



The Australian Industry Group
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21 July 2017

The Project Manager
Spectrum Reform
Department of Communications and the Arts
Email: spectrumreform@comunications.gov.au

Dear Sir/Madam

AUSTRALIAN GOVERNMENT CONSULTATION ON NEW SPECTRUM REFORM

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the new spectrum reform package under consultation by the Department of Communications and the Arts. We also thank you for the invitation to your stakeholder information session on 7 June 2017 in Sydney.

Our members affected by these reforms include suppliers of devices and appliances that receive or transmit, providers of communications, broadcast and information services that rely on spectrum allocations, and customers who use such devices and services to carry out and improve their business.

Our submission focuses on two proposed changes under the new Radiocommunications Bill 2017 (Cth) ("the Radcoms Bill"): equipment regulation arrangements ("Equipment Rules"); and the compliance and enforcement regime.

While the Department's information session in June provided some clarification to the material under consultation, there remains questions about elements of the proposed reforms that are still being tested and fleshed out. Once these have been clarified, we may have additional comments at the second exposure draft stage.

1. Equipment regulation

The Department has decided to introduce provisions in the Radcoms Bill to authorise the Australian Communications and Media Authority (ACMA) to make rules relating to equipment ("Equipment Rules").¹ The Department indicates that the Equipment Rules would have to include complying with the following objectives: "minimising interference to radiocommunications equipment, and management of risks to health and safety resulting from radio emissions". It appears that the new draft provisions are intended to address the following issues: "the Act does not enable the ACMA to target the relevant person in a supply chain"; and "[b]ecause the mechanisms enabling each kind of equipment regulation are set out in the Act, the ACMA has limited flexibility to ensure that they are targeted appropriately and keep pace with market developments".²

While we do not disagree with the issues outlined by the Department and support broader reforms around equipment regulation that enables more flexibility for the regulator, we are concerned that the issues outlined in our submission to the Department on 29 April 2016 have not been adequately considered and would welcome further clarification from the Department.

For instance, while we welcome ACMA's statement in its supporting papers to this review that it "expects to look to expert Australian technical committees for advice on the appropriate standard to prescribe", this does not provide assurance that ACMA will allocate sufficient weight to expert industry advice.³ This submission recommends certain conditions to address this concern.

¹ Department of Communications and the Arts, A proposed approach to transition from the 1992 Act to the Radiocommunications Bill, Consultation paper, p. 10 (May 2017).

² Department of Communications and the Arts, Introducing Equipment Rules, Fact Sheet (May 2017).

³ ACMA, Equipment rules, Supporting material for the Exposure Draft of the Radiocommunications Bill 2017, p. 6 (May 2017).



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We are also cautious with the following statements by ACMA in its proposed approach to international standards:

- “The ACMA may also consider making equipment rules that ... simplify the regulatory arrangements for supply, including ... direct adoption of international standards.”
- “Consistent with government policy, the ACMA would consider making equipment rules that prescribe international standards directly wherever possible.”
- “Where appropriate, the ACMA may consider a flexible approach to demonstrating compliance by reference to international standards.”
- “The ACMA expects that the equipment rules will cater for the operation of international agreements, such as mutual recognition agreements.”⁴

Our concerns and proposed solutions are discussed in detail below.

1.1 Need for industry consensus-based technical standards

In our previous submission to the Department, we shared our members’ experiences in other areas of technical standards regulation where consultation-based regulatory approaches (through government-led legal instruments such as Determinations) replaced industry-consensus based approaches.

Two examples provided were the Greenhouse and Energy Minimum Standards (“GEMS”) and Water Efficiency Labelling and Standards (“WELS”) schemes. When applied in practice, these new legal instruments were often found to be technically erroneous and complex. While the schemes have produced some benefits, they have been accompanied by more confusion, uncertainty and reduced confidence among industry in the regulatory regime than would have been achievable with a more industry consensus-based approach. The GEMS and WELS experiences demonstrate that for complex technical matters such as the equipment regulation arrangements, technical standards based on industry consensus still have an important role to play, and should not simply be substituted with legislative instruments for the sake of providing apparent flexibility to the regulator.

Balancing our concerns with a need for broader improvement to the existing equipment regulation arrangements, we recommend the following conditions for any form of equipment regulation:

- technical standards should continue to be developed through industry consensus-based input and be referred to in any new equipment regulation arrangements;
- ACMA should continue to be involved in the development of these standards to ensure that its expectations for the purposes of compliance and enforcement are met; and
- alternative ways to make the equipment regulation arrangements more flexible will need to be explored and consulted upon further.

The above conditions are consistent with the Australian Government’s support for Recommendation 6 of the review of ACMA on 22 May 2017 (released after the commencement of the Department’s consultation process), namely:

That, within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self regulation, in consultation with relevant industry bodies:

- Technical Standards

....

The ACMA regularly explore further opportunities for self-regulation in consultation with industry.⁵

⁴ Ibid.

⁵ Minister for the Department of Communications and the Arts, “Modernising the Australian Communications and Media Authority”, Media Release (22 May 2017).



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1.2 Approach to trusted international standards

The trusted international standards regime has been developed as part of the Australian Government's Industry Innovation and Competitiveness Agenda, with the objective of reducing duplicative domestic regulation and red tape. This means that if a system, service or product has been approved under a trusted international standard or risk assessment, then Australian regulators would not impose any additional requirements, unless there is a good and demonstrable reason to do so.

While Ai Group strongly supports the Government's agenda to reduce red tape, we express caution with respect to ACMA's statements regarding the potential direct adoption and referencing of international standards, which risks the removal of a critical element in Australia's regulatory framework. This element encompasses the participation of a balanced group of diverse stakeholders in a consensus-based environment to develop standards – the importance of which has been discussed above. These standards may be referenced in Australian regulation as deemed-to-comply solutions or technical documents.

The risk is that the value of these Australian industry consensus-based standards is traded off under a trusted international standards regime. Under this regime, the regulator chooses a standard developed by an international organisation that may not have had any Australian input and therefore has not properly consulted with Australian stakeholders on the appropriateness of the standard in accordance with a set of predetermined criteria.

In other words, the use of trusted international standards moves stakeholders from participating in a consensus-based model to a consultative model, which significantly reduces the opportunity for appropriate Australian industry expertise to shape the outcome for the benefit of the Australian market and consumers.

Ai Group believes that it is important that, if trusted international standards are to be referenced by ACMA in any form of equipment regulation, the following criteria should be adhered to:

- widely accepted principles for developing standards are used;
- appropriate public consultation processes are observed;
- international standards must improve regulatory coherence and technical convergence (it cannot be assumed that because a standard is trusted internationally that it will automatically fit within the Australian regulatory and technical context); and
- Australia complies with its obligations under the World Trade Organization Agreement on Technical Barriers to Trade, which requires Australia to influence and adopt international practice where possible.

Ai Group also recommends that a balanced group of stakeholders, constituted in a working group or committee, be assigned the responsibility to review any international standard that is to be adopted under a trusted international standards regime.

2. Compliance and enforcement

As stated in previous submissions, Ai Group supports a need to broaden the options for the compliance and enforcement regime, providing ACMA with more flexibility. We therefore support the Department's inclusion of graduated enforcement mechanisms in the Radcoms Bill.

However, we wish to reiterate that operational flexibility will need to be accompanied by strong guidance from ACMA as to how it will be applied that enables regulatory certainty, including:

- establishing a principle that the costs of compliance and enforcement action should be less than the benefits;



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- establishing a clear hierarchy of responses to clarify how ACMA distinguishes cases requiring a warning from requiring cancellation, or how time-sensitivity and impact will be taken into account in graduating between levels of responses; and
- ensuring consultation with affected business where practical before product recalls, interim bans or warnings are issued, and targeting appropriate enforcement. These measures are vital where a device creates risks of potentially dangerous interference and also have a major commercial impact. Where time and urgency allow, consultation with suppliers prior to action will help maximise cost effectiveness of regulatory action, allowing for recalls and other action to be accurately targeted and limiting disruption to users and suppliers.

Should the Department or ACMA be interested in discussing our submission further, please contact our adviser Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,

Peter Burn
Head of Influence and Policy