The Case for Reviewing Broadcasting Co-regulation

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Introduction – the policy context

In July 2020 the Department of Infrastructure, Technology, Regional Development and Communications ('the Department') released a consultation paper addressing the topic of 'Choice and Fairness', as part of the third stage of its Consumer Safeguards Review. In reflecting on 'the lived experience of self-regulation for consumer protection rules (in the telecommunications space)' (p. 14), the Department observed:

> The code development process has appeared to suit matters that require cooperation across industry (e.g. technical matters), rather than consumer issues that may create an impost on industry. There is an inherent tension in a process that requires industry to formulate its own consumer protection rules (p.15).

Despite using the terminology of 'self-regulation' and 'co-regulation' inconsistently, these statements appear to signal a more critical view of the role of industry participants in developing and administering codes of practice than was evident just four years ago when the (then) Department of Communications and the Arts completed its review of the communications regulator, the Australian Communications and Media Authority ('the ACMA'). At that time, the Department nominated the following as one of its regulatory design principles that could apply both to telecommunications and broadcasting: 'regulation should promote the greatest practical use of co-regulation and self-regulation' (2016: 87).

The Department's more recent preparedness to reconsider the established use of co-regulation in the telecommunications sector also stands in contrast to the view on broadcasting co-regulation expressed by the Australian Government as recently as November 2020. The Media Reform Green Paper – in proposing a new approach to commercial television spectrum and licensing arrangements – notes that 'Licensees would continue to operate under

a co-regulatory model for content regulation, which is based on industry codes of practice (2020: 20).

The Department's July 2020 observations on the limits of telecommunications co-regulation are restricted to the topic of consumer protection under the *Telecommunications Act 1997* (Cth) ('TA'). However, these observations also have implications for the codes of practice developed under the *Broadcasting Services Act 1992* (Cth) ('BSA'), as the statutory regimes regulating their development are similar; in fact, the framework set out in Part 6 of the TA was modelled on that developed five years earlier for Part 9 of the BSA. The Department's review of the continuing suitability of co-regulation in telecommunications therefore prompts the question: is the process for code development under the BSA still fit for purpose?

In this article we begin to answer that question with reference to one of the principles underpinning the third stage of the Consumer Safeguards Review: 'The rule-making process should be timely, efficient, enable a wide range of views to be considered and produce clear, targeted rules' (Principle 3: 30). We also draw on our empirical research, completed in late 2019, involving desk-top analysis of publicly available information and semi-structured Round Tables with consumers, industry and regulators, on consumer and public involvement in rule-making by 20 self- and co-regulatory schemes of the Australian communications sector (Lee and Wilding, 2019a and 2019b). We argue that the engagement mechanisms used by industry bodies in the broadcasting sector do not 'enable a wide range of views to be considered'. This deficiency, coupled with additional weaknesses found in the co-regulatory regime for broadcasting, gives rise to a pressing need for review. We conclude by arguing that the scope of any review should not be limited to Part 9 of the BSA. Rather, a more holistic review of rule-making across the communications sector is required in order to provide Australian policymakers with an opportunity to tackle in a more principled way the problems associated with regulating digital platforms.

In approaching this topic, we note there is little scholarly research on the subject of communications co-regulation. In relation to broadcasting, there is some commentary on inadequacies of the co-regulatory code of practice relating to commercial radio (Turner, 2003; Hitchens, 2004; Wilding, 2015) and there is research on self-regulation, particularly in relation to food advertising codes (eg, Reeve, 2016, 2013; Handsley and Reeve, 2018; Mackay, 2009). There is also some commentary on the co-regulatory internet and telecommunications schemes (Corker, Nugent and Porter, 2000; Williams, 2003; Field, 2000; and Wilding, 2005, 2006). And while Lee (2018) has provided an in-depth empirical study of the development of three telecommunications consumer codes of practice, this is the only study of its kind for telecommunications and there is no in-depth research of the broadcasting co-regulatory codes.

Characterising the consultation activities of Free TV and Commercial Radio Australia

To assess the requirement identified by the Department that rule-making processes 'enable a wide range of views to be considered', we focus here on the two commercial broadcasting codes: the *Commercial Television Code of Practice* ('the Commercial Television Code') administered by Free TV Australia (Free TV) (eg, Free TV, 2015) and the *Commercial Radio Code of Practice* ('the Commercial Radio Code') administered by Commercial Radio Australia (CRA) (eg, CRA, 2017). Both codes are registered by ACMA under Part 9 of the BSA, which requires, among other things, that ACMA must be satisfied that 'members of the public have been given an adequate opportunity to comments on [them]' (s 123(4)(iii)). These codes are also considered the most influential broadcasting codes, and have been the subject of regular review and amendment (generally at least every three years) since they were first registered in the mid-1990s.

While different means of public consultation have been used, the two peak bodies have tended to use the same mechanisms of engagement. They can almost exclusively be grouped into the following four categories:

- Use of complaints data – including complaints made direct to broadcasters, and investigations conducted by the ACMA. Free TV's Code Review Group (comprising representatives from the association's broadcaster members) and CRA have taken account of programming complaints (if any) made directly to their members by viewers, listeners, and members of the public as well as the findings of any ACMA investigations into complaints made to the ACMA.
- Review of research by the regulator, including the ACMA's research on viewer and listener attitudes and practices, but also relevant findings of other agencies.
- Information dissemination, such as media releases and newspaper advertisements calling for written submissions on a draft code. More recently, Free TV and CRA have also provided notices via their social media channels; and added copies of draft codes, explanatory guides and/or discussion papers on their websites.
- Written submissions on draft rules. The amount of time that Free TV and CRA give the public to make written submissions depends on the extent of amendments they propose to make to a code. If substantial amendments are made to a code, Free TV and CRA have typically provided the public a minimum of six weeks in which to make written submissions, although they gave them four weeks when the code was revised to include new gambling advertising rules in 2017.

The exception to these groupings is Free TV's practice of arranging for staff to speak to consumer or public interest organisations about draft rules. But this is an historical practice.

It is not possible to gauge the real effectiveness of these mechanisms because there is insufficient information publicly available on the views expressed during consultation exercises or the ways in which they were considered by Free TV, CRA or the ACMA. However, by applying our typology of engagement mechanisms (Lee and Wilding, 2019a: 44-61), developed for the Australian communications sector and based on the 'flow of information' (Rowe and Frewer, 2005: 255) between the public and industry, we can ascertain when and the extent to which those affected by regulation have input into code formation.

Of the four mechanisms mentioned above that have been used recently by Free TV and CRA, the first two (use of complaints data and review of research by the regulator) fall into the least consultative category of *data collection*, which involves the acquisition and collation of pre-existing data about industry practices. Both mechanisms are deployed during fact-finding, ie, when the industry bodies are identifying, understanding and describing industry and consumer/citizen practices and the environments in which they place. The third mechanism (information dissemination) falls into the second category of *public communication* – the provision of information about a rule-making to consumers or citizens. It is used when formulating regulatory approaches and rules. The fourth mechanism (written submissions on draft rules) falls into the third category of *public input*, which involves opportunities for consumers and citizens to respond to an invitations issued by an industry body to supply information to it. Free TV and CRA permit public input only when formulating regulatory approaches and rules. Neither organisation uses any mechanism in any rule-making stage that falls into the fourth, most expansive form of consultation, *public dialogue* – mechanisms that facilitate the simultaneous exchange of information, ideas and proposals as well as debate and negotiation between consumers or citizens. And none of the four mechanisms used by Free TV or CRA is used in the process of identifying and describing regulatory issues (which

involve an industry body identifying, understanding and evaluating the aspects of the business practices of its members that raise regulatory concerns) or in monitoring and assessing the operation of rules.

Analysis – lack of responsiveness

Freiberg (2017: 158) has said that good regulatory practice supports some contribution by those who will be the subject of regulation to its design. The ACMA (2015a) has explained, 'Public consultation on a draft code must take place to allow community concerns to be identified and evaluated'. Other scholars (eg, Dean (2017), Fung (2006), Thomas (1993), Toscano (2017), Bishop and David (2002), Brackertz and Meredyth (2009) and Black (2006)) have also turned their minds to classifying the nature of this input, often by way of some kind of spectrum or continuum from minimal to substantial consultation modes. Perhaps the most useful way of understanding engagement as an element of co-regulation is through the concept of responsiveness, which underpins highly influential concepts of regulatory design, including 'responsive regulation' (Ayres and Braithwaite (1992); Braithwaite, 2008), 'smart regulation' (Gunningham and Grabosky, 1998), 'collaborative governance' (Ansell and Gash, 2008), and 'really responsive regulation' (Baldwin and Black, 2008), that encourage industry actors to participate in regulatory activities, including rule-making, once seen as the exclusive duties of the state.

Responsiveness has usually been applied in the context of compliance and enforcement; however, when the state transfers responsibility for rule-making from itself to industry, as it has in Part 9 of the BSA, responsiveness helps us to understand that requirements for, say, accountability and a degree of transparency, will also be transferred from the state to industry. Indeed, the revised explanatory memorandum that introduced the BSA code regime in 1992 recognised the benefits that flow from industry engagement, but also the responsibilities that would accompany this transfer of power: part of the rationale for this

new approach was 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' (p. 61).

If the criteria of responsiveness are applied to Free TV and CRA rule-making, in addition to the absence of any mechanisms of 'public dialogue' already noted above, three weaknesses in their engagement practices suggest Part 9 code development may not responsive: the late involvement of citizens in rule-making; the failure to take account of known barriers to participation; and the absence of any body or group representing the public during code development.

Late involvement of citizens in rule-making

The absence of the public from the initial stages of issue identification in a review is the first and perhaps the most striking weakness emerging from our analysis: work related to issue identification is undertaken by Free TV and CRA and their industry members in consultation with the ACMA, but it is not until proposed amendments to the code have been drafted that members of the public are invited to contribute.

Barriers to participation

The second weakness is the failure of Free TV and CRA to take account of known barriers to participation and missing stakeholders – stakeholders who have not traditionally participated, but can contribute 'information about impacts, problems, enforceability, contributory causes, [and] unintended consequences' (Farina et al, 2011: 148). In the early stages of a code review, Free TV and CRA both draw on complaints statistics and research conducted by regulators; however, for new, targeted input from members of the public, both organisations rely primarily on written submissions on draft rules. While written submissions are an important contribution to regulatory review, the obstacles to participation faced by vulnerable

consumers and under-resourced community groups are well recognised in the international literature, particularly in the work of Farina et al (2014: 1550, 1553, 1559, 1564), who identified four barriers to participation in the context of US administrative rule-making:

- Lack of awareness that proposed rules may affect them or that they can participate in the formation of these rules;
- Information overload – where the information is not presented in a way that ordinary people can understand or want to read, or is even incomprehensible;
- Low participation literacy – where stakeholders may not realise that to participate effectively they may, for example, need to give reasons and additional information to support their view, and not simply express support for or against a specific result; and
- Motivational barriers – where there may be competing demands on submitters' time and attention, or even distrust of the rule-maker and cynicism about the likely effect of their input.

While our Consumer Round Table participants did not comment specifically on the problems encountered in relation to the Commercial Television Code and the Commercial Radio Code, those who had made written submissions on draft telecommunications codes and other privacy-related codes referred to the problems of 'submission fatigue' arising from repeated requests for comment in circumstances where there were few contributors; of the difficulties of participating in a long and complicated review when they are volunteers with their own professional and personal responsibilities; and of the motivational disincentive arising from a feeling that something was 'already a done deal' (Lee and Wilding, 2019a: 65-74). We are not aware of any study of who submits to commercial television and commercial radio code review processes, but in our Industry Round Table, the Free TV representative said while it received over 2,000 written submissions on one recent consultation, most of these were in

similar terms as part of a campaign, and only 11 other substantive submissions were received. The CRA representative said it receives fewer than 10 submissions on draft codes.

Absence of a broad-based advocacy group

The third weakness of Free TV and CRA engagement practices is perhaps more attributable to Parliament and government than to the associations themselves. This concerns the absence of any organisation that can represent 'members of the public', in the way that the Australian Communications Consumer Action Network (ACCAN) 'represents the interests of consumers' when Part 6 codes of practice are developed under s 117 of the TA. ACCAN is Australia's peak communications consumer organisation with a membership base that includes individuals, legal centres, disability advocates, Indigenous organisations and others. It is funded for this work by the Federal Government under s 593 of the TA, with the funding recovered from charges on telecommunications carriers. The importance of informed and adequately resourced representation was recognised recently by the Productivity Commission when commenting on the potential, and also the limitations, of eliciting contributions via social media:

> While social media has significantly changed the way consumers are able to voice their concerns, it is not a substitute for organised and informed consumer advocacy. Being able to make an effective contribution to the policy debate requires time, resources and know-how (2017: 217).

The Department's Consumer Safeguards Review, referred to in the Introduction, illustrates the kind of contribution that can be made by a representative group such as ACCAN. ACCAN's submission to Part C of the review described the 'failures of co-regulation' and called for the movement of consumer protection measures into directly enforceable rules administered by the ACMA. While ACCAN's view is disputed by service providers, it can at

least claim an authoritative consumer-focussed position grounded in practical experience, as demonstrated in its comment on code development:

> ACCAN's experience sitting on code Working Committees has shown that providers have ample opportunity to shape code development to suit their commercial interests. Regrettably, in some instances, the code development process resembles a style akin to 'negotiation by attrition', where working committees work for month after month to come to agreement. Areas where there is an impasse are left until last and if consumer and industry representatives are not aligned, there is limited appetite to adopt ACCAN's proposals regardless of the public interest. This often results in little or no shifts from industry positions, with small changes and concessions at best that frequently do not deliver effective consumer protections (ACCAN, 2020: 28).

The place of ACCAN in the telecommunications regulatory environment is well recognised by government (see, for example, DOCA, 2017: 8). But ACCAN's remit means that its activities are limited to telecommunications and internet services. Other groups may have interest in some media policy issues, but it is not their core activity and they have not been heavily involved in communications-related debates. In short, no organisation has the remit or funding to represent the 'citizen' related aspects of media policy and regulation in the way that ACCAN represents the consumer-related aspects of telecommunications and internet services.

When we put this to participants at our Round Tables, the resistance from industry and regulator representatives to either the extension of ACCAN's remit or the establishment of a dedicated public interest body was surprising. However, their response is consistent with a view expressed some years ago by the CEO of Free TV's predecessor, the Federation of Australian Commercial Television Stations (FACTS), when explaining why (at the time) the organisation preferred to use community service announcements to attempt to solicit

submissions from individual viewers: FACTS was 'not convinced that interest groups necessarily spoke for a great many members of the commercial television viewing audience' (Lee and Wilding, 2019b: 53-54). At our Industry Round Table, some industry participants also raised the possibility of duplication of research conducted by the ACMA, while another raised the concern that such a group could have its view elevated above others (Lee and Wilding, 2019a: 96).

The likelihood of such an outcome is, of course, hard to judge, not only because there is no current body whose contribution can be assessed, but because the process by which the views of submitters are considered is not made public by either the industry associations or the regulator. The most insight we have found on the process was at the conclusion of the 2015 review of the Commercial Television Code, when a Free TV representative noted that a number of changes were made to the draft code after public consultation and negotiation with the ACMA (O'Neil, 2016: 2). For its part, the ACMA (2015a) said:

> 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 … 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.

Code registration and the role of the regulator

The analysis in the previous section leads us to the conclusion that the current arrangements for public engagement in review of the commercial broadcasting codes are not of a sufficient standard to pass the test advanced by the Department in Principle 3 of the third phase of the

Consumer Safeguards Review, that 'The rule-making process should be timely, efficient, *enable a wide range of views to be considered* and produce clear, targeted rules' (emphasis added). Our work on public and consumer engagement in industry rule-making does not provide evidence for us to fully address, in the broadcasting context, the other aspects of good regulatory practice identified by the Department in Principle 3; namely, timeliness, efficiency, and the production of clear, targeted rules. However, it does lead us to question the nature of the 'robust engagement' described by the ACMA in relation to the 2015 Commercial Television Code, at least in regard to the engagement between commercial broadcasters and members of the public. It also leads us to question why Part 9 of the BSA does not include a provision comparable to that found in Part 6 of the TA: that industry bodies must consult with 'at least one body or association that represents the interests of consumers' about the development of a code (s 117(1)(i)).

ACMA's 2015 statement that a TA Part 6 code is taken 'as a whole' when it assesses whether to register it raises additional questions about the appropriateness of the code development framework. One of the tests for registration under Part 9 of the BSA is that 'the code of practice provides appropriate community safeguards for the matters covered by the code'; the same test for registration is applicable under Part 6 of the TA when a code addresses matters 'of substantial relevance to the community'. When reviewing the test in the form appearing in the TA, the Department made the following observation:

> The test for registering codes is low and subjective. ACMA must register a code if it is satisfied that the code 'provides appropriate community safeguards' for the matters it covers, amongst other things. The test applies to the code as a whole, meaning individual safeguards within a code might be of varied quality. Moreover, the safeguards quality test is 'appropriate'—a subjective test for all involved (consumers, industry and the regulator). This means that some code protections are likely to be

> sub-optimal, depending on the perspective taken, and a balance needs to be struck. In practice, ACMA could assess each article, though is not required to do so or prompted to under legislation (2020: 15).

There are clear implications here for the broadcasting regulatory framework, both in the observation that matters involving an impost on industry (whether the imposition of a new obligation, or the continuation of an existing one) may not be well suited to co-regulation; and in the inadequacy of the statutory test for registration of a code of practice. These similarities suggest that it would be reasonable to conclude that any flaws in the regulatory design of this aspect of Part 6 of the TA would, at the very least, provide cause for reconsidering the suitability and effectiveness of the equivalent provisions under the BSA. In its consultation paper on the TA, the Department's observations on the likely 'sub-optimal' results obtained through telecommunications consumer code development lead it to consider various options for '[s]trengthening the self-regulatory framework to set tighter parameters around the industry codemaking process' (2020: 25). These include specifying that the ACMA 'must refuse to register sub-optimal codes or code provisions' and 'providing a higher threshold for code registration beyond providing "appropriate community safeguards"' (2020: 25). It even goes so far as considering a scenario under which 'self-regulation [would be] confined to second order safeguards or situations where Minister or regulator-developed rules could usefully be supported by technical or process requirements' (2020: 25). (Again, 'self-regulation' is used here to refer to registered codes of practice that are ordinarily characterised as 'co-regulation'.)

While providing an effective legislative framework is the role of Parliament, some responsibility for the inadequate performance of broadcasting co-regulation must also lie with the regulator. In 2000, the Productivity Commission recommended that guidelines on the meaning of 'adequate opportunity to comment' be developed by the Australian Broadcasting

Authority ('ABA'), one of ACMA's predecessors, but none was ever adopted. Instead, the meaning of an 'adequate opportunity to comment on the code' is determined by relevant industry bodies and associations in conjunction with ACMA on a code-by-code and case-by-case basis (Lee and Wilding, 2019a: p.19). In the past, the ACMA has indicated that any decision was informed by six general principles of consultation outlined in a guide (ACMA, 2015b) titled *Effective Consultation: The ACMA's Guide to Making a Submission*, but by 2019 it appeared the guide was withdrawn.

Despite the limitations of the statutory framework and the absence of any formal guidance on the regulator's role, the ACMA has, at least on the occasion of revisions to the Commercial Television Code in 2015, described its approach as 'robust'. Our own research reveals that the ACMA is presented with opportunities for active involvement at various stages of code development. Evidence given by Free TV to a Senate standing committee indicates that when code review and revision begins, the CEO meets with the director of the ACMA's Content Safeguards (or equivalent) to discuss the issues that should be addressed in the Code and agree the manner in which review and revision will be conducted. ACMA also 'reviews' any draft Code presented by Free TV's Code Review Group – the body tasked with drafting the Code. If and when ACMA indicates agreement to proceed, it authorises Free TV to release a copy of it to the public, and public engagement begins (Lee and Wilding, 2019b: 52). Less information has been published about the development of the Commercial Radio Code, but CRA said it consults with the ACMA, and CRA engages in public consultation after it and ACMA agree the terms of a draft code (CRA, 2008: 2). However, it characterised its collaboration with the ACMA in stronger terms than Free TV: it said CRA and the ACMA 'jointly develop' the code.

Yet the exact nature of the relationship between the ACMA and the broadcasting industry participants whose codes it registers is not transparent because the code development process

is confidential. This lack of transparency has contributed to the absence of any meaningful public commentary or analysis. Where this commentary does exist, it suggests the relationship between ACMA and industry has changed over time, with the self-described 'robust' engagement of the ACMA of the late 2010s standing in contrast to the approach to co-regulation expressed by two former chairs of the predecessor body, the Australian Broadcasting Authority (ABA). Former ABA chair, David Flint (2005: 35), in a book published after he left the ABA, described the function of the media codes of practice in the following terms:

> Media codes … prescribe what a responsible journalist or editor should do or not do, in broad terms, not as a crime or even a tort, that is, a civil wrong. What they declare are matters of morals, or ethics, except of course some matters of administration, for example the number of minutes of advertising allowed on television.

This rather dismissive characterisation of non-journalistic aspects as 'matters of administration' refers primarily to the content of the codes, and should be read alongside an explanation offered by Flint's successor at the ABA, Lyn Maddock (2006: 29), of the ABA's role in relation to compliance and enforcement:

> the whole system depends crucially upon what you might call outsourcing the compliance, the monitoring, to the public so that the public have an active role in complaining and advancing those complaints.

As we note above, the notion of an 'active role' on the part of the public is not seen in relation to code development, as distinct from compliance monitoring. The comments by the former chairs suggest that an 'active role' was not envisaged for the regulator either. Indeed, it is possible that 'active' was regarded as 'interventionist' – a quality that was eschewed

from the start, as Sadler (2006: 150) notes when citing the description in the explanatory memorandum of the regulatory approach underpinning the Broadcasting Services Bill:

> It promotes the ABA's role as an oversighting body akin to the TPC [Trade Practices Commission] rather than as an interventionist agency hampered by rigid, detailed statutory procedures, and formalities and legalism as has been the experience with the ABT [Australian Broadcasting Tribunal].

In referring to the attitudes expressed by its former chairs, we do not mean to suggest that current practice of the ACMA demonstrates the same attitudes; there is at least some evidence of a markedly different approach. However, it is reasonable to assume that the content of the codes and the vigilance applied to the testing of community views was influenced by the non-interventionist approaches expressed by its chairs. Further, the public statements that do exist on the relationship between the regulator and industry bodies whose codes it approves appear to show different understandings of the ACMA's role. It is not clear, for example, whether the 'joint development' of a code (to use the terminology of CRA) means the ACMA contributes to the list of matters that should be covered by it, and whether 'review' of a draft by the ACMA (to use the Free TV terminology) means the regulator effectively has a veto over its release for public comment. Finally, uncertainty over how the ACMA exercises its crucial decision-making role in judging whether proposed codes meet community expectations is at least partly due to the absence of any meaningful, substantive explanations by the ACMA itself. This lack of clarity is concerning because it impedes a more comprehensive understanding of regulatory practice and accountability. If left unchecked, it can also lead to accusations of regulatory capture.

Conclusion

In this article we have examined the code development process for the Commercial Television Code and the Commercial Radio Code – especially the circumstances in which industry associations involve the public in reviewing and developing rules – in the context of the telecommunications Consumer Safeguards Review. This has led us to the conclusion that the broadcasting scheme is itself due for review.

While acknowledging that researchers routinely call for reviews of government policy and regulation, we argue that – after almost 30 years' experience of broadcasting co-regulation and over 25 years of telecommunications co-regulation – now is the moment for action, as a review framework has already been established. The Government's 'implementation roadmap' for the Digital Platforms Inquiry marks out numerous areas for review in the quest to 'harmonise' media regulation, with the Green Paper offering further impetus for reform. Fortuitously, the Department's near complete Consumer Safeguards Review should also offer useful insights into the experience of co-regulation in telecommunications.

At a minimum, such a review would need to consider the ways in which stakeholders participate in co-regulation and the circumstances under which the ACMA approves and registers broadcasting codes. However, the creeping effects of communications convergence suggest the review should also involve consideration of other aspects of Part 9 of the BSA, including: the matters that might be subject to this form of regulation; the parties who might develop these rules, including mechanisms for encouraging the involvement of at least one broad-based advocacy organisation covering emerging issues relating to digital platforms as well as traditional broadcasting services; and the articulation of a clearer and more compelling public interest mandate for the ACMA. Though our research to date has focussed on consumer and public engagement in rule-making, we have suggested the Department's criticism of the 'appropriate community safeguards' test in telecommunications should raise concerns about the application of the same test in broadcasting.

Our preferred approach – and one that would avoid the risk of reproducing one sector's problems in another – is to consider rule-making in telecommunications, broadcasting and online services in one coherent, expansive, and holistic policy review.

Such a review would first need to consider how content obligations are developed and applied to various categories of service providers who supply content to the public. This would include the use of self-regulation, co-regulatory codes of practice (including those developed under Schedules 5 and 7 of the BSA), program standards, licence conditions and other statutory requirements, and consider the consultation practices of government as well as industry. For example, digital platforms such as Google and Facebook, as well as providers of subscription video-on-demand (SVOD) and 'advertising video-on-demand' (AVOD) services are not generally subject to the requirements of the BSA, just as broadcasters' catch-up (or 'BVOD' – broadcast video-on-demand) services are not subject to the requirements of their free-to-air services. A social media service *does* meet the definition of 'online content service' in cl 3 of Schedule 8 of the BSA, meaning it is subject to restrictions about gambling advertisements, and it also meets the definition of 'content service' for the purposes of abhorrent violent material scheme in Division 474 of the Criminal Code. To be included in the recently enacted 'News Media Bargaining Code', a social media service would need to be the subject of a determination by the Minister, naming it as a 'designated digital platform service' (*Competition and Consumer Act 2010* (Cth), pt IVBA, s 52E). While a social media service would appear to meet the definition of 'hosting service' in Schedule 7 of the BSA, the likely absence of a sufficient 'Australian connection' appears to mean the online content scheme, including the development of codes of practice under that schedule, do not apply. The review would need to consider the analysis of past reviews – for example, those of the Productivity Commission (2000), the Convergence Review (2013) and even the Department

of Communications itself (2016) – but it will need to be sensitive to the new shape of the communications sector, reflecting the prominence of digital platforms.

A second, and arguably greater, challenge for such review would be the need to formulate unifying principles for bringing digital platforms into the regulatory framework. Government is making efforts to regulate digital platforms, but as yet, no consistent approach has emerged. Instead, policy approaches have been formulated, and regulatory mechanisms selected, on a relatively ad hoc basis, as we briefly illustrate below.

The government appears to be making greater use of the formal but voluntary 'government expectations' approach, first deployed in the *Enhancing Online Safety Act 2015* (Cth) to regulate social media providers (ss 21 and 22), whereby government expectations are incorporated in legislation but only become enforceable following some other trigger event. For example, in the November 2020 Media Reform Green Paper, the Government proposed setting voluntary 'minimum investment' expectations with mandatory reporting obligations for certain large SVOD and AVOD services. If an SVOD or AVOD service failed to meet the expectation, the Minister would be empowered to impose 'a formal regulatory obligation' (Australian Government, 2020: 30, 35). A similar approach is reflected in Part 4 of the Online Safety Bill 2021 (Cth), introduced in the House of Representatives on 24 February 2021.

But the government is also experimenting with the use of voluntary and mandatory obligations, and new forms of self- and co-regulation not previously deployed in the telecommunications, broadcasting and online services. This is seen most clearly in the shift in approach to the scheme under which digital platforms will make payments to news media organisations for content that appears on their services. Initially a voluntary scheme, within six months, it soon took the form of a mandatory legislative scheme. Concurrently, an industry association representing digital platforms has responded to a separate call from the

Government (also as part of the 'implementation roadmap') to develop a voluntary code that might help curb the spread of disinformation and promote credible sources of news.

This last initiative brings digital platforms into the regulatory arena through what we might describe as 'guided self-regulation': while the voluntary code will not have the legislative backing of the broadcasting or telecommunications codes, the code development process occurred under the watchful eye of the regulator (ACMA, 2020), and the Government has warned that it 'will assess the success of the codes and consider the need for any further reform in 2021' (Australian Government, 2019: 7). This hybrid approach in developing a code of practice – like the emerging 'government expectations' approach – sits somewhere between self-regulation and co-regulation.

As part of the process of formulating unifying principles for the new regulatory framework for communications, the government will need to confront head-on the extent to which traditional co-regulation should continue to play a role. Although we believe there are reasons for improving the process for developing codes of practice – most notably, the ways in which public engagement is enabled – these are not, of themselves, arguments for abandoning co-regulation. Indeed, there are some circumstances where it is appropriate for industry to take primary responsibility for rule-making, and consumers and the public may be better served by renewed investment in co-regulation – if it provides a genuine opportunity to participate and incorporates adequate registration safeguards – than by a reversion to government regulation.

If government intends to rely on co-regulation in the future, however, it will need to revisit the appropriateness of the current statutory frameworks that underpin it as well as give some consideration to harmonising the disparate registration requirements. As we have highlighted, there are important differences in the specific criteria for the registration of codes developed under the existing schemes, including the requirement for the involvement of a consumer

representative group in telecommunications codes, with no equivalent in either the broadcasting or internet codes. In addition, the Consumer Safeguards Review has already resulted in the identification, by the Department, of flaws in the regulatory framework for consumer codes of practice in the telecommunication sector. As we have argued above, these flaws apply equally, if not more so, to the regulatory framework for broadcasting – including those aspects concerning the role of the regulator.

In recent commentary on the development of new policy initiatives for the digital platform era, Flew and Wilding (2020: p.14) have warned of the risk that in focussing on newer industry participants, governments internationally may overlook longstanding problems with legacy regulation. Earlier in this article, we observed that the explanatory memorandum to the Broadcasting Services Bill in 1992 presented the potential of co-regulation in terms of the 'opportunity to devise a flexible and responsive approach to meeting the demands and needs of the community'. Almost thirty years later, we can see the flexibility has been there from the start, but so have the flaws. As we develop new approaches to regulate the contemporary communications environment, we should focus on responsiveness.

Declaration of Conflicting Interests

The authors have made submissions or assisted parties making submissions to the government's New Media Bargaining Code policy initiative, and for Dr Lee this took the form of contract research. Dr Wilding was part of a team commissioned by the industry association representing digital platforms to assist with the development of the Australian Code of Practice on Disinformation and Misinformation Code.

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