



AMTA

**Australian Mobile
Telecommunications
Association**

Submission to the Department of Communications and the Arts
Review of the Australian Communications and Media Authority
(ACMA)

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Background

The Australian Mobile Telecommunications Association (AMTA) is the peak industry body representing Australia's mobile telecommunications industry. Its mission is to promote an environmentally, socially and economically responsible, successful and sustainable mobile telecommunications industry in Australia, with members including the mobile Carriage Service Providers (CSPs), handset manufacturers, network equipment suppliers, retail outlets and other suppliers to the industry. For more details about AMTA, see www.amta.org.au.

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>.

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1 Introduction

AMTA and Communications Alliance (the Associations) welcome the opportunity to make comments on the Department of Communications and the Arts (the DoCA) *Review of the Australian Communications and Media Authority* (the Review).

The Associations welcome the Review and are supportive of many of the Draft Proposals. We contend that the implementation of these recommendations will facilitate the ACMA's effective execution of its functions.

In particular, the Associations are supportive of the introduction of measures to enhance the ACMA's performance. In particular, the Associations support the following Draft Proposals:

- to articulate the ACMA's regulator principles - this will serve to provide important clarity with regard to the ACMA's role and regulatory approach pending further consideration of objectives that will arise from review of the substantive legislation the ACMA administers; and
- to enshrine in legislation a number of 'Regulator Performance Principles'. In addition to the Principles proposed at Draft Proposal 18, the Associations would include principles relating to reducing duplication, the promotion of outcomes-based regulation and to promote engagement with innovation.

The Associations also strongly support Draft Proposal 27 - the need to reform the communications Regulatory Framework over the longer term. The Associations consider that any changes to the ACMA should not compromise the longer term objective to reform the communications regulatory framework.

1.1 The Communications Market in Australia

The communications industry is necessarily an innovative and dynamic sector of the economy. It is also a mature, highly regulated sector and this regulatory environment is complex. The industry has generally been regulated in silos across telecommunications, broadcasting and radiocommunications. The Associations advocate outcomes-based regulatory reform which promotes a more competitive, responsive and innovative communications market.

1.1.1 Self-Regulation in the Context of the Communications Sector

The Associations note that in relation to telecommunications there is currently a legislative requirement for the ACMA to promote the greatest use of self-regulation where practicable. In its Occasional Paper on 'Optimal Conditions for Effective Self- and Co- Regulatory Arrangements', the ACMA notes:

"In the telecommunications sector, a key policy intent is that the sector 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 [industry participants]'.

Under the Broadcasting Services Act 1992, a key policy intent is that the broadcasting and internet sectors be regulated in a way that ‘does not impose unnecessary financial and administrative burdens’ on industry. To that extent, the relevant legislative schema requires the ACMA to give industry an opportunity to develop self-regulatory solutions before other forms of intervention are considered.¹

The Department of Communications and the Arts paper ‘Regulating Harms in the Australian Communications Sector’ states:

As noted previously, while the regulatory policy incorporated in the Telecommunications Act 1997 promotes the greatest practicable use of self-regulation, in reality the dominant form of intervention in the telecommunications market remains through black-letter law and co-regulatory codes of practice... Similarly, there are currently few issues in the television and radio broadcasting sectors that are handled completely by industry alone (although some advertising content on these mediums is handled through self-regulatory arrangements).

This is perhaps surprising given that each sector is relatively well-organised and mobilised: there are incentives for taking issues outside the co-regulatory and black letter law environment; and, in some areas there has been a strong level of compliance for many years.... It may be timely for industry to ask itself about how it could make greater use of self-regulation and engage with consumers and Government on the issue in the context of the current discussion on deregulation.”²

The Associations contend that the self-regulatory model has not be used to its fullest. Despite this, there are examples of success in telecommunications self-regulation.

Case Study: Communications Compliance

Communications Compliance (CommCom) is an independent compliance monitoring body established under the Telecommunications Consumer Protections (TCP) Code in (C628:2012 – now C628:2015). The TCP Code contains a set of rules to ensure the protection of consumer rights and to promote good customer service and fair outcomes for consumers. CommCom “seeks to assist CSPs with guidance on how to comply with the Code and to provide an overview of industry compliance”.

CommCom reports that in 2015, 391 CSPs lodged compliance documents with CommCom. Further, in the Telecommunications Industry Ombudsman’s latest (2014-15) annual report, it was noted that there were 10.5 per cent fewer new complaints than in the previous financial year and 35.7 per cent fewer than in 2011-12. The number of new complaints was the lowest since 2007-08.³

Conversely, the Associations can highlight instances where the opportunity for self-regulation was short-circuited by the imposition of a heavy-handed, regulatory approach, such as the International Mobile Roaming (IMR) Standard. The IMR Standard was imposed on industry, at a time when industry was already implementing market-based solutions to a recognised consumer

¹ http://www.acma.gov.au/webwr/_assets/main/lib311886/self-_and_co-regulatory_arrangements.pdf

² <https://www.communications.gov.au/publications/regulating-harms-australian-communications-sector-policy-background-paper-no2>

³ <https://annualreport.tio.com.au/performance/complaint-numbers>

issue. The IMR Standard has since been amended by the ACMA in an attempt to rectify its prescriptiveness which industry members maintain stifles innovation and the ability to flexibly meet the needs of consumers.

The Associations contend that it is appropriate to consider, as a matter of principle, whether there are opportunities to extend the use of self-regulation. However, we note that the Review's focus is fragmented, highlighting particular issues which may be candidates for self-regulation.

The Associations contend that there should be a degree of confidence in the ability to transfer aspects of regulation to industry for 'self-regulation'.

1.2 The ACMA's Operating Environment and the Case for Further Regulatory Reform

(Draft Proposal 27): to enable the communications sector to reach its full potential as an enabler of innovation and productivity, the Government commence a coordinated programme of regulatory reform to establish a contemporary communications regulatory framework.

The Associations strongly support Draft Proposal 27 identifying the need for a coordinated programme of regulatory reform.

The current regulatory framework needs significant reform to provide the ACMA with the appropriate tools to regulate in an environment where new platforms, technologies, services and convergent forces continue to pose new challenges. Implicit in this challenge is the fact that government policies, once put in place, are typically difficult to modify, and any fixed regulatory scheme that for today is difficult to 'future-proof'.

The Associations note the challenge for policy makers to devise a new regulatory structure that will protect consumers while encouraging vigorous competition and supporting ongoing innovation and that will remain relevant over time.

2 Design of a Contemporary Regulator

2.1 Remit

(Draft Proposal 1) The Review proposes that the ACMA's remit should cover all layers and this should be clear.

The Review proposes that the ACMA Act be amended to clearly define its remit across four 'stacks' of interdependent layers, namely: applications/content layer; devices layer; transport layer; and infrastructure layer.

The Associations note that, while there is some rationale for the ACMA to be granted powers across the 'layers' of the communications industry, it is also important to contemplate whether there are any inherent risks associated with granting broad, generic powers.

As stated in the Communications Alliance submission of August 2015:

"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 20115 (which does, however, provide an extensive list of the ACMA's functions), nor elsewhere".

It is noted that the structural change and evolution of the communications industry has had a profound impact on the way in which the ACMA can perform its functions. Currently, outdated, inconsistent, sectoral-based regulation prevents the implementation of optimal regulatory outcomes. The Associations consider that it is essential that this inconsistency is resolved and in particular that the Regulator is focused on a transition to outcomes-based regulation.

2.1.1 Limiting the ACMA's Remit

The communications industry is evolving in ways that make it even more pervasive throughout the economy. This trend will be further fortified by the emergence of the Internet of Things (IoT) – as connected devices multiply and create new business models, applications opportunities and risks. In this context, it will be vital that the regulation of 'communications' is clearly demarcated from the regulation of other parts of the economy (notwithstanding the fact that the Australian Consumer Law touched all sectors). Clearly defining the remit of the communications regulator – as opposed to other regulatory bodies – is a fundamental necessity. The Review does provide some assurances regarding the scope of expansion of the ACMA's remit:

"This remit should be interpreted from the perspective of the communications industry enabling activity in other sectors of the economy, but it would not extend into these other sectors..." (p8)

...

...the ACMA's role will require it to monitor activity across all these layers and understand how they interact to deliver services and content to end users. However, this does not mean that it should be involved in regulation at each layer..." (p32)

2.1.2 ACMA Accountability

Conferring on the ACMA such a broad remit needs to be tempered by appropriate constraints to ensure that regulatory intervention is not the default procedural approach of the ACMA. Regulatory consistency and certainty are necessary precursors to any company wishing to invest and operate successfully in a regulated sector.

As such, the Associations support the Regulatory Principles proposed at Draft Proposal 18 and consider that expanding the remit of the ACMA must be considered while ensuring that the risk of regulatory overreach is mitigated.

Further, the Associations consider that it is important to avoid a situation in which a regulator has broad powers and can apply these without appropriate accountability. The introduction of the Government's Regulator Performance Framework is an important commitment to reduce the cost of unnecessary or inefficient regulation imposed on business. Consistent with Communication Alliance's submission in August 2015, we consider that:

"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."

2.1.3 The Need for Long-Term Changes to the Regulatory Framework

Finally, it is noted that the remit of the ACMA is being considered at a time in which there is recognition that the broader regulatory framework needs to be reformed. At Draft Proposal 27 the Review states: *"To enable the communications sector to reach its full potential as an enabler of innovation and productivity, the Government commence a coordinated programme of regulatory reform to establish a contemporary communications regulatory framework"*.

The Associations note the need for broad changes to the regulatory framework over time. These long-term changes are essential to ensure that the regulator has the right regulatory tools at its disposal. Once this programme of work is completed, it will doubtless be necessary to re-visit the remit of the ACMA to ensure consistency between the framework and the ACMA's areas of activity.

2.2 Functions:

As a general comment, the Associations consider that each of the Draft Proposals relating to the functions of the ACMA – whether to devolve current functions or introduce additional functions – must be considered on its merits. Further, consideration must be given to any unintended consequences resulting from a change in activities or functions.

2.2.1 CyberSecurity

(Draft Proposal 2) Cybersecurity program moved to Attorney Generals (along with staff and funding) (p36-37)

The Associations are not persuaded that the Draft Proposal to consolidate cybersecurity functions under the remit of the Attorney-General's Department will deliver the best outcome for industry.

As is apparent from the wide ranging and detailed proposals in Australia's Cybersecurity Strategy, engagement with industry in relation to cybersecurity involves considered strategy, the implementation of rules and policies (for example in relation to interception capability and mandatory data retention), the management and coordination of programs (for example the Australian Internet Security Initiative and proposed government health checks) and community engagement.

Development and implementation of overall strategy and coordination of rules and programs with law enforcement and national security infrastructure seems well placed with the A-G and Department of the A-G. However, the industry-related programs associated with information sharing, network regulation and management, and community engagement seem well placed with the ACMA.

The ACMA has a history of managing elements of this broad policy area – including areas relating to education - with success and has the requisite technical knowledge in narrow aspects of cyber-security to ensure successful policy outcomes. Also the technical expertise that exists within ACMA to support its role in the management of spectrum and telecommunications licensing and regulation are a resource necessary for the proper practical engagement with industry on security. Moreover, Industry also values formal as well as informal consultative processes at the technical expert level that the ACMA has been able to offer in the past (which Industry would see strengthened and streamlined as per this submission) and that would be difficult to replicate in the more formal settings of the Attorney General's Department.

Attorney-General's Department would need to develop many of the capabilities that already exist with ACMA in order to take over its functions. Further, there is a question as to whether cybersecurity sits wholly within the remit of a policy department or a regulator. For example, would matters relating to illegal, classified or harmful content also be moved to the Attorney-General's Department? Where exactly would the line of demarcation lie? The replication of current ACMA capabilities together with a potentially shared remit raises the issue of potential duplication of expertise and overlap.

The rationale for moving these functions needs further consideration and industry would caution consolidating this policy area without considering the implications of such a change.

2.2.2 International Engagement

(Draft Proposal 3) The Bureau of Communications Research assume the lead in taking forward research about the emerging environment and market trends,

with the ACMA's research focusing on support the effectiveness of regulatory functions and harms affecting business and consumers.

and

(Draft Proposal 4) The DoCA be responsible for head of delegation roles to key international policy-setting forums, including WTC and clear guidance and negotiating parameters be provided by the DoCA to heads of delegation (p38)

The Associations note that Draft Proposals 3 and 4 reflect the position advocated by Communications Alliance in its submission of August 2015. Namely, 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..."

and

"it is recommended however, that – in line with the practice 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."

The Associations are supportive of any efficiencies that can be gained through the consolidation of research activities. Further, it is appropriate for the Bureau of Communications to lead research relating to market trends and the ACMA's research to focus on potential consumer harm and regulatory functions.

The Associations are also supportive of the DoCA assuming responsibility for head of delegation roles. However, it should be noted that international representation and engagement is one part of the broader role of Government in relation to the development of, for example, spectrum policy. The role of policy development as it relates to international engagement must also be contemplated.

It is appropriate for the DoCA to assume responsibility for the development of spectrum policy more generally. That is, the DoCA should be invested in the decisions process relating to the way in which spectrum is used, not only representing these views at international fora. A prerequisite of the DoCA developing these positions should be actively engaging with industry to obtain formal input.

There should be a clear demarcation with regarding spectrum **management** by the ACMA. The spectrum management role necessarily requires technical capabilities in several areas, including interference management as well as economic analysis.

The ACMA should be properly resourced to continue this work. The Associations note that the Spectrum Review of the Radiocommunications Act and regulatory framework is ongoing. The Associations support a new regulatory framework for spectrum management that would define the ACMA's role clearly with regard to international engagement. Under the new regulatory framework, the Associations believe it would be the role of the Minister, with advice from the Department, to develop high-level strategic policy positions. These policy positions should be

based on a multi-stakeholder consultation process, to underpin Australia's engagement in international fora and used to guide the ACMA's preparations for participation in these fora.

The Associations recognise the ACMA's considerable experience and expertise in actively monitoring spectrum and technology harmonisation developments in international forums like the ITU, APT, 3GPP, GSMA, and IEEE. The Associations agree that engagement with the respective international bodies is essential both to facilitate global harmonisation and to promote Australia's interests.

Case study: 'Self-Regulation of Spectrum for Inclusion'

In the radiocommunications area there have been discussions over recent years about discrete bands that could be "self-managed" – for example, the TVOB/ENG bands, 1980–2110 and 2170–2300 MHz, used for television coverage of sporting events and other outdoor special events.

Television broadcasters, subscription and free-to-air, along with other local and international television production companies need access to this spectrum for such events, sometimes on a regular basis and sometimes on an itinerant basis. There are times, particularly when an event receives international coverage when the spectrum could be in great demand; the 2018 Commonwealth Games is an example.

In the UK, Ofcom operates a self-managed system for the management of its Programme Making and Special Events spectrum used in the in the UK for the same purpose as the TVOB bands here.

Licensing arrangements for TVOB spectrum in Australia have recently been settled for the current licence period. Under these arrangements licences have been granted to particular providers; but, in the case of the subscription television sector, with the intention that the allocation be shared about channel providers (in a self-managed way within the sector).

Nonetheless, in similar cases where a piece of spectrum is used by a small community of users for the same or similar purpose (either within or across sectors), an approach departing from the standard ACMA licensing arrangement could be more effective and efficient. The spectrum could be managed by the ACMA or industry, and in either case it would likely be a contracted third party which would manage the use of the band, for example, by taking bookings and allocating a centralised pool of spectrum on a time limited basis (for example for a the length of a sporting tournament) and collecting fees.

2.2.3 Revenue Collection

(Draft Proposal 5) Consider revenue collection function moved to ATO (Further work be undertaken to determine whether it may be more efficient for ATO to undertake revenue collection (39))

The Associations are, in principle, supportive of the work to determine whether efficiencies can be gained through the consolidation of revenue collection via the Australian Tax Office. However, if it is found that there can be efficiencies gained, it is our strong view that these

efficiencies should be returned to industry via a reduction in Government fees such as the Carrier Levy.

2.2.4 Outsourcing – technical standards, IPND, DNCR, Unsolicited Communications

(Draft Proposal 6) Within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self-regulation, in consultation with industry bodies – technical standards, Integrated Public Number Database (IPND); DNCR, Action on unsolicited communications (including spam).

The Associations are, in principle, supportive of increased self-regulation, where appropriate. However, it is important to recognise the difference between 'self-regulation' and 'outsourcing' of current functions of Government to industry to manage.

Self Regulation vs Outsourcing

'Self-Regulation', as noted in the Terms of Reference of the Treasury's Industry Self-Regulation in Consumer Markets stated:

*"Self-regulation includes those regulatory regimes which have been generally developed by industry (sometimes in cooperation with government but enforced exclusively by industry). **Self-regulation excludes explicit government legislation and regulation as well as regulation developed by government and handed over to industry for implementation**, although for the purposes of this Taskforce it could include co-regulation, where a scheme is developed by industry with some government involvement but industry is fully responsible for its implementation. Examples of self-regulation include: _ individual businesses choosing to adopt a standard; _ private institutions regulating themselves by a set of rules; and the _ introduction by industry participants of an industry-wide regulatory code.⁴*

The Associations support the Draft Proposal to '**examine whether...functions can be referred to industry**', so long as the work is carried out in close consultation with industry and this work is done in good faith, with no pre-determined outcome.

Further, it is imperative that if the industry is to assume responsibility for these functions, then industry is adequately compensated. The exercise of outsourcing current government functions to industry should not be an opportunity for passing these costs on to industry without appropriate reimbursement. The Associations would, as a principle, not support taking on any additional roles without the development of an appropriate funding/reimbursement framework.

2.2.4.1 Technical Standards

The Associations welcome the opportunity to explore opportunities to administer technical regulation in a more efficient manner. A detailed discussion of these opportunities can be found at Appendix A.

2.2.4.2 Unsolicited Communications

⁴ http://archive.treasury.gov.au/documents/1131/HTML/docshell.asp?URL=01_prelims.asp

Currently, the ACMA is the regulator responsible for monitoring all unsolicited communications transmitted via communications networks. That is, unsolicited communications sent by a business from any sector of the economy is monitored, investigated and enforced by the ACMA and its remit is not limited to the communications sector.

It is expected that these scenarios will become more prevalent as the communications sector's role of enabling technological innovation continues. 'Self-regulation' of this area must not result in the communications sector assuming responsibility for regulatory oversight of other industries.

2.2.5 Classification

(Draft Proposal 7) The Department to undertake further work on the potential to expand the ACMA's remit to include the functions of the Classification Board/Classification Review Board Scheme.

The regulation of content is a useful example to demonstrate the current complexities of the evolving communications market. That is, currently, as a result of disparate, sectoral regulation, the same piece content may be subject to different regulation according to the type of device it is being viewed on.

The Associations consider that the optimal outcome is for consistency across various platforms. However, simply shifting administrative functions, as proposed by the Review, is unlikely to resolve the broader issues.

To clarify, this is not to advocate an increase in regulation of media such as music or books, the content of which is not subject to classification regimes in the same way as television, films or games. Rather, the Associations note that with the emergence of on-demand consumption of content, the classification regime must be amended to ensure that the primary focus is on consumer education and consistency. A new classification regime should ensure that consumers benefit from information that is clear and consistent and is platform-neutral.

That is, in order to develop an appropriate regulatory framework, there needs to be a more substantive consideration of how content is classified and distributed as well as how citizens interact with content – including consuming (and complaining about) content. Moreover, the regulation of content has been further fragmented with the establishment of the Children's e-Safety Commissioner. There are now some types of content that are under the purview of this newly established body. The Associations would support a more thorough analysis of these issues.

The Associations contend that the principal focus should be the development simple, clear and consistent classification information to be applied uniformly across content and platforms. The administration of this regime – and who is responsible for its administration - is a second order issue.

2.2.6 Interactive Gambling

(Draft Proposal 8) Compliance and enforcement of Interactive Gambling Act move from AFP to ACMA. ACMA to handle all complaints relating to interactive gambling

services, conduct the same investigation process whether the content is hosted in Australia or overseas, enforce civil penalties for breaches of the Act (p43)

The Associations note that there is a considerable amount of work occurring in the area of online gambling. Specifically, the Government's response to the Review into Illegal Offshore Wagering.

The Associations also note that gambling policy is complex and often strays into areas of social policy which the ACMA may not be the appropriate regulator or have the expertise to manage.

Similar to the comments relating to unsolicited communications, gambling policy is a complex and pervasive policy area. Online gambling is one small element of a broader social issue and consideration must be given as to whether it is appropriate, in the interests of consistency, for the ACMA to be responsible for a subset of a larger social problem.

2.2.7 Economic Regulation

(Draft Proposal 9) that the current institutional arrangements for economic regulation of the communications sector be retained.

and

(Draft Proposal 10) that cross appointment arrangements between the ACMA and ACCC be strengthened to benefit both ACMA and ACCC decision making.

The Associations note and concur with the rationale provided for the recommendation to retain the status quo in relation to institutional arrangements for the economic regulation of the communications sector.

However, this does not negate the need for the ACMA to have a strong economic capability. Within the ACMA's remit are issues which necessarily require a capacity to undertake complex economic analysis. For example, the ACMA is responsible for the administration of spectrum auctions and spectrum pricing.

In relation to the ACMA's spectrum responsibilities, the Associations' response to the Spectrum Review stated:

"Assuming the ACMA manages the spectrum allocation process and the ACCC provides advice on spectrum allocation limits, the Associations recommend that the (proposed new Radcomms) Bill:

- ensure the ACCC has regard to the auction design, where an auction is used to allocate the spectrum, and the reserve prices in forming its advice to the ACMA;*
- mandate that the ACCC adopt a public inquiry process, publish and consult on a draft advice outlining its recommendations and then publish its final advice;*
- specify the test to be used by the ACCC in providing advice to the ACMA about whether competition limits should apply and if so what they should be;*
- require the ACMA to adopt the recommendation of the ACCC; and*
- extend protection from section 50 of the Competition and Consumer Act 2010 (Cth) (CCA) to all participants both if competition limits have been applied and complied with and if there has been an assessment that no competition limits should apply (because the latter would indicate that there is no competition concern justifying the imposition of any remedy).*

Finally, the Associations would like to point out that there is an inter-play between the tests used by the Radcomms Act and the CCA that is appropriate here, so some analysis of how these two pieces of legislation and the relevant tests and review mechanisms work together will be required."

While the rationale for a continuation of current arrangements is logical, the Associations are supportive of the Review's proposed actions to improve arrangements to support a competitive market. That is:

- a regulator principle in the ACMA Act to make sure the ACMA has regard to the impact of its decisions on competition, innovation and efficient investment (Draft Proposal 18);
- strengthening formal cross consultation between the ACMA and ACCC (p51); and
- that cross appointment arrangements between the ACMA and ACCC be strengthened to benefit both ACMA and ACCC decision making (Draft Proposal 10).

2.2.8 Consumer Protection

(Draft Proposal 11) the current institutional arrangements for the communications consumer protections be retained.

The Associations note the Draft Proposal to retain the current institutional arrangements for communications consumer protections. In this regard, the Associations would note that, while it may be appropriate to retain general consumer law with sectoral regulation, work can be done to improve reduce overlap and duplication of regulation. Further, the Associations contend that this principle, to ensure that overlap/duplication of regulation is minimised, should be enshrined within the Regulator Performance Principles of the ACMA.

Specifically, it is the Associations' view that there is considerable overlap between the overarching Australian Consumer Law, administered by the ACCC, and the Telecommunications Consumer Protection (TCP) Code. In 2014, Communications Alliance commenced a project to reduce the overlap contained within the TCP Code, as well as move to a more principles-based – rather than prescriptive – approach. Elements of these efforts were met with resistance from both the ACMA and the ACCC. In an environment where government was actively promoting deregulation, very little reform was achieved.

In our view, it highlights the necessity to ensure that there is a high degree of consultation between the ACMA and the ACCC.

2.3 Objectives

(Draft Proposal 12): That, as a priority as future reform is undertaken, the Government provide the ACMA with a clear set of overarching policy objectives to guide its decision-making.

The Associations are supportive of Draft Proposal 12. It is imperative that the ACMA is provided with objectives against which its performance can be measured. In terms of the ability to measure success and strive for continuous improvement, it is important to establish a set of criteria against which an organisation can be measured.

The Associations also consider that these objectives will be useful in shaping the strategy of the review of the regulatory framework (flagged at Draft Proposal 27). Conversely, it is likely that once a suitable regulatory framework is in effect, it may be necessary to re-visit these objectives to ensure that they remain appropriate.

2.4 Governance

(Draft Proposal 13): That the Commission model of decision-making be retained

(Draft Proposal 14) That the skill set be covered by Authority members be outlined in legislation to ensure an appropriate and diverse mix of abilities to respond to the future needs of the ACMA;

(Draft Proposal 15) That all members of the Authority be appointed on a full-time basis and that the Authority consist of a Chair, a Deputy Chair and at least three other full-time members.

(Draft Proposal 16) That the existing arrangements are maintained where the Chair is the Accountable Authority with an ability to delegate powers, duties and functions, to the extent permitted by the PGPA Act, to a CEO.

(Draft Proposal 17): That provision be made in the ACMA Act for the Authority to establish sub-boards to manage subject matter not requiring the full commitment of Authority, or to manage issues that would otherwise diminish the Authority's capacity to focus on its key decision-making or direction setting responsibilities. That the Chair of any such sub-boards be a member of the Authority but not be the Chair of the Authority.

The Associations are supportive of Draft Proposals (13) through (17) and note that – other than Draft Proposal 16 - these reflect the view within the Communications Alliance submission of August 2015.

In relation to Draft Proposal 16, the Associations support the Chair delegating powers, duties and functions to a CEO. That is, while the PGPA Act limits particular structural arrangements, the Associations support an arrangement in which there is – in practice - a separation of roles between a Chair and a CEO.

In relation to Draft Proposal 17, the Associations are supportive of such arrangements, if the sub-groups are empowered in such a way as to ensure greater efficiency of decision making. That is, it is hoped that if a sub-group were tasked with reviewing a particular issue, it would be only in unusual circumstances that the findings of the ACMA Authority would be different to the outcome of a sub-group review.

Further, it would be important to ensure that the sub-group structure - and accountabilities - is transparent to stakeholders. That is, industry would expect to have visibility of the various sub-groups and their workloads, as well as the opportunity to participate in sub-group structures as is appropriate.

3 Part Three: Enhancing Regulator Performance

3.1 Performance Outcomes for the ACMA

The Review proposes four desired performance outcomes for the ACMA:

1. Agile, timely and informed decision maker
2. Actions are targeted and commensurate with risk
3. Delivers continuous improvements of regulatory frameworks; and
4. Has the trust and confidence of stakeholders

The Associations are supportive of the performance outcomes for the ACMA. We would suggest that 'efficient' could also be included in the performance outcome number 1. That is, "agile, timely, efficient and informed decision maker".

3.2 Regulator Performance Principles

(Draft Proposal 18): Legislate the following four regulator principles in the ACMA's enabling legislation, proposed draft:

- *The ACMA have regard that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.*
- *The ACMA should apply a risk-based approach to regulation, compliance and enforcement activities. Regulatory intervention should be targeted, evidence-based and commensurate with risk.*
- *The ACMA should implement continuous review of regulation to reduce burden and streamline approaches where the benefits exceed the costs.*
- *The ACMA should be transparent in its actions and clearly indicate the priorities and objectives which inform its decision-making to regulated entities and the broader public.*

The Review proposes to establish a series of principles to address the way in which the ACMA goes about performing its regulatory functions. While the Associations support the introduction of regulator principles in legislation, it should be noted that the principles, as proposed in Draft Proposal 18, are not new concepts for the ACMA to take into consideration when contemplating regulatory intervention.

In the ACMA's 2010 Occasional Paper 'Optimal Conditions for effective self- and co-regulatory arrangements', it references the Commonwealth Government's 'The Australian Government Guide to Regulation' noting:

*"The development and choice of regulatory and non-regulatory tools is also guided by principles of good regulatory process endorsed by the Australian Government, and outlined in best practice guides. These require that the ACMA, along with all Australian Government agencies, clearly analyse the costs and benefits of undertaking regulatory action and identifies a range of feasible options—regulatory and non-regulatory—for achieving the stated objectives."*⁵

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<http://www.acma.gov.au/~media/Regulatory%20Frameworks%20and%20International%20Engagement/Report/PDF/Optimal%20conditions%20for%20effective%20self%20and%20co%20regulatory%20arrangements%202015%20edition.pdf>

Guidance on 'Best Practice Regulation'

There are a number of materials available to Government policy makers and regulators when contemplating intervention in a competitive market. For example:

The Australian Government Guide to Regulation outlines the 'Ten Principles for Australian Government Policy Makers':

1. *Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option.*
2. *Regulation should be imposed only when it can be shown to offer an overall net benefit.*
3. *The cost burden of new regulation must be fully offset by reductions in existing regulatory burden.*
4. *Every substantive regulatory policy change must be the subject of a Regulation Impact Statement.*
5. *Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals.*
6. *Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens.*
7. *The information upon which policy makers base their decisions must be published at the earliest opportunity.*
8. *Regulators must implement regulation with common sense, empathy and respect.*
9. *All regulation must be periodically reviewed to test its continuing relevance.*
10. *Policy makers must work closely with their portfolio Deregulation Units throughout the policy making process.*

Similar concepts were also contained within the Council of Australian Government's 2007 publication **'Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies'**. These Principles of Best Practice Regulation were established to provide guidance to standard setting bodies on best practice regulation making. These included:

1. *Establishing a case of action before addressing a problem;*
2. *A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;*
3. *Adopting the option that generates the greatest net benefit to the community;*
4. *In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:-*
 - a. *The benefits of the restrictions to the community as a whole outweigh the costs, and*
 - b. *The objectives of the regulation can only be achieved by restricting competition;*
5. *Providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;*
6. *Ensuring that regulation remains relevant and effective over time;*
7. *Consulting effectively with affected key stakeholders at all stages of the regulatory cycle;*
and
8. *Government action should be effective and proportional to the issue being addressed.*

The Associations consider that there may be some value in including some additional Principles within Draft Proposal 18. Namely:

- the ACMA should, where appropriate, develop outcomes-based regulation to allow flexibility in the way regulations are complied with and to future proof regulations
- the ACMA should have regard to other regulation and ensure that duplication of regulation is minimised; and
- the ACMA should have regard to international innovation and not impede the communications sector from engaging with international best practice

As such, while these principles – or principles similar to them - are not new, it will be useful to have these enshrined in legislation. Further, the Associations are supportive of the establishing a number of measures to ensure that there accountability relating to the ACMA's performance against these principles.

(Draft Proposal 19): that the Minister provide the ACMA with an annual Statement of Expectations and the ACMA respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government's expectations.

(Draft Proposal 20): That the Minister provide the ACCC with an annual Statement of Expectations and the ACCC respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government's expectations. (p67)

(Draft Proposal 21) That timeliness of decision-making be established as a key area of focus and accountability for future cycles of the ACMA's regulatory performance framework, and Government consider legislative amendment to support more timely decision-making, where necessary.

(Draft Proposal 22): that the ACMA publish information on the steps it takes to ensure stakeholders have a clear understanding of the relationship between its actions and its compliance and enforcement policy.

(Draft Proposal 23): that the ACMA publish a report to the Minister every two years on initiatives undertaken to identify and reduce regulatory burden on industry and individuals.

(Draft Proposal 24): that the ACMA produce a public report on steps taken to improve the transparency and consistency of its decision-making processes, and that implementation and stakeholder satisfaction be independently assessed by the end of 2017.

In relation to Draft Principles 19 and 20, while a majority of AMTA/CA members involved in the preparation of this submission are supportive of these recommendations, some members expressed concerns that the Statement of Expectations should not be used in any way that would jeopardise the independence of the Regulators.

The Associations are supportive of Draft Proposals (21) through (24). It is our view that measures relating to timely decision making and transparency of decision making will provide additional assurance to stakeholders regarding the ACMA's performance.

However, we consider that in relation to Draft Proposal 23, the ACMA should be required to publish an annual report to the Minister. Further, the task of reviewing and reporting on the reduction in regulatory burdens on industry should form part of the ACMA's self-assessment under the Regulator Performance Framework.

4 Resources

Draft Proposal (25) That it would be timely to review the policy objectives of revenue collection from the communications sector and evaluate whether new business models and OTT services are contributing appropriately.

Draft Proposal (26) That the ACMA should further analyse its cost base, in light of the proposed function change, to ensure it is efficiently delivering on its responsibilities and minimising costs to industry.

The Associations are supportive of Draft Proposals (25) and (26). However, we consider that the primary focus should be Draft Proposal 26, analysis of the ACMA's cost base to ensure that it is operating efficiently and minimising costs to industry. It is logical to conduct this analysis prior to any consideration of an appropriate model for reimbursement.

Once there are assurances that the ACMA is operating efficiently, it may be appropriate to consider whether the current revenue model is appropriate and all participants in the communications sector are contributing appropriately. Such an exercise should not simply be about identifying additional revenue streams for the ACMA.

4.1 The Right Resources - Ensuring the ACMA has the Right Capabilities

An assessment of the efficiency of the ACMA's operations must take into consideration the types of skills that the ACMA needs to perform the tasks within its remit. That is, the ACMA necessarily requires particular skill set to ensure that it is effective in its role and maintains the trust of its stakeholders.

- Spectrum management – the Associations contend that it is appropriate that the ACMA continue in its role managing spectrum. This requires specific technical radiocommunications capability in order to, for example, effectively manage interference issues as they arise.
- Technical Standards – the ACMA is required to have specific technical understanding relating to the way new technologies and products are introduced into the Australian market.
- Competition and economic analysis – as noted above, while it is important for the ACMA to engage with the ACCC with regard to competition, the ACMA must also possess economic capabilities. For example, the ACMA is currently responsible for managing spectrum auctions.

The Associations contend that the above 'technical' skills should not be eroded in the name of efficiency. The ACMA must be adequately resourced and any erosion of these skills will have a direct impact on the ability of the ACMA to perform its functions.

5 Conclusion

PROPOSAL	ASSOCIATIONS COMMENT	RECOMMENDATION
REMIT		
Draft Proposal 1 (Remit)	Ensure that any risks with granting broad, generic powers are mitigated.	Support
FUNCTIONS ANALYSIS		
Draft Proposal 2 (Cyber Security)	The rationale for moving these functions needs further consideration.	Support further consideration with industry input.
Draft Proposal 3 (Research)	Support any efficiencies and for Bureau of Communications to assume lead relating to market trends	Support
Draft Proposal 4 (Heads of Delegation)	It is appropriate for DoCA to assume responsibility for head of delegation roles	Support
Draft Proposal 5 (Revenue Collection)	Support work to determine if efficiencies can be made. Any efficiencies should be passed back to industry.	Support
Draft Proposal 6 (Self-regulation)	In-principle supportive of further self-regulation. Each candidate should be considered on its merit.	Support further consideration with industry input.

Draft Proposal 7 (Classification)	Support a consistent platform-neutral classification scheme	Support further consideration with industry input.
Draft Proposal 8 (Interactive Gambling)	Gambling policy is complex. It is unclear if it is appropriate.	Support further consideration with industry input.
Draft Proposal 9 (Economic Regulation)	Rationale for retaining the institutional arrangements for economic regulation of the communications sector is logical. Does not negate the need for the ACMA to have a strong economic capability.	Support
Draft Proposal 10 (Economic Regulation)	Cross appointment arrangements between the ACMA and ACCC should be strengthened.	Support
Draft Proposal 11 (Consumer Protection)	It is appropriate to retain the current cross institutional arrangements for consumer protections. However, there should be a regulator performance principle to reduce/minimise regulatory overlap and duplication.	Support with the addition of a principle to minimise duplication.

OBJECTIVES		
Draft Proposal 12 (Objectives)	The ACMA should have a set of objectives in order to assess its effectiveness. These objectives should be re-assessed subsequent to the longer-term reform of the communications regulatory framework to ensure that they remain appropriate.	Support
GOVERNANCE		
Draft Proposal 13 (Commission Model)	N/A	Support
Draft Proposal 14 (Skill Set)	N/A	Support
Draft Proposal 15 (Appointment of Authority)	N/A	Support
Draft Proposal 16 (Chair Accountable Authority)	The Associations support structural arrangements in which – as allowed by the PGPA Act – the Chair delegates powers, duties and functions to a CEO.	Support the Chair delegating powers to a CEO
Draft Proposal 17 (Sub-Boards)	Sub-groups must be empowered to ensure greater efficiency of decision-making	In-principle support

ENHANCING REGULATOR PERFORMANCE		
Draft Proposal 18 Regulator Performance	Addition of 'efficient' to performance outcomes. Include additional Regulatory Performance Principles.	Support with additional principles.
Draft Proposal 19 (SoE – ACMA)	The Statement of Expectations should not be used in any way that would jeopardise the independence of the Regulator.	
Draft Proposal 20 (SoE – ACCC)	The Statement of Expectations should not be used in any way that would jeopardise the independence of the Regulator.	
Draft Proposal 21 (Timeliness)	N/A	Support
Draft Proposal 22 (Compliance and Enforcement)	N/A	Support
Draft Proposal 23 (ACMA Report to Minister)	The ACMA should be required to provide an annual report to the Minister.	Conditional Support

Draft Proposal 24 (ACMA public report)	N/A	Support
RESOURCES		
Draft Proposal 25 (New Business Models Contribution)	Primary focus should be on Draft Proposal 26 (analysis of cost base). This should be conducted prior to any review of reimbursement model.	Conditional Support
Draft Proposal 26 (Cost Base analysis)	The ACMA should review its cost base. Focus should be on ensuring that the ACMA has the right resources and capabilities to undertake its functions.	Support
REGULATORY REFORM		
Draft Proposal 27	The Case for Further Regulatory Reform – important to provide the ACMA with the appropriate regulatory framework. Challenge for policy makers to devise a new regulatory structure that will protect consumers while encouraging competition and supporting innovation.	Support

Appendix A: Technical regulation

The Associations welcome the opportunity to explore ways where the administration of technical regulation can be carried out more efficiently and in a cost-effective way. We look forward to engaging with the ACMA over the next 12 months, in examining technical standard functions in the context of what functions may be contenders for self-regulation.

Where benefits arise from regulatory efficiencies and cost savings, these savings could be channeled back to the industry, for example through reduced Carrier licence fees and ultimately, savings for the consumer.

1 Roles and responsibilities

The ACMA manages the *Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015* (the TLN). This Instrument and the associated Standards form the basis for regulating the supply of customer equipment and customer cabling connected (or intended for connection) to a telecommunications network. The TLN specifies the compliance labelling and record keeping requirements and how suppliers' compliance records can be subject to inspection and auditing by the ACMA on request. The TLN also specifies the applicable technical standards for various types of customer equipment.

Customer equipment and cabling Standards have been developed and managed by Communications Alliance on behalf of the industry for the past 19 years. These Standards are drafted by technical experts from a wide cross-section within the communications industry, including Carriers, CSPs, equipment suppliers and test laboratories. Once industry has agreed to the requirements for these Standards, they are published by Communications Alliance as voluntary standards.

The ACMA's role in the development and application of these Standards is seen to be twofold; to provide regulatory advice during the development and once published, the drafting of the instruments (i.e. ACMA Standards that mandate compliance with the Communications Alliance Standards) to give the Communications Alliance Standards regulatory status. As the development of technical standards is already being carried out by industry, the remainder of the technical regulatory functions centre around the enforcement of compliance duties to ensure that suppliers meet their obligations under s376 of the *Telecommunications Act 1997*.

It is important to identify the specific roles of the ACMA that naturally fall under the functions of a regulator. The Associations recognise that there are certain functions which need to remain within the powers of the ACMA. The management of the radiocommunications, EMC, EMR and equipment safety Standards that are published by Standards Australia would be considered to be an area where the Associations

believe the ACMA performs a critical role in managing the health and safety of the general public in the use of communication services.

2 Resourcing regulations

The Associations are aware that with the reduction of resourcing over the years within the Technical Regulation section of the ACMA, there is an increasing reliance on industry self-attestation of equipment being connected to the telecommunications networks without a comparable level of inspection and auditing being carried out by the ACMA. Australian Standards are based on or reflect international Standards where achievable, noting that national variations are incorporated to meet local technical and regulatory conditions. With the increasing supply of equipment to the Australian market from global manufacturers, there is an inherent reliance on the expertise of global partners to meet these local conditions. One outcome of this is that there is a decreasing pool of local knowledge here in Australia and with that, an increasing risk of equipment non-compliance.

The recent ACMA consultation concerning in-home powerline telecommunications (PLT) devices provides a case in point. The ACMA has recently undertaken an audit of suppliers of these devices and found that the compliance investigations demonstrated that there was a systemic non-compliance issue with the supply of these devices in Australia. Although these devices have been supplied to the Australian market for many years, suppliers were not able to provide suitable evidence that their products complied with the relevant radiocommunications emission Standard, i.e. AS/NZS CISPR 22 or AS/NZS CISPR 32 or their international or European equivalents. This suggests a regulatory failing, in part due to under-resourced compliance processes to effectively manage equipment in the Australian market. This observation is not a reflection on the competence and diligence of the ACMA staff but indicates that there may be lack of technical resourcing which the ACMA has enjoyed and used to great effect in past years.

Notwithstanding the discussion around the management of technical regulatory functions into the future, one activity that should be considered that would have an impact on the level of compliance is for the ACMA to undertake more random audits of equipment suppliers. A sound regulatory regime needs to be backed up by a robust compliance scheme. An increasing focus on imposing fines on non-compliant suppliers would get the attention of the suppliers, provide a deterrent in the supply of non-compliant devices and provide a source of revenue for the ACMA.

3 Opportunities for industry self-regulation

In reviewing the proposal for the ACMA to examine the referring of the technical standard functions for self-regulation, the Associations wish to draw out a number of issues for the Department to take into consideration.

3.1 Technical Standards and Industry Codes

Industry self-regulation within the telecommunications sector is underpinned by two distinct areas of legislation within the *Telecommunications Act 1997*.

Part 6 of the *Telecommunications Act 1997* provides the ability for the ACMA to place obligations via industry Codes on nominated sections of the telecommunications industry on the services that they provide to the Australia market. These Codes centre on managing behaviour of, for example Carriers/CSPs, in providing telecommunications services to their customers.

Part 21 of the *Telecommunications Act 1997* provides the ability for the ACMA to specify requirements via technical Standards that equipment suppliers have to meet in the supply of their products for connection to Australian telecommunications networks. The risks being managed by the technical regulation framework are addressing aspects of the Australian market that are quite distinct from those by industry Codes. Technical Standards address the risks being mitigated under the ACMA's *Heads of Power* including equipment safety, network integrity, STS interoperability and emergency services access. In addition, Technical Standards provide a level playing field for equipment vendors to be able to supply products to the Australian market. These arrangements facilitate active competition in the marketplace, specifically beyond the Carriers' network boundaries and within the customers' premises.

As different regulatory mechanisms lend themselves to different sectors of the industry, any changes to how technical regulations are managed needs to take into account these differences. The original drafters of the telecommunications legislation had the foresight to appreciate these differences, resulting in the regulatory arrangements that industry follows today. As an observation, it is probably worth considering the challenges that have been experienced with the implementation of the *Information on Accessibility Features for Telephone Equipment Industry Code (C625)* which is the only Code that has been registered under Part 6 and applied to equipment vendors who typically comply with regulations developed under Part 21.

3.2 Self-regulatory options

The Associations welcome the opportunity to engage with the ACMA in examining the technical standard functions in the context of self-regulation but wish to highlight the following observations and pitfalls:

- the ACMA will always have a role in managing technical regulations; the question is if there is an opportunity for change and to what extent. The objectives to be met are the long term interests of end-users which include ensuring communications devices are safe and effective.

- there are limits to the boundaries of self-regulation when applying to technical regulation. Workable solutions need to demonstrate that they are cost effective with identifiable net savings.
- additional costs brought about by industry taking on-board self-regulatory functions should not be borne by the industry. Concerns raised by Carriers with having additional burdens placed on them beyond their current interoperability testing for value-add services. Little value was seen in returning to the days of network managers issuing consent for each equipment supplier to be able to have their equipment connected.
- it would be an unreasonable expectation for hundreds of existing CSPs to take on an enforcement role where a regulatory approach would be more efficient and cost-effective.
- it would also be an unreasonable expectation for equipment vendors to obtain consent from hundreds of CSPs which would impose a huge burden on vendors. It should be noted that the justification for the development of AS/CA S042.4 was because of the challenges faced by mobile CE vendors in having to obtain consent from each of the then three mobile Carriers.
- any transfer of regulatory responsibilities to industry would require a risk assessment and audit of the current arrangements and identifying potential risks. It was felt that Government funds should also be made available to address costs arising from compliance issues that may surface.

4 Other issues

Although the Associations understand that the Draft Report is not suggesting as a part of this review to consider changes to regulations, we felt that there was one issue that was brought to our attention that could be addressed quite readily and would resolve an ongoing problem for our members.

Currently there is little or no guidance for industry on what are the appropriate safety Standards for network equipment (as opposed to customer equipment). Such guidance is provided by the ACMA for radiocommunications, EMC and EMR. Such guidance, maybe in the form of a factsheet on the ACMA website, would assist Carriers so they can direct suppliers to the appropriate safety requirements for the supply of network equipment.