

Australian Consumer Law Review

ACMA submission in relation to equipment and device supply

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Executive summary

The purpose of this submission is to:

1. Describe the interaction between the Australian Consumer Law (ACL) and the ACMA's regulatory responsibilities.
2. Describe the ACMA's equipment supply arrangements, in the context of the overall Australian consumer policy framework.
3. Share the ACMA's analysis of issues also under consideration in the Australian Consumer Law Review.

Given that the ongoing role of telecommunications specific consumer protections is being canvassed in the ACMA review process, this submission focuses on the interaction between the ACL and certain technical regulation administered by the ACMA.

In particular, the submission highlights the ACMA's consideration of and continuing response to the evolving market for the supply of communications, electrical and IT devices and equipment. It identifies the policy and market issues raised in the Issues Paper that are relevant to the ACMA, and – in some cases – also addressed under the ACMA's equipment supply regulation arrangements.

The main points of this submission are:

- > the ACMA arrangements for equipment supply manage certain consumer risks, including safety
- > although the ACMA and ACL arrangements complement each other, in some situations a consumer may have no redress under either the ACMA arrangements or ACL where an item of equipment causes consumer detriment
- > changes in technology and supply arrangements and practices have transformed the type of risks and associated harm associated with the supply and use of communications/IT products.

Background

Introduction

The ACMA is Australia's communications regulator, responsible for the regulation of broadcasting, the internet, radiocommunications and telecommunications.

There are two broad categories of regulatory activity managed by the ACMA that are relevant to the ACL. These are:

- > the supply to end-users of retail telecommunications carriage services
- > the supply and operation of communications and IT products.

A general overview of the ACMA's role in relation to the supply of telecommunications carriage services is provided below. The focus of this submission, however, is on the ACMA's role in relation to the supply of communications and ITU products.

Regulation of the supply of telecommunications carriage services

The consumer protections of general application, such as those contained in the ACL, are complemented by telecommunications sector specific regulation. Most of this sector specific regulation is made under the *Telecommunications Act 1997* and administered and enforced by the ACMA.

The main object of the Telecommunications Act read together with Parts XIB and XIC of the *Competition and Consumer Act 2010* is to provide a regulatory framework that promotes:

- > the long term interests of the end-users of carriage services
- > the efficiency and international competitiveness of the Australian telecommunications industry
- > the availability of accessible and affordable carriage services that enhance the welfare of Australians.

Other objects include the provision of appropriate community safeguards in relation to telecommunications activities.

In consumer protection matters, telecommunications industry codes and standards prescribe behaviours which variously supplement, complement and elucidate the ACL. For example, since 2012, the [Telecommunications Consumer Protections \(TCP\) Code](#) has placed a positive obligation on telecommunications providers to provide consumers with specific, easy-to-understand information on key matters at the most relevant times including: point-of-sale information; usage alerts; billing information and complaints processes. These obligations both complement and supplement the general prohibition in the ACL on misleading conduct.

The draft report on the [Review of the ACMA](#) being conducted by the Department of Communications and the Arts (DoCA) proposes that the current institutional arrangements for communications consumer protections be retained. It proposes a case for communications specific consumer protections. The ACMA agrees that sector-specific consumer protections remain relevant for the telecommunications sector.

ACMA regulation of device and equipment supply

The ACMA has regulatory responsibilities for the supply of communications, electrical and IT products within the broader Australian consumer policy framework. The ACMA also has regulatory responsibility for the installation and maintenance of telecommunications customer cabling.

The objective of ACMA product supply regulation is to manage certain identified risks including:

- > interference to radiocommunications services
- > health and safety, including access to emergency call services
- > telecommunications network integrity.

The ACMA's arrangements apply to radiocommunications products, non-intentional emitting devices (for example, televisions, whitegoods, lighting) and telecommunications customer equipment and cabling.

The regulatory arrangements comprise:

- > compliance with technical standards where applicable (not all products supplied in Australia will be covered by an applicable technical standard)
- > labelling of products subject to an applicable standard
 - a compliance label affixed to a product is an indication that the product complies with applicable standard/s
 - for all ACMA regulatory arrangements, the compliance label is the Regulatory Compliance Mark (RCM)
 - labelling requirements do not allow for 'qualitative' advice, such as how the product should be used or any limitations on a product's functionality.
- > record-keeping obligations on suppliers of products to which a compliance label has been, or should be, applied
 - a supplier is an Australian importer, manufacturer or an authorised agent of an Australian importer or manufacturer
 - a supplier must hold records that support the supplier's claim that the product complies with the applicable standard/s.
- > prohibitions on persons supplying non-standard radiocommunications devices or prohibited devices, such as mobile phone jammers

- a device is a non-standard device where there is an applicable standard to which the device does not comply
- a device is not non-standard if there is no applicable standard.
- > restrictions on the supply of certain products, such as mobile phone repeaters.

The operation of radiocommunications devices is also subject to licensing requirements under the *Radiocommunications Act 1992*. The ACMA's regulatory requirements for the supply of radiocommunications products, in general, work in concert with the ACMA regulatory controls on the operation of those products under radiocommunications licensing arrangements. These licensing arrangements minimise radiocommunications interference between users as well as authorise use.

Spectrum Review

In 2015, the Australian Government agreed to implement the recommendations of the [Spectrum Review](#) including replacement of the Radiocommunications Act with legislation that removes prescriptive processes and streamlines licensing. The Radiocommunications Bill currently being drafted by DoCA will support flexibility, innovation and certainty. Device and equipment supply will be regulated through new Equipment Rules that accommodate a flexible regulatory approach and use risk-based enforcement.

Discussion

The focus of the ACL is on the transaction between the consumer (purchaser) and the seller of goods, the quality of goods, and the represented capability or functionality of those goods.

The ACMA's product supply regulation arrangements have a broader focus to the ACL. The 'consumers' of ACMA-regulated products can be retail residential customers, or wholesale business customers (for example, as part of procurement arrangements).

The ACL Review Issues Paper discusses the role of specialist regulators to deal with safety issues associated with particular products or industry sectors. The ACMA is the regulator responsible for electrical safety for:

- > telecommunications customer equipment and customer cabling
- > electromagnetic energy (EME) for radiofrequency products.

There is a direct consumer outcome associated with some of the ACMA supply requirements, such as safety. In other cases, the consumer outcome is indirect. The electromagnetic compatibility (EMC) arrangements address the risk of interference to radiocommunications services used by other members of the public, including services used for safety-related purposes including police and ambulance.

Relationship between the ACL and ACMA supply regulation

On some occasions a product that is non-compliant with an ACMA applicable standard (or not labelled) will also be non-compliant for the purposes of the ACL. For example, a telephone that does not comply with the applicable interoperability standard but is marketed as expected to be capable of 'calling anyone' is likely to contravene the ACL as well as ACMA arrangements.

However, there are occasions when a product can be non-compliant with an ACMA applicable standard but its supply can comply with the ACL, for example:

- > A product that does not comply with the applicable ACMA technical standard may still be safe to operate and fit for the purpose for which it was sold. For example, a light that does not comply with the EMC requirements may still operate as represented by the retailer and expected by the purchaser. However, the outcome of not complying with the ACMA arrangements is that the light when operated may cause interference to reception of free to air television as well as radiocommunications services.

- > The operation of a radiocommunications device may be unlawful under the ACMA’s radiocommunications licensing arrangements even though the product is fit for purpose at the point of supply. For example, a wireless audio product that operates in frequency bands not allocated for that use may function as specified but is unable to be lawfully operated.
- > The supply of a product that does not comply with radiocommunications regulations may not contravene the ACL. For example, it is a requirement under the *Radiocommunications Regulations 1993* that mobile repeaters are only supplied to a mobile network operator or to a person authorised by the mobile network operator. The supply of mobile repeaters without prior authorisation was prohibited because of the high risk of interference to mobile phone networks which hold exclusive licences for the spectrum in which mobile phone repeaters operate. The supply of a mobile phone repeater that is illegal under the ACMA arrangements may only contravene the ACL if the seller represents that the mobile phone repeater can legally be used in Australia.
- > While the ACMA requirement to apply the RCM label to a compliant product is relevant to consumer outcomes, the RCM label is not intended to have a consumer focus. Therefore, it is arguable that the incorrect application of the RCM label, while a breach of the ACMA’s supply arrangements, would not necessarily contravene the ACL.

Topics in the ACL Review of relevance to the ACMA

The Issues Paper identifies a number of topics that are of relevance in relation to the supply chain, after-market challenges, product labelling and use of international standards.

Supply chain regulation

Under the current ACMA regulatory arrangements, a supplier is responsible for ensuring their product meets the ACMA regulatory requirements for network integrity, interoperability, performance characteristics, and health and safety. The supplier is responsible for product compliance and meeting record-keeping requirements. The Radiocommunications Act also prohibits any person from supplying a product that the person knows to be non-standard.

A supplier may be a manufacturer in Australia, an importer in Australia or an authorised representative of an importer or manufacturer in Australia. New and emerging supply models (see below) have put pressure on this definition. In developing the new [Radiocommunications Bill](#), including the legislative provisions concerning supply of equipment in Australia, DoCA is considering

whether suppliers as currently defined in law are the most appropriate responsible parties in the supply chain.

New and emerging supply models

ACMA labelling and record-keeping requirements are premised on a linear supply chain model that assumes that the roles of the parties in the supply chain are distinct and easily understood, for example:

- > overseas manufacturer → exclusive local importer/distributor → retailer → customer (end-user).

However, the modern supply chain is more complex and diffuse and may consist of:

- > grey import: overseas manufacturer → multiple local distributors/importers → retailer → retail customer
- > drop shipping: overseas manufacturer → customer purchasing via local business ('web shop front') (customer has no direct relationship with the overseas manufacturer or distributor/importer)
- > direct import: overseas supplier → local customer
- > online market: local internet market (for example, eBay, Gumtree) → local business → customer.

In these newer supply chains, it can be difficult to identify the 'supplier' obliged to hold compliance records for a product. Identifying the party responsible for compliance is further complicated where products are installed into larger systems or installations.

Online supply

The ACMA has analysed the capacity for suppliers and consumers to circumvent regulatory controls (whether deliberately or unwittingly) in the online environment. Due to newer fragmented markets and complex supply chains, product regulation alone may not have sufficient regulatory reach to effectively control the risk of interference from products such as mobile repeaters sourced through the global market.

This is especially the case where a significant information asymmetry exists in the market, driven by misleading information from overseas-based suppliers targeting the Australian market. Practically speaking, direct importation can occur with little regulatory product approval, meaning a potential increase in the risk to spectrum utility, safety and interference to radiocommunications-dependant services.

The ACMA arrangements apply to supply in Australia. In circumstances where the supply chain is so fragmented that the separate entities in the supply chain are all located outside Australia, escalated compliance and enforcement

action may not be possible because of jurisdictional limits and difficulties in enforcement.

Recognising the significant role of consumers in driving online supply, the ACMA has developed demand-side strategies to complement the ACMA's supply-side regulatory controls. These are intended to influence consumer behaviour by reducing information asymmetry between buyers and sellers. For example, the ACMA has published information encouraging purchasers of radiocommunications products via the internet to confirm with the seller that the product can be operated legally in Australia. The ACMA has engaged with a range of industry organisations and associations and partnered with other regulatory agencies.

Enforcement and remedies

The ACL aims to promote a proportionate, risk-based approach to enforcement. This is also the approach taken by the ACMA. As such, the ACMA needs to be able to use a range of enforcement options proportionate to the risk and specific circumstances of product supply and operation. The new supply models described above continue to present enforcement and compliance challenges for the ACMA. For example, overseas manufacturers operating without a local representative may not be aware of the Australian regulatory arrangements, or regulatory obligations may apply to parties who do not have control over the relevant technical or operational matters.

These challenges may be addressed through collaboration between specialist regulators. The ACMA works with State consumer affairs regulators regarding misleading information provided to consumers by online suppliers about Australian requirements for supply and operation of communications and IT products.

Changes in technology and the nature of 'consumer harm'

The Issues Paper discusses consumer rights where a product is not of acceptable quality. As the scenarios in this submission outline, the ACMA has encountered situations where the normal operation of a product may cause other harms to the operator or to third parties. For example:

- > non-compliant LED lights may interfere with the reception of television services or radiocommunications services at the local and/or neighbouring premises
- > the incorrect installation of a solar inverter may cause interference to radiocommunications services or copper-based broadband technologies in the local and/or neighbouring premises
- > the operation of certain customer equipment such as powerline telecommunications devices may affect the performance of the broadband system to which the device is connected.

The question of whether consumers should have redress for this consequential harm may be relevant to the review of the ACL. It would be useful to consider if the ACL could be an appropriate legal or regulatory vehicle to address consumer harm caused by the impact of a product on third parties.

The remedies available under the ACMA arrangements are typically focused on the responsible supplier of the product, and do not, per se, provide a consumer right of action. For example, the ACMA may take action against a supplier in relation to supply of non-compliant product, including accepting an enforceable undertaking, warning the supplier, issuing an infringement notice or seeking prosecution. However, the Radiocommunications Act does not provide the ACMA with the power to compel the recall of products. DoCA is considering whether to include recall provisions in the new Radiocommunications Bill.

After-market challenges

The issue of digital products is significant in relation to:

- > telecommunications customer equipment (for example, telephony applications for tablets) where a product can be ‘augmented’ after market by means of software additions to enhance or alter functionality
- > radiocommunications equipment (for example, software defined radio) where a product upgrade may allow the user to operate the product in contravention of licensing requirements.

Product labelling

Provision of mandatory consumer information is a matter of interest for some consumers. There has been some consideration by overseas jurisdictions that suppliers of radiocommunications products be required to include information with the product about the risk of exposure to EME. However, the ACMA’s labelling requirements are limited to illustrating a product’s compliance, rather than broader quantitative or qualitative information about the product.

International standards and risk assessment

The objective to generally rely on trusted international standards rather than imposing additional Australian requirements (unless there is a good and demonstrable reason to do so) is reflected in both the ACL and the ACMA regulatory arrangements. However, for an increased reliance on international standards to be effective, Australian interests and requirements will need to be reflected in the development of those international standards.

The use of appropriate international standards and risk assessment, while a desired policy outcome, can present challenges. In the area of radiocommunications, there remain differences between Australian and

overseas spectrum allocation arrangements in relation to specific products. Reliance on overseas labelling requirements (for example, the CE mark or FCC approval) requires an assessment of the technical standards and testing arrangements underpinning the overseas approval against Australian requirements – rather than solely relying on the affixation of the overseas label.

The ACMA continues to look to use international standards and risk assessments in its regulatory arrangements, and to encourage standards-making bodies such as Standards Australia and Communications Alliance to adopt or substantially reference international standards in developing Australian standards.

Alternative arrangements

Question 3 in the Issues Paper asks whether there are “new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues”.

Alternative arrangements to the ‘normal’ regulatory framework can achieve the same regulatory and policy outcomes with a lower cost to suppliers. For specialised supplier segments, the ACMA may make alternative arrangements via a code of practice that reduce compliance costs while still ensuring that the objectives of the regulatory arrangements are met. Examples of this can be seen with the codes of practice that apply to members of the Federated Chamber of Automotive Industries (FCAI) and Trucking Industry Council (TIC).

Under these alternative arrangements, suppliers are exempt from complying with the EMC labelling notice if the product is supplied in accordance with a relevant industry association code of practice. This approach is appropriate for industries where there are clear incentives – complemented by governance and accountability arrangements within the relevant industry sector – for members to ensure their products comply with applicable requirements.

Conclusion

This submission explores the intersection between the ACMA regulation and the ACL, and shares the ACMA's experiences with the regulation of product supply.

In the context of the scenarios discussed, the following questions may be relevant to the review of the ACL and, in particular, the relationship with specialist regulatory regimes:

1. If a product is offered for sale in a condition that does not comply with ACMA radiocommunications licensing requirements, should a purchaser (consumer) of that product have rights and/or protections under the ACL?
2. What should be the relationship, if any, between labelling requirements that apply to specified products under specialised regulatory regimes (such as the arrangements administered by the ACMA) and the ACL?
3. To what extent should the ACL impose an obligation on suppliers of products to disclose information to consumers regarding the risk of interference from the product to radiocommunications, domestic broadcasting and broadband technologies?
4. Should the ACL apply to 'consequential harm' caused by the use of digital products?

Like the ACL, it is important that the ACMA regulatory arrangements are able to respond to new and emerging issues, such as product modification, product labelling and new supply chains including online supply. The outcomes and observations of the ACL Review – especially in relation to online supply – may assist the ACMA in its development of the new Equipment Rules.