



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

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Ms Rachel Blackwood
A/g Assistant Secretary
Spectrum & Telecommunications Deployment Policy Branch
Department of Infrastructure, Transport, Regional Development and Communications
Email: spectrumreform@communications.gov.au

Dear Ms Blackwood

AUSTRALIAN GOVERNMENT CONSULTATION ON EXPOSURE DRAFT OF RADIOCOMMUNICATIONS LEGISLATION AMENDMENT BILL

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission on the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 under consultation by the Department of Infrastructure, Transport, Regional Development and Communications.

Our members affected by the proposals include suppliers of devices and appliances that receive or transmit communications; broadcast and information service providers that rely on spectrum allocations; and business customers who use such devices and services.

Our submission focuses on two proposed changes under the new Bill: equipment regulation arrangements ("equipment rules"); and the compliance and enforcement regime.

1. Equipment regulation

The Department proposes to introduce provisions in the new Bill to authorise the regulator, Australian Communications and Media Authority (ACMA), to make rules relating to equipment ("equipment rules").¹ It states that the new draft provisions are intended to address the following issues with the current framework: excessive prescription in relation to labelling and record-keeping; a reliance on criminal offences and limited enforcement tools; difficulties targeting the right person in a supply chain, in terms of responsibility for compliance (especially in supply chains that involve drop shipping); insufficient flexibility to regulate devices proportionate to risk and specific circumstances; and a lack of flexibility to group or separate different kinds of requirements.²

While we support changes to equipment regulation that enable more flexibility for the regulator, we remain concerned with two features of the proposed approach.

A primary concern is the lack of assurance that the regulator will properly consult expert Australian technical committees for advice on the appropriate standard to prescribe and allocate sufficient weight to such advice.

For example, we are cautious with the following explanatory note made by the Department with respect to the proposed section 158 on standards (read in conjunction with the proposed section 156 on equipment rules), which omits consultation with industry experts (emphasis in bold):³

This section [158] prescribes that the equipment rules may set standards for equipment, and as such may require particular things of the equipment in order for equipment to meet that standard. This extends to the design features and the performance requirements of the equipment. Subsection (3)

¹ Department of Infrastructure, Transport, Regional Development and Communications, 2020 Radiocommunications Reform (Consultation paper, June 2020), pp. 13-14.

² Ibid.

³ Department of Infrastructure, Transport, Regional Development and Communications, Explanatory notes to the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill, p. 41.

provides that a standard may be applied broadly or be more limited in its application. The inclusion of subsection (3) does not limit subsection 33(3A) of the Acts Interpretation Act 1901 which details the scope of powers with respect to particular matters.

*For example, ACMA may make equipment rules prescribing standards for the maximum permitted levels of radio emissions for equipment. The maximum permitted level of radio emissions from equipment would be expected to be determined according to the type of device and the use of the device in consideration of electromagnetic energy (EME) and human safety. This would be determined **in consultation with the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) and be set in accordance with international standards such as those determined by the European Telecommunications Standards Institute (ETSI), the International Electrotechnical Commission, and the International Organisation for Standardisation (ISO).***

Standards prescribed in the equipment rules in accordance with this section would be accompanied by obligations or prohibitions determined for the purposes of section 159. Such obligations or prohibitions would require compliance with the standards when undertaking certain conduct. For instance, the supplier of certain equipment may be prohibited from supplying a specified kind of device if it does not comply with the standard prescribed in accordance with this section.

We discuss further below our concerns and recommend certain conditions to help address them.

1.1 Need for stakeholder consensus-based technical standards

In previous submissions to the Department, we shared our members' experiences in other areas of technical standards regulation where consultation-based regulatory approaches (through government-led legal instruments such as Determinations) replaced stakeholder consensus-based approaches.

Two examples provided were the Greenhouse and Energy Minimum Standards ("GEMS") and Water Efficiency Labelling and Standards ("WELS") schemes. When applied in practice, these new legal instruments were often found to be technically erroneous and complex. While the schemes have produced some benefits, they have been accompanied by confusion, uncertainty and reduced confidence among industry in the regulatory regime that could have been avoided with a more stakeholder consensus-based approach. The GEMS and WELS experiences demonstrate that for complex technical matters such as the equipment regulation arrangements, technical standards based on stakeholder consensus have important roles to play in improving the effectiveness and efficiency.

Recommendation: We recommend the following conditions for any form of equipment regulation:

- Technical standards should continue to be developed through stakeholder consensus-based input and be referred to in any new equipment regulation arrangements. We urge some caution if local standards were to be developed and these were at odds with international standards, then compliance with local variations will be expensive.
- ACMA should continue to be involved in the development of these standards to ensure that its expectations for the purposes of compliance and enforcement are met.

The above conditions are consistent with the Australian Government's previous support for Recommendation 6 of the review of ACMA on 22 May 2017, namely:⁴

That, within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self-regulation, in consultation with relevant industry bodies:

- *Technical Standards*

....

The ACMA regularly explore further opportunities for self-regulation in consultation with industry.

⁴ Minister for the Department of Communications and the Arts, "Modernising the Australian Communications and Media Authority", Media Release (22 May 2017).

1.2 Approach to trusted international standards

The trusted international standards regime has been developed as part of the Australian Government's Industry Innovation and Competitiveness Agenda, with the objective of reducing duplicative domestic regulation and red tape. This means that if a system, service or product has been approved under a trusted international standard or risk assessment, then Australian regulators would not impose any additional requirements, unless there is a good and demonstrable reason to do so.

While Ai Group strongly supports the Government's agenda to reduce red tape, we express caution with respect to the Department's statements (as highlighted in bold text above) regarding the potential direct adoption and referencing of international standards, which risks the removal of a critical element in Australia's regulatory framework. This element encompasses the participation of a balanced group of diverse stakeholders in a consensus-based environment to develop standards – the importance of which has been discussed above. These standards may be referenced in Australian regulation as deemed-to-comply solutions or technical documents.

The risk is that the value of these Australian stakeholder consensus-based standards is traded off under a trusted international standards regime. Under this regime, the regulator chooses a standard developed by an international organisation that may not have had any Australian input and therefore has not properly consulted with Australian stakeholders on the appropriateness of the standard in accordance with a set of predetermined criteria.

In other words, the use of trusted international standards moves stakeholders from participating in a consensus-based model to a consultative model, which significantly reduces the opportunity for appropriate Australian industry expertise to shape the outcome for the benefit of the Australian market and consumers.

Recommendations:

- Ai Group believes that it is important that, if trusted international standards were to be referenced by ACMA in any form of equipment regulation, the following criteria should be adhered to:
 - widely accepted principles for developing standards are used;
 - appropriate public consultation processes are observed;
 - international standards must improve regulatory coherence and technical convergence (it cannot be assumed that because a standard is trusted internationally that it will automatically fit within the Australian regulatory and technical context); and
 - Australia complies with its obligations under the World Trade Organization Agreement on Technical Barriers to Trade, which requires Australia to influence and adopt international practice where possible.
- Ai Group recommends that a balanced group of stakeholders, constituted in a working group or committee, be assigned the responsibility to review any international standard that is to be adopted under a trusted international standards regime.
- Ai Group recommends that care be given to the timing of when international standards are considered for adoption. As one member comments:

If we implement newly developed international standards earlier than the rest of the world, we need to educate our suppliers to the requirements and pave the way for others to follow. If we wait to adopt these standards after a major economy has done so (e.g. Europe) we will have a much easier path.



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2. Compliance and enforcement

The Department proposes to provide ACMA with access to a wider range of graduated enforcement mechanisms under the new Bill.⁵ As stated in previous submissions, Ai Group supports a need to broaden the options for the compliance and enforcement regime, providing ACMA with more flexibility. We therefore support the Department's inclusion of graduated enforcement mechanisms in the Bill.

However, we wish to reiterate that operational flexibility will need to be accompanied by strong guidance from ACMA as to how it will be applied that enables regulatory certainty.

Recommendation: We recommend the following requirements be implemented if graduated enforcement mechanisms were to be introduced:

- Establishing a principle that the costs of compliance and enforcement action should be less than the benefits.
- Establishing a clear hierarchy of responses to clarify how ACMA distinguishes cases requiring a warning versus cancellation, or how time-sensitivity and impact will be taken into account in graduating between levels of responses.
- Ensuring consultation with affected business where practical before product recalls, interim bans or warnings are issued, and targeting appropriate enforcement. These measures are vital where a device creates risks of potentially dangerous interference and also have a major commercial impact. Where time and urgency allow, consultation with suppliers prior to action will help maximise cost effectiveness of regulatory action, allowing for recalls and other action to be accurately targeted and limiting disruption to users and suppliers.

If you would like clarification about this submission, please do not hesitate to contact me or our adviser Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,

Peter Burn
Head of Influence and Policy

⁵ Department of Infrastructure, Transport, Regional Development and Communications, 2020 Radiocommunications Reform (Consultation paper, June 2020), pp. 14-15.