



Submission by Free TV Australia

Department of Communications and the Arts

*Review of the Australian Communications and
Media Authority – Draft Report*

17 June 2016

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EXECUTIVE SUMMARY

- Free TV welcomes the opportunity to comment on the *Draft Report into the Review of the Australian Communications and Media Authority* (Draft Report).
- Free TV members are generally supportive of the Draft Report's overarching approach, which is directed towards principles of deregulation, reform, innovation and transparency.
- The draft proposals cover a broad range of matters. Some of these proposals are supported, others are supported only in part, and a number are opposed. More detailed discussion on the proposals are contained within the submission.
- Importantly, the Draft Report recognises that there are **fundamental structural deficiencies** in the existing, outdated communications regulatory framework. These issues were discussed at length in Free TV's initial submission to the Review. Commercial free-to-air television broadcasters strongly support the proposals in the Draft Report directed to addressing those deficiencies, in particular:
 - Review the policy objectives of revenue collection from the communications sector (in particular television broadcasting licence fees) (draft proposal 25);
 - Commencement of a co-ordinated programme of regulatory reform to establish a contemporary communications regulatory framework (draft proposal 27); and
 - Steps to enhance regulator performance, with a focus on minimising burden to industry, transparent and consistent decision making, and enabling competition and innovation (draft proposals 18-24).

These proposals should be **implemented as a priority** to remedy the regulatory disparity that exists in the current framework, and deal with the "misplaced emphasis" on traditional broadcasting and communications providers.

- Free TV supports a number of draft proposals concerning the Australian Communications and Media Authority's (ACMA's) functions, either in part or in full:
 - shifting policy-making functions and certain research areas to the Department of Communications to ensure that the ACMA is appropriately focused on regulation;
 - shifting primary responsibility for regulating the National Classification Scheme to the ACMA and streamlining those arrangements; and
 - the ACMA being given responsibility for handling advertising complaints under the *Interactive Gambling Act 2001* (IGA) before referral to the AFP (the introduction of civil penalties is not supported).
- The current co-regulatory system for Codes of Practice should be the subject of a recommendation in the Final Report to align commercial broadcasters with the national broadcasters.
- Commercial television broadcasters have some reservations around the discussion and proposals in the Draft Report which deal with governance and structure. A number of these proposals are not supported, including the recommendation in relation to full time Authority members.
- Free TV is concerned that a number of problematic issues faced by commercial free-to-air broadcasters and raised in its initial submission are not specifically addressed in the

Draft Report, including duplicate and overlapping legal and regulatory requirements (such as licence conditions that duplicate other existing laws).

Introduction

Free TV Australia (Free TV) represents all of Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, commercial free-to-air television is watched by more than 15 million Australians.¹

Commercial free-to-air television is the only platform that delivers high quality Australian programs including news, current affairs, drama, children's programs, sport and culture to all Australians for free.

Unlike many of the new competitors in the market, the commercial free-to-air industry is a major contributor of value to the Australian economy and a positive driver of social and economic welfare. It is also the most heavily regulated media platform in Australia. This regulatory disparity puts at risk the significant contributions that commercial free-to-air broadcasters make to Australian content production, the Australian production industry, jobs investment and the economy.

The Draft Report acknowledges this regulatory disparity, as well as the significant disruption and change that has occurred in the communications sector. Free TV welcomes the recognition in the Draft Report that broadcasters are currently facing a perfect storm of declining revenues combined with increasing costs.²

Despite this disruption however, television remains the most watched screen across the overall population, and takes the greatest share of viewing, with live broadcast (and playback within 7 days) accounting for 84.3% of all viewing.³

Free-to-air television also remains the most accessible form of entertainment and content for Australians. Subscription video on demand (SVOD) and pay TV are still only reaching a small proportion of Australians, and as at Q1 2016, 19% of Australian households still do not have an internet connection.⁴

It is therefore critical that the regulatory framework be recalibrated to enable commercial free-to-air television to remain sustainable and continue providing Australians with high-quality, culturally relevant services at no charge.

This submission addresses the issues raised in the Draft Report and is intended to supplement the earlier submission provided by Free TV in August 2015.

¹ Source: OzTAM and RegionalTAM, 5 capital cities, 5 aggregated regional markets, 1 January - 31 December 2015, total people, all day, metro and regional daily reach figures are combined to form a national estimate, excludes spill, total commercial TV, consolidated.

² Department of Communications and the Arts, *Draft Report – Review of the Australian Communications and Media Authority*, 2016; pp 25

³ Nielsen, Australian Multi-screen Report Quarter 1, 2016, pp 9

⁴ *Ibid.*, p7

Priority areas for reform

1. Licence fees

The Draft Report notes that revenue from the charges applied to traditional elements of the communications sector (including commercial free-to-air broadcasting) is likely to remain under pressure due to the emergence of increased competition.

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.

Free TV strongly supports this proposal, noting that a review of television licence fees is currently underway, as well as a review of spectrum pricing arrangements.⁵

The long term structural changes to the media market mean that television licence fees are no longer an appropriate regulatory intervention, and must be abolished as a priority. A number of overseas governments such as the United Kingdom and Germany have reviewed their free-to-air licence regimes in recent years, in recognition of the evolving market.

Even with the recent reduction of 25%, licence fees for commercial free-to-air broadcasters remain higher than in any other market on any comparative measure. Further reductions would empower broadcasters to innovate and compete more effectively, as they do in other sophisticated markets.

When measured in relation to spectrum usage on a measure of A\$ cents/MHz/Pop by country, Australian broadcasters pay about five times more than the second most onerous regime (Singapore), and 150 times more than the United States.⁶ On a percentage of revenue basis, Australia is almost twice as expensive as Singapore with other markets at significantly lower levels. This disparity is compounded by Australian broadcasters' content obligations, which are far more onerous than other regimes around the world.⁷

Removing broadcasting licence fees will address some of the regulatory imbalance in the media market, and enable a popular and valued Australian industry to continue to deliver highly valued services to Australian viewers.

Abolishing licence fees will also give all broadcasters a greater capacity to innovate and invest more in the services that Australians highly value and rely on, including, for example, Australian productions and local news services.

A healthy and vibrant commercial free-to-air broadcasting sector will result in positive outcomes for government, through a continued delivery of a strong economic surplus and a range of other positive public policy outcomes, such as continued investment in the production sector, ongoing local employment, and a strong Australian cultural voice on television.

⁵ Minister for Communications and the Arts, *Supporting Public Broadcasting and Creating a More Competitive Environment for Commercial Broadcasters*,

http://www.minister.communications.gov.au/mitch_fifield/news/supporting_public_broadcasting_and_creating_a_more_competitive_environment_for_commercial_broadcasters#.V1gHfGxXquU

⁶ Venture Consulting, *The Value of Free TV, the contribution of commercial free-to-air television to the Australian economy*, May 2015. Available at:

[http://www.freetv.com.au/SiteMedia/W3SVC751/Uploads/Documents/FreeTV Economic Study Report_Venture_Consulting.pdf](http://www.freetv.com.au/SiteMedia/W3SVC751/Uploads/Documents/FreeTV_Economic_Study_Report_Venture_Consulting.pdf)

⁷ Ibid.

2. Wholesale regulatory reform of the communications sector

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.

As Part Five of the Draft Report notes, the majority of the regulatory regime administered by the ACMA was developed in the 1990s, and has a “misplaced emphasis” on traditional broadcasting or telecommunications providers to achieve public policy outcomes.

The urgent need for reform of the outdated communications regulatory framework has been well documented by a number of reviews in recent years, including the *Convergence Review* and the ACMA’s own *Broken Concepts* series. There is universal agreement among industry participants and stakeholders that a review is required, even if there are differing views on what the outcome should ultimately be.

Free TV supports a comprehensive regulatory reform process, and agrees with the overarching philosophy in Part Five of the Draft Report that such a process would need to be carefully planned to enable and enhance commercial activity, innovation, and investment in the sector. Any such review must recognise and value the enduring relevance of commercial free-to-air television to viewers, the economy and Australia’s cultural voice.

The principles identified by the review and set out at page 82 of the Draft Report are appropriately focused towards minimising intervention and cost to industry and government, as well as parity for similar services. These principles adopt many of the matters raised by Free TV in its earlier submission to the Review, and are generally supported by Free TV members as a starting point for reform discussions.

Such a wide-ranging reform process will necessarily involve more detailed consideration of specific issues, and extensive consultation with relevant stakeholders.

For example, the Draft Report discusses the prospect of self-regulation for some industry participants as part of the reforms, however it assumes that this will be effected by the establishment of independent complaints handling bodies funded by industry (similar to the Press Council or the Advertising Standards Board).

While self-regulation may be an option explored as part of the reform process, it can only occur in the context of substantial deregulation. Such a move would not necessarily involve the duplication of existing models, or the simple transfer of some ACMA functions to an independent body funded by industry. Further consultation with stakeholders would be required to determine the appropriate parameters, jurisdiction and scope of any self-regulatory system.

3. Enhancing regulator performance

Free TV supports the draft proposals directed to improving the regulatory performance of the ACMA. These initiatives promote the overarching and desirable objective of minimising unnecessary regulatory burdens and interventions in the delivery of public policy outcomes.

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.*

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.

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 regulator 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 particular, commercial free-to-air broadcasters welcome the focus on transparency, consistency and timeliness. As noted in our earlier submission to the Review, there have been occasions where the current regulatory framework has not always been applied consistently by the ACMA, leading to a loss of confidence in the regulator and increased business costs.

A number of the draft proposals can be immediately adopted. For example, the ACMA now has discretion to investigate complaints received in relation to broadcasting matters. This welcome change allows the prioritisation of more serious complaints by the ACMA.

However, there is currently no visibility or public guidance for stakeholders as to how the ACMA exercises this discretion. Draft proposal 22 envisages that such guidance will be provided as a matter of course. This can be implemented without legislative amendment, to immediately improve transparency and confidence in the ACMA's decision making regarding investigations.

The Draft Report does not address the prospect of introducing an external merits review process for ACMA investigation outcomes. Currently, broadcasters can only seek review of such decisions under the *Administrative Decisions (Judicial Review) Act 1977*. This is an onerous and expensive process which is limited to jurisdictional, procedural or legal error. The availability of an external merits review process for investigations should be incorporated into any reform agenda.

Free TV also welcomes the focus on continuing assessment of the regulatory burden, with a view to minimising the impost on stakeholders. Implementing a legislative requirement to regularly undertake this examination (similar to the system in the United Kingdom) is supported.

Functional issues

1. Research and Policy

Draft proposal 3: That the Bureau of Communications Research assume the lead in taking forward research about the emerging environment and market trends, with ACMA's regulatory research programme focusing on supporting the effectiveness of regulatory functions and harms that are affecting businesses and consumers.

Research is fundamental to effective, evidence based policy development and implementation. Elsewhere in the Draft Report, the draft proposals are directed towards assigning responsibility for policy making to the Department of Communications and the Arts (for example, in relation to international spectrum policy), and reaffirming the ACMA's focus as a regulator first and foremost.

The draft proposal concerning the research function reflects this delineation and is supported by Free TV. It identifies that the BCR will be most appropriately placed to conduct some forms of research, while other areas should remain within the ACMA's research remit.

Research and analysis of market trends and the communications environment should be conducted by BCR, to support the development of future communications policy at a broader level.

It is also appropriate that the ACMA continues its own research functions regarding the effectiveness of its own regulatory operations and functions, including impacts on business and consumers. Such research (such as the Contemporary Community Safeguards Inquiry) can be useful to support the activities of the regulator.

If this proposal is implemented, the BCR and the ACMA should work closely to co-ordinate their research programs and ensure there is no overlap or duplication.

In implementing the Departmental research program, consideration should be given to introducing legislative requirements for regular market and consumer research, as exists in the United Kingdom. The resulting *Communications Market Report* which is produced annually by Ofcom contains a range of factual and statistical information and analysis across the breadth of the communications sector. This is an invaluable reference for all stakeholders.

Draft proposal 4: That the Department of Communications and the Arts be responsible for head of delegation roles to key international policy-setting forums, including the World Radiocommunications Conference, and that clear guidance and negotiating parameters be provided by the Department to heads of delegation.

Spectrum use and allocation is an increasingly contested area at both an international and domestic level.

As stated in Free TV's earlier submission to the review, the Minister and the Department should have overarching responsibility for setting spectrum policy, while the ACMA administers the regime determined by the Government and provides technical support where required. This includes representation at international forums such as the International Telecommunications Union and the World Radiocommunications Conference.

The Department should also give consideration to formally incorporating stakeholder views and representation at such events.

This is appropriate as the Government is accountable to Parliament and the public for their decisions, whereas the ACMA is an independent statutory body.

2. Operational matters

Deregulation: Review of co-regulatory approach to Codes of Practice

The current co-regulatory system of industry Codes of Practice should be a matter that forms part of the recommendations in the Final Report of the ACMA review. The Code registration process for commercial television broadcasters is expensive, time consuming and onerous. It should be revised in favour of a scheme in line with the national broadcasters.

The *Broadcasting Services Act 1992* (BSA) establishes a co-regulatory framework for broadcasters in Australia. When the BSA was introduced, the Explanatory Memorandum to the Bill noted:

*...It is expected that relevant broadcasting service industry groups will appreciate that it is in their interests to ensure that an appropriate balance is struck between the public interest in maintaining community standards of taste and decency, and licensees' desire to provide competitive services - such groups will be aware that the ABA will have the power to impose program standards...where it considers that codes of practice have failed or have not been developed.*⁸

However, the BSA requires a Code of Practice to be developed in consultation with the ACMA, and taking account of any relevant research conducted by the ACMA.⁹

Consequently, while industry groups develop the Codes and manage the various processes required, the ACMA is still very influential in the development of the Codes for certain industry sectors. In particular, a Code of Practice cannot be registered unless the ACMA is satisfied that it provides "appropriate community safeguards".¹⁰

Furthermore, the ACMA is empowered to make a Standard if it determines that the Codes of Practice are not operating to provide appropriate community safeguards, or no Code is determined in relation to a matter and the ACMA determines that there should be one in place.¹¹

In contrast, the national broadcasters are not required to consult the ACMA or conduct a public consultation process in the development of their Codes. The ABC and SBS Codes are developed and approved by their Boards, and simply notified to the ACMA.¹²

Recently, the ABC amended its Code to include classification zones that are more permissive than the changes that were the subject of intense scrutiny by the ACMA in the 2015 review of the Commercial Television Industry Code of Practice.

There is no evidence that the process currently employed by the ABC and SBS in setting their own Codes has caused significant levels of complaint, community detriment or policy failure.

Commercial television broadcasters should be subject to the same rules as the national broadcasters in the development of their Codes of Practice. The ACMA's role in the process should be limited to making a Standard where there is a demonstrated or persistent failure in the Codes.

⁸ Explanatory Memorandum to the Broadcasting Services Bill 1992, 66-67

⁹ Subsection 123(1) BSA

¹⁰ Subparagraph 123(4)(b)(i) BSA

¹¹ Section 125 BSA

¹² See: section 8(1)(e) of the *Australian Broadcasting Corporation Act 1983*; and section 10(1)(j) of the *Special Broadcasting Service Act 1991* (Cth), respectively.

Draft proposal 5: That further work be undertaken to determine whether it may be more efficient for another body such as the Australian Taxation Office to undertake the revenue collection functions currently performed by the ACMA.

The identity of a revenue collector is largely irrelevant where a revenue function involves the application of a formula and does not require particular industry expertise, or subjective assessment.

Nevertheless, broadcasters pay a range of other taxes and deal with the Australian Tax Office on those matters, so there may be some limited efficiencies for stakeholders in a single revenue collection point.

In any event, television licence fees as a revenue stream should be abolished, for the reasons set out above.

Draft proposal 6: That, 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 relevant industry bodies:

- *technical standards;*
- *Integrated Public Number Database;*
- *Do Not Call Register;*
- *Action on unsolicited communications, including Spam.*

As noted above, self-regulation is only desirable in the context of significant de-regulation. It does not merely involve outsourcing existing regulatory functions to industry.

It is not clear why these particular areas have been singled out for priority assessment of self-regulation, given that commercial broadcasters have significantly lower levels of complaint and higher levels of compliance.

For example, in 2014-15, the ACMA received more than 350,000 complaints under the Spam Act, resulting in over 6900 compliance activities (mostly informal warnings).¹³

In contrast, commercial television broadcasters received a total of 1,911 Code complaints – the lowest level in many years. The vast majority of these were resolved between the complainant and the broadcaster. Similarly, commercial television free-to-air broadcasters have excellent compliance records in relation to their other regulatory obligations, such as Australian content and captioning.

Industries with strong compliance records, such as commercial free-to-air broadcasting, should be prioritised for deregulation initiatives, which will also provide an incentive for those with weak compliance records.

3. Classification

Draft proposal 7: That the Department will undertake further work on the potential to expand the ACMA's remit to include the functions of the Classification Board and Classification Review Board Scheme.

¹³ Australian Communications and Media Authority *Annual Report 2014-15*; pp 77-78

Free TV supports the functions of the Classification Board and the Classification Review Board Scheme moving to the ACMA. It is more sensible for a single body to administer a harmonised classification scheme and the ACMA has existing expertise in classification matters for both online and broadcast material.

The vast majority of classified content consumed by Australians is on commercial free-to-air television, and classified in-house by commercial television networks. Viewer feedback provided to television stations allows in-house classifiers to be responsive to audience concerns, both generally and in relation to particular issues.

Due to their experience and understanding of audience expectations, in-house classifiers are also able to modify content and remove material which may be inappropriate for a particular classification or time-zone. The retention of autonomous in-house classification for television content should be an essential component of any revised classification framework.

This is in line with the overall approach of reducing regulation and shifting classification to a more industry-led model.

The Draft Report recognises that the current classification arrangements result in duplication and inconsistency, for example, in relation to the classification of DVDs by the Classification Board where the same content has already been classified for free-to-air television by a network. The proliferation of online content (both free streaming and SVOD) also raises a number of challenges for any new classification framework.

While it is desirable to reduce duplication, there may be instances where it is not appropriate for commercial free-to-air broadcasters to be bound by a classification that has been given by another entity.

As the Draft Report notes, further consultation will be required with stakeholders to ensure that any modernised scheme is practical and effective.

4. Administration of the IGA

Draft proposal 8: That the Interactive Gambling Act 2001 be amended to require the ACMA to:

- *Handle all complaints relating to interactive gambling services and advertisements;*
- *Conduct the same investigation process irrespective of whether the content is hosted in Australia or overseas; and*
- *Enforce civil penalties for breaches of the Act.*

Free TV supports a complaints regime under the *Interactive Gambling Act 2001* (IGA) that is administered by the ACMA, which then refers matters to the AFP for prosecution as required.

The current system, involving complaint handling by both the ACMA and Department of Communications and the Arts, is unwieldy and can lead to inefficiencies and inconsistencies when a complaint involves both a prohibited interactive gambling service and advertisements.

The recommendation to introduce civil penalties for breaches of the advertising prohibition is not warranted, as the existing regime provides sufficient deterrence. To the extent that a different approach to enforcement is considered necessary, Free TV recommends the development of industry codes under existing legislative structures.

The very high levels of compliance with the existing provisions of the IGA means that there is no demonstrated need for additional enforcement options. Free TV does not support any additional powers or penalties in relation to the advertising prohibitions in the IGA, at least in relation to broadcasters.

However, if the introduction of civil penalties is to be pursued, the regulatory framework should be amended so that it is applied consistently across platforms. This lessens the risk of operators choosing the least regulated forum to conduct their activities. Broadcasters should face the same regulatory regime as outdoor, print and online publishers. It is not equitable to have the same rules applying across the board, but with different penalty options for different platforms.

To implement a consistent approach across all media platforms, any introduction of civil penalties should also involve the removal of current provisions that are specific to broadcasters.

In particular, section 61FD of the IGA should be repealed and the additional enforcement measures available to the ACMA that are only applicable to broadcasting services should be removed. This will create a technology neutral framework for the regulation of interactive gambling service advertisements. A platform-neutral civil penalty regime can then be applied consistently by the ACMA.

5. Economic regulation of the sector

Draft proposal 9: That the current institutional arrangements for economic regulation of the communications sector be retained.

Draft proposal 10: That cross-appointment arrangements between the ACMA and ACCC be strengthened in order to benefit both ACMA and ACCC decision-making.

Draft proposal 11: That the current institutional arrangements for communications consumer protections be retained.

Free TV supports the ACCC retaining economic regulation of the communications sector, noting that the cross-appointment arrangements proposed in the Draft Report will address many of the industry concerns raised in the submissions.

The ACCC has existing economic expertise to continue performing these functions, and there is a benefit in the same principles and approach being applied across all regulated markets. In an era of convergence, treating communications differently could lead to business uncertainty for industry participants.

Increasing cross-agency co-ordination and communication appropriately balances the competing issues that are identified in the Draft Report.

Governance issues

1. Decision making

Draft proposal 13: That the commission model of decision making be retained.

Free TV supports the retention of a Commission structure for the ACMA. It is appropriate that most substantive decisions for the communications regulator are made in a collective manner by an independent statutory body, comprised of individuals with relevant expertise.

Decisions of a more routine nature should continue to be delegated to senior staff, a sub-board, or a single Authority member.

Independence in decision making by Authority members is critical to ensuring confidence in the process by the regulated entities. For this reason, Free TV does not support draft proposal 15, regarding full time membership. This is discussed in more detail below.

2. Membership

Draft proposal 14: That the skill set to 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.

Authority members should be drawn from a range of areas across industry. Diversity and relevant expertise in the regulated industries are important factors which underpin a robust commission model of decision making.

However, the prescription of skill sets for Authority members in legislation is not supported.

Prescribing certain skill sets for Authority members in legislation will mean that the Government will not have the flexibility or agility to appoint members who do not meet the criteria, even where it may be desirable to do so.

For example, there may be a need to appoint an expert in a newly emerged market which may not be envisaged in the legislation; or a situation may arise where a very suitable candidate becomes available for appointment, but does not meet the prescribed elements set out in the legislation.

The Government should be afforded maximum flexibility in the appointment of Authority members, without being limited by legislative requirements. Such an approach will also support the appointment of people who have expertise across more than one regulated industry.

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.

This draft proposal is opposed by Free TV members for two key reasons.

Firstly, it will limit the available pool of members. The ACMA (and before it, the Australian Broadcasting Authority) has benefited from industry practitioners and specialists serving as part time members. These part time members have made valuable contributions to the decision making processes, and effectively managed any conflicts of interest.

The requirement to serve on the Authority full time will substantially reduce the pool of suitable candidates, as industry practitioners or experts of the necessary calibre may not be in a position to give up their other professional activities.

The Draft Report itself highlights the need in the future for appointees who have expertise in developing technologies, or more than one regulated industry. Appointing just full time members would lose valuable industry perspectives that can only be achieved through part time membership. Continuing work in the communications sector whilst serving on the Authority ensures that a Member's knowledge and experience remains current and relevant to the decision making process.

If the quality of Authority members is to be maintained, the framework must allow scope to serve as a part-time member.

Secondly, it is likely that governance issues will arise if full-time members take more of a leadership or management role within the organisation itself. This situation is clearly contemplated by the Draft Report at page 61.

Similar concerns were recently raised in relation to the ACCC's existing structure in the Final Report of the *Competition Policy Review*:

The Panel sees a number of problems with the Commission's current governance. Commissioners appear to be too enmeshed in the ACCC's day-to-day decision making and so act like senior managers of the ACCC rather than independent directors. The Panel notes the ACCC's comments that Commissioners cannot direct staff recommendations (DR sub, page 100); however, this is not the nub of the Panel's concern. The Panel is concerned that enforcement decisions under the CCA are currently susceptible to 'group think' given the strong internal focus induced by the full-time nature of appointments to the Commission. The Panel is also concerned about the emergence of 'silos' in the ACCC's structure, which further narrows the focus of individual Commissioners.¹⁴

Free TV shares the concerns outlined in the *Competition Policy Review*. The independent nature of the Authority's decisions would be compromised (or seen to be compromised) if the Members were full time and involved in the day-to-day operations of the agency. For example, it is not appropriate to have decision makers participate in the investigation process, even in a supervisory capacity. This is particularly problematic if Members are designated to act as "specialists" in particular areas.

Free TV does not support the Authority being comprised only of full time Members, nor does it support the increased involvement of Members in the oversight of the Authority's work.

3. Management

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.

Free TV does not support the separation of the Chair and CEO roles. While it is appropriate for the Chair to delegate operational matters to a Chief Operating Officer (or similar Manager), this does not necessarily require a separate CEO to run the organisation.

Free TV supports the current arrangements, which provide the flexibility for delegation at the discretion of the Chair, without requiring a separation of management functions to a CEO.

4. Sub-boards

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 the 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.

Free TV supports any measure that will improve the timeliness and agility of the Authority's decision making process.

The creation of sub-boards to deal with specific issues, or a specific class of issues, is likely to achieve this outcome. In practice, the creation and operations of sub-boards should be subject to discussion and consultation with affected industry stakeholders.

Other matters

Draft proposal 1: That the ACMA's remit cover all the layers of the communications market, including infrastructure, transport, devices, content and applications.

¹⁴ Competition Policy Review *Final Report*, pp 464: <http://competitionpolicyreview.gov.au/final-report/>

While the “layers” identified are appropriate matters to be captured by the ACMA’s remit, further consultation and work must be undertaken on the detail and level of intervention applied to each of the layers.

In keeping with the principles underpinning the Draft Report and its overarching recommendations, the ACMA’s remit and its regulatory practice should be discharged using the minimum level of intervention necessary to achieve public policy outcomes.

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.

Free TV supports this draft proposal in principle, however the relevant policy objectives should be subject to industry consultation and engagement prior to being finalised and provided to the ACMA.

We have not provided comments on draft proposals 2 and 26.

Additional matters

There are a number of issues raised by Free TV in its earlier submission which have not been addressed in the Draft Report. Some issues, such as the need for merits review of certain ACMA decisions, have been canvassed in the discussions above.

However, there are additional significant matters that must be addressed as a priority in any reform program.

As a general principle, the regulatory framework that broadcasters operate within should not impose duplicate or complex layers of legal and regulatory requirements on broadcasters in relation to the same conduct.

Legal requirements that broadcasters are subject to in any event should not be replicated as licence conditions or incur additional penalties. Areas where duplication currently exists include the promotion of therapeutic goods, interactive gambling, and tobacco advertisements.

In particular, clause 7(1)(h) of Schedule 2 to the BSA should be repealed. The High Court decision in *ACMA v Today FM*¹⁵ effectively empowers the ACMA, an administrative body, to form an opinion about whether a broadcaster has committed a criminal offence in the absence of any determination by a criminal court and using a lower standard of proof. Where the ACMA exercises its power to form such an opinion, it can impose serious penalties as a consequence; including cancellation or suspension of a broadcaster’s licence.¹⁶

Due to the large range of offence provisions in State and Territory Acts, this provision is extremely broad, resulting in substantial levels of risk for broadcasters.

It is relevant to note that repeal of this provision would not alter the fact that broadcasters would be in breach of the law if they used their broadcasting services in the commission of an offence against a law of a State or Territory, and be subject to those laws in the same way as other organisations and citizens (including new competitors in the communications market).

Inconsistent Federal, State and Territory rules in relation to advertising and similar matters also pose a significant regulatory burden to broadcasters, noting that such restrictions do not often apply to new media.

Any reformed communications regulatory framework should cover the field, so that broadcasters are not subject to different obligations in each state.

¹⁵ *ACMA v Today FM (Sydney) Pty Ltd* [2015] HCA 7.

¹⁶ Section 143 BSA

Conclusion

The Draft Report foreshadows a significant transformation of the Australian communications regulatory framework in the near future. The communications sector and its participants are currently engaging in innovations and developments that were impossible when the regulatory regime was developed.

After a number of reviews, the need for reform is now urgent. Commercial free-to-air broadcasters and other regulated media platforms are struggling with the market disruption and regulatory disparity that currently exists.

Free TV looks forward to engaging with the Department as this reform process moves to the next stage.