# Convergence Review

Submission by the Australian Communications Consumer Action Network
to the Department of Broadband, Communications and the Digital Economy

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## About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

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# Introduction

ACCAN recognises that there are many public interest questions being considered by this review. In this submission we have chosen to address three issues that are key to the consumer interest which have not received a great deal of attention from other submitters and where ACCAN has particular expertise.

# Co-regulation in telecommunications

## Smurfberries, convergence and consumers

In September 2011, ACCAN was approached by media for comment on iPhone games aimed at children which charge for virtual game items (also known as "in-app purchases"). One game called Smurfs' Village charges $109.99 for a "wagon of smurfberries".[1] As is well known, Smurfberries refers to berries from a species of smilax known as sarsaparilla.[2] Smurfs' reliance on these berries is likely to be an evolutionary adaptation that takes advantage of an otherwise unfilled ecological niche.

The same in-app purchasing issue has also caught public attention elsewhere. In the United States, inadvertent in-app purchases involving several games including Smurfs' Village received attention from the *Washington Post* after an eight-year old child unknowingly went on a $1,400 Smurfberry binge.[3]

Clearly, Smurfberries can be poisonous. They stand for the next wave of consumer issues about to be triggered as smartphones and apps spread from the early adopters and tech-savvy to the broader community.

We have been here before. The Mobile Premium Services (MPS) issue, where consumers were induced into inadvertent subscriptions at exorbitant prices, is an illustration of what occurs under our present consumer protection arrangements when new technology presents a new problem.

Initially, the problem was brought to the attention of regulator and industry in 2003. After industry resistance and delay and then a failed code development process, an MPS scheme and guideline developed by industry in 2006 proved ineffective.[4] Eventually, a Determination that effectively dealt with the problem emerged from the ACMA in 2009. The process, from the emergence of the problem to effective regulatory response, was six years – a technological eternity.

We do not have confidence that as Smurfberry-style issues become today's analogous MPS that the current framework will adequately address it.

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[1] Karen Collier and Wes Hosking, "It's not child's play", *Herald Sun*, 15 Sept 2011, p.9
[2] Smurfology wiki http://wiki.bluebuddies.com/Sarsaparilla
[3] Cecelia King, "In-app purchases in iPad, iPhone, iPod kids' games touch off parental firestorm", *Washington Post*, 8 Feb 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706073.html?sid=ST2011020706437
[4] "Time to deliver real consumer protection for mobile premium services" *Consumers' Telecommunications Network Newsletter*, June 2008. http://www.ctn.org.au/content.cfm-ContentType=Content&ContentID=82.htm

The justification for general consumer protection measures and consumer protection measures for the telco field to be different is disappearing as the telco sector itself becomes less distinct and well-defined. App developers enter into agreements with gadget suppliers who are also content vendors (Apple and iStore) and inevitably telcos are now retailing, and billing for, content along with internet access and phone calls.

As the ACMA has reported, the optimal conditions for co-regulation do not exist where there exist numerous industry players, and where products are varied, complex and confusing.[5] Co-regulation also assumes "a collective will or genuine industry incentive" to address problems based on a stable, long-term view of the industry's relationship with customers and the community.[6]

We are not at all convinced that given the converged content-telco market, with the likelihood of more new entrants, that the optimal conditions any longer exist for co-regulation as it has been practiced. Many market players will not necessarily be based in Australia, and will therefore be less likely to have a sense of overall obligation to the community.

## Tel Act consumer codes

Under converged market conditions, the Telecommunications Consumer Protection (TCP) Code will, quite simply, be even more of an irrelevance than it is now. Lack of effective enforcement is the chief weakness that afflicts our present arrangements. Currently, it is rarely clear who is responsible for taking action when there is a problem and there is no systematic compliance and enforcement mechanism. The rationale for having voluntary codes is therefore weak and becoming weaker. In our judgment the problem stems from both the co-regulatory scheme of the Tel Act itself and the choices made by the ACMA.

Industry is expected to develop and register codes to provide "appropriate community safeguards"[7]. Yet complying with these registered codes is not mandatory. The TCP Code empowers industry to have the TIO resolve disputes on a voluntary basis. It requires a regulator's "direction to comply" to bring code breaches within the ambit of civil penalty provisions.[8]

The pattern set by the legislation is effectively of *suggested voluntary processes* for industry and *suggested voluntary actions* that a regulator may take at its discretion. The result is that neither industry nor regulator feels an onus of responsibility or sense of obligation to act on problems that arise. We have neither self-regulation, nor government regulation, but rather a watery in-between.

This might not be so problematic if the ACMA used its power to give directions to comply and pursue civil penalties systematically and actively. However, this has not been the case. The ACMA has rarely chosen to use the suite of powers at its disposal in relation to enforcing consumer codes in telecommunications. It has usually chosen to assume that industry will do the right thing if given time and informal guidance.

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[5] Optimal conditions for effective self- and co-regulatory arrangements. *ACMA Occasional Paper, Sept 2011,* p.12 http://www.acma.gov.au/webwr/_assets/main/lib310665/optimal_conditions_for_self-_and_co-regulation.pdf
[6] Optimal conditions paper, as above.
[7] s 117 Tel Act
[8] s 121 Tel Act

For the reasons outlined, ACCAN suggests that this Committee recommend that a converged environment requires at minimum making compliance with the industry codes mandatory. The codes should deliver real, enforceable outcomes, and subject to the nature and purpose of the particular code, the enforcement mechanism should apply to all industry participants and not just those that sign up.

The preceding points lead to the question of whether the ACMA is really the appropriate agency to be regulating telco consumer issues in a sector-specific manner.

**Converged consumer regulation: ACCC is best placed**

ACCAN believes that the Australian Competition and Consumer Commission (ACCC) is best placed to be administer consumer protection regulations in the telecommunications sector as it does in other sectors. The ACCC has both the expertise and the institutional commitment to consumer protection. Since the introduction of the Australian Consumer Law, the ACCC also has the strong powers it needs to do its task well.

Many services, including television, health services, educational services, and security monitoring have already, or will soon, acquire a telecommunications dimension because they will be delivered over broadband links.

Therefore in our view, the consumer safeguards should be treated as converged, and should be overseen by the general competition and consumer regulator, the ACCC. We do not believe there is any longer a sound justification for keeping the ACMA as a separate consumer protection agency in the converged environment. The ACMA's role should be to focus on its natural strength in industry technical regulation and broadcasting.

## Standard Telephone Service: from voice-centric to connectivity-centric

Two interrelated issues regarding statutory Standard Telephone Service (STS) is that the definition is limited to voice telephony. However of equal importance is that regulations have excessively confined the STS in a way that allows for no consumer choice as to the form in which the STS should be delivered.

A new statutory concept to replace the STS in terms of "network access" or "connectivity" should be created to legislatively support a universal service which allows for individuals to choose the services that meet their needs. The aim should be to deliver functional equivalence for telecommunications services, not necessarily limited to 'voice', in a converged environment.

This should be addressed particularly if the Committee were to make any recommendations to move to a 'layers' regulatory structure or similar.

The ACMA's recent Numbering paper notes:

> "the intent of the enabling legislation in regard to the STS was to define a basic communications service—independent of delivery technology—to which a number of

> regulatory obligations and consumer safeguards relating to a minimum community standard of communications service are attached."[9]

Today, for many people, the 'basic communications service' is just as likely to be a mobile and safeguards which are attached to a service they do not use are of no comfort.

**Implications for people with disability**

ACCAN's concerns with the way the STS is interpreted and implemented are for the way it unnecessarily limits people with disabilities and even prevents people with disabilities from getting affordable access to the exciting range of possibilities made available by ubiquitous high-speed broadband. As has been pointed out by others, voice is now just one of many applications that will run on broadband infrastructure. The submission by Paul Budde to the Committee has already provided an excellent overview of what is possible for people with disabilities.

Changing the STS into a standard connectivity concept would mean that new consumer communities that to date have not been able to enjoy subsidised equipment and tailored services will be able to do so. There are several assistive devices and technologies that people need to achieve functionally equivalent telecommunications (be it a TTY, a refreshable Braille display or text-to-speech software) that could be made available instead of the extremely limited 'disability equipment programs' operated by Telstra and Optus.

In addition, currently the National Relay Service (NRS) provides a service which is supposed to be an equivalent to the STS, for people who are Deaf, hearing-impaired or speech-impaired. The NRS user, via a TTY or internet connection, contacts the NRS call centre, and is then connected to a third party via the PSTN, and their call is relayed by a relay officer.

However, while NRS users can rent a TTY from a Disability Equipment Program, they are unable to obtain equipment to make internet relay calls via broadband or on mobile devices, due to the limits imposed by regulation.[10] Other essential equipment is unavailable also – for example, people who are Deafblind are unable to rent a Deafblind Communicator, even though it works on landlines, because it also functions as a mobile device and therefore, it is argued by Telstra, falls outside of category of equipment they are obliged to supply.

ACCAN's vision is for a new, functionally equivalent Disability Telecommunications Service[11], which would provide disability equipment to ensure access to landlines, mobile devices and broadband, as well as improving and expanding relay services to include next generation text relay, video relay and captioned telephony – all of which require fast and reliable access to broadband services and devices. Such a service would fit well under the mandate of the Telecommunications Universal Service Management Agency (TUSMA) in its role as universal service manager in a broadband-enabled environment.

The entire Australian society and economy will benefit from enabling, for the first time, people with disabilities to enjoy an equivalent service to the rest of the population.

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[9] Numbering: Calls to freephone and local rate numbers – The way forward, *ACMA Paper*, p.8 http://acma.gov.au/webwr/_assets/main/lib410119/ifc37-2011_numbering-freephone_and_local_rate.pdf

[10] Reg 7, Telecommunications (Equipment for the Disabled) Regulations 1998

[11] Outlined in ACCAN's submission to the DBCDE Review of Access to Telecommunication Services by People with Disability, Older Australians and People Experiencing Illness

## Accessibility and regulatory parity in broadcasting

The concept of regulatory parity is an attractive concept on the surface. In ACCAN's judgment it contains potentially regressive implications.

The special and more highly-regulated status of free-to-air media is important for social equity reasons. Free-to-air television which charges nothing for access and consumption, has nearly ubiquitous geographic availability, and can be consumed on relatively cheap and legacy devices, is an important universal service. There is also a fundamental distinction between the way in which content is viewed on a free-to-air service where content is pushed out, and a service which is either paid for via subscription or 'on-demand' where there is a higher degree of conscious choice being exercised by the viewer. Given these social equity and social influence factors, free-to-air media should continue to be required to meet community service obligations.

One principal regulatory obligation of this type is the requirement to caption certain programs.[12] There are also plans in the coming months for a trial of audio description. Captioning is for many reasons a valuable community service obligation.[13] If for reasons of commercial viability, captioning requirements are not to be extended to more platforms, such as PayTV and online, then we must at least be prepared to continue to apply different rules for free-to-air television.

The notion of regulatory parity or technology neutrality, which in some submissions is seen as only practical if the 'regulatory burden' on industry is lowered across the board[14] should not be the pretext for removing those obligations.

In our view, convergence is the logical trigger for harmonising the accessibility rules upward. For example, if a program has already been captioned for free-to-air, captions should also be provided when the program is shown on non-free-to-air delivery platforms. Currently there are no statutory requirements for pay-TV channels to provide captioning.

This upward harmonisation has begun in the United States. Last year saw the enactment of the *Twenty-First Century Communications and Video Accessibility Act 2010* (CVAA). Along with several other commendable measures, the CVAA requires video programming that is closed captioned on TV to be closed captioned when distributed on the Internet. It also expands the requirement for equipment that shows TV programs to be capable of displaying closed captions, to devices with screens smaller than 13 inches (e.g., portable TVs, laptops, smart phones), and requires these devices to be able to pass through video descriptions and emergency information that is accessible to people who are blind or visually impaired, if technically feasible and achievable.[15]

ACCAN submits that the single most important contribution the Convergence Committee can make to the lives of people would be to recommend and urge that a broadly equivalent statute to the CVAA be enacted in Australia.

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[12] Broadcasting Services Act Schedule 4, Clause 38
[13] Wayne Hawkins, 'Captions: Australians are turning on', *ABC Ramp* Up, 7 February 2011 http://www.abc.net.au/rampup/articles/2011/02/07/3131785.htm
[14] Eg. Telstra submission p.3-4 http://www.dbcde.gov.au/__data/assets/pdf_file/0008/139265/Telstra.pdf
[15] Summary of Act http://www.govtrack.us/congress/bill.xpd?bill=s111-3304&tab=summary