REVIEW OF THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

Response to Issues Paper dated July 2015 by the Department of Communications

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA welcomes this opportunity to contribute to the Department's review of the Australian Communications and Media Authority (**ACMA**). The commercial radio industry has had a long and productive relationship with the ACMA over the years. However, there are a number of regulatory processes, approaches and structures which the industry believes may be reduced, deleted and streamlined in order to create a more efficient and consistent regulatory regime.

CRA does not intend to respond to all of the questions in the Department's Issues Paper, but has highlighted the most relevant below. CRA has grouped some questions together and answered them collectively.

SUMMARY

The commercial radio industry submits that:

1. The commercial radio industry is a largely compliant industry. It receives very few formal complaints under the Commercial Radio Codes of Practice (**Codes**) or the Commercial Radio Disclosure Standard (**Disclosure Standard**).[1][2] The industry has been subject to heavy regulation over the years, and is now ready for a phase of much lighter touch regulation (**see responses to Qs 1 to 3**).

2. If full self regulation is not the outcome of this Review, CRA proposes that where duplication exists in the Codes in relation to areas covered by other codes or legislation/regulation, these areas of duplication are removed from the Codes (**see responses to Qs 1 to 3**).

3. Commercial radio specific regulation should be reduced as far as possible. The regulator should focus primarily on areas such as spectrum licensing and allocation, planning and media ownership. This will allow the more efficient allocation of the ACMA's resources. Insofar as the ACMA's functions concern the regulation of program content, these functions both cut across freedom of speech and unnecessarily duplicate other legislative and common law restrictions (**see responses to Qs 1 to 3**).

4. The regulator must be fit for purpose, flexible and nimble in its approach and response to regulatory issues and, in particular, handling of complaints, in an age where traditional media is competing against platforms that are, essentially, unregulated (**see responses to Qs 4 to 5**).

5. The radio industry is not advocating the imposition of regulation on new platforms but rather a significant reduction of, and streamlining of approach to, regulation of the commercial radio sector (**see responses to Qs 4 to 5**).

6. Sections 149 and 170 of the *Broadcasting Services Act 1992* (**BSA**) should be amended to ensure that the ACMA does not initiate investigations under these sections in relation to stale

[1] Only 4 Codes breaches have been found by the ACMA during the 20 month period from January 2014.
[2] No complaints or breaches in relation to the Disclosure Standard have taken place in the last 2 years.

complaints, made outside the timescale prescribed under the Codes. This will remove uncertainty as to proper process and finality of decisions relating to complaints made under the Codes (**see responses to Qs 4 to 5**).

7. Section 170 should be amended to restrict its use by the ACMA to exceptional circumstances, perhaps with a threshold of 'significant public interest'. It should not cover codes related complaints. The ACMA's criteria for initiating section 170 investigations should also be reviewed, particularly in light of the ACMA's current criteria, which include the fact that 'the complaint was made by a prominent person or media personality'.[3] (**see responses to Qs 4 to 5**).

8. The regulator must have its powers carefully and clearly delineated, to avoid inefficiency of duplication, inconsistency and inequity. In particular, the commercial radio industry considers it highly inappropriate that the ACMA has the power to decide independently whether a broadcaster has breached a criminal code or has committed a criminal act.[4] The commercial radio industry agrees with the underlying policy rationale behind the rule that broadcasters should not be permitted to use their services to act in breach of the law. However, it is inappropriate for the ACMA to investigate and reach decisions of this nature (**see response to Qs 4 to 5**).

9. The regulation of the commercial radio industry should be reduced, to reflect the compliant nature of the commercial radio industry and to align with other industries in the communication sector. Accordingly, we submit that the Codes should be administered as follows:

    a. the next review of the Codes should see a substantial reduction in the number of Codes. Currently there are 9 codes, all of which are administered by the ACMA in an unwieldy and time consuming process. The industry submits that this should be replaced by a Codes framework under which 2 or 3 key provisions will be administered by the ACMA, and the remaining Codes will be developed and administered by the commercial radio industry, after reasonable public consultation.

    b. over the next few years, the commercial radio industry will examine different forms of self regulation, including looking at international and domestic examples. At the following Codes review, the industry may choose to put forward a proposed self regulatory model (**see responses to Qs 4 to 5**).

RESPONSES TO QUESTIONS IN THE ISSUES PAPER

Our responses to the Departments questions are set out below, with specific recommendations highlighted in each section.

1. ***Are there unique characteristics of the communications sector that require a particular style of regulation and regulator?***

2. ***Do the characteristics of the communications sector mean that a sector-specific regulator should be responsible for all aspects of industry regulation including economic regulation? Would switching models enable the regulator to strike the optimal balance between investment and consumer outcomes?***

3. ***What developments in the communications sector over the next 5 to 10 years are likely to affect the role of the regulator? In what ways will that role be affected?***

[3] Extracted from the Criteria set out in the ACMA's standard form 'New Investigation Brief', which is used to record decisions in s.170 investgations.

[4] *ACMA v Today FM (Sydney) Pty Ltd* [2015] HCA 7

Q1. Characteristics of the commercial radio industry and readiness for self regulation

Commercial radio is largely compliant, with low levels of community concern

- The commercial radio industry is a compliant industry. It has been subject to heavy regulation over the years – in particular the Disclosure, Advertising and Compliance Standards – and is now ready for a phase of much lighter touch regulation. The culture of compliance in the industry was recognised in the decision by the ACMA in 2012 to repeal the Advertising and Compliance Standards and rely instead on the Codes.

- The compliant nature of the industry is evidenced by the low level of complaints. Over a 20 month period since the beginning of 2014, there have been only 19 Codes complaints investigated by the ACMA. Of these, only 4 were found to be breaches of the Codes. The remaining 15 complaints were found not to be breaches.[5]

- There have been no complaints relating to the Disclosure Standard over the past 2 years.

- The low level of complaints is particularly remarkable given the number of commercial radio stations. **Out of the content broadcast by 260 commercial radio stations across Australia over a 20 month period, only 4 breaches of the Codes were found by the ACMA**. This shows that the industry is, in reality, already largely self regulating and is attracting little community concern.

- The ACMA's own research *Community Attitudes to Radio Content* (2010) also supports the view that there is not a significant amount of community concern regarding radio content. The commercial radio industry has concerns regarding the validity of the ACMA's research (as set out in the industry's submission to the Convergence Review dated 28 October 2011). However, even accounting for an overstatement in the level of community concern found in the research, ACMA's own research shows that there are extremely low, and perhaps non-existent, levels of concern in actual radio listeners (see table below).[6]

[5] http://www.acma.gov.au/theACMA/ACMAi/Investigation-reports/Radio-investigations

[6] [6] Commercial Radio Australia submission to the Convergence Review, dated 28 October 2011, page 23.

Table extracted from ACMA research showing sources of concern and offence by listener type, 2009

Issue of concern	All radio listeners n=1,423	All regular commercial radio listeners n=1,018	CONCERNED RADIO LISTENERS		
			Commercial FM radio listeners n=186	Commercial AM radio listeners n=107	Non-commercial listeners n=70
Offensive language/lyrics	4.4%	5.1%	23.1%	18.7%	14.3%
Immature attitude of presenters	3.2%	3.7%	15.6%	16.8%	10.0%
Sex-related advertisements	3.1%	3.1%	11.8%	16.8%	17.1%
Sexual references	2.4%	3.1%	11.8%	13.1%	4.3%
Certain content heard by children	2.0%	2.7%	12.9%	9.4%	1.4%
Presentation of talkback programs	2.0%	1.5%	5.4%	9.4%	20.0%
Bias/disagreement with opinions	1.8%	1.4%	4.8%	7.5%	17.1%
Presentation of news stories	1.6%	1.8%	7.5%	6.5%	5.7%
Racial or homophobic comments	1.4%	1.6%	4.8%	10.3%	5.7%
Inappropriate religious comments	1.2%	1.2%	4.8%	5.6%	7.1%
Tricks, pranks and competitions	0.8%	0.9%	4.3%	1.9%	4.3%
Other	1.3%	1.3%	5.4%	7.5%	8.6%
Can't remember	0.4%	0.5%	1.6%	1.9%	0
Concern about news and talkback topics (not relevant to the way news and talkback are presented)	5.4%	6.0%	n/a	n/a	n/a
TOTAL Offensive content, attitudes and practices	8.4%	9.8%	43.0%	37.4%	28.6%
TOTAL Presentation of talkback programs and news stories	3.9%	3.7%	14.5%	18.7%	25.7%
TOTAL Offensive racial, homophobic and religious comments	2.3%	2.4%	8.6%	13.1%	11.4%
TOTAL with concern	22.1%	24%	100%	100%	100%

Percentages add to more than totals due to multiple responses.
Note: care is needed when interpreting results from small sample sizes i.e. the concerned radio listener sub-groups.

- Extensive regulation by the ACMA of content on commercial radio is largely unnecessary in light of the variety of sources available to audiences and the level of regulation of content in other industries, including press and online. It also cuts across the fundamental right of freedom of speech, for example by requiring stations to broadcast a multiplicity of viewpoints on significant issues of public importance or take account of hypothetical "credible alternative sources" when presenting contested factual material.

- Social media and the internet provide licensees with an accurate understanding of community standards and opinion. Such sources allow licensees to understand, reflect and engage with their listener base, providing a much more accurate picture of listeners' prevailing standards than a regulator is able to glean through the existing Codes review process.

- The trend of compliance supports the industry's view that any regulator of the commercial radio industry should have a much less interventionist role than is currently the case. In the interests of efficiency, the industry should be left to self regulate where possible.

Self regulation would reduce the cost of compliance

- A further factor supporting the move towards a less heavily regulated commercial radio industry is the compliance cost imposed on the industry under the current regulations.

- The commercial radio industry's submission to the Convergence Review, dated 28 October 2011, included a report by the Competition Economist's Group (CEG) retained by CRA. This analysed the cost burden imposed on the commercial radio industry as a result of the various regulatory obligations.

- CEG found that the cost to the industry of complying with the Disclosure Standard was around $2.4 million per annum. The cost of complying with the Advertising Standard (which has since been incorporated into the Codes) was estimated by CEG to be $6.1 million per annum. [7]

- The commercial radio industry is operating in a tough economic climate. In order to ensure the continuing commercial viability of the industry, particularly in regional and remote areas, the regulatory burden should be reduced as far as possible. A move towards self regulation would help to reduce compliance costs, and would enable licensees to focus on their core business of providing high quality radio to the Australian public.

  ***Recommendation*: The regulatory burden on the commercial radio industry should be reduced. This reflects the largely compliant nature of the industry and will significantly reduce compliance costs.**

Q2. Duplication should be removed

- While some areas of the communications sector might require specialist oversight, there are several areas currently within the ACMA's remit which are governed by legislation that is not administered by the ACMA. This duplication is confusing and inefficient. The commercial radio industry suggests that, in the interests of efficiency, these areas should be identified and removed from the ACMA's jurisdiction.

- In particular, there is comprehensive legislation covering advertising legislation, both federally and in each State and Territory across Australia. The Advertising Standards Bureau (**ASB**) is responsible for adjudicating complaints relating to advertising content. The vast majority of listeners choose to make their complaints to the ASB rather than to the ACMA. The ACCC and Fair Trading also review complaints related to concerns with advertising, in particular misleading and deceptive conduct, which Code 3 (*Advertising*) seems to be trying to address.

- The CEG research undertaken as part of the industry's submission to the Convergence Review found that compliance with the Advertising Standard cost the industry in the region of $6.1 million per annum.[8] A significant cost saving is likely to be made if the duplication of advertising regulation is removed from the Codes.

  ***Recommendation*. There is no need for advertising issues to be covered by the Codes or otherwise administered or adjudicated by the ACMA. They should be governed by applicable State/Territory legislation, adjudicated by the ASB and overseen by the ACCC. Any other areas subject to duplication should also be removed from the Codes.**

[7] Commercial Radio Australia submission to the Convergence Review, dated 28 October 2011, page 24.
[8] *Ibid*.

Q2. Commercial radio specific regulation should be limited

- Industry specific regulation should be used only where there is a systemic failure to self regulate, or where there are no more general sources of regulation. This would mean that areas such as advertising would be dealt with by existing regulation, rather than industry specific codes.

- Commercial radio specific regulation should be reduced as far as possible. The regulator should focus primarily on areas such as spectrum licensing and allocation, planning and media ownership. This will allow the more efficient allocation of the ACMA's resources. Insofar as the ACMA's functions concern the regulation of program content, these functions both cut across freedom of speech and unnecessarily duplicate other legislative and common law restrictions

- The regulation across different stakeholders within the communications industry should be consistent. Currently, traditional broadcasters are much more heavily regulated than new entrants to the market, particularly those using the internet as a platform. This has led to inconsistencies across platforms, an inequitable regulatory and compliance burden, and commercial disadvantage for commercial radio broadcasters. The administrative and cost burden of compliance with the Codes, and in particular ACMA investigations, is high.

- The commercial radio industry does not currently have a strong view on whether a regulator deals only with the communications sector, or industry more widely. A reduction in intervention into traditional media might make it possible to have a single non industry specific regulator, hence creating efficiencies and improving consistency.

- However, any more general regulator would need to possess deep expertise in broadcasting issues, for example in licence planning and spectrum management. It would also need to understand the commercial and practical issues that face commercial radio broadcasters and the communications industry more generally.

  ***Recommendation*. Commercial radio specific regulation should be reduced as far as possible, particularly in relation to the management of content. This would help to achieve consistency between the commercial radio industry and new entrants to the communications market. The regulator should focus primarily on areas such as spectrum licensing and allocation, planning and media ownership.**

Q3. Developments over next 5 – 10 years

- Over the next 5 to 10 years, convergence is likely to increase, and regulation across traditional and newer media will need to be aligned. A less interventionist approach, together with regular reviews of the Codes, with regard to commercial radio should help to achieve this alignment.

4. What should be the unifying objective and purpose of the communications regulator – is there a succinct way to describe what the regulator should achieve?

5. Looking at both national and international trends, what are considered the optimal objectives, functions and structure for a best practice regulator in the communications sector?

Q4. Purpose of the regulator

- The regulator's primary function should be to work cooperatively with its stakeholder industries, to allow industry to regulate in an efficient, commercial, consistent and practical way. The search for practical and efficient solutions must be preceded, on the part of the regulator, by a deep understanding of the challenges faced by industry and the need for workable and efficient solutions.

- The regulator's role must not be unduly obstructive and nor should it create unnecessary burdens on industry or restrictions on freedom of speech. Examples of instances where regulation is or has previously been unnecessarily burdensome or disproportionate include:

    - local content and trigger event reporting;
    - financial reporting for regional radio stations;
    - B2/B3 Corporate Control reporting;
    - duplication of Advertising Standard and Codes;
    - imposition of an industry wide Live Hosted Entertainment Code in response to a single station's breach;
    - imposition on the entire industry of a gambling code ;
    - balanced reporting provision applicable to current affairs programs (Code 2.3);
    - election blackout under Schedule 2, BSA (applicable only to television and radio); and
    - Disclosure Standard.

Q5. Changes in the ACMA's approach that will help it to achieve optimal performance

The following changes in the ACMA's current approach will help it to become a best practice regulator, by creating efficiencies, improving engagement with stakeholders and more accurately reflecting public opinion.

(a) Codes Review process should be streamlined

- A key part of the regulator's role is the administration of the *Commercial Radio Codes of Practice*. Currently, the process can be time consuming and inefficient with many investigation decisions taking up to one year to be issued. The BSA provides for triennial reviews. However, in practice the reviews take more than 3 years to complete, and the legislative timetable tends not to be followed.

- Further, in between the triennial reviews the ACMA has initiated a number of additional codes, such as the codes relating to *Live Hosted Entertainment* and the *Promotion of Gambling and Betting Odds in Live Sports Coverage*.

- The last comprehensive Codes review was initiated in 2007, and took 3 years to complete, with regulation finally taking place in 2010. Since registration of the Codes in 2010, the ACMA has requested the addition of two further codes – Code 9 (*Live Hosted Entertainment*) and Code 10 (*Gambling and Betting Odds in Live Sports Coverage*). The last addition was made in September 2013.

- Accordingly, the Codes were in a state of review for the 6 year period from 2007 to 2013. Clearly, this is an inefficient and costly way of proceeding, both from the regulator and industry's perspective.

- Codes review discussions between the regulator and the commercial radio industry are time consuming and protracted, involving multiple meetings and correspondence. This is despite typically very little public comment at the consultation stage.

- The divergence between the views of the public and those of the ACMA is something that the commercial radio industry considers must be addressed. During the **2007** review process, CRA received **only 9 submissions from the public**, following the 6 week public consultation period. Similarly, during the **2002/3** Codes review process, CRA received only **9 public submissions**.

- The ACMA's own community standards research also shows that the public has a low level of concern about the issues that are regulated by the Codes (see table on page 4 above).

- There are multiple benefits to a self regulatory or hybrid self-regulatory/co-regulatory model:

    - the Codes review process would be significantly quicker and more efficient to administer;
    - the cost of compliance on the commercial radio industry would be significantly reduced;
    - the Codes would be shorter and more user friendly; and
    - duplication and inconsistency between the Codes and other regulatory frameworks would be removed.

- The commercial radio industry submits that the Codes process should be significantly revised to remove duplication, inefficiency of process and to more accurately reflect the views of the public. As much as possible of the regime should be self regulatory. The industry's proposed model is as follows:

    - All areas covered by existing laws should be removed from the Codes. This would include advertising and some program content. This is covered adequately elsewhere and to duplicate coverage in the Codes causes conflict, confusion and makes the Codes more cumbersome and less user friendly.

    - The commercial radio industry should be permitted to self regulate on as many areas as possible. This is the most efficient starting point for the industry. This could be achieved either through an entirely self regulatory regime, or a hybrid co-regulatory/self regulatory model.

    - A very small number of Codes of particular public importance could remain co-regulatory, and subject to discussions between the ACMA and the commercial radio industry prior to registration.

    - The industry suggests that the below process would be followed:

        - the commercial radio industry would write the Codes and put them out for public consultation;
        - industry would then amend the Codes as necessary to reflect public opinion;
        - the Codes would be published by the industry;
        - the industry would develop a structure and process under which complaints and any instances of non compliance would be handled; and
        - if there is a co-regulatory component to the regime, the ACMA and commercial radio industry would discuss and agree the co-regulatory parts of the Codes prior to registration.

***Recommendation*: the commercial radio industry submits that the following approach should be taken to the next review of the Codes:**

a. the next review of the Codes should see a substantial reduction in the number of Codes. Currently there are 9 codes, all of which are administered by the ACMA in an unwieldy and time consuming process. This should be replaced by a Codes framework under which 2 or 3 key provisions will be administered by the ACMA, and the remaining Codes will be developed and administered by the commercial radio industry, after reasonable public consultation.

b. over the next few years, the commercial radio industry will examine different forms of self regulation, including looking at international and domestic examples. At the following Codes review, the industry may choose to put forward a proposed self regulatory model.

(b) The ACMA's use of sections 149 and 170 of the BSA should be restricted

(i) *Overlap of sections 149 and 170 with the complaints process under ss147 and 148*

- Sections 149 and 170 of the BSA confer broad investigatory powers on the ACMA. Currently these powers are used in a way that overlaps and conflicts with the complaints process set out under the Codes, and in section 148 of the BSA.
    - Section 149 of the BSA permits the ACMA to '*investigate the complaint if the ACMA thinks that it is desirable to do so*'.
    - Section 170 of the BSA entitles the ACMA to '*conduct investigations for the purposes of the performance or exercise of any of its broadcasting, content and datacasting functions*...'.
- The commercial radio industry submits that the regulator's use of sections 170 and 149 of the BSA should be reviewed. Sections 170 and 149, as currently used by the ACMA, do not fit neatly with the complaints process under the Codes and section 148 of the BSA.
- Currently, the interaction between the complaints mechanism under the Codes, the ACMA's initiation of investigations under section 170 and the ACMA's discretion to investigate under section 149 is unclear. In particular:
    - it is unclear what complaints process should be followed or how the Codes complaints process fits with investigations under sections 170 or 149; and
    - members have no comfort that once they have dealt with a complaint in accordance with the Codes, it will not resurface in the form of a section 170 or 149 investigation. This uncertainty makes it difficult for members to assess and respond to risk.

(ii) *ACMA's increasing use of Section 170*

- Section 170 entitles the ACMA to conduct investigations of its own volition for the purpose of performance or exercise of any of its broadcasting, content and datacasting functions.
- Historically, this provision has been applied by the ACMA only in exceptional circumstances. However, the industry has seen a dramatic increase in the ACMA's reliance on this provision in recent years.

- The commercial radio industry has significant concerns regarding the ACMA's increasing use of section 170 to initiate investigations. Despite the decreasing number of complaints made by the public (19 Codes complaints to the ACMA since January 2014, across all 260 commercial radio stations, of which only 4 were upheld as breaches by the ACMA), the ACMA has substantially increased the number of its own investigations under section 170.

Year	Number of published s170 Investigations
2005	0
2006	0
2007	1
2008	0
2009	0
2010	8
2011	3
2012	0
2013	4
2014	7

- The above table demonstrates that over the last 5 years (**2010 to 2014**), the ACMA has initiated an average of **4.4 investigations** under section 170. In the 5 years preceding (**2005 to 2009**), the ACMA initiated an average of **0.2 section 170 investigations** per year.

- The commercial radio industry strongly submits that this upward trend must be stopped. This could be achieved through the legislative amendment of section 170, to make it clear that section 170 should only be used in exceptional circumstances, and should never be used in circumstances where the public has the right to initiate complaints under section 147 or the Codes.

- The industry understands the rationale behind conferring on the ACMA a power to initiate investigations in certain exceptional and limited circumstances. However, the industry believes that the legislators may not have intended that this provision be used regularly by the ACMA for unexceptional issues.

- The process under the Codes and section 148 is easy and accessible to listeners, who are able to lodge complaints, with a choice of fax, letter or online electronic forms. Use of section 170 enables the ACMA to sidestep the application of the Codes and the complaints process, thereby reducing the role of the listener and ultimately devaluing the existing Codes complaint processes under section 148 of the BSA. This has resulted in the ACMA becoming the de facto content regulator for the commercial radio industry on relatively minor issues.

- It is also worth pointing out that simulcast of terrestrial broadcasts is not covered by the Codes, or by sections 148 or 170 of the BSA, as confirmed by the Full Federal Court[9]. Complaints in relation to simulcasts may not therefore be used by the ACMA to initiate investigations under the BSA.

Recommendation. **The commercial radio industry's strong view is that:**

  - **complaints should only be initiated by listeners of the terrestrial broadcasts under the process set out under section 148 and the Codes. If the ACMA is contacted by**

[9] PPCA v Commercial Radio Australia Ltd [2013] FCAFC 11

listeners directly then it should direct them to the processes contained in the Codes; and

- **the regulator's use of section 170 should be significantly limited, to avoid uncertainty as to the proper process and finality of decisions. This could include the imposition of a 'significant public interest' test as a threshold for triggering section 170. Further, the regulator should not be permitted to use section 170 to investigate any listener complaint, where the subject matter of the complaint is the subject of an existing code.**

(iii) *Criteria underpinning use of section 170*

- The commercial radio industry submits that the criteria used by the ACMA in deciding whether to initiate an investigation under section 170 should be reviewed. The ACMA's standard form 'New Investigation Brief', which records the ACMA's decision in each section 170 investigation, sets out the criteria to be taken into account in deciding whether to investigate a section 170 investigation. It states that:

  '[f]or an investigation outcome to be considered by the ACMA it generally satisfies one or more of the following criteria:
  [...]
  2. The complaint was made by a prominent person or media personality or it relates to a program of wide public appeal or popularity.
  3. The anticipated outcome may have a strong political or media sensitivity or notoriety.

- CRA submits that the inclusion of criteria 2 and 3 above is wholly inappropriate. The regulator should not be entitled to launch a costly and time consuming investigation, entirely of its own volition, simply because the complaint was made by a 'prominent person'. Nor is it appropriate for the regulator to launch an investigation simply because the anticipated outcome may have 'political or media sensitivity''.

- The ACMA's use of such subjective criteria, which appear geared towards public perception rather than the seriousness of the issue being investigated, indicate that there is an urgent need for a comprehensive review of the grounds on which the ACMA may initiate section 170 investigations.

***Recommendation*. The commercial radio industry submits that an urgent review is taken of the ACMA's approach to section 170 investigations, particularly the grounds on which such investigations are initiated.**

(iv) *Stale Complaints*

- The commercial radio industry has previously raised concerns regarding the ACMA's investigation of stale complaints under sections 149 and 170 of the BSA.

- The industry's view – consistent with *Harbour Radio Pty Ltd v ACMA* [2010] FCA 478 - is that section 149 may only be used if the provisions of section 148 are satisfied. In other words, complainants must adhere to the timetable set out in the Codes in order for the ACMA's entitlement to initiate investigations under section 149 to be triggered.

- One effect of the *Harbour Radio* case was that the ACMA could no longer pursue stale complaints under section 149. As a response to this, the ACMA started to initiate investigations relating to

stale complaints by using section 170. This is another example of the regulator's desire to find a way of extending its remit to side step the complaints process set out in the Codes and section 148.

- It has been the experience of CRA members that the ACMA has relied on section 149, and now section 170, to investigate broadcasts which are dated beyond any reasonable definition of a 'stale complaint'. This means that the commercial radio industry has no certainty regarding the circumstances in which a complaint may be investigated by the ACMA.

  Recommendation. **In order to give greater certainly to the complaints process, the commercial radio industry submits that the ACMA should interpret sections 149 and 170 as specifically excluding the investigation of any listener complaint made outside the time period specified in the Codes. To avoid any continuing uncertainly, CRA submits that sections 149 and 170 should be amended to make this explicit.**

(c) Remove over extension of powers

- The regulator's powers should not extend beyond its specific areas of expertise to those of other law enforcement agencies or administrators. The regulator for the communications sector must have its powers carefully and clearly delineated, to avoid inefficiency of duplication, inconsistency and inequity.

- In particular, the commercial radio industry considers it highly inappropriate that the ACMA has the power to decide independently whether a broadcaster has breached a criminal code or has committed a criminal act.[10] The commercial radio industry agrees with the underlying policy rationale behind the rule that broadcasters should not be permitted to use their services to act in breach of the law. However, it is not appropriate for the ACMA, as an administrative body, to investigate and reach decisions of this nature where the bodies able to do so have elected not to investigate.

- The commercial radio industry's view is that it may not have been the intention of the legislators to hand over power to an administrative body, such as the ACMA, to act as police, judge and jury, independently of any police investigation, hearing or finding.

  Recommendation. **The ACMA should not be permitted to reach decisions as to whether a broadcaster has breached a criminal code. This outcome should be avoided in the future, by amendment of section 8(1)(g) of Schedule 2 of the *Broadcasting Services Act 1992* (BSA)**.

(d) Complaints should be restricted to listeners

- The commercial radio industry is strongly of the view that the complaints process must be restricted to listeners of the programs.

- The context of content is key to understanding whether, for example, a community standard has been failed, and hence whether a Code has been breached. Accordingly, the process should not be open to those who have not listened to the program at the time of its broadcast. Nor should it be open to corporate entities.

[10] ACMA v Today FM (Sydney) Pty Ltd [2015] HCA 7

***Recommendation*. The Codes should be amended in the next Codes Review, to make it clear that only listeners of programs are entitled to make complaints in relation to such programs.**

(e) Consultation on Guidance Notes

- Efficiency and consistency would be improved if the ACMA consulted with the commercial radio industry prior to issuing Guidance Notes.

- Previously, the ACMA has consulted with industry before issuing Guidance Notes on interpretation of the BSA or Codes. An example of this was the ACMA's consultation in relation to Guidance Notes on the local content and trigger event regulations. This ensures that industry and the regulator are consistent in their approaches, and also that guidance is provided in the most user friendly form, reflecting current practices where possible.

- More recently, the ACMA has issued Guidance Notes without consulting with industry, for example in its *Investigation Concepts* series, covering Decency and Fairness and Accuracy. While the industry appreciates the ACMA's efforts to share insights from its investigations work – and agrees that such insights are very helpful - it might be useful for the ACMA to seek industry comments before publishing such reports. Industry input can help to shape the guidance to make it accessible and relevant to the commercial radio business.

***Recommendation*. The ACMA should consult with the commercial radio industry before publishing Guidance Notes that affect it**.

(f) Remove duplication

- The regulator should not duplicate functions performed by other bodies or covered by other legislation (see answers and recommendation under questions 1-3 above).

7. What are the optimal structure and governance arrangements for the Authority and Executive?

8. What are the optimal arrangements to support good decision making and maintain trust (including for managing conflicts of interest for decision makers and delegating decision making)?

- The commercial radio industry submits that the ACMA should separate the functions of Chief Executive Officer and Chair and follow a 'governance board model''. Under this model, the board would delegate most regulatory decision making functions to the CEO and staff.

- The industry's view is that this would be the most efficient means for the regulator to make decisions. Currently, Commercial Radio Australia has experienced a disjunct between discussions with ACMA staff and decisions by the Authority, particularly during the Codes reviews.

- To delegate more powers to the staff would be a more efficient way of structuring the regulator, as it would mean that the commercial radio industry could have more constructive discussions with the ACMA staff.

- The industry believes that good decision making would be optimised by ensuring that all stakeholder industries are represented by the decision makers in the ACMA. There have been instances where the absence of deep understanding of the challenges faced by the commercial radio industry has been evident in the Authority's approach, for example in the Codes review and implementation of local content and trigger event legislation.

- This problem could be addressed by ensuring that the decision makers include an individual with direct knowledge of the commercial radio industry. The commercial radio industry would be pleased to assist by suggesting individuals who might be suitable.

9. How does the ACMA perform against the Regulator Performance Framework KPIs?

10. Has the ACMA been effective in progressing or influencing regulatory reform initiatives where there has been a change in risk or market characteristics to warrant change?

- The commercial radio industry works with the ACMA on many issues, and appreciates its cooperation and assistance. However, there are a number of ways in which industry feels that the regulator could improve its performance under the Regulator Performance Framework KPIs.

- In relation to KPIs 1 and 2, the responses to questions 4 to 8 above set out the ways in which the ACMA's efficiency and communication might be improved, through more streamlined and efficient processes, particularly in relation to registration of the Codes and handling of complaints and investigations. Investigations currently take an unnecessarily long time to complete, with many taking over a year. This expends considerable resources which could be put to better use, particularly in relation to spectrum management and planning.

- In relation to KPIs 3 and 4, the industry has some concerns about the proportionality of the ACMA's response to the regulatory risk being managed. These are outlined in the answers to questions 4 to 8 above. In particular:

    - the Department is aware of the industry's concerns about the local content and trigger event regulations. In particular, the reporting obligations imposed by the ACMA, which imposed a huge burden on regional commercial radio broadcasters. These processes have improved over the last couple of years, but regional radio still bears an extremely high level of compliance reporting. This threatens the viability of the regional radio industry, as such stations already operate with extremely stretched resources; and

    - similarly, the ACMA's change of approach in the way in which small stations submitted their financial reports was a disproportionate response, which imposed significant financial and administrative costs on the industry. This issue seems to have been resolved, but in doing so took a significant amount of the industry's time and resources.

Our responses to questions 14 to 19 are dealt with above, under questions 4 and 5.

The industry makes no comment in relation to questions 20 to 22.