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Towards Responsiveness: Consumer and Citizen Engagement in Co-Regulatory Rule-Making in the Australian Communications Sector

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Abstract

This article begins the process of evaluating the adequacy of the procedural and substantive requirements that Australian communications regulators (and hence industry bodies) must satisfy before co-regulatory codes of practice can be registered. It considers if the procedural requirements relating to consumer and public consultation, included in the statutory frameworks that authorise and govern co-regulation in the media, online and telecommunications sectors, ensure co-regulatory rule-making is sufficiently responsive to the interests of consumers and citizens. Drawing on publicly available information about seven industry bodies that have drafted codes of practice and round table discussions with industry, consumers and regulators, the article highlights that the current engagement practices of industry bodies often fall short of the 'democratic credentials' of responsiveness. It suggests that the code registration criteria relating to consumer and public consultation must be overhauled if these weaknesses are to be rectified.

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I Introduction

Over the last three decades, co-regulation—'when [an] industry develops its own code or accreditation scheme and this has legislative backing'[1]—has become an important component of the framework used to regulate the Australian communications sector. Since as early as 1992, 'bodies and associations' representing traditional broadcasters—providers of free-to-air television and radio services and subscription broadcasting services[2]—have had the right to draft codes for registration by the Australian Communications and Media Authority (ACMA) and its predecessors. Bodies and associations representing 'sections of the telecommunications industry' acquired the right in 1997.[3] Bodies and associations representing '[t]he internet service provider section of the internet industry' obtained the right in 1999[4] and 2001;[5] and 'sections of the content industry' in 2007.[6] All are expected, and in some cases may be requested,[7] to formulate codes and seek their registration with ACMA or the eSafety Commissioner, who are obliged to register any codes they submit for registration provided they meet specified statutory criteria. If industry bodies and associations (industry bodies) do not develop codes or registered codes developed by them 'fail', then ACMA or the eSafety Commissioner may, in specified circumstances, adopt an industry standard.[8] Since being given the responsibility to draft codes, industry bodies have drafted numerous codes dealing with a variety of matters such as content and programming standards, billing, complaint handling and debt collection, the best known of which are the *Commercial Television Industry Code of Practice* and the *Telecommunications Consumer Protections Code* (TCP Code).[9] The former imposes obligations relating to matters such as accuracy in news, classification of programs and restrictions on advertising; the latter imposes obligations, among others, relating to advertising, sales, contracts and credit management.

1. This definition, which reflects widespread understanding of the term within the communications industry in Australia, was adopted in Department of Communications, *Regulating Harms in the Australian Communications Sector: Observations on Current Arrangements* (Policy Background Paper No 2, May 2014) 10 ('*Regulating Harms*'). In this article, we differentiate co-regulation, as defined above, from self-regulation (meaning voluntary rules developed by industry without legislative backing or regulator enforcement) and direct regulation (meaning legislation and rules developed under legislation by government or regulators). Our approach is largely consistent with how the terms are used in the 2014 Policy Background Paper (see pp 6 and 15), except that we use 'direct regulation' in place of 'black letter law'.
2. See *Broadcasting Services Act 1992* (Cth) ('*BSA*') pt 9. Although the *BSA* in 1992 anticipated codes for subscription television broadcasting services (pay TV), these services did not commence until 1995.
3. See *Telecommunications Act 1997* (Cth) ('*TA*') pt 6.
4. See *BSA* (n 2) sch 5 pt 5 (introduced by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth)). Codes must deal with matters such as procedures to ensure children do not access online accounts without the consent of parents or responsible adults.
5. Part 4 of the *Interactive Gambling Act 2001* (Cth) ('*IGA*') refers to 'a body or association' that 'represents internet service providers'.
6. See *BSA* (n 2) sch 7 pt 4 (introduced by the *Communications Legislation Amendment (Content Services) Act 2007* (Cth)). 'Sections of the content industry' include hosting service providers, live content service providers, links service providers and commercial content service providers; in all cases, the services must have an Australian connection.
7. See, eg, *TA* (n 3) s 118; *BSA* (n 2) sch 5 pt 5 cl 63; *IGA* (n 5) s 39; *BSA* (n 2) sch 7 pt 4 cl 86.
8. *BSA* (n 2) s 125; *TA* (n 3) ss 123, 125; *BSA* (n 2) sch 5 pt 5 cls 68, 70; *IGA* (n 5) ss 44, 46; *BSA* (n 2) sch 7 pt 4 cls 91, 93. With the exception of Part 9 of the *BSA*, comparable powers to develop industry standards exist in the other four frameworks if there are no bodies or associations representing industry interests.
9. See Free TV Australia, *Commercial Television Industry Code of Practice* (2015); Communications Alliance Ltd, *Industry Code C628: Telecommunications Consumer Protections Code* (2019).

As the regulatory framework is adapted for the converged communications industry, co-regulation is likely to remain a feature of the communications regulatory landscape. This is so, even though government itself has questioned whether co-regulation should be 'the default approach to dealing with regulatory harms'.[10] In practice, government and regulators have recently relied on (or are intending to rely on) both self-regulation and direct regulation[11] to address problems confronting the industry. While self-regulation is being used in relation to disinformation and news quality on digital platforms,[12] new rules were issued by ACMA to address difficulties experienced by consumers when transitioning to the NBN (difficulties that were attributed in part to weaknesses in the co-regulatory TCP Code[13]), and new legislation has been proposed to address the bargaining imbalance between Australian news media businesses and Google and Facebook (where initial attempts as self-regulation were curtailed by government intervention).[14] Nevertheless, in its final report on the review of ACMA published in 2017, the then Department of Communications identified 'promot[ing] the greatest practical use of co-regulation and self-regulation' as an important principle of regulatory design. The Australian Competition and Consumer Commission then noted that the same principle should inform the development of the harmonised, platform-neutral media regulatory framework it recommended in its Final Report of its Digital Platform Inquiry.[15] And in December 2019, the then Department of Communications and the Arts proposed that a wider range of online service providers be permitted to develop 'principles-based codes' that address 'harmful content'.[16]

However, even though co-regulation has been a feature of the communications landscape for the last 28 years and is likely to be in the future, there has been no comprehensive review or assessment, by academic scholars, government and regulators,[17] of the adequacy of the procedural and substantive requirements that communications regulators (and hence industry bodies) must satisfy before codes are registered.

This article begins that process. It considers whether the procedural requirements relating to consumer and public consultation included in each of the five statutory frameworks that authorise and govern co-regulation in the sector ensure co-regulatory rule-making is sufficiently responsive to the interests of consumers and citizens. It asks whether amendments are needed to the five frameworks which require ACMA or the eSafety Commissioner to be satisfied that either

10. *Regulating Harms* (n 1) 44; Department of Infrastructure, Transport, Regional Development and Communications, *Consumer Safeguards Review: Part C/Choice and Fairness Consultation Paper* (July 2020) 10 ('*Consumer Safeguards Review*').
11. See above n 1 for definitions of self-regulation and direct regulation.
12. See, eg, Australian Communications and Media Authority (ACMA), *Misinformation and News Quality on Digital Platforms in Australia: A Position Paper to Guide Code Development* (June 2020).
13. Joint Standing Committee on the National Broadband Network, *The Rollout of the National Broadband Network: 1st Report of the 45th Parliament* (29 September 2017) 98–9. For an example of the new ACMA rules, see the *Telecommunications (NBN Consumer Information) Industry Standard 2018* (Cth).
14. See, eg, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Cth); Explanatory Memorandum, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Cth).
15. See, eg, Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (July 2019) ch 4.
16. See Department of Communications and the Arts, *Online Safety Legislative Reform: Discussion Paper* (December 2019) 40–1.
17. At the time of writing, the Department of Infrastructure, Transport, Regional Development and Communications is undertaking a review of Part 6 of the *TA* (n 3). See generally *Consumer Safeguards Review* (n 10).

'members of the public have been given an adequate opportunity to comment on the code' before registering broadcasting codes[18] or industry bodies have 'invited members of the public to make submissions' about draft codes within a specified period.[19] It also considers if an obligation 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', currently imposed on ACMA when it registers a code applicable to sections of the telecommunications industry, should be revised and incorporated into all current and future statutory frameworks governing co-regulation.[20]

The article starts by defining responsiveness—a principle of regulatory design which calls for sensitivity to the 'targets of regulation'[21] that has been highly influential since the 1990s—but which has never been clearly delineated. It will be argued that responsiveness should mean the weighing up of alternatives and determination of what, on balance, meets the needs of all stakeholders; the exercise of some independent judgement by industry; the disclosure by industry to participants in the rule-making process of information necessary to hold it to account; and the explanation and justification by industry of its position to others.

After identifying the seven industry bodies that currently participate in co-regulatory rule-making in the media, online and telecommunications sectors, the article then sets out their rule-making frameworks and the mechanisms they use to engage with consumers and citizens. Their engagement mechanisms are considered in detail because the statutory obligations of consumer and public consultation were intended by Parliament to be 'additional to any opportunities the industry may provide.'[22] It will be highlighted that the seven industry bodies have used a range of mechanisms, during the different stages of rule-making, to involve consumers and citizens and understand their concerns. However, with some notable exceptions, they tend to involve consumers, citizens and related organisations late in the process (ie, after regulatory issues have been framed and rules have been drafted) and to rely on two engagement mechanisms: complaints data collected by themselves or a regulatory body, and the provision of an opportunity to make written submissions on draft codes. Moreover, when assessed against the criteria of responsiveness adopted in this article, industry's reliance on the engagement mechanisms of complaints data and written submissions, appears to fall short because consumers and citizens confront a number of 'barriers to participation'[23]—the same (or similar) barriers that have hindered their participation in traditional administrative rule-making. The article concludes by suggesting that the code registration criteria relating to consumer and public consultation should be overhauled if these weaknesses are to be remedied.

As both the rule-making activities of industry bodies and code registration processes of the regulators are confidential, our analysis draws primarily on empirical data gathered during round

18. This obligation applies to ACMA when registering codes under Part 9 of the *BSA* (n 2).
19. This obligation applies to ACMA when registering codes under Part 6 of the *TA* (n 3) and under Part 4 of the *IGA* (n 5); and to the eSafety Commissioner when registering codes under Schedules 5 and 7 of the *BSA* (n 2).
20. See *TA* (n 3) s 117.
21. Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119, 128.
22. See, eg, 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.
23. Cynthia Farina et al, 'Democratic Deliberation in the Wild: The McGill Online Design Studio and the Regulation Room Project' (2014) 41(5) *Fordham Urban Law Journal* 1527, 1550 ('Democratic Deliberation in the Wild').

table discussions with industry, consumer and regulators.[24] It also draws on the limited information about the internal rule-making processes of industry bodies that could be found in the public domain. All publicly available information that could be located was summarised and provided to each industry body for comment. Feedback and/or additional information were received from six of the seven industry bodies that engage in co-regulatory rule-making in the communication sector.

II The Purpose of Public Engagement in Co-Regulatory Rule-Making

Before identifying the seven industry bodies which have drafted codes and explaining their rule-making frameworks and mechanisms of consumer and public engagement, it is essential to identify the underlying purpose for which their consumer and public engagement mechanisms are being used. This often overlooked step is important because, as scholars of participation design emphasise, clarification of purpose can avoid wasted time and effort and minimise conflict that differing sets of expectations, held by interested parties, may cause.[25]

Freiberg has noted that engagement with those who might be affected by or have an interest in regulation is a requirement of good regulatory process, and indeed, of public policy in general.[26] He also notes that engagement is needed for a range of practical purposes such as understanding the nature of a problem and how people might be affected by regulatory proposals.[27] ACMA has explained the purpose of public consultation in the following terms: 'Public consultation on a draft code must take place to allow community concerns to be identified and evaluated'.[28]

It is suggested here that the function of public engagement in co-regulatory rule-making should be evaluated by reference to responsiveness. Responsiveness is suggested because it has been and remains a highly influential principle of regulatory design. It underpins many of the best known strategies of regulation, such as 'responsive regulation',[29] 'smart regulation',[30] 'democratic experimentalism',[31] 'collaborative governance'[32] and 'really responsive regulation',[33] that encourage

24. One round table was held for each set of stakeholders. The Consumer and Regulator Round Tables were held on 9 May 2019; the Industry Round Table was held on 10 May 2019. All round tables were semi-structured. The Industry Round Table included representatives from bodies engaged in self-regulatory rule-making and bodies engaged in co-regulatory rule-making.
25. See, eg, John M Bryson et al, 'Designing Public Participation Processes: Theory to Practice' (2013) 73(1) *Public Administrative Review* 23, 26.
26. Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) 158.
27. 'Consultative and inclusive' are some of several matters Freiberg nominates as the 'principles of good regulation': Freiberg (n 26) 157–69.
28. ACMA, 'The ACMA Registers New Commercial Television Industry Code of Practice' (Media Release 56/2015, 10 November 2015).
29. See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008).
30. Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998).
31. Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2) *Columbia Law Review* 267.
32. See, eg, Chris Ansell and Alison Gash, 'Collaborative Governance in Theory and Practice' (2008) 18(4) *Journal of Public Administration Theory and Practice* 543.
33. Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *The Modern Law Review* 59.

industry actors to participate in regulatory activities, including rule-making, once seen as the exclusive duties of the state. Indeed, for each strategy, responsiveness is a prerequisite for regulatory effectiveness—the achievement of the public policy goals set by the state. The desire to be responsive has also been cited as a justification, if not the sole justification, for co-regulation by governments, legislators and policymakers in Australia and worldwide. For example, the explanatory memoranda that accompanied the legislation that enables traditional broadcasters in Australia to develop and seek the registration of codes stated the rationale for its provisions was the desire to avoid the 'social costs' of 'formal regulation' that 'can deprive industry of the opportunity to devise a flexible and *responsive* approach to meeting the demands and needs of the community'.[34]

Despite its influence in regulatory and government circles, as we note below, responsiveness has largely been understood in terms of compliance and enforcement, rather than in relation to rule-making; this may explain the absence of a clear and comprehensive definition of the term. We suggest that, in the rule-making context, it describes a process that accords with the *rationales* that underpin the principles of procedural and institutional legitimacy in legislative and administrative rule-making in democratic countries—two of the four values of the rule of law that are said to give law its legitimacy. The legitimacy of rules and rule-making can also be socially constructed; individuals and organisations accept rules and rule-making for numerous reasons, one of which may be compliance with rule of law norms.[35] However, in our view, responsiveness (as properly understood in the regulatory literature on which we draw) is not concerned with the various reasons why individuals and organisations perceive rules and rule-making to be legitimate. Rather its focus is to ensure the minimum requirements of procedural and institutional legitimacy of the rule of law are satisfied.

A The Meaning of Responsiveness

The vast majority of the regulatory literature dealing with responsiveness has focused on its requirements in the context of compliance and enforcement.[36] Because of the literature's focus, it is assumed that responsiveness centres exclusively on the relationship of regulators with their regulatees and the factors regulators should consider when seeking to enforce and ensure compliance with the law[37]—factors such as enforcement 'styles',[38] 'motivational postures',[39] 'the operating and cognitive frameworks of firms' and the 'institutional environments' of regulatory

34. Explanatory Memorandum, Broadcasting Services Bill 1992 (Cth) 66–7 (emphasis added). The same statement appears in Explanatory Memorandum, Broadcasting Services Bill 1992 (Cth) (Revised) 61.
35. See, eg, Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *Academy of Management Review* 571; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137.
36. This point is made by Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7(1) *Regulation & Governance* 2, 4; Karen Lee, *The Legitimacy and Responsiveness of Industry Rule-making* (Hart, 2018) 208; Seung-Hun Hong and Jong-sung You, 'Limits of Regulatory Responsiveness: Democratic Credentials of Responsive Regulation' (2018) 12(3) *Regulation & Governance* 413, 414.
37. Hong and You (n 36) 414.
38. Peter J May and Robert S Wood, 'At the Regulatory Front Lines: Inspectors' Enforcement Styles and Regulatory Compliance' (2003) 13(2) *Journal of Public Administration Research and Theory* 117.
39. See, eg, Valerie Braithwaite et al, 'Regulatory Styles, Motivational Postures, and Nursing Home Compliance' (1994) 16(4) *Law & Policy* 363.

regimes (among others).[40] However, the concept of responsiveness is also relevant to the rule-making context, and it is increasingly being recognised and emphasised that responsiveness, as envisaged by its leading architects, should not be confined to the narrow technical understandings often associated with it.[41] Rather, it needs and has an explicit normative democratic underpinning—an underpinning that requires regulators and regulatees to take into account 'the needs of the broader public, including stakeholders and the general public'[42]—if the pitfalls of regulatory capture[43] are to be avoided. Two approaches to understanding responsiveness in the context of rule-making are considered before we evaluate them and set out the definition we will use to assess consumer and public engagement practices of industry bodies in Section IV.

1 Approaches. Writing about the confidential code development process of the Communications Alliance (Comms Alliance), which represents sections of the telecommunications industry and—since the Internet Industry Association (IIA) ceased its operations in 2014—internet service providers and other providers that constitute sections of the content industry, one of the co-authors has suggested that responsiveness should be defined by reference to the rationales that underpin the principles of deliberation, impartiality, transparency and accountability—the four principles that give procedural and institutional legitimacy to rule-making by legislative and administrative bodies.[44]

Three reasons for adopting this approach are given. First, the rationales for deliberation, impartiality, transparency and accountability are consistent with the principle of non-domination, central to republican theories of democracy.[45] This principle implicitly underpins Ayres and Braithwaite's *Responsive Regulation: Transcending the Deregulation Debate* and the four techniques of responsive enforcement they develop therein: the pyramid, tripartism, enforced self-regulation and partial-industry intervention. Second, deliberation, transparency, accountability and impartiality are compatible with pluralism and deliberative democracy—the other two theories of democracy that it has been suggested provide a normative basis for the various regulatory strategies mentioned earlier.[46] Third, use of these standards is consistent with the conceptions of law and society assumed by proponents of these strategies. These include the ideas that society is divided into a series of autonomous spheres, and the function of law is to coordinate the 'impact' the various spheres have on each other by using procedural mechanisms that seek to encourage dialogue, participation and deliberation between the different spheres.[47]

Under this approach, deliberation retains its original meaning—'the weighing up of alternatives and determination of what (on balance) meets the needs of all stakeholders'.[48] However, the precise meanings of impartiality, transparency and accountability are revisited and adjusted in

40. Baldwin and Black (n 33) 59.
41. See, eg, Julia Black, 'Proceduralizing Regulation: Part 1' (2000) 20(4) *Oxford Journal of Legal Studies* 597, 607; Lee (n 36); Hong and You (n 36).
42. Hong and You (n 36) 418.
43. See, eg, Ayres and Braithwaite (n 29) 54–5; Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12(1) *Journal of Public Policy* 61; Dorit Rubinstein Reiss, 'The Benefits of Capture' (2012) 47(2) *Wake Forest Law Review* 569.
44. Lee (n 36) 12–13, ch 9.
45. See, eg, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press, 1997) ch 2.
46. Black, 'Proceduralizing Regulation: Part 1' (n 41) 607.
47. For the arguments developed in full, see Lee (n 36) 209–22.
48. Ibid 225.

order to decouple them from the mechanisms that lawyers believe confer procedural and institutional legitimacy when legislators and administrators engage in rule-making (mechanisms such as 'the hard look doctrine', 'disinterested and professional' administrative decision-makers and judicial review), and to ensure they remain relevant when industry is permitted to take part in (or assume responsibility for) the formation of legally binding rules.[49] Impartiality, which is commonly understood as acting without self-interest, is modified to mean whether industry has considered the relevant concerns of others before it reaches it decisions: in other words, whether it has exercised 'some independent judgement'.[50] Rather than imposing an obligation of full and complete disclosure of information to the public, transparency mandates 'the disclosure of a sufficient amount of relevant information by industry to enable stakeholders and others to hold it to account'.[51] Instead of entitling principals such as citizens to 'seek information, explanation and justification'[52] from agents such as Parliament and to impose some form of sanction retrospectively if they fail to comply with their instructions, the focus of accountability becomes a search for 'real-time' mechanisms that ensure industry answers for its decisions or explains itself to others.

The traditional definition of impartiality was adapted because requiring industry bodies to satisfy that threshold was unrealistic; industry would automatically fail to meet any such test. It was also inconsistent with the central purpose of allowing industry bodies to formulate their own rules: channelling self-interest by requiring industry to take the interests and concerns of all other parties into account. Expecting industry to consider the relevant concerns of others before it reached it decisions, it was argued, was more consistent with the aim of industry rule-making and served the same function that a traditional understanding of impartiality was intended to encourage: listening to the views of all parties during discussion and critical assessment of the merits of their arguments.[53]

Transparency, which has frequently (but not exclusively) been understood to require full and complete disclosure, was more narrowly defined because industry rule-making often takes behind closed doors, and if such a 'strong-form' conception of transparency[54] were adopted for this context, industry bodies would automatically fail this requirement too. However, provided industry disclosed a sufficient amount of relevant information to key stakeholders, directly involved in the rule-making process—including consumer representatives—the confidentiality of industry rule-making could be reconciled with the two underlying objectives of wider conceptions of transparency: ensuring deliberation is not compromised by the presence of the self-interests of lawmakers and facilitating accountability of rule-makers.[55]

The traditional analytical framework of accountability, which typically centres around questions of 'who is accountable?', 'to whom?' and 'for what?',[56] was judged to be inappropriate for evaluating rule-making by the Comms Alliance because it is premised on three assumptions that cannot be made in that context: (1) the existence of some form of hierarchy between a principal and agent; (2) the ability of the principal to clearly specify policy goals; and (3) accountability is

49. Ibid 192–204.
50. Ibid 198.
51. Ibid 12, 194, 195.
52. Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 9.
53. Lee (n 36) 197–8.
54. See, eg, Mark Fenster, 'The Opacity of Transparency' (2006) 91(3) *Iowa Law Review* 885.
55. Lee (n 36) 193–4.
56. See, eg, Colin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* 38, 41.

'retrospective', ie, it is a process that occurs after an agent has carried out the particular tasks requested by the principal. The existence of some form of hierarchy between a principal and agent could not be assumed, it was argued, because it was difficult to conclude Comms Alliance is an agent of Parliament given the underlying enabling legislation does not technically give Comms Alliance any power to make legally binding rules; ACMA, not Comms Alliance, determines if rules acquire the force of law. Yet it was also difficult to classify ACMA as an agent of Parliament given co-regulatory rule-making is a process led by industry. The enabling legislation also does not provide industry bodies such as Comms Alliance with much (if any) direction about the content of the rules they may adopt, and any guidance that is provided falls well short of the 'precise instructions' that the principal-agent model presumes. Finally, if goals cannot be set and monitored in advance, any evaluation process cannot be conducted retrospectively. For these reasons, it was suggested that accountability should be understood to involve the imposition of a requirement that industry bodies such as Comms Alliance answer for their decisions or explain themselves to others throughout the code development process.[57]

A different approach to responsiveness is taken by Hong and You. Drawing on the work of Selznick,[58] they suggest that responsiveness imposes two inter-related conditions: 'comprehensiveness' and 'proactiveness'.[59] Both must be satisfied in the contexts of rule-making, compliance and enforcement, according to Hong and You, if responsiveness is to acquire democratic legitimacy. Comprehensiveness is the idea that an institution must be responsive to 'those upon whom the institution depends; and to the community whose well-being it affects'.[60] Proactiveness is the need for institutions to 'reach out',[61] 'gather voices as diverse as possible' and 'seek to respond not only to expressed but also unexpressed demands [of social needs]'.[62] They argue both conditions are essential components of Selznick's notion of 'institutional responsiveness'[63]—a concept that also influenced Ayres and Braithwaite's classic text and, in particular, their concept of tripartism, which involves empowering public interest groups so (along with regulators and regulatees) they may participate effectively in the regulatory enforcement process.[64]

In order to satisfy the conditions of comprehensiveness and proactiveness, according to Hong and You, responsiveness must be connected to 'a variety of accountability mechanisms.'[65] Recognising that citizens and other parties affected by regulatory decisions do not elect regulators and regulatees and thus cannot hold them accountable directly, they emphasise the need to link responsiveness to mechanisms of 'indirect reciprocity'[66]—the achievement of the objectives of

57. Lee (n 36) 201–3.
58. See, eg, Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992); Philippe Nonet and Philip Selznick, *Law & Society in Transition* (Transaction Publishers, 2001).
59. Hong and You (n 36) 418.
60. Ibid 419, quoting Selznick (n 58) 338.
61. Ibid 422.
62. Ibid 420.
63. For Selznick, an institution (whether public or private) is responsive if it has integrity. However, to have integrity, the institution must have both autonomy and sensitivity to the wider environment in which it operates (ie, a capacity to 'outreach to others' without undermining its autonomy): Selznick (n 58) 334–45. See also Hong and You (n 36) 418–19.
64. See Ayres and Braithwaite (n 29) ch 3.
65. Hong and You (n 36) 420.
66. Ibid.

accountability via the use of indirect means. To that end, they suggest their concept of 'overlapping networked responsiveness'.[67] Hong and You never clearly define this term, but, in essence, it consists of multiple 'chains' of 'networked responsiveness'—the creation or existence of avenues through which community members and others may appeal to politicians and/or other stakeholders who are in a position to apply pressure directly on regulators or regulatees to take action or alter their position in light of community concerns. NGOs, trade unions and media are provided as examples of stakeholders who could perform this function. Promoting accountability is Hong and You's principal focus, but they also point out that overlapping networked responsiveness 'acts in the way that . . . deliberation works', ie, it promotes the contestation of ideas,[68] and a 'transparent flow of information' is essential for its success.[69]

2 Evaluation. The two approaches have some clear differences. Identification of the rationales that procedural and institutional legitimacy have in common with responsiveness is the basis for the first approach. The second relies predominantly on Selznick, although it too is informed by republicanism and its concern for non-domination. Under the second approach, comprehensiveness and proactiveness are seen as additional factors that need to be considered along with others already found and emphasised in the enforcement and compliance literature; Hong and You expressly state it is not their 'intention that the proposition for democratic regulatory responsiveness replaces the current understanding of responsive regulation'.[70] The first approach, on the other hand, goes further (at least in the rule-making context). It sees responsiveness as subsuming the underlying concerns of procedural and institutional legitimacy with the rationales for the principles of deliberation, impartiality, transparency and accountability emerging as measures that can be used to evaluate if co-regulation and other forms of industry rule-making are responsive. Notwithstanding their differences, however, both approaches make explicit the democratic foundations of responsiveness and provide benchmarks against which public engagement by industry rule-makers could be assessed.

Nevertheless, subject to one modification, the first approach is adopted in this article because the criteria of the exercise of some independent judgement; the disclosure of a sufficient amount of relevant information by industry to enable stakeholders and other others to hold it to account; ensuring industry explains itself to others; and weighing up of alternatives and determination of what (on balance) meets the needs of all stakeholders more accurately capture the limits and conditions under which co-regulation and other forms of industry rule-making should operate. No stakeholders in the process (be they regulatees, regulators and public interest groups) are truly impartial. Yet if co-regulation and other forms of industry rule-making are to succeed interested parties must be willing to consider the views of others and that necessitates the exercise of some degree of independent judgement—a test that an industry body could satisfy, for example, if it provided evidence that alternative ideas put forward by others were examined, with reasons given for accepting or rejecting those ideas, and these reasons were tested by other stakeholders in an inclusive process.[71] However, because impartiality is so closely associated with the absence of

67. Ibid.
68. Ibid 421.
69. Ibid 422.
70. Ibid 423.
71. See, eg, ACMA, *Guide to Developing and Varying Telecommunications Codes for Registration* (September 2015) 25. Evidence that rules subsequently adopted by the industry body fail to address identified regulatory problems may also indicate that an industry body has not exercised independent judgement.

self-interest, we propose this criterion of responsiveness should be referred to as the requirement of '*consideration*' to avoid any possible confusion. The test of *transparency* acknowledges that a sufficient amount of relevant information by industry and others must be disclosed to enable stakeholders and others to hold them to account, but equally it recognises that full disclosure to the public may not always be feasible or desirable, especially in circumstances where the aim is to encourage industry bodies to engage in full and frank discussion in order to critically analyse and assess their practices. The definition of *accountability* is also consistent with Hong and You's concept of indirect reciprocity. It reflects the shift from hierarchy to heterarchy that scholars of responsive regulation[72] call for and accepts that the premises on which traditional accountability mechanisms are based cannot be assumed when strategies of responsive regulation are deployed. Equally, it opens up the possibility of a range of mechanisms that may serve as functional substitutes for traditional accountability—mechanisms such as overlapping networked responsiveness. Finally, the requirements of consideration, transparency and accountability (as defined) all promote robust *deliberation*, which is consistent with law's central purpose in the 'decentred' state and the way Hong and You envisage accountability should operate when techniques of responsive regulation are used.

III The Industry Bodies, Their Rule-Making Frameworks and Mechanisms of Consumer and Citizen Engagement

A The Industry Bodies

Seven industry bodies (all companies limited by guarantee) have drafted codes of practice currently registered with ACMA or the eSafety Commissioner: Australian Community Television Alliance (ACTA), Australian Narrowcast Radio Association (ANRA), Australian Subscription Television and Radio Association (ASTRA), Communications Alliance (Comms Alliance), Community Broadcasting Association of Australia (CBAA), Commercial Radio Australia (CRA) and Free TV Australia (Free TV). Comms Alliance represents the sections of industry described above.[73] The other six industry bodies represent different types of broadcasters. ACTA represents free-to-air community television channels; ANRA, 'low and high power open narrowcast radio service [providers]';[74] ASTRA, subscription television and radio broadcasters; CBAA, community radio broadcasters;[75] CRA, commercial radio broadcasters;[76] Free TV, free-to-air commercial television licensees.[77]

72. See, eg, above nn 29–33.
73. See above Section II(A)(1).
74. Its members provide a range of radio programming from 'rhythms to ethnic essentials, spiritual support to racing results' and include the Big Country Radio network, Adventist Radio Australia and Coolstream Radio: ANRA, *ANRA Members* (Web Page) <https://www.anra.org.au/members>.
75. It has more than 300 members which include stations such as Brisbane Youth Radio and Jewish Australian Internet Radio.
76. CRA has 260 members including 2 GB, Nova and 2Day.
77. Free TV's members include the Seven Network, the Nine Network, Network Ten, Prime Television, WIN, Southern Cross Austereo and Imparja Television.

B Their Rule-Making Frameworks

The boards of ASTRA, CBAA and Free TV initiate code development, review and revision. At Free TV, the industry body that developed the *Commercial Television Industry Code of Practice* referred to in the introduction, a Code Review Group comprised of member representatives undertakes rule-drafting and related decision-making.[78] At CBAA, the secretariat drafts codes; a Code Advisory Committee provides advice and feedback on them. At ASTRA and ANRA, their boards or their secretariats draft their codes, and they consult with their members during the process. CRA said it 'jointly developed' its code with ACMA, but the CRA's internal rule-making process is likely to be similar to those of ANRA, ASTRA, CBAA and Free TV. The boards of each of these five industry bodies must approve the final version of any code.[79]

By contrast, code development within the Comms Alliance, the industry body that developed the TCP Code mentioned earlier,[80] is initiated by Reference Panels or Advisory Groups—two types of standing bodies, comprised of Comms Alliance members, responsible for a specific area of industry activity. If approval from the CEO of Comms Alliance is obtained, a working committee 'representative' of interested parties—those 'who have a stake in or are affected by the subject matter of the proposed code'[81]—is established; it is responsible for drafting the code by way of 'consensus'. Following publication of the code in draft and consideration of any written submissions, members of the working committee formally vote to decide if the code should be approved. If approved, the code is then submitted to Comms Alliance's board, which decides if the code should be adopted and registered with ACMA or the eSafety Commissioner.[82]

As we note in Section IV below, the confidentiality that attaches to the rule-making processes of industry bodies makes it difficult to obtain specific information about particular instances of rule-making and the mechanisms industry bodies used to engage with citizens and consumers, although Lee's in-depth historical case studies of three consumer codes[83] developed by working committees established under the auspices of Comms Alliance provide some insight.[84] There is equally a lack of information on the extent to which the results of consumer engagement affect the decision-making of regulators, at the point of registering a draft code of practice. Some indication of the exchange between the ACMA and Free TV in 2015 in relation to the finalisation of the *Commercial Television Industry Code of Practice* is provided by published comments from parties. A representative from Free TV noted that ACMA only registered the code after a number of changes

78. At CBAA, 'other relevant stakeholders' are also involved.
79. Several attempts to contact ACTA for information about its procedures were unsuccessful, and it did not participate in a round table. The inability to contact them may have been due to the June 2018 announcement of the Minister for Communications that the three remaining community television broadcasters must vacate the terrestrial spectrum by 30 June 2020: see the Hon Mitch Fifield, 'Community Television Broadcasters Granted Two Year Licence Extension' (Media Release, 1 June 2018)
80. See above Section I.
81. Communications Alliance Ltd, *Operating Manual for the Establishment and Operation of Advisory Groups and the Development of Codes, Standards and Supplementary Documents* (December 2019) s 7.1 ('*Operating Manual*').
82. See ibid ss 6–9.
83. They included *Industry Code ACIF C620: Consumer Contracts* (2005), *Industry Code ACIFC625: Information on Accessibility Features for Telephone Equipment* Code (2005) and *Industry Code C637: Mobile Premium Services* (2009).
84. She found that the involvement of consumer representatives on Comms Alliance working committees was a significant contributor to the legitimacy and responsiveness of the three codes in question, but written submissions made by members of the public played an insignificant role: Lee (n 36) 237.

were made to its draft code as a result of both public consultation and consultation with the ACMA.[85] Then in a media release to announce registration of the code, the chair of ACMA made the following observations:

> This code is the product of a robust engagement between the ACMA, the commercial television sector and its audiences, manifest in submissions made by individual viewers and advocacy groups,' Mr Chapman said. 'The ACMA is precluded by law from registering a code which does not contain appropriate community safeguards. The ACMA is satisfied that the process of engagement with Free TV and the wider community has resulted in a new code which, taken as a whole, meets this requirement.[86]

C Their Mechanisms of Engagement

To provide a structure to the discussion and analysis that follows, the mechanisms of engagement used by the seven industry bodies have been classified into *four forms of consumer and citizen engagement*: data collection, public communication, public input and public dialogue.[87] Each category broadly reflects the 'flow of information'[88] or the extent of dialogue between an industry body and consumers or citizens that likely occurs as a result of the engagement mechanism.[89] Throughout the discussion, *four functions of rule-making* that industry bodies perform when deploying the engagement mechanisms are highlighted. These four functions are: fact-finding (which involves an industry body identifying, understanding and describing industry and consumer/citizen practices and the environments in which they take place); identifying and describing regulatory issues (which involves an industry body identifying, understanding and evaluating the aspects of the business practices of its members that raise regulatory concerns); formulating regulatory approaches and rules;[90] and monitoring and assessing operation of rules.[91]

The industry bodies considered in this article have used one or more of 13 different mechanisms of consumer and citizen engagement[92] and have often used one mechanism in conjunction with one or more of the others.

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85. Clare O'Neil, 'New Commercial Television Industry Code of Practice' (2016) 35(1) *Communications Law Bulletin* 1, 2.
86. ACMA (n 28).
87. In this article, references to 'public' in public communication, public input and public dialogue include citizens and consumers.
88. Gene Rowe and Lynn J Frewer, 'A Typology of Public Engagement Mechanisms' (2005) 30(2) *Science, Technology & Human Values* 251, 254–5.
89. While we have drawn heavily on the classification approach developed by Rowe and Frewer (n 87), we elected to create a fourth category of public engagement mechanisms—data collection—because of the importance of information about consumer and citizen experiences that industry bodies usually, but not exclusively, acquire from third parties, such as the Telecommunications Industry Ombud and research conducted by ACMA.
90. The term 'rules' is adopted here because in some instances it may be preferable for an industry body to adopt something other than a code such as an industry guideline.
91. The functions are a reflection of the different stages in the regulatory process and the various 'duties' of rule-makers. On the importance of stages in the regulatory process, see, eg, Julia Black, 'Involving Consumers in Securities Regulation' (Taskforce to Modernize Securities Regulation, 2006) 19–21. On the duties of legislators, see Luc J Wintgens, *Legisprudence: Practical Reasons in Legislation* (Ashgate Publishing, 2012) 294–304.
92. Comms Alliance has used certain other consumer and public engagement mechanisms outside of its rule-making activities that may have indirectly influenced its rule-making activities. For example, until 2008–09, Comms Alliance allowed consumer and/or public interest organisations to become members of its organisation.

All mechanisms have been adopted voluntarily unless otherwise noted.

1 Data Collection. Six of the seven industry bodies (ANRA, ASTRA, Comms Alliance, CBAA, CRA and Free TV) engage in some form of data collection—the acquisition and collation of pre-existing data about industry practices related to the subject of a potential rule or an existing rule, or about some aspect of the operation of the rule.

Complaints data—data about complaints made by consumers, viewers and listeners to members of an industry body, or a regulatory body, such as ACMA, the eSafety Commissioner or the Telecommunications Industry Ombud (TIO), which provides the data to the relevant industry body—are the second most commonly used engagement mechanism. However, review of research into the experience of listeners, viewers and others carried out by, or on behalf of, a regulatory body or law reform commission (review of research) is also used. During the Industry Round Table, representatives from four media-related industry bodies that are the subject of this article said audience feedback often provided 'instant response[s]' about programming content via Messenger, Facebook and other means,[93] but no one provided an example of how audience responses to programs might feed into code review activities, as distinct from the daily activities of an audience relations or audience analysis team.

Complaints data and review of research are used primarily in the initial stages of fact-finding, the first rule-making function. However, they are also used by industry bodies in connection with the fourth function of rule-making, monitoring and assessing the operation of rules (once adopted).

Minimal data collection appears to occur in connection with the second and third functions of rule-making (identifying and describing issues and then formulating regulatory approaches and code rules for the issues identified). Industry bodies may use data collected during fact-finding when performing these other functions. However, it is also likely that, when performing these other functions, the more specific information obtained from the use of public input and dialogue mechanisms (considered below) supplants the data collected in fact-finding and when monitoring and assessing the operation of rules.

2 Public Communication. Mechanisms of public communication—the provision of information about a rule-making initiative to consumers or citizens—are not used by any industry body when conducting fact-finding or monitoring or assessing the operation of rules. Only Comms Alliance has sought to convey information to the public while identifying and describing issues: it has on occasion published issue papers relating to the development of 'consumer codes' on its website.[94] By contrast, all seven industry bodies have used one of two mechanisms of public communication when formulating regulatory approaches and rules: dissemination of information by publication on their websites, social media channels and/or other outlets such as newspapers and radio stations, and holding meetings with consumer and public interest organisations to explain and answer questions about proposed codes following their publication in draft.

All seven industry bodies publish their draft rules. As noted above, the legislative frameworks authorising co-regulatory rule-making in the online and telecommunications sectors mandate that

93. Statement by a representative from an organisation whose name was withheld (Industry Round Table, 10 May 2019).
94. Consumer codes, one of three types of codes Comms Alliance has adopted, generally relate to telecommunications goods and services that are delivered to residential and small businesses customers and grant some form of rights or protections to them.

ACMA or the eSafety Commissioner, before registering a code, must be satisfied that the industry body concerned has published a draft of it. In contrast, Part 9 of the *Broadcasting Services Act 1992* (Cth), applicable to ACTA, ANRA, ASTRA, CBAA, CRA and Free TV, does not explicitly require publication of a draft code: it states only that ACMA must be satisfied that 'members of the public have been given an adequate opportunity to comment on the code'. The meaning of an 'adequate opportunity to comment on the code' is determined by relevant industry bodies in conjunction with ACMA on a code-by-code and case-by-case basis. In practice, however, ACMA has always required the relevant industry body to publish its codes in draft in order to satisfy this obligation.[95]

Other information published when formulating regulatory approaches and rules includes notices about draft codes (ASTRA, Comms Alliance, CRA, Free TV); press releases (ASTRA, CRA, Free TV); explanatory guides, discussion papers and overviews of principal proposed changes (Comms Alliance, CRA, Free TV); written submissions received during public consultation (Comms Alliance, CRA, Free TV[96]); and the names of the individuals who serve on code working committees (Comms Alliance).

With few exceptions, copies of the information that the seven industry bodies conveyed to consumers and citizens when engaged in public communication could not be located, making further analysis difficult.

In addition to dissemination of information by publication, CBAA and Free TV have met with consumer and citizen interest organisations to explain, and answer questions about, draft codes after they have been published.

3 Public Input

(a) Mechanisms Deployed. The seven industry bodies have used seven different mechanisms of public input, which consists of opportunities for consumers and citizens to respond to invitations issued by an industry body to supply information to it.[97]

Overwhelmingly, the most commonly used engagement mechanism is the provision of an opportunity to make a written submission. However, advisory committees,[98] focus groups, meetings with consumer/citizen interest organisations, and employees of industry bodies or persons engaging in code development on their behalf (collectively referred to below as meetings),[99] phone submissions, round tables and surveys have been deployed as well.

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95. Interview with ACMA employees (names withheld) (Karen Lee and Derek Wilding, by phone, 22 November 2018). During the interview, we were also told that ACMA's approach to satisfying this requirement was informed by the six general principles of consultation outlined in ACMA, *Effective Consultation: The ACMA's Guide to Making a Submission* (November 2015), but this document no longer appears on ACMA's website.
96. Since 2014, subject to some exceptions, Comms Alliance is required to publish on its website any submissions made concerning a draft code developed under Part 6 of the *TA*. See *TA* (n 3) s 119B. A similar requirement is not imposed on industry bodies that develop codes in accordance with Part 9 and Schedules 5 and 7 of the *BSA* (n 2) or Part 4 of the *IGA* (n 5), but CRA and Free TV have in recent years published the written submissions they receive.
97. This category is the same as Rowe and Frewer's category of 'public consultation'. Its name has been changed because the one-way nature of information flow from consumers or the public to the industry body is better captured by the term 'input' rather than 'consultation'.
98. These are committees comprised exclusively of consumer and/or public stakeholder representatives who provide advice about rule development to the industry body or its working committees.
99. Meetings may be requested by employees of the industry body, the members of its rule-making committee or consumer and public interest organisations.

When formulating regulatory approaches and rules, each of the seven industry bodies has afforded the public an opportunity to make written submissions on draft codes. This is because ACMA[100] has insisted upon it in order to satisfy itself that the requirements of public consultation in each of the applicable statutory frameworks have been met.[101] However, Comms Alliance has also solicited written submissions in response to issue papers relating to the development of consumer codes (ie, when identifying and describing issues).

The other six public input mechanisms have been used by Comms Alliance and CBAA, but neither body has used all of them. Comms Alliance has used advisory committees (until 2009), focus groups, meetings and surveys. CBAA has used focus groups, round tables, meetings and phone submissions. Comms Alliance and CBAA have used these mechanisms when formulating regulatory approaches and rules. CBAA does not appear to have used any of the six public input mechanisms during issue identification or when monitoring or assessing the operation of code rules. However, Comms Alliance has held meetings with, or otherwise sought comment from, the Australian Communications Consumer Action Network (ACCAN)—the peak organisation representing communications consumers in Australia—during issue identification and when monitoring and assessing the operation of consumer codes such as the TCP Code and other codes[102] that Comms Alliance believes have an effect on consumers. In addition to these mechanisms, the CEOs of Comms Alliance and ACCAN meet quarterly, and ACCAN and Comms Alliance's Industry Consumer Advisory Group, responsible for 'represent[ing] and advanc[ing] the interests of CA [Communication Alliance] members involved in the delivery of services to end users',[103] meet annually. ACCAN's views on the appropriateness of rules may be discussed during these meetings.

(b) Procedural Aspects of Written Submissions. There are a number of procedural matters involving written submissions. Below we briefly explain the practices of the seven industry bodies in relation to three such matters because they appear to contribute (at least in part) to the barriers to participation identified and discussed in Section IV.

(i) Means of Publicising Opportunity to Make Submissions. ASTRA, CBAA, CRA, Comms Alliance and Free TV have used various means to publicise the opportunity to make written submissions and, in many instances, they have used multiple publicity mechanisms concurrently. All have advertised opportunities to make written submissions on their websites, via social media channels and other outlets, including major newspapers such as *The Australian* and *The Sydney Morning Herald,* and in press releases. Other mechanisms used by some industry bodies have

100. The eSafety Commissioner acquired the power to register codes in accordance with Part 5 of Schedule 5 and Part 4 of Schedule 7 of the *BSA* (n 2) in 2015 following the enactment of the *Enhancing Online Safety for Children (Consequential Amendments) Act 2015* (Cth). Until then, ACMA was responsible for registering codes pursuant to the two schedules of the *BSA*. The eSafety Commissioner has not registered a code since it acquired this power.

101. As mentioned in the introduction, all applicable legislation requires the relevant regulator, before registering a code, to be satisfied that 'members of the public have been given an adequate opportunity to comment on the code' or that industry bodies have invited members of the public to make submissions within a specified period. However, the legislation does not refer specifically to written submissions.

102. They include network and operations codes. Network codes deal with technical matters. Operations codes govern operational relationships between members of the telecommunications industry. ACIF, *Guideline: Development of Telecommunications Industry Operations Codes* (March 1998) 5–6. Until 2006, Comms Alliance was known as the Australian Communications Industry Forum (ACIF).

103. Communications Alliance Ltd, *Industry Consumer Advisory Group: Terms of Reference* 1 <https://www.commsalliance.com.au/Activities/committees-and-groups/ICAG>.

included: the monthly subscriber magazines of their members (ASTRA); email (ASTRA, Comms Alliance); newsletters (Comms Alliance); community service announcements on television (Free TV when it was known as the Federation of Australian Commercial Television Stations (FACTS)); and radio (CBAA).[104]

(ii) Acknowledgement of Written Submissions. None of the seven bodies requires its rule-makers[105] to acknowledge receipt of, and/or to provide comments in response to, submissions made by individuals and other organisations. Nevertheless, as a matter of practice, when developing codes, Comms Alliance has provided a response to consumer organisations and private individuals who submit comments.

(iii) Requirements When Accepting or Rejecting Public Comments. Comms Alliance is the only industry body that requires 'reasons for not incorporating feedback' in an amended draft code to 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)'.[106]

4. Public Dialogue. Two of the seven industry bodies (Comms Alliance and CBAA) have employed mechanisms of public dialogue—mechanisms that facilitate the simultaneous exchange of information, ideas and proposals as well as debate and negotiation between consumers or citizens, and an industry body.[107]

Both CBBA and Comms Alliance have invited and allowed consumer/citizen interest organisations to serve on their code advisory and working committees. At CBAA, representatives from stakeholders such as First Nations Media Australia, Christian Media and Arts Australia have been appointed to advisory committees which have provided code-related advice and feedback to the CBAA secretariat, which is responsible for drafting codes. At Comms Alliance, representatives from participating consumer/citizen interest organisations have been appointed to working committees responsible for drafting consumer codes and other codes that Comms Alliance believes have an effect on consumers. Codes are drafted by consensus, and as working committee members, consumer/citizen interest organisations are entitled to vote if codes should be approved and submitted to the Comms Alliance board, which decides if they should be submitted for registration.[108] Comms Alliance has appointed a number of different consumer organisations and other entities such as the police to relevant code working committees. However, ACCAN is the most significant. Since its creation in July 2009, it has been involved with all consumer code working committees and most working committees developing other codes with an effect on consumers.

In addition to working committee participation, Comms Alliance relies 'heavily'[109] on ACCAN to solicit the views of its members about draft consumer codes and related issues. ACCAN members are free to make written submissions directly to Comms Alliance. However, ACCAN

104. Email from CBAA employee to Derek Wilding and Karen Lee, 30 May 2019.
105. Codes are drafted by working committees which may include non-industry members (eg, Comms Alliance), code review groups comprised of member representatives (eg, Free TV) and industry body secretariats (eg, ANRA). Some secretariats are advised by code advisory committees (eg, CBAA).
106. *Operating Manual* (n 80) s 11.4(a).
107. This category of mechanism is the same as Rowe and Frewer's category of the same name. See Rowe and Frewer (n 87) 255–6.
108. For more on Comms Alliance's rule-making framework, see *Operating Manual* (n 80).
109. Statement by a Comms Alliance representative (Industry Round Table, 10 May 2019).

often collates feedback from its 100 plus members—feedback which is fed into Comms Alliance working committees by way of a single written submission or via ACCAN representatives during working committee discussions.[110] ACCAN determines how best to consult with its members, and the methods used vary depending on the circumstances. For example, during the informal 'chapter by chapter' review of the TCP Code initiated by the relevant Comms Alliance working committee in 2018,[111] 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 the code, 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 feedback. If a member did not reply to the initial email, follow-up calls were made.

Both public dialogue mechanisms are deployed when industry bodies formulate and evaluate approaches and alternatives. Thus, they are used after fact-finding occurs and when issues have already been identified and described.

IV Assessment of Industry Engagement Mechanisms

At the outset, it must be acknowledged that several factors contribute to responsiveness in industry rule-making. While important, mechanisms of consumer and citizen engagement (used individually or collectively) are just some of the factors that are likely to contribute to responsiveness. Other elements, including the ability (and willingness) of regulators to wield 'big sticks'[112] or impose 'penalty defaults',[113] the involvement of Ministers and vertical supply chains, have also been shown to contribute to the responsiveness of co-regulatory rule-making.[114] In addition, it must be acknowledged that the data collected does not allow for easy evaluation of all facets of responsiveness. Much more specific information about particular instances of rule-making and the mechanisms industry bodies used to engage with citizens and consumers—information that is difficult to obtain because the rule-making processes of industry bodies are confidential—is needed before each element of responsiveness could be definitively applied. Any assessment of consideration, in particular, is difficult without this information, as it is tough to determine if the industry bodies seriously considered or reflected on the concerns and ideas conveyed to them through any of the identified forms of engagement. However, the data collected enables some assessment of the mechanisms of consumer and citizen engagement industry bodies have deployed because certain mechanisms are inherently much more likely than others to promote the achievement of responsiveness.

If, as suggested, responsiveness is the appropriate benchmark against which consumer and citizen engagement practices should be evaluated, then it would appear that the current consumer and citizen engagement practices of several industry bodies are not adequately facilitating

110. This mechanism has been placed in the category of public dialogue because ACCAN frequently provides the feedback in the course of discussion with industry members of Comms Alliance working committees.

111. *Telecommunications Consumer Protections Code* (C628:2015 (incorporating variation no 1 2016)) was the edition of the TCP Code subject to this review.

112. Ayres and Braithwaite (n 29) ch 4.

113. See, eg, Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14(3) *European Law Journal* 271, 308.

114. Lee (n 36) 167–206, 226–37.

deliberation, transparency, consideration[115] and accountability (as defined). This is so, notwithstanding the awareness, demonstrated during the Industry and Regulator Round Tables, many industry and regulatory bodies have of the difficulty of engaging consumers, citizens and related organisations, and the deployment, by some industry bodies (often with the encouragement of regulators), of more than one mechanism of engagement to that end.

As the analysis in Section III(C) highlighted, there is limited adoption of the fourth form of consumer and citizen engagement, namely public dialogue. The mechanisms applicable to this form of engagement promote discussion between consumers and citizens, regulators, and industry bodies, or require industry bodies and regulators to explain and defend their positions to others. Most industry bodies are heavily reliant on complaints data when engaged in data collection during fact-finding and monitoring and assessing the operation of rules, and on written submissions when seeking public input during the formulation of regulatory approaches and rules. While both mechanisms may yield important information to the rule-making process, neither promotes the robust exchange of ideas between all interested parties that is the hallmark of responsiveness. Moreover, when public dialogue mechanisms are deployed, they are deployed relatively late in the rule-making process, ie, after fact-finding and regulatory issues are identified and described. Some industry bodies have used different public input mechanisms to identify and describe issues. However, use of these mechanisms is not the norm, and no industry body is using mechanisms of public dialogue to assist with issue identification and description. Even Comms Alliance, which appoints consumer representatives to its working committees developing consumer codes and other codes with an effect on consumers, does not appear to routinely involve representatives in dialogue when framing the issues codes are intended to address. Only a few examples of the information industry bodies convey during public communication could be found,[116] but on the basis of the information reviewed, there is significant doubt that they are disclosing the information consumers, citizens and related organisations need in order to play a meaningful role (along with regulators) in holding industry to account. While certain documentation may explain the substance of rules and/or highlight amendments made to them, rationales for new or revised rules are not provided. Alternatives that may have been considered, but rejected, are not described or explained.

The information gathered about industry's engagement practices raises a number of specific questions and concerns. However, in the discussion that follows, the focus is primarily on the difficulties of relying on written submissions and complaints data. Written submissions and complaints data are the focal point for several reasons. First, they are the most commonly used engagement mechanisms, and in the case of written submissions, their use has been insisted upon by ACMA in order to satisfy the code registration criteria relating to public consultation. Second, there was evidence that few consumers, citizens and organisations representing their interests make written submissions, despite industry efforts (and increasingly regulator efforts),[117] to publicise opportunities to make them. For example, CRA now receives fewer than 10 submissions in

115. As noted above, conclusions concerning consideration are difficult to make because of the lack of data.

116. They included three newspaper advertisements, placed by Comms Alliance, FACTS and CRA, soliciting public comment on draft codes; a public comment explanatory statement, published by Comms Alliance, that accompanied a draft TCP Code; and the 'consultation package' Free TV issued in November 2018 in relation to the draft code provisions banning gambling advertising in live sport.

117. In the last few years, ACMA has supported the publicity efforts of Comms Alliance, CRA, Free TV and other industry bodies by issuing press releases about, and advertising, opportunities to make written submissions on draft codes on its website and social media channels.

response to draft codes published during its code review process.[118] Similarly, ASTRA's public consultation on the *Codes of Practice for Subscription Narrowcast Radio and Subscription Broadcast and Narrowcast Television*, registered by ACMA on 7 November 2013, resulted in just 18 submissions from consumer organisations and members of the public.[119] Only Free TV reported it received a sizeable number of written submissions from the public on draft codes, which was due in part to concerted campaigns by consumer organisations on issues such as gambling and alcohol advertising. Third, round table participants' perceptions of the reliability of complaints data as a mechanism of public engagement differed significantly depending on the complaints handling body involved. For example, subject to some qualifications,[120] complaints data gathered by the TIO was seen as valuable because it receives a large number of complaints annually.[121] By contrast complaints data collected by ACMA about traditional broadcasters was seen as less useful, because it receives only a small number of code-related complaints each year.[122] Fourth, employing an approach developed by Farina et al in the US administrative rule-making context, the analysis highlights a range of stakeholders that do not participate in co-regulatory rule-making and the existence of significant barriers to their participation—barriers that suggest both mechanisms have significant limitations.

Writing in the context of the Obama administration's 'Open Government Plan' initiative, which was intended (among other things) to increase, through the use of Web 2.0 technology, citizen participation and the number of written submissions citizens make during public consultation on draft administrative rules,[123] Farina, Newhart and Heidt reject the position that all information and other preferences expressed by consumers and citizens are equally valuable to administrative rule-makers.[124] They argue, instead, that 'the value of participatory inputs [such as written submissions] must be gauged [not by the number of submissions received but] by the kind of decisional process we *expect* [an] . . . agency to engage in'.[125] In their view, administrative rule-makers are expected to engage in reasoned decision-making, weigh competing interests and values and give reasons for their decisions. Therefore, if one is seeking to increase public participation, administrative resources and energy should be directed to encouraging submissions from 'missing stakeholders'—stakeholders such as small businesses, citizens and individual consumers who have not traditionally participated in public consultation, but are directly affected by policy decisions and

118. Karen Lee and Derek Wilding, *Industry Bodies and Schemes in the Communications Sector: Rule-Making Frameworks and Consumer and Citizen Engagement* (Supplementary Report, November 2019) 42.
119. ACMA, 'Improved Community Safeguards in Codes for Subscription Television and Radio Industry' (Media Release 84/2-13, 7 November 2013).
120. For example, the ACCAN representative emphasised that the TIO data 'can provide a false picture of what's really happening' because it reflects the number of 'escalated' complaints—complaints that individuals have been unable to resolve with their telecommunications providers—and not the total number of complaints made to the industry.
121. In 2018–19, the TIO received a total of 132,387 complaints, a figure that was 21.1 per cent lower than in 2017–18: TIO, *Annual Report 2018–19* (Report, 25 September 2019) 13.
122. In 2018–19, ACMA conducted 21 investigations in response to complaints about traditional broadcasters. See ACMA and Office of the eSafety Commissioner, *Annual Reports 2018–19* (Report, 15 October 2019) 108–120. Each investigation was triggered by at least one complaint made to ACMA, but we could not determine the total number of complaints received by ACMA.
123. Cynthia R Farina, Mary J Newhart and Josiah Heidt, 'Rulemaking vs Democracy: Judging and Nudging Public Participation That Counts' (2012) 2 *Michigan Journal of Environmental and Administrative Law* 123, 128–9.
124. See, eg, Nina Mendelson, 'Rulemaking, Democracy, and Torrents of Email' (2011) 79 *George Washington Law Review* 1343.
125. Farina, Newhart and Heidt (n 122) 140–1 (emphasis in original).

can contribute 'situated knowledge'—'information [known by missing stakeholders] about impacts, problems, enforceability, contributory causes, [and] unintended consequences' of those policy decisions.[126] Moreover, resources and energy should be directed to identifying measures needed to overcome four principal barriers to participation faced by these stakeholders: a lack of general or specific awareness that proposed rules may affect them and/or that they can participate; 'information overload'; 'low participation literacy'; and 'motivational barriers'.[127] Information overload means information provided by rule-makers is incomprehensible, uses jargon or is otherwise not presented in a way that ordinary people can understand or want to read.[128] Low participation literacy means missing stakeholders are unfamiliar with how to participate in the quasi-deliberative processes of rule-making. It needs to be explained to them that merely expressing support for or against a specific result is not sufficient in order to participate effectively in the process. They must be encouraged, for example, to provide information, give reasons and consider alternative arguments.[129] Motivational barriers include obstacles such as competing demands for their time and attention, distrust of rule-makers and cynicism about the likely effect public consultation will have on the final outcomes.[130]

Co-regulatory rule-making in Australia is different from the US administrative context in which Farina et al have observed written submissions. Despite this, their approach was used to interrogate consumer and public engagement in co-regulatory rule-making and formulate questions posed to round table participants for several reasons. First, their view that not all written submissions are of equal value is implicit in guidance on public consultation provided by the Australian government to its departments and agencies.[131] Thus, it accords with the Australian consultative approach. Second, for the reasons explained in Section II above, although very different entities, industry rule-makers are expected to engage in a similar deliberative decision-making process as their administrative counterparts, ie, one that involves reasoned decision-making, assessment of competing interests and values and the giving of reasons. Third, Farina et al's approach encourages serious evaluation of the stakeholders who are missing from industry consultation exercises and the measures that could be taken to address the barriers to participation they face. Fourth, their approach is pragmatic. It recognises that resources for written submissions (and other forms of public engagement) are not unlimited; they should be strategically deployed where they are 'most likely to make a significant contribution to policymaking'.[132]

Below the different barriers to making written submissions and filing complaints that confront consumers and citizens in the context of co-regulatory rule-making are highlighted. Research that suggests these barriers may be overcome by adopting certain measures is then briefly considered. Next, it will be argued that the cost of overcoming these barriers is significant and, even if all were overcome, continued reliance on written submissions and complaints data is unlikely to achieve responsiveness. It will be suggested that if the goal of responsiveness is to be advanced, the onus of initiating and sustaining engagement during code development and the cost of that engagement

126. Ibid 148 (emphasis omitted).
127. Farina et al, 'Democratic Deliberation in the Wild' (n 23) 1550.
128. Ibid 1553.
129. Ibid 1559.
130. Ibid 1564.
131. See, eg, the Department of the Prime Minister and Cabinet, *Best Practice Consultation Guidance Note* (March 2020) 7–9.
132. Farina et al, 'Democratic Deliberation in the Wild' (n 23) 1567.

should shift from consumers and citizens to industry. Industry bodies should be required to engage comprehensively with the public, using a range of alternative engagement mechanisms, such as surveys, focus groups and round tables, to be specified by the relevant regulator in a legislative instrument, instead of, or in conjunction with, written submissions and complaints data. Moreover, industry bodies should be required to demonstrate that one or more bodies or associations that represent the interests of consumers or citizens has been appointed to, and served on, the working committees or industry advisory bodies they convene for the purposes of code development.

A Written Submissions

Consumer Round Table participants identified a number of stakeholders who could enhance industry rule-making but are not submitting written comments when industry bodies offer them that opportunity. These missing stakeholders included: young people, women escaping domestic violence, homeless individuals, individuals from regional, rural and other remote communities, people who do not speak English and people with disabilities. Small businesses were also identified as a particularly difficult group to engage. As one representative stated:

> they're spread so thin . . . there are huge demands, because everybody wants to talk to small business . . . we try to engage with industry associations, because they have more time . . . but typically even the industry associations are run by small business people who are . . . trying to juggle the association and also run their business[es].[133]

Industry and regulatory participants were not specifically asked to identify stakeholders who were missing from industry engagement processes, but both sets of participants accepted that some stakeholders, including those who are not vulnerable, are missing. The representative from Comms Alliance stated that her organisation 'rarely get[s] interactions with or feedback from the average consumer'. The comments made by several representatives from other industry and regulatory bodies also indicated industry bodies have not managed to obtain feedback from 'a broader and more diverse audience'.

Consumer Round Table participants also drew attention to barriers to participation—barriers with clear parallels to those identified by Farina et al that made it difficult for individual citizens and consumers as well as organisations established to advocate on their behalf to participate in code development.

One such barrier that affected consumer organisations was 'submission fatigue',[134] which ACCAN later suggested was closely connected to the limited resources available to consumer organisations. In its experience, the costs of preparing written submissions were disproportionately higher for small consumer organisations (than they are for larger industry organisations) relative to the benefit they obtain from making written submissions, and it is these costs that contribute to submission fatigue. However, Consumer Round Table participants also attributed submission fatigue to repeated industry requests for the same or similar information and the failure to provide accessible or 'effective' information.[135] They reported spending a significant amount of time setting out accessible summaries of proposed rules and the background information needed to

133. Statement by an ACCAN representative (Consumer Round Table, 9 May 2019).
134. Statement by a representative from an organisation whose name was withheld (Consumer Round Table, 9 May 2019).
135. Ibid.

evaluate them—information required before they can begin to consult with their members and other stakeholders.

Motivational barriers to participation mentioned by consumer representatives 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'[136] and the absence of feedback from industry bodies following submission of written comments. Several consumer representatives also agreed with this statement made by a colleague:

> 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 . . . [137]

Consumer Round Table participants spoke about the following barriers as well:

- The lack of time that individuals and organisations have to engage with the various issues. As one stated, 'I think it's about time and it's about priorities'. She explained, 'We're an entirely voluntary organisation and there's just a limit to how much we can move—we're all trying to run businesses as well, and make a living, and there's a point where you just have to draw the line . . . '[138]
- The cost of participation and industry's failure to compensate them for their time.[139]
- The use of technical or complex language. The Country Women's Australia representative stated, 'They [industry bodies] use language that the average person or disadvantaged people might not necessarily understand . . . [I]t's about using basic language and trying to deliver the message from the point of view of somebody who actually has a limited knowledge of the subject or what you're trying to deliver.'
- Industry's failure to engage with consumers, citizens and related organisations early on in the rule-making process, which contributed to the impression that written submissions were a 'done deal'.

Although not specifically mentioned by any round table participant, missing stakeholders are also likely to lack awareness about the effect draft rules proposed by industry bodies may have on them and/or their entitlement to participate. Invitations to make written submissions are published on the websites of industry bodies, but many individual consumers and citizens are unlikely to look at them because they do not know who these industry bodies are. Some industry bodies place advertisements in major newspapers and other fora inviting written submissions on their draft codes (at some considerable expense),[140] but they may not be seen by missing stakeholders. One consumer representative, who suggested advertisements were not being seen by senior citizens, commented, 'If you want to talk to seniors, you have to go to the vehicles that seniors use [vehicles

136. Ibid.
137. Ibid.
138. Ibid.
139. Payment of travel costs was not raised as a concern by Consumer Round Table participants as industry bodies such as Comms Alliance have typically paid for such costs for consumer organisations where travel to code-related meetings was necessary.
140. For example, the Free TV representative observed that placing newspaper advertisements inviting written submissions on its draft code cost approximately $20,000.

such as *The Senior*], not just, do what you've been doing for the last 20, 30 years, and going to [*The*] *Sydney Morning Herald*, or something like that'.[141]

B Complaints Data

Obstacles similar to those raised in the context of written submissions discourage the filing or escalation of complaints, or at least make it harder for aggrieved individuals to make and/or continue to pursue their complaints.

First, as a TIO representative stated, individuals must be able to identify the body to which they should complain and/or escalate a complaint, a process which is not straightforward. As highlighted below, the bodies to whom they may complain and the procedures they must follow differ. The complexity gives rise to a significant participation barrier.

If consumers and citizens wish to make complaints about a traditional broadcaster subject to codes promulgated by ACTA, ANRA, ASTRA, CBAA, CRA and Free TV, they must complain in the first instance to the specific broadcaster concerned. However, if they receive no response within 60 days of making a complaint or are dissatisfied with the response they receive, they may refer the complaint to ACMA.[142]

On the other hand, if consumers and citizens wish to complain about entities subject to codes that are the responsibility of Comms Alliance, the body they may complain to, and the procedures they must follow, vary depending on the relevant code and/or the Act under which it is registered. If their complaints relate to codes, such as the TCP Code, that are registered under Part 6 of the *Telecommunications Act 1997* (Cth) ('Part 6 codes') and have conferred power on the TIO to resolve complaints,[143] they must first attempt to resolve their complaints with the relevant telecommunications provider.[144] If their complaints are not satisfactorily resolved, they may then complain to the TIO. However, complaints relating to entities subject to Part 6 codes that do not confer power on the TIO must be referred to ACMA.[145] Complaints relating to entities subject to the *Interactive Gambling Industry Code*,[146] registered under s 38 of the *Internet Gambling Act 2001* (Cth), may be made to ACMA.[147] Complaints relating to the *Codes for Industry Co-Regulation in Areas of Internet and Mobile Content*,[148] registered under Schedule 5 of the *Broadcasting Services Act 1992* (Cth)[149] and applicable to internet service providers, and the *Content Services Code*,[150] registered under Schedule 7 of the *Broadcasting Services Act 1992* (Cth)[151] and

141. Statement by a representative from an organisation whose name was withheld (Consumer Round Table, 9 May 2019).
142. *BSA* (n 2) s 148.
143. At the time of writing, nine Part 6 codes have conferred powers on the TIO. Section 114(1) of the *TA* (n 3) stipulates the TIO must consent to the conferral of such powers.
144. All carriage service providers who supply the following services are required under statute to participate in the TIO's complaints resolution scheme: standard telephone services used by residential and small business customers, public mobile telecommunications services and carriage services that enable end-users to access the internet. See *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) ss 127–8(1).
145. See *TA* (n 3) ss 508–9.
146. Internet Industry Association, *Interactive Gambling Industry Code: A Code for Industry Co-regulation in the Area of Internet Gambling Content* (December 2001).
147. *IGA* (n 5) s 17.
148. Internet Industry Association, *Codes for Industry Co-Regulation in Areas of Internet and Mobile Content* (May 2005).
149. *BSA* (n 2) sch 5 pt 5 cl 62.
150. Internet Industry Association, *Content Services Code* (10 July 2008).
151. *BSA* (n 2) sch 7 pt 4 cl 85.

applicable to sections of the content industry, may be made to various entities designated in the two codes or the eSafety Commissioner.[152] These arrangements are in addition to those supporting complaints about advertising and about print and online news media under various self-regulatory schemes.[153]

In addition to needing to know to whom they can complain, Consumer Round Table participants said complainants need to 'feel empowered enough . . . to actually pick up the phone or send . . . an email'. Complainants must also 'have the time, and know the skills' to complain, and, in the case of TIO complainants, be 'resilient enough to take it all the way to the TIO.' One consumer representative added that complaints processes were 'totally skewed towards the white, middle-class'—a statement consistent with the empirical findings of academics who have carried out research into the socio-economic demographics of individuals who made complaints to public- and private-sector ombuds schemes in Belgium, Germany, the Netherlands and the UK.[154] Hertogh, who conducted research in Belgium and the Netherlands, for example, found that 'most complainants are highly educated, white-collared, and politically interested men with a fairly high level of trust in law and the justice system'.[155] A Regulator Round Table representative said that the data TIO records[156] provides indicators about the people who participate in the scheme and 'a reasonably accurate reflection of who is missing', thus serving to highlight when additional engagement mechanisms are needed to obtain information from those 'voices'.[157] However, the TIO does not record matters such as gender, Indigeneity or socio-economic status of complainants,[158] and no academic studies have been conducted on the profiles of complainants to the TIO, ACMA or the eSafety Commissioner. Most scholars and practitioners working in the complaints arena assume 'vulnerable consumers are less likely to complain'.[159]

C Overcoming Participation Barriers

Interdisciplinary research, also conducted by Farina et al in the context of administrative rule-making, demonstrated that the use of Web 2.0 technologies could increase the number of missing

152. See *BSA* (n 2) sch 5 pt 4 div 1 cl 23, sch 7 pt 3 div 1 cl 38(2).
153. Karen Lee and Derek Wilding, *Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-Making* (Report, November 2019) 25.
154. See, eg, Steven Van Roosbroek and Steven Van de Walle, 'The Relationship between Ombuds, Government and Citizens: A Survey Analysis' (2008) 24(3) *Negotiation Journal* 287; Marc Hertogh, 'Why the Ombuds Does Not Promote Public Trust in Government: Lessons from the Low Countries' (2013) 35(2) *Journal of Social Welfare and Family Law* 245, 253; Naomi Creutzfeldt, 'What Do We Expect from an Ombuds? Narratives of Everyday Engagement with the Informal Justice System in Germany and the UK' (2016) 12(4) *International Journal of Law in Context* 437, 442.
155. Hertogh (n 153) 246.
156. This information includes their geographic location (ie, the state or territory in which they live and whether they reside in major cities, regional and remote areas) and if they are residential, small business or not-for-profit consumers.
157. Statement by an ACMA representative (Regulator Round Table, 9 May 2019). His opinion does not necessarily represent ACMA's view.
158. Conversation with a TIO representative who attended the Regulator Round Table (Karen Lee, by phone, 18 March 2020).
159. Carol Brennan et al, 'Consumer Vulnerability and Complaint Handling: Challenges, Opportunities and Dispute System Design' (2017) 41(6) *International Journal of Consumer Studies* 638–9.

stakeholders making submissions.[160] However, the use of Web 2.0 technologies led to that outcome because barriers to participation were acknowledged and attention was given to them when engagement processes were designed.[161] For example, barriers to participation were surmounted by developing 'outreach plans', which involved the use of conventional and social media, direct communication with missing stakeholders and the enlistment of organisations and 'opinion leaders' who could pass on consultation notices to their members; deploying techniques such as 'information triage', 'translation' and 'information layering';[162] using independent facilitators who educated interested parties about how to make written submissions; providing extensive background information relevant to the specific rule-making exercise; emphasising that comments can affect the outcome of the process; and sending messages that explained where and how public comments had an impact on the process.

Empirical research, similar to that undertaken by Farina et al,[163] into complaints handling by regulatory bodies, ombuds and other alternative dispute resolution schemes, does not appear to have been conducted. However, ombuds and alternative dispute resolution scholars are also increasingly drawing attention to the design of complaints mechanisms and the effect design-related choices may have on the accessibility of such schemes.[164] Moreover, a range of measures have been proposed and/or deployed to help overcome the barriers potential complainants face. Some of these measures, many of which are comparable to strategies Farina et al[165] found helpful in the context of written submissions, include undertaking outreach activities, increasing media presence and enhancing the capacity of staff to assist people with disabilities.[166] Appointing 'intermediaries' such as community workers or elders to serve as representatives for ombuds in local communities has also been suggested as a way to increase the number of complaints made by Indigenous people.[167]

Application of the available research to the Australian co-regulatory rule-making context therefore suggests industry bodies and regulators are likely to increase the number of written submissions and complaints they receive by addressing the various barriers identified above. Industry bodies and regulators could begin to address them by increasing the funding consumer and public interest organisations receive so they have the basic resources needed to make written submissions.

160. Farina et al, 'Democratic Deliberation in the Wild' (n 23) 1544–53, 1556–8, 1560–4, 1565–6; Farina, Newhart and Heidt (n 122) 147–71.

161. See Farina et al, 'Democratic Deliberation in the Wild' (n 23); Farina, Newhart and Heidt (n 122); Cynthia R Farina et al, 'Rulemaking 2.0' (2011) *University of Miami Law Review* 395; Cynthia R Farina and Mary J Newhart, 'Rulemaking 2.0: Understanding and Getting Better Public Participation' (Paper No 15, Cornell e-Rulemaking Initiative Publications, 2013).

162. Information triage involves identifying the information citizens need to comment effectively and structuring it accordingly. Translation requires rewriting information in plain English, using short sentences and avoiding jargon and technical terminology. For more information about these and other techniques, see Farina et al, 'Democratic Deliberation in the Wild' (n 23) 1556–8. See also Farina and Newhart (n 160) 21–37.

163. See above nn 23, 122, 159.

164. See, eg, Chris Gill et al, 'Designing Consumer Redress: A Dispute System Design (DSD) Model for Consumer-to-Business Disputes' (2016) 36(3) *Legal Studies* 438; Brennan et al (n 158) 642–3.

165. See above nn 23, 122, 159.

166. Bernard Hubeau, 'The Profile of Complainants: How to Overcome the "Matthew Effect"?' in Marc Hertogh and Richard Kirkham (eds), *Research Handbook on the Ombuds* (Edward Elgar, 2018) 259, 273. See also Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 1, 326–34.

167. Winangali Indigenous Communications and Research, *Improving the Services of the Commonwealth Ombuds to Australia's Indigenous Peoples* (Report, November 2010) 26.

They could utilise modern technologies, including opportunities arising in a Web 2.0 environment, and deploy techniques Farina et al and other scholars have identified to make participation and complaints-handling more visible and accessible. However, these suggestions have a number of significant limitations. First, despite calls from the Productivity Commission for more funding for consumer and citizen organisations to engage in advocacy,[168] the government has, with some exceptions,[169] been reluctant to adequately fund them. Industry has also not voluntarily offered to pay consumers, citizens and related organisations to make written submissions. Second, the cost of modifying written submission and complaints-handling processes is not insignificant, and it is not guaranteed that, if implemented, the modifications will increase the number of complaints and written submissions received. Increased funding for participation and the use of new technologies will not, for example, overcome the absence of trust in industry bodies or the lack of time many individuals and smaller organisations have to engage in code development. Third, and perhaps most importantly, even if industry bodies and ACMA were to make all required investments, any consequential increase in written submissions and complaints data is not likely to adequately provide the 'countervailing regulatory power' needed to achieve responsiveness and mitigate the risks of regulatory capture that co-regulatory rule-making generates.[170] While written submissions may provide important information for consideration by industry bodies, they are, as one consumer representative described complaints data, a 'reactive way to operate'.[171] They do not allow for the inclusion of consumers, citizens and related organisations early on in the rule-making process or require industry bodies to initiate direct contact with them. Other engagement mechanisms, deployed when industry bodies perform the four functions of rule-making, are much more likely to encourage industry bodies to weigh alternatives and determine what (on balance) meets the needs of all stakeholders; to explain themselves to others; to disclose a sufficient amount of relevant information to enable stakeholders and others to hold them to account; and to exercise independent judgement. Some of these alternative mechanisms and the statutory modifications needed to transfer the burden (and cost) of initiating and sustaining engagement are considered below.

D Alternative Mechanisms and Necessary Statutory Modifications

A range of engagement mechanisms not currently or routinely used by the schemes we examined are available. Surveys, for example, enable industry, using an array of means and technologies, such as chatbots, to actively target and solicit contributions from consumers and citizens. Focus groups and round tables (conducted in person or online) also provide opportunities for discussion and dialogue—opportunities Consumer Round Table participants said they would welcome because 'it makes them feel like somebody wants to hear what they've got to say'.[172] Citizen

168. See, eg, Productivity Commission, *Consumer Law Enforcement and Administration* (Final Report, March 2017) 217.
169. For example, pursuant to a five-year funding agreement, ACCAN received $2,296,000 (excluding GST) from the federal government in 2018–19, but this funding is recovered from charges on telecommunications carriers, not consolidated revenue. See Department of Communications and the Arts, *Funding of Telecommunications Consumer Representation Grants: Annual Report 2018–19* (December 2019) 4.
170. Ayres and Braithwaite (n 29) 83.
171. Statement by a representative from an organisation whose name was withheld (Consumer Round Table, 9 May 2019).
172. Ibid.

juries[173] have been used by water companies in the UK when preparing business plans for assessment during price control reviews.[174] Deliberative polling[175] has been used by electricity companies in Texas to inform the development of 'integrated resource plans', submitted to the Public Utility Commission, that set out how they intend to meet the current and future electricity needs of customers within their service areas.[176] Both mechanisms have the potential to more closely approximate the dialogue that responsiveness in a co-regulatory rule-making context requires.[177]

However, the four criteria of responsiveness are unlikely to be satisfied unless one or more of the above engagement mechanisms are used in conjunction with the appointment of representatives from consumer and citizen interest organisations to industry advisory and working committees, especially if confidentiality is to remain a characteristic feature of co-regulatory rule-making.[178] Consumer representatives on industry working committees that operate by consensus, in particular, can challenge industry by demanding it to provide reasons for its conduct and to think through the actions it proposes to take to address underlying regulatory problems. They are also privy to information that is exchanged between industry representatives serving on working committees. In addition, consumer representatives push regulators to ask questions of and demand possible solutions from industry.[179] As an attendee at the Regulator Round Table stated, 'The benefit of a working committee is it can pull issues apart, get different perspectives on them and then try to put something back [together] that makes sense.'[180]

Suggesting that representatives from consumer and citizen interest organisations should be appointed to industry advisory and working committees is, of course, predicated on the assumption that there is at least one consumer and citizen interest organisation willing to serve this function and adequately resourced to perform it. It also assumes that one of the responsibilities of the appointed consumer and citizen interest organisation is to create a network of other consumer and citizen interest organisations (where they exist) and actively solicit and synthesise their views during code development. Several round table participants highlighted that participation by consumer and citizen interest representatives requires substantial time and resource commitments, especially when issues to be addressed in codes are complex and contentious. It also requires consumer and citizen interest organisations to have some knowledge of the markets in which the members of industry bodies operate—knowledge that the Comms Alliance representative said rendered ACCAN's involvement in industry rule-making 'much more efficient'.[181] Network

173. For an explanation of this mechanism, see Gary E Marchant and Andrew Askland, 'GM Foods: Potential Public Consultation and Participation Mechanisms' (2003) 44(1) *Jurimetrics* 99, 120–2.
174. See Robert Hahn, Robert Metcalfe and Florian Rundhammer, 'Promoting Customer Engagement: A New Trend in Utility Regulation' (2020) 14(1) *Regulation & Governance* 121, 129–36.
175. For an explanation of this mechanism, see James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2009) 25–6.
176. Robert C Luskin, James S Fishkin and Dennis L Plane, *Deliberative Polling and Policy Outcomes: Electric Utility Issues in Texas* (Paper, Annual Meeting of the Association for Public Policy Analysis and Management, 4–7 November 1999) 3 <https://cdd.stanford.edu/wp-content/plugins/pdfjs-viewer-shortcode/pdfjs/web/viewer.php?file=/mm/2000/utility_paper.pdf&download=true&print=true&openfile=tru>.
177. Further research (which is outside the scope of this article) is required before a citizen jury and/or a deliberative poll could be designed for use in the context of industry rule-making.
178. See also Lee (n 36) 230–2; Ayres and Braithwaite (n 29) chs 3 and 4.
179. Lee (n 36) 230–1.
180. See above n 156.
181. Statement by a Comms Alliance representative (Industry Round Table, 10 May 2019).

building is essential to capture the diversity of views held by consumer and citizen interest organisations and (as at least one Regulator Round Table participant suggested) to identify areas of agreement and difference.

The Department of Communications has acknowledged that there is 'an ongoing need for consumer participation in policy and regulatory processes' in the telecommunications sector and believes that 'a telecommunications-specific consumer representative body [such as ACCAN, which has 213 members, including 110 organisations and 103 individuals][182] remains an appropriate model to ensure effective consumer representation'.[183] It has also committed funding for ACCAN until 2022. Yet, there is no equivalent body, provided with the level of funding ACCAN receives, representing citizen interests in the media sector,[184] even though media regulation raises important issues that directly affect citizen interests—issues such as content classification, and integrity and quality of news and journalistic content. Extending ACCAN's remit to include media-related issues[185] and/or creating a new citizen interest organisation especially for this purpose could assist in overcoming the on-going audience fragmentation brought about by video-on-demand services such as Netflix and the digital media platforms Google and Facebook—a factor that likely contributes to the low number of complaints made to ACMA and written submissions industry bodies in the media sector receive in response to draft codes. Such a body could serve on industry advisory and working committees, facilitate the collation of comments from disparate organisations and feed them into advisory and working committee discussions. It could also emerge, as one Industry Round Table participant described ACCAN, as 'a mediator' between various groups. There are some potential drawbacks for responsiveness if a citizen interest body were to perform that function. For example, media industry bodies might listen only to it and would not be exposed to the conflicting viewpoints of various citizen stakeholders. However, several representatives from consumer organisations at the Consumer Round Table who were ACCAN members emphasised a body such as ACCAN was 'approachable' and created a 'space' where 'a lot of different organisations but with similar issues . . . could compare notes' and 'bounce . . . ideas around'.[186] Establishing a similar space for citizens would promote greater engagement and provide opportunities to educate them about participation in co-regulatory rule-making. Any concerns about capture of the citizen interest body by industry bodies and their members could be addressed by government allocating funding to the citizen interest body on a competitive basis every five years, as it currently does for the telecommunications-specific consumer representative body.[187] Industry bodies would remain free to engage with other citizens and related organisations. The funding needed for an expanded ACCAN and/or citizen interest organisation

182. ACCAN, *Quarter 2, FY19–20* (Report, undated).
183. Department of Communications and the Arts, *Review of Consumer Representation: Review of Section 593 of the Telecommunications Act 1997: Final Report* (February 2017) 8.
184. With some possible exceptions, such as the Consumer Policy Research Centre, existing generalist bodies and associations such as the Public Interest Advocacy Centre and Human Rights Law Centre in Victoria have not been heavily involved in communications-related debates.
185. ACCAN is funded to represent consumers of telecommunications and internet services. With the exception of direct carrier billing, it does not focus on the customer-related aspects of content service provision (eg, billing and complaint handling) across distribution platforms. It does not become involved in debates relating to content regulation.
186. Statement by a Country Women's Association representative (Consumer Round Table, 9 May 2019).
187. On the importance of contestability and public interest groups, see Ayres and Braithwaite (n 29) 57.

could be recovered from charges on broadcasters, content service providers and possibly the digital platforms themselves.

Any decision by government to fund a public interest organisation for the media sector will require the introduction of a provision in applicable legislation, comparable to s 593 in the *Telecommunications Act 1997* (Cth), that empowers the Minister to make a grant to that body for the purpose of representing the public interest. It will also require legislation such as the *Telecommunications (Carrier Licence Charges) Act 1997* (Cth) that enables the Minister to levy charges on telecommunications carriers. However, to bring about change to the current engagement practices of industry bodies, the statutory criteria that must be satisfied before ACMA or the eSafety Commissioner must register codes of practice also need to be modified in at least two significant ways.

First, all statutory frameworks for code development should be amended to require industry bodies to engage comprehensively with the public, using mechanisms of engagement, such as surveys, focus groups and round tables, specified by the relevant regulator from time to time in a legislative instrument. It should be noted that recent research undertaken by ACMA in relation to broadcasting codes has included, for the first time, surveys of viewers,[188] and some industry bodies have on occasion already used focus groups and round tables. However, this requirement expands the scope of current public consultation obligations and ensures that responsibility for, and cost of, initiating engagement lies with industry bodies, not individual consumers and citizens, who, as it has been shown, face a number of impediments when that responsibility rests with them. It also requires the relevant regulator to specify the engagement mechanisms it judges are best suited for ensuring consultation is comprehensive and gives it the flexibility to exclude mechanisms that fail to meet this objective and to include new mechanisms that may be developed in the future that better achieve it.

Second, the registration criteria for codes should be amended to require regulators to be satisfied that at least one body or association that represents the interests of consumers or citizens has been appointed to, and has served on, a working committee or advisory body convened by the industry body to prepare the code. Imposing such an obligation addresses a disparity that exists in the current statutory frameworks for communications, thereby creating a level playing field for all industry bodies. Even more importantly, it will provide opportunities for consumer and public interest organisations to engage in critical dialogue with members of industry—opportunities that most industry bodies currently fail to provide. Comms Alliance has often been seen as an outlier in the sector because it permits consumer and citizen interest representatives to serve on its working committees, but its practice serves as a model that all industry bodies should be required to follow because it allows for the exchange of ideas between individual representatives of all interested parties that responsiveness envisages.

In addition to these modifications, consideration may need to be given to providing regulators with the power to determine the number of representatives from consumer and citizen interest organisations who serve on industry working committees and/or requiring regulators to adopt a consumer harm approach when evaluating the substance of codes.[189] Consumer and regulator representatives with experience of Comms Alliance processes commented that power imbalances

188. See ACMA, *Impartiality and Commercial Influence in Broadcast News: Discussion Paper* (January 2020). Although ACMA has conducted audience research in the past, this has almost exclusively related to rules it formulates itself.

189. The concept of harm is used in competition and consumer law as well as regulation in Australia and worldwide. See, eg, KJ Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(2) *Competition Law Review* 121; *Regulating Harms* (n 1) 22–3.

between industry and consumer representatives may adversely affect the way in which discussion unfolds on working committees,[190] and these mechanisms were suggested as two of the ways in which these imbalances could be redressed. However, further research and analysis are needed to determine if they are warranted or would adequately address the underlying concern identified by consumer and regulator representatives.

V Conclusion

If co-regulatory rule-making in the communications industry (as well as other industries) is to be responsive, engagement with consumers and citizens is essential. However, it must be acknowledged that 'mass participation'[191] by consumers and citizens in code development—an assumption that arguably underpins current statutory procedural requirements relating to consumer and public consultation—is unlikely. As the analysis has shown, although citizens and consumers have knowledge that they can contribute to the rule-making process, they face a number of hurdles that render their participation difficult. The skills, knowledge, time, confidence and resilience required to participate in co-regulatory rule-making all create significant impediments that hinder consumer and citizen involvement. Code registration requirements relating to consumer and public consultation must therefore seek to ensure that industry bodies engage with consumers and citizens using mechanisms (other than written submissions) that accomplish the same functions that participation by a significant number of fully engaged consumers and citizens in industry rule-making performs—deliberation, consideration, transparency and accountability (as defined). As the regulatory frameworks for the converged communications industry and digital platforms continue to evolve, legislators, government, policymakers, and regulators are urged to set their expectations for consumer and citizen engagement in co-regulatory rule-making accordingly. By not ensuring adequate consumer and citizen engagement, the regulatory framework for the communications industry is unlikely to ever achieve responsiveness—the regulatory tool that legislators and government have accepted will facilitate the achievement of the wider public policy goals they have set for the sector.

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190. But see Lee (n 36) ch 8.
191. Ayres and Braithwaite (n 29) 83.