

Consumer and Citizen Engagement in Self-regulation and Co-regulation: An Industry Stock Take

Karen Lee and Derek Wilding, University of Technology Sydney, report on their research into the ways consumers and citizens have been involved in rule-making in the Australian advertising, media, online and telecommunications sectors.

The industry and regulatory environment

Self- and co-regulation have become important components of the framework used to regulate the Australian communications industry. Despite the use of government regulation to promote a less fraught transition of consumers to the NBN and a November 2018 statement by the Department of Communications and the Arts that consumer safeguards for voice and broadband services are best delivered through direct regulation, 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 proposed new co-regulatory codes of practice for designated digital platforms such as Google and Facebook, as well as a 'disinformation' co-regulatory code for digital platforms generally.

Consumer and citizen engagement

Reliance on self- and co-regulation raises the issue of consumer and citizen engagement in the processes the converged communications industry will use to formulate rules. However, research into consumer and citizen engagement in industry rule-making has been limited, and there has been no attempt to map the mechanisms industry bodies and schemes (collectively referred to as 'schemes') use to engage with consumers and citizens or to assess how they may best be deployed to ensure self- and co-regulation within the converged sector is responsive and effective.

In this article, we present some of the findings of our 18-month long research project, which began the process of addressing the complex issues surrounding consumer and public engagement in industry rule-making.¹

First, we briefly set out the scope of our research, including the 20 industry bodies and schemes that were its focus, and the methodology we used. We then identify the 22 public engagement mechanisms used by the various industry schemes. We conclude by presenting some insights gathered during three Round Tables with consumers, industry and regulators where their experiences with these engagement mechanisms were discussed.

The schemes we reviewed

Our project consisted of two stages.

In Stage 1 of the project, in addition to undertaking literature reviews, we mapped consumer and public engagement within the existing industry rule-making frameworks of the Australian advertising, media, online and telecommunications sectors (collectively referred to as the 'communications industry'). This resulted in a preliminary report, which was the basis for Stage 2 of the project.

In Stage 2 of the project, we ran three semi-structured Round Tables to explore aspects of the preliminary report with consumers, industry and regulators. We then reviewed the information and analysis in the preliminary report and produced a final report.

The 20 self- and co-regulatory schemes we identified in the communications industry 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). 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

¹ The findings set out in this article are based on the published report, *Responsive Engagement: Involving Consumers and Citizens in Industry Rule-making*, a copy of which may be found at <http://accan.org.au/grants/completed-grants/1431-responsive-engagement>.

remaining 18 bodies and schemes are companies limited by guarantee, incorporated associations or other entities. Similarly, 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.

The information we gathered

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. Table 1 lists the name of each scheme for which we were able to find information about rule-making and engagement practices, a brief summary of its functions and its rules relevant to the project.²

In 2018, we sent summaries of rule-making and engagement practices to the industry schemes for comment. Fifteen of the nineteen schemes responded.³ In May 2019 we held Round Tables with three groups – consumer, industry and regulator representatives. In total, there were 29 participants in our Round Tables.⁴

Our findings: current mechanisms of public engagement

Of the schemes reviewed, it appeared that only the AFGC (which has 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 has developed best practice guidelines relating to internet-based advertising) had not incorporated some form of consumer or public engagement mechanism when they formulated or reviewed their initiatives.

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. FCAI commented on the summary we provided, 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, including, for example, advisory committees, audience feedback, relying on a consumer body to solicit the views of its members, focus groups, round tables, appointing consumer representatives to working committees responsible for rule drafting and/or holding meetings with organisations representing consumer and citizens. Table 2 lists the 22 mechanisms and the schemes that have used them.

In most cases, all mechanisms have been adopted voluntarily by the 15 schemes. 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 engagement mechanisms used were determined on a 'case-by-case' or 'needs' basis – decisions that reflected seven different factors, including:

1. the importance of the proposed rule or the change to existing rules;
2. the number of proposed rules or changes to existing rules;
3. the complexity of the underlying subject matter;
4. anticipated receipt of competing consumer viewpoints on specific issues;
5. government scrutiny;
6. expectations of relevant regulatory bodies;
7. cost and other resource-related implications.

However, some schemes have regularly used particular mechanisms. For example,

Communications Alliance appoints consumer representatives to the working committees that draft new rules; Free TV seeks written comment on rules its member organisations have drafted; the Australian Press Council holds round tables to discuss issues and approaches; and AANA uses focus groups and surveys undertaken by the complaint-handling body, Ad Standards.

Providing an opportunity to make written submissions on draft rules was overwhelmingly the most common method used to engage with the public, although we found evidence that only a few consumers, citizens and organisations representing their interests make written submissions on draft rules when industry schemes provide them with such opportunities, despite industry efforts to publicise them. For example, CRA advised us that it now receives fewer than 10 submissions in response to draft codes published during its code review process.

Using complaints data to inform the development and revision of rules was the second most commonly used public engagement tool.

Insights from Round Tables

1 Experience with specific engagement mechanisms

Complaints data

There were mixed views on the efficacy of complaints data as a public engagement mechanism. ACMA and Australian Communications Consumer Action Network (ACCAN) representatives saw TIO complaints data as valuable, although ACCAN expressed some concern that the data 'can give a false picture of what's really happening' because the TIO collects information about escalated complaints, not all complaints made to telecommunications service providers.

However, complaints data gathered in the advertising and media sectors was seen as much less useful for several reasons. First, 'people don't generally put the effort into making complaints'.

2 Despite several attempts to contact ACTA, we were unable to find any information about its rule-making processes and its mechanisms of consumer and public participation.

3 The three schemes that did not respond to our request for comment on the summaries were ADMA, AFGC and IAB.

4 To obtain a copy of our summaries (as amended), go to <https://www.uts.edu.au/sites/default/files/article/downloads/Industry%20Bodies%20and%20Schemes%20in%20the%20Communications%20sector%20-%20Summaries.pdf>.

Second, individuals often do not complain because they believe their complaints will not be taken seriously. Third, complaints processes assume people 'feel empowered enough' and 'have the time and know the skills' to complain.

Written submissions

Several participants, including representatives from consumer organisations, believed written submissions can be helpful. However, many participants from each of the three Round Tables questioned their utility.

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' and other obstacles to participation that made it difficult for individual consumers, consumer organisations and members of the public to make written submissions. One such barrier was '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 ...

Working committees

An ACMA representative (who spoke in his individual capacity) saw the appointment of consumer delegates to working committees as a 'superior tool' for consumer and public engagement. 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.

Among consumer representatives, there were mixed views about whether consumer participation on working committees improves the development of Comms Alliance codes of practice.

Surveys, focus groups and round tables

The 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. 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.

Use of social media

Several participants at the Regulator Round Table noted social media comments can be useful, but they have their limitations. However, many industry representatives expressed strong 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. The difficulty in cutting through the now widespread use of Facebook, LinkedIn and Instagram was also seen as another drawback. Another concern was scepticism about whether active and frequent contributors on social media platforms accurately reflected the views of the general public.

2. 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.

Industry and regulators attributed industry's inability to engage with individuals other than the 'usual suspects' 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.

Consumer organisations agreed that many of these factors are significant barriers to participation, but identified others, including:

- The belief that industry was engaged in 'issues management' when it undertook consultation rather than a 'discussion of the real issues'.
- 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.
- The use of technical and/or complex language.
- A failure to engage with consumers, citizens and related organisations early on in the rule-making process, eg when issues were identified and described.

Conclusion

The key issue that emerges from these findings is whether current consumer and public engagement practices are responsive. Responsiveness remains a highly influential principle of regulatory design that underpins many of the best known approaches to regulation (eg, 'responsive regulation', 'smart regulation and 'collaborative governance') and has served as a justification for the use of self- and co-regulation by governments, legislators

and policy-makers in Australia and worldwide.⁵ It includes four essential elements:

- deliberation - the weighing up of alternatives and determination of what, on balance, meets the needs of all stakeholders
- impartiality - the exercise of some independent judgement by industry

- transparency - the disclosure by industry to participants in the rule-making process of information necessary to hold; and
- accountability - the explanation and justification by industry of its position to others.

Our research has found that the engagement mechanisms

and practices of some industry schemes facilitate the achievement of responsiveness. With some persuasion, assistance and greater attention to regulatory design, the remaining schemes could accomplish the same objective.

The implications of our findings are discussed at length in our report *Responsive Engagement*:

Table 1: The schemes, their functions and relevant rules

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; Code for Advertising and Marketing Communications to Children; Food and Beverage Code Advertising and Marketing Code; Environmental Claims Code; 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)	'Data-driven marketing and advertising'; one of four organisations of the Australian Alliance for Data Leadership Limited.	ADMA Code of Practice
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)	'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.'	Statement of General Principles; 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 Industries (FCAI)	Peak industry organisation for manufacturers & importers of passenger vehicles, light commercial vehicles and motorcycles in Australia.	Voluntary Code of Practice for Motor Vehicle Advertising in 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	Development of Australian standards, including standards relating to communications, information technology and e-commerce services	Various standards
Special Broadcasting Service (SBS)	Multilingual and multicultural radio, television and digital media services.	SBS Codes of Practice

Involving Consumers and Citizens in Industry Rule-making, where we also make recommendations to promote responsive regulation through enhanced consumer and citizen engagement. We hope the research can contribute to the adaptation of the regulatory framework for Australia's converged communications industry and the review processes related to potential regulation of digital platforms.

Dr Karen Lee is a Senior Lecturer in the Faculty of Law at UTS. **Dr Derek Wilding** is Co-Director of the Centre for Media Transition. Our research was 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, where Dr Lee was previously employed. 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.

5 The concept of responsiveness is explored in Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Karen Lee, *The Legitimacy and Responsiveness of Industry Rule-making* (Hart, 2018) and Seung-Hun Hong and Jong-sung You, 'Limits of Regulatory Responsiveness: Democratic Credentials of Responsive Regulation' (2018) 12 *Regulation & Governance* 413.

Table 1: 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											
Information dissemination		YES	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											
Sentiment index			YES																			
Surveys of consumers or public	YES	YES	YES								YES											
Working committee		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		YES

* Until 2008-2009 | # Provided to groups and individuals who meet with council members | ^ Information not available