Submission to the Department of Communications

Review of the Australian Communications and Media Authority

Introduction - this submission

1. This submission is the personal submission of Ian Robertson who is a corporate, media and regulatory lawyer and a senior partner of the national law firm Holding Redlich. A summary of Mr Robertson's professional profile is at Annexure A.

2. It will be noted that Mr Robertson's relevant experience includes seven years as a part-time member of the predecessor authority to the Australian Communications and Media Authority (**ACMA**), the Australian Broadcasting Authority (**ABA**), from 1997 until 2004.

3. During that period Mr Robertson was directly involved in a number of important activities of the ABA including the so-called 'cash for comment' inquiry (of which he was one of the members of the three person panel), the allotment and auction of additional commercial FM radio licences in Australian capital cities, the regulatory arrangements for the introduction of digital television and radio, the introduction of minimum requirements for local television news content in regional Australia, and the arrangements concerning datacasting.

4. Holding Redlich acts for Southern Cross Media Group Limited (**SCA**), the owner of Today FM Sydney Pty Ltd (**Today FM**), and Mr Robertson is the partner in charge of Holding Redlich's work for that client. Holding Redlich acted for Today FM in all legal and regulatory aspects arising out of the prank call made by Today FM to a London hospital on 4 December 2012.

5. However, the views expressed in this submission are solely those of Mr Robertson and are not necessarily the views of Holding Redlich or of SCA. This submission, which deals only with the broadcasting regulatory role of the ACMA, is not confidential.

The urgent need for significant broadcasting regulatory reform

6. A significant difficulty faced by this review is the fact that it is only the regulator, the ACMA, which is being reviewed when in fact a comprehensive review of the entire regulatory regime concerning Australian broadcasting is long overdue.

7. The *Broadcasting Services Act 1992* (Cth) (**BSA**) represents and is a reaction to the issues relevant to Australian broadcasting in the 1980s. In that era commercial broadcasting services were very important and influential. The internet did not exist for public or commercial use and subscription television was not available in Australia. The importance and influence of commercial broadcasting compared to other means of communicating information and other content to the public has diminished and will diminish further in the short term. The principles of public policy which underpin the BSA are now largely out of date and irrelevant.

8. The ACMA itself recognises that the current media regulatory model is substantially flawed. In its submission to the Convergence Review in 2011 titled '*Broken Concepts*' the ACMA reviewed the 55 legislative concepts that form the basis of current Australian media regulation and found the majority to be either 'broken or under significant strain'.

9. When it was introduced the BSA was intended to be a significant departure from the previous regime of complex and rigid black letter law, and an adversarial approach to regulation and enforcement. The BSA aimed to substantially free-up broadcasting regulation in Australia and to

provide an emphasis on co-regulation and appropriate flexibility to meet ever-changing circumstances which, for a while, it did.

10. However, regular and complex amendments to the BSA in the 23 years since its commencement have significantly increased its length and made parts of it similar to income tax law in the complexity of its provisions. Much of the BSA's complexity stems from its robust restrictions on ownership and control, and extensive anti-avoidance provisions to prevent the ownership restrictions from being circumvented.

11. Other restrictions in the BSA are intended to limit competition. The comprehensive provisions restricting the activities of datacasters are an example of this. They have operated effectively to ensure that datacasting has not occurred in Australia in other than in a very limited way.

12. When the BSA was passed by the Parliament in 1992, it totalled fewer than 100 pages. Today it is ten times that length. In addition, the ACMA often takes a rigid, legalistic, process-driven and confrontational approach to its regulatory role under the BSA. As a result, Australian broadcasting regulation currently has a number of undesirable similarities to the pre-1992 regime which the BSA sought to remove and replace.

A simplified regulatory model

13. A strong case can be made for ceasing to regulate Australian broadcasting content differently to other comparable forms of content such as on-line content and newspapers. If that approach were to be adopted there would be no further need for codes of practice applicable to particular types of broadcasting, and the only regulation of broadcasting content would be the same as that applicable to other media in areas such as defamation, contempt, copyright, censorship and obscenity, privacy, anti-terrorism, tobacco advertising, misleading and deceptive conduct, etc. If these laws provide sufficient community safeguards for popular on-line content and for newspapers, it is difficult to argue that an extra level of content regulation continues to be necessary specifically for broadcasting.

14. Similarly, a strong argument can be made that the ownership and control provisions in the BSA are outdated and are limiting the efficient further development of the Australian commercial broadcasting industry. It is unlikely that regulation other than competition regulation in the *Australian Competition and Consumer Act 2010* (Cth) – and, specifically, section 50 of that Act which concerns mergers and share and asset acquisitions which substantially lessen competition – is required.

15. If this approach to broadcasting regulation were to be adopted the future role of the broadcasting regulator would most likely be limited to dealing with issues related to spectrum planning and management, and licence conditions compliance.

The formation of the ACMA in 2005

16. The process of merging the ABA and the Australian Communications Authority into a new authority, the ACMA, commenced in 2003. The process spanned three Communications Ministers in the Howard Government – the Hon Richard Alston (until 7 October 2003), the Hon Daryl Williams (from 7 October 2003 until 18 July 2004), and the Hon Helen Coonan (from 18 July 2004).

17. The establishment of a new "converged" regulator gave the Australian Government the opportunity to consider whether the traditional "commission"–style regulator was appropriate to meet Australia's future media and communications regulatory needs.

18. The United Kingdom, which has many similarities to Australia in respect of broadcasting and communications, was at that time a significant distance ahead of Australia in its approach to regulation of these industries. The UK Communications Act 2003 which came into effect in July 2003 established a new regulatory regime for communications and broadcasting in the UK and a new regulator, the Office of Communications (**Ofcom**).

19. Ofcom is a significant departure from a commission-style regulator. It is not a statutory authority, its staff are not public servants, it has a part time Board and Chair, and it has considerable flexibility in the way it conducts its regulatory functions with an emphasis on outcomes rather than process.

20. In the lead-up to the establishment of the ACMA the then Minister, the Hon Helen Coonan, visited the United Kingdom and Ofcom. However, apparently, neither she nor the Australian Government considered that Ofcom was a model worth considering or following.

21. Instead the ACMA was established as a traditional commission-style regulator with all of its staff being public servants, and the very powerful role of Chair and Chief Executive held by one person who is essentially responsible for all of the authority's personnel and finances, being the "accountable authority" of the ACMA within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth). This means that the governance of the ACMA rests almost entirely with one person, the Chair.

A practical example of a major ACMA investigation - the 2012 Today FM "prank call"

22. The recent high profile and extensive investigation by the ACMA of a prank call made to a London hospital in December 2012 by Sydney commercial radio station Today FM provides an opportunity to assess the effectiveness and timeliness of the ACMA's approach to its investigations, the exercise of its powers, and whether the outcomes it achieves are optimal.

23. On 4 December 2012, Today FM broadcast a prank telephone call made by the hosts of the *Summer 30 Program* to the King Edward VII Hospital in London, where the Duchess of Cambridge was a patient (**Segment**). The Segment was not broadcast live, but had been pre-recorded earlier that day and edited for broadcast. Three days after the occurrence of the prank call, the nurse at the hospital who answered the call, Ms Jacintha Saldanha, took her own life.

24. As a result of this tragic and unforeseeable event, Today FM was subject to investigation by the Metropolitan Police and Crown Prosecution Service in the United Kingdom, HM Coroner for Inner West London (Westminster) in the United Kingdom, the New South Wales Police Force, the Australian Federal Police, and the ACMA.

25. On 13 December 2012, the ACMA formally notified Today FM that it was commencing an investigation under section 170 of the BSA, in connection with the broadcast of the Segment (**Investigation**). The Investigation then continued for a further two and a half years, with the ACMA providing its preliminary investigation report to Today FM six months after the Segment was broadcast, on 4 June 2013. The ACMA provided its final investigation report to Today FM on 20 February 2014 (**Investigation Report**), and publicly announced the action it proposed to take in relation to the broadcast of the Segment (after reaching agreement with Today FM) 15 months later, on 17 July 2015.

The two key issues arising from the prank call

26. Two important public policy and regulatory issues arise from the making of the prank call and the broadcast of the Segment:

(a) First, is it appropriate for a commercial radio station to make a prank call to an emergency service such as a hospital?

(b) Secondly, is it appropriate for a prank call to be broadcast without the consent of the participant(s) in the call?

27. The ACMA did not consider the first issue at all during the course of its Investigation and has not referred to it in the Investigation Report or in any of its public statements about the Investigation.

28. The ACMA did consider the second issue but only in the narrow context of whether the broadcast of the Segment breached any of the *Commercial Radio Australia Codes of Practice and Guidelines 2011* (**Commercial Radio Codes**).

Action taken by SCA subsequent to the prank call

29. As is usually the case when a commercial broadcaster finds itself at the centre of widespread community and advertiser concern, as happened after the broadcast of the Segment, the broadcaster has a strong incentive to itself take action to ensure that a similar occurrence does not happen again. Commercial broadcasting is a very competitive and commercially-significant activity and licensees, being commercially rational, will do everything possible to avoid any loss of revenue or damage to their "brand". This is an important issue which the ACMA appears to not understand. It is also relevant to the consideration of the future approach to broadcasting content regulation in Australia.

30. One of a number of steps taken by SCA after the broadcast of the Segment was to commission a thorough and independent review of its broadcasting policies and procedures. As a result of that review SCA adopted a policy that it would not again make a prank call to any emergency service (such as a hospital) or broadcast a prank call without the prior consent of the participant(s) in the call.

31. SCA informed the ACMA of these decisions in April 2013. However, the ACMA showed no interest and sought no further information from SCA in relation to its updated policies and procedures related to these important issues. SCA subsequently offered to have Today FM enter into an enforceable undertaking to the ACMA under the BSA to not again make a prank call to an emergency service or broadcast a prank call without the prior consent of the participant(s). Again, the ACMA showed no interest.

The recording of the prank call by Today FM

32. The method of recording the prank call was peripheral to the key issues which arose from the making of the prank call and the broadcast of the Segment referred to above. Today FM records telephone calls and all program content in the same manner and using much the same equipment as all commercial radio stations. However, during its Investigation the ACMA paid close attention, and sought a great deal of information, about Today FM's method of recording the prank call.

33. This is because from the commencement of the Investigation the ACMA sought to establish that the recording of the prank call breached either the *Surveillance Devices Act 2007* (NSW) (**SDA**) or the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIAA**).

34. The ACMA pursued this line of enquiry because it sought to establish that Today FM had used its broadcasting service in the commission of an offence which would amount to a breach of a standard licence condition of Today FM's broadcasting licence, which is a great deal more serious than a breach of the Commercial Radio Codes. Such a finding of licence condition breach would enable the ACMA to suspend the broadcasting licence of Today FM under section 143 of the BSA.

Such a suspension of Today FM's licence would have been the first occasion on which a commercial broadcasting licence has ever been suspended in Australia.

The ACMA's power to find that a broadcaster has committed an offence

35. The assertion by the ACMA that, as an administrative body, it had the power to determine whether an offence had been committed by a broadcaster such as Today FM on the civil standard of proof (i.e. on the balance of probabilities) in order to make a finding that a broadcaster had breached a condition of its licence was of great concern to SCA and the entire Australian commercial radio and television broadcasting industry.

36. It is relevant to note that the ACMA's views on this issue had changed over time. Historically, the ACMA (and its predecessor the ABA) declined to consider whether a broadcaster had used its broadcasting service in the commission of an offence until the broadcaster had been convicted of the offence in question.

37. For instance, in Investigation Report No. 1485, in respect of Harbour Radio Pty Ltd, published on 8 March 2007, the ACMA declined to consider the application of the standard licence condition contained in paragraph 8(1)(g) of Schedule 2 of the BSA and whether Harbour Radio had breached section 20D of the *Anti-Discrimination Act 1977* (NSW). The ACMA stated (at page 3) that:

> *"… that offence requires both conduct of a degree of seriousness akin to that which threatens physical harm or incites others to threaten harm and also that the State Attorney-General give consent for any prosecution. ACMA is not aware of any grant of consent to prosecution in respect of the broadcasts. In these circumstances, ACMA has not considered the application of the licence condition and the matters raised by complainant B under clause 1.3(e) of the Code."*

Judicial review of the power of the ACMA to determine that a broadcaster has committed an offence

38. As soon as Today FM was informed by the ACMA that the ACMA intended to find that the recording and broadcast of the prank call constituted a criminal offence Today FM made application to the Federal Court of Australia to challenge the power of the ACMA to make that finding. The case solely concerned the power of the ACMA to make the finding, and not the correctness of the finding as to whether Today FM had in fact committed an offence under NSW or Commonwealth law (which has not been considered by a court).

39. The case was heard by the Federal Court of Australia, then on appeal to the Full Court of the Federal Court of Australia, and then on appeal to the Full Court of the High Court of Australia. The peak bodies of commercial radio and commercial television, Commercial Radio Australia and Free TV Australia, each sought to intervene in the case in support of the position adopted by Today FM.

40. The Full Federal Court unanimously held, in its judgment delivered on 14 March 2015, that the ACMA does not have the power to determine that a broadcasting licensee had committed a criminal offence and therefore breached a standard condition of its commercial radio broadcasting licence under the BSA. The Full High Court reversed this decision in its unanimous judgment delivered on 4 March 2015 and held that the ACMA did have that power.

The need to remove the Clause 8(1)(g) and Clause 7(1)(h) Licence Conditions

41. This issue remains of considerable concern and importance to the Australian commercial broadcasting industry which continues to seek the removal of the relevant licence conditions, which are contained in paragraphs 8(1)(g) (for commercial radio licensees) (**Clause 8(1)(g) Licence**

Condition) and 7(1)(h) (for commercial television licensees) (**Clause 7(1)(h) Licence Condition**) of Schedule 2 of the BSA, which grant this power to the ACMA.

42. The ACMA found in its Investigation Report that, in broadcasting the recording of the "private" conversation, Today FM contravened section 11(1) of the SDA and therefore breached a standard condition of its licence (being the Clause 8(1)(g) Licence Condition).

43. Today FM maintains that its recording of the prank call did not breach the SDA or the TIAA. In any event, Today FM maintains that the relevant legislation to consider is the TIAA rather than the NSW legislation, and that it did not breach that Act.

44. Today FM's view is supported by the findings of the NSW Police Force and the Australian Federal Police, both of which investigated the recording of the prank call (and both of which have explicit jurisdiction to do so, unlike the ACMA). The NSW Police took the view that the only applicable law was the Commonwealth law, a view with which the Australian Federal Police agreed. The Australian Federal Police investigated the recording of the call thoroughly, including by inspecting the equipment used and watching a telephone call being recorded in the Today FM studios in the presence of technical experts. On advice from the Director of Public Prosecutions the Australian Federal Police determined that no offence had been committed and closed its file.

45. The thoroughness of the Australian Federal Police investigation contrasts with the approach taken by the ACMA in its Investigation which relied principally on written correspondence between the ACMA and Today FM. However, this is not surprising given that the ACMA was not established to conduct criminal investigations with the thoroughness of a law enforcement agency. It is for this reason, in particular, that the broadcasting industry is so concerned that the ACMA should have taken upon itself the power to make findings of criminal conduct by broadcasters for the purpose of determining whether they have committed a breach of a broadcasting licence condition.

46. Had the ACMA proceeded to suspend Today FM's broadcasting licence it is likely that Today FM would have sought to have that decision reviewed by the Federal Court of Australia. It would have only been in the course of that review that a proper analysis of the law and the evidence as to what had transpired in the recording of the call, and the application of the applicable law, would have taken place. This demonstrates one of the serious difficulties which arise from the ACMA taking upon itself the exercise of this power.

Conclusion – a better approach to Australian broadcasting regulation

47. In conclusion, and as discussed above:

    (a) The future role of the broadcasting regulator should be limited to dealing with issues related to spectrum planning and management, and licence conditions compliance. There is no longer a reason to apply additional content regulation to broadcasting content compared to other media, and ownership and control issues should be dealt with under competition law by the ACCC.

    (b) The broadcasting regulator should adopt a less legalistic and rigid approach to its investigations. Free TV Australia stated in its 2009 submission on the "Annual Review of Regulatory Burdens on Business: *Social and Economic Infrastructure Services"* that broadcasters at that time were experiencing an interventionist and legalistic approach to ACMA investigations, an approach which was not seen in the regulation of other platforms. That approach by the ACMA continues, as demonstrated by the Investigation.

    (c) The Clause 8(1)(g) and Clause 7(1)(h) Licence Conditions should be removed from the BSA.

(d) Ofcom remains a regulatory example which should be further considered for Australia. The separation of the roles of Chair and Chief Executive (which is clearly necessary for proper and effective governance), the vesting of considerable governance powers in a part-time expert board, the ability to employ staff members who are not public servants, the ability for the agency to raise its own funds, and, importantly, the ability for the agency to show considerable flexibility in its approach to regulation so that it can focus on appropriate outcomes in the public interest rather than rigid processes, remain desirable and even more appropriate in the period ahead.

Ian Robertson

10 August 2015

Annexure A

Ian Robertson

Expertise

Ian is a corporate, commercial, media and regulatory lawyer who advises a wide range of Australian and overseas clients with particular emphasis on the media, entertainment and technology industries.

He has been listed in “Best Lawyers in Australia” as a leading lawyer in the categories of Corporate Law and Entertainment Law since 2011.

Ian is a panel member of the Advertising Claims Board which adjudicates disputes between advertisers.

Qualifications

Bachelor of Laws - University of Melbourne

Bachelor of Commerce - University of Melbourne

Memberships

Screen Producers Australia

Communications and Media Law Association of Australia

Fellow of the Australian Institute of Company Directors (FAICD)

Appointments

Australia-China Relations Institute – Chairman’s Council (2015 to date)

Film Victoria – President of the Board (2011 to date)

Beyond International Limited – Director (2005 to date)

Screen Australia – Deputy Chair (2008 to 2013)

Ausfilm International Inc. – Director (2001 to 2009) and Chair (2003 to 2007)

Australian Broadcasting Authority – Member (1997 – 2004)

Cinemedia Corporation (now called Film Victoria) – Board Member (1998 – 2000)

Film Australia Limited – Director (1991 – 1997) and Deputy Chair (1996 – 1997)

Melbourne Parks and Waterways – Director (1994 – 1996)

Camberwell Grammar School – Member of Council (1991 – 1994)

Next Wave Festival – Board of Management (1989 – 1993)