



CENTRE FOR MEDIA TRANSITION

Digital Technology Hub

Consultation Paper, January 2020

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About the Centre for Media Transition

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

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

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1. Introduction

Thank you for the opportunity to contribute to this consultation on the Digital Technology Hub.

Our submission addresses questions 1 and 9 posed by the Department.

We are Dr Derek Wilding, Co-director of the Centre for Media Transition, and Dr Karen Lee, senior lecturer in the Faculty of Law at UTS.

2. Question 1

In November 2019, we completed an 18-month research project, funded by the Australian Communications Consumer Action Network (ACCAN), examining consumer and public engagement in industry rule-making in a converged communications environment.

As part of the project, we identified 20 self- and co-regulatory industry bodies and schemes (referred to below as 'industry schemes') operating in the advertising, media, and online telecommunications sectors (collectively referred to as the 'communications industry'). The schemes included the co-regulatory codes of practice administered by the telecommunications and broadcasting peak bodies, Communications Alliance and Free TV Australia; the self-regulatory press and advertising schemes operated by the Australian Press Council and the Australian Association of National Advertisers; the domain name registration scheme operated by .au Domain Administration Limited (auDA); and the cross-sector rule-making of Standards Australia.

We also gathered information about the mechanisms these schemes use to engage with consumers and citizens during rule-making and found that the most common mechanism deployed was the provision of an opportunity to make written submissions on draft rules.

However, as we highlight in our report [Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making](#), a summary of which appeared in the December 2019 edition of the *Communications Law Bulletin* published by the Communications and Media Law Association), there are a number of stakeholders—stakeholders such as small businesses, and individuals residing in regional, rural and remote areas of Australia—who are missing from industry public engagement exercises. They do not participate even though they have 'information [known by them] about impacts, problems, enforceability, contributory causes, [and] unintended consequences'¹ of rules proposed by industry that affect them.

These missing stakeholders confront a number of barriers to participation, including technical complexity and motivational barriers such as competing demands for their time and attention, distrust of the rule-maker and cynicism about the likely effect public engagement will have on the final outcome. However, one of the most significant barriers is a lack of awareness about the opportunities to submit written comments. Invitations to make written submissions are published on the websites of industry schemes, but many consumers and citizens, including those living in regional, rural and remote areas, are unlikely to know who these industry bodies are. Industry advertisements inviting written submissions are placed in major newspapers and other fora, but they may not be seen by or sufficiently targeted at missing stakeholders. For these reasons, we recommended that all consultation documents issued by the 20 schemes be published on single website hosted by a government regulator such as ACMA with which

¹ Cynthia R Farina, Mary Newhart, Josiah Heidt and CeRI, 'Rulemaking vs Democracy: Judging and Nudging Public Participation That Counts' (2012) 2 *Michigan Journal of Environmental and Administrative Law* 123, 148.

consumers and citizens may be more familiar. The relevant pages from our report are extracted in the annexure to this submission.

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

The focus of our report and recommendations was on responsive engagement in the context of industry rule-making, but the DTH could be used to disseminate information about consultation exercises relating to the communications industry undertaken by the Department of Infrastructure, Transport, Regional Development and Communications or regulators such as ACMA and the eSafety Commissioner as well. Research conducted in the United States suggests the missing stakeholders we identified are likely to face the same or similar barriers to participation when government departments and agencies consult on draft legislative instruments.

Finally, we would also suggest that information included on the DTH for consumers and citizens should not be limited to telecommunications services, as the consultation paper indicates on p.5. Rather, information on the DTH should reflect the wider changes occurring in the communications industry. For example, as the demand for video-on-demand streaming services such as Netflix, Foxtel and Spotify continues to grow, it is increasingly difficult for all consumers, including those living in regional, rural and remote areas of Australia, to distinguish between telecommunications and content services because many telecommunications customers receive content services as part of their phone packages. Consumers are therefore likely to also need information about how to resolve disputes concerning the customer-related aspects of content service provision. Similarly, information about the work of the eSafety Commissioner and the current and proposed schemes she oversees relating to cyberbullying, image-based abuse, and illegal and harmful online content should be included.

3. Question 9

We believe the Government should continue to fund the DTH beyond its initial two year funding period. However, if government funding is not forthcoming, the Department should explore the possibility of ACMA recovering at least some of the cost of the DTH from carrier licence fees (as it does for the costs of developing consumer-related codes of practice for the purposes of Part 6 of the *Telecommunications Act 1997* (Cth)). If the Department decides to include information relating to eSafety on the DTH, it should also consider designing a mechanism that would allow it to recoup the related costs from the largest digital platform providers —Google and Facebook.

We are opposed to the idea of paid advertising unless providers of communications services that are the subject of the DTH are prohibited from advertising on it. Permitting paid advertising by such providers would create the appearance of, and possibly give rise to, conflict of interests, thereby undermining the Department's stated objective of 'providing independent and factual information'.

ANNEXURE

Extract from Karen Lee and Derek Wilding, *Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making* (2019)

6.1.2 The Australian self- and co-regulatory rule-making context

As explained in section 5.2.3, Consumer Round Table participants identified (and Industry Round Table representatives appear to have accepted) that a number of stakeholders who could enhance industry rule-making are not submitting written comments when industry offers them that opportunity. These missing stakeholders included young people, small businesses, a variety of individuals from vulnerable communities and often the relatively small organisations that in several cases represent their interests. Round Table participants also identified a number of barriers to their participation including submission fatigue, technical complexity and motivational barriers, such as competing demands for their time and attention, distrust of the rule-maker and cynicism about the likely effect public consultation will have on the final outcome. Although not specifically mentioned by any Round Table participant, we would also suggest that missing stakeholders likely face two additional barriers (barriers that Farina et al found in their research): a lack of awareness that draft rules proposed by industry schemes may affect them and/or that they can participate, and information overload. The limited amount of public communication provided by the industry schemes that we were able to locate contains much jargon and uses terminology that missing stakeholders are unlikely to understand without assistance.

The precise steps that would need to be taken to reduce these participation barriers will vary from rule to rule and turn on the specific industry body and scheme and the specific stakeholders the rule-maker is seeking to attract. Nevertheless, our research of the 19 schemes carried out for the project indicates there are some additional measures that industry schemes could take to reduce participation barriers faced by stakeholders who do not currently participate in their public engagement processes. Below, we identify possible measures to increase participation by individual consumers and citizens as well as by organisations representing their interests.

Possible measures to assist individual consumers and citizens

First, to maximise the chances of missing stakeholders reading consultation documents, including issue papers, **all documentation could also be published by industry self- and co-regulatory industry schemes on a single website hosted by a government regulator such as ACMA.** We note ACMA already performs a similar function when it issues alerts advertising opportunities to make written submissions to consultation documents published by Comms Alliance, CRA and Free TV. As was noted in Section 3.21.1, industry publicises the opportunity to make written submissions on consultation documents on their websites (often in conjunction with other means). However, advertising those opportunities on their websites assumes consumers, citizens and any other organisations representing their interests know of the relevant schemes and regularly look at those websites. In the UK and the US, for example, there are websites that effectively serve as ‘one-stop shops’ for consumers and citizens. Information relating to all ongoing consultations by UK departments, agencies and public bodies is published on www.gov.uk.² In the US, all notices of rule-making are published at www.regulations.gov. Publication on a single website will not alleviate all participation barriers, but it may assist some consumers and citizens.

Second, **ACMA (or any future regulatory authority) could publicise (via its communication channels) opportunities provided by industry schemes for consumers, citizens and related organisations to engage with their rule-making processes.** As noted above, ACMA already performs this function in relation to

² See https://www.gov.uk/government/publications?publication_filter_option=consultations/.

consultation documents published by Comms Alliance, CRA and Free TV, and we see no reason why ACMA could not do the same for other industry schemes.

Third, in order to make it easier for consumers and citizens to identify proposed amendments to existing rules, **industry schemes could issue a marked-up (redline) version of proposed rules.** According to our research, only auDA requires publication of a redline version of the changes to its policies.³ We note cameron.ralph.khoury made a similar recommendation in 2018 following its review of Standards Australia's technical governance.

Fourth, to help overcome motivational barriers, **industry schemes could publish statements explaining how consultation processes have shaped the rules they have adopted and write directly to individuals explaining if their comments were accepted or rejected, and if rejected, why.** There is some overseas precedent for this measure. For example, it is the practice of the UK Committee of Advertising Practice (CAP), which is responsible for drafting the UK Code of Non-broadcast Advertising and Direct and Promotional Advertising Code, and the UK Code of Broadcast Advertising, to publish such a statement.⁴ As already mentioned in Section 3.21.1 above, in Australia, auDA now requires advisory committees to represent stakeholders' views and the rationale for accepting some stakeholder input in their draft reports, which must be published (August 2018, para 39). Comms Alliance requires reasons for not incorporating certain comments in amended draft documents to be recorded in meeting minutes. Authors of comments are also advised in writing about the action taken (June 2007, s 6.5(a)).

Fifth, to help overcome motivational barriers, **consumers and citizens could become involved during the 'formative stage'** of rule-making where their input is arguably more likely to have an effect on the final outcome. For example, industry schemes could invite consumers and citizens to provide input into issue papers, including the formulation of questions they pose, and/or ask them to make submissions in response to them.

Sixth, where members of industry schemes have an existing relationship with customers, they could **solicit customer participation by advertising opportunities to comment on draft rules in bill messages and/or via email.** In the UK, one of the ways that at least one water company is engaging with its customers when preparing its business plans for regulatory price control reviews is through bill messages (Hand, Metcalfe & Rundhammer 2018 p. 12).⁵ In Australia, broadcasters have the email addresses of viewers who have registered and accessed their catch-up television services. Where appropriate, they could notify their viewers of draft rules and opportunities to comment on them.

Seventh, industry could make use of **information layering and plain English explanations of terminology.** The limited amount of public communication provided by industry bodies and schemes that we were able to locate contains much jargon and uses terminology that it is unreasonable to assume missing stakeholders are likely to understand without assistance. As the CWA representative stated:

... they use language that the average person or disadvantaged people might not necessarily understand. So, it'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.

Eighth, **where significant difficulties reaching a critical mass of individual consumers or citizens are encountered, industry schemes could tailor consumer and public engagement so that an adequate range of consumer and citizen views is solicited.** Tailored engagement could include holding meetings between rule-makers and representatives from peak consumer and public interest organisations on a one-on-one basis and/or adoption of one or more of the alternative mechanisms discussed in section 6.2 below.

³ See section 3.21.1 above.

⁴ Advertising Standards Authority (ASA), *How We Consult* (Web Page) <<https://www.asa.org.uk/about-asa-and-cap/the-work-we-do/how-we-consult.html>>.

⁵ See also section 6.2.2 below.

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

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

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