



The Australian Industry Group
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29 April 2016

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

Dear Sir/Madam

AUSTRALIAN GOVERNMENT PROPOSED RADIOCOMMUNICATIONS BILL 2016

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the Federal Government's consultation on the Legislative Proposals Consultation Paper on its proposed approach to the Radiocommunications Bill 2016.

Our submission focuses on two particular aspects of the Government's proposals: proposed changes to the current equipment regulation arrangements ("Equipment Rules"); and the compliance and enforcement regime under the *Radiocommunications Act 1992* (Cth) ("the Radcoms Act"). Notwithstanding other changes proposed in the consultation paper, our members will be affected by these reforms in their role as either: suppliers of devices and appliances that receive or transmit; providers of communications, broadcast and information services that rely on spectrum allocations; or as customers who use such devices and services to carry out and improve their business.

Equipment regulation

As outlined in the consultation paper, the equipment regulation arrangements currently operate under the Radcoms Act,¹ and refers to technical standards that apply to specified devices; the testing labelling and record keeping requirements imposed on suppliers (importers and manufacturers or authorized agents) through labelling notices; and specific prohibitions imposed by ACMA on supply, possession and operation of certain devices.

The consultation paper suggests there are a number of limitations under these current arrangements, namely: insufficient flexibility to regulate equipment proportionate to the risk and specific circumstances of their supply and operation; the Act is overly detailed and duplicative; all breaches are criminal, which limits enforcement options; and labelling and record-keeping requirements can only be imposed on Australian manufacturers and importers, and therefore fail to capture relevant parties in supply chains. The paper also refers to standard practice in other jurisdictions with respect to providing regulators with the ability to issue alternative enforcement options to address product or device safety issues. It therefore proposes to adopt a new model for equipment regulation through an outcomes-based approach, where ACMA would have the ability to make Equipment Rules through legislative instrument which addresses key objectives under the Bill, including ensuring electromagnetic compatibility of equipment, containing interference and protecting the health and safety of persons from radio emission. It considers that this would provide ACMA with increased flexibility to make Equipment Rules commensurate with the risk of the equipment and enable it to devise rules to cover all standards and/or requirements in relation to a class of devices or create separate instruments for each standard or requirement.

In Ai Group's previous submission to the Government's 2014 consultation paper on potential reform directions for the spectrum review, Ai Group supported a number of reform principles, including flexibility as well as transparency, efficiency, certainty and simplicity. If these principles are achieved, it would plausibly maximise public benefit from spectrum policy. However, whether these principles are achieved depends on a level of detail and practical implementation. With respect to the Government's Equipment Rules as proposed in this new consultation paper, Ai Group does not consider that these reform principles as a whole will be achieved.

¹ *Radiocommunications Act 1992* (Cth) Pt 4.1.



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Learning from the GEMS and WELS experience

While Ai Group supports looking at ways to improve regulatory regimes, the Government's proposed changes to the equipment regulation arrangements appear to introduce new problems. Two cases in point are our members' experiences with the Greenhouse and Energy Minimum Standards ("GEMS") and Water Efficiency Labelling and Standards ("WELS") schemes, where changes in regulatory approaches were introduced. Similar to the proposed Equipment Rules, the GEMS and WELS regimes reduced the need for technical standards (developed through industry consensus) with government-led legal instruments (Determinations). When applied in practice, these new legal instruments were often found to be technically erroneous and complex. While the schemes have still produced benefits, these have been accompanied by more confusion, uncertainty and reduced confidence among industry in the regulatory regime than would have been achievable with a more consensus-based approach.

Part of the issue with the introduction of the GEMS and WELS schemes is that they reduced the need for the standards development process, which had been a well-informed, balanced and consensus-based approach for developing technical requirements. This standards development process had provided for sufficient industry input and expertise, which ensured that these technical requirements were both feasible and adequate before approval. In contrast, the GEMS and WELS schemes are based on a consultative process – well short of consensus – which relies on the regulator to make the final decision through Determinations as to the appropriateness of the technical requirements. The problem with this consultative approach for developing technical standards through Determinations means that the balance and risks for developing standards are shifted towards the regulator, with the assumption that the regulator will have greater expertise and sufficient allocation of resources to make a more informed decision.

So while a consultative-based regulatory approach may be appropriate in some circumstances, 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 be simply substituted with legislative instruments for the sake of providing apparent flexibility to the regulator. The benefit of these past industry experiences should be considered by governments, when considering the option of replacing technical standards developed through industry consensus with legislative instruments developed through industry consultation.

Support for developing an alternative approach

Notwithstanding the above, Ai Group supports a broader improvement to the equipment regulation arrangements, which may be in the form of a new legislative instrument that enables more flexibility for the regulator, but subject to certain conditions including:

- technical standards should continue to be developed through consensus-based industry 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.

Compliance and enforcement

The consultation paper considers that the current compliance and enforcement regime is outdated and does not reflect contemporary regulatory approaches, noting that the current regime is limited in options and scope for graduated approaches to compliance. It also indicates that the regulator is currently limited to imposing labelling and record-keeping requirements to Australian manufacturers and importers, but unable to extend enforcement and compliance to all relevant parties along the relevant supply chains. It therefore proposes to provide ACMA with a simple and graduated approach to offences and penalties and expand the range of enforcement tools, as well as allowing ACMA to continue to use other tools to encourage compliance.



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Overall, Ai Group supports a need to broaden the options for the compliance and enforcement regime. As previously stated in Ai Group's submission to the 2014 spectrum review, extending the suite of enforcement measures available to ACMA would provide more flexibility. This is broadly positive by: allowing a more light-handed approach where it is more appropriate than criminal penalties or cancellation of a licence; and making lower impact options available, allowing ACMA to enforce the law whenever needed, rather than only when very strong measures are merited.

However, 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;
- 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.

On a separate matter, the consultation paper appears to draw a connection between the limitations of the current compliance and enforcement options and scope for action against relevant parties along the supply chain, and the current equipment regulation arrangements. Ai Group considers that these are two separate issues that should be treated independently, as we have done in this submission. If amendments are made to the current compliance and enforcement regimes to expand the compliance and enforcement options and extend their applicability to all relevant affected parties, these should not be contingent on how technical standards are developed.

Should the Government be interested in discussing our submission further, please contact our adviser Charles Hoang [REDACTED]

Yours sincerely, 2/

[REDACTED]
Innes Willox
Chief Executive