



Responsive Engagement

Involving Consumers and Citizens in
Communications Industry Rule-making



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Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making

Authored by Karen Lee and Derek Wilding

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Table of Contents

Table of Contents.....	i
Tables and Figures	iv
Acknowledgements.....	1
Executive Summary.....	2
Overview	2
What we looked at.....	2
The engagement mechanisms and how they are used	2
How we classified them	3
Findings	3
What this tells us.....	4
Recommendations	5
1. Introduction	8
1.1 Project overview	8
1.2 Scope of the project.....	9
1.3 Methodology.....	10
1.4 Definitions.....	12
1.5 Structure of this report	14
2. Regulatory contexts	15
2.1 Industry schemes not subject to direct statutory regulation	15
2.2 Industry schemes subject to direct statutory regulation.....	16
2.2.1 Overview of arrangements	16
2.2.2 The statutory frameworks	18
2.2.3 Consumer and public consultation requirements and related measures	18
3. Current mechanisms of public engagement.....	21
3.1 Advisory Committee	22
3.2 Advisory Council.....	23
3.3 Audience feedback.....	24
3.4 Complaints data	25
3.5 Consumer views solicited by consumer body.....	25
3.6 Focus groups with consumers or members of the public.....	26

3.7 Information dissemination.....	27
3.8 Meetings with person conducting review	31
3.9 Meetings with scheme’s staff during proposal stage	31
3.10 Meetings with scheme’s staff to discuss proposed rules	32
3.11 Phone submissions.....	32
3.12 Public fora	32
3.13 Review of research by regulator	32
3.14 Review of previous submissions	32
3.15 Round tables	33
3.16 Sentiment index	33
3.17 Surveys of individual consumers or members of the public.....	33
3.18 Working committees, advisory committees or code review bodies	34
3.19 Written submissions at proposal stage.....	36
3.20 Written submissions on an issues paper	36
3.21 Written submissions on draft rules.....	37
3.21.1 Procedural aspects of written submissions on draft rules	37
3.22 Other feedback	43
4. Classification of Public Engagement Mechanisms	44
4.1 Introduction	44
4.2 Matrix and approach for classifying Australian engagement mechanisms	44
4.2.1 Form of engagement	46
4.2.2 Functions of industry scheme	46
4.3 Existing classification schemes.....	47
4.3.1 Consumer empowerment and social change	47
4.3.2 ‘What works best when’	49
4.3.3 Adapting the existing approaches	53
4.4 Designing a tool for the Australian communications environment.....	55
4.4.1 Models for the Australian matrix.....	55
4.4.2 The two dimensions of the matrix: form of engagement and function of the body or scheme	57
4.4.3 Limitations of the matrix.....	60
5. Analysis of current engagement practices.....	62
5.1 Initial observations.....	62
5.1.1 Data collection	62

5.1.2 Public communication	62
5.1.3 Public/consumer input.....	63
5.1.4 Public participation	65
5.2 Insights from Round Tables	65
5.2.1 The multiplicity of mechanisms and factors affecting mechanism choice	65
5.2.2 Experience with specific engagement mechanisms	66
5.2.3 Missing stakeholders and barriers to participation	72
5.2.4 Timing of public engagement	74
5.3 The responsiveness of current public engagement practices	74
5.3.1 The meaning of responsiveness.....	74
5.3.2 Application to existing practices.....	75
6. Conclusions and recommendations.....	77
6.1 Improvements to existing public engagement practices.....	77
6.1.1 Farina et al's findings	78
6.1.2 The Australian self- and co-regulatory rule-making context	81
6.2 Experimentation with alternative mechanisms.....	85
6.2.1 Surveys, focus groups and round tables	85
6.2.2 Citizen juries.....	86
6.2.3 Deliberative polling.....	86
6.3 Working committees.....	87
6.4 Timing of issue-specific public engagement and active data collection.....	88
6.5 Minimum public engagement expectations	89
6.6 Possible statutory and related modifications	89
6.6.1 Amendments to legislative frameworks	89
6.6.2 Addressing disparities in consultation practices between industry schemes and ACMA ...	91
6.6.3 Widening ACCAN's remit and/or creating a new public interest body	93
6.7 Implications for the future regulation of digital platforms.....	97
Authors.....	99
Appendix 1: Industry bodies and schemes within scope of this report.....	100
Appendix 2: Industry bodies and schemes outside the scope of this report	103
Abbreviations.....	105
References	106

Tables and Figures

Table 1: Statutory requirements of consumer and public engagement in development of co-regulatory codes of practice in Australian media, online and telecommunications sectors	17
Table 2: Engagement mechanisms	28
Table 3: Information provided/available to consumers/citizens.....	30
Table 4: Means of publicising opportunity to make written submissions.....	39
Table 5: Farina et al's participation barriers and steps taken to reduce them.....	80
Figure 1: Components of Public Engagement.....	14
Figure 2: Advertisement published in <i>The Australian</i>	38
Figure 3: Advertisement published in <i>The Weekend Australian</i>	39
Figure 4: Matrix for Mechanisms of Consumer and Public Engagement	45
Figure 5: Arnstein's ladder	48
Figure 6: Dean, Four Models of Public Participation in Policy Decisions	50
Figure 7: Fung, Democracy Cube	51
Figure 8: Thomas, A Matrix Guide to Public Involvement	52
Figure 9: Bishop and David, Map of Participation Types	53
Figure 10: Toscano, Social Media Participation Range	54
Figure 11: Black: Examples of public involvement in different stages of the regulatory process	56

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Executive Summary

Overview

This report looks at methods of engaging consumers and the public in self- and co-regulation (referred to below as ‘industry regulation’) within the Australian advertising, media, online and telecommunications sectors.

Specifically, we examine how consumers and citizens have been involved in the rule-making aspects of industry regulation. We map and classify these mechanisms of engagement. We start from the principle that involving consumers and members of the public in rule-making helps to make industry regulation more responsive. By this we mean it facilitates the exercise of independent judgement by industry, the disclosure by industry of information necessary to hold it to account, greater deliberation of alternatives and ways of meeting the needs of all stakeholders and the explanation and justification by industry of its position to others.

We conclude by recommending some ways in which adapting engagement mechanisms could improve responsiveness of rule-making in these sectors.

What we looked at

We identified 20 self- and co-regulatory industry bodies and schemes (generally referred to as ‘industry schemes’) – operating in the advertising, media, online and telecommunications sectors. For convenience, we refer to these four sectors collectively as the ‘communications industry’. The regulatory context is described in Chapter 2.

These schemes include (but are not limited to): 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 auDA; and the cross-sector rule-making of Standards Australia.

The engagement mechanisms and how they are used

We were able to gather information on the operation of 19 of these schemes and we obtained feedback from 16 of them. We used this information to identify 22 distinct engagement mechanisms. We then involved representatives from a number of these schemes, as well as regulators and consumer representatives, in a series of Round Table meetings to discuss our preliminary findings.

The two most commonly used mechanisms were written submissions on draft rules, and complaints data. Others included advisory councils; meetings with a person conducting a code review; focus groups; and participation in working committees that review and formulate rules. In Chapter 3, we explain how these mechanisms are used by the various schemes.

How we classified them

To classify these mechanisms, we developed a matrix that shows both their form and function. By form we mean the kind of engagement mechanism, using four categories: data collection mechanisms, public communication mechanisms, public/consumer input mechanisms, and public participation mechanisms. These are described in Chapter 4.

We also classified the 22 mechanisms by function so we could record some aspects of the way in which they are used by the various schemes when they engage in rule-making. The four functions are: fact-finding, identifying and describing issues, formulating regulatory approaches, and monitoring and assessing operation.

We then plotted the mechanisms against the matrix.

Findings

Not surprisingly, the mechanisms we classify as ‘data collection’ are mostly used in fact-finding, but they are also used in monitoring and assessing operation of rules. In contrast, more of the public communication mechanisms are used in identifying and describing issues. A greater variety of consumer/public input mechanisms is used in the performance of a range of rule-making functions, but we could only identify two participation mechanisms used when formulating regulatory approaches. These are shown on the matrix below.

Matrix for mechanisms of consumer and public engagement

	Forms of consumer/public engagement				
		Data collection	Public communication	Consumer/public input	Consumer/public participation
Rule-making function	Fact-finding	<ul style="list-style-type: none"> • Audience feedback • Sentiment index • Complaints data • Review of research by regulator • Review of previous submissions 	<ul style="list-style-type: none"> • None identified 	<ul style="list-style-type: none"> • Meeting with scheme’s staff • Focus group • Survey • Advisory committee • Advisory council 	<ul style="list-style-type: none"> • None identified
	Identifying and describing issues	<ul style="list-style-type: none"> • None specifically used 	<ul style="list-style-type: none"> • Information dissemination (media, reports & other communication) • General call for proposal stage input • Publication of issues paper 	<ul style="list-style-type: none"> • Written submission at proposal stage • Written submission in response to issues paper • Advisory committee • Advisory council 	<ul style="list-style-type: none"> • None identified
	Formulating regulatory approaches	<ul style="list-style-type: none"> • None specifically used 	<ul style="list-style-type: none"> • Information dissemination (media, reports 	<ul style="list-style-type: none"> • Public fora • Round tables • Focus groups 	<ul style="list-style-type: none"> • Working committee • Consumer organisation

	Forms of consumer/public engagement				
	and rules		& other communication) • Publication of draft rules	• Meeting with person conducting review • Written submission on draft rules • Phone submission • Meeting with scheme's staff to discuss proposed rules	consults with its members (fed into committee)
	Monitoring and assessing operation	• Audience feedback • Sentiment index • Complaints data • Review of research by regulator • Review of previous submissions	• Information dissemination (media, reports & other communication)	• Advisory committee • Advisory council • Focus group • Round table • Meeting with person conducting review • Survey	• None identified

What this tells us

Our Round Tables provided insight into how these mechanisms are used and also the views of industry, consumer and regulator participants on their benefits and shortcomings. We record their observations in Chapter 5. Participants from all backgrounds recognised the difficulties of involving people in matters that might be quite technical and time-consuming. Industry participants pointed to initiatives to reduce barriers to participation, but acknowledged that some had only partial success. Consumer representatives told of 'participation fatigue'. Regulators signalled their awareness that some groups of consumers and members of the public are missing from the regulatory process.

In evaluating the current state of engagement of consumers and citizens in industry regulation, we have tried to recognise the goodwill of all those who participated in our research, and the common view among consumer groups, industry and regulators that it is desirable to enhance engagement and bring in new participants, at least at certain points in the regulatory cycle. We, too, see this as necessary if industry regulation is to fulfil the requirements of responsive regulation and work successfully as an alternative to government regulation.

As we explain in Chapter 4, we have designed our matrix (above) in a way to enable new mechanisms to be identified and plotted, and to encourage this we have made some observations on current practice, as well as some more direct recommendations. In our observations, set out in Chapter 5, we have drawn on some overseas work which aims to identify missing stakeholders and to develop steps that may be taken to reduce barriers to participation.

Based on our research, current consumer and public engagement practices raise a number of questions and concerns, including the following:

- whether industry effort and resources should be directed to addressing the absence of missing stakeholders and, in particular, reducing the barriers to participation citizens and consumers confront, especially when asked to submit written comments;
- whether industry should be encouraged to use and/or experiment with alternative mechanisms of public engagement in order to improve greater dialogue when carrying out all rule-making functions;
- whether all industry schemes should appoint consumer and public interest representatives to their working committees when drafting rules;
- whether public engagement should commence earlier in the rule-making process (ie, during fact-finding or issue identification and description rather than during or after regulatory approaches and rules have been determined and formulated);
- whether all industry bodies should be expected to comply with a minimum set of public engagement obligations;
- whether amendments are required to the existing legislative frameworks that support co-regulation in the communications industry;
- whether disparities in public consultation practices between industry schemes and ACMA should be addressed;
- whether an evidence-based approach to formulating regulatory solutions requires the body or scheme to actively solicit information (ie, collect data) specific to the issues being considered;
- whether ACCAN's remit should be extended or if a new public interest body should be created to ensure the concerns of consumers and citizens relating to content are adequately represented in industry rule-making and other regulatory processes; and
- whether additional measures are needed to address the absence of public engagement in the regulatory framework that is emerging for technology platforms, such as Google and Facebook.

We address each of these issues in detail in Chapter 6.

Recommendations

Our recommendations, also set out in Chapter 6, are as follows:

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.

Recommendation 3: Industry schemes could provide consumer and public interest organisations with easily accessible, plain English summaries of proposed rules and related background for distribution to consumer and citizen stakeholders.

Recommendation 4: Industry schemes could develop libraries of submissions made by consumer and public interest organisations, and a regulator such as ACMA or the eSafety Commissioner could develop an electronic repository, accessible by all industry schemes, of submissions made by consumer and public interest organisations.

Recommendation 5: Industry schemes could seek the input of consumer and public interest organisations during the ‘formative stage’ of rule-making by seeking their input into issue papers, including the formulation of any questions they pose.

Recommendation 6: Schemes could make greater use of surveys, focus groups and round tables, compensating participants for their time, and consider making use of citizen juries and/or deliberative polling.

Recommendation 7: All industry schemes could consider appointing consumer and public interest representatives to their working committees when drafting and/or revising rules with a significant impact on consumers and citizens.

Recommendation 8: Industry schemes could seek to engage consumer and public interest organisations when they identify and frame issues.

Recommendation 9: All industry schemes should (at an absolute minimum) be expected to publish their rules in draft and provide consumers, citizens and related organisations with an opportunity to make written submissions.

Recommendation 10: The legislative frameworks that underpin co-regulatory rule-making in the media, online and telecommunications sectors should be harmonised through the setting of standard, minimum requirements for consumer and citizen consultation.

Recommendation 11: When developing codes of practice under a co-regulatory legislative framework, industry schemes could seek to build on the input from representative bodies

by conducting some form of direct engagement with consumers and citizens where this might address known gaps in representation.

Recommendation 12: The extensiveness of industry public consultation for co-regulatory codes should turn on the impact the proposed rules are likely to have on consumers and the wider public; ACMA could set expectations of industry to assist in this.

Recommendation 13: ACCAN's remit could be expanded to include customer-related aspects of content service provision; the Government should then provide ACCAN with the additional funding it needs to perform this new function.

Recommendation 14: ACCAN's remit could be expanded or a similar body could be funded to provide representation of citizen interests in the communications industry, including in their interaction with digital platforms.

1. Introduction

1.1 Project overview

Self- and co-regulation have become important components of the framework used to regulate the Australian communications industry. Both tools are likely to be used as the framework is adapted for the converged communications industry. Indeed, in the Final Report of its Digital Platforms Inquiry, the Australian Competition and Consumer Commission (ACCC) proposed new co-regulatory codes of practice with designated digital platforms such as Google and Facebook, as well as a ‘disinformation’ co-regulatory code for digital platforms generally (June 2019, pp. 17, 22). In its Final Report on the review of the Australian Communications and Media Authority (ACMA), the Department of Communications also suggested that reform of the communications regulatory framework should aim to ‘reinvigorate’ self-regulation (October 2016, p.90).

Since the publication of the ACMA review report, there has been a swing back to some forms of government regulation to promote a less fraught transition of consumers to the Australian Government’s high-speed National Broadband Network (NBN). Moreover, the Department of Communications has stated that consumer safeguards for voice and broadband services supplied over the NBN are best delivered through direct regulation (DOCA November 2018, p.9). However, reliance on self- and co-regulation in the converged communications industry remains a likely scenario because of the long-established trend towards non-statutory regulatory responses across multiple policy domains in Australia and countries throughout the world. Different policy issues are also likely to suit a range of regulatory responses, including self- and co-regulation.

Reliance on self- and co-regulation raises the issue of consumer and public engagement in the processes the converged communications industry will use to formulate rules. However, research into consumer and public engagement in industry rule-making is limited, and there has been no assessment of how such engagement can best be deployed to ensure self- and co-regulation within the converged sector is responsive and effective. This project begins the process of addressing the issues surrounding consumer and public engagement in industry rule-making.

The three specific aims of this project are:

1. To compare and evaluate current mechanisms for consumer and public engagement in industry rule-making in the advertising, telecommunications, media and online service sectors;
2. To develop a framework for evaluating the success and limitations of current engagement mechanisms; and
3. To identify the implications of its findings for the future of Australian communications regulation.

Our research is made possible by funding received from the Australian Communications Consumer Action Network (ACCAN), the Faculty of Law, UTS and the School of Law, University of New England. Funding received from ACCAN is made possible by funding provided by the Commonwealth of

Australia under section 593 of the *Telecommunications Act 1997*. This funding is recovered from charges on telecommunications carriers.

1.2 Scope of the project

The project consists of two stages.

In Stage 1 of the project, we mapped consumer and public engagement within the existing industry rule-making frameworks of the Australian advertising, media, online and telecommunications sectors; reviewed overseas developments in consumer and public engagement in the European Union (EU), the United Kingdom (UK) and the United States (US); carried out literature reviews and analysed the data collected. This resulted in a Preliminary Report on 14 April 2019. This was used as the basis for Stage 2 of the project, which consisted of three Round Tables, one with each of the following stakeholder groups: consumers, industry and regulators. We then reviewed the information and analysis in the Preliminary Report and produced this report for publication. Further details are provided in 'Methodology' below.

In Stage 1, we identified 20 self- and co-regulatory bodies and schemes (referred to below as schemes or industry schemes) in effect within the Australian advertising, media, online and telecommunications sectors. In alphabetical order, they are:

- Alcohol Beverages Advertising Code scheme (ABAC scheme)
- .au Domain Administration Limited (auDA)
- Australian Association of National Advertisers (AANA)
- Australian Broadcasting Corporation (ABC)
- Australian Community Television Alliance (ACTA)
- Australian Direct Marketing Association (ADMA)
- Australian Food and Grocery Council (AFGC)
- Australian Narrowcast Radio Association (ANRA)
- Australian Press Council (APC)
- Australian Subscription Television and Radio Association (ASTRA)
- Communications Alliance (Comms Alliance)
- Community Broadcasting Association of Australia (CBAA)
- Commercial Radio Australia (CRA)
- Federal Chamber of Automotive Industries (FCAI)
- Free TV Australia (Free TV)

- Independent Media Council (IMC)
- Interactive Advertising Bureau Australia (IAB)
- Media, Entertainment and Arts Alliance (MEAA)
- Special Broadcasting Service (SBS)
- Standards Australia

The overall functions of these schemes vary greatly and include industry peak bodies (eg Comms Alliance, CRA), broadcasters (the ABC and SBS) and a trade union (MEAA). However, in this report, we are concerned only with their rule-making functions.

Each scheme was relevant to the project because it formulates codes of conduct, ethics or practice, guidance notes, guidelines, initiatives, policies, principles, specifications, standards or other forms of rules that have or are likely to have an effect on consumers or citizens (below referred to collectively as ‘rules’). A table listing the name of each scheme, a brief summary of its functions and its rules relevant to the project is provided in Appendix 1. The bodies and schemes not discussed in this report and the reasons why they are not discussed are set out in Appendix 2.

Not all of the 20 schemes considered in this report are privately owned or developed. The ABC and SBS are created by statute and funded by government. The remaining 18 bodies and schemes are companies limited by guarantee, incorporated associations or other entities.

1.3 Methodology

In 2018, we prepared summaries of the schemes’ rule-making processes and their mechanisms for consumer and public engagement. Despite our extensive searches of publicly available information, we were unable to find any information about ACTA’s rule-making processes and its mechanisms for consumer and public engagement.¹ For this reason, our study is based on 19 rather than 20 schemes.

Each summary was prepared on the basis of information in the public domain. Relevant information was found in sources such as: annual reports; media releases; reports issued by the schemes; evidence and submissions made to Parliamentary committees and regulatory inquiries; and online resources, including the websites of the 19 schemes, ACMA, its predecessors the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA), and the ACCC.

Each summary was sent to the relevant scheme for review in the second half of 2018. We also asked all 20 schemes to provide any additional information they believed would assist us with our research. We received comments on summaries and/or additional information from 16 of them: auDA, AANA, ABAC, ABC, ANRA, APC, ASTRA, Comms Alliance, CBAA, CRA, FCAI, Free TV, IMC, MEAA,

¹ Several attempts to contact ACTA were unsuccessful. It should be noted that in June 2018, the Minister for Communications announced that the three remaining community television broadcasters must vacate the terrestrial spectrum by 30 June 2020. See Minister for Communications, Sen the Hon Mitch Fifield, ‘Community Television Broadcasters Granted Two Year Licence Extension’ (Media Release, 1 June 2018).

Standards Australia and SBS. Where necessary and appropriate (eg, to correct factual inaccuracies or to supplement information on the public record), the summaries were amended to reflect comments received. Despite sending several requests via email and/or speaking to their representatives, we did not receive comments on summaries about ADMA, AFGC or IAB.

All summaries (as amended) are set out in K. Lee & D. Wilding, *Industry Bodies and Schemes in the Communications Sector: Rule-making Frameworks and Consumer and Citizen Engagement* (2019).

In addition to preparing the 19 summaries, we interviewed representatives from Comms Alliance on 27 April 2018 and 12 June 2018; an ACCAN representative on 25 October 2018; and representatives from ACMA's Content Safeguards Branch on 22 November 2018. An ACCAN representative was interviewed because Comms Alliance expects ACCAN to undertake consultation with its members when Comms Alliance releases draft consumer codes of practice that it intends to register with ACMA in accordance with Part 6 of the *Telecommunications Act 1997* (Cth) (TA). Representatives from ACMA's Content Safeguards Branch were interviewed so we could better understand ACMA's expectations when ANRA, ASTRA, CBAA, CRA and Free TV consult with members of the public when developing codes for registration under Part 9 of the *Broadcasting Services Act 1992* (Cth) (BSA).

In May 2019, we held three semi-structured Round Tables to explore aspects of the Preliminary Report and to seek participants' views on a series of targeted questions. We chose Round Tables over individual interviews because they would allow participants in the research to hear and reflect on others' experience in aspects of self- and co-regulation. We separated our participants into three groups – consumer, industry and regulator representatives – to encourage greater depth of discussion and to promote more candid commentary than might occur in a mixed group. We requested that organisations nominate a representative with experience in the development of self- or co-regulatory rules. To further promote open discussion and to protect participants' privacy, we informed them in advance that they, personally, would not be identified in any way in published material and we also gave them the option of having their organisation identified only in general terms (ie, a consumer, industry or regulatory organisation). This explains why, throughout this report, some participating organisations are referred to by name while others are not.

Based on our research conducted for the Preliminary Report, including the summaries we prepared on each of the schemes, we identified 27 consumer organisations, 18 industry organisations and 10 regulators that had participated in some aspect of communications industry self- or co-regulation. There was some degree of overlap in these categories; for example, APC and ADMA advocate for industry issues on occasion, but also operate their own set of rules and/or handle complaints about the rules. There were 10 confirmed participants in each of the Consumer and Industry Round Tables and 11 in the Regulator Round Table, although two of the consumer representatives were unable to attend on the day. As a result, there were 29 participants in total.

In advance of the Round Tables, all participants were given access (via password) to a closed webpage with a copy of our three-volume Preliminary Report and a condensed consultation document that referred at relevant points to parts of the Preliminary Report. The consultation document included a full list of questions we intended to cover at the Round Tables, with each group later being informed of the questions that we would focus on in their session. All groups were asked the same opening questions concerning strengths and weaknesses of the identified mechanisms and any that had not yet been identified. However, only certain groups were asked other questions. For

example, only the industry group was asked what industry representatives take into account when deciding which engagement methods to use, whereas only the consumer group was asked about participation barriers faced by missing stakeholders, and only the regulator group was asked about the legislative framework.

Each Round Table was facilitated in a similar way, beginning with the focus questions and expanding on these as appropriate in response to matters raised by the participants. We gave all of the participants the option to submit any further comments on matters raised in these sessions or in the Preliminary Report, with just over three weeks to do so. We later obtained transcriptions of the audio recordings and used these in the compilation of this report.

1.4 Definitions

Throughout this report, the terms ‘communications industry’, ‘industry regulation’, ‘self-regulation’, ‘co-regulation’, ‘responsiveness’, ‘public interest participation’, ‘public engagement’, ‘public consultation’ and ‘public communication’ are used. We define them to mean the following.

Communications industry means the Australian advertising, media, online and telecommunications sectors.

Industry regulation refers to self- and co-regulation.

Self-regulation occurs when members of industry, acting collectively, voluntarily develop, administer and/or enforce their own rules ‘without any formal oversight from Government or legal backstop for enforcement’ (Department of Communications May 2014, p. 15; Black 1996, p. 27).

Co-regulation is ‘when [an] industry develops its own code or accreditation scheme and this has legislative backing’ (Department of Communications May 2014, p. 10). In contrast to self-regulation, co-regulation generally involves some oversight of code development by government or a regulatory body and the codes industry drafts can be enforced by a regulatory body.

Responsiveness is a concept we consider in more detail in Chapter 5, where we note its influence in regulatory theory, underpinning theories of ‘responsive regulation’, ‘smart regulation’, ‘democratic experimentalism’ and ‘collaborative governance’. We identify four elements of responsiveness:

Deliberation means ‘the weighing up of alternatives and determination of what, on balance, meets the needs of all stakeholders’;

Impartiality means ‘the exercise of some independent judgement’ by industry;

Transparency means ‘the disclosure by industry to participants in the rule-making process of information necessary to hold it to account’;

Accountability means ‘the explanation and justification by industry of its positions to others’.

Public interest participation means participation within regulatory processes with the objective of representing aspects of citizenship, rather than consumer interests.²

² Rights of citizenship are generally thought to consist of civil, political and social rights. Civil rights include the right of freedom of speech and other rights required for the exercise of individual

Public engagement refers collectively to all forms of public communication, public consultation and public participation (represented in Figure 1 below). Below, we adopt (with some slight modifications) the definitions of these terms as proposed by Rowe and Frewer, two leading scholars in this field (2005, pp. 254-56). In Chapter 5, we explain how and why we departed from Rowe and Frewer's categories when designing our own scheme for characterising forms of public engagement.

Public communication involves an industry scheme conveying information about a rule-making initiative to consumers or citizens.

Public consultation consists of consumers or citizens being offered an opportunity to supply information relating to, or an opinion about, a rule-making initiative to an industry scheme at the invitation of or following a request made by an industry scheme. Unlike public participation, public consultation does not involve any dialogue between the industry scheme and consumers and members of the public. The industry scheme solicits (or refers to) information or opinion that originates from, or is generated by, consumers and members of the public.

Public participation means an exchange between an industry scheme and consumers and members of the public (relevant to a rule-making initiative) to the extent that it involves dialogue or conversation between them. This may consist of some involvement in the crafting of rules and/or acts of decision-making.

freedom. Political rights involve 'the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body', whereas social rights of citizenship are comprised of the rights 'to live the life of a civilized being according to the standards prevailing in [Australian] society' (Hitchens 2007, pp. 350-51. See generally ACMA June 2010, pp. 14-7).

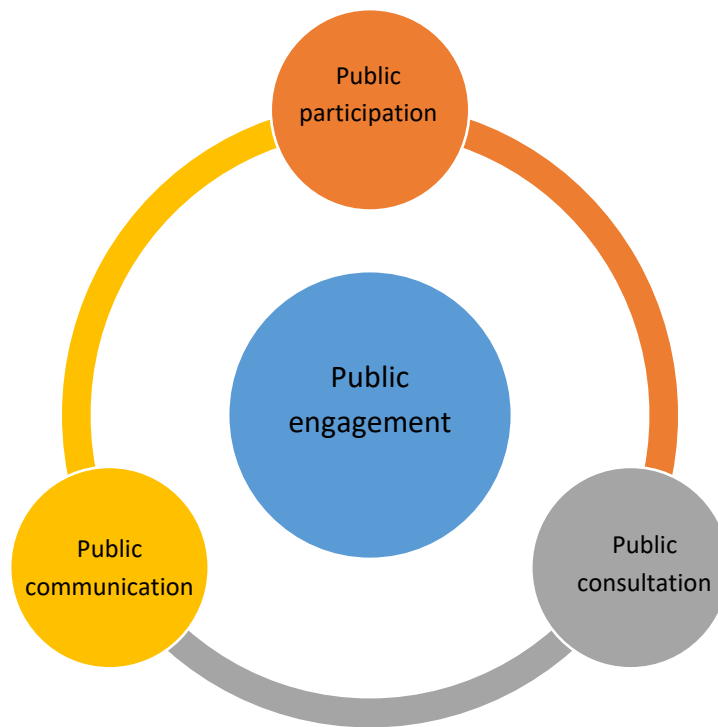


Figure 1: Components of Public Engagement

1.5 Structure of this report

This report is divided into six chapters.

Chapter 1 comprises this introduction.

Chapter 2 sets out the different regulatory contexts in which the industry schemes operate. It highlights the varying levels of government involvement in their rule-making processes.

Chapter 3 identifies the mechanisms of public engagement that are used by the 19 schemes for which we were able to prepare summaries.

Chapter 4 presents our proposal for the classification of these mechanisms, taking into account classification schemes that have been developed by researchers in other industries and jurisdictions.

Chapter 5 provides some observations on the use of the Australian mechanisms, following the approach to classification we present in Chapter 4. It is based on the information gathered in our summaries and from the Round Tables.

Chapter 6 sets out our recommendations.

2. Regulatory contexts

The 20 bodies and schemes we identified engage in various forms of self- and co-regulatory rule-making. Consequently, government involvement in their rule-making processes differs significantly between them. Some of their rule-making processes are subject to government or statutory regulation, which mandates consumer and/or public consultation; others are not.

Below we first identify the schemes that are not subject to any direct statutory regulation and highlight where government is nevertheless involved in, or has some (direct or indirect) influence over, their rule-making processes.

Second, we identify the schemes that are subject to some form of statutory regulation and briefly summarise the relevant legislative provisions, including any consumer and public consultation requirements and related measures.

2.1 Industry schemes not subject to direct statutory regulation

Nine of the 20 bodies and schemes we identified are not subject to any direct government or statutory regulation when engaged in rule-making. They are ABAC, AANA, ADMA, AFGC, APC, FCAI, IMC, IAB and MEAA. Regulators and/or other government stakeholders may become involved in the various rule-making processes or the management committees of the schemes at the request or invitation of these schemes. For example, ABAC's Management Committee includes a government representative; this is said to give government a degree of influence as changes to its code are made by agreement of members of the Committee.³ AANA and FCAI have consulted with government representatives when developing rules. However, there is no legislation expressly authorising or requiring these schemes to adopt rules and no legislation regulating how they formulate rules they may wish to adopt.

auDA and Standards Australia are not subject to any statutory regulation, but they are 'endorsed' or 'recognised' by the Australian government. auDA is endorsed by the Australian government as the appropriate body to administer the .au domain and associated second-level domains.⁴ Standards Australia is recognised by the Australian government as the 'peak non-government Standards-writing body' and as the Australian representative on the International Organisation for Standardization (ISO) and the International Electrotechnical Commission (IEC) (Standards Australia 6 October 2016, s. 3.1). Notwithstanding the absence of any statutory powers of regulation, the power of endorsement or recognition gives the government a certain degree of influence or oversight over

³ This observation was made to the authors in a letter of 26 April 2019 from Henry Jenkins AO, Chair of the ABAC Management Committee. The letter also indicated ABAC regards itself as a form of 'quasi-regulation' (rather than self- or co-regulation), a term used by the Department of Prime Minister and Cabinet (2014, p. 20).

⁴ auDA was endorsed by the Australian government in 2000 and following a review by DOCA that began in 2017, again in 2018. The 2018 endorsement is 'contingent' upon auDA implementing a number of reforms by April 2020 (DOCA November 2017; April 2018; Attachment to Letter from Mitch Fifield (Minister for Communications) to Chris Leptos (Chair, auDA Board) 16 April 2018).

the governance and/or rule-making processes of these two schemes that it does not have over the nine schemes identified above.

2.2 Industry schemes subject to direct statutory regulation

2.2.1 Overview of arrangements

The boards of directors of the ABC and SBS are required under the *Australian Broadcasting Corporation Act 1983* (Cth) (ABC Act) and the *Special Broadcasting Service Act 1991* (Cth) (SBS Act) to develop codes of practice and notify them to ACMA. Neither piece of legislation mandates how the codes of practice should be developed. Government and ACMA are not involved in their development, but Part 11 of the BSA provides for complaints about code breaches to be made (in some circumstances) to ACMA.

ACTA, ANRA, ASTRA, Comms Alliance, CBAA, CRA and Free TV have all developed codes of practice in accordance with statutory frameworks.⁵ Comms Alliance has developed codes of practice in accordance with Part 6 of the TA. ANRA, ACTA, ASTRA, CBAA, CRA and Free TV have developed codes of practice in accordance with Part 9 of the BSA. The *Codes for Industry Co-regulation in Areas of Internet and Mobile Content*, registered under Part 5 of Schedule 5 of the BSA; the *Content Services Code*, registered under Part 4 of Schedule 7 of the BSA; and the *Interactive Gambling Industry Code*, registered under Part 4 of the *Interactive Gambling Act 2001* (Cth) (IGA), are now the responsibility of Comms Alliance, but were developed by the (now defunct) Internet Industry Association (IIA).

Part 6 of the TA, Part 9 of the BSA; Part 5 of Schedule 5 of the BSA; Part 4 of Schedule 7 of the BSA; and Part 4 of the IGA each permits industry bodies and associations representing various ‘sections’ of the telecommunications, media and online industries to formulate and seek the registration of codes of practice with an authority (ACMA) or commissioner (eSafety Commissioner). Before ACMA or the eSafety Commissioner may register a code of practice, they must be satisfied that the relevant industry body or association has complied with certain requirements, including some procedural obligations. Consequently, if an industry body or association representing a section of the telecommunications, media and online industries wishes to register a code of practice with ACMA or the eSafety Commissioner, it must ensure its rule-making procedures meet the legislative requirements.

A brief summary of each of the five statutory frameworks and their consumer and public consultation requirements and related measures is provided below. The key points made in the discussion that follows are summarised in Table 1.

⁵ Comms Alliance has developed numerous rules that have or are likely to have an effect on consumers (other than codes of practice) that are not subject to any statutory requirements. Examples include unregistered codes, ‘voluntary’ technical standards, guidelines and industry guidance notes.

Table 1: Statutory requirements of consumer and public engagement in development of co-regulatory codes of practice in Australian media, online and telecommunications sectors

Framework	Part 6, TA	Part 9, BSA	Schedule 5, Part 5, BSA	Schedule 7, Part 4, BSA	Part 4, IGA
Consumer Consultation	One body or association that 'represents the interests of consumers' must be 'consulted' before registration by ACMA	N/A	N/A	N/A	N/A
Public Consultation	Yes	'Members of the public' must be given 'an adequate opportunity to comment' before registration by ACMA	Yes	Yes	Yes
- Place/form of publication	Website	None specified	None specified	None specified	None specified
- Specified period	Min 30 days	None specified	Min 30 days	Min 30 days	Min 30 days
- Publication of submissions	Yes	No	No	No	No
Relevant Industry Bodies	Comms Alliance	ANRA, ACTA, ASTRA, CBAA, CRA, Free TV	Comms Alliance (previously IIA)	Comms Alliance (previously IIA)	Comms Alliance (previously IIA)
Relevant codes	Various, including the Telecommunications Consumer Protections Code	Various codes, including Commercial Television, Subscription Broadcast Television, Commercial Radio, Community Radio, Open Narrowcast Radio	Code for Industry Co-Regulation in Areas of Internet and Mobile Content	Content Services Code	Interactive Gambling Code
Relevant Regulator	ACMA	ACMA	eSafety Commissioner	eSafety Commissioner	ACMA

2.2.2 The statutory frameworks

(1) Part 6 of the *Telecommunications Act 1997* (Cth)

Part 6 of the TA relates to the telecommunications sector. It enables bodies and associations representing sections of the telecommunications industry to draft and seek the registration of codes of practice with ACMA. Codes of practice may address a variety of matters including, for example, billing, complaint handling and debt collection.

(2) Part 9 of the *Broadcasting Services Act 1992* (Cth)

Part 9 of the BSA is applicable to ‘traditional’ broadcasters — providers of free-to-air television and radio services and subscription broadcasting services. Part 9 of the Act allows industry groups representing these broadcasters to formulate and seek the registration of codes of practice with ACMA. Part 9 codes may deal with various content and programming standards, including, for example, accuracy and fairness in news programs.

(3) Part 5 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth)

Part 5 of Schedule 5 of the BSA permits bodies and associations representing internet service providers (ISPs) to draft codes of practice and seek their registration with the eSafety Commissioner. Codes of practice must address various matters such as procedures to ensure children do not access online accounts without the consent of parents or responsible adults; procedures to inform producers of internet content of their legal responsibilities; and procedures to assist customers who wish to make content-related complaints.

(4) Part 4 of Schedule 7 of the *Broadcasting Services Act 1992* (Cth)

Part 4 of Schedule 7 of the BSA permits bodies and associations representing ‘sections of the content industry’⁶ to draft codes of practice and seek their registration with the eSafety Commissioner. All codes may deal with certain matters, including complaint-handling procedures and promotion of safety awareness. Codes applicable to commercial content service providers must deal with specified matters such as engagement of trained content assessors.

(5) Part 4 of the *Interactive Gambling Act 2001* (Cth)

Part 4 of the IGA is also applicable to ISPs and enables bodies and associations representing them to formulate a code of practice dealing with ‘designated internet gambling matters’ and seek its registration with ACMA.

2.2.3 Consumer and public consultation requirements and related measures

All five frameworks require industry bodies and associations to consult with the public. Part 6 of the TA, Schedules 5 and 7 of the BSA and Part 4 of the IGA require industry bodies and associations to publish a draft of the code; invite members of the public to make submissions within a specified

⁶ They include hosting service providers, live content service providers, links service providers and commercial content service providers; in all cases, the services provided must have an Australia connection.

period (ie, not less than 30 days) and consider any submissions received.⁷ Part 9 of the BSA states that ACMA must be satisfied that ‘members of the public have been given an adequate opportunity to comment on the code’.⁸ In 2000, the Productivity Commission recommended that guidelines on the meaning of ‘adequate opportunity to comment’ be developed by the Australian Broadcasting Authority, one of ACMA’s predecessors, but none was ever adopted. The meaning of an ‘adequate opportunity to comment on the code’ is determined by relevant industry bodies and associations in conjunction with ACMA on a code-by-code and case-by-case basis.⁹ However, any decision is informed by the six general principles of consultation outlined in *Effective Consultation: The ACMA’s Guide to Making a Submission*, published by ACMA in November 2015.¹⁰

Draft Part 6 codes must be published on the website of the industry body or association concerned; and since 2014, subject to some exceptions, any submissions made concerning a draft Part 6 code must be published on the website. These requirements are not imposed on codes developed in accordance with Part 9 and Schedules 5 and 7 of the BSA or Part 4 of the IGA.¹¹

Only Part 6 of the TA requires ACMA to be satisfied that ‘at least one body or association that represents the interests of consumers has been consulted about the development of the code’.¹² As a matter of practice, ACMA requires industry bodies and associations to provide a certificate of mandatory consultation signed by a consumer representative body or association to substantiate that they have consulted a consumer representative body or association.¹³ In addition, industry bodies and associations typically consult with and ask the Australian Communications Consumer Action Network (ACCAN) to sign mandatory consultation certificates for Part 6 codes. ACCAN receives Commonwealth funding pursuant to s 593(1) of the TA to represent the interests of consumers in relation to telecommunications issues.

Industry bodies and associations are not limited to the forms of consumer and public consultation specified in the legislation. The Explanatory Memoranda for Schedule 5 of the BSA and Part 4 of the IGA state explicitly:

⁷ TA pt 6 s 117(1)(f); BSA sch 5, pt 5 cl 62(1)(e), sch 7, pt 4, cl 85(1)(e); IGA pt 4 s 38(1)(e).

⁸ BSA s 123(4)(b)(iii).

⁹ Interview with ACMA employees (names withheld) (Karen Lee and Derek Wilding, by phone, 22 November 2018).

¹⁰ The document was published on the ACMA website until October 2019 but appears to have been removed as part of a website restructure. It was summarised by ACMA in a document archived by AustLII: <<http://www5.austlii.edu.au/au/journals/AUCMAsphereNlr/2010/34.pdf>>.

¹¹ Some broadcasting industry bodies publish submissions made concerning draft Part 9 codes as a matter of practice. See Section 3.21.1 (Publication of written submissions) below.

¹² TA s 117(1)(i).

¹³ See, eg, ACMA, Certificate of Mandatory Consultation on an Industry Code under Part 6 of the Telecommunications Act 1997 available at <<https://www.acma.gov.au/register-telco-industry-codes-and-standards>>.

The public comment requirements are additional to any opportunities the industry may provide for the involvement of the public or consumer representatives in the code development process.¹⁴

¹⁴ Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999 (Cth) 51; Revised Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999 (Cth) 57; Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth) 52.

3. Current mechanisms of public engagement

The summary in this chapter is based on our review of the 19 schemes for which we were able to prepare summaries and on additional information gathered from participants during the Industry Round Table. As noted in section 1.3 above, for one scheme there was insufficient information in the public domain to prepare a summary and there was no response to our requests for information. The body that manages that scheme also did not participate in the Industry Round Table.

Of the schemes reviewed, it appeared that two schemes did not engage with consumers and citizens when developing their rules: AFGC (which developed the Responsible Children’s Marketing Initiative for the Australian Food and Beverage Industry and the Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children) and IAB (which adopted the Australian Best Practice Guidelines Internet Based Advertising). The nutrition criteria that form part of the Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children were developed by a team of accredited practising dietitians.¹⁵ However, neither this initiative nor the AFGC’s Responsible Children’s Marketing Initiative for the Australian Food and Beverage Industry appeared to have given consumers or the public an opportunity to participate in any way in its development.

Two other schemes – ADMA and FCAI – permit consumer and/or public engagement in their rule-making processes in some form, but the nature of these engagement practices is not apparent. Information on ADMA’s website about its code of practice (last updated in 2018) states it ‘consulted extensively with ... [among others] consumer bodies over a two-year period ...’ Similarly, the explanatory notes to the FCAI’s Voluntary Code of Practice for Motor Vehicle Advertising (adopted in 2004 and currently under review) point to consultation with a range of stakeholders, including the Australian Automobile Association and the National Road Safety Strategy Panel (which consists of representatives of motoring associations). However, precisely how and when consumers and/or the public are permitted to engage in their rule-making processes could not be determined from the publicly available information on which their summaries were based. FCAI commented on the summary we provided (Lee & Wilding 2019), but it did not elaborate on these issues.

ADMA did not comment on its summary.

The other 15 schemes have used one or more of 22 mechanisms of consumer and public engagement in their rule-making activities. Below, each mechanism and the schemes that have used the various mechanisms are explained. The mechanisms are discussed in alphabetical order. Table 3 presents a summary of the information in this chapter.

All mechanisms have been adopted voluntarily by the 15 schemes unless otherwise noted. It should also be emphasised that many of these mechanisms have not always been used by these schemes. Indeed, several bodies that participated in the Industry Round Table reported the precise public

¹⁵ AFGC, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report* (2011).

engagement mechanisms used were determined on a 'case-by-case' or 'needs'¹⁶ basis.¹⁷ Often, one of the mechanisms has been used in conjunction with one or more of the others.

Moreover, some bodies and schemes have used certain other consumer and public engagement mechanisms outside of their rule-making activities that may have indirectly influenced their rule-making activities. For example, auDA,¹⁸ Comms Alliance (until 2008-2009) and Standards Australia have allowed consumer and/or public interest organisations to become members of their organisations.¹⁹ The CEOs of Comms Alliance and ACCAN meet quarterly. ACCAN and Comms Alliance's Industry Consumer Advisory Group meet annually. Comms Alliance also participates in ACMA's Consumer Consultative Forum, which is an advisory group that consists of ACMA, up to eight representatives from Australian consumer organisations, Comms Alliance, the Australian Mobile Telecommunications Association and the Telecommunications Industry Ombudsman (TIO). Until 2008, Comms Alliance appointed consumer organisations to its Reference Panels and Advisory Groups – standing bodies responsible for specific areas of industry activity. In the broadcasting sector, at least one SBS Board member must be a person of Aboriginal or Torres Strait Islander background,²⁰ and the directors of the SBS Board must collectively consist of persons with 'a diversity of cultural perspectives'.²¹

3.1 Advisory Committee

An advisory committee is comprised exclusively of consumer and/or public stakeholder representatives who provide advice about rule development to the scheme itself, its managing director or board or a working committee. They have been used by the ABC, Comms Alliance and SBS.

The ABC has its Bonner Committee, which is an internal advisory and representative body on matters relating to Aboriginal and Torres Strait Islander content and communities. Members of the committee include Indigenous and non-Indigenous members of ABC staff and are from geographically diverse parts of Australia.²² Among other things, the Bonner Committee provides

¹⁶ Email from CBAA representative to Derek Wilding and Karen Lee, 30 May 2019.

¹⁷ Factors affecting mechanism selection are discussed in section 5.2.1 (below).

¹⁸ See *Constitution of .au Domain Administration Ltd* CAN 079 009 340 (adopted prior to 2018) cls 9.3(b), 9.5. According to cl 2.4(b) of auDA's constitution adopted in 2018, following the transition date, persons may be a governing member of auDA if they are eligible to hold a .au domain name licence under the policy published by auDA. Members of auDA were and are entitled to vote at annual general meetings.

¹⁹ Up to five bodies representing consumers may be members of Standards Australia. They are permitted to vote at ordinary and annual general meetings of the members and appoint a councillor to the Standards Australia Council, the function of which is to advise and make recommendations to the board of directors. ACCAN and CHOICE are members. Consumer and public interest organisations who were members of Comms Alliance were represented on the Comms Alliance board until 2006.

²⁰ SBS Act 17(2)(d).

²¹ Ibid s 17(2)(b).

²² ABC, *Investing in Audiences: Annual Report 2017* (2017), vol II, 62-3.

input and feedback about the ABC code of practice to the ABC board, which, as noted in section 2.2.1, has a duty to notify codes of practice to ACMA in accordance with the ABC Act.²³

SBS has a Community Advisory Committee (CAC) which performs a similar role. SBS is required by statute to establish CAC,²⁴ and CAC's function is to assist the SBS board in its duty to 'be aware of, and responsive to, community needs and opinions on matters relevant to the SBS Charter.'²⁵ To that end, CAC is required to advise the board on 'community needs and opinions, including the needs and opinions of small or newly arrived ethnic groups, on matters relevant to the SBS Charter.'²⁶

Individuals may not be appointed to CAC unless the board is satisfied that they have 'an understanding of Australia's multicultural society; and in particular, ha[ve] interests relevant to, and an understanding of, ethnic, Aboriginal or Torres Strait Islander communities.'²⁷ Established pursuant to s 50(1) of the SBS Act, CAC provides written comments to SBS working groups developing codes of practice for notification to ACMA.

Until 2009, Comms Alliance had two advisory bodies – the Disability Advisory Body (DAB), later known as the Disability Advisory Council (DAC), and the Consumer Advisory Council (CAC), which subsequently became the Consumer Council (CC). The function of DAB and DAC was to advise on the likely impact of proposed rules on disabled end-users and the appropriate methods of consultation with these individuals and those organisations representing their interests.²⁸ DAB/DAC was comprised of nine members, including a chair, and included organisations such as the Australian Association for the Deaf and Blind Citizens Australia.²⁹

CAC and CC were responsible for providing consumer 'input' into the work of Comms Alliance.³⁰ CAC was comprised of up to 15 members, which consisted of the chair of DAB/DAC and organisations representing a variety of consumers.³¹ When CAC became the Consumer Council, its membership was reduced to 12 members, and included Comms Alliance's CEO and the chair of the Disability Council.³²

3.2 Advisory Council

An advisory council is similar to an advisory committee. However, when rules are being developed, the members of an advisory council are specifically requested to consult with their constituents and provide reports to the council. The council subsequently provides a report to the board of the scheme.

²³ ABC Act s 8(1)(e).

²⁴ SBS Act s 50.

²⁵ SBS Act 10(1)(g).

²⁶ Ibid s 50(2).

²⁷ Ibid 50(4).

²⁸ See, eg, ACIF, *Annual Report 1999* (1999); ACIF, *Industry Guideline: Consumer Participation in ACIF and ACIF Processes* (2002) 7; DAB, *Terms of Reference* (28 October 2002).

²⁹ See, eg, ACIF, *Annual Report 2003* (2003) 82; ACIF, *Annual Report 2004* (2004) 76.

³⁰ *Industry Guideline: Consumer Participation in ACIF and ACIF Processes*, above n 28, 11.

³¹ Ibid 8.

³² ACIF, *Consumer Participation Framework* (July 2006) cl 3.1.

In addition to an advisory committee, the ABC uses an advisory council. When significant changes are proposed to its code of practice, the ABC board asks its Advisory Council (AC), whose function is to advise it on all matters relating to television and radio programming, to consult with the public about the content of the code. The 12 members of the AC, each of whom represents a particular constituency, including Indigenous, faith-based and immigrant groups (Lee & Wilding 2019, p. 22), then solicit the views of their constituents and provide a written report to the AC. Members of the AC are not obliged to consult with their constituencies in a specific way: they are free to determine the manner in which they consult with their constituencies. However, the chosen method of consultation must be lawful; and if AC members wish to conduct an online survey, they must obtain the prior permission of the ABC's secretariat. The ABC's website lists the following as possible methods of consultation AC members may use: one-on-one interviews, questionnaires, online surveys (such as Survey Monkey), informal meetings and 'structured community events'.³³ The AC is mandated by section 11 of the ABC Act, which also requires that the ABC board 'have regard to' any advice the AC provides.

3.3 Audience feedback

During the Industry Round Table, representatives from several schemes reported the rules of their organisations were informed by routine feedback received from their audiences and/or the audiences of their member organisations. For example, daily audience and viewer feedback reports are compiled by SBS.³⁴ In addition, SBS has created The Exchange, a virtual 'community of audiences'.³⁵ Members of The Exchange are able to provide opinions about, and give ideas for, SBS programs and series (sometimes in response to survey questions posed by SBS).³⁶ Membership is free, but before joining members must complete a short questionnaire about their backgrounds and viewing habits. New and existing members have the opportunity to win gift cards and other prizes.³⁷

Similarly, the ABC has established a large panel of audience members and solicits its views on programming matters. Representatives from commercial media-related bodies and schemes reported their members regularly carry out focus groups with their viewers and listeners. Matters raised in focus groups affect commercial programming decisions and the content of codes of practice. Representatives from all participating media-related bodies said viewers and listeners often provided 'instant response[s]' about programming content via Messenger, Facebook and other means.

³³ ABC, *ABC Advisory Council – Member Obligations* (Web Page) <<http://about.abc.net.au/who-we-are/abc-advisory-council/>>.

³⁴ SBS, *Comments on Designing Responsive Regulation: Consumer and Public Engagement Practices in Industry Rule-making – Preliminary Report* (6 June 2019) 2

³⁵ Ibid.

³⁶ See <https://www.theexchange.sbs.com.au/O.aspx?s=569&_m=58509fae-9341-4e44-9735-aa880026893e&_psc=8d242204-a339-4845-aa36-a778004d1cea&t=0&_a=ca3569f7-d7c7-4df9-b266-a76200e78092&_dspvw=d>.

³⁷ Ibid.

3.4 Complaints data

This mechanism – the second most commonly used public engagement tool employed by the schemes discussed in this report – involves the use of complaints data to inform the development and revision of rules. Complaints are made by consumers and audiences or readers. These complaints may be made to an arm of the scheme itself or to its industry members or to a regulatory body, such as the ACMA or the TIO, each of which resolves disputes and compiles information about them. The data is then given to the relevant rule-makers for consideration. The mechanism is used by AANA, ABAC, ABC, APC, ASTRA, Comms Alliance, CBAA, CRA, FCAI, Free TV, IMC, MEAA and SBS.³⁸

Complaints relating to codes developed by AANA and the Voluntary Code of Practice for Motor Vehicle Advertising in Australia adopted by the FCAI are made to Ad Standards. Complaints relating to alcohol advertising by signatories of the Alcohol Beverages Advertising Code are made to the ABAC Adjudication Panel. The APC's complaints panels evaluate readers' complaints against its members, while Readers' Editors and/or the IMC hear complaints about publications that are subject to the IMC's jurisdiction. MEAA's Ethics Panel oversees complaints made under its Code of Ethics. In accordance with the BSA, the ABC, SBS and individual licensees handle viewer complaints in the first instance, but if viewers receive no response within 60 days of making a complaint or are dissatisfied with the response they receive, they may refer them to ACMA.³⁹ All carriage service providers who supply services falling within the jurisdiction⁴⁰ of the TIO are required under statute to participate in the TIO's complaints resolution scheme,⁴¹ and the TIO provides complaints data to Comms Alliance. Participation in a complaints scheme is a contractual requirement imposed on the members or signatories of AANA, ABAC, APC, FCAI and IMC and a condition of union membership in the case of journalist members of the MEAA.

3.5 Consumer views solicited by consumer body

In addition to its other public engagement mechanisms, Comms Alliance expects ACCAN to consult (and ACCAN has consulted) with its members when Comms Alliance working committees draft Part 6 consumer codes of practice. For example, as part of the review of the *Telecommunications Consumer Protections Code* (C628:2015 (incorporating variation no 1 2016)) (TCP code), ACCAN consulted its members at two stages: (1) during the (informal) 'chapter by chapter' consultation, initiated by the relevant Comms Alliance working committee, on the then current version of the TCP code; and (2) during the 'formal' public consultation, required under Part 6 of the TA, on the draft of the revised code.

³⁸ ADMA and AFGC have each adopted an adjudication mechanism for complaints relating to, respectively, their codes and initiatives, but we could not determine if any complaints data generated is used to inform their rule-making activities. Complaints concerning ADMA's *Code of Practice* are heard by the AADL Code Authority. Complaints concerning AFGC's *Marketing Initiative for the Australian Food and Beverage Industry* and *Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children* are administered by Ad Standards.

³⁹ BSA s 148.

⁴⁰ They include: standard telephone services, where any of the customers are residential customers or small business customers; public mobile telecommunications services; or carriage services that enable end-users to access the internet. *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 127.

⁴¹ *Ibid* s 128(1).

ACCAN determines how best to consult with its members, and the methods it uses vary depending on the circumstances. During the ‘chapter by chapter’ consultation on the TCP code in 2018, ACCAN sent an email to its members for whom the code was most relevant. The email included a brief explanation of each chapter of the TCP code, a link to *Telecommunications Consumer Protections Code* (C628: 2015 (incorporating variation no. 1 2016)), ACCAN’s ‘top concerns’ and its suggestions as to how each chapter should be amended; and a request to comment on ACCAN’s suggestions and provide any additional comments. Where necessary, follow-up calls were made. ACCAN then generated a single submission informed by member feedback that was made to the industry. During formal public consultation on the TCP code, after sending an initial email, ACCAN contacted the members it had previously identified to explain ACCAN’s outstanding issues and concerns and encouraged them to make written submissions. ACCAN also made a number of posts about the TCP code to ACCAN’s social media accounts (ie, Facebook and Twitter) and created a blog for its website.

3.6 Focus groups with consumers or members of the public

The results of focus groups have been used by AANA, ABAC, ABC, auDA, CBAA, Comms Alliance and SBS to inform reviews of, and decisions about whether to revise, their codes.

In 2017, when AANA made changes to its Code of Ethics following an ‘evaluation process’, Ad Standards, which hears complaints made in relation to AANA members and the compliance of its members with the Code of Ethics, commissioned Colmar Brunton, the largest independent Australian-owned market research agency, to conduct 12 face-to-face focus groups with individuals across Australia to determine if Ad Standards decisions were ‘in line with prevailing community standards on advertising in Australia’ (ASB December 2017).

In 2013 and 2017, ABAC commissioned Colmar Brunton to engage in ‘community standards research’. As part of its research, Colmar Brunton conducted 10 face-to-face focus groups with individuals in 2013 and six face-to-face focus groups with individuals in 2017. In each focus group, 12 alcohol advertisements, which included seven complaints upheld and five complaints dismissed by the Complaints Panel, were tested to determine if decisions of the ABAC Complaints Panel were ‘in-line with the view of community standards’ (ABAC 17 June 2013, 19 May 2017; Colmar Brunton 9 May 2013, 1 May 2017).

auDA’s 2017 Policy Review Panel conducted focus groups in November 2018 and February 2019⁴² with domain investors, .au registrars, large corporates and representatives from small businesses, government, and the education and not-for-profit sectors.

In 2018/2019, during its review of its codes of practice, CBAA appointed third parties to conduct focus groups with community broadcasting ‘sector representatives’, including, for example, First Nations Media Australia, Christian Media and Arts Australia.⁴³

⁴² auDA, ‘From the PRP: Focus Groups Announced in Relation to Direct Registration Implementation Policy’ (24 August 2018); auDA, ‘Call for Participants: Focus Groups on Reform of Existing auDA Policies & Implementation of Direct Registration’ (21 February 2019). See also auDA Policy Review Panel (February 2019, p. 41).

⁴³ Email from CBAA representative to Derek Wilding and Karen Lee, 30 May 2019; Email from CBAA representative to Karen Lee, 16 July 2019.

SBS regularly runs its own *Meet the Audience* focus group sessions,⁴⁴ and any relevant information gathered is fed into its code development processes.

Comms Alliance conducted three focus groups with consumers on Critical Information Summaries⁴⁵ when revising the *Telecommunications Consumer Protections Code* (C628:2015 (incorporating variation no. 1 2016)).

3.7 Information dissemination

Fourteen of the 19 schemes have provided information to the public. They are AANA, ABC, ACTA, ANRA, auDA, ASTRA, Comms Alliance, CBAA, CRA, Free TV, IMC, MEAA, SBS and Standards Australia.⁴⁶

When reviewing its Code of Ethics in 2010, AANA released a ‘public statement’. However, it has also said that it publishes an issues paper when it engages in public consultation. (Lee & Wilding 2019, pp. 19, 20).

The ABC prepares an issues (or discussion) paper, which is distributed to the members of its Bonner Committee and Advisory Council (Lee & Wilding 2019, pp. 22-23).

Over the years, auDA Advisory Panels have published issue papers, draft reports, accompanying statements, copies of the minutes of their meetings,⁴⁷ the names of Advisory Panel members and submissions made in response to issue papers and draft reports. In addition, since 23 November

⁴⁴ SBS, Comments on *Designing Responsive Regulation: Consumer and Public Engagement Practices in Industry Rule-making – Preliminary Report* (6 June 2019) 2.

⁴⁵ Critical Information Summaries include essential information for every product and service offered by a telecommunications provider. They are required under the *Telecommunications Consumer Protections Code*.

⁴⁶ Here we include publication of written submissions as a form of public communication.

⁴⁷ Copies of all advisory committee minutes are published on auDA’s website, but we could not determine when they were published (eg before or after issue papers and draft reports were published).

Table 2: Engagement mechanisms

Mechanism	ABAC	auDA	AANA	ABC	ACTA	ADMA^	AFGC^	ANRA	APC	ASTRA	Comms Alliance	CBAA	CRA	FCAI	Free TV	IMC	IAB^	MEAA	Standards Australia	SBS
Advisory committee				YES							YES									YES
Advisory council				YES																
Audience feedback				YES																YES
Complaints data	YES		YES	YES					YES	YES	YES	YES	YES	YES	YES	YES		YES		YES
Consumer views solicited by consumer body											YES									
Discussion at proposal stage		N/A									YES									
Focus group	YES	YES	YES	YES							YES	YES								YES
Information dissemination		YES	YES	YES	YES			YES		YES	YES	YES	YES		YES	YES#		YES	YES	YES
Meeting with person conducting review			YES						YES		YES					YES				
Meeting with scheme's staff during proposal stage											YES									
Meeting with scheme's staff to discuss draft rules												YES			YES					
Phone submissions												YES								
Public fora		YES																		
Review of research by regulator								YES		YES		YES	YES		YES					
Review of previous submissions	YES																			
Round table									YES		YES	YES								
Sentiment index			YES																	
Surveys of consumers or public	YES	YES	YES								YES									
Working committee		YES							YES		YES	YES						YES	YES	
Written submissions at proposal stage																				YES
Written submissions on issues paper		YES	YES								YES							YES		
Written submissions on draft rules		YES			YES			YES		YES	YES	YES	YES		YES			YES	YES	YES

* Until 2008-2009

Provided to groups and individuals who meet with council members

^ Information not available

2018, Advisory Committees must publish stakeholder engagement plans (auDA August 2019, para 35). If auDA must consult on draft policies for a second time when managing policy development, it must publish a marked-up version (sometimes called a 'redline version') of the changes to the draft policy and a statement explaining why the changes were made (August 2019, para 46). Moreover, in April 2019, following publication of the 2017 Policy Review Panel's final report on the reform of auDA's existing policies and the implementation of direct registration (25 March 2019), auDA launched a public awareness campaign (in addition to its usual means of information dissemination). Known as the 'shorternames.com.au campaign', the campaign involved the creation of a 'micro' website which explained the proposed policy changes in simple terms. The website was advertised by way of two short videos that were distributed via Facebook, Instagram, catch-up TV and the Internet (auDA May 2019).

When ASTRA last revised its Part 9 code in 2018, it published the draft code and a related notice on its website, issued a press release and posted relevant information on its social media sites.⁴⁸ It also published on its website the written comments it received on the draft code (Lee & Wilding 2019, p.-37).

Comms Alliance publishes draft codes and standards (and notices of them) on its website.⁴⁹ It also publishes copies of written submissions, received during public consultation, on draft Part 6 codes and related guidelines.

CRA and Free TV have issued press releases, provided notices on social media channels and published on their websites copies of draft codes, explanatory guides, discussion papers and/or overviews of principal proposed changes. They have also published written comments received on the draft codes.⁵⁰

IMC provided a copy of its draft code of conduct to the groups and individuals invited to participate in meetings with council members held when the IMC code and operational guidelines were developed in 2012. MEAA has released issue papers.

SBS has publicised proposed codes and informed the public about where a copy of them may be obtained on television, radio and its website. Similarly, CBAA provides its radio station members with community service announcements about draft codes that can be played on air. The announcements encourage listeners to make submissions in writing or over the phone.⁵¹

Until recently, in addition to making announcements inviting written comments, Standards Australia published drafts of new standards on its website, but if a draft standard amended an existing standard, it published only the proposed amendments. If an individual/organisation wanted to see the existing standard, he/she had to purchase a copy of it from Standards Australia. Following a review of its technical governance by cameron.ralph.khoury in April 2018, Standards Australia is considering adopting several measures to increase the transparency of its processes, including

⁴⁸ See the summary of the engagement practices adopted by ASTRA in Lee & Wilding (2019).

⁴⁹ If Comms Alliance elects to publicly consult during the development of Guidelines and Specifications, the draft Guidelines and Specifications will also be published.

⁵⁰ See the CRA and Free TV summaries in Lee & Wilding (2019).

⁵¹ Email from CBAA representative to Derek Wilding and Karen Lee, 30 May 2019.

publishing drafts of revised standards that highlight where changes have been made and publishing all standards-related documentation, including the minutes and composition of technical committees. However, at the time of writing, very little detail of the initiatives Standards Australia will take was in the public domain.⁵² The other 12 bodies and schemes do not charge consumers and/or members of the public to access their draft rules. Table 3 lists the types of information provided and which bodies and schemes provide them.

Table 3: Information provided/available to consumers/citizens

Information Type	AANA	ABC	auDA	ASTRA	CA	CRA	Free TV	IMC	SBS	Stnds Aus
Draft reports			YES							
Draft rules			YES	YES	YES	YES	YES	YES*	YES	YES [#]
Explanatory statement					YES	YES	YES			
Issues paper	YES	YES [^]	YES		YES	YES	YES			
Minutes of rule-making meetings			YES							
Names of rule-makers			YES		YES					
Overview of proposed rules			YES ⁺			YES	YES			
Redline versions of changes			YES							
Stakeholder engagement plans			YES							
Statements	YES		YES	YES						
Submissions			YES		YES	YES	YES			

* To groups and individuals who met with council members

+ For only the shorternames.com.au campaign.

[#] In full, if new standard; in part, if amendment to existing standard

[^] Distributed to Bonner Committee and Advisory Council

With a few exceptions, we have been unable to locate copies of the actual information provided by these bodies, and the lack of information has made refinement of this table difficult. We are aware, for example, that ‘statements’ may provide an overview of proposed rules and/or other information

⁵² See the Standards Australia summary in Lee & Wilding (2019) for an overview of the possible changes it is considering.

listed in this table. There was insufficient data available to prepare a meaningful table of the means these schemes use to provide the information.

It should also be noted that ANRA, CRA and Free TV require their members to make a weekly public announcement about the existence of the codes of practice applicable to them and the processes viewers and/or listeners must follow to make a complaint.

3.8 Meetings with person conducting review

This mechanism involves an individual appointed by the scheme to review rules, or one or more members of the scheme's rule-making committee, interviewing or meeting with consumer organisations and/or interest groups after the rule-making process begins. The interviews or meetings may be requested by the rule-making committee, consumer organisations, or members of the public.

This type of public engagement has been used by AANA, APC, Comms Alliance and the IMC. When the AANA's Code of Ethics was reviewed in 2010, the independent reviewer appointed by AANA conducted personal interviews with 55 organisations and individuals, some of whom included 'advocacy and interest groups'.⁵³ The APC held 'informal meetings around Australia with a range of people from the media and broader community' when it revised its Statement of General Principles in 2014 (APC 2014, p.3). Comms Alliance has held meetings about its consumer, network and operational codes with members of ACMA's Consumer Consultative Forum. It has also held meetings with interest groups when formulating technical standards in its capacity as a Standards Development Organisation (SDO) accredited by Standards Australia or for adoption by ACMA in accordance with the TA. For example, when developing *AS/CA S042.1:2018 Requirements for Connection to an Air Interface of a Telecommunications Network – Part 1: General* (a technical standard), members of the Comms Alliance Working Committee met with ACMA's Emergency Call Service Advisory Committee (ECSAC). ECSAC is comprised of representatives from a number of different stakeholders, including consumer groups. Finally, when drafting the Code of Conduct, the three members of the IMC invited and met collectively with a number of interest groups, including mental health groups, disability groups and Muslim organisations. Each interest group was heard separately by the IMC members.⁵⁴

3.9 Meetings with scheme's staff during proposal stage

Schemes that use this mechanism discuss and/or seek input from consumer and/or public interest organisations about the problems and issues that should be addressed by proposed rules *before* internal approval to develop rules is obtained or code development by the rule-making schemes occurs. They discuss the problems and issues that are identified with consumer and public interest organisations.

Comms Alliance is the only scheme that appears to have regularly used this mechanism.

⁵³ AANA, Submission to Australian Communications and Media Authority Contemporary Community Safeguards Inquiry Issues Paper (July 2013) 10.

⁵⁴ Email from IMC representative to Karen Lee, 12 July 2018.

Prior to the establishment of its 2017 Policy Panel Review, which was convened to make recommendations on the development of an implementation policy for direct registration and reforms of its 21 policies, auDA conducted 22 phone interviews with members and other stakeholders and an additional 17 phone interviews with regulators, industry and other stakeholders. Information from these interviews informed the decision to establish the 2017 Policy Panel Review. However, it could not be determined if one or more consumer or public interest organisations was interviewed.

3.10 Meetings with scheme's staff to discuss proposed rules

Schemes that adopt this mechanism make their staff available to speak to consumer and public interest organisations about proposed rules after they have been published, but before the time period for submitting written submissions has closed.

For code reviews conducted in the 1990s, Free TV – known as the Federation of Australian Commercial Television Stations (FACTS) at the time – made its staff available to speak to interest groups and government agencies about its draft Part 9 code. It could not be determined if the staff made available sat on the Code Review Group responsible for drafting the code or were FACTS administrators.

If requested, CBAA also makes its staff available to speak to consumer and public interest organisations.⁵⁵

3.11 Phone submissions

CBAA permits listeners of community radio stations to make submissions on draft codes by phone.

3.12 Public fora

auDA was the only body or scheme to have used this mechanism. Its 2017 Policy Review Panel held four public fora – one in each of Perth, Sydney, Melbourne and Brisbane – where direct registration and reform of its existing 21 policies were discussed.

We could not locate any information about the format of, or manner in which, the forums were conducted.

3.13 Review of research by regulator

This mechanism consists of reviewing research carried out by, or on behalf of, a regulator.

When developing codes of practice under Part 9 of the BSA, ANRA, ASTRA, CBAA, CRA and FreeTV will take into account relevant research into the experience of listeners and viewers and others carried out by ACMA.

3.14 Review of previous submissions

Schemes that use this type of public engagement review submissions made by consumer and public interest organisations and other individuals to government inquiries that relate to the work of the

⁵⁵ Email from CBAA representative to Derek Wilding and Karen Lee, 30 May 2019.

scheme. ABAC, for example, considers community, consumer and public health submissions made to government inquiries relating to ABAC and alcohol marketing, when reviewing its scheme.

3.15 Round tables

Round tables have been used extensively by APC, on occasion by Comms Alliance and at least once by CBAA.

APC round tables have consisted of a mix of industry and community representatives. Separate consultations have also been held with industry and community representatives. Along with APC staff, the Chair and one or more Council members usually attend the round tables, which are held in Australian capital cities. Participation is by invitation. Representatives from community organisations working in business, education, the environment, employment, health, law, religion, science and social services, for example, have participated in APC round tables (Lee & Wilding 2019, p.34). The APC representative at the Industry Round Table we conducted for this research noted how information from the APC's round tables is fed up to the APC Council, which is the decision-making body that adopts new principles, standards and guidelines. He observed that the round tables 'can be very valuable in moving forward to a useful new perspective'.

Comms Alliance convened a round table with consumer and advocacy organisations when it developed its *Industry Guideline on Assisting Customers Experiencing Domestic and Family Violence* (G660:2018).

CBAA recently convened a community broadcasting sector round table to discuss its draft codes. Members of the round table included representatives from First Nations, Media Australia, Christian Media and Arts Australia, RPH Australia (the peak body of the Radio Reading network, which provides community radio reading services for people with a print disability), the National Ethnic and Multicultural Broadcasters' Council, and Australian Community Television.⁵⁶

3.16 Sentiment index

With Ipsos (a global market research and consulting firm), AANA has developed a 'sentiment index on community perceptions of advertising', which it has said 'will help inform the AANA's advertising self-regulatory code development agenda'.⁵⁷ We have been unable to determine precisely how it measures Australian community perceptions.⁵⁸

3.17 Surveys of individual consumers or members of the public

Surveys involve the relevant scheme asking individual consumers or members of the public to answer pre-prepared questions. They may be distributed by mail or online.

ABAC, AANA (via its Ad Standards secretariat), auDA and Comms Alliance have all commissioned, relied upon and/or used surveys to inform the development of their rules.

⁵⁶ Email from CBAA representative to Karen Lee, 16 July 2019.

⁵⁷ Advice to authors from AANA representative, 13 August 2018.

⁵⁸ Ipsos, 'AANA Announces Advertising Sentiment Index (ASI)' (Media Release, 19 April 2018) <<https://www.ipsos.com/en-au/aana-announces-advertising-sentiment-index-asi>>.

In 2013 and 2017, when Colmar Brunton was commissioned by ABAC to engage in a round of community standards research, it carried out an online survey of 1,261 and 1,225 people, respectively, to test the same alcohol advertisements presented to the face-to-face focus groups mentioned in section 3.6 above.

AANA (via its Ad Standards secretariat) uses a market research firm to survey around 1,200 people each year to give a nationally representative picture of the public's views on the decisions of its community standards panel which decides complaints under the AANA Code of Ethics.⁵⁹ For example, Ad Standards commissioned Colmar Brunton to survey 1,253 people as part of its 2012 Community Perceptions Research to 'test the core provisions of the AANA Code of Ethics',⁶⁰ in addition to the face-to-face focus groups mentioned in section 3.6. The Ad Standards representative at our Round Table for this project explained: 'We'll actually ask them what they think about the different provisions of the Code of Ethics, whether they think they're suitable or inadequate and whether they think that what we do is actually useful.' Although this aspect of consultation is conducted by the complaints body, Ad Standards feeds the results back to the rule-making body: 'all that data is all the information that we give to the AANA ... when they're doing their code reviews'.

Before establishing its 2017 Policy Review Panel, auDA distributed a qualitative online survey to 200,000 .au domain registrants and members of the general public. It also invited individuals to answer three short survey questions and provide other feedback as part of its shortnames.com.au campaign following publication of the 2017 Policy Review Panel's final report.⁶¹

Comms Alliance surveyed consumers about their experiences with Critical Information Summaries⁶² when it revised the *Telecommunications Consumer Protections Code* (C628:2015 (incorporating variation no. 1 2016)).

3.18 Working committees, advisory committees or code review bodies

This mechanism allows one or more consumer and/or public interest organisations to serve on an industry working committee, advisory committee or code review body. The committees or body draft recommendations relating to rules, and in some cases may also vote on whether to adopt the changes. auDA, APC, CBAA, Comms Alliance, MEAA and Standards Australia have each appointed consumer or public interest organisations to serve on working committees that propose policy recommendations or draft rules.

Consumer and/or public interest organisations have served on many auDA Advisory Panels established prior to 2018 that recommended draft policies and rules to auDA's board, and auDA's 2017 Policy Review Panel, whose work is ongoing, includes a designated consumer protection representative. However, since 23 November 2018, auDA management is responsible for drafting rules needed to give effect to recommendations of advisory committees. Therefore, while consumer

⁵⁹ It has also used focus groups as part of this process.

⁶⁰ Ad Standards, 'Community Perceptions Research 2012 – Overview: Fact Sheet' <https://adstandards.com.au/sites/default/files/research_2012_-_overview.pdf>.

⁶¹ See Section 3.1 above for further information about the campaign.

⁶² See n 45 above.

and/or public interest organisations may be involved in formulating auDA policy recommendations, they are no longer directly involved in drafting rules.

Public members of APC, along with publisher representatives and independent journalists, sit on working committees and participate in round table discussions in developing standards instruments. They also vote to adopt these instruments.

Community broadcasting sector stakeholders, including First Nations Media Australia, Christian Media and Arts Australia, for example, have been appointed to CBAA's Codes Advisory Committee. However, while this committee provides advice and feedback on draft codes, it does not draft them. Drafting remains the responsibility of CBAA.

One or more consumer organisations are invited by the Industry Consumer Advisory Group (ICAG) of Comms Alliance to sit on all Comms Alliance working committees developing consumer codes of practice to be registered under Part 6 of the TA. They are also invited by Comms Alliance Reference Panels and Advisory Panels to sit on working committees drafting network and operational codes they believe have an effect on consumers.

MEAA appointed four 'non-journalist' members to the Review Committee that assessed the Journalists' Code of Ethics in the 1990s.

Consumer representatives have also served on some Technical Committees of Standards Australia.

ADMA's Code Authority, which consists of an independent chair, three consumer representatives and three industry representatives, reviewed the ADMA Code of Practice in 2017,⁶³ but we could not determine if the Code Authority is responsible for amending the Code of Practice. The Code Authority may only provide feedback about the Code of Practice to another party with responsibility for drafting the code.

Some aspects of the operations of auDA, APC, Comms Alliance, MEAA and Standards Australia and their working committees are explained below.

Recruitment: auDA called for expressions of interest to serve on its advisory panels from consumer and/or public interest organisations via its website, but auDA is now required to 'encourage broad representation on [Advisory] Committees using multiple communication channels' (auDA August 2018, para 25). Comms Alliance, MEAA and Standards Australia directly approached the consumer and/or public interest groups that participated.

Decision-making framework: Members of auDA advisory panels formulated rules by consensus. Members of auDA advisory committees, Comms Alliance working committees and Standards Australia technical committees also draft rules by consensus. The APC uses majority decision-making to determine if proposed rules should be accepted or rejected.

Financial support for participation: Since 2007, auDA has given participating consumer and/or public interest organisations funding to offset the cost of their participation in some advisory panels. However, we could not determine if it will fund consumer and/or public

⁶³ ADMA, 'ADMA Code of Practice 2018 Released' (Media Release, 13 February 2018) <<https://www.adma.com.au/compliance/adma-code-of-practice-2018-released>>.

interest organisations participating in advisory committees. Comms Alliance and Standards Australia also provide travel and accommodation assistance to consumer and/or public interest organisations which participate in working and technical committees. Comms Alliance recoups, from ACMA, money paid to consumer and/or public interest organisations who serve on working committees developing consumer-related industry codes.⁶⁴

3.19 Written submissions at proposal stage

Only one scheme makes a general call for written submissions before rules are drafted but does not simultaneously publish an issues paper: SBS. The opportunity is advertised on all of the SBS media platforms, including television, online and radio. Radio advertisements are played in multiple languages. How much time SBS gives its viewers to submit written comments could not be determined.

3.20 Written submissions on an issues paper

Five schemes have published an issues (or discussion) paper before rules are drafted and have provided consumers and/or members of the public with an opportunity to submit written comments in response to the paper. AANA released an issues paper when it 'reviewed' its Code of Ethics and its Wagering Advertising and Marketing Communications Code in 2015,⁶⁵ as ADMA also appears to have done when revising its Code of Practice.⁶⁶ auDA's Advisory Panels routinely published issues papers between 2006 and 2017, and since 23 November 2018 there is an explicit requirement that advisory committees must consult with stakeholders when identifying feasible options for achieving underlying policy objectives (auDA August 2018, para 25). Comms Alliance has occasionally published issues papers related to the development of consumer codes on which consumers and members of the public may comment. For example, Comms Alliance published an issues paper in 2010 (Comms Alliance 2010) when it reviewed the first version of the *Telecommunications Consumer Protections Code* (C628:2007). When MEAA reviewed its Code of Ethics in 1993, it released an issues paper.

Opportunities for the public and consumers to make written submissions on issues papers have been advertised using multiple methods. auDA and Comms Alliance have advertised them on their websites. AANA has used email and phone campaigns. auDA, AANA and Comms Alliance have permitted consumers and members of the public to submit their comments by mail and email, although auDA's preferred method of submission has been via email. Comms Alliance also permitted faxed submissions. We could not determine the precise length of time auDA, ADMA, Comms Alliance, and MEAA give consumers and members of the public to submit written comments. When AANA developed its Wagering Advertising and Marketing Communications Code in 2015, six weeks were allowed.

⁶⁴ See TA ss 136A-136E; ACMA (December 2014).

⁶⁵ See the AANA summary in Lee & Wilding (2019) for the distinction it draws between 'reviewing' and 'evaluating' its Code of Practice.

⁶⁶ See, eg, Harrison Polites, 'ADMA Set to Update Marketing Code of Practice' *The Australian Business Review* (online), 9 July 2013 <<https://www.theaustralian.com.au/business/business-spectator-adma-set-to-update-marketing-code-of-practice/news-story/2f61b3aaff0fac6578381193e62d810d>>.

3.21 Written submissions on draft rules

Providing an opportunity to make written submissions on draft rules was overwhelmingly the most common method used to engage with the public. Ten of the 19 bodies and schemes for which we prepared summaries – auDA, ANRA, ASTRA, Comms Alliance, CBAA, CRA, Free TV, MEAA, SBS and Standards Australia – have provided consumers and members of the public an opportunity to submit written comments on their draft rules.⁶⁷ Under Part 9 of the BSA, before a code of practice developed by ‘a group representing a particular section of the broadcasting industry [such as CBAA, CRA and Free TV]’ can be registered, ACMA must be ‘satisfied that members of the public have been given an adequate opportunity to comment on’ it.⁶⁸ Similarly, under Part 6 of the TA, ACMA must be satisfied that a ‘body or association representing a particular section of the telecommunications industry [such as Comms Alliance]’ has published a draft code on its website and invited members of the public to make submissions within a specified period before it can register any code under the Act.⁶⁹ Neither Act refers to written submissions, but as a matter of practice, ACMA has, in part, been satisfied that an adequate opportunity has been provided if industry bodies seeking to register codes allow the public to make written submissions on their draft codes. auDA, MEAA, SBS and Standards Australia voluntarily invite the public to make written submissions on their draft rules. Comms Alliance voluntarily invites the public to make written submissions when adopting Guidelines and Specifications. It is a condition of its authorisation as an SDO that Comms Alliance invites written comments on its draft Standards from the public (Standards Australia 9 January 2018, para 21.2).

3.21.1 Procedural aspects of written submissions on draft rules

Means of publicising opportunity to make submissions

Using an array of different means,⁷⁰ eight of the 10 schemes have publicised the opportunity to make written submissions and, in many instances, they have used multiple publicity mechanisms concurrently. auDA, ASTRA, CBAA, CRA, Comms Alliance, Free TV, SBS and Standards Australia have advertised the opportunity to submit written comments on their websites. With the exception of auDA, these same schemes have also used social media to advertise opportunities. ASTRA has used the websites of its member organisations to advertise opportunities for the public to make written submissions. auDA and Comms Alliance have directly notified relevant individuals and organisations via email. For example, between 2000 and 2006 auDA’s Advisory Panel Procedures required statements accompanying draft reports to be emailed to the individuals and organisations included in auDA’s membership, domain name system and other relevant lists (Lee & Wilding 2019, p.12).

Comms Alliance keeps a list of anyone who has made enquiries about its standards and/or any individual who has served on relevant working committees (Lee & Wilding 2019, p.45). It then

⁶⁷ When Comms Alliance develops Guidelines and Specifications, it has the option of providing an opportunity to submit written comments, but such an opportunity is typically given when Guidelines and Specifications relate to or are incorporated into a Code or Standard. See Lee & Wilding (2019, pp. 41).

⁶⁸ BSA s 123(4)(b)(iii).

⁶⁹ TA s 117(1)(f)(1).

⁷⁰ The means used by ANRA and MEAA to advertise opportunities to submit written comments could not be determined.

notifies these people of opportunities to comment on draft standards. ASTRA, CBAA, CRA and Free TV have issued press releases about their draft Part 9 codes. ASTRA has published consultation notices in its subscriber magazine. Similarly, Comms Alliance has invited submissions on its draft codes, standards and other rules in its newsletter *We Communicate*, which is emailed to subscribers. Anyone may subscribe for free.

ASTRA, CBAA, CRA, Comms Alliance, Free TV and SBS have placed notices in national newspapers, such as *The Australian* and *The Sydney Morning Herald*. (See examples below of advertisements placed by Comms Alliance and Free TV.)

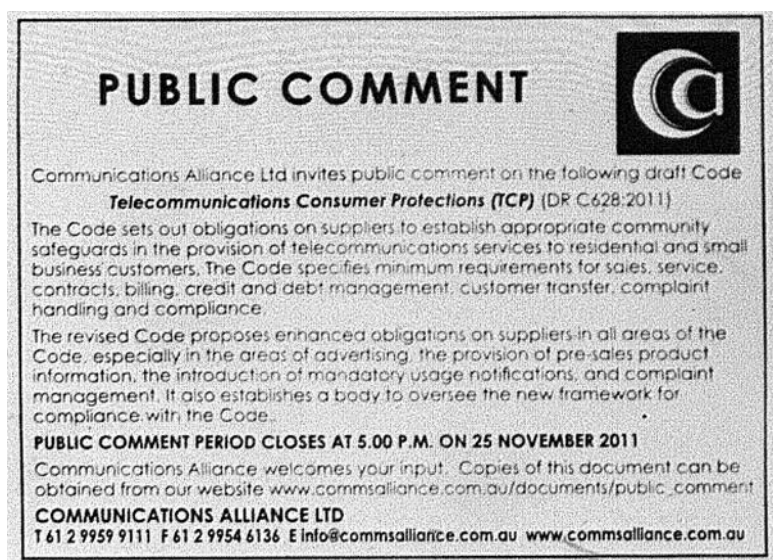


Figure 2: Advertisement published in *The Australian*, 25 October 2011, page 34.

Free TV (when it was known as FACTS) made community service announcements on television; CBAA has made them on radio.⁷¹ SBS has made announcements on radio and television. Free TV has mailed hard copies of draft rules to individuals and organisations on relevant mailing lists. Moreover, ASTRA,⁷² Comms Alliance and SBS have directly approached and asked specific consumer and public interest organisations to submit written comments. For example, the project manager of the Comms Alliance working committee responsible for developing *AS/CA S-042.1:2018 Requirements for Connection to an Air Interface of a Telecommunications Network – Part 1: General* sought input from ACMA's ECSAC. When developing its code of practice, SBS solicits comments from bodies such as the Federation of Ethnic Communities Council of Australia, the ethnic community council of each state and territory, peak organisations representing Aboriginal and Torres Strait Islander groups and the SBS Community Advisory Committee (Lee & Wilding 2019, p.63).

⁷¹ Email from CBAA representative to Derek Wilding and Karen Lee, 30 May 2019.

⁷² ASTRA, Submission to Senate Standing Committee's Inquiry *The Effectiveness of the Broadcasting Codes of Practice* (2 May 2008) 2.

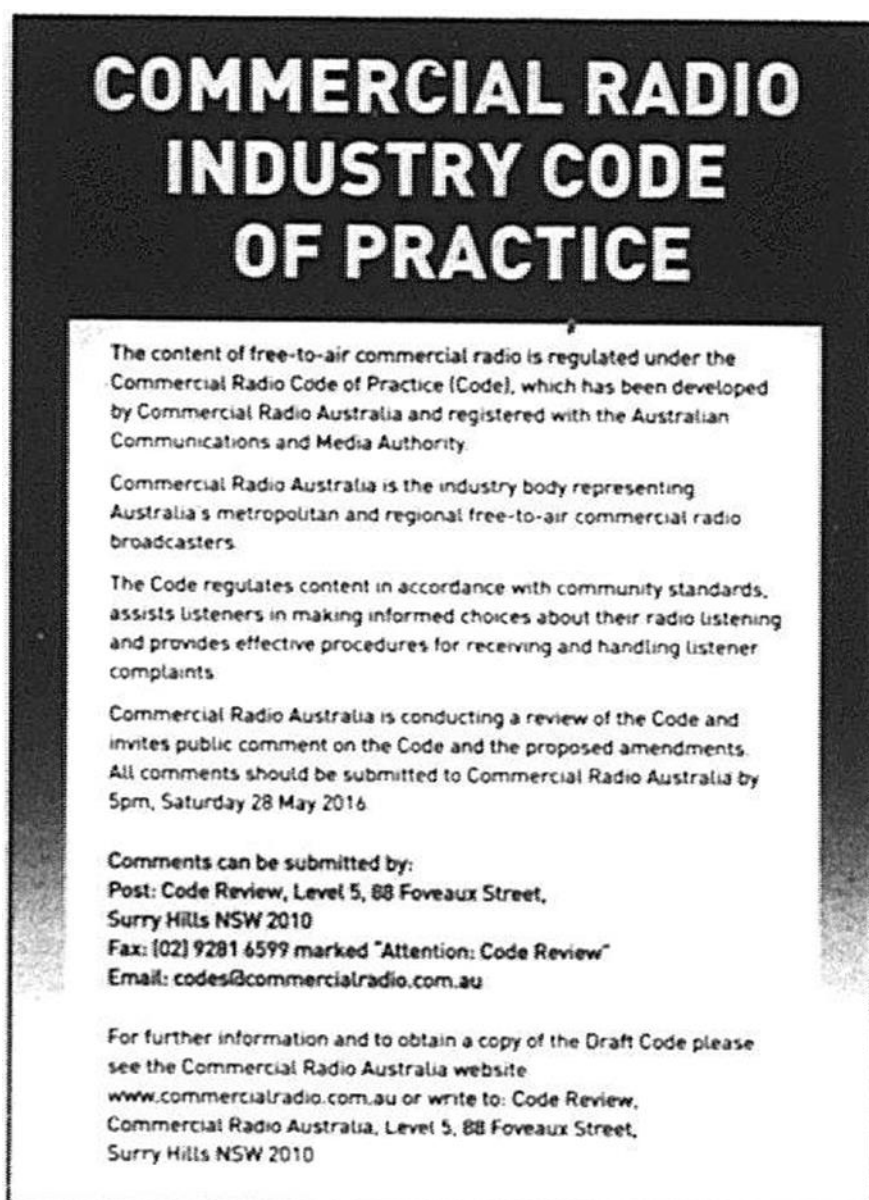


Figure 3: Advertisement published in *The Weekend Australian*, 16-17 April 2016, page 46.

Table 4 lists the various mechanisms that the eight schemes have used to publicise opportunities to submit written comments and the bodies and schemes which have employed them.

It should also be noted that ACMA has supported the publicity efforts of Comms Alliance, CRA, Free TV and other schemes which require ACMA's approval before the codes they draft can be registered under applicable legislation. ACMA has issued press releases about, and advertised, opportunities to make written submissions to the relevant schemes concerned on its website and social media channels.

Table 4: Means of publicising opportunity to make written submissions

Publicity Mechanisms	auDA	ASTRA	Comms Alliance	CBA	CRA	Free TV	Standards Australia	SBS
Direct approach		YES	YES					YES

Publicity Mechanisms	auDA	ASTRA	Comms Alliance	CBA	CRA	Free TV	Standards Australia	SBS
to consumer and/or public organisation								
Email	YES		YES					
Mailing draft rules						YES		
Newsletter			YES					
Newspaper		YES	YES	YES	YES	YES		YES
Media release		YES		YES	YES	YES		
Radio				YES		YES		YES
Social media		YES	YES	YES	YES	YES		
Subscriber magazine		YES						
Television	YES					YES		YES
Website	YES	YES	YES	YES	YES	YES	YES	YES
Websites of member organisations		YES						

Languages in which opportunity is advertised

With the exception of SBS, all schemes have advertised the opportunity to make written submissions on draft rules only in English. SBS has advertised in English as well as multiple languages. For example, when SBS conducted the review that led to the development and notification of a new code to ACMA in October 2006, advertisements in 68 languages were broadcast on radio.⁷³

Means of submission

Information about the way in which individuals are permitted to submit written comments could be found for five of the 10 schemes: auDA, Comms Alliance, CRA, Free TV and Standards Australia. auDA, Comms Alliance, CRA and Free TV have accepted written submissions by post. auDA, Comms Alliance, CRA, Free TV and Standards Australia have accepted written submissions by email. Comms Alliance has also accepted written submissions by fax. While auDA has accepted written submissions by post and email, it expressed a preference for electronic submissions between 2000 and 2016. Any comments made to Standards Australia must be submitted electronically and persons making submissions must register for a 'Standards Hub public account' before they can submit their

⁷³ Bruce Meagher, Director, Strategy and Communications, SBS, Submission to Senate Standing Committee on Environment, Communications and the Arts, *Inquiry into the Effectiveness of the Broadcasting Codes of Practice*, 1 May 2008, 2.

comments. Standards Australia states that registration is needed so submitters ‘may return at a later stage to submit more comments or review their original entries before officially submitting them’ and Standards Australia may contact them if it needs to clarify any comments.⁷⁴

Duration of consultation

We could locate information about the amount of time given to submit written comments for only six of the 10 schemes - auDA, ASTRA, Comms Alliance, CRA, Free TV and Standards Australia.⁷⁵

The amount of time given by each of these six schemes has varied, depending on the draft rule in question. ASTRA, CRA and Free TV have typically given consumers and members of the public six weeks to make written submissions on draft codes that incorporate substantial changes. However, in 2017, each provided four weeks to comment on the draft codes implementing new gambling advertising rules because the proposed amendments were more limited.

auDA’s Advisory Panel Procedures, in effect between 2000 and 2006, stipulated minimums of 21 days for public consultation on draft reports and 14 days for public consultation on revised draft reports. However, the minutes for certain Advisory Panels we reviewed suggest 28 days was given for some draft reports.⁷⁶ We could not determine with precision the number of days auDA gave for public consultation on draft and revised draft reports published between 2007 and 2016, although the minutes of the 2 April 2015 and 6 August 2015 meetings of the 2015 Names Policy Panel state 6 weeks was given for each of its issues and draft recommendations papers.⁷⁷ The minutes of the 5 June 2008 meeting of the 2008 Industry Competition Advisory Panel suggest four to five weeks was permitted.⁷⁸ auDA’s *Process for the Development and Review of auDA Published Policies*, adopted in 2018, mandates that a minimum of 20 business days must be given when advisory committees, which no longer propose rules implementing policy to the auDA Board, develop ‘new policy proposals’ or carry out ‘a major review of an existing policy to ensure [it] is effective and efficient in achieving policy objectives’ (auDA August 2018, paras 21, 38). A minimum of 21 days must be given if auDA management amends a policy for technical, administrative or legal reasons. A minimum of 28 days must be given if auDA management proposes policies or amendments to policies that result from recommendations of advisory committees.

Comms Alliance provides all interested parties with a minimum of 30 days in which to make a submission on draft Part 6 codes of practice (as is required by the TA)⁷⁹ and with 60 days on draft

⁷⁴ Standards Australia, *Register for a Standards Hub Public Account* <<https://hub.standards.org.au/hub/public/registration.jsp>>.

⁷⁵ In 1991, SBS allowed consumers and members of the public to make written submissions for four weeks, with advertisements on television for two weeks and on radio for one month. See Evidence to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Public Seminar on the Operations of Codes of Practice in the Television Industry*, Parliament of Australia, Canberra, 18 May 1995, 70-1 (Sawson Madina, Head of Television, SBS) 70-1.

⁷⁶ See, eg, Competition Model Advisory Panel (2000-2001), Minutes, 31 January 2001, item 3; Name Policy Advisory Panel (2000-2001), Minutes, 30 January 2001.

⁷⁷ 2015 Names Policy Panel, Minutes, 2 April 2015, item 4; 2015 Names Policy Panel, Minutes, 6 August 2015, item 3.

⁷⁸ Industry Competition Advisory Panel (2008), Minutes, 5 June 2008, item 1.

⁷⁹ TA ss 117(1)(f)(i), 117(3).

Standards (June 2007, s 6.4). Standards Australia usually gives interested parties no less than nine weeks to submit comments (6 October 2016, s 7.4).

Multiple opportunities to make written submissions

Most schemes provide only one opportunity to make written submissions on draft rules, but some schemes have occasionally provided two opportunities. For example, in the 1990s FACTS gave two opportunities for viewers and members of the public to make written submissions when it made significant changes to its Part 9 code as a result of the written submissions received during the first round of public consultation.⁸⁰ Comms Alliance's *Operating Manual* permits the initiation of a second Public Comment Process if an amendment to a Standard or Code at the first Public Comment Phase has 'significant impact' (June 2007, s 6.5(b)). auDA, on the other hand, mandates further public consultation where significant changes are made by auDA management to draft policies in light of submissions made by stakeholders unless the policy changes are needed to comply with legislative requirements or are technical in nature (August 2018, paras 46 & 47). When consulting for the second time, auDA must publish a redline version of the changes to the draft policy and a statement explaining why the changes were made. Since 23 November 2018, auDA's advisory committees must consult with stakeholders (1) when identifying feasible options for achieving its policy objectives; and (2) prior to recommending any option of the board (August 2018, para 40). Moreover, stakeholders must be given an opportunity to comment on an advisory committee's draft final report.

Publication of written submissions

Unless individuals or organisations submitting written comments have requested non-disclosure for reasons of confidentiality, auDA,⁸¹ ASTRA, CRA and Free TV have published the comments of submitters on their websites. Since 2014, subject to requests for confidentiality, Comms Alliance will publish written comments if they relate to draft Part 6 codes and related guidelines.⁸² Standards Australia does not publish the comments of submitters on its website. We could not locate any information about the publishing practices of ANRA, CBAA, MEAA and SBS.

Requirements when accepting or rejecting public comments

Comms Alliance (when developing Codes and Standards and, if it elects to undertake public consultation, when developing Guidelines and Specifications) and auDA have imposed certain requirements if their policy and rule-makers accept and/or reject written comments. auDA's *Process for the Development and Review of auDA Published Policies*, adopted on 23 November 2018, stipulates that advisory committees 'must represent stakeholders' views in their draft reports [which must be published] and the rationale for accepting some stakeholder input' (para 39). If policy development is managed by auDA, it must inform the board about the 'subject matter of submissions and the rationale for accepting or rejecting stakeholder comments' (para 49). Comms

⁸⁰ Evidence to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, Parliament of Australia, Sydney, 18 May 1995, 56 (Anthony Branigan, General Manager, FACTS).

⁸¹ auDA's 2017 Policy Review Panel did not consider anonymous submissions or publish them on the auDA website.

⁸² Publication of comments on draft Part 6 codes is required as a result of the *Telecommunications Legislation Amendment (Consumer Protection) Act 2014* (Cth).

Alliance's *Operating Manual* states, 'Reasons for not incorporating certain comments in amended draft document shall be recorded in meeting minutes, and advised to the author of the comment in writing' (s 6.5(a)). Standards Australia has not imposed such a requirement. We could not determine if ANRA, ASTRA, CBAA, CRA, Free TV, MEAA and SBS have implemented similar requirements.

Acknowledgement of written submissions

None of the 10 schemes requires its rule-makers to acknowledge and/or provide comments in response to submissions made by individuals and other organisations. Nevertheless, as a general rule, when Part 6 codes of practice are developed, Comms Alliance has provided a response to all consumer organisations and other private individuals who submit comments. All individuals and organisations which submit written comments in response to draft standards receive an acknowledgement of their written comments and a brief explanation of whether their comments were accepted or rejected and for what reasons. (Lee & Wilding 2019, p.45).

3.22 Other feedback

auDA's current rule-making process requires its advisory committees to provide a 'mechanism' for stakeholders to engage with them in addition to auDA's standard public consultation process. However, the mechanism (or mechanisms) used are not specified in its *Process for the Development and Review of auDA Published Policies*. auDA's standard public consultation process consists of opportunities to submit written comments on feasible options for achieving policy objectives identified by advisory committees and draft recommendations made to auDA's board.

4. Classification of Public Engagement Mechanisms

4.1 Introduction

In this chapter, we explain our approach to classifying public engagement mechanisms and present a matrix on which we plot the specific mechanisms identified in Chapter 3.

Our own proposal is set out in section 4.2 below, with a brief explanation of the terms we use and the background for our work. Further detail on existing approaches is set out in section 4.3. In section 4.4 we explain how we have adapted these approaches in designing our matrix, expanding on the guide presented at the start of the chapter.

We note at the outset that the aim of this chapter is not to provide an assessment of the effectiveness of each mechanism, as this would require a detailed consideration of specific regulatory initiatives and outcomes, relative to the form of engagement used.⁸³ Instead, our aim is to develop a tool for understanding the scope and potential application of the mechanisms identified in Chapter 3.

4.2 Matrix and approach for classifying Australian engagement mechanisms

As we explain in section 4.3 below, there is a sizeable body of academic literature on classification of engagement mechanisms. However, much of it is either dated or based on environments in other countries, as well as being characterised by different sets of participants and regulatory frameworks. As a result, we consider that none of the typologies developed by other researchers is ideally suited for current self and co-regulatory rule-making in the Australian communications environment.

In their place, we have designed a matrix based, firstly, on the *form* of engagement practices based on the flow of information or extent of dialogue between a scheme and consumers or members of the public; and secondly, on the *functions* of these engagement practices (or the rule-making activities relevant to stages in the rule-making process). In doing so, we have mainly drawn on, but departed from, the work of Rowe and Frewer (2005), Black (2006), and Wintgens (2005 & 2012). Further detail on the work of these scholars is provided below, but a brief note on each will be helpful at this stage.

Rowe and Frewer's concept of information flow has featured heavily in academic analysis of engagement practices. They observed that in traditional 'public communication' activities, information flows from the 'sponsor' (in our case, the scheme) to the public, whereas in 'public consultation' activities it flows in reverse; and in more comprehensive 'public participation'

⁸³ For detailed case studies of consumer participation on industry working committees in the Australian telecommunications sector, see Lee (2018).

	Forms of consumer/public engagement				
Rule-making function		Data collection	Public communication	Consumer/public input	Consumer/public participation
	Fact-finding	<ul style="list-style-type: none"> • Audience feedback • Sentiment index • Complaints data • Review of research by regulator • Review of previous submissions 	<ul style="list-style-type: none"> • None identified 	<ul style="list-style-type: none"> • Meeting with scheme's staff • Focus group • Survey • Advisory committee • Advisory council 	<ul style="list-style-type: none"> • None identified
	Identifying and describing issues	<ul style="list-style-type: none"> • None specifically used 	<ul style="list-style-type: none"> • Information dissemination (media, reports & other communication) • General call for proposal stage input • Publication of issues Paper 	<ul style="list-style-type: none"> • Written submission at proposal stage • Written submission in response to issues paper • Advisory committee • Advisory council 	<ul style="list-style-type: none"> • None identified
	Formulating regulatory approaches and rules	<ul style="list-style-type: none"> • None specifically used 	<ul style="list-style-type: none"> • Information dissemination (media, reports & other communication) • Publication of draft rules 	<ul style="list-style-type: none"> • Public fora • Round tables • Focus groups • Meeting with person conducting review • Written submission on draft rules • Phone submission • Meeting with scheme's staff to discuss proposed rules 	<ul style="list-style-type: none"> • Working committee • Consumer organisation consults with its members (views fed into committee)
	Monitoring and assessing operation	<ul style="list-style-type: none"> • Audience feedback • Sentiment index • Complaints data • Review of research by regulator • Review of previous submissions 	<ul style="list-style-type: none"> • Information dissemination (media, reports & other communication) 	<ul style="list-style-type: none"> • Advisory committee • Advisory council • Focus group • Round table • Meeting with person conducting review • Survey 	<ul style="list-style-type: none"> • None identified

Figure 4: Matrix for Mechanisms of Consumer and Public Engagement

Note: This table is based on the list of mechanisms in Chapter 3.

environments, information flows both ways (2005, p.255). From Black, we take the mapping of three types of public engagement that are similar to those of Rowe and Frewer (in Black's case, information/education, consultation, active participation) against stages in the policy development process (2006, pp. 15-18, 21). From Wintgens, we get the concept of 'duties' of legislators (to find relevant facts; to identify and formulate problems/issues; to weigh and balance alternatives; to take future circumstances or 'negative unintended effects' into account; to take into account actual effects of rule-making; and to correct if problems arise) (2005 & 2012). These we combine with the stages identified by Black in order to see the range of activities that might be pursued by the industry schemes we will later examine through the lens of responsive regulation.

The matrix is presented in Figure 4 above.

An explanation of the two categories used in the matrix – *form of engagement* and *function of the body or scheme* is set out below. The forms of engagement practice appear as the columns in the matrix, whereas the functions of the scheme appear in the columns.

4.2.1 Form of engagement

- (i) **Data collection.** This involves the acquisition and collation of pre-existing data about the industry practice related to the topic of a rule or a potential rule of a scheme, or about some aspect of the operation of the rule of a scheme. This category allows us to take into account the use made of information sources such as the complaints data compiled by the TIO.
- (ii) **Public communication.** This describes the situation where an industry body provides information about a rule-making initiative to consumers or members of the public. We include here materials such as ad hoc reports, annual reports and other information that is not issued within a code review period, but which is connected with its ongoing operation, as well as information issued within a code review period.
- (iii) **Public/consumer input.** This describes an opportunity for consumers/members of the public to supply information or an opinion to an industry scheme at the invitation of or following a request from it. The most commonly used mechanism of this kind (written submissions) may be used at different stages of the rule-making process, and in relation to more than one of the functions of the scheme (explained below).
- (iv) **Public participation.** This describes the simultaneous exchange of information, ideas and proposals as well as debate and negotiation between consumers/members of the public and an industry scheme. It is the most expansive form of engagement.

4.2.2 Functions of industry scheme

- (i) **Fact-finding.** This requires an industry scheme to identify, understand and describe industry and consumer practices and the environment in which they take place.
- (ii) **Identifying and describing issues.** In fulfilling this function, the industry scheme will identify, understand and evaluate the aspects of industry practices relevant to self- and co-regulatory rule-making initiatives.

- (iii) **Formulating regulatory approaches and rules.** As decisions will often need to be made on the type of regulation most appropriate for an issue (for example, the use of a binding code rule or an advisory guideline), this function involves the scheme considering various regulatory approaches as well as specific rules, including options and alternatives.
- (iv) **Monitoring and assessing operation.** Here, the scheme – having implemented the new rules – monitors their operation and notes any issues arising, including their suitability in practice for addressing the issues identified at the earlier stage in the rule-making process.

Taking all these factors in account, our matrix in Figure 4 above plots each of the 22 mechanisms used by the various schemes.

We now provide a more detailed explanation of how we arrived at this approach by examining existing approaches to classification of engagement mechanisms.

4.3 Existing classification schemes

A number of attempts have been made in various disciplines to categorise and classify the ways in which consumer and public participation is conducted.⁸⁴ These classification frameworks (or typologies) vary depending on whether the participation process is conducted by governments, regulators or private bodies, and depending on whether those conducting it seek to involve members of the public in general or some more targeted subset (eg, people from a specific geographical area; consumers of certain goods or services; participants in a government program). All attempts to classify mechanisms for consumer engagement use some kind of a scale, spectrum or matrix that depicts the degree of consumer involvement, often ranging from minimal to comprehensive.

Many scholars have pointed to two trends or schools of thought in classifying participation mechanisms: those concerned with consumer empowerment and social change (often referred to as ‘normative’ approaches), and those taking a more ‘functional’ approach which has been described as ‘what works best when’. These two schools of thought are discussed in sections 4.3.1 and 4.3.2 below. In section 4.3.3, we begin to consider how they might be adapted. For reasons that we explain in section 4.4, these existing approaches to classification are not fully suitable for application to the self- and co-regulatory environments of the communications industry in Australia. However, we have used aspects of some of these schemes in designing our own matrix.

4.3.1 Consumer empowerment and social change

The first school of thought on classification attributes a value explicitly to consultation mechanisms. Classification schemes influenced by this approach involve an element of *normative* design. They are often based on a commitment to social change so that more comprehensive consumer participation is seen as more likely to lead to social change. In the early and often-cited ‘ladder of participation’ developed by Sherry Arnstein in 1969 (Arnstein 1969), this normative design was so overt that the

⁸⁴ Some examples are: from health, Tritter & McCallum (2006); from community development, Cornwall (2008); from town planning, Quick & Feldman (2011); from agriculture and forestry, Tuler & Webler (2010); from public sector management, Thomas (1993).

upper end of the ladder was said to represent opportunities for the redistribution of power within society.

As Arnstein's ladder is often cited and helps to explain one prominent approach to classification, it is worth reproducing here:

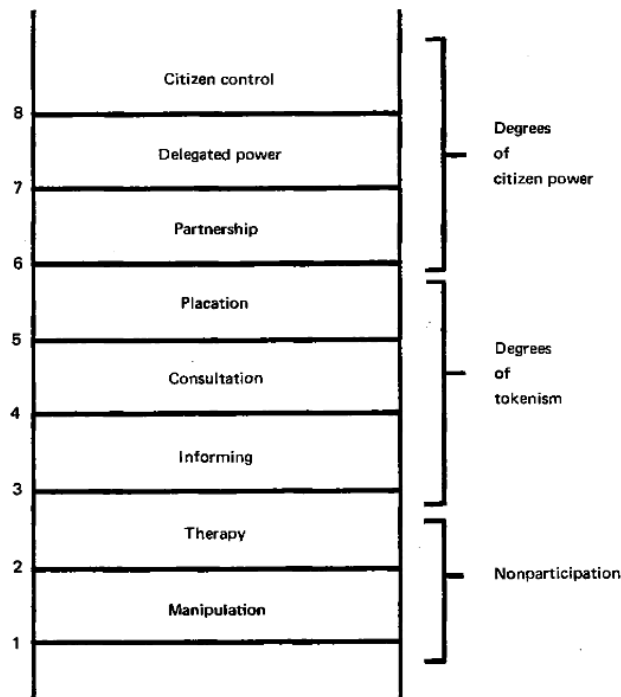


FIGURE 2 *Eight Rungs on a Ladder of Citizen Participation*

Figure 5: Arnstein's ladder (1969, 217)

In later decades, White (1996, p. 8) described 'transformative participation' in terms of empowerment while the 'typology of participation' developed by Pretty (1995, p. 1252) used terms ranging from 'manipulative participation' to 'self-mobilization'. Even as recently as 2013, Blacksher (p. 1) described the ultimate aim of participation in health as being 'a redistribution of resources and power that will advance health equity and social justice.'

In describing these schemes, Cornwall (2008, p. 270) says they 'carry with them implicit normative assumptions which place these forms of participation along an axis of "good" to "bad"'.⁸⁵

Despite the differences in approaches and disciplines, most of the studies mentioned above locate an apex of participation in which participants contribute in some meaningful way to decision-making, and perhaps also to implementation of a policy or program. However, a peak or an apex does not of itself characterise a 'normative approach' and indeed, most classification schemes

⁸⁵ Other studies demonstrating this approach include Tuler & Webler (2010) and Quick & Feldman (2011).

include some kind of judgement on the value (or at least suitability) of participation mechanisms for certain kinds of rule-making. We turn, then, to the second school of thought.

4.3.2 'What works best when'

'Functional' approaches to classification differ from the normative approaches in that they are not designed around some inherent commitment to changing power relations, and are more focused on delivery of policy or regulatory objectives. While it would be wrong to say they embed performance indicators as such, they are often seen as a way of gauging 'effective' participation. Under functional approaches, effectiveness is assessed by the extent to which the mechanisms of public engagement serve the specific needs of rule-making rather than the extent to which they affect broader social relations.

Rowe and Frewer, for example, approach classification by identifying a number of structural variables such as whether the selection of participants and the form of their contribution are controlled or uncontrolled. As noted at the start of this chapter, their description of types of public engagement is based on the concept of information flow, so that in communication activities, information flows from the 'sponsor' to the public, whereas in consultation activities it flows in reverse, and in more comprehensive participation environments information flows both ways (2005, p. 255).⁸⁶ They plot various examples of types of communication, consultation and participation activities on a table. These have certain features in common: consultation type 1, for example, includes opinion polls and surveys and exhibits controlled selection of participants and a closed response mode. These mechanisms are described as 'highly controlled ways of obtaining answers to specific questions from large samples' (2005, p. 279).

Rowe and Frewer note that their table is not intended to be a definitive typology as other mechanisms may well exist and develop (2005, p. 285). They do, however, see it having value in measuring effectiveness, and as a first step in developing a theory of 'what works best when'. In terms of measuring effectiveness, they say:

...the *effectiveness* of an exercise may be ascertained according to the efficiency with which full and relevant information is elicited from all appropriate sources, transferred to (and processed by) all appropriate recipients, and combined (when this is required) (p. 285).

A number of other schemes or models have been proposed and although we cannot deal with them fully here, below we present some aspects of three other proposals which illustrate the variation in functional approaches.

- Dean presents a typology based on quadrants (see Figure 6 below), designating four 'modes' of public participation in policy decisions arranged along two axes: the 'sociality' axis, ranging from the position where members are engaged in collective goals to the position of individuals competing and protecting their own interests; and the 'negotiability' axis, ranging from the highly negotiated position where participation is negotiated by participants themselves to 'prescribed' spaces where the terms of participation are imposed upon

⁸⁶In a more recent study, Toscano advocates for greater recognition of the potential for participation via social media, but also notes this does not mean simply using it in the more traditional sense of communicating information (2017, p. 73).

participants (2017, pp. 216-17). However, the distinction Dean draws between collective and individual goals does not appear to have direct application to the communications sector in Australia, because its rule-making environment is characterised by representative groups or coalitions of consumer groups, often working together. Nevertheless, the concept of negotiability and the extent to which the terms of participation are prescribed are useful.

Figure 1: Four modes of public participation in policy decisions

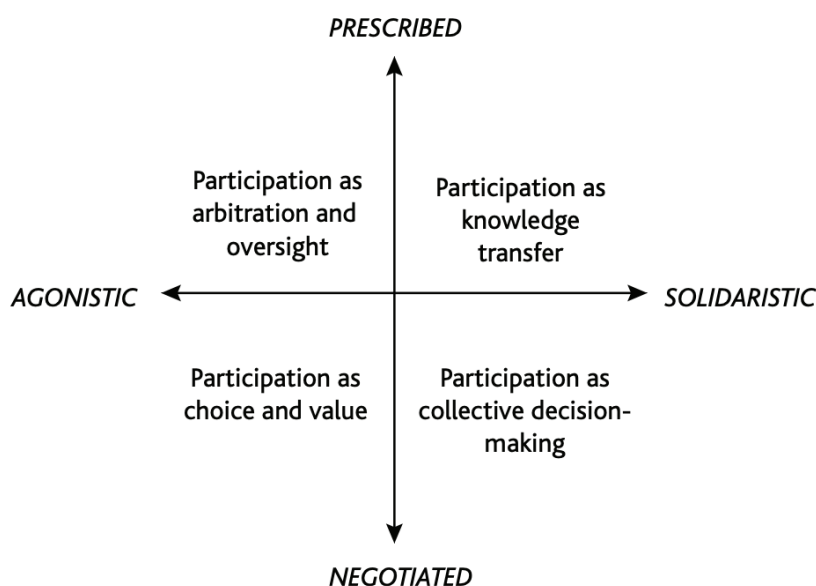


Figure 6: Dean, Four Models of Public Participation in Policy Decisions (2017, 216)

- Fung tries to insert multiple fields into a diagrammatic representation by developing a 'democracy cube' (see Figure 7 below) which incorporates three dimensions ('authority and power', 'communication and decision mode' and 'participants') and allows for specific participatory initiatives to be plotted within the cube. He says that 'participation serves three particularly important democratic values: legitimacy, justice and the effectiveness of public action', and that 'no single participatory design is suited to serving all three values simultaneously; particular designs are suited to specific objects' (2006, p. 74). While Fung's cube also appears to go beyond what we need for our analysis, his reference to democratic values is useful. In section 5.3 below, we draw on the values underpinning the concept of regulatory responsiveness to make our own observations on how a range of mechanisms can be deployed in different contexts.

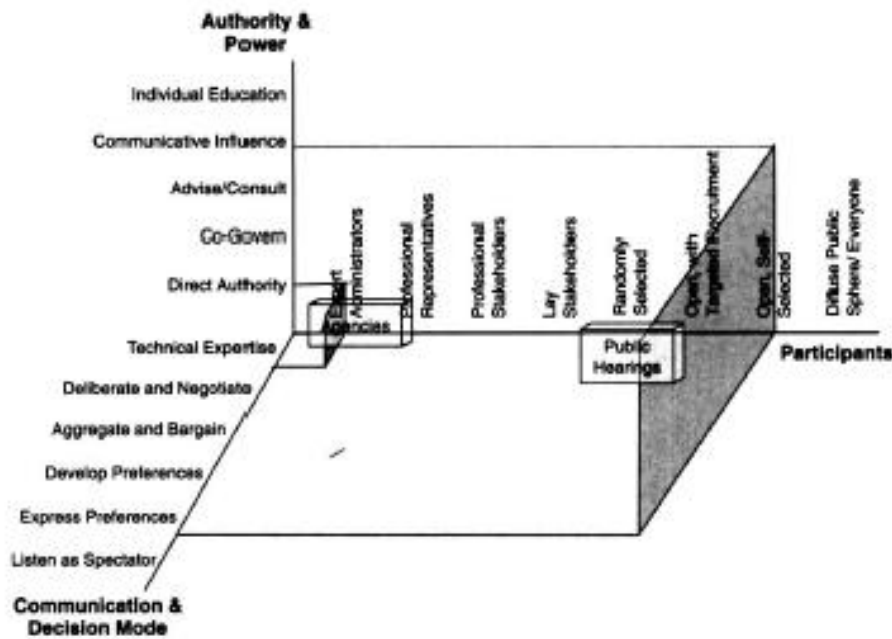


Figure 7: Fung, Democracy Cube (2006, 71)

- Thomas provides a 'matrix guide to public involvement' (see Figure 8 below) by suggesting participation mechanisms (eg, citizen surveys, negotiation with citizens' advisory committee) relative to both the style of decision-making (eg, 'modified autonomous managerial' or 'public decision') and the 'nature of the public' (eg, 'one organised group', 'unorganized public'). Thomas says: 'only certain mechanisms are likely to be appropriate in any given situation, depending on the recommended decision-making approach and the nature of the relevant public' (1993, pp. 457-58). As with Fung, this recognition of flexibility is valuable, particularly as we are examining different sections of the media and communications industry, with different traditions of self- and co-regulatory practices.

TABLE 4
A Matrix Guide to Public Involvement

<i>Style of Decision Making</i>	<i>Nature of the Public</i>			
	<i>One Organized Group</i>	<i>Multiple Organized Groups</i>	<i>Unorganized Public</i>	<i>Complex Public^a</i>
Modified auto- nomous managerial	key contacts	key contacts	citizen survey	key contacts/ survey
Segmented public consultation	key contacts	contacts/series of meetings	citizen survey	citizen survey/ meetings
Unitary public consultation	meeting(s) with group	CAC ^b or series of meetings	series of public meetings	CAC and/or meetings
Public decision	negotiate with group	negotiate with CAC	series of public meetings	CAC/public meetings

a. Complex public = some combination of organized and unorganized groups.

b. CAC = citizens advisory committee.

Figure 8: Thomas, A Matrix Guide to Public Involvement (1993, 458)

The extent to which Thomas's approach to participation differs from the earlier work of Arnstein and other normative theorists is characterised as follows by Bishop and Davis: '[p]articipation is not an absolute virtue, only an appropriate response in particular circumstances' (2002, p. 19). They argue for a schema that is based on function and description, not the normative approach of a continuum (2002, p. 21). As shown in Figure 9 below, their proposal for a 'map of participation types' identifies five such types (consultation, partnership, standing, consumer choice, control) against which are positioned 'objectives', 'key instruments' and 'limitations' (2002, p. 27). In this article, they give co-regulation as an example of a partnership approach to participation. The objective of the partnership approach is 'involving citizens and interest groups in aspects of government decision making'. Key instruments are advisory boards, citizens' advisory committees, policy community fora and public inquiries. Limitations of this type of participation are: 'issue of who can seek [sic] for a community', 'bias toward established interest groups' and 'legitimacy issues with those excluded from the process'.

Participation Type	Objective	Key Instruments	Limitations
Consultation	<ul style="list-style-type: none"> to gauge community reaction to a proposal and invite feedback consultation is only participation when information gathered can influence subsequent policy choices 	<ul style="list-style-type: none"> key contacts surveys interest group meetings public meetings discussion papers public hearings 	<ul style="list-style-type: none"> delay between consultation and any outcomes communities feel betrayed if they do not like the decision expensive and time consuming for complex decisions
Partnership	<ul style="list-style-type: none"> involving citizens and interest groups in aspects of government decision making 	<ul style="list-style-type: none"> advisory boards citizens advisory committees policy community forum public inquiries 	<ul style="list-style-type: none"> issue of who can seek for a community bias toward established interest groups legitimacy issues with those excluded from the process
Standing	<ul style="list-style-type: none"> allowing third parties to become involved in the review process 	<ul style="list-style-type: none"> review courts and tribunals open and third party standing statutory processes for social and environmental impact assessment 	<ul style="list-style-type: none"> only relevant for those issues which come to court expensive and time consuming bias toward well funded interests legal approach may be inappropriate for some issues
Consumer Choice	<ul style="list-style-type: none"> allowing customer preferences to shape a service through choices of products and providers 	<ul style="list-style-type: none"> surveys, focus groups purchaser/provider splits competition between suppliers vouchers case management 	<ul style="list-style-type: none"> relevant only for service delivery issues
Control	<ul style="list-style-type: none"> to hand control of an issue to the electorate 	<ul style="list-style-type: none"> referendum 'community parliaments' electronic voting 	<ul style="list-style-type: none"> costly, time consuming and often divisive are issue votes the best way to encourage deliberation?

Figure 9: Bishop and David, Map of Participation Types (2002, 27)

4.3.3 Adapting the existing approaches

The grouping into normative and functional models is helpful in understanding different approaches, but there are, of course, variations and hybrids. Toscano, for example, rejects the assumption (arising from Arnstein's work) that 'citizen power [is] a necessary goal for good government' (2017, pp. 73, 82). His understanding of a 'social media participation range' is represented by the concentric arcs of a Wi-Fi signal (see Figure 10 below). It positions 'non-adoption' of participation at the base, above which are 'non-participation', 'tokenism' and finally 'legitimacy' (2017, pp. 73, 82). This approach still has normative characteristics noted by Dean (2017, p. 215), but the goal of participation is seen to be effective delivery of programs and services rather than power-sharing involving citizens: 'it assumes that through citizen participation, better government decision making is possible, resulting in more effective and efficient government' (Toscano 2017, p. 82).

Figure 2. Social media participation range

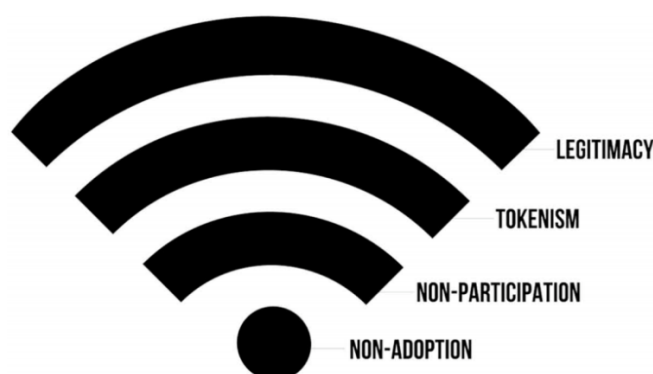


Figure 10: Toscano, Social Media Participation Range (2017, 82)

At the same time, Brackertz and Meredyth see value in both Arnstein’s ‘empowerment’ approach and Thomas’s ‘instrumental’ approach, but argue that conflating the approaches can lead to confusion in relation to expectations and to effectiveness.

... public participation can be understood as a continuum of citizen empowerment or as a tool for involving the public in the right style of decision-making in the right context. The two are not mutually exclusive, but their conflation adds to the conceptual and definitional confusions that complicate the understanding and practice of public participation (2009, p. 158).

This observation by Brackertz and Meredyth is useful for our purposes as we, too, will need to adapt the existing models to suit the environment we are seeking to analyse. Their description of a ‘tool for involving the public in the right style of decision-making in the right context’ suggests it might be possible to design a tool that will have value not just to researchers, but to the participants involved in communications industry rule-making in Australia.

Brackertz and Meredyth have also influenced our thinking in terms of adopting a normative or functional approach because their analysis suggests that even a classification scheme embodying a functional design might also embrace some normative element. We have already indicated that our overall approach to this research is based on a commitment to the aims of responsive regulation (addressed in section 5.3 below) and that, in order to achieve this, it is desirable to maximise consumer and public involvement wherever appropriate. Therefore, even though we are not trying to design a tool for social change – and we acknowledge that mandating expansive forms of engagement on even minor regulatory adjustments will be financially prohibitive and likely to exhaust the enthusiasm of even the most ardent of contributors – we do see a path to enhanced levels of consumer and citizen engagement.

This helps us to characterise our own approach to classification of engagement mechanisms: while for the most part we adopt a functional approach, our tool also has a normative element.

With these observations in mind, we now turn to the design of our matrix.

4.4 Designing a tool for the Australian communications environment

Here we consider *how* the matrix will classify the various engagement mechanisms. If the matrix is effectively a table, with individual mechanisms plotted against both a horizontal (or 'x' axis) and a vertical (or 'y' axis), what should be the categories that run along the vertical and horizontal fields? To answer this question, we turn to the work of the four scholars who have most influenced our thinking.

4.4.1 Models for the Australian matrix

Information flow

Above, we explained how Rowe and Frewer's typology of public engagement mechanisms, based on the 'flow of information', plots specific engagement mechanisms (eg, survey, focus group) against forms of engagement (eg public communication, public participation) (2005, p. 278). It will become evident in the discussion below that we have drawn heavily on this approach developed by Rowe and Frewer. Nevertheless, we should mention that despite its usefulness, there are some notable differences in the American environment described by Rowe and Frewer and that in Australia, meaning that some customisation is required for our own matrix. Examples are as follows:

- collection of data such as statistics produced by the TIO or other information appears to be an important way of gauging consumer and public views, at least as part of the fact-finding functions of many of the schemes;
- public meetings may not be just about the flow of information to the public; they may also involve the gathering of information from the public;
- Round tables with selected stakeholders are not mentioned by Rowe and Frewer, even though they were used by several schemes we examined in this research.

Perhaps most significantly, we have departed from Rowe and Frewer's category of publication communication. The reasons for this are explained in section 4.4.2 below.

Stages in rule-formation

Another way of forming categories against which to plot specific consultation mechanisms is to describe them in relation to the stage in the rule-formation process. Walters, Aydelotte and Miller (2000, p. 354) use five stages in the policy process (from defining the problem through to recommending an alternative), then apply six 'clusters' of policy problem attributes. The way in which their tool may be used is seen in the following comment:

...wide-spread disagreement about the definition of the problem means that decision makers should utilize participation methods that emphasize compromise in order to establish a common concept upon which the subsequent steps can build (p. 354).

Their analysis also leads them to suggest public hearings – which tend to be adversarial – are less suitable than workshops which promote dialogue.

Similarly, Black (2018) identifies four stages in the regulatory process (design/rule formation, implementation, enforcement and evaluation) then identifies four main forms or ‘modes’ for consumer and public involvement: information, education, consultation and active participation (pp. 15-18). She says these modes form a pyramid:

At the bottom are the most common initiatives used by regulators, which are also those which are open, at least in principle, to most of the public, including consumers, and which are the least intense forms of involvement. As one moves up the pyramid the number of initiatives decreases, the number of the public involved decreases and the intensity increases, through education, consultation, to participative modes at the very top (p. 18).⁸⁷

Black plots the stages in the regulatory process and the modes of involvement in a table, shown in Figure 11 below.

Stage in the policy process	Information / education	Consultation	Active Participation
Design / rule formation	<ul style="list-style-type: none"> Publication of policy documents, proposed legislative / rule changes 	<ul style="list-style-type: none"> Invitations to comment Surveys Focus groups / workshops 	<ul style="list-style-type: none"> Citizen's juries Representative panels / advisory groups Consensus conferences
Implementation	<ul style="list-style-type: none"> Information on compliance and non-compliance, eg scams Publication of guidance / waivers 	<ul style="list-style-type: none"> Facilitating notification by the public of complaints, non-compliance 	<ul style="list-style-type: none"> Engaging community and other groups in disseminating information on the rules and monitoring compliance Whistleblowers protection
Enforcement	<ul style="list-style-type: none"> Publication of enforcement activities, including hearings and settlements 	<ul style="list-style-type: none"> Facilitating notification by the public of complaints, non-compliance 	<ul style="list-style-type: none"> Public interest members involved in tribunals / enforcement panels Restorative justice conferences
Evaluation	<ul style="list-style-type: none"> Public notice of evaluation exercises and their outcomes 	<ul style="list-style-type: none"> Including public opinion of the regulator in evaluation exercises, eg through surveys; focus group discussions 	<ul style="list-style-type: none"> Evaluation of the regulator by independent organisations, eg consumer panels or civil society organisations

Figure 11: Black: Examples of public involvement in different stages of the regulatory process

⁸⁷ The figure of the pyramid she describes does not appear in publicly available copies of this report.

This approach and that of Walters, Aydelotte and Miller are certainly useful in terms of their recognition value for participants in the rule-formation process: they allow participants to characterise the range of mechanisms against criteria (stages in the rule-formation process) with which they are likely to be familiar. Our approach therefore builds in an element of this approach, but we have not categorised our engagement mechanisms strictly according to the stages in regulatory development. The first reason for this is that the stages in the development of a co-regulatory mechanism that involve the statutory regulator are not present in the case of self-regulatory mechanisms. The second reason is that an approach based on regulatory stages may result in a more descriptive tool, rather than one that can be used to identify appropriate opportunities for more meaningful engagement. However, the stages in regulatory development do underpin some aspects of the rule-making functions of industry bodies that we have identified, and it is for this reason that we turn to Wintgens.

Functions of the industry scheme

There is a similarity between Black's stages in the regulatory process and what Wintgens has described as the duties of rule-makers, even though he is describing the duties of legislators (Wintgens 2005 & 2008). The six 'concrete' duties of legislators identified by Wintgens are as follows: (1) to find relevant facts; (2) to identify and formulate problems/issues; (3) to weigh and balance alternatives; (4) to take future circumstances or 'negative unintended effects' into account (aka a duty of prospection); (5) to take into account actual effects of rule-making (aka the duty of retrospection and review) and (6) the duty to correct if problems arise.

This approach is particularly valuable for us because of the close connection with the democratic principles of deliberation, impartiality, accountability and accountability that we believe underpin responsive regulation. Lee has previously explained the effect of Wintgens's duties in terms of this principle. For example, she says the first four duties embody the principle of deliberation, as follows:

Collectively, they require rule-makers to gather relevant information about current practices and evaluate if they are desirable. They insist that rule-makers consider multiple means of addressing identified problems and determine which option is best to resolve them (2018, p.53).

It is this concept of a rule-maker's duties (which we rebadge as 'functions' below) together with the approaches adopted by Black and by Rowe and Frewer that give us the building blocks for our matrix for the Australian communications environment.

4.4.2 The two dimensions of the matrix: form of engagement and function of the body or scheme

As noted in sections 4.2 and 4.3, the different participants and regulatory frameworks that characterise previous work on classification of engagement mechanisms – some of it based on other jurisdictions and much of it now quite dated – have prompted us to design a new matrix for self- and co-regulatory rule-making in the Australian communications environment. And as also noted at the start of this chapter, we have based our matrix on two organising concepts. The first is the *form* of engagement practices or the flow of information between an industry scheme and consumers or

members of the public; the second is the *functions* of engagement practices —the rule-making activities relevant to stages in the rule-making process.

In the sections below we expand on the outline of these categories we offered at the start of the chapter; specifically, we explain how and why we have departed from the categories used by Rowe and Frewer in relation to forms of engagement and the duties used by Wintgens in relation to the rule-making functions of industry schemes.

Form of engagement

As we note above, our starting point is Rowe and Frewer’s concept of information flow, with its three categories of public communication, public consultation and public participation (2005, p. 255). Their approach provided us with the inspiration for our concept of ‘forms of engagement’, by which we mean modes of communication or interaction that in some way enable public or consumer views to be taken into account.

However, while the horizontal columns (or ‘x’ axis) in our matrix draw on Rowe and Frewer’s information flow approach, we have elected to create four categories (instead of three). The defining characteristics of each category and the reasons why we adopted them are as follows.

- **Data collection.** This involves the acquisition and collation of pre-existing data about industry practices related to the topic of a rule or a potential rule or about some aspect of the operation of the rule. This is an addition to the categories identified by Rowe and Frewer, reflecting the importance of information about consumer experience that schemes acquire from third-party sources (for example, the complaints data compiled by the TIO and research conducted by the ACMA). In terms of Rowe and Frewer’s information flow, data collection involves ‘one way’ communication into the scheme but it differs from their ‘consultation’ category in that it most likely has no direct contact with consumers or the public when obtaining the information – it only obtains information about consumers or citizens from other sources. In our view, data collection may have significant value, especially since the data or research collected may be of high quality. The addition of this category to describe the Australian communications environment also reflects the practical reality of existing code arrangements: many of the schemes we examined involve longstanding codes or other instruments which are periodically reviewed and amended. While new codes are developed, the cyclical nature of code review is, as noted in section 4.4.1, a marked feature of the Australian communications environment.
- **Public communication.** This is very similar to Rowe and Frewer’s category of the same name, describing the situation where an industry scheme provides information about a rule-making initiative to consumers or members of the public. Departing from Rowe and Frewer to reflect the cyclical nature of the Australian code review environment, we include here materials such as ad-hoc reports, annual reports and other information that is not issued within a code review period, but which is connected with its ongoing operation (for example, publication of annual complaint statistics which show the most significant issues for consumers over the past year, relative to code rules). We note that public communication may be conducted as a part of, or as a prelude to, other engagement activities. For example, a media release might be issued to announce a round of

consultation and inviting written submissions on a set of draft rules. These are represented as separate entries in our matrix.

- **Public/consumer input.** This is similar to Rowe and Frewer’s category of ‘public consultation’ in that it describes a mechanism that provides an opportunity for consumers/members of the public to respond to an invitation from an industry scheme to supply information to it. We have changed the name because we think the one-way nature of information flow – this time from consumers or the public to the industry scheme – will be more readily understood in the Australian environment if we use the term ‘input’ rather than Rowe and Frewer’s concept of ‘consultation’. Rowe and Frewer are clear that consultation does not involve dialogue between the industry scheme and consumers/members of the public (which is covered by the next category). Describing it as ‘input’ also allows us to differentiate the release of an issues paper (which we would classify as ‘public communication’) from the consideration of comments made in response to it (which we would consider to be public/consumer input).
- **Public participation.** This is the same as Rowe and Frewer’s category of the same name in that it describes a mechanism that enables dialogue, rather than just one-way communication. It is therefore the most expansive form of engagement. It encompasses the exchange of information, ideas and proposals as well as debate and negotiation between consumers/members of the public and an industry scheme.

Functions of the body or scheme

Having identified the forms of engagement that enable consumer or public views to be taken into account, we now need to characterise the reasons why specific engagement mechanisms are used, relative to the range of activities undertaken by an industry body when engaged in rule-making. This will give us our ‘functions of an industry scheme’.

As noted above, from Black, as well as from Walters, Aydelotte and Miller (2000, p. 354),⁸⁸ we have recognised the importance of stages in any regulatory process. Although we are only concerned with the first of Black’s stages – what she described as design/rule formation (the others being implementation, enforcement and evaluation) (2006, pp. 15-18) – we see similarities between her stages and Wintgens’ ‘duties’ of legislators (2005, 2012).

As we noted in section 4.4.1, the ‘duties’ described by Wintgens are those that operate in a statutory environment. By grouping the engagement mechanisms into categories that correspond to the rule-making functions of an industry body, we can take some account of the legislative ‘duties’ that are part of Wintgens’ scheme, while also having regard to the stages in rule formation, as suggested by Black. A further benefit of this approach is that Wintgens’ work provides a link to the democratic values underpinning the concept of responsiveness in regulation.⁸⁹ In section 1.4, we observed that

⁸⁸ As noted below, the authors identify five stages in the policy formation process.

⁸⁹ Wintgens’s duties of a legislator are grounded in a view that law must be rationally justified before it can legitimately impose restrictions on the freedom of individuals.

the principle of ‘responsiveness’ in rule-making (based on the work of Ayres and Braithwaite (1992), as well as others) has been the guiding concept for this project.⁹⁰

The analysis above leads us to the four functions of the industry scheme as the second organising concept for our matrix. These functions form the basis of the vertical rows (or ‘y’ axis) in our matrix, presented in Figure 4, above. While the first two functions are similar to the first two ‘duties’ described by Wintgens, the others have been adapted to describe the functions of Australian self- and co-regulatory schemes.

- (i) **Fact-finding.** This requires a scheme to identify, understand and describe industry and consumer practices and the environment in which they take place. Although gathering information is an integral part of many of the activities of an industry scheme, it is also an activity specifically connected to rule-making, undertaken in some form at the start of the regulatory development process, and at various points thereafter. Including it in our set of functions helps to show that fact-finding in the rule-making is an iterative process rather than a one-off exercise.
- (ii) **Identifying and describing issues.** In fulfilling this function, an industry scheme will identify and characterise aspects of industry practices and environment that raise regulatory concerns. A scheme is likely to draw on the results of fact-finding activities (for example, identifying systemic issues from complaints statistics or investigation reports). Recognising the identification and description of issues as a discrete function of industry rule-making allows us to see the importance of the ways in which issues are framed and whether consumers and citizens participate in the framing of those issues.
- (iii) **Formulating regulatory approaches and rules.** As decisions will usually often need to be made on the type of regulation most appropriate for the issue (for example, the use of a binding code of practice compared to a voluntary guideline), this function involves the industry scheme considering various regulatory approaches as well as specific rules, including options and alternatives. This category combines elements of Wintgens’ third and fourth duties: to weigh and balance alternatives, and to take future circumstances or ‘negative unintended effects’ into account (aka a duty of prospectation).
- (iv) **Monitoring and assessing operation.** Here, the industry scheme – having implemented the new rules – monitors their operation and notes any issues arising, including their suitability in practice for addressing the issues identified at the earlier stage in the regulatory process. This combines elements of Wintgens’ fifth and sixth duties: to take into account actual effects of rule-making (aka the duty of retrospection and review), and the duty to correct if problems arise.

4.4.3 Limitations of the matrix

As noted in section 4.1, we have not been able to provide an assessment of the effectiveness of each mechanism identified in Chapter 3. Our research did not provide the data for a detailed consideration of specific regulatory initiatives and outcomes, relative to the mechanism of engagement used. Figure 4 should therefore not be understood to mean the industry schemes are

⁹⁰ See section 1.4 of this report. See also section 5.3 of this report and Lee (2018).

effectively deploying the plotted mechanisms or the plotted mechanisms adequately fulfil each of the four rule-making functions we have identified. On the contrary, the matrix shows only that the identified mechanisms have been used by the industry schemes in an attempt to perform these functions.

Two further features of our matrix should also be noted.

First, the scope of the current research means the set of functions is only intended to capture the rule-making functions of schemes. For this reason, the process of actually implementing the rules, as well as aspects of complaint handling, formal compliance monitoring and enforcement, are excluded.⁹¹

Second – though not strictly a limitation – we have not included ‘code review’ as a separate function in the list. This is not because we have overlooked this step; as noted in section 4.4.1 above, code review is a significant part of self- and co-regulation in the communications sector in Australia, and many industry schemes operate on the basis of cycles of code review and amendment, rather than the development of entirely new sets or rules. For this reason, we have attempted to present a list of functions or activities that can be applied in the context of either cyclical code review or development of new regulatory instruments. Thus, fact-finding and identifying and describing issues will be functions of an industry scheme regardless of whether it is developing a new instrument or reviewing an existing one, and while these functions may be performed at the ‘start’ of a regulatory process, they may be conducted at any point during a regular code cycle.

⁹¹ These other issues may be addressed in separate research that will build on the current project.

5. Analysis of current engagement practices

We begin our assessment of the public engagement mechanisms used by the 17 industry schemes for which we have sufficient information by setting out some observations based on the findings presented in Chapter 3. Where necessary, we also refer to information in our summaries of the industry schemes (Lee & Wilding 2019). We then add to our observations by drawing on information gathered during the three Round Tables that focused on questions raised in our Preliminary Report. We conclude by suggesting the use of public engagement mechanisms by the various industry schemes should be evaluated by reference to the principle of responsiveness and applying it to existing communications industry practices. The analysis presented in this chapter draws on the matrix we presented in Figure 4 on page 45; it provides the foundation for our conclusions and recommendations in Chapter 6.

5.1 Initial observations

5.1.1 Data collection

Most (but not all) industry schemes across the communications industry engage in some form of **data collection**. Four (auDA, ACTA, ANRA and Standards Australia) did not explicitly nominate any methods of data collection used as part of rule formation. The other 13 schemes (AANA, ABAC, ABC, APC, ASTRA, Comms Alliance, CBAA, CRA, FCAI, Free TV, IMC, MEAA and SBS) mostly use the mechanism of complaints data. They use this in the initial stages of fact-finding, but also when monitoring and assessing the operation of rules.

Other data collection mechanisms used include: review of previous submissions (ABAC); sentiment index (AANA); audience feedback (SBS); and review of research by a regulator (ANRA, ASTRA, CBAA, CRA and Free TV from the media sector and ABAC from the advertising sector). As with the use of complaints data, these mechanisms are used in fact-finding and monitoring and assessing operation of rules.

It appears that minimal data collection occurs when identifying and describing issues and in formulating regulatory approaches and rules. It may be that the industry schemes use the data collected during fact-finding to inform themselves when exercising their other functions. However, it is also likely that, in these other activities, the more specific information obtained from the use of **consumer/public input** and **consumer/public participation** mechanisms supplants the data collected in fact-finding and monitoring and assessing operation of rules.

5.1.2 Public communication

Most (but not all) industry schemes across the communications industry engage in some form of **public communication**. Only three (ABAC, APC and FCAI) did not explicitly nominate any public communication, although it may be that they conduct such practices outside of rule development

exercises.⁹² The other schemes tend to deploy public communication when they are identifying and describing issues, formulating regulatory approaches and rules, or monitoring and assessing operation. Not surprisingly, they did not nominate any public communication mechanisms when conducting fact-finding.

Specific mechanisms used by the 17 industry schemes were as follows: meetings with staff to discuss proposed rules (CBAA, Free TV); a general call for written submissions at proposal stage (SBS); publishing an issues paper and inviting written submissions (auDA, AANA, CA, MEAA); publishing draft rules and inviting submissions in writing (auDA, ABC, ACTA, ANRA, ASTRA, CA, CBAA, CRA, Free TV, MEAA, SBS, Standards Australia) or by phone; publishing media releases, newsletters, reports and rules (auDA, AANA, ABC, ACTA, ANRA, ASTRA, CA, CBAA, CRA, Free TV, IMC, MEAA, Standards Australia).

In addition to auDA, MEAA, SBS and Standards Australia, all of the schemes operating under the co-regulatory arrangements established under the BSA and the TA, publish draft rules and invite submissions on them. ABAC, AANA, APC, and IMC (which are purely self-regulatory) and ABC (which is regulated by statute) do not.

As mentioned in Chapter 3, with few exceptions, we were unable to locate copies of the actual information provided by the schemes to consumers and citizens when evaluating approaches. Thus, it is not possible to make many observations about the information the schemes provide or identify patterns in their public communication practices.

5.1.3 Public/consumer input

Written submissions

Written submissions are the most commonly used mechanism of **public/consumer input** across the communications industry. Thirteen industry schemes – AANA, ABC, ADMA, auDA, ANRA, ASTRA, Comms Alliance, CBAA, CRA, Free TV, MEAA, Standards Australia and SBS – use or have used written submissions.

In most cases, written submissions are used when the schemes are seeking: to explore regulatory approaches to an issue they have already identified; to evaluate an approach they have formulated; and to seek comment on draft rules. AANA, ADMA, auDA, Comms Alliance and MEAA have all published issue papers on occasion. However, written submissions have also been solicited to assist with issue identification: SBS issues a general call for written submissions before rules are drafted but does not publish an issues paper.

Opportunities to provide written submissions on draft rules may be frequently given, but we found evidence that only a few consumers, citizens and organisations representing their interests make written submissions, despite industry efforts to publicise them. For example, CRA advised that it now receives fewer than 10 submissions in response to draft codes published during its code review process (Lee & Wilding 2019, p. 40). Similarly, ASTRA's public consultation on the codes of practice for subscription narrowcast radio and subscription broadcast and narrowcast television, registered

⁹² As an example, APC issues an annual report that gives information on the classification of complaints received during the year, relative to its various principles.

by ACMA on 7 November 2013, resulted in 18 submissions from consumer organisations and members of the public.⁹³ With the possible exception of its shorthernames.com.au campaign,⁹⁴ auDA has also been unable to attract ‘broader stakeholder interest,’ despite the importance of domain names to the Australian economy and society.⁹⁵

Other mechanisms

Written submissions are often used in conjunction with other mechanisms to obtain public and consumer input. These other mechanisms comprise advisory committees or councils; focus groups; meetings with persons conducting reviews; discussion with consumer or public representatives during the proposal stage; public fora; round tables; surveys; and phone submissions. Some of these mechanisms involve or permit ‘indirect participation’ – participation by consumer and public interest groups who are said to be ‘representative’ of wider interests rather than individual consumers or members of the public. The latter form of participation has been characterised as ‘direct participation’.

Similar to written submissions, these other mechanisms are used by schemes when **identifying and describing issues** and when **formulating regulatory approaches and rules**. As mentioned in section 4.4.1, as the process of rule formation is often cyclical or iterative, the act of formulating regulatory approaches and rules can also include evaluation of existing rules; all the input mechanisms might therefore be used in this way.

Below is an indication of mechanisms used by ten of the industry schemes (ABAC, AANA, ABC, ADMA, auDA, APC, CBAA, Comms Alliance, MEAA and SBS) as part of formulating regulatory approaches and rules.

- Different forms of targeted discussions with stakeholders are used by one scheme in the advertising sector (AANA), two media schemes in the media sector (APC and IMC), and one scheme in the telecommunications sector (Comms Alliance).
- Surveys have been used by two schemes in the advertising sector (ABAC, AANA) and one body in each of the online (auDA) and telecommunications sectors (Comms Alliance).
- Focus groups have been used by two industry schemes in the advertising sector (ABAC and AANA), three schemes in the media sector (ABC, CBAA and SBS); one scheme in the telecommunications sector (Comms Alliance) and one scheme in the online sector (auDA).
- Advisory committees and councils have been used by two schemes in the media sector (ABC and SBS) and one scheme in the telecommunications sector (Comms Alliance).
- Phone submissions have been used only by the CBAA, which operates in the media sector.

⁹³ ACMA, ‘Improved Community Safeguards in Codes for Subscription Television and Radio Industry’ (Media Release 84/2-13, 7 November 2013). See also ASTRA summary in Lee & Wilding (2019).

⁹⁴ auDA was delighted with the results of this campaign, but the campaign was arguably not inclusive. Its target market for the campaign was men between the ages of 25-34. The number of small businesses and consumer and public interest groups actually consulted as part of its 2017 Policy Review processes appears to have been small (auDA May 2019, pp. 31, 34).

⁹⁵ Email from .au Domain Administration Limited to Derek Wilding, 22 June 2018.

- Public fora have been used on one occasion by auDA, which operates in the online sector.
- Only Comms Alliance adopts consumer views solicited by a consumer body as a public consultation mechanism.
- Round tables have been used by two schemes in the media sector (APC, CBAA) and one scheme in the telecommunications sector (Comms Alliance).

As part of identifying and describing issues, six schemes – AANA, ADMA, auDA, Comms Alliance, MEAA and SBS – have engaged in some form of public/consumer input other than written submissions. During issue identification, only Comms Alliance engages in targeted discussions with stakeholders. This is because ACCAN serves as the contact point. However, AANA, ADMA, auDA, Comms Alliance, MEAA and SBS have solicited written submissions during issue identification.

5.1.4 Public participation

There are some mechanisms of **public participation**, which enable an exchange of information between consumers and citizens and schemes. They include working committees and consumer views solicited by a consumer body. They tend to be deployed when schemes formulate and evaluate approaches and alternatives. Thus, they are used after fact-finding occurs and when issues have already been identified and described. Only auDA, APC, CBAA, Comms Alliance, MEAA and Standards Australia have appointed consumer and/or public interest organisations to their working committees. Only Comms Alliance has used consumer views solicited by a consumer body.

5.2 Insights from Round Tables

We have structured the insights gathered during the Round Tables into four themes:

- The multiplicity of mechanisms and factors affecting mechanism choice;
- Experience with specific engagement mechanisms;
- Missing stakeholders and barriers to participation; and
- Timing of public engagement.

Key issues raised under each theme are set out below.

5.2.1 The multiplicity of mechanisms and factors affecting mechanism choice

Several industry and regulator participants indicated multiple mechanisms of public engagement had been used because of the difficulties involving individual consumers, consumer organisations and the wider public into rule-making processes.⁹⁶ As an ACMA representative stated,⁹⁷ 'Everybody is using multiple methods and some are using more and others less, but I think actually that's what you need because nothing is going to nail it. There's no silver bullet.' Moreover, for at least two industry participants (the ABC and SBS), the difficulties of involving individual consumers and the wider public

⁹⁶ The difficulties encountered and their underlying causes are explained in section 5.2.3 below.

⁹⁷ This individual's views may not necessarily represent ACMA's position on this matter.

had led to a strong preference for targeted consultation with the public, tailored to the specific rule-making initiative.

Industry participants reported seven different factors that affected the extent of public engagement and the selection and number of public engagement mechanisms specifically deployed:

- (i) the importance of the proposed rule and/or the significance of proposed changes to existing rules;
- (ii) the number of proposed rules and/or changes to existing rules;
- (iii) the complexity of the underlying subject matter;
- (iv) anticipated receipt of competing consumer viewpoints on specific issues;
- (v) government scrutiny;
- (vi) expectations of relevant regulatory bodies;
- (vii) cost and other resource-related implications.

In addition, public service broadcasters reported that their statutory purpose significantly influences how they carry out public engagement. As one representative stated, ‘...the principle of freedom of expression is what underlies our purpose... That’s an underlying principle that does impact on who we consult and how we consult.’ However, no one consideration was determinative, and all industry participants indicated balancing these factors was difficult. As one industry participant stated, ‘That balance around different mechanisms and trying to find what are sensible outreach opportunities vis-à-vis ROI [return on investment] processes vis-à-vis getting the right balance from the feedback ... [is] very hard.’

5.2.2 Experience with specific engagement mechanisms

Complaints data

Round Table participants had mixed views on the efficacy of complaints data as a public engagement mechanism.

Complaints data gathered by the TIO was seen as valuable by ACMA and ACCAN representatives, although ACCAN highlighted that the TIO collects information about escalated complaints, not all complaints made to telecommunications service providers. Therefore, ACCAN was concerned that TIO data ‘can give a false picture of what’s really happening’.

However, complaints data gathered in the advertising and media sectors was seen as much less useful or at least had to be treated with some caution for several reasons. First, ‘people don’t generally put the effort into making complaints’.⁹⁸ Second, individuals often do not complain because they believe their complaints will not be taken seriously.⁹⁹ Third, complaints processes assume people ‘feel empowered enough’¹⁰⁰ and ‘have the time and know the skills’¹⁰¹ to complain.

⁹⁸ An ACMA representative, whose views may not necessarily represent ACMA’s position.

⁹⁹ As the Ad Standards representative stated, ‘In our first lot of research we put the question in, have you ever complained and if not why not? The top reason is nothing will happen.’

¹⁰⁰ ACCAN representative.

¹⁰¹ Women’s Legal Service NSW representative.

One consumer representative stated, complaints processes were ‘totally skewed towards the white, middle-class’.¹⁰²

One consumer representative indicated industry will respond to complaints data, but often consumer organisations had to collect the data themselves for industry to act. This representative expressed a preference for more ‘proactive’ forms of industry public engagement. Complaints data was described as a ‘reactive way to operate’.

Written submissions

Several participants, including representatives from consumer organisations, believed written submissions can be helpful. At least one industry body or scheme reported it received ‘over 2,000 submissions from the public’ on its review process. However, many participants from each of the three Round Tables questioned their utility (at least when used as the sole mechanism of public engagement) and/or highlighted their drawbacks.

The ABAC representative stated ‘the general public are very unlikely to engage in that way’. The auDA representative observed, ‘we’ve averaged between 20 to 50 submissions over the length of policy review processes, which is in no way reflective or has any great scalability and probably doesn’t influence the process to any great extent.’

Several consumer representatives drew attention to ‘motivational barriers’ (Farina et al 2011, p. 148) and other obstacles to participation that made it difficult for individual consumers, consumer organisations and members of the public to make written submissions.¹⁰³ One such barrier was ‘submission fatigue’, which ACCAN later suggested to us was closely connected to the limited resources available to consumer organisations. In its experience, the costs of preparing submissions were disproportionately higher for small consumer organisations relative to the benefit they obtain from making written submissions (than they are for larger industry organisations), and it is these costs that contribute to submission fatigue. Other barriers mentioned by consumer representatives at the Round Table included: the lack of ‘trust that if you’re going to put time into doing a submission ... that anything is going to come out of it’ and the absence of feedback from industry following submission of written comments. Several consumer representatives also agreed with this statement made by one such representative:

the main downfall of written submissions is that often you get the impression that it's already a bit of a done deal, because something's already been drafted by people who think they know what we need and ... you're not always convinced that a written submission is going to be heard ...

Another consumer representative suggested greater attention to ‘user-centred design’ would be necessary in order to increase the number of written submissions industry receives.

A regulator representative acknowledged, ‘Written submissions have got a lot of weaknesses if you rely on that as your only method of getting consumers or the public to consider a matter, but if you combine that with various other [public engagement mechanisms] it actually creates a stronger

¹⁰² Ibid.

¹⁰³ Barriers to Participation are discussed more fully in section 5.2.3 below.

edifice.’ Another regulator representative suggested industry calls for written submissions on draft rules, if made during investigations undertaken by public regulators, such as ACMA’s *Reconnecting the Consumer* inquiry (September 2011), can significantly increase the number of submissions received because of the publicity regulatory investigations generate.

Working committees

Comms Alliance stated having a body such as ACCAN serve on its consumer code working committees was:

invaluable ... despite numerous disagreements and everything else The complexity of any rule-making that any of us go through is such that the history of the conversations, the different debates, the different opinions – having an organisation that has the technical and historical knowledge to engage in those conversations makes them much more efficient.

An ACMA representative also saw the value in consumer delegates serving on working committees and saw them as a ‘superior tool’ for consumer and public engagement. He stated:

the benefit of a working committee is that it can really tease out issues quite extensively ... if there's a really complex issue that's not easy to solve... The benefit of a working committee is it can pull issues apart, get different perspectives on them and then try to put something back that makes sense.¹⁰⁴

However, participation on working committees requires a ‘significant time commitment’, especially when issues are complex and contentious, and few organisations can afford to put in the time and resources needed. It was also suggested that the power balance on industry working committees, which formulate rules by consensus, may affect the dynamics of issues under discussion.

TIO representatives submitted that it might be possible to reduce the time and resources required by consumer organisations to participate on working committees by involving them in discussions on ‘high level’ matters at different stages rather than ‘looking at each individual line of a very complex code’. Consumer organisations might ‘bow out’ when drafting is undertaken and return when principles need to be agreed. However, ACCAN has told us:

While this suggestion would alleviate the resource demands placed on ACCAN, much of the substance of code reforms turn upon the specific drafting of code clauses. As a consequence, if [it were not] involved in the discussions on the drafting of code protections, it is very unlikely that codes would provide much if any substantive protections for consumers where there are divergent interests between consumers and industry.

Among other consumer representatives, there were mixed views about whether consumer participation on working committees improves the development of Comms Alliance codes of practice. One representative was quite positive. The representative from Women’s Legal Service NSW said Comms Alliance had become more responsive to its input ‘when it’s about the consumer information, but when it’s about actually changing what they do, to meet our needs, that door’s as shut as it ever was.’ The Consumer Action Law Centre representative referred us to the Consumers’

¹⁰⁴ See n 97.

Federation of Australia's *Good Practice Principles: Consumer Advocate Involvement and Expectations of Development and Reviews of Industry Codes and External Dispute Resolution (EDR) Schemes*, which recommends (among other things) an 'independent person or reviewer [ie, a person with no direct relationship with the relevant industry] to develop or review a code of practice' (23 April 2018, p. 2).

After the Consumer Round Table, ACCAN also told us it would prefer an equal number of industry and consumer representatives appointed to working committees drafting significant consumer codes such as the *Telecommunications Consumer Protections* code. In its view, equal representation would strengthen the voice of consumers and enable vulnerable consumers to be better represented. We were advised Comms Alliance has appointed an equal number of representatives in the past, but no longer follows this practice. The cost of appointing additional consumer representatives to working committees could be funded through the ACMA code reimbursement scheme.¹⁰⁵

In addition, ACCAN suggested that one of the reasons why current participation arrangements on working committees may not lead to effective consumer protection measures is because ACMA is not required to assess consumer harm when determining if a code should be registered under Part 6 of the TA.¹⁰⁶

Consumer views solicited by a consumer body

The Comms Alliance representative indicated Comms Alliance 'rel[ies] so heavily on ACCAN' and 'trust[s] them to get that word out [about the drafting of codes] for several reasons. First, ACCAN has 'more direct consumer relations in the media [and] in their work'. Second, Comms Alliance is not particularly well equipped to engage directly with consumers. Its role is 'to engage with industry' and its social media presence is targeted to that end. For example, whereas the Comms Alliance website may be difficult for a consumer to use, the ACCAN website is 'well built. It's easy to access. It's easy to read and understand. It doesn't have jargon.' Third, Comms Alliance is 'very shy of engaging directly with consumers, because as soon as we start to do that we will receive every complaint ever ... and that's not [its] role.' Fourth, ACCAN is able to 'take a lot of diverse viewpoints and then amalgamate them'. It presents Comms Alliance with a 'decision'. Unlike Comms Alliance which does not have 'the remit or knowledge to make those decisions', ACCAN is 'comfortable playing that role of mediator between those different community organisations that are making the decision'. However, it was also acknowledged that the drawback to relying on ACCAN meant Comms Alliance does not 'get all of the information out of the different debates'.

¹⁰⁵ See ACMA July 2019.

¹⁰⁶ The question of whether the Part 6 code registration process needs to be amended to empower consumer representatives on working committees is outside the scope of this report, but we believe it merits further consideration. On consumer harm generally, see Department of Communications (May 2014), DOCA (October 2016).

The ACCAN representative stated a body such as ACCAN makes it 'easy for industry' because it is 'much more efficient to talk to one organisation than 50.'¹⁰⁷ However, she strongly rejected our suggestion that ACCAN might perform the function of an intermediary in this context:

we consult with our members to respond, but ... that doesn't mean consumer organisations can't respond ... We want them to respond as much as possible. It's just the reality is people have very limited resources. It's really hard for them to respond. We keep an eye on what's going on. We try to let people know what's going on. We try to let people know what we think are the important issues and support them if possible, to respond ...

She later added, 'it's very hard [engaging with vulnerable groups]. I mean in terms of when we formulate positions, we consult with our members, but we go beyond our members, too. We consult with lots of consumer organisations and also with experts.'

Nevertheless, the representative from the Consumer Action Law Centre (which represents 'vulnerable consumers and those experiencing disadvantage' and is a member of ACCAN) stated industry does view ACCAN as a 'funnel'. She said, 'We've felt that we've had trouble sometimes in providing direct feedback on that to the industry body, even when they have asked for public submissions, for example, on public consultation.' She also observed:

ACCAN does a really good job of bringing together everyone's views, but they also have to bring them together into one cohesive view, so if other groups were more permitted by the industry to be involved from the earlier – from the start, then there probably would be a wider diversity of views and maybe particularly from vulnerable people ...

Other representatives of consumer organisations (all of whom were members of ACCAN) suggested ACCAN was successful because it could be 'trusted' to accurately represent the views of their members to Comms Alliance. ACCAN was also seen as particularly useful because it created a 'space' where 'a lot of different organisations but with similar issues ... could compare notes'. The CWA representative stated, 'the actual gathering together of people not only adds weight to their voices, but it also provides a better space to bounce those ideas around.' Similarly, it is much easier for industry 'outsiders' to approach ACCAN. As one representative said, 'industry fragmentation, the code, the regulatory fragmentation is a huge part of the problem and it burns off probably more than everybody'.

Surveys, focus groups and round tables

An ACMA representative commented that surveys and focus groups tend to be used as alternatives to working committees if a body still wants to draw in 'a wide circuit of participation' without a heavy time commitment.¹⁰⁸ However, the Ad Standards representative pointed out that it is important to have participants who are open to new ideas involved in focus groups and/or round tables in order to justify their time and cost.

¹⁰⁷ The representative for ADITA (representing COSBOA) agreed a single organisation such as ACCAN was more efficient.

¹⁰⁸ See n 97.

...certain organisations will have a view and you know what the view is and you know that ... no matter how many times they come sit in a roundtable they're not going to change that view. So what's the point involving them because you know their view, you'll take it into account, but you really want to be having a conversation with people that you could actually ... get new ideas from or challenge assumptions. That's what you want.

Moreover, the auDA representative commented that focus groups can involve 'high-quality people [but] the usual suspects.'

The Ad Standards representative at the Round Tables also noted that one consequence of more personal and direct interaction with stakeholders by way of mechanisms such as focus groups and round tables is that there is an expectation of some level of feedback: 'they [stakeholders] expect to see a bit of quid pro quo'.

Use of social media

Several participants at the Regulator Round Table noted social media comments can be useful, but they had their limitations. For example, one representative remarked that they can generate a volume of comments, but the comments received lack depth: 'it's a depth issue but that's okay with some matters.' According to two industry representatives, ACMA had requested them to tweet about the existence of code reviews.

However, many industry representatives expressed reservations about using social media to engage with citizens and consumers. Employing Facebook was seen as 'prohibitively expensive', and it was reported the company was reluctant to give out demographic information, making it difficult for industry schemes to find their target audiences. LinkedIn, on the other hand, provided 'good analytics', but was 'not cheap'. The widespread use of Facebook, LinkedIn and Instagram by companies and others was also seen as another drawback. As the auDA representative stated, 'Everyone is doing it, so the effectiveness and generating clickthroughs is almost non-existent.' Two notable exceptions were Weibo and WeChat, which were described as 'incredibly effective' in terms of targeting the Chinese-speaking community and 'really cheap'. Other concerns expressed included: an inability to trust the data about the 'impressions at the bottom of the screen' provided by social media companies, and scepticism about whether active and frequent contributors on social media platforms accurately reflected the views of the general public. As the representative from Ad Standards stated, '...squeaky wheel[s] can get so much coverage' on social media and 'they can overwhelm the conversation'.

Public communication

Only a few comments relevant to public communication were made during the three Round Tables.

The auDA representative reported auDA was 'ecstatic' with the results of its shortnames.com.au campaign, which resulted in 1.5 million 'impressions through all platforms' and 12,000 unique visits to the bespoke website.¹⁰⁹ The 15-second video was viewed over 300,000 times; the 30-second video was viewed 120,000 times; and 1,100 people completed the three-question survey. However,

¹⁰⁹ See section 3.1.

the campaign '[came] at a cost'; the organisation spent approximately \$500,000 on the campaign, \$200,000 of which was used on the production and marketing of the two short videos.

auDA deliberately chose not to advertise the campaign and survey on radio or television because they were too expensive and did not capture auDA's target audience, which was males between the ages of 25 to 34.¹¹⁰ However, it found placing advertisements on catch-up TV useful because 'no one can skip [them]'. Print advertising led to the 'usual suspects'.

The Free TV representative observed that placing newspaper advertisements inviting written submissions on its draft code cost approximately \$20,000, and members of FreeTV also meet the costs of television airtime that they could otherwise sell to advertise codes. The precise cost varies for each network.

A consumer representative commented that advertisements in newspapers such as *The Sydney Morning Herald* would not be seen by seniors: 'if you want to talk to seniors, you have to go to the vehicles that seniors use, not just, do what you've been doing for the last 20, 30 years, and going to *The Sydney Morning Herald*, or something like that'. She suggested it would be better to place advertisements in *The Senior*.

5.2.3 Missing stakeholders and barriers to participation

Consumer representatives stated numerous stakeholders from 'vulnerable communities' were missing from industry public engagement exercises. These missing stakeholders included: women escaping domestic violence, homeless individuals, young people, people exiting prison, individuals from regional, rural and other remote communities, people who do not speak English, recently-arrived refugees, people with disabilities, victims of privacy violations and young people. Small businesses were also identified as a particularly difficult group to engage. As the ACCAN representative stated:

they're spread so thin ... there are huge demands, because everybody wants to talk to small business – government and politicians and so on ... we try to engage with industry associations, because they have more time to [engage], but typically even the industry associations are run by small business people who are ... trying to juggle the association and also run their business.

We did not specifically ask industry and regulatory participants to identify the stakeholders who were missing from industry engagement processes, but the Comms Alliance representative stated her organisation 'rarely get[s] interactions with or feedback from the average consumer'. The comments made by several representatives from other industry and regulatory bodies throughout the discussion also indicated their schemes had not managed to obtain feedback from 'a broader and more diverse audience' or certain stakeholders with situated knowledge. Industry's inability to engage with individuals other than the 'usual suspects' was attributed to several factors, including the technical complexity of the rules and/or decisions, the 'remoteness [of the issues] to most people's lives', a lack of interest in the underlying subject matter and the limited funding consumer organisations receive from government. 'Exhaustion' also played a significant role. As the representative from Comms Alliance stated, 'We go out to either industry or consumers and they

¹¹⁰ See n 94.

just go, forget it; we've had to engage in six government reviews in the last three weeks; we can't even talk to you; just go away.'

Consumer organisations agreed with industry representatives that 'submission fatigue' was a significant barrier to participation. However, they identified several other factors that they believed have contributed to their submission fatigue. These factors included the failure of industry schemes to 'keep an easily accessible record of previous consumer submissions' so they can refer back to them. There was a view that industry repeatedly asks consumer for the same or similar information, and it failed to provide accessible and/or effective information. One consumer representative suggested, for example, that industry schemes could help consumer and public organisations by doing the preliminary work required to consult with consumers, citizens and related organisations. He thought it could 'prepar[e] a ... draft with all of the bits and pieces that [consumer and public interest organisations] would find ... difficult to pull out and [do it] in a very accessible way' so they could send the draft to their members or use in their 'invitations to engage'. He stated 'that sort of work is something that would drown most small organisations'.

In addition to submission fatigue, consumer participants identified the following 'barriers' or obstacles to participation (Farina et al 2014, p. 1564).

- The belief that industry does not take the submissions of consumers, citizens and related organisations seriously and therefore participation is a waste of time. As one consumer representative stated, 'Very often if I endeavour to find people who will come on to consultations like this, or write submissions, their attitude is, they're only doing it so they can tick the box that there's been consumer interaction. In actual fact, they're not going to take much notice'.
- The belief that industry was engaged in 'issues management' when it undertook consultation rather than a 'discussion of the real issues'. Similarly, there was a failure, as one consumer representative phrased it, to 'validate or acknowledge that as part of our service delivery we actually stuff up quite a few people and there are victims lying around'.
- The belief that industry does not have 'the right people at the table'. The ACCAN representative stated, 'They've got the lawyers, and the regulatory people are sitting at the table, and their marching orders obviously are to look after the interests of their client ... and that's fine, but we don't have the people who are responsible for actually implementing the [rules] that we're talking about or implementing training. A lot of it's to do with training and how the processes go down through the organisation'.
- A failure to recognise the cost of participation by individuals and compensate them for their time.
- The lack of time that individuals and organisations have to engage with the various issues. As one stated, 'I don't think it is about money. I think it's about **time** and it's about **priorities**'. She explained, 'We're an entirely voluntary organisation and there's just a limit to how much we can move – we're all trying to run businesses as well, and make a living, and there's a point where you just have to draw the line ...'

- The use of technical and/or complex language. The CWA representative stated, ‘They use language that the average person or disadvantaged people might not necessarily understand ... So when people sit in a room and they deal with one thing all of the time and they understand the language, they very often leave out the people who aren't in that space all the time, and so those people then feel even more disconnected, because they're trying to understand what's being said – let alone them try and make some sort of value – or add value to that space by making a comment, because they don't know whether what they're saying is right’.
- A failure to engage with consumers, citizens and related organisations early on in the rule-making process.

Following the Consumer Round Table, an ACCAN representative also suggested that the absence of an obligation requiring ACMA to assess consumer harm before registering a code of practice under Part 6 of the TA (mentioned in section 5.2.2 (Working committees)) served as a barrier to participation. In his view, it discouraged consumer representatives from participating in industry rule-making processes because they are unlikely to obtain substantive outcomes in a context where consumer harm is not adequately captured by cost-benefit analysis.

5.2.4 Timing of public engagement

Consumer representatives emphasised that public consultation currently occurs too late, especially if industry is genuinely interested in reaching vulnerable people and obtaining ‘a wider diversity of views’. While many believed providing written submissions could be helpful, all expressed a strong preference for involvement much earlier, ie, when issues were identified and described. As mentioned in section 5.2.3, there was concern that industry consults after it has already formulated approaches and alternatives to ‘suppress discussion of the real issues’, or to frame issues to their advantage; as one consumer representative stated, ‘It's issues management. It's how to control things and realising, okay, we're going to have to give here. We're going to have to give, but let's just mitigate against that of how far we've got to go’. However, there was also concern that issues predetermined by industry (for whatever reason) ‘may not actually be relevant to what we [consumer organisations] think they are’. Publishing an issues paper (or even simply ringing consumer and public interest organisations with an interest in the underlying subject matter before releasing an issues paper) were identified as two ways earlier involvement could occur. For consumer representatives, earlier involvement had the advantage of increasing the likelihood that relevant issues were brought to the fore; creating trust and making the rule-making process more credible.

A wider, but related, point raised by at least two Consumer Round Table attendees, was the desirability of engaging consumers and members of the public before or when new technologies are deployed so risk, potential harms and other issues can be identified at the outset.

5.3 The responsiveness of current public engagement practices

5.3.1 The meaning of responsiveness

In this sub-section, we suggest the concept of responsiveness should be used to assess the effectiveness of public engagement mechanisms currently used by the various industry schemes. We

suggest responsiveness because it has been and remains a highly influential principle of regulatory design. It underpins many of the best-known approaches to regulation – approaches such as ‘responsive regulation’, ‘smart regulation’, ‘democratic experimentalism’ and ‘collaborative governance’. The desire to be ‘responsive’ also often serves as the justification for the use of self- and co-regulation by governments, legislators and policy-makers in Australia and worldwide.¹¹¹

The precise meaning of responsiveness is open to some debate. However, we have adopted a definition that draws on democratic theories¹¹² and consists of four elements: deliberation, impartiality, transparency and accountability. These elements are defined as follows:

Deliberation means ‘the weighing up of alternatives and determination of what, on balance, meets the needs of all stakeholders’;

Impartiality means ‘the exercise of some independent judgement’ by industry;

Transparency means ‘the disclosure by industry to participants in the rule-making process of information necessary to hold it to account’;

Accountability means ‘the explanation and justification by industry of its positions to others’.

5.3.2 Application to existing practices

At the outset, we must acknowledge that several factors contribute to responsiveness in industry rule-making. Consumer and public engagement is just one of these. We must also acknowledge that our data does not allow us to easily apply each element of responsiveness. We would need much more specific information about particular instances of rule-making and the mechanisms used to engage with the public and consumers before we could definitively apply each of the four elements to each industry scheme. It is also particularly difficult to assess transparency and impartiality.

Nevertheless, responsiveness is a useful benchmark because it often seen as a necessary first step towards achievement of regulatory effectiveness – the ultimate end goal of any regulatory design. Moreover, some mechanisms of consumer and public engagement are much more likely than others to promote the achievement of the four aspects of responsiveness. For example, mechanisms of engagement that promote dialogue between consumers and citizens and an industry scheme – mechanisms such as representatives from consumer and public interest organisations serving on industry working committees – can facilitate deliberation, impartiality, transparency and accountability in ways that reliance on complaints data or consumer submissions made to other inquiries, even when used in conjunction with other mechanisms of consumer and public input, may not.

If, as we suggest, responsiveness is the appropriate benchmark against which current consumer and public engagement practices should be evaluated, then it would appear that many current consumer and public engagement practices are not adequately facilitating industry deliberation and accountability. This is so, notwithstanding the awareness many industry schemes have of the difficulty of engaging consumers, citizens and related organisations and the deployment by multiple

¹¹¹ See, eg, Department of Communications, (May 2014).

¹¹² Specifically, these are republican and other democratic theories that provide normative foundations for the instrumentalist theories of responsive regulation. See Lee (2018, pp. 207-221).

mechanisms to that end. Indeed, the information about current practices we encountered in this research raises a number of questions and concerns, including the following:

- whether industry effort and resources should be directed to addressing the absence of missing stakeholders and, in particular, reducing the barriers to participation citizens and consumers confront, especially when asked to submit written comments;
- whether industry should be encouraged to use and/or experiment with alternative mechanisms of public engagement in order to improve greater dialogue when carrying out all rule-making functions;
- whether all industry schemes should appoint consumer and public interest representatives to their working committees when drafting rules;
- whether public engagement should commence earlier in the rule-making process (ie, during fact-finding or issue identification and description rather than during or after regulatory approaches and rules have been determined and formulated);
- whether all industry bodies should be expected to comply with a minimum set of public engagement obligations;
- whether amendments are required to the existing legislative frameworks that support co-regulation in the communications industry;
- whether disparities in public consultation practices between industry schemes and ACMA should be addressed;
- whether an evidence-based approach to formulating regulatory solutions requires the body or scheme to actively solicit information (ie, collect data) specific to the issues being considered;
- whether ACCAN's remit should be extended or if a new public interest body should be created to ensure the concerns of consumers and citizens relating to content are adequately represented in industry rule-making and other regulatory processes; and
- whether additional measures are needed to address the absence of public engagement in the regulatory framework that is emerging for technology platforms, such as Google and Facebook.

We address each of these issues in detail in Chapter 6.

6. Conclusions and recommendations

To assist consideration of the issues identified in section 5.3, we have grouped the questions into six categories:

- the need for improvements (if any) to the existing way in which industry consults with consumers and citizens and related organisations when engaged in rule-making;
- experimentation with alternative public engagement mechanisms, including citizen juries, deliberative polling and inquiries – three types of public engagement mechanisms used in Australia and other jurisdictions in the context of traditional rule-making;
- the merit of industry schemes appointing consumer and public interest representatives to their working committees;
- timing of public engagement and active data collection specific to issues under consideration;
- the need for a minimum set of expectations relating to public engagement; and
- the need (if any) for modifications to statute and related measures.

Each is considered below.

6.1 Improvements to existing public engagement practices

The first issue that arises from our research is whether industry effort and resources should be directed to increasing the *number* of citizens and consumers who submit written comments. Views differ on this matter. In the context of traditional US administrative rule-making, for example, it has been argued that simply increasing the volume of written submissions from consumers and citizens will improve rule-making as a higher number of responses will increase the likelihood of submissions containing unidentified concerns or helpful ideas that a rule-maker should address or deploy (Farina et al 2011, p. 146). However, it has also been argued that not all preferences expressed by consumers or citizens during public consultation are equally valuable in administrative rule-making.¹¹³ For example, Farina et al have stated that ‘the value of participatory inputs must be gauged by the kind of decisional process we expect the agency to engage in’ (2011, p. 141). In the administrative rule-making context, rule-makers are expected to engage in reasoned decision-making, weigh competing interests and values and give reasons for their decisions. Consequently, in their view, resources and energy are better directed to encouraging submissions from ‘missing stakeholders’ — stakeholders such as small businesses, citizens and individual consumers who have not traditionally participated in public consultation, but are directly affected by policy decisions and can contribute ‘situated knowledge’, which means ‘information [known by them] about impacts, problems, enforceability, contributory causes, [and] unintended consequences’ of those policy decisions (2011, p. 148).

¹¹³ This view is also implicit in guidance provided by the Australian government to its departments and agencies on public consultation. See, eg, the Department of the Prime Minister and Cabinet (February 2016, pp. 8-9); and Australian Government Information Management Office (2010, p. 2).

We recognise that industry rule-making in Australia is very different from the US administrative context in which Farina et al have observed public consultation. Nevertheless, their approach to public consultation is useful to our study because industry rule-makers are expected to engage in a similar deliberative decision-making process as their administrative counterparts.¹¹⁴ Their approach also encourages serious evaluation of the stakeholders who are missing from industry consultation exercises and the measures that could be taken to address the barriers to participation they face.

In addition, their approach is pragmatic. It recognises that resources for public consultation (and other forms of public engagement) are not unlimited and they should be strategically deployed where they are 'most likely to make a significant contribution to policymaking' (Farina et al 2014, p. 1567).

Below we set out the barriers to participation Farina et al identified in their research and the modifications to public consultation design they found could increase participation by missing stakeholders. We then revisit the missing stakeholders and barriers to participation identified by Consumer Round Table participants in Chapter 5 and suggest steps that industry schemes might take to overcome them. We conclude with some final thoughts on written submissions and set out our recommendations on how to increase the number of citizens and consumers who submit written comments. Farina et al's findings are summarised first because they provided us with a useful way to think about participation by missing stakeholders in self- and co-regulatory industry rule-making and the steps industry schemes might take to overcome them. We used them to frame the questions we posed to Round Table participants and have drawn on them to formulate our own recommendations for the self- and co-regulatory rule-making context in Australia.

6.1.1 Farina et al's findings

Farina et al identified four barriers to participation in the context of US administrative rule-making:

- (1) a lack of general or specific awareness that proposed rules may affect them and/or that they can participate (2014, p. 1550);
- (2) 'information overload', which means information provided by rule-makers is incomprehensible, uses jargon or is otherwise not presented in a way that ordinary people can understand or want to read (2014, p. 1553);
- (3) 'low participation literacy', which means missing stakeholders are unfamiliar with how to participate in the quasi-deliberative processes of rule-making. It needs to be explained to them that merely expressing support for or against a specific result is not sufficient in order to participate effectively in the process. They must be encouraged, for example, to provide information, give reasons and consider alternative arguments (2014, p. 1559); and
- (4) motivational barriers, which include 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 outcomes (2014, p. 1564).

¹¹⁴ No Round Table participant disagreed with this statement.

However, in their research called the 'RegulationRoom project', Farina et al suggest that more attention to public consultation process design can increase participation by missing stakeholders (Farina et al 2011a, 2011b, 2014).¹¹⁵

The RegulationRoom project was undertaken during the Obama administration and was carried out in conjunction with officials from the US Department of Transportation (DoT) and the Consumer Financial Protection Bureau (CFPB). As part of the project, Farina et al created RegulationRoom, a website that used Web 2.0 technologies and related tools to encourage and facilitate discussion and obtain feedback from members of the public in response to particular rule-making initiatives of the DoT and CFPB.¹¹⁶ During the various rule-making proceedings, DoT and CFPB encouraged the public to use the RegulationRoom website by including information about it in their formal notices of proposed rule-makings and in their publicity about rulemaking. Farina et al found that participation rates increased as a result of the different strategies they deployed.¹¹⁷

Examples of steps taken by the interdisciplinary RegulationRoom project team to reduce the four participation barriers when the CFPB sought public input on possible rules regulating consumer debt collection practices¹¹⁸ are set out in Table 5 below.¹¹⁹

¹¹⁵ The principal work we draw on here is Cynthia R Farina, Mary K Newhart, Claire Cardie, Dan Cosley, Cornell eRulemaking Initiative (CeRI) 'Rulemaking 2.0' (2011) *University of Miami Law Review* 395.

¹¹⁶ See <<http://regulationroom.org/>>.

¹¹⁷ The VTaiwan initiative, which involves the use of an electronic discussion platform to help engage citizens in the public consultation process, established in 2015 by Taiwan's Finance Ministry, has also been modelled on the RegulationRoom project. See <<https://info.vtaiwan.tw/>>.

¹¹⁸ Farina et al, above n 115, 1551-53, 1556-1558, 1560-63, 1565-1566.

¹¹⁹ For more information about these and other strategies, see Cynthia R Farina and Mary J Newhart, *Rulemaking 2.0: Understanding and Getting Better Public Participation* (2013) 21-37.

Participation Barrier	Steps Taken to Reduce Barrier
Lack of Awareness	Development of an 'outreach plan' designed to notify missing stakeholders of the opportunity to submit comments on the proposed rule-making where they already obtain information related to their needs and interests. The plan included the use of conventional and social media; direct communication with missing stakeholders; and enlisting organisations and 'opinion' leaders to pass the notice on to their members/readers. ¹²⁰ All notices provided included three elements: (1) an explanation of how the proposed action would affect relevant stakeholders; (2) a statement that stakeholders had a right to comment on the proposal; and (3) the CFPB wanted public input and had a legal responsibility to review and consider every comment before making a decision.
Information Overload	Engaged in 'information triage' : identified the relative importance of information in rule-making documentation drafted by CFPB and the information needed for participants to comment effectively. Information was then organised into topic/sub-topic posts on the RegulationRoom website. 'Translated' the information in the rule-making documentation drafted by CFPB and rewrote it into plain English. Short sentences were used. Jargon and technical terminology were avoided. Engaged in 'information layering' , which involved the use of hyperlinks and glossaries so individuals could find more information if they chose to. ¹²¹
Low Participation Literacy	Participation was encouraged/supported by website design, substantive content and facilitative moderation. The RegulationRoom website included a 'carousel' that provided video/text explanations of the rule-making process and how to comment effectively. Comment streams were placed to the right of sub-topic posts in order to signal the subject of the relevant sub-topic was central to the discussion threads. Individuals were required to comment on specific sub-topics, which helped ensure contributions were focused to the specific issue. The use of information layering also assisted participants who had different levels of knowledge and wanted access to more or less information. Facilitators were used to point participants to relevant information; encourage them to give reasons for their position; consider alternative perspectives; and offer alternative solutions. ¹²²
Motivational Barriers	At the very beginning, information that could add value to the rule-making process and the missing stakeholders who could provide that information were identified. Messages/website content sought to convey the same information included in the notices listed in Lack of Awareness. In addition, it was emphasised that 'good' comments could make a difference to the outcome of the process. When the final decision was taken, messages explaining where and how comments had an impact on the process were also sent to missing stakeholders who participated in the process.

Table 5: Farina et al's participation barriers and steps taken to reduce them

¹²⁰ We note this process is not unlike the role that ACCAN undertook when it consulted with its members on the draft Telecommunications Consumer Protections Code in 2018. See section 3.5.

¹²¹ To see exactly how relevant information was translated and layered, go to <http://regulationroom.org/rules/consumer-debt-collection-practices-anprm/>.

¹²² To see the carousel, location of comment streams and interventions made by moderators, go to <http://regulationroom.org/rules/consumer-debt-collection-practices-anprm/>.

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.¹²³ 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.

¹²³ See https://www.gov.uk/government/publications?publication_filter_option=consultations/.

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 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.¹²⁴ 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.¹²⁵ 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).¹²⁶ 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

¹²⁴ See section 3.21.1 above.

¹²⁵ 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>.

¹²⁶ See also section 6.2.2 below.

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.

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.

Possible measures to assist organisations representing consumer and citizen interests

Two measures could be taken to help reduce submission fatigue. First, industry bodies and schemes could do more of the preliminary work many consumer and public interest organisations currently need to do before they are able to ask their members for their input. Contributions from Round Table participants suggest that most of that preliminary work consists of setting out an accessible summary of the proposed rules and the background information needed to evaluate them. (See section 5.2.3.) Summaries should be written in plain English and, where appropriate, information layering techniques could be used.

Second, if, as at least one Consumer Round Table participant stated, industry bodies and schemes are repeatedly asking organisations representing consumer and citizen interests for the same or similar information, they could each develop an internal electronic library of previously received consumer and public interest submissions to which they can refer. In addition, regulators with responsibility for registering co-regulatory codes, such as ACMA and the eSafety Commissioner, could consider developing an electronic repository of submissions made by consumer and public interest organisations to co-regulatory schemes that all industry schemes may access if appropriate and when required.

Finally, to help overcome motivational barriers, industry bodies and schemes could involve consumer and citizen organisations much earlier in the rule-making process – a point that was made strongly by all representatives at the Consumer Round Table. As mentioned in section 5.2, publishing an issues paper or even simply ringing consumer and public interest organisations with an interest in the relevant subject matter before issuing an issues paper might create the trust and confidence in the industry rule-making process that will encourage them to make written submissions.¹²⁷

Recommendation 3: Industry schemes could provide consumer and public interest organisations with plain English and easily accessible summaries of proposed rules and related background for distribution to consumer and citizen stakeholders.

Recommendation 4: Industry schemes could develop libraries of submissions made by consumer and public interest organisations, and a regulator such as ACMA or the eSafety Commissioner could develop an electronic repository, accessible by all industry schemes, of submissions made by consumer and public interest organisations.

Recommendation 5: Industry schemes could seek the input of consumer and public interest organisations during the ‘formative stage’ of rule-making by seeking their input into issue papers, including the formulation of any questions they pose.

Final thoughts on written submissions

The measures listed above are all possible measures that might increase the number of citizens and consumers who make written submissions. However, as Farina et al suggest in their work, it is also important to consider if it is reasonably feasible for industry to provide the level of support that would be needed to implement them. In other words, is the level of investment required in terms of money and time to facilitate the types of contributions that would enhance industry rule-making worthwhile? The investment might generate valuable insights, but industry participants might seek to pass on the associated costs to their customers. It is also possible that similar outcomes in terms of the quality of information obtained might be achieved by more cost-effective means.

We consider the issue of alternative means of public engagement in section 6.2 (below) and argue that when seeking to engage individual consumers and citizens, industry schemes should make greater use of surveys and focus groups and consider experimenting with citizen juries and deliberative polling. These mechanisms are, in our view, more likely to increase consumer and industry participation and stimulate greater dialogue between them and industry schemes at a lower cost. However, the industry schemes which continue to rely on written submissions as a form of

¹²⁷ We revisit this point in section 6.3 below.

public engagement should at a minimum implement the measures for organisations representing consumer and citizen interests identified earlier. These organisations are the entities that industry schemes assume will reach out to their members for comment and they need support both to maintain their own motivations to become involved in industry-public engagement and to facilitate the participation of their members. Preparing plain English summaries and implementing information layering techniques will also increase the likelihood of participation by individual consumers and citizens.

6.2 Experimentation with alternative mechanisms

6.2.1 Surveys, focus groups and round tables

As noted in section 5.1, surveys, focus groups and round tables have been used by a few industry schemes but in most cases not regularly or extensively. However, we believe that greater use of these mechanisms, which require industry to more actively solicit information and contributions from consumers and citizens, are more likely to result in better quality engagement. ACCAN, for example, has used focus groups to explore the question of whether Skype technology is an adequate alternative to national video relay services. The CWA representative at the Consumer Round Table also commented:

I like the idea of focus groups because (a) they're smaller groups, but (b) it was mentioned before about people feeling disconnected and that there is no point in making time to have a say, or write a submission, because they feel like they're not going to be listened to, so if the people who are looking for the information are prepared to go somewhere marginally closer to the people they're trying to talk to, it actually then conveys a message that we are actually interested. We're prepared to give up our time to come and see you, so it actually – it probably has a dual effect of not only giving people an opportunity to speak, but it makes them feel like somebody wants to hear what they've got to say.

Industry would need to compensate focus group participants for their time (which was identified as a significant barrier to participation) and/or otherwise offer them some form of incentive to participate. For example, one consumer representative noted food would encourage older people to contribute. Another representative agreed, adding that 'the value of the conversations you have over food just gives the back story of people who you're consulting with and give[s] more confidence to what they're saying.' However, these costs are likely to be much less than those that would need to be incurred to overcome the barriers to participation citizens and consumers face when making written submissions.

We would also encourage industry schemes to consider making use of citizen juries and deliberative polling. Further research (which is outside the scope of this report) is required before a citizen jury and/or deliberative poll could be designed for use in the context of industry rule-making. However, if used correctly, these mechanisms could serve as a cost-effective way to engage consumers and the public that more closely approximates the dialogue that responsiveness requires. Below is a brief explanation of the two alternative mechanisms along with examples of where and how they have been used.

6.2.2 Citizen juries

Citizen juries (also referred to as ‘citizen panels’ or ‘consensus conferences’) involve between 12 and 20 members of the public or a customer base meeting to discuss a particular policy issue or problem (Rowe & Frewer 2000, p. 9). Participants are selected by organisers to be representative of the designated population or customer base in an attempt to ensure the ‘typical’ views of all similarly situated citizens or customers are obtained. Jury members are first presented with information from ‘experts’ nominated by relevant stakeholders and are permitted to ask questions of the experts. Then they deliberate the issue among themselves and draft a report or recommendation. Discussion is usually facilitated by an independent moderator and jury members are expected to reach a consensus (Marchant & Askland 2003, pp. 121-22). The duration of citizen juries varies, but usually involves meetings over a few days (Rowe & Frewer 2000, p. 9).¹²⁸

Citizen juries are being used by industry in the UK. When preparing business plans for submission to the Office for Water Services Regulation Authority (Ofwat) for assessment during price control reviews, water companies have established citizen juries in order to solicit relevant information from their customers (Hand, Metcalfe & Rundhammer 2018, pp. 10-16). Ofwat expects water companies to enable ‘customers to engage with and influence all parts of their business plans’ (Littlechild & Mountain July 2015, p. 30),¹²⁹ and to this end stipulates (amongst other things) that water companies must engage directly with their customers and not solely through customer representatives (Littlechild & Mountain July 2015, p. 31). Ofwat does not prescribe the mechanisms the water companies must use to achieve this objective. However, citizen juries have become one of the ways water companies have met Ofwat’s expectations (Hand, Metcalfe & Rundhammer 2018, p. 10).

6.2.3 Deliberative polling

Deliberative polling is a variant of the citizen jury. Deliberative polling combines polling of a statistically representative sample of citizens and/or customers with deliberation (Fishkin 2009, p. 25, Fishkin 2018, ch 19). Deliberative polling usually involves a three-step procedure. First, there is a poll of representative participants on a particular matter. Participants then meet face-to-face to deliberate the issue over a day or two. Before meeting face-to-face, participants are given briefing materials to read. On arrival, they are randomly divided into small groups where they discuss the matter. Trained moderators facilitate small-group discussion and encourage participants to ask questions of competing experts and other stakeholders during later sessions with all participants. At the end of the face-to-face meeting, participants then take the same poll they completed at the start of the process. Results of the poll are announced and a summary of the small-group discussions is given (Fishkin 2009, p. 26). It has been said that deliberative polling is a more robust method for gathering data than a citizen jury because probability sampling is incorporated into the process.¹³⁰

¹²⁸ There is an extensive literature on citizen juries and it is not possible to summarise all of it here. For more detailed overviews, see, eg, Stewart, Kendall & Coote, (21 November 1994).

¹²⁹ See also Ofwat (25 May 2016).

¹³⁰ For further discussion of the advantages and disadvantages of each mechanism, see Marchant and Askland (2003, pp. 120-124). See also Sanders (2010), Azmanova (2010), Mansbridge (2010) and Levinson (2010).

Deliberative polling has been carried out in 24 countries worldwide, including Australia,¹³¹ and between 1996 and 1998 was used by electricity companies in Texas to inform the development of ‘integrated resource plans’ – plans, submitted to the Texas Public Utility Commission, that set out how they would meet the current and future electricity needs of customers within their service areas. The Texas Public Utility Commission required that the electricity companies take into account the preferences of their customers when developing their plans (Luskin, Fishkin & Plane 1999, 3), and the electricity companies elected to use deliberative polling to elicit better informed customer opinion.

Recommendation 6: Schemes could make greater use of surveys, focus groups and round tables, compensating participants for their time, and consider making use of citizen juries and/or, deliberative polling.

6.3 Working committees

In section 5.2.2, we highlighted that Round Table participants believe that having ACCAN representatives serve on Comms Alliance working committees requires substantial time and resource commitments. It was also noted that power imbalances between industry and consumer representatives may affect the way in which discussion unfolds on working committees and these imbalances may be contributing to the ambivalence consumer representatives expressed about the value of their participation. ACCAN also suggested that there should be an equal number of industry and consumer representatives on working committees, especially when important codes are developed, to help overcome these imbalances.

We acknowledge that appointing consumer representatives to industry working committees has its difficulties and it may be appropriate for more than one industry and consumer representative to serve on working committees to ensure consumer and citizen voices are heard. However, we agree with the ACMA representative that working committee participation is a ‘superior tool’ of consumer and public engagement; indeed it is the tool most likely to satisfy the four criteria of responsiveness.¹³² Consumer representatives on self- and co- regulatory industry working committees can challenge industry by demanding it provide reasons for its conduct and to think through the actions it proposes to take to address any underlying regulatory problems. In co-regulatory rule-making contexts, consumer representatives also push regulators to ask questions of and demand possible solutions from industry.

We therefore commend the six industry schemes that have appointed consumer and public interest organisations to their working committees and strongly recommend that other industry schemes appoint consumer and public interest representatives to their working committees when drafting and/or revising rules with a significant impact on consumers and citizens.

¹³¹ A deliberative poll was conducted before the referendum on whether Australia should become a republic.

¹³² See also Lee (2018, pp. 230-232); Ayres and Braithwaite (1992, chs 3 and 4).

Recommendation 7: All industry schemes could consider appointing consumer and public interest representatives to their working committees when drafting and/or revising rules with a significant impact on consumers and citizens.

6.4 Timing of issue-specific public engagement and active data collection

We have already suggested in section 6.1.2 above that earlier involvement of consumer and public interest organisations in industry rule-making processes is necessary to increase the number of written submissions industry schemes receive from them and/or their members. Earlier involvement would give consumer and public interest organisations more time to consult with their members and vulnerable people and help overcome the cynicism that many such organisations have about industry's reliance on written submissions. However, we return here to the issue of when industry should engage with consumers, citizens and related organisations because of the overwhelming view of Consumer Round Table representatives that engagement occurs too late and the wider impact earlier public engagement is likely to have on the rule-making process.

As Consumer Round Table representatives stated, consumer and public engagement earlier in the process significantly increases the likelihood that any rules industry formulates will be targeted at relevant issues (ie, the underlying behaviours and practices that industry needs to reform and/or regulate). We note that some industry schemes have used different mechanisms to solicit consumer/public input to identify and describe issues. However, use of these mechanisms is not the norm for most of the schemes considered in this report, and no scheme is using mechanisms of consumer/public participation to assist with issue identification and description. Even the Communications Alliance, which appoints consumer representatives to its consumer code working committees, does not appear to involve representatives when framing issues to be addressed in codes. Our data does not enable us to evaluate which engagement mechanisms best assist with issue identification and description. Nevertheless, we believe there is sufficient evidence to suggest industry schemes should seek to engage consumer and public interest organisations during issue identification and description. Again, involvement in issue framing would more closely approximate the exchange of views that responsiveness requires.

A related question is whether industry schemes should as a matter of practice, or be required to, actively solicit information specific to the issues under consideration while discharging their fact-finding functions. Active solicitation would involve using mechanisms of consumer and public engagement to gather data that informs issue identification and description. Currently, no industry schemes make use of consumer and public engagement mechanisms during fact-finding; however, gathering better data at the outset will enhance the probability that appropriate regulatory solutions will be developed and adopted. We believe it is likely that industry schemes may lack important information that active data collection could compile, but our limited data does not permit us to properly evaluate if existing fact-finding mechanisms are inadequate. To the extent that industry schemes require further additional information, they should not discount the value that mechanisms of consumer and public engagement might provide.

Recommendation 8: Industry schemes could seek to engage consumer and public interest organisations when they identify and frame issues.

6.5 Minimum public engagement expectations

As we noted in section 2.1, some of the industry schemes discussed in this report are not subject to any direct statutory regulation (eg, they are entirely self-regulatory). Certain others are not subject to any direct statutory regulation but are endorsed or recognised by the Australian government. A third group is subject to some form of direct statutory regulation. Nevertheless, because government relies on most (if not all) of these schemes to undertake regulatory functions that it would otherwise perform, we believe that industry schemes should (at an absolute minimum) be expected to publish their rules in draft and provide consumers, citizens and related organisations with an opportunity to make written submissions. Industry bodies would be free to deploy additional mechanisms of consumer and public engagement as they believe are appropriate in the circumstances, but the extensiveness of consumer and public engagement should be dictated by factors such as the impact of new and revised rules on consumers and citizens. Of the 20 schemes we identified, seven (ABAC, AANA, ABC, APC, FCAI, IAB and IMC) do not publish their rules in draft and/or provide consumers, citizens and related organisations with an opportunity to make written submissions. With the exception of the ABC, all are not subject to any statutory regulation.

Recommendation 9: All industry schemes should (at an absolute minimum) be expected to publish their rules in draft and provide consumers, citizens and related organisations with an opportunity to make written submissions.

6.6 Possible statutory and related modifications

6.6.1 Amendments to legislative frameworks

Table 1 in Chapter 2 above highlights that there are four principal differences between the consultation provisions in the statutory frameworks that regulate the development of codes of practice drafted by various sections of the telecommunications, media and online industries and registered by either ACMA or the eSafety Commissioner. However, in our view, these differences cannot be justified, and in the absence of a coherent rationale for their differences, the consultation provisions in the legislative frameworks regulating co-regulatory rule-making in the communications sector should be harmonised. Below the four principal differences in the frameworks are first explained. Two additional observations about the frameworks are then made before we set out our specific recommendations.

First, consultation with ‘at least one body or association that represents the interests of consumers’ is required only in Part 6 of the TA. The absence of a similar obligation in Part 9 of the BSA is perhaps not surprising, given the emphasis on the role of citizenship and citizen interests in traditional media regulation and content regulation more generally. However, Part 9 of the BSA permits subscription broadcasters to formulate codes relating to ‘dealings with customers of the licensees, including methods of billing, fault repair, privacy and credit management’.¹³³ These matters are similar to matters that sections of the telecommunications industry have addressed in Part 6 codes, but relevant sections of the telecommunications industry must consult with a ‘body or association that represents the interests of consumers’ before their codes can be registered by ACMA. Likewise, codes of practice registered under Schedules 5 and 7 of BSA may relate to aspects of customer

¹³³ BSA s 132(2)(k).

relationships (eg handling of content-related complaints), but there is no requirement imposed on internet service providers and content providers to consult with a body or association representing the interests of consumers.

Second, only Part 6 of the TA stipulates that submissions made by members of the public and industry in response to invitations from relevant industry bodies and associations must be published on their websites. Why a similar obligation does not extend to all industry bodies and associations who are permitted to draft and seek the registration of codes of practice, or why the obligation applies only to industry bodies and associations representing sections of the telecommunications industry could not be determined. There may be good reasons for not requiring publication of submissions made to certain industry bodies and associations, but to our knowledge no such rationale has been articulated by either government or Parliament.

Third, Part 6 of the TA is the only provision that requires a draft of a code of practice to be published on the websites of industry bodies and associations. In practice, industry bodies and associations representing other sectors of the media and online industries are publishing drafts of codes on their websites, but they are not obliged to do so.

Fourth, Part 9 of the BSA is the only legislative provision that does not explicitly require publication of a draft of a code of practice, the extension of an invitation to members of the public to make submissions within a specified minimum period of 30 days and consideration of submissions received from members of the public. ACMA must be satisfied that ‘members of the public have been given an adequate opportunity to comment on the code’, but again the rationale for treating broadcasting licensees differently could not be determined.

In addition to these four differences, we note that there is no provision in any of the legislative frameworks discussed in this report that requires consultation with at least one body or association that represents citizen or public interests. Consumer interests are frequently equated with public interests by governments and others in a number of areas of regulation (Schudson 2006). Nevertheless, there are important distinctions between consumer and public interests and both types of interest need to be adequately taken into account when codes of practice are developed. As the ACCC has recognised in its Digital Platforms Inquiry Report (2019, chs 4 & 6), codes of practice relating to the quality of news and journalism developed under Part 9 of the of the BSA, in particular, directly affect public interests, but codes registered under Part 6 of the TA and other co-regulatory frameworks can also implicate public interests. ACCAN’s existing remit extends to universal service and it also does some work in relation to the quality of live captions and audio description. However, to our knowledge, there are currently no bodies or associations representing the other full range of public interests that the provision of communications content and services raises. Below in section 6.6.3 we consider whether such a body or association should be established (and supported by government) or if government should require ACMA (or any future Regulatory Authority) to establish a Content Board, one of whose functions would be to advocate on behalf of viewers, listeners and citizens.

A final observation about the co-regulatory legislative frameworks (and the related expectations ACMA may have with respect to whether members of the public have been given an adequate opportunity to comment on draft codes developed under Part 9 of the BSA) is the absence of any requirement on industry bodies and associations to engage directly with individual consumers,

viewers and/or citizens when formulating codes of practice. The question arises as to whether or not the co-regulatory legislative frameworks or ACMA should impose such a requirement. As mentioned in section 6.2.2, UK regulators such as Ofwat are starting to require industry participants to engage more directly with their customers (Centre for Analysis of Risk and Regulation February 2016). Legislation applicable to Ofwat does not appear to mandate that it impose obligations of direct engagement on water companies. Rather, Ofwat insists upon it. We also recognise that, unlike many markets in the various sectors that comprise the communications industry, water markets are not competitive. Typically, water companies have monopolies in the geographic areas they serve. In addition, we recognise there is some risk of a reduction in the quality of consumer and citizen input overall if the experience of representative bodies is not engaged. This risk may be higher in situations where there is a need for some technical knowledge, and also in situations where rules are needed to protect certain groups of consumers whose input is unlikely to be gained through large-scale surveys or similar mechanisms. However, direct engagement with consumers and citizens (by way of focus groups, surveys, citizen juries or deliberative polling, for example) during code development, in addition to the involvement of representative bodies, might better inform relevant industry schemes and regulators such as ACMA.

To address the issues identified above, we believe the consultation provisions in the legislative frameworks that underpin co-regulatory rule-making in the communications industry should be harmonised. The consultation provisions of Part 6 of the TA should serve as the model, because they are the most extensive and more consistent with the objectives of responsiveness. However, the Part 6 consultation provisions should be modified to require an industry body to publish an issues paper (prior to publishing a draft code) on which consumer and public interest organisations (and others) may comment. This suggestion would provide consumer and public interest organisations with at least one opportunity to provide their input earlier in industry rule-making processes, thus increasing the likelihood that industry identifies all relevant issues.

No Round Table participant commented on our suggestion that co-regulatory legislative frameworks should require some form of direct engagement with consumers and citizens (eg, focus groups, surveys, citizen juries or deliberative polling). However, we remain of the view that there is merit in the proposal, providing direct engagement does not seek to replace the informed and experienced contributions that are made by representative bodies.

Recommendation 10: The legislative frameworks that underpin co-regulatory rule-making in the media, online and telecommunications sectors should be harmonised through the setting of standard, minimum requirements for consumer and citizen consultation.

Recommendation 11: When developing codes of practice under a co-regulatory legislative framework, industry schemes could seek to build on the input from representative bodies by conducting some form of direct engagement with consumers and citizens where this might address known gaps in representation.

6.6.2 Addressing disparities in consultation practices between industry schemes and ACMA

During the course of our research, we found one instance where we believe industry schemes consulted the public once when it first adopted a specific rule in a code of practice to be registered

under one of the statutory frameworks, but ACMA consulted the public twice when it first adopted rules with similar content by way of a legislative instrument.

We understand that when television and radio broadcasters' rules sought to restrict the promotion of live odds during live sporting events (and related advertising) in their Part 9 codes of practice in 2012 and 2013 in response to pressure from the Council of Australian Governments and the Prime Minister,¹³⁴ they undertook one round of public consultation. They also conducted one round of public consultation before amending the gambling advertising rules¹³⁵ in their codes of practice in 2018; this was in response to announcements in 2017 by the Minister for Communications and the Arts that advertising restrictions would be increased.¹³⁶ However, ACMA consulted the public twice before imposing comparable rules on online service providers, adopted in accordance with Schedule 8 of the BSA.¹³⁷ Online service providers and their practices of promoting gambling during live sporting events were not previously subject to any form of regulation before ACMA adopted the online content service provider rules on 12 July 2018. However, as ACMA itself has explicitly recognised, the rules applicable to broadcasters and online content service providers are substantially similar and the effect of both sets of rules on consumers and the public is the same.¹³⁸ In this instance at least, consultation practices appear to have turned on the classification of the instrument implementing the rule and the entity conducting the consultation rather than the impact they may have on consumers and the wider public.

In our view, the extensiveness of industry public consultation for co-regulatory codes should turn on the impact the proposed rules are likely to have on consumers and the wider public. Co-regulatory schemes should be expected to consult as extensively as public regulators; ultimately, the rules co-regulatory bodies and schemes adopt can acquire legal force – they can be enforced by ACMA if industry fails to comply with them.¹³⁹ Responsiveness does not necessarily require industry to use the same methods of consumer and public engagement employed by ACMA, but it does require an equivalent amount of consumer and public engagement to ensure each of its four elements is satisfied. The discrepancy we found in ACMA and industry's public consultation practices might be explained because ACMA was satisfied that the schemes concerned had used other mechanisms of public engagement, in conjunction with one round of public consultation, to ensure rule-making was responsive. We do not have the data to properly make that assessment. However, the example illustrates that disparities in the public engagement practices between industry schemes are

¹³⁴ ACMA, 'Betting Sports Odds and Gambling Codes Registered' (Media Release, 11 October 2013), archived at <https://webarchive.nla.gov.au/awa/20140212131935/http://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/betting-odds-and-gambling-codes-registered>.

¹³⁵ See the ASTRA, CRA and Free TV summaries in Lee & Wilding (2019).

¹³⁶ Minister for Communications and the Arts, Sen Mitch Fifield, 'New Gambling Advertising Rules to Commence' (Media Release, 16 March 2018).

¹³⁷ See *Broadcasting Services Online Service Provider Rules 2018* (Cth).

¹³⁸ See page 2 of the consultation document prepared by ACMA, Draft online content service provider rules—Gambling promotional content provided in conjunction with live coverage of a sporting event. Further information is available at: <https://www.acma.gov.au/consultations/2019-08/online-content-service-provider-rules-consultation-82018>.

¹³⁹ Whether there is adequate enforcement of co-regulatory codes of practice raises wider questions that are outside the scope of this report.

occurring, and to the extent industry is not using other mechanisms and/or achieving responsiveness by employing them, ACMA should expect industry to consult as often as it would.

Recommendation 12: The extensiveness of industry public consultation for co-regulatory codes should turn on the impact the proposed rules are likely to have on consumers and the wider public; ACMA could set expectations of industry to assist in this.

6.6.3 Widening ACCAN's remit and/or creating a new public interest body

As discussed in section 6.1 above, more attention to public consultation process design, including greater use of the Internet, social media and related tools, has the potential to enhance public consultation in industry rule-making. However, we noted in section 6.1 that these measures might not be the most cost-effective when compared to the alternative means we highlighted in section 6.2. Several Round Table participants also indicated that social media and related tools have significant limitations, even if they were to be adopted on a broader scale.¹⁴⁰ Equally, it has been recognised by other bodies that recognised that reliance on social media alone will not be sufficient to ensure consumer and public interest perspectives are adequately fed into government as well as industry rule- and decision-making processes. For example, in March 2017, the Productivity Commission wrote:

While social media has significantly changed the way consumers are able to voice their concerns, it is not a substitute for organised and informed consumer advocacy. Being able to make an effective contribution to the policy debate requires time, resources and know-how (p. 217).

Similarly, overseas regulators who have required direct engagement with customers have also insisted market participants obtain feedback from established consumer advocacy organisations. For example, Ofwat mandates the creation of 'Customer Challenge Groups' whose members include (among others) established consumer advocacy organisations (Hand, Metcalfe & Rundhammer (2018, p. 11).

The Australian Department of Communications acknowledges that there is 'an ongoing need for consumer participation in policy and regulatory processes' in the telecommunications sector and believes that 'a telecommunications-specific consumer representative body [such as ACCAN] remains an appropriate model to ensure effective consumer representation' (DOCA February 2017, p. 8). It has also committed funding for ACCAN at least until 2022. However, ACCAN's remit (and consequentially its work) has been limited to issues relating to the provision of telecommunications and Internet services.¹⁴¹ To date, as ACCAN is funded to represent telecommunications consumers, not content consumers, and with the exception of direct carrier billing,¹⁴² it has not focused on the customer-related aspects of content service provision (eg billing and complaint handling) across

¹⁴⁰ See section 5.2.2.

¹⁴¹ *Constitution of Australian Communications Consumer Action Network Limited* (31 October 2012) cls 3.1-3.2.

¹⁴² In the case of content services like apps and games provided on mobile devices, direct carrier billing allows subscribers to make purchases without having to provide their bank account details. The costs of all such purchases appear on the bills they receive from their mobile provider. See the explanation at <<https://www.pcmag.com/encyclopedia/term/63496/direct-carrier-billing>>.

distribution platforms. It has also not become involved in debates relating to the regulation of content provided over distribution platforms, such as radio, television and the Internet, or the ACCC's Digital Platforms inquiry, which involved an investigation into the impact of online search engines, social media and digital content aggregators on competition in the media and advertising services market.

In addition, there are no bodies or associations dedicated to representing the public's interests on these matters, and with some possible exceptions, such as the Consumer Policy Research Centre, existing generalist bodies and associations such as the Public Interest Advocacy Centre and Human Rights Law Centre in Victoria have not been heavily involved in communications-related debates. Interest groups make submissions to public consultations on industry codes of practice developed under the BSA, but there are no specific bodies or associations, provided with the level of funding ACCAN receives, tasked with protecting wider public interest concerns, such as content classification, integrity in quality in news and journalistic content and the ramifications of social media platforms on Australian democracy.

The first issue that merits consideration is **whether the concerns of consumers of content are adequately represented** in industry rule-making and other regulatory processes. If those interests are not adequately represented, then it must be asked if it is appropriate for ACCAN's role to be extended to include the customer-related aspects of content service provision. If it is not appropriate for ACCAN to serve that function, it may be necessary to create and fund another representative body which would perform such a role.

The second (and more complex) question that deserves attention is **whether the absence of citizen interest representation should be addressed**. Assuming it should be addressed, there are at least three possible ways some citizen interest representation could be achieved. One option would be to establish a new body or association similar to ACCAN tasked with representing citizen interests. The new body would need to be financially supported by government, and to that end the BSA would need to be amended to incorporate a provision similar to s 593 of the TA. Another option would be to impose a statutory obligation on ACMA (or any future Regulatory Authority) to establish a Content Board, one of whose functions would be to advocate on behalf of viewers, listeners and citizens. The Content Board could be modelled on the Content Board of the UK's Office of Communication (Ofcom). Ofcom's Content Board is a committee of Ofcom's Board and responsible for examining 'issues beyond the consumer interest, with focus on those aspects of the public interest which competition and market forces do not reach'.¹⁴³ Under the applicable UK law, Ofcom is required to ensure that the Content Board has members which can represent the interests and opinions of people living in the different parts of the UK.¹⁴⁴ The Content Board currently has 13 members.¹⁴⁵ A third option would be to amend the legislation that establishes ACMA to require the Minister to appoint one or more people representing citizen interests as associate members of the Authority.¹⁴⁶

¹⁴³ Ofcom, *Content Board* (Web Page) <<https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>>

¹⁴⁴ *Communications Act 2003* (UK) s 12.

¹⁴⁵ For more on Ofcom's Content Board, see Lunt & Livingstone (2012).

¹⁴⁶ See *Australian Communications and Media Authority Act 2005* (Cth) s 24.

Below we set out observations of Round Table participants relevant to each of these issues and our recommendations made in light of them.

Addressing content consumer needs

During the Consumer Round Table, it was noted that the demand for video-on-demand streaming services such as Netflix, Foxtel and Spotify continues to grow and that it is becoming increasingly more difficult for ACCAN to distinguish between telecommunications and content services because many telecommunications customers receive content services as part of their phone packages. The ACCAN representative stated it was ‘a bit strange’¹⁴⁷ that ACCAN’s work does not deal with the customer-related aspects of content service provision,

because there’s a contract formed. We [ACCAN] are concerned about the bill – the way the bill looks, the clarity of the information [provided], whether people are being told up front what charges are going to be incurred – that whole relationship we’re very concerned with.

Expanding ACCAN’s remit so it can address the customer-related aspects of content service provision was also seen as a logical and natural extension of the work ACCAN currently performs. No participant suggested that another representative body funded like ACCAN should be established to perform such a role. Indeed, many felt that creating a new body would only create confusion about the jurisdiction of the new body and ACCAN for consumers and others. However, it was stated that if ACCAN’s remit were extended, it would need to receive additional resource and its responsibilities in the telecommunications sphere should not be diminished in any way.

We agree that representation for customer-related aspects of content service provision is needed now and will most likely be needed in the future. We also agree that the creation of an entirely new organisation to perform this function would be likely to create confusion for consumers and unnecessary conflict between ACCAN and another body. Minimising conflict is particularly important as customer-related issues relating to the provision of telecommunications and media services will need to be dealt with holistically in a converged communications environment. We therefore recommend that ACCAN’s remit should be expanded so it can start to address these issues and the Government should provide ACCAN with the additional funding it needs to perform this task.

Addressing citizen interests

All Round Table participants acknowledged (implicitly or explicitly) that citizen interests are an important component of content regulation now and will be in the future.

However, representatives at the Regulator Round Table and representatives from media organisations at the Industry Round Table disagreed that creating a representative body or association similar to ACCAN tasked with representing citizen interests would be feasible or desirable. A representative from the Department of Communications observed ‘the market is fragmenting so quickly’ and stated, ‘it will be very hard for any single organisation to get so many points of views from so many niche audiences or sets of consumers to represent that to us.’ A regulator representative agreed, saying, ‘I’m not sure whether the world still accommodates a single

¹⁴⁷ The debacle surrounding Optus and its live streaming of the 2018 Football World Cup provides an excellent example of the problem. ACCAN could not become involved with the issue even though it affected thousands of Optus subscribers.

[consumer or citizen-type body], or can, unless that group is very agile and very creative around being constantly responsive to who is on it, who they're representing'.

Two industry participants were concerned that the proposed body would most likely duplicate research and other work that ACMA already performs when Part 9 broadcasting codes of practice are developed. Another industry representative was concerned that creating an ACCAN-like body would elevate its views above others:

My concern would be that you've elevated a group above anyone else. You wouldn't want them to feel that their views were more important than anyone else's view. You want to encourage views from as many sectors as possible, and if you had one group that felt that they spoke on everyone's behalf it does tend to stop you being able to then go out and talk to other people. It creates quite a weird dynamic.

Representatives at the Consumer Round Table, on the other hand, were more receptive to the idea. One stated the ACCAN-like body could serve as 'a backstop, a responder of default in those public interest issues'. The representative from Women's Legal Service NSW cited image-based abuse as one example for ACCAN of the issues the body could address. Moreover, several consumer participants indicated it would be preferable for ACCAN to represent both consumer and citizen interests in order to minimise confusion and avoid any possible jurisdictional conflicts between ACCAN and another body. Again, any proposed modifications to ACCAN's remit were made subject to the proviso that ACCAN's current responsibilities should not be lessened and any additional work be separately resourced.

No participant commented on our alternative suggestion that ACMA (or any future Regulatory Authority) could be required to establish a Content Board, but one media industry participant did object to any increased role for ACMA, citing the importance of its independence from the regulator.¹⁴⁸ We did not raise the suggestion of amending the legislation that establishes ACMA to require the Minister to appoint one or more people representing citizen interests as associate members of the Authority.

Despite the concerns raised during the Round Tables, we believe that detailed consideration should be given to extending ACCAN's remit to include the representation of citizen interests in the communications industry. Clearly, more work would need to be done with consumer representatives (amongst others) to explore how, in practice, a representative body might seek to provide input on content issues for which there can be a wide range of opinions (eg, there will be differences of opinion on a matter such as gambling advertisements). However, audience fragmentation makes an ACCAN-like body with the responsibility of representing citizen interests all the more important, especially as there are no dedicated bodies currently performing this function in Australia and adverse consequences that flow from the absence of such representation are already being felt in the digital platforms arena. The views of the ACCAN-like body would not be superior to those of others. All individuals and other interested organisations would continue to be permitted to make representations to industry bodies and schemes (as they do to Comms Alliance), but the ACCAN-like body would be expected to make representations on public interest matters, thus ensuring at least some representations would be made.

¹⁴⁸ SBS, above n 44, 2.

We are also of the view that the potential contribution made by ACCAN and the members of its existing network – the network that a second ACMA representative identified as crucial to its success – are being overlooked. Many of these organisations have opinions on public interest matters, but they currently do not express their views because it is not ACCAN’s role to solicit them. If ACCAN’s remit were to be extended to include responsibility for representing public interest concerns, ACCAN would be able to draw on the members of its existing network. By no means would ACCAN be able to rely solely on its existing members. However, stimulating discussion among its existing membership base would at least increase the likelihood that contributions to industry rule-making initiatives would be made and start to address the low rates of written submissions. As we saw in section 5.2.2, ACCAN is trusted by its members and creates space for them to discuss concerns. Industry outsiders also feel ACCAN is approachable. Expanding ACCAN’s role would also have the benefit of avoiding the potential jurisdictional conflicts that might arise between ACCAN and a second-ACCAN-like body for citizen interests, which is particularly important in the communications policy area which is so fluid because of continuous technological developments.

Recommendation 13: ACCAN’s remit could be expanded to include customer-related aspects of content service provision; the Government should then provide ACCAN with the additional funding it needs to perform this new function.

Recommendation 14: ACCAN’s remit could be expanded or a similar body could be funded to provide representation of citizen interests in the communications industry, including in their interaction with digital platforms.

6.7 Implications for the future regulation of digital platforms

Our research was focused on understanding the consumer and public engagement practices in industry rule-making in the advertising, media, telecommunications and online service sectors. We therefore did not invite representatives of Facebook, Google or other digital platforms to participate in the Industry Round Table. However, as one representative in the Consumer Round Table commented, Facebook and Google are ‘like the bushfire that’s going on in the background [of this report]’. It is therefore appropriate for us to conclude this report with a few brief observations about the regulatory framework that is emerging for digital platforms following publication of the ACCC’s Final Report on its Digital Platforms Inquiry.

If the government adopts the ACCC’s recommendations, co-regulation will be one of the ways Facebook and Google will be regulated – they will engage in industry rule-making under at least two statutory frameworks. More specifically, each will be required to develop a code of practice (‘a Business Code’) for registration with ACMA that will regulate their relationships with news media businesses, which must at a minimum contain four commitments relating to:

- the sharing of data that they gather about users of news content;
- early notification of changes to the ranking or display of news content in online search results and on social media platforms;
- ‘not impeding’ opportunities for news media businesses to monetise their content on their own websites or applications and on the websites and applications of Facebook and Google; and;

- ‘fair’ negotiations when determining how revenue should be shared or how media businesses should be compensated.

Facebook and Google will also be responsible for collectively developing a code of practice (‘a Disinformation Code’) for registration with an independent regulator (possibly ACMA) that deals with the handling of complaints involving ‘disinformation’ and ‘malinformation’. Disinformation means ‘false or inaccurate information that is deliberately created and spread to harm a person, social group, organisation or country’ (ACCC 2019, p. 352). Malinformation is ‘accurate information appropriately spread by bad-faith actors with the intent to cause harm’ (ACCC 2019 p. 352).

However, the ACCC’s Final Report makes no reference to the involvement of consumer and/or public interest organisations in the development of either the Business or Disinformation Codes, even though these codes will clearly have ramifications for consumers of news media content and citizens throughout Australia. As we suggested, in section 5.3, industry engagement with consumers and citizens is an important component of responsiveness, and the absence of any discussion about how they will be involved in the development of those codes and/or who will represent their interests is deeply concerning. We strongly believe consumer and citizen should form an important part of the development of this emerging regulatory framework.

All of the recommendations made in this report have relevance to the way in which Facebook and Google should engage consumers, citizens and related organisations. The government, the Department of Communications and the Commonwealth Parliament should take them into consideration when seeking to implement the ACCC’s recommendations. We also believe that now is the appropriate time to reassess the role ACCAN or an ACCAN-like body should play in this new regime and the framework that needs to be developed for the converged communications sector.

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Appendix 1: Industry bodies and schemes within scope of this report

Industry Body or Scheme	Functions	Relevant Rules
Alcohol Beverages Advertising Code scheme (ABAC scheme)	Scheme consists of ABAC Alcohol Marketing Code, the Alcohol Advertising Pre-vetting Service and a complaints adjudication process.	ABAC Responsible Alcohol Marketing Code
.au Domain Administration Limited (auDA)	Administers the .au domain and associated second-level domains.	21 policies
Australian Association of National Advertisers (AANA)	Represents advertisers.	Code of Ethics; AANA Code for Advertising and Marketing Communications to Children; AANA Food and Beverage Code Advertising and Marketing Code; AANA Environmental Claims Code; AANA Wagering Advertising and Marketing Communications Code
Australian Broadcasting Corporation (ABC)	Various functions, including providing within Australia innovative and comprehensive broadcasting services of a high standard.	ABC Code of Practice
Australian Community Television Alliance (ACTA)	Represents free-to-air community television channels.	Community Television Broadcasting Codes of Practice
Australian Direct Marketing Association (ADMA)	The '[p]rincipal industry body for data-driven marketing and advertising'; one of four organisations of the Australian Alliance for Data Leadership Limited.	ADMA Code of Practice

Industry Body or Scheme	Functions	Relevant Rules
Australian Food and Grocery Council (AFGC)	Represents Australia's food, drink and grocery manufacturing industry. Members include Coca-Cola, Kellogg and Arnott's.	Responsible Children's Marketing Initiative for the Australian Food and Beverage Industry; Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children
Australian Narrowcast Radio Association (ANRA)	'Peak industry body representing Low Power Open Narrowcast (LPON) Radio services and the High Power Open Narrowcast (HPON) Radio services located across all States and Territories of Australia.'	Open Narrowcast Radio Codes of Practice
Australian Press Council (APC)	'The principal body with responsibility for setting standards and responding to complaints about material in Australian newspapers, magazines, their associated digital outlets, as well as a growing number of online-only publications.'	The Statement of General Principles; the Statement of Privacy Principles; Specific Standards (Coverage of Suicide; Contacting Patients) and 13 non-binding Advisory Guidelines.
Australian Subscription Television and Radio Association (ASTRA)	Represents the Australian subscription media industry in Australia.	Subscription Broadcast Television Code of Practice 2013; Subscription Narrowcast Code of Practice 2013; Subscription Narrowcast Radio Code of Practice 2013
Communications Alliance (Comms Alliance)	The primary industry body and industry co-regulatory body in the Australian communications sector.	Various, including the Telecommunications Consumer Protections Code
Community Broadcasting Association of Australia (CBAA)	Represents the interests of community radio broadcasters.	Community Radio Broadcasting Codes of Practice
Commercial Radio Australia (CRA)	Represents Australia's commercial radio industry.	Commercial Radio Code of Practice (15 March 2017)
Federal Chamber of Automotive	The peak industry organisation representing the manufacturers	Voluntary Code of Practice for Motor Vehicle Advertising in

Industry Body or Scheme	Functions	Relevant Rules
Industries (FCAI)	and importers of passenger vehicles, light commercial vehicles and motorcycles in Australia.	Australia
Free TV Australia (Free TV)	Represents all of Australia's commercial free-to-air television licensees.	Commercial Television Industry Code of Practice 2015
Independent Media Council (IMC)	Established by Seven West Media in 2012 to address reader complaints by publisher members.	Code of Conduct
Interactive Advertising Bureau Australia (IAB)	Administers the Relevant Rules (see next box), which are developed by members of the Australia Digital Advertising Alliance.	Australian Best Practice Guidelines Interest Based Advertising (or online behavioural advertising) (September 2014); Social Advertising Best Practice Guidelines 2013
Media, Entertainment and Arts Alliance (MEAA)	Union representing journalists and other media workers.	Journalist's Code of Ethics
Standards Australia	Responsible for the development of Australian standards, including standards relating to communications, information technology and e-commerce services	Various standards
Special Broadcasting Service (SBS)	Its principal function is to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.	SBS Codes of Practice

Appendix 2: Industry bodies and schemes outside the scope of this report

The report does not discuss or consider the following Australian bodies or schemes:

- dating site operators which have developed (with the Australian Competition and Consumer Commission (ACCC)) *Best Practice Guidelines for Dating Sites: Protecting Consumers from Dating Scams*;¹⁴⁹
- the Australian Music Retailers Association (AMRA) and the Australian Recording Industry Association (ARIA), which adopted a code of practice for labelling CDs and other recorded music products;
- the scheme administered by the Outdoor Media Association (OMA);
- the *Cooperative Arrangement for Complaints Handling on Social Network Sites* in which (as of 16 January 2013) Facebook, Google (YouTube), Microsoft and Yahoo! participate;
- the Fundraising Institute of Australia (FIA), which adopted a code of practice on 1 June 2018;
- Netflix or its content classification tool;
- the Association of Market and Social Research Organisations (AMSRO), which adopted *the Privacy (Market and Social Research) Code 2014* that was registered by the Australian Information Commissioner under the *Privacy Act 1988* (Cth); and
- Various transnational industry rule-making schemes.

The *Best Practice Guidelines for Dating Sites: Protecting Consumers from Dating Scams* were excluded because they relate to an online activity that is not otherwise an aspect of the advertising, media, online and telecommunications sectors.

The AMRA/ARIA code of practice applies only to physical media (ie, CDs) and has not been updated in the last 15 years.

Although the OMA publishes its own Code of Ethics, the consumer-related obligations against which complaints may be considered are those set out in other codes (principally, the AANA Advertisers' Code of Ethics, as well as other schemes considered in this report, including the ABAC and FCAI codes) and complaints are handled by Ad Standards. As OMA notes on its website, 'Although the

¹⁴⁹ See <https://www.accc.gov.au/system/files/ACCC%20Best%20practice%20guidelines%20for%20dating%20sites_FA.pdf>

content displayed in OOH [out of home] is not owned by the operator, they still must ensure that it does not infringe on the Codes the industry is governed by'.¹⁵⁰

The development of the *Cooperative Arrangement for Complaints Handling on Social Network Sites* was led by the Commonwealth government's Consultative Working Group on Cyber Safety – a working group that was established by the then Minister for Broadband, Communications and the Digital Economy, Senator the Hon. Stephen Conroy in 2008. Representatives from industry, the then Department for Broadband, Communications and the Digital Economy and the Australian Communications and Media Authority sat on the working committee, but the development of the Cooperative Arrangement was initiated and directed by government. The FIA's code of practice is applicable to organisations who engage in fundraising activities – organisations such as charities and other not-for-profit organisations. Fundraisers may make use of communications media to fundraise, but the focus of this report is on consumer and public engagement in self- and co-regulation of industry participants within the advertising, media, online and telecommunications sectors.

Classification decisions made by the Netflix automated tool are (by a Ministerial decision under the *Classification (Publications, Film and Computer Games) Act 1995* (Cth)) taken to be valid but reviewable decisions (eg, the tool may rate content as G, but the Classification Board may replace that classification decision with a PG decision). The National Classification Code and associated guidelines which (with the Act) contain the rules are statutory instruments. Thus, they fall outside the scope of this report.

The *Privacy (Market and Social Research) Code 2014* is applicable only to full and associate members of AMSRO. Market participants in the advertising, media, online and telecommunications sectors may use services provided by AMSRO members, but they are not AMSRO members. The code does not apply directly to them. It is also not drafted by them.

Transnational industry rule-making bodies, such as the Internet Corporation for Assigned Names and Numbers (ICANN), the Institute of Electrical and Electronics Engineers (IEEE), the International Electrotechnical Commission (IEC), the International Organisation for Standardization (ISO) and the Internet Engineering Task Force (IETF), are also not considered in this report. It is acknowledged that transnational industry rule-making has ramifications for Australian consumers and citizens, and a comparison and preliminary evaluation of mechanisms for consumer and public participation within that process is also important. However, it was not possible to carry out that additional research and analysis with the amount of funding awarded by ACCAN.

¹⁵⁰ See <http://www.oma.org.au/regulation-and-community/advertising-content-and-self-regulation>.

Abbreviations

AANA	Australian Association of National Advertisers
ABA	Australian Broadcasting Authority (one of ACMA's predecessors)
ABAC	Alcohol Beverages Advertising Code scheme
ABC	Australian Broadcasting Corporation
ACA	Australian Communications Authority (one of ACMA's predecessors)
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ACTA	Australian Community Television Alliance
ADMA	Australian Direct Marketing Association
AFGC	Australian Food and Grocery Council
ANRA	Australian Narrowcast Radio Association
APC	Australian Press Council
ASTRA	Australian Subscription Television and Radio Association
auDA	.au Domain Administration Limited
BSA	<i>Broadcasting Services Act 1992</i> (Cth)
CBA	Community Broadcasting Association of Australia
Comms Alliance	Communications Alliance
CRA	Commercial Radio Australia
DOCA	Department of Communications and the Arts
FACTS	Federation of Australian Commercial Television Stations (Free TV predecessor)
FCAI	Federal Chamber of Automotive Industries
Free TV	Free TV Australia
IGA	<i>Interactive Gambling Act 2001</i> (Cth)
IMC	Independent Media Council
IAB	Interactive Advertising Bureau Australia
MEAA	Media, Entertainment and Arts Alliance
NBN	National Broadband Network
SBS	Special Broadcasting Service
TA	<i>Telecommunications Act 1997</i> (Cth)
TIO	Telecommunications Industry Ombudsman

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Responsive Engagement

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