SUBMISSION

CONSUMER REPRESENTATION:
REVIEW OF SECTION 593 OF THE TELECOMMUNICATIONS ACT 1997

Submission to Department of Communications and the Arts by

Dr Derek Wilding, Faculty of Law, University of Technology Sydney

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Submission
Issues Paper on Consumer Representation: Review of Section 593 of the *Telecommunications Act 1997*

Thank you for the opportunity to comment on the Issues Paper. This submission addresses the following aspects of the review:

1. Should the mechanism in section 593 of the *Telecommunications Act 1997* (TA) for the funding of consumer representation be retained?
2. If so, is supporting a peak consumer organisation such as ACCAN the most effective use of these funds, including funds for consumer research?

The submission draws on my experience as a consumer member of the ACIF committee that developed the Consumer Contracts Code in 2004[1] and on subsequent experience of statutory regulation at the ACMA and industry self-regulation at the Australian Press Council. It also draws heavily on the work of Dr Karen Lee from the School of Law at the University of New England, particularly the analysis of rule-making under Part 6 of the TA conducted for her doctoral thesis completed earlier this year.[2]

The substance of the comments below is that consumer participation is essential to the legitimacy as well as the effectiveness of the Australian model for industry-based regulation, where standard setting is moved away from Parliament or the statutory regulator to industry. However, it is not just the presence of the consumer representatives that serves to legitimate this form of regulation; it is how they perform. By providing the necessary financial assistance for effective consumer participation, section 593 is one of the foundations of our regulatory framework.

1. Operation of section 593

The Issues Paper explains that the review will consider whether section 593 is 'still fit for purpose', meaning the review will address a key aspect of communications co-regulation.

The link between financial assistance and Part 6 rule-making

Section 593 provides (relevantly) as follows:

> **593 Funding of consumer representation, and of research, in relation to telecommunications**
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> (1) The Minister may, on behalf of the Commonwealth, make a grant of financial assistance to a consumer body for purposes in connection with the representation of the interests of consumers in relation to telecommunications issues.
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> (2) The Minister may, on behalf of the Commonwealth, make a grant of financial assistance to a person or body for purposes in connection with research into the social, economic, environmental or technological implications of developments relating to telecommunications.
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> …
>
> (8) In this section:
>
> ***consumer body*** means a body or association that represents the interests of consumers.
>
> …

There is no direct reference here to standard-setting or rule-making, even though the participation of consumer organisations is integral to the development of registered codes of practice, at least for a

[1] At the time I was Director of the Communications Law Centre and a member of consumer councils operated by ACIF, the Australian Communications Authority and Telstra.. I have previously written about the experience of developing the Consumer Contracts Code: Derek Wilding, 'On Fair Terms: Public Participation in Communications Regulation in Australia' in Tim Dwyer and Virginia Nightingale (eds), *New Media Worlds: Challenges for Convergence* (Oxford University Press, 2007). For a broader examination of the role of consumer representation in communications self-regulation, see: Derek Wilding, 'In the Shadow of the Pyramid: Consumers in Communications Self-Regulation' (2005) 55(2) *Telecommunications Journal of Australia* 37. I have recently become an academic member ACCAN.

[2] Karen Lee, *Legitimacy in the New Regulatory State* (PhD Thesis, UNSW, 2016). The following is an earlier published article on the origins of Part 6 of the TA: Karen Lee, 'Counting the Casualties of Telecom: The Adoption of Part 6 of the *Telecommunications Act 1997* (Cth)' (2009) 37 *Federal Law Review* 41.

set of consumer-related issues. Even the Part 6 registration criteria set out in s 117(1) refer only to consultation rather than participation:

> 117(1)(i) the ACMA is satisfied that at least one body or association that represents the interests of consumers has been consulted about the development of the code.

Nevertheless, the political, regulatory and industry environment – marked initially by the introduction of competition and by privatisation of the incumbent government provider – has meant that consumer participation is an integral part of the regulatory framework. In fact, the participation of consumer organisations is one of the defining elements of the system for developing codes of practice under Part 6 of the Act.

This form of standard setting, or at least the practice of making private actors the key participants, is so much a part of telecommunications regulation that a return to command and control law-making is now unthinkable.

This does not mean, however, that accountability is less relevant – if anything, it becomes more important to include mechanisms that promote accountability and allow it to be tested.

Co-regulation has been criticised in the past,[3] but as Karen Lee has shown, in at least some circumstances it can be seen as legitimate and responsive. Although consumer participation has long been recognised as an important aspect of self-regulatory or co-regulatory systems,[4] Lee makes an important contribution to the understanding of industry-based regulation and the contribution of organisations representing consumers and the public interest. Her extensive analysis of the circumstances in which three Part 6 industry codes were developed[5] provides concrete evidence for the legitimacy of industry-based rule-making as an alternative to law developed by Parliaments or the Courts.

On the strength of her analysis of the code development scheme administered by the Communications Alliance, Lee advances a set of indicia for judging when industry rule-making is more likely to be legitimate and responsive.[6] These indicia include not just the participation of consumer and public interest organisations from the outset of the code development process, but adequate funding for these organisations. She observes:

> … if consumer and public interest organisations are not financially supported during the rule-making process, there are risks that the dynamic of industry rule-making would be altered quite significantly to the detriment of the legitimacy and responsiveness of the rule-making process. Consumer and public interest organisations would be much less likely to participate.[7]

I can attest to this on a personal level, having been one of the four consumer representatives on the Consumer Contracts Code which forms one of Lee's case studies. ACIF (now the Communications Alliance) put great effort into establishing the optimum conditions for a negotiated outcome. This involved considerable commitments from ACIF, but it also involved modest funding for my organisation (the Communications Law Centre) to participate in consumer representation through the s 593 grants program.

In summary – and as Karen Lee has shown – the legitimacy of the code development process under Part 6 of the TA depends in part on the active and effective participation of consumer representative organisations. Their participation, in turn, depends on adequate financial assistance.

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[3] See, for example, Senate Environment, Communications, Information Technology and the Arts References Committee, Parliament of Australia, *The Performance of the Australian Telecommunications Regulatory Regime* (2005).

[4] See, for example, the highly influential characterisation of the 'tripartite' regulatory scheme advanced by Ayres and Braithwaite over two decades ago: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

[5] Lee's review of these processes includes detailed analysis of documentation and interviews with key participants from industry and consumer organisations as well as from the predecessor of the Communications Alliance, and regulators.

[6] Lee, above n 1, 268-81. Lee argues that these indicia must be regarded as cumulative: 268.

[7] Ibid 274.

Contrast to Part 9 rule-making under the Broadcasting Services Act 1992

In further support of the argument for adequate funding for consumer and public interest organisations, Karen Lee observes that public consultation is unlikely to be an adequate substitute.

This is partly because public consultation tends to be conducted at the end of a rule-making process, when issues have already been considered and hard-fought compromises achieved. But it is also because 'consumer and public interest organisations need to be educated about the relevant sectors of the industry and their specific practices'[8] and because members of the public will not be in a position to consider comments and responses from industry and to interrogate them in the way that consumer organisations are. In short, public consultation 'promotes an exchange of monologues rather than trigger any real dialogue.'[9]

Lee's characterisation of public consultation in the telecommunications sector and her warning against viewing it as an alternative for participation by consumer organisations is borne out by the experience of code-making under Part 9 of the *Broadcasting Services Act 1992*. There is no equivalent practice for contribution by consumer or public interest organisations to code development and, as a result, the rules included in some of these codes are far from adequate.

This is not an issue to be developed fully in the present review, but it was mentioned in the submission I made with three other academics to the Department's recent review of the ACMA.[10] In my own view, the rule-making process of a purely self-regulatory system such as the Australian Press Council, which includes consumer and public interest representatives on its Council and standards setting committee and which consults extensively from the outset with stakeholders, is superior to the procedures under Part 9 of the BSA. In some cases, the Part 9 process includes only a single round of public consultation, conducted by industry, with no publication of submissions.

There is a risk that the deficiencies in this approach could be transferred to the telecommunications environment by the removal or reduction of consumer organisation funding under s 593.

Design of section 593

In its Draft Report on the review of the ACMA, the Department flagged a review of the regulatory framework for communications with the aim to 'reinvigorate the use of self-regulation'.[11] Draft proposal 27 included a recommendation that the government 'commence a coordinated program of regulatory reform to establish a contemporary communications regulatory framework'.[12]

I support this proposal and I believe it would be more appropriate to consider as part of that review the way in which section 593 fits with Part 6 and other aspects of the communications regulatory framework.

2. Support for a peak consumer organisation

ACCAN grants for consumer representation

The comments above point to the importance of adequately funded consumer representation, partly on the basis that participants in regulatory decision-making need to be well-informed of industry practice and regulatory arrangements as well as consumer experience.

This is not to say that all participants need to have all these attributes and to have an expansive knowledge of telecommunications consumer experience – but at least one organisation should.

ACCAN is not only the peak consumer telecommunications organisation in Australia, it is the only organisations with a history of regulatory participation, dedicated exclusively to communications consumer issues. This history (in part via its antecedent organisation, CTN) and the exposure to a vast range of consumer experience provide value to other consumer organisations which cannot be

[8] Ibid 274.

[9] Ibid.

[10] Derek Wilding, Tim Dwyer, Michael Fraser and Lesley Hitchens, Submission to Department of Communications and the Arts, *ACMA Review Draft Report*, June 2016 <https://www.communications.gov.au/sites/g/files/net301/f/submissions/acma-review--wilding-dwyer-fraser-hitchens.pdf>.

[11] Department of Communications and the Arts, above n 10, 67.

[12] Ibid 68.

expected to contribute at the level of ACCAN other than on specialised issues. This was certainly my experience in the Consumer Contracts Code development: although the CLC had extensive experience in unfair contract terms, we still relied on the knowledge and judgement of ACCAN (then CTN) in considering the application of those terms in practical situations.

The improved funding arrangements since 2009 have meant that the peak communications consumer body has expanded its expertise and, for example, was able to supply a representative with legal training to a review of the Telecommunications Consumer Protection Code.

If other organisations are considered for support under the s 593 funding scheme, this should not be at the expense of ACCAN's position and current funding levels. Funding the peak organisation in the way that ACCAN has been funded since 2009 allows it to respond flexibly to issues arising within the industry and the community and relieves government of the risks involved in predicting consumer behaviour.

By all means, ACCAN's performance should be assessed in a transparent way,[13] but its role in communications regulation is central to the legitimacy that Karen Lee has attributed to the ACIF/Communications Alliance framework for self-regulation. The support it has received to date is a credit to both ALP and Coalition governments.

Grants for consumer research

There are other means of pursuing research into consumer issues, some of which are identified in the Issues Paper. One of these is to partner with universities and others (for example, in the way ACCAN has partnered with Swinburne University and the Central Lands Council in an ARC-funded project on home internet use in remote Indigenous communities), but this can be achieved without changes to the current arrangements.

The ACCAN Independent Grants Program is unique and valuable precisely because its priorities are determined by those who are most in touch with consumer issues. It serves as a supplement to the work of government. The alternative of having the Bureau of Communications Research administer the program is less attractive. At the CLC I participated in research projects funded through the scheme which was, at that time, administered by the Department. There does not appear to be any obvious benefit to such an arrangement, while there is the risk of losing the value of consumer-focussed research by removing it from ACCAN. The BCR and the ACMA should of course be free to conduct survey work and other research which is generally beyond the scope of ACCAN grants, but not as an alternative to ACCAN grants. In addition, tying ACCAN grants to government policy priorities rather than permitting them to respond to emerging issues may inhibit innovative and responsive projects initiated from the consumer sector.

3. Summary – responses to selected questions in the Issues Paper

In this section I provide very brief responses to the questions that relate to the comments above.

4. Is a telecommunications specific consumer representative body funded by Government required or …

Yes – such a body is required.

(a) Should Government fund representation only for a body or bodies representing consumers with particular needs?

No – to the extent there is some need not adequately covered by a peak representative body, even on a temporary basis, representation should be funded in addition to the peak body.

(b) Could a telecommunications representation function be carried out by a general consumer body?

No – this would dilute and make less effective targeted representation in an industry that is known for complex and rapidly-changing technology and applications.

(c) Could Government more directly measure consumer views by undertaking its own consumer research?

[13] I have not commented in this submission on ACCAN's performance because I have only recently returned to conduct work in the telecommunications area, having spent most of the past decade working in media regulation.

No – it could certainly provide an additional layer to consumer research, but this should not be seen as a replacement for research initiated through the ACCAN grants scheme.

7. Is it appropriate for the Government to continue to provide grants to a consumer representative group (or any other non-government body) to undertake research into telecommunications issue?

Yes – and the body should be ACCAN.

8. If this is appropriate, what changes (if any) would you recommend to how the funding is provided and to whom?

No convincing evidence has been provided for a change to the current arrangements.