Australian Government | acma

Australian Communications and Media Authority

Equipment rules—concepts and design considerations for equipment rules under the Exposure Draft of the Radiocommunications Bill 2017

Consultation paper

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Introduction

The ACMA has prepared this consultation paper in response to the government's Exposure Draft of the Radiocommunications Bill 2017 (the exposure draft of the Bill) and the final report on the Review of the ACMA.

Exposure draft of the Bill

The ACMA will be responsible for designing and developing new spectrum management arrangements in accordance with the exposure draft of the Bill, should the Bill be enacted in its current form.

The ACMA released supporting material with the exposure draft of the Bill, which was intended to provide stakeholders with a greater understanding of how the ACMA envisages key aspects of the Bill may operate, if it is enacted, in order to facilitate consideration of the exposure draft of the Bill.

This consultation paper expands on the supporting material in relation to equipment rules and seeks the views of stakeholders on possible regulatory options for the equipment rules.

The paper is based on the provisions of the exposure draft of the Bill released in May 2017 and is without prejudice to any applicable policy decisions that may be made by the Australian Government.

ACMA Review

In its response to the report of the *Review of the Australian Communications and Media Authority* (ACMA Review) by the Department of Communications and the Arts (DoCA), the government indicated that it supports Recommendation 6 and supports, or supports in-principle, all of the other recommendations of the ACMA Review.[1]

Recommendation 6 of the ACMA Review states:

> That, within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self-regulation, in consultation with relevant industry bodies:
>
> > technical standards
>
> > Integrated Public Number Database
>
> > Do Not Call Register
>
> > action on unsolicited communications, including spam.
>
> The ACMA regularly explore further opportunities for self-regulation in consultation with industry.

[1] Australian Government Response to ACMA Review, 22 May 2017.

The ACMA Review considered:

> … that the ACMA should explore further whether it could outsource certain functions, or parts of functions, and report back to the Minister for Communications and the Arts (the minister) within twelve months on any legislative or other impediments to doing this. In addition, the ACMA should consider whether any of these arrangements could change and look more like self-regulation, thereby giving effect to a key theme of this Review.[2]

The ACMA Review also recommended the ACMA develop a set of principles to guide any reform of its regulatory regime. The ACMA has adopted both the high-level intervention principles and the regulatory design principles recommended in the report on the ACMA Review. These principles will guide the way the ACMA assesses the need for regulatory intervention and the approach to any intervention. This informs the approach the ACMA takes across its regulatory remit, including technical regulation.

The ACMA is particularly interested in the views of stakeholders on concepts and design considerations for development of the equipment rules. The ACMA will use stakeholder views and suggestions to consider the most effective approach for managing the risks that technical regulation is intended to address, including whether there are now better regulatory or non-regulatory options available in light of current and emerging developments within the communications environment.

The ACMA will be undertaking substantial stakeholder consultation as it designs and then settles on the new equipment rules framework. This paper is the first stage of this consultation process. All views expressed in this paper are preliminary only, and based on the exposure draft of the Bill. The content of this paper does not fetter the ACMA's discretion in the making of future decisions about the matters discussed in this material or any other matter.

No person should rely on statements made in this paper as an indication or explanation of future or present rights and obligations. Neither the ACMA nor the Commonwealth accepts any responsibility or liability for any damage, loss or expense incurred as a result of reliance on any part of this paper.

Any person reading this paper is advised to also consult the exposure draft of the Bill, DoCA explanatory materials and the final report on the Review of the ACMA.

[2] ACMA Review, p. 42.

Approach

Report to the minister

In responding to the ACMA Review, the ACMA will provide a report to the minister with advice on whether the specified functions—or parts of the functions—could be referred to industry for self-regulation, or whether other regulatory responses (such as co-regulation) or non-regulatory responses are appropriate for further consideration.

The report will include advice on the potential form of any self-regulation or other regulatory or non-regulatory responses that are contemplated, any legislative or other impediments involved. The report will also include advice on the need or opportunities for broader reforms to ensure existing policy objectives can continue to be met and that regulatory approaches are, and will continue to be, fit for purpose. Broader policy questions raised during the process may also be referred to the minister for further consideration.

The report will be informed by:

> ACMA compliance and enforcement data, and other experience of administering the functions

> submissions received in response to this paper

> targeted consultation with industry and other key stakeholders

> the assessment framework and principles (see below).

Assessment framework and principles

The ACMA has developed an assessment framework to inform thinking about more efficient and effective regulatory design and administration. The framework incorporates regulatory best practice theory and draws on the ACMA's earlier paper, *Optimal conditions for self- and co-regulatory arrangements*.

Additionally, the ACMA Review identified a number of principles, including high-level intervention principles and specific design principles.

The ACMA will use the assessment framework—and reference the principles—to assist consideration of whether technical regulation functions could be referred to industry for self-regulation, or whether other regulatory or non-regulatory responses may be more appropriate for consideration. Accordingly, the issues discussed in this paper are based on this assessment framework. Stakeholders are encouraged to consider the framework and principles when developing their submissions.

A summary of the assessment framework and the intervention and design principles is provided at Appendix A.

Terminology

In accordance with the assessment framework, the term ‘regulatory responses’ is used to refer to options on the regulatory continuum; namely, market-based, industry self-regulation, co-regulation and direct regulation.

For the purposes of this work, and consistent with regulatory design practice, the following definitions are used in this paper:

> **Self-regulation**—where industry voluntarily develops, administers and enforces its own solution to address a particular issue without any formal oversight from government or legal backstop for enforcement.

> **Outsourcing**—the situation where a regulatory obligation or function sits with one entity, but that entity has chosen to enter into a contract with another entity (usually a private provider) to help fulfil that obligation or deliver the function.

> **Co-regulation**—involves government and industry sharing the regulatory role, with industry typically developing and administering its own arrangements (such as codes of practice) and government providing the underpinning legislation to enforce it.

The full regulatory continuum is described in Table 1 of Appendix A.

Existing arrangements

Technical regulation involves the combination of technical requirements and compliance arrangements that regulate the supply of equipment to the market.

Part 4.1 of the *Radiocommunications Act 1992* (1992 Act) details the standards and other technical regulation provisions.

Section 155 states the object of Part 4.1 of the 1992 Act as follows:

(1) The object of this Part is to establish an efficient, flexible and responsive system for technical regulation of equipment that uses, or is affected by, radio emissions.
(2) The system is intended to:
  (a) benefit users of the equipment by promoting the electromagnetic compatibility of equipment; and
  (b) contain interference within acceptable limits; and
  (c) establish standards for the equipment and services provided using the equipment; and
  (d) control sale or supply of non-standard devices; and
  (e) enable efficient management of compliance and enforcement, including, in particular, industry self-certification for compliance with standards; and
  (f) protect the health and safety of persons who:
    (i) operate radiocommunications transmitters or radiocommunications receivers; or
    (ii) work on radiocommunications transmitters or radiocommunications receivers; or
    (iii) use services supplied by radiocommunications transmitters or radiocommunications receivers; or
    (iv) are reasonably likely to be affected by the operation of radiocommunications transmitters or radiocommunications receivers.

The ACMA has contributed to that system by creating regulatory arrangements for equipment, including by making:

> technical standards under section 162 of the 1992 Act

> labelling notices under section 182 of the 1992 Act.

The technical regulation arrangements made by the ACMA under the 1992 Act are grouped into three categories:

> electromagnetic energy (EME) requirements, which manage the health and safety risk of exposure to the electromagnetic energy emitted by particular transmitters.

> radiocommunications devices requirements, which impose frequency and power emission requirements on radiocommunications devices to minimise the risk of interference

> electromagnetic compatibility (EMC) requirements, which manage the risk of interference to radiocommunications services from non-intentionally emitting devices (for example, electrical goods).

Each of these categories has a labelling notice that requires the importer or Australian manufacturer of a device, or that person's authorised agent to, among other requirements, register on a national supplier database, hold certain documentation demonstrating the device's compliance with technical standards and apply a label to the device.

Each labelling notice addresses the likely impact that different types of devices could have if they were not compliant with the technical standards. This is achieved by specifying different minimum documentation requirements based on the risk category (or compliance level) of the device.

The categories are low risk (which has the minimum documentation requirements), medium risk, and high risk (which has the highest documentation requirements). In all cases, the devices are required to comply with the technical standards specified in the labelling notices. Only the amount of documentation required to demonstrate compliance varies.

Technical standards

Under section 162 of the 1992 Act, the ACMA has the power to make standards for:

a) the performance of specified devices; or

b) the maximum permitted level of radio emissions from devices within specified parts of the spectrum.

These standards are to consist only of such requirements as are necessary or convenient for:

(a) containing interference to radiocommunications; or

(b) containing interference to any uses or functions of devices; or

(c) establishing for the operation of radiocommunications transmitters or radiocommunications receivers an adequate level of immunity from electromagnetic disturbance caused by the use of devices (including other radiocommunications transmitters or radiocommunications receivers); or

(d) establishing for the uses or functions of devices an adequate level of immunity from electromagnetic disturbances caused by the operation of radiocommunications transmitters; or

(e) establishing for the uses or functions of devices an adequate level of immunity from electromagnetic disturbances caused by the use of other devices; or

(f) protecting the health or safety of persons who:

  (i) operate radiocommunications transmitters or radiocommunications receivers; or

  (ii) work on radiocommunications transmitters or radiocommunications receivers; or

  (iii) use services supplied by means of radiocommunications transmitters or radiocommunications receivers; or

  (iv) are reasonably likely to be affected by the operation of radiocommunications transmitters or radiocommunications receivers.

The approach taken by the ACMA to the making of technical standards under section 162 of the 1992 Act has been to refer to, or adopt industry standards, a practice that is referred to as ‘incorporation by reference’. The industry standards that the ACMA incorporates by reference into its technical standards are typically Australian standards developed by Standards Australia (AS standards or AS/NZ standards if developed jointly with Standards New Zealand). In turn, the Australian standards may reference international standards. In some cases, the technical standards made by the ACMA directly incorporate international standards.

One reason for making technical standards for radiocommunications transmitters is to facilitate the supply of devices that comply with the technical requirements specified in class licences. Class licences are radiocommunications licences made by the ACMA

that authorise the operation of different types of radiocommunications transmitters on common sets of frequencies and conditions.

For example, a condition of the Radiocommunications (Low Interference Potential Devices) Class Licence 2015 (LIPD Class Licence) requires a person operating a device under the class licence to comply with each applicable standard for the device, subject to some limited exceptions. The main applicable standard for low interference potential devices is the technical standard Radiocommunications (Short Range Devices) Standard 2014 (SRD standard) made by the ACMA under section 162 of the 1992 Act. The SRD standard adopts the industry standard AS/NZS 4268 made by Standards Australia, which contains technical parameters that align with the requirements specified in the LIPD Class Licence.

In conjunction with the provisions of the 1992 Act discussed below, the effect of the SRD standard is to ensure that only those devices that can be operated under the LIPD Class Licence can be manufactured in Australia or imported into Australia. This minimises the risk of interference between devices operating in accordance with the LIPD Class Licence or with other radiocommunications services.

Other provisions relating to supply and operation

In addition to the labelling and technical standards provisions discussed above, the 1992 Act includes other provisions that support the overall operation of the regime. The other provisions relevant to technical regulation relate to:

> the supply, possession and operation of 'non-standard devices'—that is, devices that do not comply with an applicable standard made by the ACMA (sections 157, 158 and 160)

> the supply of devices that are required to bear a compliance label (sections 182 and 186).

Broadly speaking, sections 157 and 158 of the 1992 Act provide that the operation or possession of a non-standard device is an offence. A person does not contravene sections 157 and 158 if a permit has been issued under section 167. Section 160 provides that the supply of a non-standard device is an offence. A person does not contravene section 160 if supplying a non-standard device in accordance with a permission under section 174. A non-standard device is one that does not comply with one or more applicable technical standards made by the ACMA.

Section 182 of the 1992 Act allows the ACMA to make labelling notices requiring a supplier to apply a label to a device that indicates that the device meets the requirements of specified technical standards.[3] If the device is a radiocommunications device, the labelling notice may also require a supplier to apply a label that indicates that the device complies with a specified class licence. Section 186 makes it an offence for a person who manufactured or imported a device, who knows that a label is required to be applied to the device, to supply the device unless a label has been applied.

Section 301 of the 1992 Act also prohibits the supply of specified radiocommunications devices to a person other than a licensee who is authorised by their licence to operate such a device, or to a person authorised by such a licensee.

[3] Radiocommunications (Compliance Labelling – Devices) Notice 2014, Radiocommunications Labelling (Electromagnetic Compatibility) Notice 2017, Radiocommunications (Compliance Labelling – Electromagnetic Radiation) Notice 2014.

Mobile phone repeaters are the only devices that have been made subject to supply arrangements established under section 301.

In addition, EME requirements for fixed transmitters are contained in the Radiocommunications Licence Conditions (Apparatus Licence) Determination 2015 made under paragraph 107(1)(f) of the 1992 Act, and the Radiocommunications Licence Conditions (Temporary Community Broadcasting Licence) Determination 2015 made under paragraph 108A(1)(e) of the 1992 Act.

Radiocommunications Bill 2017

Part 10 of the exposure draft of the Bill proposes to authorise the ACMA to make rules relating to equipment (the equipment rules). The equipment rules must be directed toward one or more of the objectives listed in subclause 121(3) of the Bill.

The objectives include (but are not limited to):

a) ensuring the electromagnetic compatibility of equipment,

b) containing interference to radiocommunications,

c) containing interference to any uses or functions of equipment, and

d) protecting the health or safety of individuals from any adverse effect likely to be attributable to radio emissions resulting from a reasonably foreseeable use (including misuse) of radiocommunications transmitters.

The equipment rules proposed to be made under the Bill may impose regulatory obligations on a broader range of participants, rather than just the Australian manufacturer or importer, which will provide more flexibility to establish arrangements that are appropriate for modern supply chains.

Proposed approach of equipment rules

In the supporting material, the ACMA outlined that it will take an evidence-informed approach to implementing the exposure draft of the Bill, if passed, consistent with the government's policies on regulatory reform including best-practice regulation. In choosing the options with the greatest net benefit, the ACMA would gather the best available evidence, including by seeking the views of current and prospective spectrum users and other key stakeholders.

The ACMA anticipates that any equipment rules it may make would include four main parts:

> general requirements, including labelling of equipment and supplier registration

> application of EME standards, and record-keeping requirements for mobile/portable equipment and fixed transmitters

> application of EMC standards and record-keeping requirements for equipment

> application of radiocommunications transmitter standards and record-keeping requirements.

In broad terms, the ACMA expects that the equipment rules would:

> define the scope of the equipment to which each part applies of the rules, and the person responsible for ensuring the equipment complies with relevant requirements

> differentiate between different categories of in-scope equipment according to the risk profile of the equipment

> reference or adopt industry standards and specify the compliance documentation that can be used by the responsible entity to demonstrate compliance with those applicable standards.

It is expected that Part 10 of the exposure draft of the Bill, if passed, will enable the ACMA to make equipment rules that preserve the fundamental elements of the 1992 Act equipment regulation arrangements, including:

> the requirement that certain equipment display a compliance label (Regulatory Compliance Mark or RCM), the use of which attests to compliance of the equipment with applicable standards and other requirements

> record-keeping, labelling and supplier obligations imposed on a person ('the responsible entity') for equipment

> prohibitions or restrictions imposed on persons supplying a non-standard device, or a device that is required to be labelled under the equipment rules and does not bear the compliance label

> restrictions on the supply of certain equipment so that the equipment can only be legally supplied to the holder of the appropriate licence under the Bill, or a person authorised in writing by the licensee.

The ACMA may also consider making equipment rules that:

> accommodate a wider range of arrangements for compliance responsibility

> simplify the regulatory arrangements for supply.

The following options have been identified as ways to simplify these arrangements:

> the direct adoption of international standards

> greater recognition of overseas compliance documentation

> coordination between spectrum authorisations and changes to relevant industry standards

> possible consolidation of regulatory requirements into a single regulatory instrument.

Responsible supplier

In contrast to the 1992 Act, which is premised on a linear model of equipment manufacture and supply, the exposure draft would provide the ACMA with more flexibility in identifying responsibility for device compliance. Record-keeping obligations could be tailored to, and imposed on, the appropriate person in the supply chain, while still providing certainty to industry.

The device supply arrangements under the 1992 Act assume that the roles of the parties in the supply chain are distinct and easily understood. That is:

> Australian manufacturer → exclusive local distributor → retailer → customer (end-user)

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

In the case of importation, the 1992 Act supply arrangements assume that the local importer or distributor of a product, or that person's authorised agent, is the appropriate person to hold the necessary compliance documentation for the product.

Similarly, the provisions in the 1992 Act are predicated on the assumption that the importer or Australian manufacturer of a product is responsible for record-keeping and labelling obligations that apply to the product. The importer or manufacturer may authorise an Australian-based agent to carry out the compliance requirements on its behalf. However, an importer or manufacturer, or an agent of the importer of manufacturer, may also authorise another person to apply labels, and maintain compliance documentation, on their behalf.

Modern supply chains can be more complex and diffuse. The person with the regulatory obligation to hold compliance records for a device may be difficult to identify. Identifying the party responsible for compliance is further complicated where individual devices are installed into larger systems or installations. These systems may be constructed from multiple individual items (for example, an array of LED lights or a Wi-Fi network with multiple access points).

Modern supply models may include:

> grey import: overseas manufacturer → multiple local distributors/importers → retailer → retail customer

> drop shipping: overseas manufacturer → customer purchasing via on-line retailer (where the on-line retailer does not physically handle goods and the customer has no direct relationship with the overseas manufacturer or distributor/importer)

> direct import: overseas supplier → local retail customer

> online market: internet market (for example, eBay, Ali Baba, Gumtree) → local business → retail customer.

In recognition of modern supply models, the ACMA will consider if there is scope for the equipment rules to allow an overseas manufacturer to authorise an Australian agent to assume compliance obligations on behalf of multiple importers of specified products. This would allow a person to operate as an 'agent-at-large' for several importers of particular equipment.

The exposure draft of the Bill may also enable the ACMA to impose record-keeping or information production obligations on persons other than 'importers' and 'manufacturers'. For example, the equipment rules could impose obligations on a person arranging for the importation of a product from a supplier to an end-user in Australia. Any proposal to impose record-keeping obligations on a person other than the importer or manufacturer would be subject to the normal checks and balances that apply to legislative instruments, including best practice regulation requirements published by the Office of Best Practice Regulation.

Concepts and design considerations

While there are aspects of the existing technical regulation arrangements that will be maintained (as outlined previously), there is an opportunity to refine the requirements and explore the level of regulation that is appropriate.

Being able to reduce the regulatory burden could have flow-on consumer benefits, including better access to equipment, lower costs and less delay in new equipment getting to the market.

In the sections following, the ACMA is seeking feedback on some of the concepts and design considerations that will enable it to prepare equipment rules should the exposure draft of the Bill be passed by parliament.

Adoption or incorporation of industry standards and international standards in ACMA instruments

In making a legislative instrument, the ACMA may prescribe matters by reference to another document, such as industry standards or other legislation enacted by another jurisdiction. This is provided for by section 314A of the 1992 Act.

In doing so, the ACMA must comply with provisions of the *Legislation Act 2003* (LA), and any special provisions of the enabling legislation (in this case, the 1992 Act). There is also a general expectation that the law should be clear, understandable and freely accessible.[4]

The ACMA has, in making a legislative instrument under section 162 of the 1992 Act, typically adopted an industry standard made by a recognised Standards Development Organisation, making the referenced standard a part of the law.

Principles-based regulation

The ACMA's existing technical regulation arrangements are prescriptive in nature, where they provide detailed steps that must be complied with. An alternative to prescriptive (or rules-based) regulation is principles-based regulation.

Principles-based regulation can be distinguished from rules-based regulation in that it does not necessarily prescribe the steps that must be complied with, but instead sets an overall objective that must be achieved. In this way, principles-based regulation seeks to provide an overarching framework that guides and assists regulated entities to understand the core goals of the regulatory scheme.

A key advantage of principles-based regulation is its facilitation of regulatory flexibility through the statement of general principles that can be applied to new and changing situations.

[4] For example, the Standing Committee on Regulations and Ordinances of the Australian Senate has published a guideline on incorporation of documents in legislative instruments. The Joint Standing Committee on Delegated Legislation of the Parliament of Western Australia also published Report 84 on Access to Australian Standards Adopted in Delegated Legislation in June 2016.

By contrast, rules-based regulation is comparatively rigid and detailed rules impose requirements that are not always appropriate for all entities regulated by the relevant scheme. However, a regulatory approach based on using prescriptive rules can provide greater clarity as it is easier for the regulated entities to determine what rules it must comply with and the minimum standards of compliance that are expected.

The development of the equipment rules gives the ACMA an opportunity to review its approach to technical regulation so it is effective and appropriate in managing the risks that are intended to be addressed. Issues explored in the following sections include scope of the regulations, whether the regulations should be prescriptive or principles-based, the incorporation by reference of standards, and the appropriate compliance levels and documentation.

Electromagnetic compatibility

There are a number of areas within the current electromagnetic compatibility (EMC) regulatory arrangements that could be refined, including scope, the use of mandatory standards, and requirements and compliance levels.

Scope

The EMC regulatory arrangements apply to an extensive range of equipment including, but not limited to, products with internal combustion engines (such as chainsaws, motorcycles, cars and lawnmowers), household appliances (such as refrigerators, dishwashers and microwave ovens), electronic toys, lighting equipment and information technology equipment.

Issues for comment:
The EMC regulatory arrangements apply to an extensive range of equipment. Is it appropriate for the new equipment rules to apply to the same range of equipment?

Is there equipment that should be considered exempt from the EMC regulatory arrangements under the equipment rules?

If certain equipment is exempted from the EMC regulatory arrangements, are the general interference provisions in the Bill sufficient to manage any interference that does occur?

Prescriptive or principles-based regulation

A fundamental element of the ACMA's technical regulation arrangements is that devices must comply with specified technical standards. The ACMA may make standards under section 162 of the 1992 Act for the performance of specified devices, or the maximum permitted level of radio emissions from devices within specified parts of the spectrum.

The ACMA technical standards are legislative instruments that define the technical performance requirements for equipment, generally by directly incorporating industry standards.

Operating or supplying a non-standard device is an offence under the 1992 Act and, therefore, the technical standard effectively makes a device's compliance with an industry standard mandatory.

One option the ACMA may consider is whether to move to a principles-based regulatory approach, similar to the regulatory arrangements that are in place in Europe.

The potential benefits of a principles-based approach include:

> a reduction in the regulatory burden by providing more options and greater flexibility to industry

> a regulatory framework that is better able to respond to technological change and innovation.

Under a principles-based approach, equipment would need to meet essential requirements, which are expressed as principles rather than specific technical requirements in mandatory standards.

For example, in the European EMC Directive 2014/30/EU, the essential requirements include:

> Equipment shall be so designed and manufactured, having regard to the state of the art, as to ensure that:
>
> > The electromagnetic disturbance generated by the equipment does not exceed the level above which radio and telecommunications equipment or other equipment cannot operate as intended.[5]

Equipment that complies with an applicable EMC standard published by a recognised Standards Development Organisation would be presumed to comply with the essential requirements. While compliance with technical standards made by the ACMA would continue to be a pathway to compliance, alternatives approaches would also be available to suppliers that could be more cost-effective.

Issues for comment:
Would the adoption of a principles-based approach to some or all aspects of the equipment rules be a more effective or efficient way of meeting the objectives of the equipment rules?

If a principles-based approach is adopted, should the ACMA identify or prescribe the standards that can be used for purposes of assessing whether the requirements of the equipment rules have been met?

Alternatively, if a principles-based approach is adopted, should the ACMA identify or prescribe the Standards Development Organisations (such as AS/NZS, IEC or CISPR) whose standards would be accepted for the purposes of compliance with the equipment rules?

Compliance levels

The EMC regulatory arrangements under the 1992 Act have three compliance levels, which are based on the risk of interference that may be caused by the equipment. The documentary evidence (compliance records) required to be obtained and maintained by a supplier is different for each compliance level (high, medium and low risk). The labelling obligation does not apply to a low-risk device, although the supplier of an unlabelled device must comply with other requirements of the labelling notice.

Low-risk equipment requires the least amount of documentary evidence and only requires a description of the equipment. A declaration of conformity is required if the equipment is labelled. Labelling low-risk equipment is voluntary.

[5] Should the ACMA decide to adopt a principles based-approach, the legislative drafting may take a different form to that used in the European EMC Directive.

Medium-risk equipment requires a description of the equipment, a declaration of conformity and a test report showing the equipment complies with an applicable standard. Labelling medium-risk equipment is mandatory.

High-risk equipment requires the same documentary evidence as medium-risk; however, the test report must be an accredited test report produced by an accredited testing laboratory.

Issues for comment:
Is it appropriate to continue to have three compliance levels?

Could the number of compliance levels be reduced without compromising the integrity and effectiveness of the equipment rules?

For example, would it be appropriate to have low-risk and high-risk categories of equipment with the overall scope the same as under the 1992 Act?

Alternatively, would it be appropriate to have only medium risk and high risk categories with no regulatory requirements for low risk equipment?

In either case (or under any other approaches), what would be the basis for distinguishing between the levels?

What are the documentary evidence requirements that would be appropriate to each compliance level?

Radiocommunications devices

There are a number of areas within existing regulatory arrangements for radiocommunications devices that could be refined, including the scope, the use of mandatory standards, and compliance levels.

Scope

The majority of radiocommunications devices that are required to comply with a standard, whether a technical standard made by the ACMA or an industry standard, are devices that are authorised by a class licence for operation. Although it is possible for the ACMA to require radiocommunications devices operated under apparatus and spectrum licences to comply with standards, interference risks associated with those licensing arrangements are generally managed through licence conditions that apply to the operation of devices, or the locations at which they can be used, or both.

Based on the exposure draft of the Radiocommunications Bill, class licences are generally expected to be replaced with spectrum authorisations. One consideration is to limit the application of the equipment rules to those radiocommunications devices whose operation is authorised by a spectrum authorisation.

For the bulk of devices that would be operated under a spectrum authorisation, the end-user would have very little ability to control the radio characteristics of the equipment. Therefore, it seems appropriate that the regulatory burden of compliance should lie with the supplier of the device.

Issue for comment:
Should the scope of the equipment rules as they apply to radiocommunications devices be limited to those devices whose operation is authorised under a spectrum authorisation in accordance with the exposure draft of the Bill?

Prescriptive or principles-based regulation

A fundamental element of the ACMA's technical regulation arrangements is that devices must comply with specified technical standards. The ACMA may make standards under section 162 of the 1992 Act for the performance of specified devices, or the maximum permitted level of radio emissions from devices within specified parts of the spectrum. Technical standards made by the ACMA are legislative instruments that define the technical performance requirements for equipment, generally by directly incorporating industry standards.

Operating or supplying a non-standard device is an offence under the 1992 Act. Making a technical standard effectively makes it mandatory for a device to comply with the incorporated industry standard.

One option the ACMA may consider is whether to move to a principles-based regulatory approach, similar to the EMC regulatory arrangements that are in place in Europe.

Under a principles-based approach, equipment would need to meet essential requirements, which are expressed as principles, rather than specific technical requirements in mandatory standards.

For example, the equipment rules might state that 'a radiocommunications device, where its use is permitted by a spectrum authorisation, must not be supplied in Australia unless the device is capable of being operated only in accordance with the relevant spectrum authorisation'.

A radiocommunications device that complies with relevant radiocommunications equipment standards (equivalent to a technical standard under the 1992 Act) would be presumed to comply with the essential requirements. While compliance with a technical standard would continue to be a compliance pathway for suppliers, other options may also be identified during the development of the equipment rules.

Issues for comment:

Would adoption of a principles-based approach to some or all aspects of the equipment rules be a more effective or efficient way of meeting the objectives of the equipment rules?

If a principles-based approach is adopted, should the ACMA identify or prescribe the standards that can be used for purposes of assessing whether the requirements of the equipment rules have been met?

Alternatively, if a principles-based approach is adopted, should the ACMA identify or prescribe the standards development organisations (such as AS/NZS, IEC or ETSI) whose standards would be accepted for the purposes of compliance with the equipment rules?

Compliance levels

Currently, the radiocommunications device arrangements make provision for three compliance levels, which take into account the interference impact of the equipment on other devices using the spectrum. However, the Radiocommunications (Compliance Labelling – Devices) Notice 2014 does not currently specify any device as being a 'high risk' device. The evidence required to document compliance is different for each compliance level.

Low risk has the least evidence required and only requires a description of the equipment and a declaration of conformity.

Medium risk requires a description of the equipment, a declaration of conformity and reasonable written evidence that the equipment complies. The evidence can be a number of things including a test report or manufacturer's performance specifications.

High risk requires a description of the equipment, a declaration of conformity and an accredited test report from an accredited laboratory. There are currently no mandatory standards that require this level of evidence.

Issues for comment:
Is it still appropriate to have three compliance levels?

What would be the basis for distinguishing between the compliance levels?

What are the documentary evidence requirements that would be appropriate to each compliance level?

Electromagnetic energy

Under the 1992 Act, electromagnetic energy (EME) is regulated through two arrangements:

> EME regulatory arrangements for mobile and portable products, which set exposure limits for emissions from radiocommunications transmitters. The arrangements impose labelling and record-keeping obligations on a supplier of transmitters with integral antennas before the products can be supplied to the Australian market.

> EME from transmitters authorised for use under apparatus and spectrum licensing arrangements is regulated through conditions of the licence. These include both certain end-user equipment (for example, land mobile radio equipment) and network transmitters (for example, mobile phone base stations).

Under the exposure draft of the Bill, these two arrangements will merge and all EME requirements will be specified under equipment rules.

The objectives of the EME-related equipment rules would be to protect the health or safety of individuals from any adverse effect likely to be attributable to radio emissions resulting from a reasonably foreseeable use (including misuse) of radiocommunications transmitters.

At this point in time, the ACMA is still considering if any changes to the way the EME requirements operate are necessary, and the ACMA will work with the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) to ensure consistency between the ACMA's arrangements and ARPANSA's.

However, we are open to your suggestions if you believe the EME arrangements can be improved.

Issue for comment:
Do you have suggestions on improvements to the EME arrangements for incorporation into the EME equipment rules?

Other comments

Issue for comment:
Do you have suggestions on improvements to the existing equipment regulation arrangements that should be considered for incorporation into the equipment rules?

Related matters

Certain equipment that is within the scope of the equipment rules will also be subject to the Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015 (TLN), made under section 407 of the *Telecommunications Act 1997* (Telecommunications Act).

In conjunction with technical standards made by the ACMA under section 376 of the Telecommunications Act, the general effect of the TLN is to impose equivalent regulatory obligations on Australian manufacturers and importers of customer equipment and customer cabling.

The ACMA recognises the importance to industry of common regulatory approaches and obligations for both radiocommunications and telecommunications equipment. This will be a key consideration for the ACMA as it develops equipment rules under the exposure draft of the Bill.

Request for comment

Comments are sought from the public regarding the issues raised in this paper.

Making a submission

The ACMA invites comments on the issues set out in this consultation paper or any other issues relevant to the concepts and design considerations for equipment rules.

> **Online submissions**—submissions can be made via the comment function or by uploading a document. The online consultation page provides details.

> **Submissions by post**—can be sent to:

The Australian Communications and Media Authority
Technical Regulation and NBN Section
PO Box 13112 Law Courts
Melbourne VIC 8010

The closing date for submissions is COB, Thursday 29 March 2018.

Electronic submissions in Microsoft Word or Rich Text Format are preferred.

Enquiries

> Consultation enquiries can be emailed to techreg@acma.gov.au.

> Media enquiries can be directed to Emma Rossi on 02 9334 7719 or by email to media@acma.gov.au.

Effective consultation

The ACMA is working to enhance the effectiveness of its stakeholder consultation processes, which are an important source of evidence for its regulatory development activities. To assist stakeholders in formulating submissions to its formal, written consultation processes, it has developed *Effective consultation—a guide to making a submission*. This guide provides information about the ACMA's formal written public consultation processes and practical guidance on how to make a submission.

Publication of submissions

In general, the ACMA publishes all submissions it receives, including any personal information in the submissions (such as names and contact details of submitters). The ACMA prefers to receive submissions that are not claimed to be confidential. However, the ACMA accepts that a submitter may sometimes wish to provide information in confidence. In these circumstances, submitters are asked to identify the material (including any personal information) over which confidentiality is claimed and provide a written explanation for the claim.

The ACMA will consider each confidentiality claim on a case-by-case basis. If the ACMA accepts a claim, it will not publish the confidential information unless authorised or required by law to do so.

Release of submissions where authorised or required by law

Any submissions provided to the ACMA may be released under the *Freedom of Information Act 1982* (unless an exemption applies) or shared with various other government agencies and certain other parties under Part 7A of the *Australian Communications and Media Authority Act 2005*. The ACMA may also be required to release submissions for other reasons including for the purpose of parliamentary processes or where otherwise required by law (for example, under a court subpoena). While the ACMA seeks to consult submitters of confidential information before that

information is provided to another party, the ACMA cannot guarantee that confidential information will not be released through these or other legal means.

Privacy

The *Privacy Act 1988* imposes obligations on the ACMA in relation to the collection, security, quality, access, use and disclosure of personal information. These obligations are detailed in the *Australian Privacy Principles*.

The ACMA may only collect personal information if it is reasonably necessary for, or directly related to, one or more of its functions or activities.

The purposes for which personal information is being collected (such as the names and contact details of submitters) are to:

> contribute to the transparency of the consultation process by clarifying, where appropriate, whose views are represented by a submission

> enable the ACMA to contact submitters where follow-up is required or to notify them of related matters (except where submitters indicate they do not wish to be notified of such matters).

The ACMA will not use the personal information collected for any other purpose, unless the submitter has provided their consent or the ACMA is otherwise permitted to do so under the Privacy Act.

Submissions in response to this paper are voluntary. As mentioned above, the ACMA generally publishes all submissions it receives, including any personal information in the submissions. If a submitter has made a confidentiality claim over personal information that the ACMA has accepted, the submission will be published without that information. The ACMA will not release the personal information unless authorised or required by law to do so.

If a submitter wishes to make a submission anonymously or use a pseudonym, they are asked to contact the ACMA to see whether it is practicable to do so in light of the subject matter of the consultation. If it is practicable, the ACMA will notify the submitter of any procedures that need to be followed and whether there are any other consequences of making a submission in that way.

Further information on the Privacy Act and the ACMA's privacy policy is available at www.acma.gov.au/privacypolicy. The privacy policy contains details about how an individual may access personal information about them that is held by the ACMA, and seek the correction of such information. It also explains how an individual may complain about a breach of the Privacy Act and how the ACMA will deal with such a complaint.

Appendix A—Assessment framework and principles

The ACMA's assessment framework

The purpose of the regulatory assessment framework developed by the ACMA is to provide a high-level, consistent, transparent and flexible tool for assessing potential regulatory design choices that support the government's policy objectives and outcomes.

In summary, the framework involves:

> identifying the regulatory issue and the risks and harms for different stakeholder groups

> considering what regulatory response—or responses—might be appropriate to address the issue given the external policy environment and characteristics of the market and industry

> applying 'implementation filters' to identify appropriate ways of delivering aspects of the proposed regulatory response

> ongoing review in light of changes in the environment and consumer and public interest considerations.

Under the framework, the overall approach is to assess the costs and benefits of the different regulatory responses, while taking broader policy considerations into account. This will include an explicit analysis of any risks and incentives. The framework is in line with *The Australian Government Guide to Regulation* that works to ensure all policy options are carefully assessed, with the aim of cutting red tape and regulation, where appropriate.

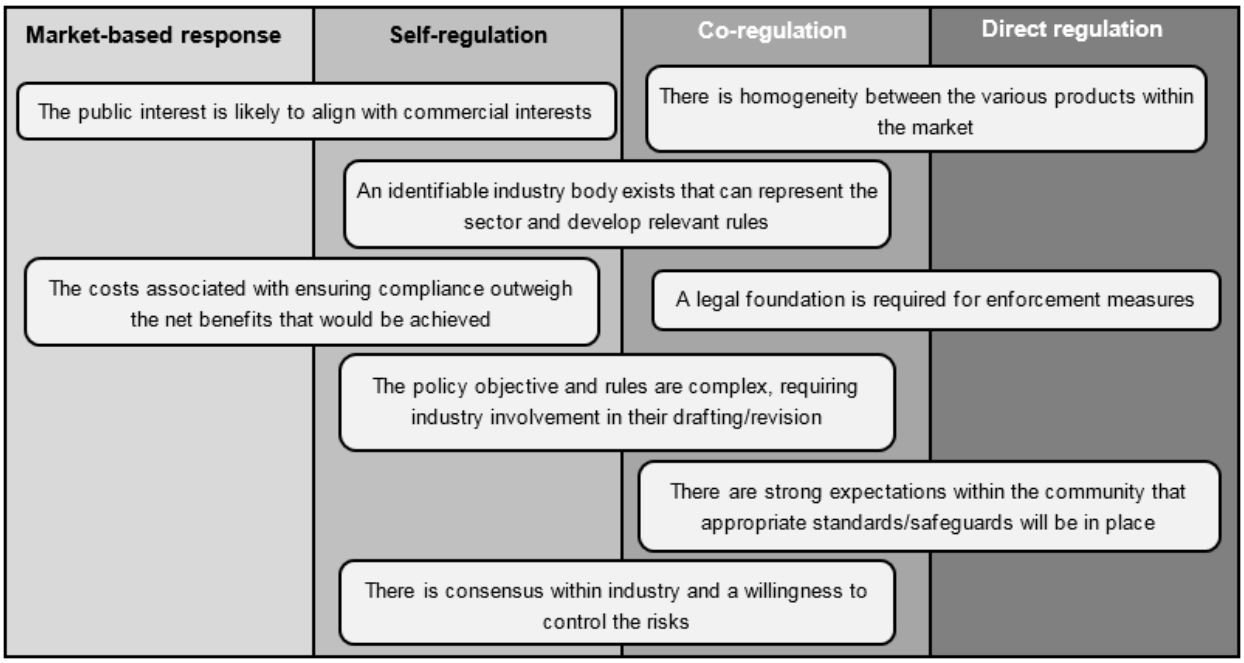
The regulatory responses are considered to sit along a 'regulatory continuum' with a market-based response at one end, and direct government regulation at the other. Responses along the continuum, and the market and industry characteristics to which they are suited, are shown in Table 1 and Figure 1 on the following pages.

The government may also use non-regulatory responses—either on their own, or in combination with a regulatory response. Non-regulatory responses may include education campaigns, facilitation, regulatory forbearance and observation.

Table 1: Regulatory responses along the regulatory continuum

Response	Description	Key elements
Market-based	Relies on market solutions—no regulatory action is required	> Likely to be appropriate where there are no significant public policy concerns > Needs to be a reasonable expectation that the market can deliver any public policy objectives > The cost of imposing the regulatory obligation outweighs the benefit of the public policy objective > Can be supported by non-regulatory tools (e.g., education campaigns)
Industry self-regulation	Involves industry voluntarily developing, administering and enforcing its own solution to address a particular issue without any formal oversight from government or legal backstop for enforcement	> Needs a strong alignment between industry interests and the stated public interest or value outcome > Often involves a combination of other regulatory design options
Co-regulation	Involves government and industry sharing the regulatory role, with industry typically developing and administering its own arrangements (such as codes of practice) and government providing the underpinning legislation to enforce it	> Required where the public interest is unlikely to be fully addressed by industry alone
Direct regulation	Involves the greatest amount of intervention by the regulator, where 'black letter' law arrangements are regarded as necessary to support policy objectives	> Often appropriate where clear obligations are required that do not need to be readily adjusted to reflect market developments. > Can be supported by a range of non-regulatory tools

Figure 1: Market and industry characteristics suitable for each regulatory response



ACMA Review principles

The ACMA Review identified two sets of principles.[6] First, there are high-level intervention principles that guide decisions about when and how governments should intervene in the market. Second, where it is decided that regulation is the appropriate form of intervention, a set of regulatory design principles are proposed to help guide the way regulation is used. These are outlined below.

High-level intervention principles

> The role of government is to facilitate competitive market environments as the primary mechanism for achieving public policy goals and then to intervene further only where clear evidence exists of market failure, or if a public policy goal is unlikely to be delivered by the market.

> When government intervenes in the market, it should be done in such a way as to impose the minimum cost in order to achieve the public policy goals. Such interventions should produce benefits that outweigh the costs, including costs imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, choice or competition).

> When market interventions are necessary, a number of regulatory tools should be considered—policy-makers should not rely exclusively on 'black letter' regulation, but also consider other options such as direct and co-investment (for example NBN, Screen Australia and the Mobile Black Spot Program), contracted service delivery (Universal Service Obligation, National Relay Service), indirect funding (tax incentives), and facilitation and education programs.

> Government intervention should be considered from a system-wide view of the interdependence, interconnectivity and feedback relationships between different parts of the communications sector and other sectors in the economy.

[6] ACMA Review, p. 87.

Regulatory design principles

> Regulation should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical base.

> Regulation should be competitively neutral, such that it achieves parity of treatment of similar services regardless of the underlying medium or device used to deliver or receive the service, unless there are clearly articulated and compelling reasons to do otherwise.

> Regulation should promote the greatest practical use of co-regulation and self-regulation.

> Enforcement frameworks in legislation should provide remedies that are proportionate to the nature of the relevant breach.