Engaging Industry in Co-Regulatory Rule-Making

Karen Lee*

Abstract

Co-regulation — when an industry association develops a code of practice and this has legislative backing — has become an important regulatory tool. Yet, we lack an understanding of how industry associations engage their members and non-members when developing codes of practice. This oversight is surprising given growing recognition of the importance of regulatory intermediaries like industry associations for achieving regulatory objectives. It is all the more surprising when the purposes of industry engagement during rule-making are understood. In this article, I use the development of the Australian *Telecommunications Consumer Protections Code 2019* by the Communications Alliance ('Comms Alliance') as a case study to identify the different ways in which the Comms Alliance engaged with industry participants during rule-making and to assess if the functions of industry engagement were discharged. Drawing on interviews with telecommunications companies subject to the Code, I argue that the process of industry engagement had some value in the development of the Code. However, the engagement barriers faced by a sizeable number of industry participants prevented the full realisation of co-regulatory rule-making's purported benefits. I conclude the article by discussing the potential implications of these findings for legislators, governments, and policymakers, highlighting the need for further empirical study of industry associations and their practices in industry sectors within Australia and farther afield.

I Introduction

In the modern regulatory state, co-regulation — 'where [an] industry [association] develops its own code or accreditation scheme, and this has legislative backing'[1] — has become an important tool in the effort to accomplish public policy goals in

Please cite this article as:

Karen Lee, 'Engaging Industry in Co-Regulatory Rule-Making' (2025) 47 *Sydney Law Review* 20700: 1–33 <https://doi.org/10.30722/slr.20700>.

* Senior Lecturer, Faculty of Law, University of Technology Sydney (UTS), Sydney, New South Wales, Australia. Email: Karen.Lee@uts.edu.au. ORCID iD: https://orcid.org/0000-0002-9640-221X. I wish to thank the UTS Law Faculty for the research grant that made aspects of this research possible and the two anonymous referees for helpful comments on an earlier draft. The research was approved by the UTS Human Research Ethics Committee (ETH 21-6356 and 21-6752).

1 Department of Communications (Cth), *Regulating Harms in the Australian Communications Sector: Observations on Current Arrangements* (Policy Background Paper No 2, May 2014) 10.

Australia and worldwide. The reasons for turning to industry associations and their norms vary,[2] but when legislators, governments and regulators do so, they often stipulate that these associations must have consulted with industry participants before they will recognise and/or enforce those norms. For example, pt 6 of the *Telecommunications Act 1997* (Cth) ('*Telecommunications Act*') enables 'bodies or associations' representing 'sections of the telecommunications industry' to formulate and seek the registration of codes of practice dealing with (among other matters) consumer protection with the Australian Communications and Media Authority ('ACMA').[3] Upon registration, codes become enforceable by the ACMA.[4] However, before registering codes, the ACMA must be satisfied that the relevant body or association has 'published a draft of the code on its website, and invited participants in that section of the industry to make submissions to the body or association about the draft'.[5] Comparable obligations can be found in the *Broadcasting Services Act 1992* (Cth) and *Online Safety Act 2021* (Cth),[6] which permit, respectively, bodies and associations representing traditional broadcasters and sections of the online industry to formulate and seek the registration of codes of practice with the ACMA or the eSafety Commissioner.

There is, however, a limited understanding of: how industry associations engage their members and non-members when undertaking rule-making; which industry members engage with those industry associations; and why they choose to engage or disengage with their rule-making processes. With few exceptions, the law and policy literature on engagement during rule-making focuses on consultation undertaken by state actors — government departments and independent regulators — either when developing legislative proposals for consideration by Parliament or before adopting rules in legislative instruments and other forms of delegated legislation.[7] There is some literature on how industry and industry associations consult with consumers during industry rule-making,[8] but even less on how industry actors (individually or collectively) engage with each other. This oversight is surprising given the growing recognition of the importance of regulatory intermediaries like industry associations to the achievement of regulatory

---

2 See, eg, Karen Lee, 'Counting the Casualties of Telecom: The Adoption of Part 6 of the *Telecommunications Act 1997* (Cth)' (2009) 37(1) *Federal Law Review* 41.

3 *Telecommunications Act 1997* (Cth) ss 106, 117 ('*Telecommunications Act*').

4 Ibid ss 121–2.

5 Ibid s 117(1)(e)(i).

6 *Broadcasting Services Act 1992* (Cth) ss 123(4)(b)(ii), 130M(1)(f); *Online Safety Act 2021* (Cth) s 140(1)(f)(i) ('*Online Safety Act*'). The Australian Government's November 2024 announcement that it will adopt a duty of care and due diligence approach to regulate digital platforms and other online providers means co-regulation may have a less prominent role in that industry sector in the future: Michelle Rowland, 'New Duty of Care Obligations on Platforms Will Keep Australians Safer Online' (Media Release, 14 November 2024). However, it does not affect the significance of this article, which is focused on the engagement practices of industry associations when co-regulation is used.

7 The literature is voluminous: see, eg, John Morison, 'Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations' (2017) 37(3) *Oxford Journal of Legal Studies* 636.

8 See, eg, Karen Lee and Derek Wilding, 'Towards Responsiveness: Consumer and Citizen Engagement in Co-regulatory Rule-Making in the Australian Communications Sector' (2021) 49(2) *Federal Law Review* 272.

objectives.[9] It is all the more surprising when the rule-making, compliance, and enforcement purposes of industry engagement, underpinning legislative consultation requirements, are understood.

In this article, I use as a case study the development of the fourth edition of the *Telecommunications Consumer Protections Code* ('*TCP Code 2019*').[10] At the time of writing, the Code is an important component of the Australian telecommunications consumer protection framework, drafted by a working committee of the Communications Alliance ('Comms Alliance')[11] — the communications industry's primary co-regulatory body.[12] I seek to build a better understanding of the ways in which industry associations engage with industry participants during co-regulatory rule-making and how industry participants respond to those initiatives. Drawing on interviews with micro, small, medium and large telecommunications companies subject to that Code, I highlight that the desire for voice and avoidance of costly, ineffective regulation may motivate large and medium businesses to become members of industry associations and participate in industry rule-making. However, small and micro-sized businesses apparently confront a number of engagement barriers — barriers that suggest that if industry rule-making is to truly fulfil its objectives of knowledge-gathering, education, and self-reflection, and its ultimate goal of effective regulation, the conferral of rule-making powers by the state may be more appropriate when the regulated sector contains a relatively small number of medium to large participants.

I begin by setting out the rule-making, compliance and enforcement functions of industry engagement. I then provide an overview of the *TCP Code 2019* and how it was developed, including an explanation of the process used to collect the qualitative data that informs this article. Following discussion of the mechanisms

---

9 See, eg, the journal issue on this topic edited by Kenneth W Abbott, David Levi-Faur and Duncan Snidal: Regulatory Intermediaries in the Age of Governance (2017) 670 *The Annals of the American Academy of Political and Social Science*.

10 Communications Alliance, *Telecommunications Consumer Protections Code* (4th ed Industry Code C628:2019) ('*TCP Code 2019*'). It was varied in minor respects in 2022: see Communications Alliance, *Telecommunications Consumer Protections Code Incorporating Variation No 1/2022* (4th ed Industry Code C628:2019, registered 16 June 2022) ('*TCP Code 2019 Incorporating Variation No 1/2022*'). Minor variations do not necessitate industry consultation: *Telecommunications Act* (n 3) s 119A(1)(e). At the time of writing, the *TCP Code 2019 Incorporating Variation No 1/2022* is registered with the Australian Communications and Media Authority ('ACMA'): 'Register of Telco Industry Codes and Standards', *ACMA* (Web Page, 22 October 2025) <https://www.acma.gov.au/register-telco-industry-codes-and-standards>.

11 As of July 2025, the Communications Alliance ('Comms Alliance') has rebranded as the Australian Telecommunications Alliance ('ATA'): 'About Us', *ATA* (Web Page) <https://www.austelco.org.au/about-us/>. However, this article will refer to the Comms Alliance given it was known as such during my research.

12 Whether the Code will remain so in the future is less clear. On 24 October 2025, the ACMA declined to register a fifth edition of the TCP Code proposed by the ATA, stating that 'it would not provide appropriate community safeguards for telco consumers' and giving the ATA 30 days to revise the Code: ACMA, 'ACMA Rejects Proposed Telco Industry Code' (Media Release MR33/2025, 24 October 2025) <https://www.acma.gov.au/articles/2025-10/acma-rejects-proposed-telco-industry-code>. The ATA submitted a revised Code to the ACMA for registration on 24 November 2025. However, if the ACMA concludes the revised Code has failed to address the deficiencies it identified, the ACMA may adopt an industry standard: see 'Stage 4: Submission to the ACMA', *ATA* (Web Page) <https://www.austelco.org.au/news-and-resources/reviews-and-consultations/tcp-code-review-2024/stage-4-submission-to-the-acma/>; *Telecommunications Act* (n 3) s 125.

used by the Comms Alliance to engage industry participants and whether they chose to engage or disengage with Code development, I assess whether the rule-making functions of industry engagement were discharged, notwithstanding that most industry participants subject to the Code did not participate in the process. I argue that for participating Comms Alliance members, which included the largest industry players along with a representative mix of other large and medium participants subject to the Code, the engagement process had some value. It led to the pooling of a significant amount of industry knowledge. Participating members also benefited from educational opportunities presented during the process, arguably provoking some critical self-reflection. However, the engagement barriers apparently faced by a sizeable number of small and micro-sized participants prevented the full realisation of co-regulation's potential benefits. I conclude the article by discussing the potential implications of these findings for legislators, governments, and policymakers, highlighting the need for further empirical study of industry associations and their practices in industry sectors within Australia and farther afield.

II The Importance of Industry Engagement

Industry engagement in the rule-making processes of industry associations is essential for the success of co-regulatory regimes. Without it, rules would not be produced. Behaviour would not be altered. Regulatory problems would remain unaddressed, forcing government to intervene directly in the market. More worryingly, consumers may suffer harm.[13] Yet, even though the success of co-regulation turns on industry engagement, the specific purpose(s) of participation by firms and engagement by industry associations with industry participants during their rule-making processes have not been clearly identified. A close reading of the regulatory literature, however, indicates that industry engagement in a co-regulatory rule-making context serves (or has the potential to serve) three rule-making functions as well as important compliance and enforcement-related functions.

In Parts II(A)–(C) below, I identify and explain each function of industry engagement, grounding them in regulatory theory and the small, but growing, body of literature on industry rule-making. This literature considers multiple types of industry rule-making, including those which permit individual firms to draft their own rules for regulatory approval. Although different from the definition of co-regulation offered above and from the forms of co-regulation that have traditionally been used in the communications sector, these 'one-on-one' forms of industry rule-making shed light on the functions of industry engagement in co-regulatory rule-making.

A *The Rule-Making Functions of Industry Engagement*

1 *Knowledge-Gathering*

The first function industry engagement serves is *knowledge-gathering*: the individual companies and industry associations involved are expected to gather information relevant to the particular regulatory issue. Relevant information, which

[13] See, eg, Rodrigo Vallejo, 'The Private Administrative Law of Technical Standardization' (2021) 40(1) *Yearbook of European Law* 172, 225–6.

may take the form of data and/or know-how, may be sourced, for example, from industry participants subject to any proposed rules and other industry participants not subject to those proposed rules. These other market participants might have a direct or indirect role in the creation and/or resolution of the particular regulatory problem and have important knowledge to share in relation to those roles. Industry participants may already have the information to hand or need their employees and/or contractors to find and collate data located within or outside their business premises. In the case of industry associations, the information is most likely to come from its members, although longstanding and well-established associations may also have acquired pertinent information they can share.

Knowledge-gathering is central to the leading regulatory approaches that encourage the state to experiment with industry rule-making. Indeed, one of the most common purposes cited in support of involving industry in rule-making is to overcome the information asymmetries regulators confront when formulating rules. Industry participants are said to have a deeper knowledge about themselves, the industry in which they operate, and the cost and impact of rules than regulators have or than regulators can obtain at a reasonable cost. As Coglianese and Mendelson, writing about meta-regulation and self-regulation, have stated, regulatory targets likely have 'far greater knowledge of and information about their own operations — and are therefore more likely to find the most cost-effective solution to the problem at issue'.[14] The importance of knowledge-gathering is also seen in the literature on democratic experimentalism and its precursor, directly deliberative polyarchy.[15] In their classic text *Responsive Regulation: Transcending the Deregulation Debate*,[16] Ayres and Braithwaite do not explicitly refer to 'industry knowledge' or 'industry expertise' in support of their conception of 'enforced self-regulation',[17] but the model is clearly predicated on the assumption that industry participants have important knowledge of themselves with a direct bearing on the matter in question — an assumption Gunningham and Grabosky also make in *Smart Regulation: Designing Environmental Policy*.[18]

2 *Education*

The second function of industry engagement is *education*: engagement is expected to inform industry members and/or their associations. The precise lessons industry engagement will or ought to impart to industry members and associations will vary on a case-by-case basis. Ideally, however, industry engagement has the potential to educate industry participants about the adverse risks and consequences of their own business practices — especially when used in conjunction with engagement with uncaptured regulators, consumers, and citizens. The exercise allows industry

[14] Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146, 152.

[15] Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3(4) *European Law Journal* 313, 326.

[16] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

[17] Ibid ch 4.

[18] Neil Gunningham and Peter Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998).

associations, for example, to convey salient information, gathered during discussions with regulators, consumers and/or citizens, to their members, perhaps in language that translates reported difficulties, so they better understand the matters at hand. But industry consultation is not limited to this objective. It serves additional purposes too. It provides an important opportunity for underperforming market participants to learn about industry best practice, the norms they are expected to meet and how they might meet them. It can also teach industry about the advantages and disadvantages of different ways to mitigate and/or eliminate unwanted risks and consequences.

Although not as pronounced in the leading regulatory approaches that encourage the state to experiment with industry rule-making, the education function, which can also be seen as a corollary of the knowledge-gathering function, is nevertheless present. For example, in their discussion equating informational regulation with 'elementary forms of management-based regulation',[19] Coglianese and Lazer state the purpose of informational regulation is 'to change the behavior of the firm by making managers *more aware of* and concerned about their organization's social outputs'.[20] If informational regulation and management-based regulation share this same objective, then at least one of the purposes of engaging directly with industry during 'internal rule-making efforts' must be to educate industry participants about their practices with the purpose of moving it toward 'the achievement of specific public goals'.[21] Scholars of enforceable undertakings also indicate this form of rule-making may 'be viewed as educational, sending a message to regulated entities regarding the types of conduct deemed inappropriate by regulators'.[22] Similarly, Gunningham and Sinclair have noted evidence that 'the very act of negotiating co-regulatory agreements provides industry with a greater *insight* into better environmental management'.[23]

3 *Self-Reflection*

The third and final function of industry engagement is to trigger self-reflection: the internal review and assessment by individual companies of their conduct against legal, social, regulatory norms, their causes, and the tools at their disposal to resolve them. In an ideal world, corporate self-reflection should occur in the absence of external regulatory triggers.[24] However, where internal self-reflection has not already taken place, industry engagement should mark the commencement of self-assessment in light of any knowledge gathered and shared as a result of participation or the industry association consultation exercise. Where some internal self-reflection has already occurred, industry engagement has the potential to spark further and deeper self-reflection, forcing reconsideration of concerns initially or summarily

---

19 Cary Coglianese and David Lazer, 'Management-Based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) *Law & Society Review* 691, 695.

20 Ibid (emphasis added).

21 Ibid 692.

22 Marina Nehme, 'Enforceable Undertakings' Practices Across Australian Regulators: Lessons Learned' (2021) 21(1) *Journal of Corporate Law Studies* 283, 301.

23 Neil Gunningham and Darren Sinclair, 'Instruments for Environmental Protection' in Neil Gunningham and Peter Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998) 37, 55 (emphasis added, citations omitted).

24 See, eg, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) ch 2.

dismissed. Industry engagement, of course, does not guarantee self-reflection will occur, but it has the potential to set it in motion and is undertaken in the hope that it will trigger critical self-evaluation.

Like the education function of industry engagement, activating self-reflection is not as prominent as knowledge-gathering in the regulatory literature considered thus far. However, activating self-reflection is or should be one of industry consultation's objectives (if not its fundamental objective) for the regulatory scholars discussed here. For them, industry consultation is in no way the sole trigger for self-reflection, but along with public consultation it can be an impetus for self-reflection. Coglianese and Lazer state explicitly that management-based regulation involves 'forcing firms to *confront and assess* risks that they might otherwise find insufficiently beneficial to study'.[25] In their discussion of the strengths and weaknesses of self-regulation, which they define as 'a process whereby an organized group regulates the behaviour of its members',[26] Gunningham and Sinclair also highlight that self-regulation, in theory, offers 'the potential for utilizing peer pressure' to raise the standard of industry behaviour.[27] In other words, it provides opportunities for industry 'laggards' to reflect on their own conduct and learn from industry 'leaders' — an idea echoed by Braithwaite in subsequent work explaining and developing the ideal of responsive regulation[28] and Parker in her work on meta-regulation and other strategies to render the corporation more 'permeable' to wider social concerns.[29]

The actual depth of self-reflection that industry engagement sparks may, of course, depend on the way in which the industry association undertakes it or the way in which a firm chooses to engage with that process. Techniques of enforced self-regulation, management-based-regulation, and enforceable undertakings all envisage mandatory one-on-one consultation (orally and in writing) with firms, tailored to their needs. Led by regulators, this form of consultation is seen as preferable to one of the standard ways of engaging with industry in traditional rule-making — a call for voluntary written submissions — because it involves direct participation and is likely to provoke more fulsome and deeper industry engagement. However, if undertaken by an industry association, engagement may not need to be one-on-one. A call for voluntary written submissions to its members and non-members may be sufficient, because the consultation process is led by industry — an issue that is addressed below in Part IV.

B *The Compliance Function of Industry Engagement*

Industry engagement during rule-making also potentially serves an important compliance function — it can help to motivate companies (or at least some of the various individuals who work for them and make decisions collectively on their behalf) to voluntarily conform to rules. By engaging their members and non-

[25] Coglianese and Lazer (n 19) 703 (emphasis added).
[26] Gunningham and Sinclair (n 23) 50.
[27] Ibid 52.
[28] John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475, 481, 503.
[29] Parker (n 24) chs 8–9.

members in discussions individually or collectively as rules are drafted, industry associations can enhance the likelihood firms will accept those rules and therefore take the necessary steps to comply with them.

Ayres and Braithwaite make the connection between consultation, regulatory rule-making, and compliance in their chapter on enforced self-regulation, stating that having a say in rule-making is likely to make regulation 'more palatable', thereby enhancing 'acceptance' of rules and their 'execution'.[30] However, the basis for the connection is best explained in their chapter on the 'benign big gun',[31] where they highlight that economic rationalism — the premise that underpins traditional deterrence theories of compliance — is not the only factor that motivates compliance.[32] Corporate actors will often be motivated by economic rationalism and some corporate actors will only be motivated by profit-seeking motives, but many (if not most) will also be motivated 'to do what is right, to be faithful to their identity as a law abiding citizen, and to sustain a self-concept of social responsibility'.[33] It is for that reason they suggest that regulators need to engage in dialogue with regulatees — dialogue that a 'tit-for-tat' enforcement strategy and dialogue that consultation during co-regulation, enforced self-regulation and other forms of industry rule-making facilitate.[34]

C *The Enforcement Function of Industry Engagement*

In addition to its compliance functions, industry engagement during rule-making may facilitate regulatory enforcement of rules adopted by industry associations and registered with regulators. Enforcement may be facilitated because industry engagement can lead to rules with more precision and greater clarity, thereby helping to eliminate the risks of over- and under-inclusiveness, 'indeterminacy' and interpretation said to hinder rule enforcement and regulatory effectiveness in traditional regulatory contexts.[35] Compliance with industry codes is often voluntary, but compliance with codes may be mandatory. This may occur, for example, if legislation supporting a co-regulatory regime makes code compliance mandatory upon the registration of a code[36] or if a regulator has power to direct a firm, found to be in breach of a code, to comply with the code.[37] However, where code enforcement (in any form) is envisaged, contributions made by individual corporate actors to

30 Ayres and Braithwaite (n 16) 113.
31 Ibid ch 2.
32 Ibid 21–7.
33 Ibid 22.
34 Procedural justice theorists like Tom Tyler share similar views but emphasise that compliance is motivated by legitimacy — people's belief that lawmakers have the right to govern them: see, eg, Tom R Tyler and John M Darley, 'Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law' (2000) 28(3) *Hofstra Law Review* 707.
35 Julia Black, *Rules and Regulators* (Clarendon Press, 1997) ch 2.
36 See, eg, Michelle Rowland, 'Albanese Government Takes Strong Action to Protect Telco Consumers' (Media Release, 21 January 2025). The Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth), reintroduced into Parliament on 28 August 2025, stipulates that compliance with registered industry codes is mandatory: Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 12 of 2025–26, 1 September 2025). See also Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth) sch 2.
37 See, eg, *Online Safety Act* (n 6) s 143; *Telecommunications Act* (n 3) s 121.

industry associations during rule-making can contribute to the particularity that regulators need to withstand legal challenge.[38]

Of all the functions of industry engagement considered here, the possible enforcement benefit of industry engagement in rule-making has received the least attention in the regulatory literature. Moreover, when industry consultation and enforcement are discussed, they are talked about only in contexts where individual firms engage in rule-setting on a one-on-one basis with regulators such as enforced self-regulation, enforceable undertakings, or management-based regulation. For example, when setting out the potential benefits of enforced self-regulation, Ayres and Braithwaite state that involvement of regulatees in rule-making has the potential to replace 'bland and meaningless rules (eg, that accounts be "true and fair")' associated with direct regulation with 'precise and particularistic rules', rendering 'acquittals … more difficult to secure by appeal to the vagaries of the wording'.[39] The contribution of discussions that industry associations might have with their members and non-members about Code rules are not explicitly acknowledged or considered. Collective industry rule-making by industry associations may not lead to rules that are as particularistic as rules produced by one-on-one firm negotiation. Nevertheless, any industry input that industry associations receive must have the potential to lead to greater particularity with possible resultant enforcement benefits in the form of more accurate inclusiveness, greater determinacy and further clarity.

III The *Telecommunications Consumer Protections Code*

A *Overview of the* TCP Code 2019 *and Its Development*

The *Telecommunications Consumer Protections (Code* ('*TCP Code*') has been a cornerstone of the consumer protection framework for the Australian telecommunications industry since 2007[40] when the first version of the Code was adopted by the Comms Alliance and registered with the ACMA.[41] The *TCP Code* applies to a sub-class of carriage service providers, namely those which supply telecommunication services, including related goods such as handsets and some content services, to residential customers and small-business/non-profit organisations.[42] To qualify as a carriage service provider, including those subject to the Code, entities and individuals do not need to own and/or operate communications infrastructure. Instead, they must supply 'listed carriage services'[43] — carriage services provided within and/or to and from Australia to the public using 'network units'[44] owned and/or operated by third parties known as 'carriers'. Examples of carriage services well-known to consumers and on which they depend include telephony, mobile, Internet access and data services.

---

38 See, eg, ACMA, *Guide to Developing and Varying Telecommunications Codes for Registration* (2015) 5–6.

39 Ayres and Braithwaite (n 16) 115.

40 Whether it will be in the future is in doubt at the time of writing: see above n 12.

41 It resulted from the amalgamation of six earlier industry codes.

42 See, eg, *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 1.4.

43 *Telecommunications Act* (n 3) s 16.

44 Put simply, network units include any communications infrastructure, including wires, cables, fibres, base-stations and satellite-based facilities. See further *Telecommunications Act* (n 3) pt 2 div 2.

The precise obligations imposed on telecommunications providers differ in each of the four editions[45] (and their variations[46]) of the *TCP Code*; however, each iteration has adopted rules corresponding to each stage of the customer lifecycle (for example, advertising, sales, contracts and billing). The '*TCP Code 2019*', development of which is the focus of my case study, is 83 pages long with eight substantive chapters setting out general rules and additional requirements relating to: advertising, sales, contracts, and customer service; billing; credit and debit management; financial hardship;[47] changing suppliers; and Code compliance and monitoring.[48] Among other obligations, the *TCP Code 2019* required telecommunications providers to make available 'critical information summaries' about their product and service offerings, detailing, for example, minimum and maximum charges, early termination fees, and how to make a complaint,[49] so consumers could compare offers. The Code also mandated that providers assess the ability of their customers to pay their bills before providing post-paid services.[50] Further, it stipulated that providers had to: provide tools like call barring and expenditure caps to help customers limit the money they spent on post-paid services; and notify customers when they exceeded specified percentages of their data allowances.

Development of the *TCP Code 2019* began in 2017 (as was required) with a review of the previous edition of the Code.[51] In accordance with the Comms Alliance's internal processes,[52] the review was initiated by its Industry Consumer Advisory Group ('ICAG'). ICAG is a standing body comprised of Comms Alliance members (including carriers, carriage service providers, and content service providers[53]) responsible for matters related to 'the delivery of services to end users'.[54] Following consideration of a background report prepared by the Comms Alliance's project manager, and meetings with regulatory bodies[55] and the Australian Communications Consumer Action Network ('ACCAN'), the 'peak'

---

45 See Communications Alliance, *Telecommunications Consumer Protections Code* (1st ed Industry Code C628:2007); Communications Alliance, *Telecommunications Consumer Protections Code* (2nd ed Industry Code C628:2012) ('*TCP Code 2012*'); *Telecommunications Consumer Protections Code* (3rd ed Industry Code C628:2015) ('*TCP Code 2015*'); *TCP Code 2019* (n 10).

46 The third edition was varied three times. The fourth edition was varied once.

47 The financial hardship obligations were replaced by the requirements of the *Telecommunications (Financial Hardship) Industry Standard 2024* (Cth).

48 The complaint handling chapter included in the *TCP Code* 2015 (n 45) was omitted from *TCP Code 2019* (n 10) because, when the latter was being drafted, the ACMA adopted an industry standard for complaint handling: see *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* (Cth).

49 *TCP Code 2019* (n 10) cl 4.2.

50 Ibid cl 6.1.

51 See Communications Alliance, *Telecommunications Consumer Protections Code Incorporating Variation No 1/2018* (3rd ed Industry Code C628:2015, July 2018) cl 1.6.

52 Communications Alliance, *Document Maintenance Policy and Process* (May 2008) cl 3.

53 Content service providers use listed carriage services to provide content services to the public, including, for example, broadcasting, video-on-demand and interactive computer game services: see *Telecommunications Act* (n 3) s 97.

54 Communications Alliance, *Industry Consumer Advisory Group* (Web Page, 10 April 2013), archived at <https://webarchive.nla.gov.au/awa/20130409203438/http://commsalliance.com.au/Activities/committees-and-groups/ICAG>.

55 They included ACMA, the Australian Competition and Consumer Commission ('ACCC'), the Telecommunications Industry Ombudsman and Communications Compliance ('CommCom').

Australian consumer group for communications consumers, ICAG decided the Code should be revised.[56] The Comms Alliance Project Manager then sought expressions of interest to participate in a 'representative'[57] working committee responsible for drafting the new Code from consumers, regulators, and Comms Alliance industry members.[58]

By October 2017, the working committee had been established and its members appointed. It was independently chaired by Fay Holthuyzen, former Deputy Secretary of the Commonwealth Department of Communications (also appointed by the Comms Alliance),[59] and initially consisted of six voting members and four non-voting members. The six voting members comprised four industry representatives (inabox, Optus, Telstra, and Vodafone Hutchison Australia ('VHA')[60]) and two consumer group representatives (ACCAN and Legal Aid NSW). The four non-voting members included the ACMA, the Australian Competition and Consumer Commission ('ACCC'), the Commonwealth Department of Communications and the Arts, and the Comms Alliance).[61] Working committee members met periodically over a period of approximately 16 months to revise the Code. A draft of the revised Code was published on the Comms Alliance's website for industry and public comment on 9 July 2018 with both groups given 30 days to provide written feedback.[62] Following consideration of submissions, the members of the working committee, which by then no longer included inabox[63] and Legal Aid NSW,[64] formally voted to approve the *TCP Code 2019*. It was later submitted to the Comms Alliance's Board for approval. The Board decided to adopt and submit the Code to the ACMA for registration. The ACMA registered the *TCP Code 2019* on 1 July 2019.[65]

B *Data Collection*

When data collection for my research began in 2021, the *TCP Code 2019* had been registered for approximately 18 months with the ACMA and its development was therefore relatively 'fresh' in the memories of potential interviewees. However, identifying and locating potential interviewees still proved to be difficult. This was

---

56 Interview with Comms Alliance representative (Karen Lee, online, 17 September 2021).

57 Communications Alliance, *Operating Manual for the Development of Industry Codes, Standards and Supplementary Documents and the Establishment and Operation of Advisory Groups* (June 2007) cl 2.1 archived at <https://web.archive.org.au/awa/20170215092811mp_/http://commsalliance.com.au/__data/assets/pdf_file/0010/1252/Operating_Manual_June_2007.pdf> ('*Operating Manual* (2007)').

58 Interview with Comms Alliance representative (n 56).

59 Communications Alliance, 'Independent Chair Appointed to Telecommunications Consumer Protection Code Review' (Media Release, 21 August 2017).

60 VHA merged with TPG Telecom in 2020: 'About Us', *TPG Telecom* (Web Page) <https://www.tpgtelecom.com.au/about-us>.

61 *TCP Code 2019* (n 10) 76.

62 Communications Alliance, 'Stronger Telco Consumer Protection Code – Feedback Wanted' (Media Release, 9 July 2018) ('Stronger Telco Consumer Protection Code').

63 inabox was purchased by MNF in October 2018: Brendon Foye, 'Inabox Sold to MNF Group for up to $33.5 million', *IT News* (online, 8 October 2018) <https://www.itnews.com.au/news/inabox-sold-to-mnf-group-for-up-to-335-million-513628>.

64 *TCP Code 2019* (n 10) 76.

65 Communications Alliance, 'Stronger Protections for Telecommunications Customers Take Effect Today' (Media Release, 1 August 2019).

because since 1997 when the Australian market was fully liberalised, there was no requirement to notify a regulator of service provision and no corresponding obligation on a regulator to publish a register of service providers.[66] In the absence of an official list, I decided the closest substitute was the list published by Communications Compliance ('CommCom') of 379 service providers that lodged the *TCP Code 2019* compliance documentation in 2020. The CommCom list was a relatively accurate snapshot of market participants for three reasons. First, CommCom, a company limited by guarantee, is the independent body responsible for overseeing the *TCP Code* compliance and monitoring. Second, since September 2012,[67] service providers have been required to submit, on an annual basis, a compliance attestation and/or independent assessment of compliance,[68] and when non-compliant, a 'compliance achievement plan' to CommCom.[69] Third, since 2016,[70] service providers must register with the Comms Alliance for the purposes of Code compliance. The information collected by the Comms Alliance is not published but is forwarded to CommCom so it can perform its compliance functions. CommCom, however, published only the names of the 379 service providers. It did not publish their Australian Business Numbers, Australian Company Numbers, all relevant business names, or the contact details of the nominated staff members service providers were required to submit when registering with the Comms Alliance. It also did not publish the number of telecommunications 'services in operation' that each service provider supplied to its customers. This is a measure commonly used by the ACCC and the industry to determine market share.[71]

'Services in operation' data (other than for the very largest providers) was not published by another source. Therefore, in an effort to ensure interviews were conducted with differently situated members of the telecommunications industry, I decided that, before contact details were located, the 379 service providers should, where possible, be classified into four categories using criteria commonly adopted

---

66 A registration requirement is common in other countries: see, eg, *Communications Act 2003* (UK) ss 33, 44. The absence of a register has also frustrated the ACCC, ACMA and Telecommunications Industry Ombudsman, who have repeatedly called for one to facilitate the enforcement of applicable regulatory requirements: see, eg, submissions in response to Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Cth), *Registration or Licensing Scheme for Carriage Service Providers: Discussion Paper* (September 2023) <https://www.infrastructure.gov.au/have-your-say/discussion-paper-carriage-service-provider-csp-registration-or-licensing-scheme-telecommunications>. These calls have finally been answered with the Commonwealth Minister for Communications announcing in January 2025 that the Government would establish a carriage service provider registration scheme: see Rowland (n 36). The Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth), which prohibits 'registrable carriage service providers' from supplying listed carriage services to the public unless registered, was reintroduced into Parliament on 28 August 2025: Department of Parliamentary Services (Cth) (n 36). See also Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth) sch 1.

67 See, eg, *TCP Code 2012* (n 45) cls 9.3–9.5.

68 The precise attestation varies depending on the size of the service provider and whether they are fully, partially or non-compliant with the *TCP Code*. For the current requirements, see *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 10.4.

69 *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 10.5.

70 See, eg, Communications Alliance, *Telecommunications Consumer Protections Code Incorporating Variation No 1/2016* (3rd ed Industry Code C628:2015, February 2016) cl 9.1.1(b).

71 See, eg, ACCC, *ACCC Communications Market Report 2023–24* (December 2024) 19–21.

by the Australian Bureau of Statistics:[72] large (200+ employees), medium (20–199 employees), small (5–19 employees), and micro-businesses (0–4 employees). Relying on data found in various business directories,[73] and after grouping subsidiary companies with their better-known parents, classification yielded a list of potential interviewees with 16 large providers, 50 medium providers, 85 small providers, and 78 micro providers.[74] The internet and other publicly-available sources of information were then searched for the direct email addresses of these providers' key principals and/or regulatory affairs managers,[75] who were then invited via email to participate in the research, with reminders sent where required. When direct email addresses could not be located, invitations were sent to generic company email addresses.[76] The Comms Alliance also emailed some invitations to its service provider members.[77] Other industry associations were also approached and asked to suggest interview candidates. Some interviewees provided the contact details of additional people they suggested should be interviewed; others wrote to colleagues on my behalf. In the end, in addition to a Comms Alliance representative, interviews were conducted with current or former employees from four large, four medium, two small, and two micro service providers.[78] Of the 12 service providers represented, four[79] were Comms Alliance members when the *TCP Code 2019* was drafted and eight were non-members. One of the non-members had previously been a Comms Alliance member. Six had never been members.[80] One joined after the *TCP Code 2019* was drafted. The four large service providers all participated in the Code's development in some way. Some sat on the working committee. The eight medium, small and micro service providers did not participate in any way. All interviewees spoke on the condition of anonymity.

The final number of companies interviewed was small. Only 12 companies were interviewed and only four of the 12 had engaged in the rule-making process. Nevertheless, when coupled with insights from a Comms Alliance representative, heavily involved with the *TCP Code 2019* and experienced in Code consultation practices, the qualitative data collected sheds light into rule-making consultation

---

72 See, eg, Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits July 2021–June 2025* (Web Page, 26 August 2025) <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/latest-release>.

73 They included Dun & Bradstreet (<https://www.dnb.com>), Zoom Info (<https://www.zoominfo.com/>), and Mint Global (now known as Moody's Orbis).

74 Forty-one providers could not be categorised.

75 I thought potential interviewees would be more responsive to emails than hardcopy invitations sent to their registered corporate addresses.

76 CoreData Research Australia, a business consultancy firm experienced in gathering business intelligence, was hired to help find the contact details of staff at medium, small and micro telecommunications service providers and to recruit participants.

77 As of 31 October 2020, the Comms Alliance had 105 members, only 18 of whom were service providers and appeared on CommCom's 2020 Code compliance documentation list: see 'Membership', *Communications Alliance Ltd* (Web Page, 31 October 2020), archived at <https://webarchive.nla.gov.au/awa/20201030135017/http://pandora.nla.gov.au/pan/25087/20201031-0000/www.commsalliance.com.au/about-us/membership.html>.

78 All interviewees confirmed their employer's classification was correct.

79 This number includes three large service providers and one small provider owned by a non-service provider member of Comms Alliance.

80 As a few interviewees appeared to confuse the Comms Alliance with CommCom, membership was verified by referring to Comms Alliance membership lists available on the Comms Alliance website archived on Trove: see, eg, 'Membership' (n 77).

processes led by industry associations and their ability to serve as effective intermediaries between regulatory targets (market participants) and regulators — the central objective of the article. Further empirical research needs to be conducted, but the findings discussed in this article serve as an important starting point. They better inform the ongoing academic debate about the capacity of rule-making intermediaries to contribute to the achievement of public policy objectives — a debate that will benefit from additional evidence of empirical experience.

C *Industry Engagement*

1 *Mechanisms of Engagement*

The Comms Alliance provided its members with four principal ways to have a say in the *TCP Code 2019* development process:

(a) working committee membership;

(b) ICAG membership;

(c) Operations Council membership and/or attendance at its meetings; and

(d) a 30-day opportunity to submit written comments[81] on the draft Code.

The Comms Alliance does not prohibit non-member companies from joining its working committees,[82] but an opportunity to submit written comments on the draft Code is the principal way that non-members can provide input into the Code development process. A Comms Alliance representative said it will take into account the views of industry non-members and provide working committees with the comments of non-members made in response to Comms Alliance media releases about the *TCP Code 2019* development. However, for the draft Code consultation, the Comms Alliance advertised the opportunity to submit written comments only on its website and in media releases[83] and its free bi-monthly newsletter *We Communicate.*[84] It did not offer additional opportunities for non-member input.[85]

I discuss below each of the four engagement mechanisms and the extent to which service providers utilised them.

(a) *Working Committee*

Four companies were represented on the working committee: inabox, Optus, Telstra, and VHA,[86] all of whom were Comms Alliance members when the *TCP Code 2019*

---

81 The *Telecommunications Act* (n 3) ss 117(1)(e), (3) mandate that industry participants have at least 30 days to comment. It does not require written submissions, but as a matter of practice the ACMA has been satisfied that an adequate opportunity to make submissions has been provided if Comms Alliance allows industry to make written submissions on its draft rules: see ACMA (n 38) 21.

82 See generally *Operating Manual* (2007) (n 57).

83 See 'Stronger Telco Consumer Protection Code' (n 62).

84 See the 9 July 2018, 17 July 2018, 6 August 2018 editions of *We Communicate*, archived at <https://webarchive.nla.gov.au/awa/20190303023657/http://commsalliance.com.au/Documents/newsletter>.

85 Interview with Comms Alliance representative (n 56).

86 *TCP Code 2019* (n 10) 76.

was drafted.[87] Telstra and Optus had, respectively, the first and third largest share of the retail markets for fixed voice services and broadband services; and the first and second largest share of the retail markets for mobile phone and mobile broadband services.[88] VHA had the third largest share of the relative mobile phone and mobile broadband services market. inabox[89] was a 'white label end-to end' provider, meaning it offered telecommunications products and services that other third-party companies could 'brand' and use to offer their own retail services. It was not a retail service provider. Its customers were retail service providers, subject to the Code, and included some small and micro providers.

inabox was directly approached by the Comms Alliance because of its familiarity with smaller service providers. Telstra, Optus, and VHA nominated themselves, and were appointed by the Comms Alliance, to participate in the working committee. The Comms Alliance extended invitations to participate on the working committee to all ICAG members and others; however, no one else volunteered.[90] Interviewees from large working committee members suggested ICAG members expected Telstra, Optus and VHA would volunteer for, and be appointed to, the working committee.[91] This expectation arose for three main reasons. First, the Comms Alliance limited the number of industry members in an effort to minimise consumer representative concerns about the disparity between the number of consumer and industry members on the working committee.[92] Second, Telstra, Optus and VHA were better resourced to support working committee's development of the Code — an activity described as long and time-consuming.[93] Third, ICAG members were

> comfortable with Telstra Optus and [VHA] arguing the case … In simple terms, I think they had a view that if Telstra, Optus and [VHA] agreed, then basically, they wouldn't agree to things that … other members couldn't agree with.[94]

---

87 'Membership', *Communications Alliance Ltd* (Web Pages, 15 February 2017, 11 March 2018, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20190303023350/http://commsalliance.com.au/about-us/membership>.

88 ACCC, *ACCC Communications Market Report 2017–18* (February 2019) 17–18, 26–7, 34, 37. The ACCC did not give a definitive breakdown of the providers' market shares of fixed voice services because it does not collect data about all service providers. The ACCC's data on Telstra's fixed services also includes Telstra's Belong-branded services: at 36–7. See also ACCC, *ACCC Communications Market Report 2018–19* (December 2019) 22, 31, 38, 42.

89 In 2017, inabox entered into a three-year agreement with Telstra to provide 'enablement services' so Telstra could provide inabox's white label services (with its own telecommunications services) to some of its wholesale customers: see Brendon Foye, 'Telstra and Inabox Join Forces to Help Resellers Quickly Launch into Telecommunications Services', *techpartmer.news* (online, 7 December 2017) <https://www.techpartner.news/news/telstra-and-inabox-join-forces-to-help-resellers-quickly-launch-into-telecommunications-services-479320>.

90 Interview with Comms Alliance representative (n 56).

91 Ibid; Interview with Large Telco A Participant 2 (Karen Lee, online, 1 September 2021) ('Large Telco A Participant 2'); Interview with Large Telco B Participant 1 (Karen Lee, online, 22 September 2021) ('Large Telco B Participant 1'); Interview with Large Telco C (Karen Lee, online, 22 December 2021) ('Large Telco C').

92 Interview with Large Telco A Participant 1 (Karen Lee, online, 7 December 2021) ('Large Telco A Participant 1').

93 Large Telco B Participant 1 (n 91); Large Telco C (n 91).

94 Large Telco A Participant 1 (n 92).

This point was emphasised by a representative of a large service provider ICAG member, not represented on the working committee.[95]

Telstra and Optus each had two representatives on the working committee; VHA and inabox each had one representative until inabox ceased to participate in the working committee in late 2018,[96] when it merged with another company, citing staff changes and resource constraints.[97] All industry representatives represented the interests of their employers.[98] One working committee representative from a large service provider reported their focus was on obtaining input from the retail divisions of their employers about the Code. Their wholesale divisions were not involved. This was the case even though their employers were also carriers (owners and operators of telecommunications networks) that provided telecommunications services on a wholesale basis to some service providers subject to the Code.[99] However, another representative from a different large service provider said, as a general rule, its wholesale division will contact its wholesale customers subject to the Code when proposed rule changes are likely to have a major impact on them and will suggest these customers contact the Comms Alliance for further information.[100] This representative added their employer was 'cognizant' of how rules might affect their wholesale customers subject to the Code and as a vertically-integrated business 'it has to make sure the rules work for different segments of the market'.[101]

One representative said they did approach at least one Comms Alliance member (a small service provider) about proposed modifications to credit assessment rules — contentious modifications proposed by consumer representatives on the working committee — to ensure they were 'pragmatic and doable'.[102] Nevertheless, the working committee generally relied on the Comms Alliance and the Project Manager for 'insights into other providers that we might not have a close relationship with', and if it did seek the views of other Comms Alliance members it 'would go to the larger ones' for reasons of 'convenience and time pressure' rather than 'malice'.[103] This representative added,

> I wish I could say [the Code] was the only thing I was doing at that particular time. But it was a fairly big commitment in terms of time. So you really were running pretty hard in terms of doing the things you had to do before the next meeting.[104]

Working committee representatives interviewed reported they did not directly approach non-members of the Comms Alliance during Code development.[105]

---

95 Large Telco C (n 91).
96 *TCP Code 2019* (n 10) 76.
97 Interview with Comms Alliance representative (n 56). Legal Aid NSW had one representative on the working committee; ACCAN had up to three representatives.
98 Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).
99 Large Telco A Participant 1 (n 92). This interviewee said contacting wholesale customers subject to the Code would '[open] another can of worms'.
100 Large Telco B Participant 1 (n 91).
101 Ibid.
102 Large Telco A Participant 1 (n 92).
103 Large Telco A Participant 2 (n 91).
104 Large Telco A Participant 1 (n 92).
105 Ibid; Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

(b) *ICAG*

ICAG is a members' only forum, and its meetings held monthly, outside of and between working committee meetings, were described as the 'main [engagement] vehicle' for the Comms Alliance members, giving them a 'voice' on the working committee.[106] The Comms Alliance's Policy and Regulation Manager, who also provided project management support to the Code's working committee, drew ICAG members' attention via email and/or in meetings to more controversial issues that arose in working committee meetings or to matters that 'may impact smaller or midsize providers differently than the larger providers' and solicited feedback.[107] ICAG meetings were also regularly attended by Telstra, Optus and VHA working committee representatives.[108]

Throughout the development of the *TCP Code 2019*, ICAG had between 10 and 12 members, not all of whom were subject to the Code's provisions.[109] The following 15 service providers were ICAG members for at least some of the time: AAPT, amaysim, Community Telco (also known as Bendigo Telco), Engin (once owned by M2/Primus, now owned by Vocus), Foxtel,[110] Fuzenet, iiNet (owned by AAPT until August 2015 when it was sold to TPG), Jeenee Mobile (now owned by amaysim), M2/Primus (now owned by Vocus), MyRepublic, Optus, Pivotel, Telstra, Vocus, and VHA.[111] Based on my classification scheme and the number of employees found in business directories,[112] these 15 ICAG members included eight large, four medium, zero small and zero micro service providers. Two providers (Jeenee Mobile and M2/Primus) could not be classified because their employee numbers could not be found. Although no small or micro service providers appear to have participated, member participation in ICAG appears to have been relatively high, given the total number of Comms Alliance service provider members who were

106 Interview with Comms Alliance representative (n 56).

107 Ibid. Feedback was provided via email, orally during meetings or over the phone.

108 Ibid.

109 See 'Industry Consumer Advisory Group (ICAG)', *Communications Alliance Ltd* (Web Pages, 15 February 2017, 11 March 2018, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20130409203438/http://commsalliance.com.au/Activities/committees-and-groups/ICAG>. NBN Co and Holding Redlich were ICAG members. However, NBN Co is a wholesale provider. Holding Redlich is a law firm.

110 Telstra owned 50 per cent of Foxtel until June 2018: David Chau, 'Telstra and News Corp to Merge Foxtel and Fox Sports by June', *ABC News* (online, 6 March 2018) <https://www.abc.net.au/news/2018-03-06/foxtel-fox-sports-merger/9517102>. Telsta owned 35 per cent of Foxtel until DAZN's acquisition of Foxtel was completed in April 2025: see Foxtel Group, DAZN Group Completes Acquisition of Foxtel, Strengthening Global Sports Streaming Leadership; (Company Announcement, 2 April 2025) <https://foxtelgroup.com.au/newsroom/dazn-group-completes-acquisition-of-foxtel-strengthening-global-sports-streaming-leadership>; 'Foxtel Group Welcomes News Corp and Telstra Agreement for DAZN to Acquire Australian Sports and Entertainment Leader' (Company Announcement, 23 December 2024) <https://foxtelgroup.com.au/newsroom/foxtel-group-welcomes-news-corp-and-telstra-agreement-for-dazn-to-acquire-australian-sports-and-entertainment-leader>.

111 The large service providers were AAPT, amaysim, Foxtel, iiNet, Optus, Telstra, Vocus and VHA. The medium service providers were Community Telco (also known as Bendigo Tel Co), Engin, Fuzenet, MyRepublic, and Pivotel. Foxtel was classified as a large service provider even though telecommunications is a small percentage of Foxtel's business because of its employee numbers.

112 See above n 73.

subject to the Code between February 2017 and March 2019. Approximately 50 per cent of its service provider members participated in ICAG.[113]

However, one of ICAG's key challenges, identified by a large service provider member, was '[making] sure that we're getting the message out to *all* the relevant members'.[114] The Comms Alliance representative suggested it kept non-ICAG members informed of Code developments via email or (if required) solicited their views by phone.[115]

(c) *The Comms Alliance Operations Council*

The Operations Council is an internal body within the Comms Alliance 'comprised of senior representatives from member companies to guide and help manage the core operational activities of the Alliance'.[116] Its members included the chairs of the Comms Alliance's Reference Panels (standing bodies comprised of Comms Alliance members, responsible for a specific area of industry activity) and former members of the National Broadband Network Project Steering Committee.[117]

When the Code was developed, 15 companies were represented on the Council.[118] Seven of the 15 companies (Foxtel, iiNet, AAPT, M2, Optus, Pivotel Satellite[119] Telstra and VHA) were service providers. As noted above, Optus, Telstra, and VHA were also working committee members, and three of their working committee representatives[120] were Council representatives.[121] Along with Comms Alliance staff, working committee representatives provided updates on *TCP Code 2019* progress as well as solicited feedback and participation from Council members.[122]

---

113 This figure was arrived at by comparing and contrasting the company names on the CommCom Code compliance documentation list and the Comms Alliance membership lists available on its website between 19 February 2017 and 3 March 2019, archived at <https://webarchive.nla.gov.au>. For various reasons too detailed to summarise here, it is not possible to give a precise figure.

114 Large Telco A Participant 1 (n 92) (emphasis added).

115 Interview with Comms Alliance representative (n 56).

116 See 'Operations Council', *Communications Alliance Ltd* (Web Page, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20190303044546/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

117 This committee was responsible for addressing industry needs following the Australian Government's 2009 decision to build and operate the NBN: see 'NBN Project History', *Communications Alliance Ltd* (Web Page, 22 March 2012), archived at <https://webarchive.nla.gov.au/awa/20120322093235/http://www.commsalliance.com.au/Activities/nbn/history>.

118 Communications Alliance, *Operations Council* (Web Pages, 15 February 2017, 11 March 2018, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20190303044546/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

119 Pivotel Satellite is the same entity as Pivotel. The name Pivotel Satellite is used here because Comms Alliance listed it on its Operations Council web page: Communications Alliance, *Operations Council* (Web Page), archived at <https://webarchive.nla.gov.au/awa/20190303044546/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

120 *Constitution*, Communications Alliance Operations Council (at 15 September 2023), archived at <https://webarchive.nla.gov.au/awa/20180310130644/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

121 Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

122 Large Telco A Participant 1 (n 92).

(d) *Written Submissions*

The opportunity to make written submissions was published on the Comms Alliance's website — an opportunity also advertised on its LinkedIn account, and in the free bi-monthly newsletter (*We Communicate*) Comms Alliance circulated via email to its subscribers.[123] In addition, the Comms Alliance issued a media release inviting industry participants to make written submissions. However, only three industry participants made written submissions: Optus; Telstra; and Aussie Broadband, a large service provider who became a Comms Alliance member as or shortly after the Code was finalised.[124]

In summary, four things stand out about industry engagement in this Code development process. First, the process had strong involvement from Comms Alliance service provider members. At least 50 per cent engaged in the process in some way.[125] Second, with one exception, the biggest service providers actively and significantly contributed to the process using three of the four available engagement mechanisms.[126] The largest providers of all services used all four mechanisms.[127] Third, the number of service providers who are Comms Alliance members was low relative to the estimated total number of industry participants. Fourth, few (if any) non-Comms Alliance members engaged with the process.[128]

In Parts III(C)(2)–(3) below, I consider why service providers chose to engage or disengage with the process, and the barriers that impeded those that did not participate. Given the strong correlation between Comms Alliance membership and engagement, I also consider why service providers were (or were not) Comms Alliance members.

2 *Why Participate?*

All interviewed representatives from the four large service providers said participation[129] allowed their employers to 'inform the development of rules'[130] — an important opportunity because they know their customers and can develop more practical solutions than regulators and consumer organisations can.[131] As one stated, the *TCP Code 2019* rules

> impact the sorts of costs that we might have to bear, the systems, the process that we might have to invest in. Sometimes, it can also … influence or conflict

---

123 Interview with Comms Alliance representative (n 56). Subscribers may include Comms Alliance members and non-members.

124 See also 'Drafts for Public Comment', *Communications Alliance Ltd* (Web Page, 31 October 2018), archived at <https://webarchive.nla.gov.au/awa/20181030223731/http://pandora.nla.gov.au/pan/25087/20181031-0143/www.commsalliance.com.au/Documents/public-comment.html>.

125 The number of members who exchanged emails or had conversations with Comms Alliance staff about the Code could not be determined.

126 Interview with Comms Alliance representative (n 56); Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

127 Interview with Comms Alliance representative (n 56); Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

128 Interview with Comms Alliance representative (n 56); Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

129 This included Large Telco D: Interview with Large Telco D (Karen Lee, online, 21 February 2022).

130 Large Telco A Participant 1 (n 92).

131 Large Telco B Participant 1 (n 91).

> with some of the things that we are wanting to do for customers. … It's important … to ensure that the rule-making processes have sufficient flexibility to provide … opportunities for different options, different technologies, different flexibility.[132]

Industry also 'need[ed] the rules written in a way, which makes sense for industry… if it's not worded in a way that industry can understand or apply, then … the value or the benefit [of the rules] is reduced'.[133] Similarly, 'there's a key interest in making sure that whatever the rules are' industry can comply with them.[134]

The motivations of 'voice' and avoidance of costly, ineffective state regulation also drove membership of the Comms Alliance. Three of the four interviewees from large providers suggested they are Comms Alliance members because co-regulation delivers the best outcome for industry, consumers and regulators, a belief 'that came from a strong commercial view that the industry … really knew best how to resolve some of the issues and manage some of the issues'.[135] Four interviewees said it was important for industry to have a 'collective' voice or influence,[136] and have their 'views heard',[137] while another said their employer wanted to play a 'constructive role' in the regulatory process.[138] However, regulatory and legal resource constraints were additional drivers of Comms Alliance membership. One interviewee from a large service provider much smaller than the others stated, 'it's impossible for any individual at the moment to stay across what's happening' in this 'regulated area';[139] membership made that task much easier.

3 *Why Disengage?*

The interviewed representatives from the eight medium, small and micro service providers which did not participate in Code development cited a variety of reasons for not engaging with the process.[140] With the exception of limited business impact, referred to by some interviewees,[141] all reasons indicate the existence of participation

---

132 Ibid.
133 Ibid.
134 Ibid.
135 Large Telco A Participant 1 (n 92).
136 Large Telco A Participant 2 (n 91).
137 Large Telco C (n 91).
138 Large Telco A Participant 2 (n 91).
139 Large Telco C (n 91).
140 Large service providers and Comms Alliance staff interviewed said cost, time commitment, Code complexity, and lack of specialist skills contributed to non-engagement by smaller providers. However, large service providers referred to three additional factors: 'they know they can rely on those who are participating to 'serve their interests and ensure that things are kept sort of honest and practical and commercial'; 'trust' in Comms Alliance to 'put [their] views forward'; and membership of another industry organisation that provides updates on Codes: see Interview with Large Telco B Participant 2 (Karen Lee, online, 22 September 2021); Large Telco A Participant 1 (n 92); Large Telco B Participant 1 (n 91), Large Telco C (n 91). While those reasons may may explain why some smaller service providers did not engage, I have not discussed them in the above analysis because the medium, small and micro service providers interviewed made no reference to them.
141 Interview with Small Telco A (Karen Lee, online, 30 September 2021) ('Small Telco A'); Interview with Micro Telco A (Karen Lee, online, 21 September 2021) ('Micro Telco A').

barriers for smaller companies in industry rule-making — barriers similar to those they encounter in traditional rule-making.[142]

The lack of resource was the most significant (and commonly cited) reason for non-engagement by medium, small and micro service providers. Participation inevitably meant that staff members were 'not doing something else'.[143] The representative of two medium service providers explained: 'As a small business … a lot of your focus is around growth … you're having to pull people off one project to work on things like that. And sometimes that can hamper your growth'.[144]

An inability to influence the process or derive benefit from their participation was also mentioned. '[T]he rules are written for the bigger guys', said one micro service provider.[145] 'If it's just gonna be I'm gonna get stuck with whatever the outcome is, it's just a case of what's the point?', said a small service provider representative.[146] A similar view was expressed by a representative from a medium service provider (and former Comms Alliance member):

> [T]here was minimal opportunity to be involved unless you're actually on the working committee for it and getting on the working committee for it was virtually impossible …
>
> Comms Alliance is very, very heavily geared towards its largest members, which are the big telcos. And I genuinely feel that as a smaller telco, they're not interested in our voice …
>
> Participation in these processes, and the desire to participate is directly proportionate to the extent that we feel our voice will be heard or our opinion will be considered and taken into effect …[147]

Another medium service provider who was critical of the *TCP Code 2019* and the way the Telecommunications Industry Ombudsman adjudicates consumer disputes arising under the Code said: 'If things don't change when those [large companies] are engaging, then our legal say is not going to make a difference'.[148]

A belief they could not add value to the process or lacked the skills or expertise needed to participate also led to non-participation. As a representative from a micro service provider observed, staff are 'often technical-focused people [with] limited sophistication in relation to business [and] legal matters [and] certainly don't have the funds to go off and get a top tier law firm to make submissions on their behalf'.[149] The representative from a medium-sized service provider said that without a law degree he could not engage in the 'quite detailed and nuanced legal wording of the ins and outs of things like [the Code]'.[150] The representative of two

---

142 On participation barriers faced by 'missing stakeholders', including small businesses, in traditional United States ('US') administrative rule-making, see, eg, Cynthia R Farina, Mary J Newhart, Claire Cardie and Dan Cosley, 'Rulemaking 2.0' (2011) 65(2) *University of Miami Law Review* 395.

143 Interview with Small Telco B (Karen Lee, online, 10 February 2022) ('Small Telco B').

144 Interview with Medium Telcos C and D (Karen Lee, online, 24 September 2022) ('Medium Telcos C and D').

145 Micro Telco A (n 141).

146 Small Telco B (n 143).

147 Interview with Medium Telco A (Karen Lee, online, 30 September 2021) ('Medium Telco A').

148 Interview with Medium Telco B (Karen Lee, online, 8 February 2022) '('Medium Telco B').

149 Interview with Micro Telco B (Karen Lee, online, 20 September 2021) ('Micro Telco B').

150 Medium Telco A (n 147).

medium service providers mentioned the 'many other bigger players in the space … that were probably better positioned to give feedback'.[151]

Criticisms of the Comms Alliance Code development process were cited as reasons for non-participation too. Several interviewees from both member and non-member service providers reported they were not provided with an opportunity to engage in the Code review or development process, and if engagement was solicited, it occurred too late in the process.[152] Notwithstanding any efforts that the Comms Alliance may have made to solicit their views, few could recall being invited to participate while the process was ongoing.[153] The Comms Alliance did send out an email to service providers registered with the Comms Alliance once the *TCP Code 2019* was finalised, inviting them to participate in a webinar about changes to the Code.[154] However, this was seen as 'late in the piece' by one member representative. This representative said that the Comms Alliance did very little to engage with smaller members (eg, holding a discussion panel for smaller service providers independent of the bigger players) and was unaware ICAG existed. They also indicated that their desire to participate was reduced because working committee representatives represented their own interests.[155]

Negative views about the Comms Alliance as an organisation, the *TCP Code* generally, and weaknesses in the co-regulatory regime and the wider regulatory framework created powerful disincentives to participate as well. One micro service provider representative stated that the Comms Alliance does not do a 'good job'; it 'acts predominantly in the best interests of Comms Alliance' (ie, 'it adopts some of the consumer advocate positions, which … don't benefit consumers and don't benefit [carriage service providers], but fall within the ambit of today's fashionable thing to do for consumer protection'); and the Code was not 'fit for purpose' (eg, its provisions do not assist consumers).[156] They added the [wider telecommunications] regulatory framework was 'piecemeal' — a sentiment echoed by a medium service provider representative: 'to be frank … I feel a lot of [consumer protection]'s about appeasing the ACCC, and appeasing the [Telecommunications Industry Ombudsman], by making policies that appear good on the surface, but actually just suck for everybody, including consumers'.[157] The fact that compliance with the *TCP Code* was 'voluntary' unless and until the ACMA directed a service provider to comply with it was also cited as a reason for service providers not to become involved in Code development.[158]

---

151 Medium Telcos C and D (n 144).

152 Medium Telco A (n 147); Medium Telco B (n 148); Small Telco B (n 143).

153 Medium Telco A (147); Medium Telco B (n 148); Medium Telcos C and D (n 144): Small Telco B (n 143); Small Telco A (n 141); Micro Telco A (n 141); Micro Telco B (n 149).

154 Interview with Comms Alliance representative (n 56). The Comms Alliance representative pointed out that the register could be used only for limited purposes, ie, *TCP Code* compliance and monitoring, not rule-making: see *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 10.1.1. The ACMA, which has access to the register, did not ask Comms Alliance to contact organisations on the register or do further consultation with registrants beyond what it had already done.

155 Small Telco B (n 143).

156 Micro Telco B (n 149). Medium Telco B said the Code failed to place enough responsibility on consumers (n 148).

157 Medium Telco A (n 147).

158 Micro Telco B (n 149).

The relatively small impact of the Code on their businesses was another factor cited by two interviewees. One micro service provider representative said many Code rules sought to regulate activities they did not engage in (eg, offering credit).[159] The representative for two medium service providers stated the *TCP Code* is not a 'really big problem for us … if it was a bigger problem for us, maybe we might think of it differently'.[160] A third interviewee suggested they are 'just better off giving [a] customer 30 days' notice and [allowing the customer to go] to another provider' if they complained to the Telecommunications Industry Ombudsman, especially when the source of the problem resides with the wholesaler, rather than engage in the process of revising Code rules that they thought were unfair to providers. They suggested that because they receive only one or two Telecommunications Industry Ombudsman complaints a month, the fees that the Ombudsman levies to resolve *TCP Code* disputes did not create a financial incentive to change or participate in the Code development system: 'unless it's a big enough problem for you, you're not gonna do anything about it'.[161]

Another factor that contributed to non-participation was the lack of knowledge about the regulatory environment — a factor identified by the Comms Alliance representative and which became apparent in interviews with medium, small and micro service providers. The Comms Alliance representative stated that 'industry sees and understands the impact of operational codes much more clearly than they see and understand the impact of changes to something like the *TCP Code*'[162] — an observation consistent with one medium service provider representative interviewed who said they failed to understand the importance of the *TCP Code* when it was developed.[163] At least two service providers interviewed confused being a member of Comms Alliance with CommCom itself or with registering with the Comms Alliance for the purposes of Code compliance and CommCom-related obligations. They said they were members of the Comms Alliance when they meant that they had registered with Comms Alliance or had submitted compliance documentation to CommCom.[164] A third service provider demonstrated some misunderstandings of the *TCP Code* rules as well.[165]

Finally, 'participation fatigue' and Comms Alliance membership fees were said, especially among micro service providers, to create disincentives to engage with Comms Alliance processes. One micro service provider reported participation fatigue arose among micro service providers because they had engaged in other regulatory fora over the years without success.[166] Moreover, even though they were

---

159 Micro Telco A (n 141).

160 Medium Telcos C and D (n 144).

161 Medium Telco B (n 148).

162 Interview with Comms Alliance representative (n 56).

163 Medium Telco A (n 147).

164 Medium Telco B (n 148); Small Telco A (n 141). Arguably, this confusion is not unreasonable given CommCom charges a fee to review Compliance Attestation Documents and interacts with them at least once a year.

165 Micro Telco B (n 149).

166 Ibid. The Interview with Comms Alliance representative (n 56) also referred to participation fatigue:

> But that is more for the RSPs [retail service providers] who are engaged but have limited resources, or honestly, even really the large ones, we are all struggling under the weight of the consultations, the revisions, the rules. … that has been and will continue to limit how much and what level of quality we can engage at.

tiered, based on company size and turnover, Comms Alliance membership fees were seen as a barrier because the profit margins of micro providers are so low. Tiered fees were also said to be the reason why the largest providers had 'more influence' over the Comms Alliance, resulting in the silencing of other voices mentioned earlier.[167] A medium service provider, and former Comms Alliance member, said the Comms Alliance is the 'baby of the large telcos' and 'their job is to represent the organisations that are their members', which it does 'right … if they're representing the interests of the members who are largest, and paying them the most to be part of it'.[168]

The most common reasons given for non-membership also overlapped with some of the reasons given for non-participation. They included: a lack of awareness of the Comms Alliance or how membership would be useful;[169] an inability to attribute the expense of membership to sales;[170] and an inability to influence the Comms Alliance and/or its rule-making processes.[171]

IV Evaluation

A *Were the Engagement Functions Performed?*

The limited interview data collected does not enable in-depth evaluation of whether Comms Alliance members' involvement in the working committee, ICAG, the Operations Council or otherwise increased their motivation or the motivation of non-members to comply with the *TCP Code 2019*. While academic literature suggests that participating Comms Alliance service provider members should be more likely to comply with the Code than non-members who did not engage in the process, testing that hypothesis (or even establishing a correlation between engagement in Code development and compliance) is difficult. Because of the risk of self-serving answers, service provider representatives were not asked if their engagement motivated their organisations to comply with the *TCP Code*. Further, there is a lack of publicly available information on the performance of individual service providers. The Telecommunications Industry Ombudsman publishes aggregated data about who makes complaints, complaints by service type (eg, Internet, landline, mobile and multiple services) and the top 10 providers and/or brands by complaint numbers.[172] However, the Ombudsman has assumed complaints-handling responsibility under multiple Comms Alliance codes, and it does not publish disaggregated *TCP Code* data. Nor does it identify or determine if service providers committed actual or potential breaches of the *TCP Code 2019*. Data published by the Comms Alliance in its quarterly *Complaints in Context* reports was also of limited assistance. They show the number of Telecommunications Industry Ombudsman complaints against service providers as a ratio of the services they provide. But only the 10 service providers with the largest number of complaints in

167 Micro Telco B (n 149).
168 Medium Telco A (n 147).
169 Micro Telco A (n 141).
170 Ibid.
171 Medium Telco A (n 147).
172 See, eg, Telecommunications Industry Ombudsman, *Quarterly Report: Quarter 2 Financial Year 2020–21* (undated).

each prior financial year are required to participate in the reports,[173] and although other service providers may voluntarily participate, few do in practice. Since October 2019, the ACMA has published, on a quarterly basis, information about the complaints-handling performance of providers with 30,000 or more services in operation,[174] but until the September 2024 quarter, this data was aggregated.[175] This data also does not specify if service providers committed actual or potential breaches of the *TCP Code 2019*. A study of the ACMA's enforcement of the *TCP Code*, including the *TCP Code 2019*, since its adoption in 2007 might shed some light on the correlation between Code engagement and compliance, but requires further research outside the scope of this article. All that can be said here is that if industry engagement in rule-making does motivate compliance, the low participation rates in Code development suggest opportunities to initiate and sustain concern about compliance at the outset may be being lost. It may also help explain the need for the annual compliance attestation process overseen by CommCom.[176]

To what extent industry engagement in Code development has led to greater particularity in rules (and hence increased ability to enforce *TCP Code* rules) is equally difficult to assess from the data collected. On the one hand, the *TCP Code 2019* is a lengthy document, and there is a view among many in the industry that it (and its predecessors) is overly prescriptive, triggering a call for a more 'principles-based' or 'outcomes-based' approach to codes.[177] On the other hand, the ACMA and consumer groups like ACCAN have argued that the existing Code development process can result in unclear and ambiguous rules, making enforcement of Code rules difficult.[178] However, the cause of both complaints is often attributed to the hard-fought negotiations between industry and consumer representatives and the requirement to reach consensus within the working committee. Industry participation per se is not mentioned as a contributing factor.[179] That said, it is almost inconceivable to think that industry involvement would not have led to greater

---

[173] See *TCP Code 2019* (n 10) cl 4.7.3. See also Communications Alliance, *Telecommunications Complaints in Context* from July–September 2019 – July–September 2024.

[174] See, eg, ACMA, *Telecommunications Complaints-Handling 2018–19* (Report, October 2019).

[175] See, eg, 'Action on Telco Consumer Protections: October to December 2024', *ACMA* (Web Page, 24 July 2025) <https://www.acma.gov.au/publications/2025-02/report/action-telco-consumer-protections-october-december-2024>.

[176] For background information on the creation of CommCom, see, eg, ACMA, *Reconnecting the Customer: Final Public Inquiry Report* (September 2011).

[177] See, eg, Telstra Corporation, Submission to Department of Infrastructure, Transport, Regional Development and Communications (Cth), *Consumer Safeguards Review — Part C: Choice and Fairness* (September 2020).

[178] See, eg, Australian Communications Consumer Action Network ('ACCAN'), Submission to Department of Infrastructure, Transport, Regional Development and Communications (Cth), *Consumer Safeguards Review — Part C: Choice and Fairness* (25 September 2020); ACMA, Submission to Department of Infrastructure, Transport, Regional Development and Communications (Cth), *Consumer Safeguards Review — Part C: Choice and Fairness* (25 September 2020) ('Submission to Consumer Safeguards Review'). See also ACMA, *What Consumers Want – Consumer Expectations for Telecommunications Safeguards: A Position Paper for the Telecommunications Sector* (July 2023).

[179] The Comms Alliance adopted a different process for the iteration of the *TCP Code* presented to, but rejected by, the ACMA on 24 October 2025: see Communications Alliance, *Discussion Paper: Telecommunications Consumer Protection[s] (TCP) Code* (May 2023) 6–7; Communications Alliance, *TCP Code Drafting Committee – Terms of Reference* (May 2023); ACMA, 'ACMA Rejects Proposed Telco Industry Code' (n 12).

particularity in the Code rules; industry working committee members often had to reach a collective industry view before taking positions to all working committee members.[180]

The limited interview data collected does, however, permit some evaluation of whether the three rule-making functions of industry engagement — knowledge-gathering, education, and self-reflection — were discharged in the case study. As highlighted below, the engagement mechanisms adopted by the Comms Alliance enabled knowledge-transfer and provided educational opportunities for its members as well as occasions capable of provoking their critical self-reflection — opportunities that most Comms Alliance members embraced, resulting in better informed rule-making and some degree of self-evaluation. However, the apparently limited engagement of non-members during industry consultation raises questions about the ability of the process to elicit information, educate or provoke critical self-reflection among this group of service providers that are subject to the *TCP Code 2019*.

Even if it is not possible to determine the precise nature or quantity of information they provided, carriage service providers subject to the Code clearly provided the Comms Alliance and/or working committee representatives with pertinent information that was considered and/or used to inform Code development. Apart from Aussie Broadband,[181] all information was provided by Comms Alliance's carriage service provider members that are subject to the Code. Representatives of the largest carriage service providers (Telstra, Optus, and VHA) fed information directly into the working committee. This information was then discussed by representatives from consumer organisations and regulators. The 12 large and medium-sized ICAG members subject to the Code but not represented on the working committee[182] were able to provide relevant information to Telstra, Optus, and VHA working committee representatives during ICAG meetings — information that was then passed on, where appropriate, to all working committee representatives. Operations Council meetings provided additional opportunities to supply and discuss information with working committee representatives. The 15 large and medium-sized members appear to have been the largest contributors of information, but Comms Alliance staff made efforts to solicit the views of the small number of remaining Comms Alliance members subject to the Code who did not participate in the working committee, ICAG or the Operations Council.[183] They also sought to ensure that organisations with knowledge about small service providers were represented on the working committee. Although not a carriage service provider, inabox could share insights about the business models and needs of small and micro service providers with all working committee members. Telstra, Optus, and VHA, as wholesalers to many small and micro service providers and owners of

---

180 See Karen Lee, *The Legitimacy and Responsiveness of Industry Rule-Making* (Hart, 2018) chs 5–7.

181 Aussie Broadband made a written submission about the draft Code during public consultation: see 'Drafts for Public Comment' (n 124).

182 See above Part III(C)(1)(b).

183 Based on the data found in sources referred to above in n 113, approximately seven service provider members did not participate in the working committee, ICAG or the Operations Council in 2017 and 2018. In 2019, approximately one service provider member did not participate in these engagement mechanisms.

diverse-sized brands,[184] were also broadly aware of their requirements and mindful of 'how changes would impact them'.[185]

Whether there was sufficient knowledge transfer from small and micro carriage service providers in the development of the *TCP Code 2019* is, however, open to debate. On the one hand, some informed feedback about small and micro service providers was fed into the process. Further, given the lack of resources faced by many small and micro service providers, it is unrealistic to expect all small and micro service providers to have participated in the process. On the other hand, subject to one exception (the small service provider that a working committee member approached directly), small and micro providers had no direct input into the Code development process, even though they were overwhelmingly the majority of service providers subject to the Code. The medium, small and micro service provider representatives interviewed suggested that their absence was problematic. They indicated that they 'get stuck with whatever's left'[186] — a result that led to 'not well thought through' rules:[187] rules that were too heavily mobile-oriented; rules that were difficult to comply with; or a set of rules designed for large market participants who offer 'standardised products' that, notwithstanding existing concessions within the *TCP Code* for smaller providers, creates 'a whole lot of red tape' for small providers who supply them; or rules that address 'real problems' that smaller providers never come across.[188] Another provider representative felt that some rules lacked important detail (eg, provision of modem information to customers) where others were too prescriptive.[189]

Education arguably began when ICAG members read the background report prepared by Comms Alliance staff and held meetings with regulators, ACCAN, and CommCom to discuss the efficacy of the third edition of the *TCP Code* (*TCP Code 2015*). It continued after ICAG recommended, and the Comms Alliance agreed to establish, a working committee to revise the Code and for the duration of its development. Self-evaluation, however, was triggered when consumer and regulator representatives brought actual and/or perceived weaknesses in the Code to the attention of the four industry working committee representatives, who in turn took this feedback to their relevant internal divisions for discussion. As one industry working committee member highlighted:

> industry went in there with no real predetermined objectives to achieve in terms of, we wanted sort of this to be changed to that. We really just wanted duplication to be removed, a bit more simplification in the Code … The consumer movement, to their credit, had done a lot of work prior to going to

[184] For example, Telstra owns the Belong brand.
[185] Interview with Comms Alliance representative (n 56).
[186] Small Telco B (n 143).
[187] Ibid. The credit-checking rules of *TCP Code 2019* (n 10) cl 6.1.1(b), requiring suppliers to perform an external credit check for new residential customers wanting to purchase post-paid services if the contract value was over $1,000, were cited by this small provider as an example. They were said to make sense from a business perspective for mobile service providers because ongoing mobile plans were 'open ended' (ie, the costs associated with performing credit checks could be easily absorbed for mobile service providers), however they were problematic for providers of fixed line products because they are offered on a fixed term basis and the maximum early termination fee is capped, so suppliers struggle to recoup the cost of the credit check from their customers.
[188] Medium Telco A (n 147).
[189] Medium Telco B (n 148).

> the start of the working committee process, and had a long list of requirements. And they basically went to just about every element of the Code.[190]

ICAG and Operations Council members not represented on the working committee would not have heard consumer and regulator concerns first-hand. Nevertheless, they were at least educated about consumer and regulator expectations. Industry working committee members explained consumer and regulator feedback to ICAG and Operations Council members. This feedback was discussed by those members and, according to an ICAG member not represented on the working committee, was passed on to internal team members for evaluation and comment.[191]

It is less clear whether and to what extent the Comms Alliance and its industry working committee, ICAG and Operations Council members taught underperforming members (if any) about industry best practice — another educational aim of industry engagement — and sparked self-reflection by those members in this case study. The Comms Alliance, as an organisation, provides a forum where its members can discuss matters, with education and self-reflection potentially important by-products of those discussions. However, the Comms Alliance is often the facilitator and not the driver of those discussions. Nevertheless, Comms Alliance staff on this occasion appear to have worked toward the goal of educating Comms Alliance members. Along with industry working committee members, they provided updates to ICAG and Operations Council members and solicited the feedback of smaller members by phone or with emails highlighting areas of concern. Responding to such requests would have necessitated consideration of the relevant issues and the ability or otherwise of the businesses to adapt accordingly. Without access to the working committee, ICAG and Operations Council minutes for this Code, it is difficult to determine if members educated other members about their own practices and if those discussions precipitated internal evaluation of their behaviour. Studies of the development of other Comms Alliance codes suggest industry working committee members do share information about their practices among themselves and with non-industry working committee members. However, information sharing does not always result in the adoption of tougher rules or lead to alterations in service provider practices because of the need to reach industry consensus and industry's reluctance to sign up to rules it cannot comply with from the outset.[192]

The Comms Alliance clearly made some effort to educate non-members about the *TCP Code 2019* while it was developed. In addition to publishing the draft Code for comment on its website, the Comms Alliance published a 12-page explanatory statement.[193] This statement included an overview of the background to the Code, its role in the wider telecommunications consumer protection framework, the revision process, and proposed changes, and sought feedback on two specific

---

190 Large Telco A Participant 1 (n 92).

191 Large Telco C (n 91).

192 Lee (n 180) chs 5–8.

193 Communications Alliance, *Telecommunications Consumer Protections (TCP) Code DR C628:2018: Public Comment Explanatory Statement* (July 2018) <https://web.archive.org.au/awa/20181030223728mp_/http://pandora.nla.gov.au/pan/25087/20181031-0143/www.commsalliance.com.au/__data/assets/pdf_file/0006/60666/EXPLANATORY-STATEMENT-TCP-Code-Public-Comment-2018.pdf>.

questions: the definition of 'consumer' and the proposed removal of 'value plan' rules. It also included two appendices: one with a detailed summary of substantive changes; the other setting out the working committee's terms of reference. However, because of the small number of industry written submissions and interviews conducted, it is difficult to determine if these documents were noticed and/or read by non-members and therefore if they had any educational impact. One suspects though its impact was limited. Following the Comms Alliance 'Public Comment' page on its website, where the Comms Alliance solicits comments on draft codes, and receiving *We Communicate* are free. *We Communicate* subscribers also do not need to be Comms Alliance members to receive it. Yet service providers need to know who the Comms Alliance is, and they must make the effort to follow the Comms Alliance to see Code development information and/or register with Comms Alliance to receive the free newsletter. As stated earlier, not all interviewees knew who the Comms Alliance was.

The limited engagement of non-members during industry consultation suggests Code development did not trigger the desired levels of self-reflection among this cohort of service providers subject to the Code.

B *Are There Ways to Improve Industry Engagement?*

Given the importance of industry education and self-reflection to consumer Code development, the question arises whether anything can and should be done to increase the participation rates of non-Comms Alliance members subject to the Code. Some potential solutions suggested by or discussed with some interviewees included:

- requiring the Comms Alliance, CommCom, and/or the ACMA to notify Comms Alliance registered service providers of Code development activities; or granting the Comms Alliance and regulators the power to access the Telecommunications Industry Ombudsman's list of service providers[194] participating in its dispute resolution scheme;[195]
- requiring or otherwise better incentivising the Comms Alliance to go beyond its membership when developing consumer codes such as the *TCP Code*, for example by organising workshops for small and micro service providers to better understand their needs and solicit their feedback or offering training sessions (perhaps in conjunction with the ACMA or CommCom) about the Code development process;
- promoting the creation of a dedicated small and micro provider industry association which could either develop its own codes or be responsible for providing input into Comms Alliance consumer Code processes;

[194] The *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 128 requires service providers to join and participate in the Telecommunications Industry Ombudsman scheme.

[195] Imposing such requirements was discussed because the register of providers that Comms Alliance maintains for *TCP Code* purposes can only be used only for compliance and monitoring: see above n 154.

- adopting a principles-based or outcomes-based approach to *TCP Code* development or requiring industry participants to formulate rules on a one-on-one basis for approval with the regulator;[196]
- addressing the weaknesses in the co-regulatory regime and the telecommunications regulatory framework that create disincentives to participate (eg, the ACMA's weak powers to enforce the *TCP Code*);[197] and
- making membership of the Comms Alliance mandatory for carriage service providers subject to the *TCP Code*.

However, many interviewees felt that these measures were undesirable, not feasible and/or would not result in a significant increase in participation. One interviewee stated they would never participate in Code development unless it was required.[198] However, mandating participation was not seen as desirable. A Comms Alliance member representative said that '[w]e want to see the people who do want to participate'.[199] An industry association for small and micro service providers was thought likely to fail because providers would be unwilling to pay membership fees given their small profit margins, and because of the impracticality of corralling the large numbers of such service providers. One-on-one negotiation with industry participants was universally seen as unworkable and too resource-intensive for small and micro service providers, as well as the ACMA, because of the large number of providers in the market.[200] While desired by many interviewees,[201] shifting to principles-based codes would create enforcement difficulties. Allowing the Comms Alliance, CommCom and/or the ACMA to use the *TCP Code* register for Code development purposes would at least ensure industry participants receive notification of Code development activities and opportunities to provide feedback, and, where necessary, enable them to actively solicit their engagement. The ACMA's usual practice is to only issue a press release or make an announcement via its social media channels highlighting the Comms Alliance's calls for comments on draft codes. Yet, while potentially beneficial, there was doubt that direct contact by any of these parties would motivate non-members to participate because of the engagement barriers they face. As the Comms Alliance Project Manager stated, 'In terms of non-members, we rarely hear anything back … you know, we do try'.[202]

Some Comms Alliance members interviewed suggested that non-participation by non-members subject to the *TCP Code* was 'not necessarily indicative of problems or faults with the process'.[203] On balance, that statement is

196 Enforced self-regulation was raised with interviewees for the reasons suggested by Ayres and Braithwaite (n 16) 110–20.

197 The Australian Government announced that it would buttress the ACMA's *TCP Code* enforcement powers after data collection finished: see above n 36.

198 Medium Telco B (n 148).

199 Interview with Comms Alliance representative (n 56).

200 Possible workarounds for small and micro service providers exist, as Ayres and Braithwaite have pointed out. These include the development of a suite of different rules for providers to choose from or allowing providers to copy rules adopted by others: Ayres and Braithwaite (n 16) 129.

201 See, eg, Large Telco A Participant 2 (n 91); Medium Telcos C and D (n 144); Micro Telco B (149).

202 Interview with Comms Alliance representative (n 56).

203 Large Telco A Participant 2 (n 91).

accurate. Apart from organising at least one workshop with smaller providers before and during Code development and possibly experimenting with e-consultation tools to help reduce resource and skill participation barriers,[204] it is hard to identify what more it should have done given the Comms Alliance was unable to use the register of service providers that CommCom maintains for Code compliance purposes. However, my case study does point to potential structural (and arguably fundamental) limitations of co-regulation (at least in the telecommunications sector) as well as the bounded capacity of industry associations like the Comms Alliance to serve as effective intermediaries between industry players and regulators during rule-making. Legislators, governments, regulators and regulatory theorists should be mindful of these potential limitations when contemplating co-regulation or designing the regulatory frameworks supporting it.

C *Implications for Co-Regulatory Rule-Making*

Two potential implications for co-regulatory rule-making can be drawn from the data collected from my research.

First, the case study suggests that co-regulatory rule-making (at least when consumer-protection measures are involved) may be more suitable for industries with a small amount of relatively large-sized players. As has been highlighted, only the large and medium-sized service providers had the resources and motivation to engage in Code development whether in working committees, ICAG, the Operations Council or by submitting written comments. While they may have been affected by the Code and had insights into the contours of regulatory problems and the limitations of Code rules, small and micro-sized service providers confronted some significant engagement barriers that hindered their ability to participate. And by not participating, the Code development process did not provoke them to critically reflect on their own conduct or serve to educate them about practices potentially detrimental to consumers. The process did lead to some transfer of knowledge about small and micro players, but the transfer occurred because of knowledge held by large service providers, owned by vertically-integrated businesses supplying services on a wholesale basis to other market participants, rather than small and micro service providers themselves. And it would appear that the input of large and medium-sized service providers should not be mistaken for being representative of possible input from small and micro providers, a counterargument often used to justify the status quo.[205] Co-regulation was first introduced in the Australian telecommunications market when there were relatively few market providers. The growth in the number of providers (and their limited engagement) have contributed, at least in part, to a call for the ACMA to have greater power to directly regulate the

[204] Similar experiments have been tried, for example, in administrative rule-making in the US with mixed success in overcoming engagement barriers for small businesses: see, eg, Farina et al (n 142). Note no interviewee mentioned using technology as a possible solution to address the barriers this article identifies.

[205] See the text accompanying n 187.

industry[206] — a call that the Australian Government announced in early 2025 and again in August 2025 that it will answer.[207]

Second, while my case study highlights that industry associations can engage successfully with their industry members, it also highlights factors that constrain the ability of industry associations to assist regulators and hence the achievement of regulatory objectives. Unless required by law, voluntary membership organisations inherently have few incentives to go beyond their membership while engaged in rule-making. As one interviewee stated:

> [The Chief Executive Officer ('CEO')] is going to invest his time in making sure his membership's happy and comfortable with what he's doing … [G]oing to Comms Alliance non-members and saying, 'What do you think?' is sort of ... well, it's a case of 'join Comms Alliance' would be [their] conversation with those non-members, as opposed to 'do you want to talk about the *TCP Code*?'.[208]

Industry associations also need funding to operate and will likely attract, as well as court, the larger providers who have more money and other resources than smaller providers. Charging smaller providers lower fees may be driven by a genuine desire to ensure equality of access to the association. However, payment of higher fees by larger providers is often rewarded with a right to appoint directors to the association's board[209] and may create incentives for industry association CEOs to appoint representatives from larger service providers to internal bodies such as working committees, with the result they have greater say in rule-making. Even if higher fee payments do not generate those incentives, smaller service providers do not have the time needed to participate in those internal bodies, and their non-involvement can create feelings of exclusion that exacerbate engagement barriers as well as the belief, expressed by one interviewee from a medium-sized service provider, that they were better off working with relevant regulators and government departments to formulate rules than with the Comms Alliance.[210] In theory, another industry association could enter the market and service the needs of smaller players, but as some interviewees suggested, it will struggle to attract members because they cannot afford the membership fees.

V Conclusion

To date, the study of intermediaries has focused on their role in 'downstream' regulatory activities: the activities of rule implementation, monitoring and enforcement.[211] In this article, I have sought to highlight that intermediaries such as the Comms Alliance are also operating in the 'upstream' regulatory activity of rule-making. I have argued that the ability of industry associations to engage industry

---

206 See, eg, ACMA, Submission to Consumer Safeguards Review (n 178) 9.

207 See above n 36; Anika Wells, 'Albanese Government Delivering Better Protection for Telco Consumers' (Media Release, 26 August 2025).

208 Large Telco A Participant 1 (n 92).

209 See, eg, *Constitution*, Communications Alliance (at November 2007) cl 5.3(b).

210 Medium Telco A (n 147).

211 See, eg, Kenneth W Abbott, David Levi-Faur and Duncan Snidal, 'Theorizing Regulatory Intermediaries: The RIT Model' (2017) 670 *Annals of the American Academy of Political and Social Science* 14.

participants in Code development is critical to the success of co-regulatory regimes, because industry engagement serves multiple rule-making, compliance and enforcement functions. My research demonstrates that industry associations can play an important role in facilitating knowledge-transfer and education as well as some degree of critical self-reflection among its members. However, it has also shown that medium, small and micro-sized non-members of industry associations can face a range of engagement barriers in industry association-led rule-making — barriers that can make it as difficult for industry associations as it is for traditional rule-makers to elicit participation in consultation exercises. In addition, my research has highlighted that industry association dynamics may unwittingly undermine smaller industry voices, thereby reinforcing, rather than reducing, other participation barriers. Further empirical research is necessary to confirm these findings, drawn from a small number of industry participants, but legislators, governments, and policymakers should nevertheless be sensitive to the possible presence of engagement barriers and exclusionary effects of industry association dynamics before delegating rule-making responsibilities to industry associations.