

COMMUNICATIONS
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Review of the ACMA

COMMUNICATIONS ALLIANCE SUBMISSION
AUGUST 2015

TABLE OF CONTENTS

INTRODUCTION	2
1. OBJECTIVES FOR THE ACMA POST-REVIEW	3
2. GOVERNANCE/STRUCTURE	5
3. INDUSTRY ENGAGEMENT	6
4. SPECTRUM MANAGEMENT	7
5. FUNCTIONS TO BE CONSIDERED FOR RE-FOCUS OR DIVESTMENT:	8
6. INTERNATIONAL ENGAGEMENT	9

INTRODUCTION

Communications Alliance is pleased to have an opportunity to make a submission to the Department of Communications Review of the Australian Communications and Media Authority (ACMA) in response to the Issues Paper released in July 2015. The views expressed herein have been endorsed by the Australian Mobile Telecommunications Association (AMTA).

Our submission is prepared at a time when the Federal Government has not yet responded definitively to the recommendations of the Competition Policy Review ("The Harper Review") and in particular to Recommendation 49 of that review, which called for competition and consumer responsibility to reside within the ACCC. This submission also comes at a time when the outcomes of the current Spectrum Review have not been finalised.

Therefore this submission does not assume the transfer of consumer protection functions away from the ACMA.

Rather, this submission focuses on potential avenues to improve the ACMA's performance and steps to better equip the ACMA for the rapidly evolving future communications environment.

This submission also does not assume that Government will move to create converged legislation that covers the multi-sectoral remit of the ACMA – although there is no doubt that the absence of unified legislation has made the ACMA's role (as a converged regulator) more difficult in the decade since its establishment.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

1. Objectives for the ACMA Post-Review

There is no doubt that the ACMA has played an important role in shaping the telecommunications industry since the agency's inception and that it has taken very seriously its consumer protection charter throughout what has been a very demanding agenda and a rapidly changing environment.

One of the evident weaknesses of the current legislative and regulatory framework, however, is that the objectives of the ACMA are not spelled out – neither in the *ACMA Act 2005* (which does, however, provide an extensive list of the ACMA's functions), nor elsewhere.

The *Telecommunications Act 1997* does state at Section 4 (Regulatory Policy) that Parliament intends that telecommunications be regulated: "in a manner that:

- promotes the greatest practicable use of industry self-regulation, and
- does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry...."

So it can reasonably be inferred that these objectives are intended to be a significant element of the ACMA's (unstated) core objectives.

There are also regulatory objects listed in the *Telecommunications Act*, the *Radiocommunications Act* and the *Broadcasting Services Act* that provide some guidance for the ACMA, without setting out the objectives of the agency

The ACMA itself - in the absence of explicit prescription elsewhere – says on its web-site that: "*the agency has the strategic purpose of making media and communications work in Australia's public interest, as the various scenarios of convergence emerge.*"

Communications Alliance believes that clearly articulated objectives for the ACMA must be a central output of the current review.

Further, such objectives should breathe life into the deregulatory intent of the *Telecommunications Act* and give greater substance to the stated aim of the present Government to reduce regulatory intervention and 'red tape'.

Co-regulatory and/or self-regulatory solutions (well-crafted and properly assessed for their net costs/benefits), can generate more flexible and rapidly implementable frameworks to deal with a plethora of industry issues. Where regulatory burdens are reduced and greater flexibility permitted for industry, these benefits can flow through to consumers in the form of lower prices, enhanced competition and diversity of offerings and also through to the broader Australian economy.

Implementing new 'black-letter' regulation or adhering to interventionist solutions when better, less burdensome alternatives are available can generate adverse outcomes for consumers and industry alike, as well as creating impediments to overall economic growth.

The decision-making powers of the ACMA and its assessment criteria, or Key Performance Indicators (KPIs) under the Regulatory Performance Framework, should be directed by the overall mission i.e. to reduce the regulatory burden on industry and promote self-regulation, where appropriate, while protecting other priorities, including consumer protection.

Complementary to this is the need to ensure that where regulatory intervention occurs or regulatory overlay is left intact, this happens on the back of a solid evidentiary base which can demonstrate that less-interventionist alternatives are not practicable.

We believe that the over-arching objectives for the ACMA, post-review, should be that the organisation will:

- (i) Maintain a bias against intervention, driven by a positive obligation to de-regulate**
- (ii) Achieve a culture of continuous self-improvement**
- (iii) Remain committed to facilitating competition, innovation and investment in the telecommunications and other regulated sectors and to promoting consequent consumer benefit.**

2. Governance/Structure

Chair/CEO

The current ACMA governance structure is unusual in that the roles of Chair of the Authority and CEO of the Agency are combined. It can be argued that this offers advantages by providing a 'seamless' link between the operational, technical and administrative bias of Agency staff and the decision-making role of the Authority.

While not discounting this potential existing benefit, we believe that, on balance, the longer term interests of the ACMA would be better served if the Chair and CEO roles were separated.

This separation would enable the CEO to focus on:

- driving greater operational efficiencies (which would be evidenced by, among other things, reductions in monetary levies on Carriers);
- managing performance against Regulator Performance Framework (RPF) self-assessment criteria; and
- creating a culture of self-improvement within the organisation, including the development of skills internally to adapt to the needs of new industry models.

Under this structural option, the Associations believe that the Chair of the Authority would be better placed to focus on leadership of the Authority, strategy, policy and stakeholder management.

This scenario could entail making the CEO an ex-officio Member of the Authority – a model that is consistent with many Boards.

Full-Time/Part-Time Authority Members

Similarly, Communications Alliance sees potential advantages and disadvantages associated with the current model that creates a mix of full-time and part-time Members on the Authority.

Part-time Members can bring a broader mix of specialist technical and policy skills to the Authority, and often a broader perspective than if their sole role is a regulatory one, which can assist in the assessment of specific issues and proposals that come before the Authority.

On balance, however, we believe that the ACMA would be better served by a transition to an Authority composed of five Full-Time Members (with the CEO as an ex-officio member). This should still enable a breadth of deep experience and expertise in the regulated sector to be recruited onto the Authority. It should also increase the scope for Members to each become expert in specific areas of the ACMA's operations, as has been the recent practise in areas such as numbering, consumer engagement and technical regulation, and to engage more regularly with ACMA staff and other stakeholders in their areas of specific expertise.

Where very specific skills and experience are not present among Authority Members, creation of an ad-hoc Panel of Experts could be considered, so that a relevant independent individual could be briefly co-opted to assist the Authority's deliberations on a specific issue.

3. Industry Engagement

During 2015, Communications Alliance and the Authority have jointly initiated a program designed to enhance the engagement framework between the Authority and Industry. We applaud the Authority's willingness to work with us in search of improvements to the co-regulatory processes that almost inevitably consume considerable resources within industry and the ACMA alike.

Initiatives to date include the adoption of a co-owned 'Project Management' approach to processes such as the review, revision and re-registration of existing Industry Codes, or the creation of new Industry Codes or Guidelines. (This process is currently in operation in respect of the recently commenced revision of Chapter 9 of the *Telecommunications Consumer Protections Code, 2012*.)

Communications Alliance believes that the Review of the ACMA should encourage further improvement of the engagement framework.

Such improvements could include:

- the setting of target timeframes (or deadlines where appropriate) for decision-making and for processes such as the practice of offering a "pre-public-comment consultation period" to the Authority during the revision of Industry Codes (i.e. an informal period of consultation with the Authority prior to a revised draft Code being released for the statutory Public Comment period);
- provision of greater transparency to Industry, including through the publication (at least to stakeholders) of key Authority decisions and the rationale for them, and;
- the development of mechanisms for public fora debate/expert witness input around key decisions where appropriate, as per the Commerce Commission practise in New Zealand of holding public "Conferences" as a means of more broadly testing the preliminary decisions taken by sector-specific Panels of Commissioners.

More broadly – and squarely in line with the Objectives proposed for the ACMA at the beginning of this submission - the industry engagement framework could be expanded to become a dynamic and iterative program through which the ACMA engages with industry and other relevant stakeholders on at least an annual basis, to explore opportunities to reduce the regulatory burden through removal of regulation, streamlining of existing regulatory processes and practise or the conversion of regulation to industry self-regulation (with appropriate funding and compliance arrangements).

Such a process could draw on:

- the Government's best practice regulation principles;
- examples of regulatory innovation and success in overseas markets; and
- the learnings from regulatory and deregulatory models in other Australian regulated sectors.

Importantly, such an annual exercise could feed directly into the goal-setting and particularly the creation of the following year's self-assessment criteria for the ACMA under the Regulator Performance Framework.

4. Spectrum Management

Both Communications Alliance and AMTA (in its submission) strongly support an ongoing role for the ACMA in the regulation of spectrum allocation and management.

The ACMA has substantial technical expertise in the management of spectrum and this expertise needs to be retained under a new regulatory framework.

Spectrum licence holders make substantial investments and it is essential that the ACMA is properly resourced to protect spectrum property rights and manage interference issues.

Our two Associations suggests that some of the revenue from spectrum licence taxes could be allocated directly to the ACMA rather than allocated to consolidated revenue. This would provide greater certainty of funding and a transparent linkage between the collection of industry taxes and the regulation of spectrum that is supported by the taxes. And if industry takes on some of the regulator's functions and responsibilities there should be scope to direct funds to the relevant industry organisations.

We submit that the ACMA should be better resourced to enable a greater focus on compliance and enforcement activities in relation to spectrum management.

Similarly, we note that the ACMA still does not have a fully integrated, self-service, online spectrum licence register. Such a register would make spectrum licence management more efficient and streamlined.

5. Functions to be Considered for Re-Focus or Divestment:

Research

The Associations believe that consideration should be given as to whether the research activities presently undertaken by the ACMA and by the Bureau of Communications Research (BCR) within the Department of Communications (DoC) should be rationalised.

Rationalisation may reduce duplication or generate other efficiencies. Nonetheless, even if the activity was consolidated within DoC, it would remain important for the ACMA to retain access to targeted research needed to inform its decision-making – for example, as occurred during its *Re-connecting the Customer* inquiry in 2010-2012. The ACMA should be discouraged from commissioning policy research, but rather confine itself to research tasks necessary to support its technical and/or operational requirements.

Numbering

Communications Alliance and its members have generated a detailed proposal to Government for the transfer of numbering management functions to Industry – a model used successfully, for example, in New Zealand.

Such a move will, Industry believes, generate both cost savings and greater flexibility in the way that numbering is managed.

Compliance Monitoring

Options for greater self-regulation of compliance monitoring within the communications sector should be explored. The industry-funded not-for-profit company, Communications Compliance, was created as part of the revision of the *Telecommunications Consumer Protections Code 2012*, to provide a Code compliance attestation and monitoring function. Communications Compliance operates successfully, without Government funding, and in 2015 has received compliance attestations or compliance achievement plans from almost 400 Australian Carriage Service Providers (CSPs). The work of Communications Compliance has been assisted by the compliance monitoring and enforcement activities of the ACMA, but there is nonetheless some duplication of activity between the two organisations.

Consistent with the deregulation/red-tape reduction orientation of the Government, Industry, Government and the ACMA should look more deeply at whether a more self-regulatory model is usefully applicable for the sector. This would involve challenges for Industry, not least of these being the potential need to create a self-enforcement regime.

Conversely, perhaps, some Communications Alliance members have pointed to the need for an upgraded compliance program in the area of spectrum use (and misuse). They point to an ever-expanding threat of interference and spectrum misuse as devices and services continue to proliferate and risks through developments such as the Internet of Things, unless the ACMA is better resourced to meet these challenges.

6. International Engagement

Communications Alliance believes it is essential that the Government and Regulators be adequately skilled and resourced to enable Australia to play an effective role in the key sectoral international fora – particularly the activities of the International Telecommunications Union (ITU).

It is recommended however, that – in line with the practise of many other countries – policy-setting, leadership and direction of these functions should sit within the Government’s policy arm, i.e. the Department of Communications. The ACMA should continue to contribute its technical expertise and advocacy skills to support international engagement and Australian policy positions.

Some Association members have pointed to the ACMA’s management of the preparations for and engagement in treaty-level ITU Conferences in telecommunications and radiocommunications as an example of current inconsistency with this recommendation.

Australia’s positions on international radiocommunication, radiofrequency spectrum management issues and ITU World Radio Conference (WRC) agenda items are arrived at through a process of active ongoing consultation with stakeholders on a number of domestic bodies, including the Australian Radio Study Groups (ARSGs) and the ACMA Preparatory Group for the WRC (PG WRC). The ARSGs mirror the ITU-R Study Groups and their Working Parties and make recommendations to the ACMA to be considered at regional and international meetings. More often than not, industry contributes the majority of Australian Delegation members attending regional and international meetings, thereby providing an essential resource that assists and reinforces the ACMA’s participation in such meetings.

This formal process of active ongoing industry consultation ensures that interested stakeholders can help shape Australia’s international radiocommunication profile and must be preserved as an essential part of Australia’s management of the spectrum in any Government actions arising from this Review. For example, the ACMA could be mandated to maintain a formal process of active ongoing industry consultation by explicit reference in legislation covering the management of spectrum in Australia such as the Radiocommunications Act or successor Acts. Such explicit recognition would ensure that industry would be better placed to make the significant resource decisions required to support Australia’s position in favour of harmonisation of spectrum use at appropriate regional and international fora under the leadership of the Department of Communications and the ACMA.



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