

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to the
Department of Communications
and the Arts Draft Report

**Review of the Australian
Communications and
Media Authority**

Public Version

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INTRODUCTION

1. Optus welcomes the opportunity to comment on the Draft Report of the Review of the Australian Communications and Media Authority (ACMA) by the Department of Communications and the Arts (“the Department”).
2. Optus commends the Department on the Draft Report and is broadly supportive of many of the recommendations it makes.
3. Comment is provided below on those draft proposals that raise concerns, or on which Optus wishes to make additional commentary beyond that contained in its earlier submission.
4. The industry associations, Communications Alliance and the Australian Mobile Telecommunications Association, have made a joint submission to the Department on this matter. Optus is a member of both associations and supports the submission.
5. As noted in the earlier submission to the ACMA review, Optus believes that the outcome of this review must be changes which result in regulators which are structured and charged with the responsibility to nurture, facilitate and unlock the future potential of the communications industry in Australia, better support self-regulation and undertake ongoing reviews and action to reduce the substantial regulatory burden on industry.

ACMA REMIT

6. The Department’s proposal that the ACMA’s remit be divided across the four layers of the communications market is a common-sense approach. Further consultation will be required to clarify which entities fall within each of the layers and how the layers will be applied under the ACMA’s jurisdiction.
7. Optus believes when considering industry and regulatory reform all participants within the telecommunications industry should bear some of the compliance burden and, if necessary, scrutiny to the relevant regulation they are party to. An examination in the ACMA’s remit across market lines is likely to assist with this principle.
8. Under the current regime, with only limited licencing arrangements for certain categories of entities (e.g. carriers, spectrum holders), it is generally other entities such as the Telecommunications Industry Ombudsman not the ACMA which are used as the source of information on relevant carriage service providers, for example.
9. Whilst Optus does not propose to over-burden the industry and over-the-top providers, it would make sense for there to be some method by which all providers must register with the industry regulator before providing services to the Australian public. All registered providers should contribute a fee (even if it is a nominal amount in some cases) towards the ACMA’s functions, as opposed to carrier licensees bearing an undue financial burden compared to the rest of the industry.
10. The above ties in with Draft Proposal 25, to review the policy objectives of revenue collection from the sector and evaluate whether new business models are contributing appropriately.

ECONOMIC REGULATION

11. The Draft Report contains an extensive discussion on potential reform options for the economic regulation of the communications sector. The report considered three options, including maintaining the status quo. The Draft Report proposes to maintain the current institutional arrangements for economic regulation, namely, that it remains with the ACCC.¹
12. Optus had submitted that the current structures and cross-responsibilities between the ACCC and ACMA may not be optimal and have resulted in:
 - (a) Some misalignment of priorities and objectives and inconsistent decision making;
 - (b) An apparent overlap and duplication of activities; and
 - (c) A lack of flexibility or ability to respond to rapidly changing market developments.
13. Whilst Optus argued for structural reform aimed at refreshing the current institutional arrangements, we also see merit in the more targeted recommendations set out in the draft report. With some modest changes, we believe these could address the concerns highlighted above.
14. We address the specific recommendations below.

Strategic objective setting and consistency

15. It is important that the economic regulation functions of the ACMA and ACCC are appropriately focused, resourced and aligned towards the goal of improving competition and consumer outcomes. Optus, therefore, agrees in principle with:
 - (a) Draft Proposal 15: Members be appointed on a full-time basis.
 - (b) Draft Proposal 10: Cross-appointment between ACMA and ACCC be strengthened.
16. Optus fully supports the observation that “Providing Authority members with oversight of certain subject areas will create greater diversity in expertise on current issues.”² Optus also notes the comments that the cross-appointment mechanism could be ‘reinvigorated’ with the chair of the ACCC communications committee attending ACMA meetings; and a full-time ACMA member attending ACCC communications committee meetings on a regular basis.
17. However, we recommend some modest adjustments to the proposals to ensure they give full effect to the underlying problem they are designed to address.
18. In particular, the final recommendations should ensure that the cross-appointment results in the ACMA member being a voting member of the ACCC communications committee, and the ACCC commissioner being a voting member of the ACMA.
19. The Draft Report observes that the success of this depends on each agency adequately resourcing its capacity to contribute effectively to decisions. To overcome the resourcing issue, and the natural resistance for agencies to share power, Optus believes the best outcome would be to appoint a dedicated communications commissioner within the

¹ Draft Proposal 9

² Draft Report, p.61

ACCC and a dedicated economic regulation member in the ACMA – and that this appointment is the same person. This would also assist in addressing concerns raised around the ACMA's lack of economic regulation experience.³ An experienced economic regulation member could bring across their experience from the ACCC and ensure that the ACMA is cognisant of the competition and industry structure implications of their decisions.

Optus' proposal

20. In summary, Optus proposes that:
- (a) A Commissioner is appointed in the ACCC with primary responsibility for the communications functions in the Competition and Consumer Act, and communications-related consumer issues. This Commissioner would deal predominantly with communications and, preferably, not be appointed to the AER, or water or gas committees.
 - (b) A Member is appointed to the ACMA with responsibility for economic regulation and competition. This role will be to ensure that ACMA decisions take into account impacts on competition and industry structure.
 - (c) The same person be appointed to both positions, with full voting rights at the ACCC Commission level and the ACMA Board level.
21. Optus believes that these administrative arrangements would be an appropriate response to the problems identified by the review body in the draft report; they would also address the key aspects of the concerns Optus set out in its submission to the review panel.

ENHANCING REGULATOR PERFORMANCE PRINCIPLES

22. Optus agrees with the key finding that a clearer description of performance expectations relating to the ACMA's regulatory role will support better outcomes for industry and consumers. The Draft Report made two recommendations in response to this finding:
- (a) Legislate four regulator principles; and
 - (b) The Minister should provide the ACMA and ACCC with Statements of Expectations.
23. Optus supports the recommendation to legislate regulator principles, in the absence of an alternate mechanism, such as a supervisory board with independent, appointed membership, combined with disallowable instruments, but recommends slight changes to these specific recommendations. This is discussed below.
24. Optus disagrees with the recommendation that the Minister should provide the ACMA and ACCC with Statements of Expectation (SOE) and require the agencies to issue Statements outlining proposed compliance with the SOE. Such a proposal would undermine the fundamental principle of regulator independence, and could raise a conflict of interest in the context of the regulation of the NBN. This is discussed in more detail below.

³ Draft Report, p.46

Legislating regulator performance principles

25. Optus agrees with the recommendation to adopt legislated regulator performance principles. However, we have reservations over the proposed wording in draft proposal 18. It is important that any proposed wording be specific, measureable and enforceable.
26. The concept of legislated regulator principles is sound and should be supported. These five factors are the key elements of regulatory best practice, as identified by the OECD⁴, European Commission,⁵ and State⁶ and Australian⁷ governments. While each jurisdiction has slightly different nomenclatures and emphases, there are clear common themes which go across them all; and which Optus believes should be reflected in the regulatory principles for the ACMA. These are:
 - (a) Evidence-based decision making;
 - (b) Transparent and public processes;
 - (c) Proportionate to the importance of the problem or objective;
 - (d) Unbiased, objective and balanced;
 - (e) Ensure intervention results in an overall net public benefit.
27. These principles are uncontroversial, and seemingly accepted by the Review during the discussion in Part Three of the Draft Report. However, it is not clear that draft proposal 18 reflects these concepts.
28. Optus notes the reference to the legislated principles for Ofcom in the United Kingdom's Communications Act. There is merit in looking at the more concise and specific drafting of the Ofcom legislated principles. Specifically, that Ofcom must have regard, in all cases, to the principles which require that regulatory activity should be:
 - (a) Transparent;
 - (b) Accountable;
 - (c) Proportionate to the identified problem;
 - (d) Consistent; and
 - (e) Targeted only at cases in which action is needed.⁸
29. Many of these principles are captured in draft proposal 18. However, while the legislated principles for Ofcom are reflected in only three lines of drafting, draft proposal 19 is substantially longer. This may undermine the clarity and effectiveness of legislated principles.
30. Optus recommends the following changes:
 - (a) Draft Principle One: As currently drafted, this only requires that the ACMA "have regard to" the principle that its regulatory settings do not unnecessarily hinder competition. In Optus' view this guidance should be more direct, and be targeted

⁴ OECD (2012), Recommendation of the Council on Regulatory Policy and Governance, OECD, Paris.
<http://www.oecd.org/gov/regulatorypolicy/49990817.pdf>

⁵ European Commission, 2015, Better Regulation Guidelines, http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf. See specifically, Chapter VIII Principles of Better Regulation, http://ec.europa.eu/smart-regulation/guidelines/tool_1_en.htm

⁶ COAG, 2007, Best Practice Regulation Guidelines,
http://www.dpvc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf

⁷ The Australian Government Guide to Regulation, 2014,
http://www.cuttingredtape.gov.au/sites/default/files/files/Australian_Government_Guide_to_Regulation.pdf

⁸ Communications Act 2003 [United Kingdom], s.3

to have a greater impact on the ACMA's decision making. Optus proposes that the principle be amended as follows:

"The ACMA must ensure that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment."

- (b) Draft Principle Two: This principle should be separated into its two constituent parts. The first sentence deals with a risk-based approach to regulation, while the second sentence deals with wider issues around proportionality and evidence. Optus recommends that the second sentence be moved to a new principle that states: "The ACMA should ensure that any regulatory intervention it makes is targeted, evidence-based, and proportionate to the impact of the problem or objective."
- (c) Draft Principle Three: It is not clear whether it is practical for the ACMA to have a "continuous review" of regulatory burden. Rather, Optus prefers a specific obligation to be imposed requiring an annual work plan. The work plan should be required to include the identification and removal of undue regulation and a plan to progressively reduce the compliance burden on industry (including via recommendations to government for legislative change if necessary). The ACMA should only be required to do this once a year, so that it would also have sufficient resources to implement the outputs of the review. The guidance could be structured as follows:

"The ACMA must publish and consult annually on its work-plan for the upcoming financial year, including a plan for reducing unnecessary regulation and minimising the compliance burden on industry."
- (d) Draft Principle Four: Optus agrees with the proposed principle for the ACMA to be transparent in its actions and its decision-making priorities and objectives.

31. Optus sees merit in two further legislated principles. These principles would help to give effect to the desired outcomes of effective, well-targeted, and proportionate regulation-making.

- (a) Optus sees merit in a principle outlining the de-regulatory intent of ACMA, namely that its default position is not to intervene through regulation unless all other approaches have been considered. Optus notes that this is consistent with the first principle of the Australian Government's Guide to Regulation that regulation should not be the default option for policy makers.⁹ Optus recommends the following:

"The ACMA will operate with a bias against regulatory intervention. The ACMA will only intervene where the benefits to do so outweigh the costs, and where it can be demonstrated that an industry self-regulatory approach is not feasible."

- (b) Optus also sees merits in adopting a principle that states how the ACMA would intervene when it passes the above test. This principle would require the ACMA to operate in a timely and efficient manner, and would require the ACMA to be transparent in its rule-making activities. This captures elements of the fourth principle in draft proposal 19 and reflects the key findings of draft proposal 24 – that there is scope to improve the transparency of the ACMA's decisions. Optus recommends the following wording:

"Where the ACMA does intervene, it will do so in a timely, efficient and transparent manner."

32. In summary, reflecting the changes above, the revised regulatory principles would read:

⁹ The Australian Government Guide to Regulation, 2014, p.2

http://www.cuttingredtape.gov.au/sites/default/files/files/Australian_Government_Guide_to_Regulation.pdf

1. The ACMA should ensure that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.
2. The ACMA should adopt a risk-based approach to regulation, compliance and enforcement.
3. The ACMA should ensure that any regulatory intervention it makes is targeted, evidence-based, and proportionate to the impact of the problem or objective.
4. The ACMA must publish and consult annually on its work-plan for the upcoming financial year, including a plan for reducing unnecessary regulation and minimising compliance burden on industry.
5. The ACMA should be transparent in its actions and clearly indicate the priorities and objectives that inform its decision-making to regulated entities and the broader public.
6. The ACMA will operate with a bias against regulatory intervention. ACMA will only intervene where the benefits to do so outweigh the costs, and where it can be demonstrated an industry self-regulatory approach is not feasible.
7. Where the ACMA does initiate a regulatory intervention, it will do so in a timely, efficient and transparent manner.

Ministerial Statement of Expectations

33. Optus supports the independence of the ACMA. The efficient administration of the telecommunications regulations requires a strong and independent regulator. Arguably, ensuring this independence is more important now given the central role the Government-owned NBN plays in the industry. There is potential for a conflict of interest to arise between the commercial objectives of NBN Co and promoting the benefits of the industry and the interests of consumers. Such conflict can be addressed by regulatory bodies that are independent of Government.
34. Maintaining the independence of the ACMA is also consistent with Australia's Free Trade Obligations, specifically ensuring that the Government's financial interest in a supplier of public telecommunications services (i.e. NBN Co) does not influence the decisions and procedures of telecommunications regulatory bodies. The proposals are also consistent with the requirement that any regulatory body is independent of a supplier of public telecommunications services (i.e. NBN Co).¹⁰
35. Optus agrees that as a matter of best practice it would be useful for both the ACMA and the ACCC to release annual statements outlining their priorities and how they will meet their statutory obligations. However, such statements should be independently developed and not in response to a Ministerial Statement of Expectations.¹¹
36. Optus has concerns over the proposal for the Minister to issue Statements of Expectation to the ACCC and ACMA for the purpose of providing guidance and certainty of the Government's priorities.
37. First, this recommendation may create a perception that these agencies were not independent from executive government. It is not clear in the Draft Report whether the agencies would have the ability to disagree with the Expectations and would be able to state reasons why the Ministerial guidance was inappropriate.
38. Second, this recommendation may result in an actual lessening of the independence of the regulators. It is not clear how these Statements interact with the discretion granted by legislation to the agencies, particularly the ACCC. An aspect of the ACCC decision-making process is to use its expert competition knowledge to assess several competing

¹⁰ See, for example, Chapter 12, Article 12.17 of the Australia-USA Free Trade Agreement; Chapter 10, Article 5 of the Australia-Singapore Free Trade Agreement.

¹¹ Draft Proposals 19 & 20

objectives to produce an outcome that promotes the long-term interest of end-users. Independence means that it is the agencies that decide the appropriate weighting to give to each potentially conflicting legislative objective. It would be concerning if the Statement of Expectations could be used to influence the manner in which the ACCC or ACMA uses this independent expertise.

39. Third, a conflict-of-interest could arise between the Commonwealth's role as a Shareholder of NBN Co and its duties in setting priorities and expectations for the regulatory authorities responsible for regulating the NBN.
40. For these reasons, Optus does not support the proposal for the ACMA and ACCC to be required to publish an annual Statement of Intent in response to an annual Ministerial Statement of Expectations. However, we would support a requirement for both the ACMA and the ACCC to publish an annual statement setting out their priorities and how these align with their statutory obligations.

SELF-REGULATION AND OUTSOURCING ARRANGEMENTS

41. Draft Proposal 6 refers to examination of whether certain functions can be referred to industry for self-regulation. As noted in the Communications Alliance and AMTA joint submission, it is vital to consider whether it is outsourcing or self-regulation that is being considered, as they are vastly different processes and outcomes.
42. In relation to the functions of the ACMA monitoring unsolicited communications in particular (Do Not Call Register and Spam), it is important to keep in mind that although unsolicited calls, messages and emails are carried over communications infrastructure, the communications industry is not the sole originator of these unsolicited communications.
43. The unsolicited communications legislation applies economy-wide to all commercial entities undertaking telemarketing calls or sending electronic messages, and therefore it would be inappropriate for the telecommunications industry to set up a self-regulatory regime which would be unenforceable against marketers from other industries, such as banking and finance, real estate, etc.
44. Optus' view is that as unsolicited communications obligations apply across all industries, consideration should be given to whether this should remain with the ACMA or whether it better fits the remit of another regulator, in the same manner that other types of sales behaviours are governed by economy-wide legislation rather than as telecommunications-specific obligations.
45. Should the management and/or monitoring to prevent unsolicited communications be moved to a telecommunications industry-led scheme rather than managed directly by the ACMA, consideration of how the commercial burden of administering such a scheme can be spread across all participating entities should also be addressed.
46. Optus supports the view expressed in the Communications Alliance and AMTA submission that in instances where the telecommunications industry is asked or expected to assume responsibility for these outsourced regulatory functions, then the transitional arrangements must be designed to adequately compensate the party to whom the function is transferred for the costs of compliance .
47. Another of the areas considered in the Draft Report for self-regulation is the administration of technical standards. We re-iterate the comments in the Communications Alliance and AMTA submission which highlight the importance of the ACMA's enforcement activities relating to customer equipment standards, and that such functions must remain with the regulator.

COMMUNICATIONS CONSUMER PROTECTION ARRANGEMENTS

48. Draft Proposal 11 recommends that the current institutional arrangements for communications consumer protections be retained. Draft Proposal 27 talks to the need for a coordinated program of regulatory reform.
49. Optus agrees that additional work is required to create a current and relevant consumer safeguard regime that is fit for purpose and future proof, rather than the current one still based primarily on the standard telephone service and a historical reliance on fixed voice communications. Even in the content space, legislation still differentiates between content accessed via different types of devices or over different platforms, which does not reflect how consumers use devices or access content today, making appropriate consumer protections complex for providers.
50. As noted by Communications Alliance and AMTA in their submission, there also remains a need to reduce the overlap between existing economy-wide consumer protection laws and telecommunications-specific obligations. Optus does not expect that this type of detailed activity would result from the current review of the Australian Consumer Law; therefore, a work program that considers such reforms is still required.
51. Optus considers that one of the benefits of appointing a person who is both a Commissioner in the ACCC and a Member to the ACMA should be recommendations to both organisations where proposed amendments or new regulation is likely to overlap with existing regulation administered by either party.
52. A focus on principles-based regulation, rather than the processes providers must follow, will only serve to benefit both consumers and industry, and enable providers to tailor their processes according to their customer base and product sets. It should also lead to a reduction in the burden currently faced by the telecommunications providers operating in such a highly-regulated environment and facing competition from over-the-top providers and others not subject to the same regulatory obligations.
53. Optus acknowledges the reform activities undertaken to date, but note that these have often entailed simpler, stand-alone or less contentious amendments. The challenge is now for industry, consumer stakeholders, government and the regulator to collaborate on the more complex reforms that are required to ensure a contemporary regulatory framework and consumer protection regime.
54. Given the multiple inquiries underway (such as the Productivity Commission review of the Universal Service Obligation, and the review of the Australian Consumer Law), we note that the review of the ACMA and plans for regulatory reform must consider the outcomes of those inquiries.
55. Optus looks forward to working with the Government and the regulators on this program of regulatory reform.