SUBMISSION TO THE REVIEW OF THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

DEPARTMENT OF COMMUNICATIONS

Joint Submission on the Issues Paper by

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Introduction

There is much to be commended in the Department's Issues Paper on the review of the ACMA, including the scope of issues covered and the efforts to consider interests of citizens and consumers alongside challenges for industry.

Nevertheless, it is difficult to address specific questions concerning the operations of the regulator when key aspects of the policy settings and regulatory framework are undecided. This problem is exemplified in the first of the terms of reference:

> "The current objectives of the entity as determined by the Government's forward priorities, other reviews and contemporary pressures of the broadening 'digital' character of the sector."

While the Department has actively undertaken consultation and review on a number of issues affecting broadcasting regulation, this work is not yet complete. For example, the Department has released Policy Background Papers on media control and ownership (June 2014) and on regulating harms in the Australian communications sector (May 2014). It is also conducting consultation on digital television (January 2015) and has delivered recommendations to government on spectrum (March 2015) and digital radio (July 2015).

In addition, while the Issues Paper recognises digital disruption has had profound effects on media businesses, it does not ask whether new digital enterprises should be subject to some form of regulation (statutory, co-regulatory or self-regulatory) or whether traditional media should be relieved of some regulatory obligations in the face of new competition. Addressing the threshold questions of who and what are subject to regulation is a crucial first step in considering how the regulator should act.

Accordingly, it is difficult to consider terms of reference such as "the future objectives and functions of the regulator" while these matters are yet to be addressed or are the subject of Departmental review or government policy consideration, especially when a change in policy (at least for some aspects) requires legislative change.

The comments below explain why these policy issues need to be addressed before deciding on the best model for the communications regulator. For the most part, they relate to media regulation. While some of the observations may be of relevance to regulation under the *Telecommunications Act 1997* and a strict delineation between telecommunications services and broadcasting services limits the ways in which we address the challenges of the contemporary communications environment, the development of "media policy" has a rich history and includes principles that continue to have relevance.

Essentially, this is a short submission on unanswered media policy issues in a convergent media environment. It anticipates further debate on these matters before decisions are made on secondary issues, such as the structure or resourcing of the ACMA.

Issue 2.1 – The Australian communications market

This section raises questions about the style of regulator and regulation appropriate for the industry. It also asks whether the ACMA should continue to have responsibility for its current set of regulatory obligations, with the ACCC having responsibility for economic regulation, or whether the ACMA – as a single specialist regulator – should have responsibility for all aspects of communications regulation, including economic regulation.

As noted above, it is difficult to address these questions before considering how threshold issues might evolve, such as the statutory concept of "degree of influence". However, some general points of principle can be stated.

Unique characteristics

In considering the style of regulator and regulation, it is worth revisiting the statement of regulatory purpose advanced by the High Court in Australian Broadcasting Tribunal v Bond, 25 years ago:

> "Commercial broadcasting plays a significant role in the dissemination of information and ideas. That dissemination is vital to the maintenance of a free and democratic society... A commercial broadcasting licence thus carries with it an obligation to the community. It also carries with it the potential for powerful influence. The community is entitled to confidently

> expect that a licensee will discharge its obligation and, in particular, that the potential for influence will not be abused."[1]

Much has changed since 1990. Commercial broadcasting still plays a significant role, but there are new sources of media content and the linear model of "dissemination of information and ideas" has been replaced by an environment in which audiences engage directly with, and may even become, content producers.

Ideas of best regulatory practice have also evolved. The heavy hand of the ABT, which required broadcasters to make detailed claims against legislative performance indicators every five years, was phased out with the passage of the *Broadcasting Services Act* in 1992. In 2015, while industry participants are right to raise questions about past assumptions of "degree of influence" and other concepts which underpin the BSA's regulatory framework, some aspects have not changed. The provision of news and comment is still of fundamental importance within a democratic society which values freedom of expression and access to information. The potential harm that might be done to children through exposure to certain material has not lessened.

The ways such material may be accessed have changed dramatically and the basis for the obligations imposed on broadcasters in return for access to spectrum is itself changing. These issues demand reconsideration of how regulation works but they do not alter the fact that the media is different from other industries and regulation cannot be based solely on measures that facilitate competition or protect consumers. Accuracy in news reports, transparency in commercial influences on editorial content, or the extent to which material might be too threatening in programs for young children are all examples of why a specialist regulator is used for communications.

This situation is not unique to Australia, and needs to be situated in the international history of regulatory debates. For example, in discussing the rationale for rules about media ownership, Des Freedman has said "some of most lucid accounts of the relationship between a competitive media system and a robust democracy are to be found in official justifications for precisely these ownership rules".[2] Both Freedman and Steven Barnett have pointed to a statement in the UK Conservative government's 1995 White Paper, which Barnett describes as "one of the most eloquent statements of why plurality matters in a democracy"[3]:

> A free and diverse media are an indispensable part of the democratic process. They provide the multiplicity of voices and opinions that informs the public, influences opinion, and engenders political debate. They promote the culture of dissent which any healthy democracy must have. In so doing, they contribute to the cultural fabric of the nation and help define our sense of identity and purpose. If one voice becomes too powerful, this process is placed in jeopardy and democracy is damaged. Special media ownership rules, which exist in all major media markets, are needed therefore to provide the safeguards necessary to main diversity and plurality.[4]

More recently, in a consultation paper issued in response to a request from the UK Secretary of State for Culture, Media and Sport, Ofcom restated the link between media plurality and democracy:

> "Plurality matters because it makes an important contribution to a well-functioning democratic society. Media plurality is not a goal in itself but a means to an end. Plurality in media contributes to a well-functioning democratic society through the means of:
>
> • **informed citizens** who are able to access and consume a wide range of viewpoints across a variety of platforms and media owners; and
>
> • **preventing too much influence over the political process** being exercised by any one media owner."[5]

In other words – and in answer to Question 1 – there *are* unique characteristics of at least the media part of the communications sector that require a particular form of regulation and regulator.

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[1] *Australian Broadcasting Tribunal v. Bond and Others* [1990] HCA 33, per Toohey and Gaudron JJ at [41].
[2] Des Freedman, "Metrics, models and the meaning of media ownership", *International Journal of Cultural Policy* 20.2 (2014), 170-185 at 175.
[3] Evidence to the Leveson Inquiry, Module 3 (May 2012) at paragraph 20. http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Steven-Barnett-University-of-Westminster.pdf
[4] Department of National Heritage, *Media Ownership: The government's proposals* (1995), p.3 (cited by Barnett).
[5] Ofcom, *Measurement Framework for Media Plurality: A consultation on Ofcom's proposed advice to the Secretary of State for Culture, Media and Sport* (11 March 2015). http://stakeholders.ofcom.org.uk/consultations/media-plurality-framework/

Economic regulation

The Issues Paper then asks whether the entity responsible for these functions, and for all the consumer protection aspects of telecommunications regulation, should also have responsibility for access arrangements, pricing and other aspects of economic regulation. It asks whether giving the sector specific regulator (the ACMA or its successor) economic regulation would enable it to "strike the optimal balance between investment and consumer outcomes".

There are two complications with this question.

The first is that, as explained above and as noted by the ACMA in its work on citizens and consumers,[6] media regulation is about more than producing "consumer outcomes". It must take account of the role of the media in society and, in recent times, the exchange between the media and citizens (who may also be producers of news, comment and information). This element may be intangible and hard to quantify, but it is at the core of the news media's role of holding to account government and other powerful interests. And it forms the basis for various rights and privileges – from the protections afforded by the *Privacy Act* and the *Competition and Consumer Act* to the scheme (however effective) for journalists' warrants in the data protection legislation.[7]

The second concerns the emphasis on investment outcomes. Policy questions such as "how to provide sufficient incentives for private sector investment while providing consumer benefits" do indeed need to be considered and the regulator needs to take into account the financial and administrative burden imposed on industry (as recognised in the Regulatory Policy set out in section 4 of the BSA). However, this can be distinguished from an industry development role. It is questionable whether such a role should be performed by the same regulating entity that is charged with upholding *social* objectives, such as promoting a degree of diversity by avoiding excessive concentration of ownership or influence (whatever form this takes in legislation or other regulation).Recognising the differences in these roles should not act as a block on innovation and investment. As the Department recently noted in its comment on the Competition Policy Review Draft Report, it is possible to emphasise the importance of competition and private sector investment, while at the same time recognising "wider public policy objectives and existing regulatory assessment frameworks".

Setting aside these two aspects, in essence the Issues Paper asks whether the ACMA should become the Australian version of Ofcom – acquiring applicable aspects of economic regulation. Currently, many key issues relating to economic regulation concern telecommunications services (which are not addressed in detail in this submission), although economic regulation is not exclusively about telecommunications and, as broadband services continue to evolve, this distinction will become less useful. Similarly, as questions relating to content production and distribution, program supply, use of conditional access systems etc become more complex and involve multiple platforms, players and jurisdictions, there will be clear advantages in one entity considering the effects on competition and the implications for diversity.

Accordingly, there may be much to commend the proposal for an expanded ACMA. It may turn out that this, in fact, is the only way to effectively meet media policy objectives that address issues of broader concern than the level of competition in a market for services of a specific kind. In relation to plurality, for example, Des Freedman has said

> "… it is more than likely that in a digital environment there will still be the need for special controls to promote pluralism and diversity. Given the amount of Internet traffic dominated by Google, YouTube and Facebook as well as by longer established media companies, a broadband internet future is certain to produce new types of monopoly and new forms of exclusion that can only be tackled with purposeful and positive intervention into media markets."[8]

Similarly, in a forthcoming collection on media pluralism and diversity, scholars involved with the EU Media Pluralism Monitor have said

> "The contemporary world creates lower barriers to participation in communication by making production easier and shifting distribution away from technologies that limited the number of providers and content available – the fundamental rationale for concern about pluralism. In the digital media world, the fundamental challenge involving pluralism is not limitations on

[6] See, for example, *'Citizens' and the ACMA: Exploring the concepts within Australian media and communications regulation* (June 2010) http://www.acma.gov.au/theACMA/About/Corporate/Authority/citizens-and-the-acma
[7] *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*.
[8] Freedman, op cit, p.179.

> producing content, expressing divergent ideas and opinions, or access to distribution systems. The primary challenge in the digital age is the ability to effectively reach audiences. In this environment promoting pluralism is coming to focus on reducing control over what flows through new digital distribution systems …"[9]

They also note "… the concentration of where the audience goes – in terms of aggregators and sites – is every bit as damaging to pluralism as limitations on spectrum and concentration of ownership".

In this environment where the controllers of major distribution networks and points of access are not even recognised by the Broadcasting Services Act, "pluralism" is about more than just media ownership and "reach" is about matters not covered by the 75% rule.

While this experience has most clearly been seen in the way participants such as Google and Facebook mediate users' access to news and comment, assumptions about access to other content such as Australian content and children's programs will also be challenged. The Convergence Review, with its scheme based on "content service enterprises" represented an attempt to formulate principles that could apply across areas of regulation such as diversity rules and Australian content. It proposed a set of criteria for assessing the status of media enterprises and a threshold over which they must pass before regulatory obligations apply. The scheme included a public interest test for transactions involving media enterprises of "national significance". This test, along with a "minimum number of owners" rule for local markets, would replace most of the current media ownership rules.[10]

Similarly, the abandoned media reform legislation of 2013 proposed a Public Interest Media Advocate which would assess media mergers and acquisitions, applying a test of "substantial lessening of diversity of control of registered news media voices" rather than a "substantial lessening competition in any market".[11] As the Explanatory Memorandum stated:

> "The public interest test will be considered in a separate process to the ACCC's substantial lessening of competition test, the ACMA's existing media diversity tests, and where necessary, the FIRB's national interest test. The PIMA will draw on the extensive expertise of the above agencies in order to ensure the effective operation of the public interest test alongside FIRB approvals, mergers and acquisitions approvals, and existing media ownership laws."[12] [13]

Although aspects of the Convergence Review's recommendations require further consideration and the proposed media reform legislation of 2013 had flaws, the Review did represent a sophisticated attempt to think through the issues facing the sector, while the reform bill (setting aside the related bill dealing with the declaration of a "news media self-regulation body"[14]) at least attempted a plan for media plurality that responded to contemporary conditions.

These matters require consideration before making decisions on the role of the ACMA. Nevertheless, on the issue of economic regulation, it appears there may already be significant benefits in establishing a single sectoral regulator with responsibility for economic regulation, content regulation and other aspects such as licensing. In time it may be futile to attempt to keep them separate.

Clearly, this issue requires further research and analysis. In the meantime, it is worth noting the risks of moving to other arrangements, not directly raised in the Issues Paper but considered elsewhere.

First, the recent Vertigan review[15] raised the possibility of a networks regulator which would assume responsibility for communications regulation along with utilities and like industries. Given the social role of communications (as noted above), there is a substantial risk this proposal for a networks regulator (unless it were confined to the aspects of economic regulation currently administered by the ACCC) would not adequately protect the public interest in a diverse media sector. As the Department

[9] Valcke, Peggy, Robert Picard and Sukosd, Miklos, "A Global Perspective on Media Pluralism and Diversity: Introduction" in Sukosd, Miklos, Robert Picard and Peggy Valcke, *Media Pluralism and Diversity: Concepts, risks and global trends* (forthcoming 2016), London: Palgrave Macmillan, 1-19 at p.2.
[10] *Convergence Review: Final report* (March 2012), see Chapter 2, Media Ownership.
[11] *Broadcasting Legislation Amendment (News Media Diversity) Bill 2013*. The Bill proposed a new Part 5A News Media Diversity of the BSA, See proposed section 78CB(3). Cf section 50 of the *Competition and Consumer Act 2010*.
[12] See p.13. http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4991
[13] In the UK, Ofcom provides advice to the Secretary of State under the Enterprise Act on whether certain mergers might operate against the public interest. This is in addition to its functions under the Communications Act related to maintaining a sufficient plurality of providers of television and radio services.
[14] News Media (Self-regulation) Bill 2013.
[15] *Independent Cost-Benefit Analysis of Broadband and Review of Regulation. Volume 1 – National Broadband Network market and regulatory report* (August 2014). See part 11, Administration of economic regulation of the telecommunications industry.

observes in the Issues Paper, "The heterogeneous nature of digital services and the any-to-any connectivity of communications networks is distinguishing them from more traditional networked industries, such as utilities." Even if the aims and objectives of the current legislative scheme were transferred to a networks regulator, there would undoubtedly be pressure over time for the schemes of the various regulated industries to be more closely aligned, leading to a loss of unique aspects of communications regulation.

Second, there has been comment that the ownership and control functions of the ACMA might be transferred to the ACCC. While there may be little difference in the way in which ACCC and ACMA officers apply statutory tests, the statutory office holders appointed to an industry-specific regulator should bring with them knowledge of that industry and a focus on its regulation that could be difficult to achieve in a cross-industry regulator such as the ACCC. More importantly, it would be unwise to make any change of this kind before the fundamental aspects of industry regulation described above are addressed. A new framework with a more contemporary approach to who is regulated and how it is done will necessarily prompt a series of regulatory decisions that establish the boundaries of the new scheme. These decisions should be made by members appointed specifically for their expertise and ability to address these industry-specific challenges.

Issue 2.2 – What should a future-focussed communications regulator look like?

Work is currently being undertaken on some of the issues raised in the first part of this section concerning regulatory functions and best practice. It could not be completed in the timeframe for consultation.

The second part concerns governance arrangements. The key point concerns the choice between the current "commission structure" of the ACMA and a "board model". A decision to change to a board model would involve splitting the positions of Chair and CEO, with the CEO appointed by the Board and the delegation of all statutory decisions under the various Acts to the CEO and other staff.

Although the Issues Paper only touches on the subject, it does refer to the OECD best practice principles, *The Governance of Regulators*, which offers further explanation of the role of a board of directors:

> "the best use of their efforts is on strategic guidance, approval and oversight of operational policy for the regulator, while delegating responsibility for implementation to the CEO and staff (Chartered Secretaries Australia, 2011). This may be the case where the regulator has a high workload of regulatory decisions or otherwise requires significant strategic guidance and oversight. The decision-making body may also need to delegate responsibility for certain time critical decisions, for example, to the Chair, CEO, or sub-committee of the board" (p.71).

While commentary in relation to the ACMA has focussed on the splitting of the Chair and CEO, there has been little in the way of evidence to support the change. This is not to say the proposal for a "governance board model" is unsound – and indeed, there may be good arguments for the additional oversight that comes with such a move – but there may also be benefits in the current arrangements. Whilst the separation of Chair and CEO is regarded as standard good corporate governance in the corporate sector,[16] the governance roles of regulatory authorities may require a more nuanced approach. This submission does not adopt a preference for the current commission structure or a board structure, but comments on some difficulties or complexities that might arise with a board structure and the separation of the Chair and CEO roles.

In practice, the vesting of Chair and CEO functions in the one individual gives the organisation a person with substantial authority when dealing with prominent and powerful stakeholders. Under a board model, the CEO is likely to gain authority *internally* (in that proposed decisions developed by staff would be presented only to the CEO and other senior officers and not to a panel of statutorily-appointed decision-makers) but he or she is likely to lose authority in dealing *externally* with industry participants and other parties.

In addition, under a board model, the Chair may not be a party to negotiations with industry, or even be appraised of the details of specific, complex matters. Still, the CEO and Chair would no doubt be lobbied by industry participants and interest groups. The OECD has noted the need for a high degree of regulatory integrity and the importance of preventing undue influence:

[16] See, for example, the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* http://www.asx.com.au/documents/rules/gn09_disclosure_corporate_governance_practices.pdf .

> "There are many reasons why different parties may wish to influence the decisions of regulators. Whether the gains are political, financial or any other, regulators will face pressure from those trying to have a more favourable decision, in whatever terms, for their benefit. Even if there has been no influence, if a decision is taken that is unfavourable to a set of stakeholders or regulated entities, then there can still be the perception that a decision has been unduly influenced" (p.54).

The potential for inconsistency between the Chair and CEO, the loss of authority on the part of the CEO, and the risks of undue interference – while not necessarily fatal – are factors to consider.

Perhaps more importantly, the board model would remove the role that Authority members can play through their expertise in statutory decision-making. This responsibility would fall to the CEO and delegated staff. There would probably be efficiency gains in this structure, as decisions would be made by staff who have extensive knowledge of applicable law and regulation as well as the factual background of matters under consideration, but these gains may be outweighed by the removal of the oversight role played by part-time Authority members.

Below are some principles that could be taken into account when considering these issues:

- A hybrid arrangement under which the positions of Chair and CEO are separated but the Authority model remains may offer benefits arising from both structures. However, there would need to be clarity around the roles and authority of the Chair and the CEO. Authority members would continue to make decisions under the various statutes and other instruments.
- If the Authority model is retained there would be value in considering the composition of the Authority and the balance of full and part-time members. There could be additional full-time members alongside independent, statutorily-appointed members.
    - The external appointments would allow for different perspectives, testing of assumptions and oversight of decision-making.
    - Increasing the number of internal executive positions (from the current two positions of Deputy Chair and Full-time Member) would assist the Authority in more efficiently and speedily handling complex technical and regulatory matters.
- Additional flexibility could also be provided for delegation of categories of decision-making, with the Authority only required to consider matters it considers merit this level of consideration. Significant matters that would nevertheless involve substantial and specialist consideration could be assigned to a Division of the Authority under delegations powers such as those in Division 3 of Part 4 of the *Australian Communications and Media Authority Act 2005*.
- If the Authority model is replaced by a Board model, the CEO should be appointed by the Board, not by the Minister. Board members should be appointed by an appointments committee, not directly by government. (These appointment principles should also apply if the Authority model was retained.) As the board of directors will be separate from the statutory decision-makers, a core function of the board should be to advance the independence of the organisation and to protect its decisions from undue interference – whether from industry, interest groups or government.

Issue 2.4 – Maximising the ACMA's efficiency

Range of functions

The Issues Paper asks whether there are functions provided by another source that would be better provided by the ACMA and whether there are functions provided by the ACMA that could be better provided by others.

Additional functions

In its review of the National Classification Scheme, the Australian Law Reform Commission recommended that a new regulator be established, bringing together functions currently performed by the Attorney-General's Department, the Classification Board, the Department of Communications and the ACMA. The ALRC referred to the need for the regulator to have "an intimate knowledge of the communications and media market and technical capabilities in relation to, for example, parental locks on televisions and media devices, internet filters and online age verification systems".[17]

[17] ALRC Report 118, *Classification – Content regulation and convergent media* (February 2012), p.327.

The ALRC suggested these functions could be performed by a new regulator or they could form one part of the ACMA. The suggestion that they be performed by the ACMA received support from industry participants who noted that classification matters are already part of the broadcasting codes registered with the ACMA.

The ALRC's report is an important contribution to the debate on how to regulate in a converged media environment. Its suggestion for moving the classification functions to a regulator familiar with developments in technology, industry practice and consumer behaviour addresses at least one aspect of the convergence conundrum. It is also a pragmatic and potentially cost-effective reform.

Functions that could be considered for divestment

In its Background Papers *Deregulation in the Communications Portfolio* (November 2013) and *Regulating Harms is the Australian Communications Sector* (May 2014) the Department begins to set out a case for reassessing the nature of regulatory interventions in the communications sector and identifying areas where the argument for statutory regulation or co-regulation might be pulled back in favour of self-regulation.

The regulation of news and comment is an aspect of the ACMA's current functions that could be considered for movement to a self-regulatory scheme, providing the settings for that scheme were sufficiently robust. There are several reasons for this.

- Convergence of production and distribution arrangements has meant that substantially the same or similar content is subject to different rules regarding accuracy and fairness (for example), depending on how it is accessed. While print and online content is subject to the Australian Press Council's Statement of General Principles, broadcast content is subject to a range of different rules set out in the various codes of practice (a situation made strikingly apparent in the ACMA's very useful "Investigation Concepts" series). There are strong arguments for bringing together these multiple sources of rules.
- The case for considering a self-regulatory model for this converged scheme is greatly strengthened by the existing role of the APC. Established in 1976 as an independent council responsible for standards of practice and complaint-handling in relation to print media, in recent years it has expanded to embrace the digital publications of its existing members as well as new digital-only publishers such as ninemsn and Crikey. Its structure provides a basis for a new independent body that would include broadcasters. In its submissions to the Convergence Review, the Council indicated a preparedness to move to a converged arrangement over time. It recognised this may be a new body, not simply a reconstituted Press Council.
- The APC's approach to recruitment of new members demonstrates a critical factor in the need for review of broadcasting policy and regulation: while it is appropriate to reconsider the underpinning rationale for regulating traditional media, it is vital that a new regulatory framework be flexible enough to incorporate (at least in some form) new sources with which readers and viewers engage. The ACMA is not able to do this under its statutory functions.
- As the public debate surrounding the previous government's attempts to regulate print media demonstrated, there are compelling reasons for the regulation of news and comment to be independent from government departments and agencies. The rationale for state intervention in the regulation of broadcasting licences is well known and it may be necessary to provide some mechanism for referral to the ACMA in cases of repeated breach of self-regulatory standards, but a scheme which offers an independent complaints mechanism in the first instance assists in the promotion of free expression.
- As it is reasonable that industry funds a self-regulatory scheme, this model will result in cost savings for government. As the Press Council has suggested, it may be appropriate for some funding to come from government, with the remainder provided by current Press Council members, broadcasters and new members. The ACMA will only need to play a minimal role in cases of repeated breaches by broadcasters.
- Complainants would have the benefit of a single destination.
- An independent body committed to fast resolution of as many complaints as possible (without the need for formal panel consideration or statutory decision-making) is likely to improve significantly the experience for complainants and the community generally.

While this is not the place to set out a detailed plan for such a scheme, some further aspects are mentioned below.

- The movement of news and comment to an independent body could be achieved by changes to the current regulatory scheme under which licensed broadcasters would be required to

participate in the scheme (similar to the way telecommunications carriers and carriage service providers are required to participate in the Telecommunications Industry Ombudsman scheme). However, it would be preferable for this change to be part of a more fundamental review of broadcasting regulation in which the existing "categories of broadcasting services" are replaced by arrangements better reflecting the current media landscape. An example of recent thinking on new regulatory frameworks is provided in Lara Fielden's report for the Reuters Institute for the Study of Journalism at Oxford University.[18] Fielden proposes a hierarchy of three categories of service, each building on the obligations of the one below. While public service broadcasters are required to comply with the highest category, other businesses may opt in to either of the two categories above the baseline category of existing legal obligations relating to trespass, surveillance, privacy etc. Fielden's summary table of this hierarchy, which is useful in considering regulatory obligations generally, is included in the Attachment to this submission.

- Another useful analysis of how media might be regulated under a new framework is offered by the New Zealand Law Commission.[19] The NZLC pointed to a series of rights, privileges and exemptions given to media companies – justifiably – on the basis of their activities in producing news and comment. These include rights relating to court reporting, exemptions for privacy legislation etc. As the NZLC noted (and the Convergence Review also proposed in its Final Report), the giving of these privileges could be tied to membership of the self-regulatory scheme for news and comment. This provides an incentive for membership and is worth considering as an alternative to statutory compulsion, although further consideration would need to be given as to whether some entities would be compelled to belong to the scheme.
- Reporting on activities will be an important part of the new scheme. While it is appropriate to review regulatory compliance activities and to attempt to remove unnecessary administrative burdens, the movement of regulatory functions from government to an independent body must be accompanied by commitments to adequate reporting so the community can have confidence in the operation of the scheme. This should be regarded as a core requirement of conducting business in the sector (not as an optional extra) and could also be seen as an essential step in building trust and serving the social functions for which the various privileges are given.
- Appointments of industry and public members to the governing body should be by way of an independent appointments panel in the way appointments to the Independent Press Standards Organisation in the UK are now made by an Appointments Panel.

Issue 2.5 – The communications regulatory framework

The Issues Paper notes the Department's earlier questioning of the reliance on co-regulation as the preferred model of intervention. This is a reasonable question and, as explained above in relation to news and comment, there is potential for a regulatory solution independent of both government and industry. However, the suggestion that an increase in industry players, diverse products, new business models and changing consumer preferences of themselves make the ACMA's job of administering co-regulation more difficult is inaccurate and misses an important point about digital disruption. Given the stable number of licensed broadcasters that are subject to the ACMA's jurisdiction, the emergence of new players and products has not, of itself, made co-regulation difficult for the ACMA; it simply means the gaps in coverage make ACMA's efforts less effective.

In addition, it should not be assumed that the system for developing, registering and considering complaints under the industry codes of practice in Australia represents the optimum co-regulatory model. While this is not the place for detailed analysis of this issue, improvements could be made to the co-regulatory system under the Broadcasting Services Act; a review of the effectiveness of the system – including its strengths – should be conducted before any decisions are made to adapt it.

As indicated in the introduction to this submission, the regulatory framework as a whole requires attention. The example of news and comment shows how a new arrangement may more effectively serve the public interest by bringing broadcasters into a common system with print and new online publishers. And while regulation of ownership and control will always need to be subject to statutory regulation, new ways of considering concepts such as "influence", "reach" and "voice" may suggest changes to current regulatory arrangements which better meet contemporary industry conditions and community expectations.

[18] *Regulating for Trust in Journalism: Standards regulation in the age of blended media* (November 2011). http://reutersinstitute.politics.ox.ac.uk/publication/regulating-trust-journalism

[19] *The News Media meets 'New Media'*. Report No. 128 (March 2013). http://r128.publications.lawcom.govt.nz/

In the UK, Ofcom research and consultation on methods of measurement is more advanced. Its latest consultation paper sets out a framework that includes three quantitative measures relating to news content (availability, consumption and impact) as well as a qualitative measure referred to as "contextual factors" (e.g. funding models, internal plurality). It recognises three different types on online news source: content originators, content aggregators and online intermediaries.[20]

In Australian, the Convergence Review was a valuable contribution to thinking on these issues. In a more recent paper, the Department provided a very useful list of indicators for measuring audiences across media platforms (see Policy Background Paper No.3, *Media Control and Ownership*, June 2014). The Department's reworking of the ACMA's research on "enduring concepts" is also useful. The recognition of the importance of access and participation, diversity, community standards and systems for complaints handling (alongside competition, efficient allocation of resources etc) is welcomed.

However, emerging pressure points that arise from the convergent media industries (for example, subscription-video on demand services and newspapers that offer television-like services) are yet to be addressed. Before deciding how the regulator should act and what resources it will need to do its job – or even how legislation, co-regulation or self-regulation should be used – consideration should be given to how these and other new services, as well as existing broadcasting services, should be treated in any revised convergent media regulatory framework.

[20] See *Measurement Framework for Media Plurality*, op cit, pp13-15 and 21-22.

Attachment

Lara Fielden, Summary of proposal, *Regulating for Trust*, p.126.

Standards Mark	Delivery/provider	Requirements	Benefits	Regulation
Tier 1 Premium 'public' content	**Compulsory** requirements for public service (publicly or privately owned) TV, radio, VOD and related online/electronic content.	Comprehensive statutory requirements including protection of minors and vulnerable adults, offence, accuracy, impartiality, incitement, fairness, privacy and commercial communications. Equivalent to the requirements of the current Ofcom Code (and therefore implementing the AVMS Directive), enabling adults, protecting children.	• Provision of content (across platforms) that is subject to consistent, comprehensive standards that safeguard informed, democratic decision-making as well as wider entertainment and information.	**Statutory 'premium standard' regulation** Comprehensive standards required of public service content providers across platforms (and elected by other providers); framed in legislation; administered and enforced by a regulator with statutory powers.
	Opt-in for non-public service commercial television and radio; newspapers; VOD; and other online/electronic content.		• Opt-in providers benefit from favourable association with public service content; differentiation from Tier 2 and 3 content; EPG prominence and PSB multiplex access for broadcasters; demonstration of values and excellence for others including the quality press.	
Tier 2 Ethical 'private' content	**Opt-in** for non-public service commercial TV* and radio*; VOD providers*; newspapers and other online/ electronic content (*denotes also subject to the compulsory requirements of Tier 3).	Requirements could include privacy, fairness, separation of fact and opinion; accuracy in news, right of reply, prohibition on incitement, some commercial restrictions, protection of minors, standards on ethical practices (Includes some requirements compulsory for broadcast and/or VOD services as set out in Tier 3).	• Provision of content (across scheduled and VOD services, online and print newspaper offerings and new media providers) that is subject to consistent, ethical standards readily understood by consumers. • Incentivised through, for example, Tier 2 membership being taken into account by the courts in privacy proceedings; accreditation in relation to court and other reporting; favourable advertising and search engine associations; potential charitable and taxation concessions; differentiation from Tier 3 and unregulated content; and, for broadcasters, associated EPG positioning.	**Independent 'ethical standard' regulation** Standards framed by industry; administered and enforced by a regulator recognised in statute but whose powers derive from the voluntary acceptance of its jurisdiction by Tier 2 members. Broadcasters and VOD providers in breach of their Tier 3 basic requirements would be referred to the Tier 3 regulator.
Tier 3 Baseline 'private' content	**Compulsory** requirements for privately owned TV, radio and VOD services.	A slim set of statutory requirements which could include right of reply, prohibition on incitement, some commercial restrictions, protection of minors (implementing European requirements and providing a baseline for radio).	• Provision of content to which a consistent baseline of standards applies (across scheduled and VOD services). Implements the European AVMS requirements.	**Statutory 'baseline' regulation** Standard s consistent with European requirements required of some providers, elected by others; administered and enforced by a regulator with statutory powers.
	Opt in for currently unregulated providers.		• Different rates 'opt in' content, including newspaper offerings, from unregulated content.	
Unregulated content	Providers not electing, or caught by, Tiers 1 to 3	Criminal and civil law applies (and any ad hoc arrangements outside of the tiered framework).	• Unregulated content readily distinguishable from regulated content carrying the Tiers 1 to 3 standards marks, enabling consumer and provider choices.	Bodies such as the IWF continue to work to minimise criminal content availability.

Figure 10.2: Summary of Proposal for an Eventual Cross-Platform Values-Based Standards Framework under a New Communications Act