

Please also note that in a submission to the Department earlier this year, we suggested the proposed Digital Technology Hub (DTH) could play an important role in overcoming the lack of awareness barrier we identified in our research. For example, it could have a dedicated webpage that highlighted opportunities for citizens and consumers to participate in industry engagement exercises, including opportunities to submit written comments, along with some information about the particular scheme that is undertaking the engagement activity. Information included on the DTH would reinforce efforts already being made by industry and by a government regulator. As we explain in *Responsive Engagement*, encouraging greater consumer and citizen engagement by reducing barriers to participation is desirable because it is said to make industry regulation more responsive and effective.

7. Applying these findings to the issues raised by Proposal 2 in the Consultation Paper

While the issue of consumer engagement in industry rule-making was the subject of the research we conducted in 2018 and 2019, we draw on this and other experience in private practice, advocacy, research and teaching in commenting on the following related issues raised in the Consultation Paper.

As a general comment, we support the Department’s objective for ‘strengthening the self-regulatory framework to set tighter parameters around the industry code making process’ (p. 24).

For convenience, we reproduce here Proposal 2, the principle supporting it, and the issues on which the Department seeks comment.

Proposal 2

The telecommunications consumer protection rule-making process should be reformed to improve its effectiveness.

The industry code-making process could be strengthened. For example:

- the triggers for ACMA to request and/or register a code could be changed
- more flexibility could be provided to ACMA in setting timeframes for code development
- the test for code registration could be strengthened
- the period of time a code must be registered before ACMA can request that code deficiencies be remedied could be reduced; and
- ACMA could be given the ability to make a standard where no code had been requested or an existing code found to be deficient.

Alternatively (or in addition), ACMA or the Minister could develop essential consumer protection rules through direct regulation.

- Industry codes would continue to be used, but would focus on providing guidance to industry on secondary, process and technical matters.

This proposal is based on the following principle:

Principle 3: The rule-making process should be timely, efficient, enable a wide range of views to be considered and produce clear, targeted rules.

- The rule-making process will be less effective if it is unable to address emerging issues quickly, is overly burdensome for participants, and is unable to effectively balance/resolve contested issues and provide clarity for industry and consumers.

Issues for comment

1. What role should direct regulation, industry codes and guidelines play in a revised safeguards framework?

Our research on consumer engagement in Tel Act Part 6 code development is the only comprehensive review of this aspect of communications co-regulation in Australia. It builds on an earlier study by one of the authors examining the circumstances in which industry rule-making is likely to meet the internationally recognised conditions of responsiveness.⁴² Our findings published in *Responsive Engagement* demonstrate that, compared to other industry schemes in the communications sector, Comms Alliance has performed well in involving consumers in code development in ways that are not perfunctory or short-lived. In this respect, it is a contrast to the experience in code development under Part 9 of the BSA. Nevertheless, commentary in the international literature and the comments of consumer and government stakeholders in our research suggest that in future, consumer engagement should – at the very least – be nothing less than what has been conducted by Comms Alliance (and its predecessor ACIF) to date. Indeed, although other schemes are in greater need of improvement, there are still areas (as indicated above) in which consumer engagement in Part 6 code development could and should be enhanced.

It also needs to be recognised that a significant level of investment is required to maintain current levels and to promote responsiveness. Responsive engagement can be expensive and time consuming, and a decision by government to maintain the current direction with co-regulation would also require a commitment to meet these costs or to continue to support the funding of them via charges placed on telecommunications carriers.

In our view, on most aspects affecting consumer choice and fairness, the public interest will be better served by a renewed commitment – including an enhanced financial commitment – to responsive co-regulation, rather than by reverting to direct (government) regulation. While there will always be a need for some matters to be the subject of government intervention, direct regulation rarely provides opportunities for consumer engagement that are superior to those used by Comms Alliance. While there are some shortcomings in the design and application of Part 6 of the Tel Act, Part 6 (as implemented by Comms Alliance and ACMA in practice) provides the opportunity for public and consumer engagement in the shaping of rules, not just an opportunity to comment on industry plans. In short, it offers consumers a ‘seat at the table’ that is rarely provided, even by government.

Co-regulation is commonly justified on the basis that it creates opportunities for better targeted rules, and better rules are said to lead to better regulatory outcomes. Co-regulation creates opportunities for better targeted rules because it allows government to draw on greater expertise and access specialist information and resources. Greater expertise and specialist information and resources are usually associated with industry input and the desirability for

⁴² Lee, K. (2018), *The Legitimacy and Responsiveness of Industry Rule-Making*, Hart Publishing, Oxford, UK.

regulatory solutions that are grounded in industry practice. However, capturing consumer and public input is equally valuable. This point is illustrated in the case studies provided in the previous work of one of the authors in relation to *Industry Code ACIF C625: Information on Accessibility Features for Telephone Equipment Code (2005)*:

The central issue involved the information equipment suppliers had to provide. Its resolution turned to a significant degree on the information people with disabilities needed to assess if phone equipment was appropriate for their particular circumstances. All consumer and disability representatives were knowledgeable about those issues and could draw on developments in the UK and elsewhere. One had involvement with Cost 2019, a European Community-funded project which among other things, considered accessibility features and telephone equipment. Another was trained electronics engineer with over 10 years' work experience modifying electronics equipment for individuals with physical disabilities. The third representative co-wrote an extensive report on accessibility features in 1998. As one consumer and disability representative stated, with some exceptions, equipment manufacturers were the ones lacking knowledge of the issues surrounding disability.⁴³

This example shows the potential offered by responsive forms of co-regulation, where experienced consumer representatives are directly involved in rule formation. It is a potential unlikely to be met by alternative forms of government regulation.

We offer this view on the desirability of a co-regulatory environment noting that we are addressing only its rule-making aspect, and that there are other aspects of co-regulation (eg, those relating to enforcement) under consideration in this review, which may affect overall conclusions about the mix of regulatory approaches. We also note that voluntary instruments such as guidelines may be effective in relation to some matters, other than those dealt with in the TCP Code and other consumer codes, which require a coordinated and consistent industry approach.

2. How could the code-making process be strengthened to improve consumer outcomes and industry compliance?
 - a. Based on our research, we propose that the Tel Act be amended to set a new objective for industry bodies to engage comprehensively with the public, especially in circumstances where there is likely to be widespread application or significant consumer impact. While Comms Alliance has performed well in deploying mechanisms such as working committees that include consumer representatives, the legislative framework should provide a surer footing for individual consumers to be involved in developing rules that directly affect them and should encourage the exploration of new forms of engagement that address known participation barriers. The Tel Act also needs to be adapted to further assist the work of consumer representatives who already participate in the Part 6 process.
 - b. To support these objectives, the statutory criteria for registration of a consumer code under Part 6 should be varied to require ACMA to be satisfied that certain minimum engagement levels have been reached (except in the case of minor modifications to existing codes). These minimum requirements could include the following:
 - i. the extent of public and consumer consultation must reflect the likely impact of the proposed rules on consumers and the wider public
 - ii. the industry body has consulted at least one representative consumer organisation early in the code development/review process (ie, at the issues-

⁴³ Ibid 112.

- gathering stage) and has appointed consumer or public members to a working committee to draft the code
- iii. the industry body has published an issues paper before issuing draft rules/variation, to allow for public comment at two stages; and
 - iv. the industry body has made reasonable efforts at inclusivity and addressing participation barriers in its engagement practices.
- c. In addition to these minimum requirements, the Tel Act should give the ACMA powers to specify the mechanisms of engagement industry bodies should use in specific circumstances. In section 6 above we present various specific proposals for enhancing engagement activities (eg, using focus groups or round tables to elicit responses on complex issues; issuing marked-up versions of code revisions). Some of these could be included in the set of measures considered by the ACMA. A more general requirement could be that consultation documents of an industry body are deposited with the ACMA or another communications hub so there is a central point for communications industry consultation.
 - d. Related to these aspects of code registration, the Consultation Paper (p.15) notes that ‘the test for registering codes is low and subjective’ and that the current legislative provisions might prompt ACMA to make an overall decision on the code when there might be a need for amendments/improvements to specific provisions. On p.24 it proposes new provisions ‘specifying that ACMA must refuse to register sub-optimal codes or code provision(s), and can require changes to sub-optimal provisions, for example, to address consumer concerns or lack of clarity in provisions’ and ‘providing a higher threshold for code registration beyond providing “appropriate community safeguards”’. We agree with these comments and suggest that the test, at least for consumer codes, requires that the ACMA be satisfied that the code will improve consumer outcomes (eg, by having a material effect in addressing consumer harms or by enhancing consumer safeguards).
 - e. In our view, the Tel Act should also be varied to allow public and consumer members of a working committee to present to the ACMA, collectively, an alternative version of the code for registration, in circumstances where agreement has not been reached by the committee despite the good faith efforts of working committee members. A more far-reaching proposal is for the Tel Act to give consumer organisations that meet certain criteria the power to develop consumer codes and to seek registration by the ACMA. Under this scenario, it would be consumer organisations that would have an obligation to promote and manage engagement in code development, and the ACMA would need to gauge the impact on suppliers before making a decision to register the code. This approach might be particularly suited to some aspects of consumer protection that would benefit from a consumer-driven approach, and would help to provide incentives for industry to address the areas of concern raised by consumer representatives.
 - f. Finally, the Consultation Paper (p.14 and p. 24) notes the length of time taken to develop some codes and contemplates this as a reason for moving to government regulation. In our view, delays in code development should be addressed by placing an obligation on ACMA to monitor working committee progress and a power to impose its own deadlines if milestones set by the working committee are not met. Problems with time management should not be a reason to revert to government regulation without adequate exploration of possible measures that incentivise all parties to conclude code development in a timely fashion. As mentioned in 1 above, co-regulation provides opportunities for consumer engagement that are in most cases superior to direct regulation.

3. Are current constraints on ACMA's power to make industry standards regulating consumer safeguards appropriate?
 - i. The Consultation Paper (p.14) notes that ACMA can only request that industry develop a code in certain circumstances. On p. 24 it proposes 'ACMA could be given "reserve" powers to make consumer protection rules without first requesting a code or finding a code deficient, where it is satisfied that prompt, direct action is necessary'. Notwithstanding our support for co-regulatory fora, we support this proposal for two reasons. First, as the Paper suggests, it allows fast responses to urgent situations that could lead to consumer harm. Second, it provides an incentive for industry participants to develop genuine and effective co-regulatory processes.