Submission: Exposure draft of the new legislation and the proposed approach to broadcasting and transitional arrangements.

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Scope

At https://www.communications.gov.au/have-your-say/consultation-new-spectrum-legislation invitations are made for The Public to comment on the Draft Radiocommunications Bill (2017) available at https://www.communications.gov.au/file/27216/download?token=1-tePMnN .

This document provides an opinion as an affected party and user of radiocommunication services about proposals placed on notice for public comment.

Contact Details

[redacted]

Release Status

- Content is not confidential.
- **May be generally released beyond Government and to the general public –**
- **Email addresses and contact telephone numbers must be redacted in the released-to-public version**.

My Background

My interests in this is as a Licensed and active Amateur Radio Operator.

I have University and Industry-sector granted qualifications in Education, Engineering, Communications and Computer Sciences fields, practised within the Technical and Higher Education sector. I practised continuously in this field for almost 28 years.

Prior to continuous service within TAFE I worked in the Secondary Education and Telecommunications sectors. I have maintained strong links with both sectors during my service with TAFE and Higher Education.

I am also subject to a third-line-forced association as a member of the Wireless Institute of Australia as I am an accredited and active of Assessor for Amateur Radio Licenses. The Wireless Institute of Australia holds a deed-for-service arrangement with The ACMA to support and outsource licensing and candidate assessment roles.

Note:

The Wireless Institute of Australia (WIA) is an entity that represents people - Australian Radio Amateurs - and their interests. This makes it part of its role “political” in part - but prime focus.

Its directors are up for election every two years (alternating terms). The WIA has been classified by many in the community as being very conservative in outlook.

The following text from Wikipedia (accessed 27/6/2017) sums up the WIA:

> *The Wireless Institute of Australia (WIA) was formed in 1910, and is the first and oldest national amateur radio society in the world. It represents[1] the amateur radio operators of Australia in dealings with the Australian Communications and Media Authority (ACMA), the authority under the government of Australia that administers communications within and external to Australia.[2][3][4][5] The WIA publishes a monthly journal for its membership called Amateur Radio.[6] The organisation is the national society representing Australia in the International Amateur Radio Union.[7]*
> *….*
>
> *Governance*
>
> *On 16 May 2004, the Annual General Meeting adopted a new constitution that established a national organisational structure (seven Directors with individual membership of persons in the national body) versus the former federal arrangement (membership held in state Divisions, and the Divisions having membership of the Federal body).[8]*
> *…*
> *Controversy*
>
> *There has been growing concern among the membership of the WIA of alleged "mismanagement and incompetence by the directors" primarily on social media. These issues have been linked to the lack of social media presence, mismanagement of finances, as well as a lack of connection between the actions of the organisation and the actions of local Amateur radio clubs. [13] There has also been a "WIA Reform Group" established to try and enact change within the*

> *organisation by ex-directors other senior role holders in the organisation. [14] Current directors have also held talks around the country identifying issues they see in the organisation and possible solutions. [15]*
>
> Wikipedia (accessed 27/6/2017)

Consultation

This document has been compiled and proofed with the assistance and members of the Australian Amateur Radio Community from across all States. In particular I would like to gratefully acknowledge the assistance and counsel of:

- Andrew Smith VK6AS
- Onno Besnchop VK6FLAB
- Chris Chapman VK3QB
- John Fisher VK3DQ
- VK6 Amateur Radio Newsline Cooperative – VK6ARN

Perspective

The major classes of licensees, managed by the ACMA, that are affected by the proposed Radiocommunications Bill are everyday people. Amateur, Maritime and Scientific licensees vastly outnumber Government, Defence and Business licensees. Amateur, Maritime and Scientific licensees mostly come from everyday backgrounds and do not have access to the vast resources that Defence, Government and Enterprise have about accessing the law, regulatory authorities and gaining interpretation of Law.

All stakeholders in the new Radiocommunications Bill have shown increasing distaste for regulation and red tape.

Government policy has been directed in recent years towards cost saving with Government Enterprises and quasi-autonomous non-governmental organisations (QANGOS) being cost-neutral – if not contributory - to the finances of the nation. There is also a perception within some elements of the community that because Business pays high prices for access to Government services that they should get and deserve should get a greater quality of service and access to Law, its protections and subsequent regulatory authorities. The Business community pays huge licensing fees and huge fees to access spectrum to the Australian Communications and Media Authority and subsequently the Ministry for Communications and Arts.

Yet it is also a fact that these organisations pay money for services entrusted to The Australian People so that they can make money.

Our Australian ancestors designed the Constitution to be non-discriminatory and without favouritism; Australian Government serves the people. Communications and its regulation is a function that devolved to the Australian people via Section 51 for management.

There is a strongly-held view in the community - especially from Radio Amateurs and The Scientific Community - that their interests are being ignored or that their interest are of a lower priority as they pay substantially less licensing fees. Evidence that the individual is not treated with the respect that it deserves, or with equality to Business interests is attached in Appendix 1 as a response provided by The Ombudsman to Dr. Andrew Smith, a former Director of the Wireless Institute of Australia. I have been authorised by Dr. Smith to provide this document in this submission as evidence. This response is noteworthy as it clearly in tone demonstrates frustration that “The Ombudsman” had about dealing with issues of concern raised by Dr. Smith (and others such as myself).

The new Law and its subsequent regulation must treat all stakeholders with equality of importance and equality of priority. It must not have rough-edges and ways for Agencies and contractors to weasel out of high standards of ethical conduct that is expected by the Australian People.

This is the perspective that this submission will come from – From “man in the street” and the protection of the rights of the everyday Australian.

This submission will also come from a position that the highest of ethical and community standards must always be observed without exception; our regulators must be mandated to act exclusively from the highest of community standards. There must be “no rough edges” and ways for both The Community and Government Agencies to slip through cracks in the law.

This occurs primarily via clarity and simplicity.

Reviewers and lawmakers examining this submission will say “but this point is covered here” and “is covered by that section …”. If and when this starts to happen my point will have been clearly made – being that parts of the proposed law is unclear, repetitive and cryptic.

The new proposals must be simple, clear and in plain English. The new law must be inherently simple and clear in its direction.

There must be provisions to work to community standards and codes. These must be enforceable.

I am not a lawyer; neither are most people (stakeholders) that need to use this law. This is the prime position that I will be viewing it from - plain English and simplicity – and equality of protection for Business, Government and “the common person-in-the-street”.

….

This submission will not deal with underlying bills and regulation – it just deals with the proposed Radiocommunications Bill. All underlying proposals are superfluous until this main framework is formalised, and comment would therefore be invalid.

Summary of Recommendations

The law and all its subsequent instruments should be written and implemented in clear, non-cryptic plain English – in a form that is easily interpretable by the "man-in-the-street".

Ministerial policy statements should be posted for review before they are enforced.

Compliance with international treaties and agreements should be enshrined into The Bill.

Protections must be granted formally within legislation to protect those using radio communications equipment under emergency circumstances.

The Inspectorate should have their rights to enter premises without warrant only subject to upper-management approval and with their oversight. The discretion as exists at the present is unacceptable to the community and does not have checks and balances..

Provisions for operators to self-incriminate and/or compel to testify against themselves should be removed.

Licenses issued to organisations (i.e. "Club Licenses" as they are termed in Amateur Radio) should have clearer operational rules and parameters. They should explicitly be written into the base-law itself.

Only the Minister should have the right to issue, direct the suspension or terminate licences and/or the alterations of conditions. This could be a delegated power by written authorisation.

Provisions distancing the Minister from operational decisions and responsibility should be removed; The Minister should have ultimate directorial oversight and responsibility over all communications. The Minister should be able to make directions to grant, terminate and over-ride activities with regards to matters that are within the community interest.

Approved community and business codes should be legislatively enforceable and punishable by simple, cost-minimised process. This should be enshrined into the base-law.

Enforcement process should be made easier to execute and require less legal expense to prosecute. It should also perhaps be used more frequently to "clean up" our airwaves – and thus be easier for The Inspectorate to prosecute.

Sale of equipment to non-authorised persons (or persons not in the process of obtaining authorisation) should be prohibited.

The whole of Part 11 should be reviewed with regards to giving The Australian people, hence The Parliament, control over extended emergency circumstances.

The Agency ARPANZA should not be referenced in the legislation itself; it should be referenced in regulation underneath the Bill/Act in order to safeguard exceptions to their standards that are accepted by the community.

The Ministry for Communications and the ACMA must operate to the highest of community standards; their level of ethical function should be solely "middle-ground" from the perspective of The Australian Public. "Rough edges" of laws and lax standards should not be tolerated internally or via contractors.

Contractors and delegates must possess adequate qualification that fits within definitions and standards recognised openly by the general community and government.

Comments: The Proposed Legislation

Part 1: Preliminary

- Section 5 - Definitions
  - Aircraft: should include drone i.e. remotely piloted devices
  - The definition of Commonwealth Officer including member of Defence Force for the terms of this Act is far too broad.
    - There are many ranks in Defence Force: this should be refined to restrict to Senior Officer rank.
    - Further Reference: Section 181
  - Import means import into Australia: I have concerns with circular definitions.
    - Never use the same word that you are defining as part of your definition.
    - This needs re-wording.
- Section 6 - Radiocommunication
  - The entire definition of Part (b) is poor
    - This definition could incorporate communication say between a CPU and a peripheral device – which is via electrons and not RF.
  - This section requires greater precision including an insert at the end of part B saying "using RF modulated signals" or similar.
- Section 22 - Consultation
  - 14 days is inadequate especially for volunteer organisations, such as maritime-related, safety-related and non-professional (amateur) organisations.
  - 28 days is perhaps more realistic for most organisations.

Part 2: Ministerial Policy Statements

- Sections 17 to 19 : There are no checks and balances associated with "Ministerial Policy Statements"
  - Where are the rights to Business, Defence and Public comment and review before these directives are enacted?
  - Only the best policy should ever be implemented; and without review and consultation before they go into effect the best interests of the community-at-large is not served.

- All Ministerial Policy Statements SHOULD be subject to public comment, consultation and public review and oversight before being enforceable.
  - Clear appeal/review processes must be put in place
  - Review processes must be accessible to the "man in the street" and not require expensive litigation.

Part 4: Radiofrequency Plans

- Sections 23 to 25: This entire section does no respect or pay tribute to international treaties and agreements that Australia is a party to… i.e. ITU and its subcommittees.

  - We have close neighbours – France (New Caledonia), Indonesia, Papua New Guinea and New Zealand being the main populated neighbours, and signals from our nation can and do propagate beyond our shores.
  - We need to respect our neighbours and respect international treaties.
  - This section only refers to Defence when other concerns need be considered.

- This entire section needs to be reworked - aimed at also acknowledging international treaties but providing Australia flexibility to deviate from these arrangements where it is within the Australian strategic and International Public Interest to do so.

Part 5: Operation of Radiocommunication Devices

- Sections 26-30 are cryptic in language construction for the average person and should be worded in plain, clear English.
- Section 29 – Almost IMPOSSIBLE to police and implement
    - What if equipment is part of a deceased estate?
    - What if the equipment is being stored?
    - What if the person is studying or applying for a licence?
    - What Protections should be provided for these circumstances?
  - Onus should be on operation and not possession….
  - Provisions for National Security should be incorporated into this act;
  - "intent" is hard to legally determine and is very subjective.
    - This whole area must be clearer in interpretation and action so that cases that are legitimately brought before the Australian people do not fall apart.

- Under the old Act only large indiscretions are prosecuted as it takes too much time and resources of the ACMA to achieve successful prosecution and thus protection of the community.
  - Under appeal many decisions and court actions have been overturned
- Provisions of "The Old Act" have just been replicated
- Legislative and associated prosecutorial processes should be simplified - implemented a framework similar to State-based to "Road Traffic Offences" that can be issued through an "electronic court".
  - There should be provisions to be able to add the costs of INVESTIGATION and ENFORCEMENT should an infringement be detected.
  - Moneys received should head back into the ACMA's revenue pool.
- This protects the "Small guy" and cleans up our airwaves – eliminating illegal, anti-social, anti-people conduct, fast through the offender's hip pocket.
- Checks and balances - using say a "complaints that float to the top of the pile-style" methodology for investigation and prosecution should be implemented in order to top vindictive, personal acts.
  - We do not want someone or an organisation that makes an unfortunate mistake occasionally (i.e. the occasional swear word) heading for investigation and subsequent prosecution, as this could be subject to abuse and could support bullying.

  - Yet it is in the interest of the community for repeat offenders that are deliberately flaunting the law - or for offenders that are causing serious harm to perhaps themselves, the community and lawful operators/business - to be dealt with.

- Further References: Sections 52, 117, 134, 139, 140, Part 13

- **There is no protection provided to individuals who use radiocommunication devices and perhaps transmit out-of-band and/or licence conditions for GENUINE emergency purposes - without going into complexity**

Part 6: Licenses

Division 2

- Section 33 part 4: Does not specify the mechanics of HOW a licence becomes active
  - Further reference: Section 80 subsection 4… But this refers to assignment (i.e. transfers/giving) of licences to others….
  - Does the Licence become active when it is placed on and appears on a publicly-accessible register? Does the licence become active when a printed piece of paper or e-document comes into their lawful possession?
  - Clarification of the above – as well as note reference to Section 80 (4) is required
- Section 33 part 6: Restricts the ACMA issuing "lifetime licences" for if this is deemed to be the best and most economically feasible option for the future.
- Further References: Division 6 Section 52, 53, Division 15

Division 3

- Section 41: Does not specify nor adequately cover "Club Licences"
  - Argument: Division 12, Section 80: Still refers to person who may assign: needs to cover licenses issued to Organisations as well
- Sections here could be improved via clear regulation and guidelines – but I feel that this issue should be cemented into "The Act" rather than regulated as regulation can be abused…

- The following guidelines are recommended:
  - If a person does not hold a qualification to use a "Licence" they must only use that license to the qualifications of a licence holder that is authorised to and directly supervising that operator.
  - A person must ONLY use the licence, if it is for Club/Shared purposes, to the limits of their personal licenced qualifications, if unsupervised by the holder of a higher-class licence.
  - A person can use a licence or to that of the highest qualification of a licence holder directly supervising.
  - Direct supervision needs a clear definition under "definitions" in The Act.
    - Currently this is a very grey area.
    - "Supervision" must be defined: "in the physical presence of"
      - The concept "in the direct sight of" is difficult to convey with clarity and should be considered carefully.

- The definition must be broad enough to cover Amateur ops and organisations such as Coast Guard, Para-emergency Services (i.e. SES/St. John's Ambulance) and Surf Lifesaving.
- Licence terms and conditions specified may cover this

Division 4

- Section 37: Requires explanatory notes clarifying the fact that Person/Qualification-based licences do NOT require equipment to be registered.
  i.e. Amateur, Maritime, Aeronautical and Experimental/Scientific Licences.

Division 8 and Division 9

- Sections 64, 71 and 103, 104, 106: Only the Minister should have the right to issue, direct the suspension or termination of licences and/or the alterations of conditions.
  - The ACMA should have delegated authority
  - But the Minister should have ULTIMATE RESPONSIBILITY
  - Too much power to the regulating agency with too little responsibility
- The Minister MUST ultimately take responsibility – not bureaucrats – for significant actions taken on behalf of The Australian people.
- As stated earlier, Legislative provisions could be utilised to empower a "computer court" as is done with Traffic Infringements to handle minor infringements.
  - Major infringements should go through the Federal DPP.

- Communications is a constitutionally mandated function of Government; the result is that The Minister and not an underling agency MUST take responsibility.
- This whole concept and associated legislative mechanism I feel needs a rethink - yet the mechanism defined in Division 8 I feel is fine.

- Section 73: EXCELLENT in intent as it enables the public to continue to report those that are recalcitrant!
  - Part 4 is irrelevant and that the register SHOULD be a Legislative instrument: Its accuracy is important and being subject to legislative provisions ensure that this function receives the administrative priority that it deserves, in order to protect the innocent.

Division 12

- Section 80: Still refers to person that may assign: needs to cover licenses issued to Organisations as well
- Covered in discussion under Section 6, Division 4

Division 13

- Section 83 Subsection 2: Personal licences (i.e. Aeronautical, Maritime personal etc.) must be specifically by law restricted from sale and not just done by "note" that can accidentally be overlooked.
  - i.e. "2-letter" calls for Amateur Licences are desirable; Making a profit on reassignment of callsigns MUST be made illegal and stamped out explicitly.
- Otherwise the whole concept of this section is fine.

Division 15

- Generally – the use of the word Website.
- See discussion under Part 6, Division 2 Section 33 part 4.
- Section 92 does not read clearly and requires simplification.
    - It refers extensively to registration of Apparatus and poorly handles licenses, such as Amateur and Experimental/Scientific Licenses, that do NOT apply to equipment but to qualified operators.
    - An interpretation of this provision as written provides argument as to whether all Amateur and Experimental / Scientific Licensees are required to register all equipment.
        - This takes the self-education and home-built/modified-for-purpose intent out of Amateur Radio !!!
        - This would be administratively very messy !!!

Part 9: Interference Management

Division 1 and 3

- Section 110 Overview and 114 Part 2: What about Short-wave services such as "Voice of America" and "Deutsche Welle"? You CANNOT legislate for this…
    - Provisions need to be changed changed so that legal competitive contracts, Competition Arrangements and Australian Law as are not circumvented with regards to transmissions from outside Australian Shores.
    - Likewise need strengthening to stop and discourage "Hateful", "Racist" and treasonable acts.
    - Later provisions Section 114 Part 8 is far too restrictive
- Section 114 requires breaking up and simplification
    - Move some items to Definitions i.e. Emergency Services
- Section 115: Perhaps gives States powers to legislate over communications…. Check, test…
    - National Radiocommunications laws MUST be consistent even if it moves into the areas of "Interception Devices" legislation as appears in all States and Territories.
    - May contravene Section 51 (v) of Constitution

Division 4

- Section 117: Perhaps penalties are not stiff enough?
    - Needs to be able to slide into higher, sliding scale of penalties.
    - Penalties may need to be added in a separate section - perhaps as an appendix to The Bill?

- Section 118: Needs specify that this agent needs be an Agent employed BY the ACMA as the Enforcement agency
    - This section allows private entities to be appointed as Agents to police the law.
    - Consider adding "Commonwealth Officer" (Section 5) as being an only eligible to be appointed as an Agent ?

Division 5

- Section 119 onwards : Needs a DIVISION 6 and Section 119a to respect the rights to individuals in a NON-EMERGENCY Situation
    - i.e. Kids : "raid" on a 15 year old minor several years back by ACMA Field Operations Branch when the minor's guardians were not home
        - Protection of minors is paramount
        - It must only be under extreme circumstances and under supervision that "raids' be conducted on minors without parents home.
        - Causing interference to systems that have redundancy (i.e. mobile phone systems) is not a valid excuse.
        - Inspectors MUST carry Working With Children Cards for All States/Territories

Additional Comments

- Licensees MAY NOT REFUSE an inspection, but can defer inspection to a time convenient to both parties
    - There should be legislated penalties for "deflection" and "deliberate inconvenience" to agency.
- Raids by Agents of the ACMA must not be based on "potential" but upon actual current operational proof.

- **INSPECTORS AND AGENTS OF THE ACMA MUST NOT HAVE THE RIGHT TO RAID A PREMISES WITHOUT A WARRANT – EXCEPT UNDER DECLARED EMERGENCY SITUATIONS.**
    - Providing interference to Business Communications Systems is an unsatisfactory excuse for raid without warrant.
    - Providing interference to Emergency Service Communications Systems is a valid
- Raids should be only formally authorised by a Senior "on-call" delegate of the ACMA and not just be able to happen in response to an issue observed at the time by an inspector.
    - This should be clearly legislated.
- There must be checks and balances with the ability to "kick doors in" without prior contact/notification that the inspectorate is coming – and it should only be used as a last resort or if the subject-under-investigation demonstrates resistance.

Part 10: Equipment

- The Bill should propose that the supply of telecommunications equipment should only be legal to those who hold qualification and/or have active qualifications within the field.
    - Adjustments to the Trade Practises Act (1974) and Customs Act (1901) may be required (as I am not a solicitor no references provided).
- Possession of equipment that is capable of transmitting on bands to which the licensee does not hold qualification should be permitted as long as there is no evidence of intent in existence to use such equipment for transmitting on bands to which they are not authorised to use.
    - This covers possession of equipment from Deceased estates
    - It also provides coverage for organisations that may hold stock of redundant or stored "for the future" equipment.
    - Current practise and law discriminates against some elements of the community that justly hold equipment; current practise allows Regulators Agencies to harass and discriminate against such individuals and organisations.

        - An Amateur living in Melbourne's East that was recently stopped by an ACMA field agent and his car searched. This should not be allowed except when there are reasonable grounds and that a superior approved the raid.

Division 2

- Section 121 Subsection (4) is NOT REQUIRED as it is covered in Part (3)
    - References to ARPANZA only promulgate conspiracy theories with respect to the safety of radio waves and RF energy.
    - Subsection 3 (e) more than adequately covers subsection (4) - so this reference is unnecessary and superfluous.
    - There are circumstances where ARPANZA standards cannot be met or are desirable that they be overlooked
        - i.e. Many mobile Taxi and emergency service installations will violate strict ARPANZA regulation. There are times when
    - There should therefore be no reference to the ARPANZA Agency in the bill;
        - It should be adhered to and enforced via regulation..

Division 4

- Section 131: Must be a clear definition of "notifiable instrument" so that all can know clearly and exactly where to go.
    - The Minister should have this same power to direct The ACMA.

- Section 142: This amounts to "presumption" and could violate people's rights.
    - Having such legal available in law I feel is very concerning and could invade accepted community standards, rights and privileges.
    - Please re-investigate/reconsider this entire clause.

Part 11: Emergency Orders

Division 2

- Sections 150, 151: This whole provision allows for a coup to be enacted and information to the Australian Public to be withheld
    - This provision is extremely dangerous.
    - The Minister and Governor General should have powers not exceeding a week: Any longer period should require Parliamentary ascent.
- Section 151: Replace Minister with Parliament
    - Trust must be taken OUT OF THE LAW and be replaced with provisions that are protective of the community.
    - Safeguards – checks and balances for the community and the people – must be enshrined in the law.

Part 12: Accreditation

- Section 163: For an organisation or entity to be accredited they must have processes and or possess qualifications that are recognised under Australian Standards and Australian Government recognised processes
    - i.e. ISO 9001 / 9003

- Be accredited under formal processes recognised by The Australian Government for processes involving assessment and training.
- Have appropriate and up-to-date Academic Qualifications under the AQF in the field to that which they are accredited in (for individuals)
- Have appropriate and up-to-date and internationally recognised trade and Industrial Qualifications in the field to that which they are accredited in (for individuals)
  - i.e. CCNA, CCNP, Radio Engineering Degrees etc.
- The aim should be NOT to have just people with Business Quals or consultants performing roles; appropriate skilled and qualified people (and the key here is QUALIFIED) should be accredited and performing roles.

Part 13: Industry Codes

- Codes should NOT just be for industry – But also for Amateur, Marine and Aeronautical operations
- Rename the section (i.e. Industry Codes and Codes of Conduct)
- Codes enforce community standards an ethics: They MUST be enshrined into Law and must be fully legally enforceable.

- **Sections 164 to 168: Despite being excellent in intent there is no legislative provision to provide for enforcement and subsequent penalisation if codes are not adhered to**
  - Broadcast TV and Radio Codes
  - Amateur, Maritime and Aeronautical Conduct Codes
- **Provisions similar to Section 170 should be written into "The Act" to enforce non-business grouping codes of conduct.**
  - These measures should be punishable through the so-called "computer-court" measures under "traffic offence" models that I proposed earlier.
  - This should clean-up Citizen's Bands, Amateur Airwaves etc…

Part 14: Information Gathering Powers

- **Section 174 Part (a) I believe could be ANTI CONSTITUTIONAL and is dangerous with regards to the rights of an Individual and free speech.**
  - **This could I believe be covered via contempt provisions within The Crimes Act.**
  - **An Individual MUST NOT BE FORCED to give evidence to convict themselves; there is a right so silence.**
  - **It is a basic principle of Australian and Western Legal concepts.**
  - **Dangerous.**

Part 15: Enforcement

- Section 176 Section 6 (b) – SES has a specific meaning in some states; to avoid confusion a better definition is required. This is far too generalised.
- Section 182: Requires a violation of "code" to be added as 182 (1) c to give the ACMA the power to investigate and enforce codes under Part 13.

- Section 184 part 1 (similar provisions in the 1992 Act) has always been a bane of contention – forcing someone again to incriminate themselves.

- It again "self-incriminates" when there may not have been any incriminating acts
  - i.e. All Amateur Radio equipment at the current point of time has the capability to transmit on bands that the Amateur may not use: i.e. 60m.
- Enforcement should not depend on equipment capability, but should depend upon INTENT and INTENT that the equipment be operated by a QUALIFIED OPERATOR ACCORING TO THEIR LICENCE CONDITIONS.
- If the equipment is in the hands of a non-qualified operator and/or there is evidence that the equipment is being operated outside of legal conditions then it MUST be seized and held under the seizure provisions of The Act.
- **If equipment is operated outside of the qualifications of an operator or licence to which that piece of equipment is subject to then an infringement notice MUST be issued.**
  - On some matters of standards and codes I have recommended that some "grace" be allowed; on this matter there should be no argument – you operate the equipment illegally, you suffer the full-force of the law.
- This has been a long standing confusion with the old Law and this must be clarified.

- **Section 186 I feel violates basic concepts and freedoms enshrined in Western Law**
  - **This section is dangerous and must be removed.**

Part 17: Delegation

- Delegates must possess qualification to perform the functions that they are charged to perform. These qualifications must be within the range of accepted and recognised academic, educational, community and industrial standards.
- Example: In Appendix 1 the organisation "[Redacted organisation]" is referred to as a sub-delegate of The Wireless Institute of Australia.
  - They are protected by the ACMA under the term "or any like organisation" (or similar wording within a deed of arrangement that exists between the ACMA and the Wireless Institute of Australia (WIA).
  - [Redacted organisation] calls itself a "Nominated Training Organisation" when there is no actual legal status within Government Definitions and frameworks recognising a "Nominated Training Organisation".
  - [Redacted organisation] is a consultant – and holds no qualifications under Government (ASQA defined) definitions that fit community standards; as a result the entity is NOT subject to public scrutiny and oversight.
    - See Appendix 1
  - Such bastardisations of due process and definitions must be outlawed so that only community accepted and legally enshrined organisations and definitions are allowed

- Section 200: Should include provisions for and powers for the Minister to terminate any arrangements or place ADDITIONAL terms onto delegates for matters in the public interest.
  - All deeds, contracts and business rules MUST be in the public domain and MUST NOT be protected under the term "commercial-in-confidence".
  - This section and its provisions should be re-written into PLAIN ENGLISH that can be easily interpreted.

- The question arises whether the ACMA is in a state where it can adequately monitor (and has the people, people-skills and financial resources) to monitor and oversee arrangements
    - Refer to Appendix 1 as evidence.

- Section 201: Is it required?

    - The ACMA and hence Government can lose control of Standards and standards set
        - Almost anyone could be a sub-delegate
    - It is a recipe for chaos.
    - Section 201 (1) may provide a conflict of interest to the delegated organisation and may in fact be contrary to Australian Corporate Law.
    - The prime delegate MUST remain responsible for the functions that it has been delegated to perform.
    - Having sub-delegates creates confusion and issues for ACMA management and oversight – who becomes responsible for overseeing the sub-delegate?
    - Organisations should be permitted to contact out service functions BUT they themselves are solely responsible for the management and solely responsible to The Australian People for these services that they provide.
    - It is the obligation of The Department to ensure correct process and probity has been followed in the appointment of delegates; it is not possible for the ACMA to apply such processes on sub-delegates
      o
    - THIS IS A VERY POOR SECTION OF LAW; IT IS CRITICAL THAT THIS ASPECT BE IMPROVED, AND PROTECTIONS PROVIDED FOR ALL AUSTRALIANS

      The whole Question of STANDARDS and QUALIFICATIONS is again raised.

Division 3: Delegation Rules

- Sections 203 to 205: Very unclear and should be expressed in plain-person English that can easily be understood.

Part 18: Review of Decisions

- Sections 209 to 213 should EQUALLY apply to delegates and delegated functions.
- Section 209: Should include “and delegates”.
- Section 210: Should be renamed to include “and delegates”
    - Requests for reviews from decisions made by delegates MUST go to delegates First
- Section 211: Should be renamed to include “and delegates”

Miscellaneous

- Section 227: incorporate the provision to use a “computer court” to deal with issues deemed as misdemeanours – to enhance process dealing with small matters and small fines.
    - Simplify prosecutorial process and expense.

Appendix 1: Ombudsman's Report

(Authorised for me to use and release by Dr. A. Smith)

From: [Ombudsman – name and email address redacted]
Subject: Finalisation of Ombudsman Investigation ref: 2017-300424 [SEC=UNCLASSIFIED]
Date: 15 June 2017 at 10:07:57 am AWST
To: [Dr. A. Smith – Contact details redacted]

Our ref: 2017-300424

Dear Dr Smith

I am writing to propose that we finalise our investigation of your complaint about the Australian Communications and Media Authority (ACMA).

Since we began our investigation of your complaint on 21 March 2017, I returned to ACMA with additional questions on two occasions. After considering ACMA's responses to our office, I have decided that further investigation is not warranted because I do not believe it will result in a different outcome.

You approached our office concerned by ACMA's response to complaints raised by yourself, [redacted name], and Mr Ireland, regarding the Wireless Institute of Australia (WIA).

You raised a number of issues with our office. I will attempt to explain our consideration of each of these issues in turn, but first will note the context of these issues in a broader sense. As I understand it, ACMA's relationship with WIA is twofold. Firstly, ACMA has delegated certain statutory functions to WIA and therefore ACMA has a responsibility to ensure these functions are performed properly. Concomitant to this, ACMA has a responsibility as a contract manager in terms of managing the Deed between the Commonwealth of Australia and WIA.

I understand WIA performs three statutory functions under the *Radiocommunications Act 1992* (the Radiocommunications Act), the two primary functions being to conduct approved examinations and issue certificates of proficiency in relation to amateur licenses. WIA also offers an administrative service in providing recommendations to ACMA for assigning of call signs. ACMA told us that it is not aware that WIA is acting outside its scope or failing to conduct these core statutory functions or administrative services properly.

I acknowledge that many of the concerns you and your fellow complainants raised with ACMA involved questions regarding WIA's compliance with the Deed, rather than direct questions about its provision of these statutory functions. ACMA's view is that while third parties may contact it to provide information relevant to the Deed, ultimately these issues are a matter for the parties themselves and proper management of the contract a matter for ACMA.

I accept that ACMA has a broad discretion when it comes to its management of the contract and in general these issues are a matter for WIA, ACMA, and the Commonwealth. While I believe it is reasonable to expect a contract manager to keep external stakeholders reasonably informed of relevant matters and contract developments, I accept ACMA's advice that it has, in essence, engaged WIA as a contracted provider for some specific services and this does not mean it can now assume responsibility for overseeing the internal governance of WIA. Despite ACMA's view on these matters, it has provided our office with helpful

clarification about how it has been managing the contract and how it sees WIA's compliance with it.

WIA Financial reports

One of the biggest concerns for you, as I understand it, was WIA's financial reporting and financial management. It was your view that WIA had failed to provide ACMA with audited financial reports within specific timeframes in accordance with its obligations under the Deed. You also drew ACMA's attention to the fact that a large number of treasurers had left the organisation in the last few years reportedly because of WIA's financial and operational mismanagement.

I asked ACMA to comment on these issues. ACMA explained that in 2011 WIA sought permission to provide financial reports that had been reviewed rather than audited due to a legislative change that meant companies limited by guarantee with revenue under $1 million per annum were no longer required to provide ASIC with audited financial reports. ACMA chose not to require audited financial reports from this time, but maintained its authority to request it. ACMA suggested that this was consistent with the risk-based approach it takes in monitoring and assessing compliance with the Deed. ACMA noted that the 2015-2016 WIA report was deficient in several respects and it therefore asked WIA to provide fully audited financial reports and audited financial statements for the 2015-2016 year. We understand the 2015-2016 audited financial report was published to WIA members on 1 May 2017.

It is our understanding that ACMA's role as a contract manager in this instance is subject to certain obligations under the *Public Governance Performance and Accountability Act 2013* (PGPA Act). The fundamental obligation is to ensure the proper use and management of public resources. Proper is defined as meaning efficient, effective, economical and ethical. Given WIA was no longer legislatively required to provide audited financial reports, I cannot conclude that ACMA's decision to allow WIA to cease providing it with audited financial reports was unreasonable. Our role does not generally extend to considering whether there is preferable action that a department could have taken. Rather we consider whether the agency's action or decision was reasonably supported by and consistent with its obligations.

While I accept your view it would have been preferable for WIA to provide audited financial reports, the alternative action taken by ACMA does not in itself appear unreasonable. That is because it is up to ACMA how it chooses to manage the contract. It appears ACMA could have provided additional explanation to you about this issue when you approached it directly. However, as ACMA has now explained the circumstances in which WIA ceased providing audited financial reports, and as ACMA ultimately has discretion as to how it will manage its contract with WIA, further investigation of the issue is unlikely to achieve a better outcome.

WIA complaint handling

Another issue you raised was that WIA had failed to adequately address complaints directed to it. ACMA told us that it had been disappointed with WIA's complaint handling processes and reporting of complaints over the last year. ACMA told us that WIA does not appear to have a complaint handling process that complies with all requirements under the Deed and that ACMA had raised the issue with WIA several times in the last 6 months, both in face to face meetings and in writing. ACMA told us that it is currently assessing the adequacy of information it recently received from WIA about this issue and it intends to continue to work with WIA to improve its complaint handling processes. ACMA suggested that given WIA is a non-profit volunteer run organisation it seeks to take a flexible approach when working with WIA to improve its performance.

We acknowledge your frustrations with WIA's handling of your complaints and we have made a record of ACMA's advice regarding WIA's complaint handling processes. However, as ACMA appears to be taking steps to monitor and work with WIA to improve its complaint handling processes, we would not consider this response to be unreasonable and further investigation by our office is not warranted at this point.

Access to documents

In terms of gaining access to certain documents under Clause 10.2 of the Deed, ACMA's view is that this section provides discretion for it to publish copies of performance reports. ACMA explained that, where there is the potential for the release of commercially sensitive and/or personal information, ACMA would prefer requests for such information be made under the *Freedom of Information Act 1982*. In view of the potential for a request for release to include commercially sensitive or personal information, we would not consider this to be an unreasonable approach.

[Redacted organisation] Australia

Regarding WIA's appointment of [Redacted organisation] Australia as the WIA appointed RTO, we asked ACMA to provide further explanation for its view that [Redacted organisation] meets the definition of an "other like organisation". We noted that [Redacted organisation] is no longer an RTO and there is therefore no body appointed to regulate its conformance with the Australian Quality Training Framework.

ACMA advised us that in its view the definition of 'other like organisation' in the Deed includes an organisation "capable of providing training services in a similar manner to an RTO". ACMA noted that maintaining registration as an RTO involved significant costs and considers it is up to WIA to consider whether accreditation is necessary.

While I acknowledge your view that accreditation as an RTO should be a mandatory requirement to ensure the quality of training provided, I do not consider that our office can conclude that ACMA's consideration of the issue is unreasonable. This is primarily because any apparent issues with [Redacted organisation] should properly be dealt with by raising a complaint with WIA, and then with ACMA, regarding the quality of the training provided. ACMA suggested that none of the complaints it received from [redacted name], Mr Ireland, or yourself raised any specific concerns regarding the quality of training provided by [Redacted organisation] to the WIA's assessors and learning facilitators. In the absence of any clear quality issues, we would not consider ACMA's assessment to be unreasonable.

[Redacted name] also raised concerns with our office about the requirement of assessors and facilitators to be members of WIA. He suggested that [Redacted organisation] required this, which was illegal as it was third-line forcing. ACMA noted that it is WIA itself that has put in place this requirement. ACMA referred to clause 4.1.1 of the Business Rules prepared by WIA and approved by ACMA which notes that WIA must maintain and develop certain 'Assessment Instructions for Examinations' setting out qualifications for assessors and clause 4.5 which requires examinations be conducted in accordance with these instructions. These instructions require that its assessors and learning facilitators must be members of WIA. Further to this, ACMA advised us that WIA has notified the Australian Competition and Consumer Commission (ACCC) of this practice and the ACCC has approved it, meaning that what might otherwise be considered exclusive dealing has been authorised.

Conflict of interest

I acknowledge your concern that [redacted name] 's position as director of WIA raises questions of a conflict of interest between this position and his control of [Redacted organisation]. However, I accept ACMA's view that for its purposes a conflict of interest would arise in this circumstance only if it appeared that WIA's interests were now in conflict with its obligations under the Deed. This would include if WIA sought to benefit by completing its tasks under the Deed improperly or poorly, or sought to use its position to make an additional financial gain.

ACMA does not consider that the appointment of [Redacted organisation] creates any clear conflict with WIA's obligations under the Deed in this manner. As ACMA has suggested, WIA directors are subject to duties under the *Corporations Act 2001* to not improperly use their position to gain an advantage for themselves or someone else. ACMA's view is that if you believe [redacted name] has used his position as a director to improperly influence WIA's decision to appoint [Redacted organisation] then you may refer these concerns to the Australian Securities and Investments Commission (ASIC). I consider this to be a reasonable response to this issue.

Overall performance of WIA

I understand you believe ACMA should conduct an audit of WIA per clause 12. 1. ACMA noted that in 2012 it engaged its internal auditors Protiviti to review the overall performance of the WIA against requirements of the Deed and the Business Rules. The review concluded that WIA was performing its role in accordance with these requirements. As noted above, ACMA has explained that it takes the approach of trying to work with WIA to improve its compliance where possible, and I accept that this is reasonable. ACMA has advised us that if it identifies further concerns with WIA's performance, particularly in relation to complaint handling, then it may decide to request an audit.

Our office understands that it is at ACMA's discretion whether it decides to conduct an audit of WIA and I accept that given the limited nature of ACMA's responsibility for the actions of WIA that its decision to not require an audit at this time appears reasonably open to it.

Concluding comments

As noted above, perhaps the most important aspects of this situation to understand is ACMA's limited responsibility when it comes to the actions of WIA, along with ACMA's broad discretion as a contract manager in terms of the Deed between the Commonwealth and WIA. While I acknowledge you may remain concerned that WIA's internal governance raises serious questions as to whether it will remain capable of fulfilling its obligations under the Deed in future, I accept ACMA's view that at this point it does not appear WIA has failed to appropriately discharge the core statutory functions delegated to it. ACMA has noted that if it was made aware of evidence that indicated serious impropriety or illegality of such a kind that the capacity of WIA to act appropriately on behalf of the Commonwealth or adequately fulfil its statutory obligations appeared in jeopardy, then it would consider exercising its rights under the Deed, which includes possible termination. This means if you have further information about WIA's activities that you believe is relevant to ACMA you would be encouraged to provide this information to it.

I understand you may be disappointed in the decision not to further investigate this matter. Please note that the decision to finalise the investigation does not mean that we consider the issue is unimportant. It may be helpful to point out here that our office cannot compel a department to undertake a particular action. We will keep a record of the information you have provided to assist the office in its broader role of identifying and attempting to resolve systemic issues in government administration.

Thank you for bringing your concerns to the attention of the Commonwealth Ombudsman's Office.

If you want to discuss this email, please contact me on 1300 362 072 or via return email.

Kind regards

[Ombudsman – Name redacted]
Investigation Officer
COMMONWEALTH OMBUDSMAN
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Influencing systemic improvement in public administration

The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.