

**COMMUNICATIONS
ALLIANCE LTD**



**ACMA Draft Regulator Performance Framework
Performance Assessment 2020-21**

COMMUNICATIONS ALLIANCE SUBMISSION

October 2021

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About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

The most influential association in Australian communications, co-operatively initiating programs that promote sustainable industry development, innovation and growth, while generating positive outcomes for customers and society. To create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry, enhance the connectivity of all Australians and foster the highest standards of business behaviour. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

INTRODUCTION

Communications Alliance welcomes the opportunity to provide this submission in response to the ACMA's draft performance assessment against the Regulator Performance Framework for 2020-21. Our responses have been set out in the same order as the draft assessment.

We appreciate the ACMA's willingness to work with industry through the challenges of the COVID-19 pandemic. While we offer some suggestions in this submission on how the ACMA could better achieve its KPIs, we also recognise that the ACMA is continually working to improve.

Some of the key points on which we consider the ACMA could more closely align with the KPIs are improving the regulatory framework, clearly communicating with regulated entities to assist them in understanding and applying their obligations and ensuring that compliance and monitoring approaches are streamlined and proportionate.

REGULATORY EFFICIENCY AND CONTINUOUS IMPROVEMENT OF REGULATORY FRAMEWORKS

Industry's experience is that there is an overall lack of focus on this area from the ACMA as regards telecommunications regulation, in particular relating to consumer protection or operations.

Over the past years, the general approach has appeared to be that industry must make the case for the ACMA not to impede efficient operation, or to improve regulatory frameworks, with few proactive steps (and in fact, sometimes direct opposition to these goals) from the ACMA. While we appreciate that the ACMA is willing to engage with and hear proposals from industry, this approach does not seem to align with the KPIs.

However, this is not true for all areas the ACMA regulates. Industry welcomed, for example, the reforms to the radiocommunications legislation and associated instruments.

KPI 1: Regulators do not unnecessarily impede the efficient operation of regulated entities

On the whole, we agree with the ACMA's assessment that it substantially met KPI 1. There remains significant further work to be done before we would consider that the ACMA has fully achieved this KPI, but we do appreciate the work the ACMA has done to improve in this area.

Industry finds the ACMA's preference for prescriptive regulations to be inefficient and that many prescriptive obligations unnecessarily impede efficient operation, without delivering benefits to consumers. One example is the focus on prescribing which contact methods customers must be able to use, which prevents the development of digital-only business models and offerings that can offer lower costs to consumers.

Additionally, there is a significant regulatory burden from information requests and RKR, discussed in more detail under KPI 4. The unpredictability of some of these information requests requires redirection of resources, impeding business transitions and other work in place.

However, we appreciate the work the ACMA has done to achieve Strategy 1, *Improve the efficiency of our transactions and processes*. In particular, the registration processes for the Mobile Premium Services (MPS) and Emergency Call Services (ECS) Codes were efficient.

We also appreciate the ACMA's willingness to work with industry on flexibility of implementation of some rule changes or introductions, which avoids unnecessary impacts on efficient operation. The ACMA's openness to discuss the challenges of submitting information via methods that required a MyGov or AusKey account in recent years was another example of ensuring transactions and processes were not unnecessarily complex.

Finally, we welcome ACMA's direction to significantly reduce many of the apparatus licence taxes applicable to satellite services – an initiative that will improve the global competitiveness of Australian services. We note that there are areas where price reductions have not been proposed, but we believe such reductions would benefit Australian satellite service users and promote further investment.

KPI 6: Regulators actively contribute to the continuous improvement of regulatory frameworks

We disagree that the ACMA has achieved KPI 6, and would instead put forward that it has been substantially met.

Communications Alliance's Carrier and CSP members' experience has been that the ACMA does not actively contribute to the improvement of regulatory frameworks, and in fact often impedes such progress. This is specifically relevant to Strategy 2, *Streamline and enhance flexibility of our regulations*. The ACMA should use the same test when considering retaining regulations that would need to be considered when putting those regulations in place. For example, there are two outdated Codes (**C518:2006** Call Charging and Billing Accuracy and **C519:2004** End-to-End network Performance for the STS) that industry has proposed deregistering in recent years. The technology covered by the Codes is outdated and some of the Standards referenced in the Codes no longer exist.

These would not be considered reasonable to be introduced at this time given current technology and other protections that are in place, but the ACMA is resisting the retirement of these Codes – apparently simply because they are already in place. If the processes involved in the attempted deregistration of industry Codes are overly onerous, the ACMA should consider a similar process to that of Determinations, whereby unless a reasonable consideration of the need for the Determination is given, the instrument sunsets within a prescribed timeframe.

However, Industry welcomed the ACMA's work on the implementation of the reforms to the *Radiocommunications Act 1992*, which certainly contributed to the improvement of that regulatory framework.

Industry also welcomes the ACMA's ongoing work to support Strategy 3, *Expand our evidence base to inform improvements and reforms*, and agrees with the assessment that the research program is helpful.

We also appreciate the slightly more flexible regulatory approach agreed to by the ACMA during COVID, although we would recommend looking towards the ACCC's proactive steps in this space as better practice for the future.

COMMUNICATION, OPENNESS AND TRANSPARENCY

Overall, we appreciate the ACMA's willingness to engage with industry and ongoing publication of their work.

However, we believe there could be additional guidance to RSPs on their regulatory obligations.

KPI 2: Communication with regulated entities is clear, targeted and effective

We disagree with the assessment that the ACMA has achieved KPI 2. Considering that Strategy 5 is to *Tailor communication to reach our stakeholders and support understanding of regulatory obligations*, we find that the ACMA does limited work on education of regulated entities on their obligations, and instead often focuses on either enforcement of current rules, or even more often, altering rules or implementing new ones.

Active outreach to RSPs on their obligations to ensure implementation of current rules would have more effective outcomes for all parties.

In fact, it would be beneficial for the ACMA to report on its communication and outreach to industry – in particular, smaller RSPs and those not actively engaged in the regulatory process.

At a minimum, it would be beneficial for the ACMA to provide more (and up-to-date) industry-focused information on its website to educate telecommunications providers about their current obligations. For example, the ACMA's "Know your obligations" booklet for carriers and carriage service providers does not appear to have been updated since September 2015, while the [Carrier licensing guide](#) has not been updated since May 2018.

Additionally, information such as the list of obligations on this page: [Telecommunications providers | ACMA](#) is helpful, but should be linked to on the home page as the "Rules for TV and radio broadcasts" page is, while the page on reporting obligations ([Telco reporting obligations | ACMA](#)) is similarly helpful but incomplete, as it does not include the Regional Broadband Scheme reporting requirements or point providers to the ACCC, where they will also have reporting obligations.

While Communications Alliance members are often actively engaged in the regulatory process – and therefore fairly knowledgeable about their obligations – there are numerous small telecommunications providers who may not be as familiar with the regulatory structure or requirements. The ACMA's website could be a key point of information on all obligations for such organisations, including information not directly relevant to the ACMA's roles but which bringing regulated entities' attention to would benefit consumers and all parts of the industry.

KPI 5: Regulators are open and transparent in their dealings with regulated entities

Industry also disagrees with the assessment that the ACMA has achieved this KPI, in particular due to the ACMA's unwillingness to provide guidance when regulated entities have specific questions about their obligations. While we understand that the ACMA cannot provide legal advice and does not wish to put any future enforcement action at risk, the ACMA should be open to helping entities who are acting in good faith in trying to either understand their obligations or design a new business model – that the obligations were not designed for/do not clearly apply to – while remaining compliant.

Industry additionally found the ACMA fell short of Strategy 6, *Enhance transparency of key information to promote accountability*, in work on SIM swap frauds. The ACMA had told industry it had concerns about this topic, driven by specific information. In order for industry to fully understand and address the issues, such evidence was necessary. However, despite numerous requests for this information, the ACMA took many months to provide it. This slowed the process of developing solutions that could help protect consumers. The communication from the ACMA in relation to the Existing Customer Authentication industry code has been – in industry's view – suboptimal and is the subject of ongoing discussion.

We also feel that 2 weeks (3 with a requested extension) for a response to this specific consultation is not reasonably transparent or open, considering that revisions to Codes must have a 4-week minimum consultation, which is typically taken as standard for consultations which are part of a long-term schedule and not in reaction to an urgent issue. It is important for all stakeholders to be able to fully review the ACMA's self-assessment of its performance in order to be able to provide honest and full feedback with constructive examples, and this timeframe does not support that work.

However, we do appreciate the positive work the ACMA has done towards transparency in recent years. For example, the complaints data gathered via the Record-Keeping Rules is presented in a transparent and accessible way, and the ACMA has been open and willing to discuss industry proposals and suggestions in relation to numbering.

We are also appreciative of the ACMA's willingness to engage in person with the Communications Alliance Industry Consumer Advisory Group (ICAG) for informal discussions about current and impending consumer-related issues.

Industry also welcomes the ability to work with the ACMA in its spectrum planning activities through the Five-Year Spectrum Outlook program. We welcome the recognition given to the satellite community and are encouraged that the ACMA is taking a more holistic view of spectrum management and the benefits of balanced protection of satellite-based services.

Finally, Communications Alliance members appreciate the efforts by the ACMA in working with the Government supporting Australia's international activities with the ITU and specifically during this WRC-23 cycle. We believe that this is an area where industry engagement is vital and that there is an opportunity for improvement for industry expertise and experience to be better utilised.

PROPORTIONATE ACTIONS AND STREAMLINED AND COORDINATED COMPLIANCE MONITORING

In this area, Industry has particular concerns about compliance monitoring, which has not appeared to be streamlined and coordinated.

KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed

Members' experiences are that the ACMA has not met this KPI, and thus we disagree with the ACMA's assessment. This is largely based on the ACMA's compliance activities, noting that there may be varied reviews on its enforcement activities.

Specifically the ACMA's use of desktop reviews for compliance do not appear to be aligned with Strategy 7, *Use risk-based and graduated compliance and enforcement approaches*.

To our understanding, there is a lack of evidence-based decision making when commencing reviews: generally, it appears that reviews are based on an ACMA compliance priority with an expectation of a certain number of reviews being conducted regardless of if there is an identified need on that particular sub-section of the compliance priority. As a result, the necessity of the review may not be the key factor in starting the review.

Flowing from there, the current desktop review model seems to disproportionately impact some telcos as there is no need for there to be specific complaints or concerns about the telco for them to be included in the review. We also understand that the selection of providers for reviews is often intended to be 'random' – however, members have observed a pattern that it is more likely they will be included in a review if they have had previous contact with the ACMA (regardless of it was related to that matter). The impact is that certain telcos are being reviewed on a regular basis, while we have noticed many other telcos have never been included in any public reports by the regulator.

As a result, there is a greater risk of potential breaches being identified for those telcos regularly being reviewed (plus the risk of the associated impact of an investigation and any enforcement activity).

In addition to the ACMA appearing to not focus on the potential risk when choosing whether to proceed with some compliance activities, members have also experienced a focus on technicalities in enforcement actions resulting from these desktop reviews and audits, including warnings based on only 1 transaction (out of millions of services in operation).

Ultimately, the ACMA should be focusing its resources on supporting providers to comply with their obligations through education and engagement, and using compliance and enforcement activities where – per the KPI and strategy – there is a regulatory risk that justifies such actions.

KPI 4: Compliance and monitoring approaches are streamlined and coordinated

Industry disagrees that the ACMA has achieved KPI 4, and specifically views that the ACMA has taken limited steps towards Strategy 8, *Avoid unnecessary compliance information requirements and remove duplication*.

Members have recently experienced a significant uptick in the ACMA's use of information requests. While these are an important compliance and enforcement tool for the ACMA, the timeframes do not appear to consider the other concurrent regulatory obligations, such as

Record-Keeping Rules (both the ACMA's and the ACCC's) and the Annual TCP Code Compliance Attestation process via Communications Compliance. Additionally, the overlaps between the ACMA's information requests and the Telecommunications Industry Ombudsman's information requests have been duplicative and unnecessary – a situation that we acknowledge is not fully within the control of the ACMA.

One example that Industry would be interested to engage with the ACMA on is the Financial Hardship information requests. Industry acknowledges the importance of this topic, but altering the types of data collected each year shortly before the request itself does not allow RSPs to make changes to their systems that would allow them to collect such data throughout the year, and instead requires significant resourcing to gather often disconnected or previously uncollected data and then analyse those data so they can be presented in the format the ACMA has requested it.

The information gathered by the ACCC, TIO and ACMA through existing Record-Keeping Rules is significant, in addition to the information provided through the ACMA's strong research program. These data should be considered prior to the ACMA developing an information request, to attempt to focus information requests and the associated resources where necessary. We would also be interested to further work with all parties on streamlining these processes.



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