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## TELSTRA CORPORATION LIMITED

Telstra's Response to the Draft Report of the Review of the Australian  
Communications and Media Authority

10 June 2016

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## EXECUTIVE SUMMARY

Telstra welcomes the opportunity to respond to the Department of Communications and the Arts (the Department) draft report of its review of the Australian Communications and Media Authority (the ACMA). We consider the Department has completed a comprehensive and thorough review of the ACMA, and are generally supportive of all 27 draft proposals, albeit with suggestions on how to improve a number of them.

We have set out below five key areas where we consider further improvements could be made to the Department's draft proposals, which in turn would help ensure that the operation of the ACMA is aligned to best practice regulatory principles. This in turn is more likely to foster an environment encouraging innovation, competition and investment, and therefore encourage the market to deliver the outcomes that consumers expect and need.

### 1. Remit of the ACMA

It is proposed that the ACMA's remit be amended to cover all the service layers of the communications market, including infrastructure, transport, devices, and applications and content. The Department has also proposed that the Government commence a coordinated programme of regulatory reform to establish a contemporary communications regulatory framework. As a result, we consider changes to the ACMA remit should be introduced as a temporary approach pending the establishment of the new framework. Further, while the service layer framework is a useful way of framing the communications sector, the remit of the ACMA should not be left as broad as contemplated in draft proposal 1, otherwise consideration should be given to ensuring that the risk of regulatory overreach is mitigated.

### 2. Regulatory structure

Telstra supports the proposal to retain the institutional arrangements for economic regulation, that is, to not bring economic regulation into the remit of the ACMA. However, the Vertigan and Harper reviews strongly indicate that economic regulation could be reformed to align more with best practice by changing the structure of economic regulation to address a number of key issues, including the very high workload of the ACCC and the lack of accountability by regulators. These issues are yet to be addressed. Telstra recommends that the Department continues to participate in Government consideration of the Harper recommendations that relate to regulatory structure, to ensure that the economic regulation of telecommunications markets is further aligned to best practice.

### 3. Accountability

The Department has proposed that the ACMA's objectives should be set out more clearly and that the ACCC and the ACMA should be provided with a statement of expectations, and be required to produce a statement of intent. The Department should also consider additional means to improve the accountability of communications regulators in respect of the decisions they make, including effective and efficient review of decisions, an independent review of regulators' performance, and delineation of regulatory functions.

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#### **4. Best practice principles**

Telstra considers the Department should consider including all their principles of regulatory best practice in the ACMA enabling legislation. While the Department has proposed several means to enhance the performance of the ACMA, including by legislating four key principles, they are only a subset of what it takes to align to best practice.

#### **5. Self-regulation**

Telstra considers that the Department, the ACMA and Communications Alliance should work cooperatively to set out the optimal design of a self-regulatory framework, including the building blocks needed for industry to undertake self-regulation. A greater focus on self-regulation within the regulatory framework could provide considerable benefits to all affected parties. In particular, a regulatory regime that emphasises the role of self-regulation, aligns with best practice principles, reduces costs for industry and government, and provides for flexible solutions to policy issues that will ultimately benefit industry and consumers. However, these benefits will only be attainable if there is a stable framework within which industry can develop effective self-regulation.

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## 1. Introduction

Telstra welcomes the opportunity to respond to the draft report of the Department of Communications and the Arts (the Department) of its review of the Australian Communications and Media Authority (the ACMA).

We consider the Department has completed a comprehensive and thorough review of the ACMA, and are generally supportive of all 27 draft proposals, albeit with suggestions on how to improve a number of them.

Telstra's submission will discuss:

- Regulation in the telecommunications sector;
- Better alignment to best practice regulation; and
- Telstra's recommendations for further improvements to the Department's draft proposals.

## 2. Regulation in the telecommunications sector

### 2.1 Why is the communications sector important?

The communications sector affects all of us on a daily basis. Australians increasingly depend on digital connectivity and services in every part of their lives – whether they are working, learning, shopping, socialising, or simply relaxing. Access to modern, reliable, affordable communication services helps individuals to live their lives to the fullest, our economy to function efficiently, and businesses to connect to suppliers, partners and customers.

Reliable and ubiquitous advanced communication services are integral to the strength and progress of our economy and hence the welfare of every Australian. The Australian Government's National Digital Economy Strategy highlights the importance of telecommunications infrastructure to the economy, citing research that indicates a 10 per cent increase in the number of households connected to broadband delivers economic gains of \$2.4 billion per year.<sup>1</sup>

In addition to this, each year the mobile sector contributes value of about \$14 billion to the Australian economy, with almost half arising from indirect benefits such as enhanced productivity and convenience.<sup>2</sup> The importance of telecommunications to the nation's economy is made evident by the increasing reliance on digital services.<sup>3</sup>

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<sup>1</sup> Australian Government, *National Digital Economy Strategy 2011*, page 3.

<sup>2</sup> Deloitte Access Economics, *Mobile nation – The economic and social impacts of mobile technology*, page 26.

<sup>3</sup> ACMA, *Communications Report 2013-14*.

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## 2.2 Why does regulation matter?

Telecommunications has long been closely regulated in Australia. As in many parts of the world, the legacy in Australia is of a publicly-owned monopoly telecom provider asked to deliver social as well as commercial outcomes. In Australia, the regulations telecommunications companies face today fit into two broad categories:

- Like businesses in other sectors, they must comply with **State and Federal laws applying generally across the whole economy** – including most of the *Competition and Consumer Act 2010 (CCA)*, the *Corporations Act 2001*, the *Privacy Act 1998*, the Australian Consumer Law (ACL), and a myriad of other laws and regulations regarding taxation, workplace relations and employment, occupational health and safety, planning and the environment, fair trading, and consumer safety; and
- They must also comply with **telecommunications-specific laws, regulations, technical standards and codes** – including the *Telecommunications Act 1997*, the *Radiocommunications Act 1992*, Parts XIB and XIC of the CCA, the Telecommunications Consumer Protections Code (TCP Code), and many other statutes, instruments, standards and industry codes dealing with commercial, technical, consumer protection and security matters.

The objective of industry-specific regulation generally falls into one of four categories:

- Ensuring consumer rights are safeguarded, and households and businesses receive appropriate and accurate information about often-complex products and services;
- Ensuring the telecommunications market is competitive and investment is efficient;
- Ensuring all telecommunications networks in Australia adhere to common technical standards and all industry participants abide by shared licence conditions; or
- Ensuring the safety, security, reliability and resilience of telecommunications services.

Regulation that supports a dynamic, innovative and globally competitive telecommunications sector that is attractive to investors is a cornerstone of a competitive 21st century economy. There is also an important continuing role for regulation in ensuring societal objectives, such as affordable access to services and competitive markets, are achieved.

However, regulation needs to be effective, and to be effective it needs to adhere with the principles of best practice. Those principles guide between the sometimes conflicting approaches of the regulator forcing outcomes using the powers it has, and the regulator developing an environment in which competition and suppliers deliver outcomes for the community. When regulation departs from the principles of best practice regulation it is less likely to foster an environment encouraging innovation, competition and investment, and discourages the market from delivering the outcomes customers expect and need.

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## 2.3 The ongoing need for reform

As the pace of change in telecommunications technologies, products and markets accelerates, it is important for regulation to also evolve. The future development of the telecommunications sector and its ability to contribute to broader economic prosperity depend critically on an efficient, supportive and up-to-date regulatory framework. The more quickly and cheaply new technologies and offerings can be brought to market, the greater the benefit for consumers. This requires a regulatory environment which minimises distortions to producer or consumer behaviour, keeps the cost of compliance low, and adapts readily to a dynamic and constantly changing market.

Poorly designed and administered regulation imposes significant costs on the community. It results in reduced consumer choice, higher prices, lower wages and reduced job creation. By adding to business costs, poor regulation also reduces the competitiveness of business and limits the capacity for companies and countries to adjust to changing economic circumstances and emerging threats or opportunities.

Much of Australia's basic telecommunications-specific regulation dates from the opening of the local market to competition in 1991 and market liberalisation in 1997. It, therefore, predates subsequent developments including fundamental changes in industry structure and ownership, the NBN, a gradual convergence and blurring of once-distinct markets, remarkable advances in the power and capabilities of core underlying technologies and rapid change in consumer demands and commercial offerings. It is, therefore, critical to more fundamentally test the need for and appropriate form of regulation in the telecommunications sector.

Given unceasing change in the economy, reform of technical, economic and competition regulation is by its very nature a race that never ends. Regulation is typically introduced into a market at a point in time to address a societal concern or promote a beneficial non-market outcome. But as the surrounding market then evolves and changes – as consumer demands, supplier offerings, market boundaries and technological capabilities all shift – not only is regulation left behind, but the social benefit and relevance of the intended objective may be reduced.

For these reasons, the Business Council of Australia articulated the need for ongoing regulatory reform in 2013:

*“Regulation has an important role to play in upholding critical rights and providing legitimate safeguards, but to be effective regulation must be properly thought-through and applied sensibly.*

*There is no escaping the fact that efforts by business to comply with unnecessary or poorly designed and administered regulation simply displace productive wealth-generating activities like innovation and investment in new technology. Poor regulation also frustrates attempts by companies to lower costs and reorganise their operations in response to competitive pressures and structural transition that is occurring through the economy. Regulatory delays can be a major deterrent to investment and add to the costs of major projects.<sup>4</sup>*

The Australian Government has indicated it agrees, summarising its approach in these terms:

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<sup>4</sup> Business Council of Australia, 2013, *Improving Australia's Regulatory System*, page 5.

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*“Cutting red tape is at the heart of this Government’s mission to build a strong and prosperous economy for a safe and secure Australia. For too long, more regulation has been the default option for policy makers.*

*“Poorly designed and inefficient regulation has been imposing unnecessary costs on us all. This has damaged productivity, deterred investment and undermined jobs and growth.*

*“Our goal is to make life easier for Australians – and to make it easier for businesses to decide to invest and create more jobs.”<sup>5</sup>*

The current regulatory framework applying to telecommunications includes a complex array of general and industry-specific legislation, ministerial determinations, regulatory instruments and orders, technical rules, industry codes, and other guidelines. Telstra counts no fewer than 212 pieces of telecommunications regulation and codes that applied to its operations as of 10 June 2016, excluding relevant parts of the CCA, and ACCC requirements.

While in many cases the public policy purpose that originally prompted regulation remains valid, in numerous cases changing markets, technologies and industry structure mean the chosen method of achieving an outcome is no longer efficient and, in some cases, adversely distorting outcomes for consumers and businesses. For telecommunications carriers and other industry participants, this is a growing challenge in managing their businesses.

## 2.4 Progress in the Government’s reform policy

The Australian Government has driven a policy of red tape removal and reform of telecommunications regulation since September 2013. In keeping with the Government’s focus on deregulation, there has been a concerted focus on eliminating red tape and redundant or obsolete reporting requirements.

The Government has established a Regulator Performance Framework, and undertaken several systematic processes of review of existing legislation and administration of that legislation.

The Government has also commissioned, or undertaken itself, the following reviews of communications-related legislation and regulation:

- The Vertigan panel of experts reviewed the statutory regulatory requirements placed on NBN Co and Part XIC of the CCA;
- The Government commissioned an independent audit of the NBN public policy process, which was undertaken by Bill Scales AO;
- Professor Ian Harper chaired a review of competition policy and the CCA;
- A statutory review of the adequacy of telecommunications services in regional areas was undertaken;

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<sup>5</sup> The Australian Government, *Annual Deregulation Report: 2014*, Foreword.



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- The Productivity Commission is to review the USO and the Department will review consumer safeguards; and
  - The Department is reviewing the ACMA, which this submission addresses.

Clearly the Government has effectively focussed on some key building blocks of regulatory reform: removing duplicative, ineffective or burdensome red tape, measuring regulator performance, and reviewing key areas of policy and regulation.

### 3. Better alignment to best practice regulation

The review of the ACMA is being undertaken in a period of comprehensive review of regulation, so Telstra is encouraged by the Department's recognition of this broader reform work. Finding the solution to reform the ACMA, while government is reviewing regulatory mechanisms more generally, requires, in Telstra's view, strong reference to general principles of best practice regulation. Telstra is encouraged by the Department's reference to the principles of best practice regulation in developing its draft proposals.

#### 3.1 What is best practice regulation?

Regulatory best practice seeks to identify approaches to regulation that, empirically, have been shown to support economically optimal outcomes over time. This is typically measured by:

- Maximising choice and value for money for consumers;
- Promoting competition, investment, innovation and differentiation among producers;
- Delivering predictability, transparency, sustainability and efficiency for investors, taxpayers and governments; and
- Ensuring accountability for regulators.

Both governments and regulated businesses emphasise the value of adhering to best practice. The Department recognises the importance of the principles for regulatory best practise in Part IV of its Draft Report, when discussing the case for further reform. A number of Australian government councils and departments have put forward best practice regulation principles:

- In 2007, the Council of Australian Governments agreed that all governments will ensure that regulatory processes in their jurisdictions are consistent with their principles of best practice regulation;<sup>6</sup>
- The Australian Government's Department of the Prime Minister and Cabinet has developed and continues to maintain and update a guide to regulation for the use of policymakers across the

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<sup>6</sup> Council of Australian Governments, 2007, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*.

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Australian Public Service (APS). This is an important document that establishes ten principles that governments and policymakers should apply to intended changes to regulation;<sup>7</sup> and

- The Department has published its own regulatory principles aimed at ensuring effective and appropriate regulation.<sup>8</sup>

These principles should form the cornerstone of regulation of the telecommunications sector in Australia. The content of these principles is set out in Appendix A.

In the remainder of this section, Telstra supports the best practice principles the Department focusses on in its draft report, and proposes additional opportunities for the Department to further align the regulatory regime to best practice.

### 3.2 Regulation should be competitively neutral

Like services should be regulated alike, to provide fairness and clarity for competing industry participants and avoid the regulatory gaming and economic distortions that arise if essentially similar services delivered via different technologies are regulated differently. The Department has highlighted the need for regulation to be as technologically neutral as possible, to prevent distortions arising from arbitrary distinctions between similar services.<sup>9</sup>

The Department's review of the ACMA recognises the convergence of technologies, services, and suppliers and provides, what Telstra considers to be a useful framework for context that divides the communications services into applications/content, devices, transport and infrastructure layers. It also questions how convergence affects the competitive neutrality of regulation applying to different types of suppliers within this layer. Telstra provides further suggestions to improve the competitively neutral application of regulation in section 4.4.

### 3.3 Regulation should be cost-effective, efficient and proportionate

Regulation should represent the least costly and most efficient means of achieving a socially beneficial outcome. Thorough cost-benefit analysis conducted prior to its implementation should be capable of persuasively demonstrating this, and should also ensure that costs are proportionate to the expected benefits of the intervention. This is a dynamic process – cost-benefit analysis must be periodically updated over time to ensure that the impact of continually evolving markets on cost and benefits is adequately assessed. Both the European Commission and the OECD emphasise the need for rigorous cost benefit analysis to ensure regulation is appropriately targeted and does not create unanticipated costs.<sup>10</sup>

The Department has paid careful consideration to cost efficiency in considering proposals relating to the ACMA's remit, in terms of what functions it undertakes, whether it is the most efficient at revenue

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<sup>7</sup> Department of the Prime Minister and Cabinet, 2014, *The Australian Government Guide to Regulation*.

<sup>8</sup> Department of Communications, 2013, *Deregulation in the Communications Portfolio*, page 5.

<sup>9</sup> Department of Communications, 2013, *Deregulation in the Communications Portfolio*, page 6.

<sup>10</sup> European commission, 2015, *Better Regulation Guidelines*; OECD, 2012, *Recommendation of the Council on Regulatory Policy and Governance*, page 4-5.

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collection, and whether it can refer functions to self-regulation. Telstra supports most of the Department's proposals, and provides some further suggestions for consideration in section 4.

### **3.4 The least imposing regulation should be adopted to achieve a policy goal**

Regulators and policymakers should consider light-touch mechanisms such as self-regulation and co-regulation as genuine options to meet policy objectives. Co-regulation should avoid rigid prescription and operate as a dynamic, interactive principles-based means of achieving regulatory goals. The value of such an approach is highlighted by COAG and the Department of Prime Minister and Cabinet, whose principles caution against reflexive resort to black-letter regulation and encourage light-handed alternatives encompassing no regulation, self-regulation and co-regulation.<sup>11</sup>

The Department has put forward useful proposals for regulatory functions to be referred to self-regulation. However, there is additional work needed to develop the framework for self-regulation to ensure it is fit for purpose, attractive to industry, and ultimately delivers better outcomes to customers. This is discussed in section 4.5.

### **3.5 Regulation should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical base**

While further reform is needed to bring out of date regulation up to date, the Department and broader government appear to have a clear agenda to continue to review and reform regulation (e.g. in relation to consumer safeguards and the ACL). The Department has also proposed regulatory performance measures to provide an incentive for the future ACMA to give this principle a high priority in its decision making process.

## **4. Telstra's recommendations for further improvements to the Department's draft proposals**

Telstra considers there are six key areas where further improvements could be made to the Department's draft proposals, which in turn would ensure the operation of the ACMA is aligned to best practice regulatory principles:

- The scope and remit of the ACMA needs further refinement;
- Improving the delineation of overlapping functions;
- Improving accountability;
- Aligning the ACMA principles to best practice;
- Effective self-regulation needs a formal framework; and

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<sup>11</sup> Council of Australian Governments, 2007, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, page 4; Department of the Prime Minister and Cabinet, 2014, *The Australian Government Guide to Regulation*, page 2.

- Enhancing the efficiency and effectiveness of regulators.

These key areas are discussed further in the sections below.

#### 4.1 The scope and remit of the ACMA needs further refinement

The underlying complexity of the legislative regime that the ACMA is currently required to administer leads to duplication of effort, and is inefficient and expensive for both government and industry. These inefficiencies are in turn passed onto consumers.

Draft proposal 1 states that the ACMA's remit cover all the layers of the communications market, including infrastructure, transport, devices, content and applications. The proposal will remove from the ACMA the existing vertical areas of accountability that reflect the historical legislative framework. While the move to a more forward looking horizontal layer approach is attractive at a principle level, it does require further consideration.

In particular, the Department makes it clear at draft proposal 27 that the Government should commence a coordinated programme of regulatory reform to establish a contemporary communications regulatory framework. This broader review is long overdue and does require a significant discussion as to the most appropriate structures that should be applied to the various regulatory agencies. The ACMA administers some 26 communications acts relating to telecommunications, broadcasting, radiocommunications and online content.<sup>12</sup> Telstra considers that some of this sectoral-based regulation is outdated and inconsistent, which prevents the implementation of optimal regulatory outcomes, and that it is essential for this inconsistency to be resolved.

With this in mind, the initial changes to the ACMA remit as contemplated by draft proposal 1 should be introduced as a temporary approach pending the further review contemplated by draft proposal 27.

The Review proposes that the *Australian Communications and Media Authority Act 2005* be amended to clearly define the ACMA's remit across four 'stacks' of interdependent layers, namely: applications/content layer; devices layer; transport layer; and infrastructure layer. While this approach does in part seek to address the underlying complexity of the existing legislative framework, the extent of the ACMA's power would be spread across four very broad layers and would therefore include the inherent risks associated with the granting of broad, generic powers.

This could lead to:

- A lack of certainty as to where the ACMA's role starts and finishes. Conferring the ACMA with such a broad remit needs to be tempered with the appropriate constraints to ensure that regulatory intervention is not the default procedural approach of the ACMA; and

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<sup>12</sup> ACMA Annual Report 2009-10, pp. 214-5.

- A lack of clarity regarding when the ACMA should involve itself in issues, which in turn adds to the regulatory risk. Of fundamental importance to the communications industry is the concept of regulatory consistency and predictability.

As such, Telstra supports the Regulatory Principles proposed at draft proposal 18 and considers that, if the remit of the ACMA is to be expanded, consideration must be given to ensuring that the risk of regulatory overreach is mitigated. However, it is also noted that there are already a number of principles that the ACMA must have regard to, such as the Principles for Best Practice Regulation. This is discussed in section 4.4.

Further, Telstra considers 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. However, this is an ex-post framework, the incentive effect of which is untested, that in practice may only drive better decision making, regulatory predictability, and reduced industry costs and risk after repeated measures of poor performance.

Telstra believes that the Government Statement of Expectations that will be given to the ACMA should also be examined to provide greater clarity as to how regulatory risk is mitigated and regulatory certainty is achieved.

Recommendations:

- The remit of the ACMA should not be as broad as contemplated in draft proposal 1, otherwise consideration should be given to ensuring that the risk of regulatory overreach is mitigated.
- The initial changes to the ACMA remit should be introduced as a temporary approach pending the further review contemplated by draft proposal 27.

## 4.2 Improving the delineation of overlapping functions

The Department considered the overlap of competition and economic regulatory functions between the ACMA and the ACCC, including a proposal to create a sector-specific regulator with responsibility for competition and economic regulation in addition to the ACMA's other responsibilities. The Department concluded with a proposal to retain the current institutional arrangements for economic regulation of the communications sector (draft proposal 9).

Combining communications sector regulation into a single sector-specific regulator would not lead to best-practice regulation, as set out in Telstra's earlier submission on the ACMA review. However, there are several issues that were aired in the Vertigan and Harper reviews that strongly indicate that economic regulation could be reformed to align more with best practice. Those issues include the following:

- a) First, the ACCC has a very high workload within its broad remit and a comparatively small set of resources with decision-making responsibilities. The ACCC currently has a Chairman, two Deputy

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Chairs and four Commissioners, who collectively must oversee a wide range of decisions across regulated aviation and airport, communications, gas and electricity (together with AER Commissioners), fuel, post, rail, water, waterfront and shipping, and wheat export markets; across consumer rights, protections and guarantees; across competition issues including administering many codes, policing price changes in response to government tax changes, misleading advertising, franchising, anticompetitive behaviour and mergers; and advising government by undertaking reviews, reporting, and advising on policy. Needless to say, the expected workload of the current ACCC Chair and Commissioners, and additional two AER Board members is very high.<sup>13</sup>

- b) Second, there is a lack of means by which regulators are held accountable for their decisions. This is discussed in detail in section 4.3. The Vertigan and Harper review recommendations sought to improve accountability through structural reform of economic regulation.

For example, Vertigan and Harper recommended moving economic regulation and, in the case of Harper, establishing a network regulator separate from the ACCC. As in gas and electricity regulation, a delineation of regulatory functions so that a regulator responsible for one function is accountable to the regulators responsible for other functions would improve overall accountability and eliminate 'blurring of the lines' between policy, coverage, rule-making and enforcement decisions undertaken by a common regulatory body.<sup>14</sup>

The regulator responsible for one regulatory function would need to engage openly and transparently with the regulators for other functions. An example of this source of accountability has played out recently in the energy sector where the ACCC has publically questioned the strength of declaration criteria – the declaration function is administered by the NCC, a separate regulator. There is a risk that such transparency and discourse in policy does not happen when regulatory functions are concentrated in the remit of the same regulatory body.

- c) Third, the effectiveness of economic regulation can also be improved by ensuring that regulatory functions that are best served by an inquisitorial culture within the regulator (e.g. economic regulation) are separate from regulatory functions that are best served by an adversarial culture within the regulator (e.g. enforcement).

These and other issues aired under the Vertigan and Harper reviews are yet to be addressed. Telstra recommends that the Department continues to engage with the broader Government as it determines how to implement the Harper recommendations that relate to regulatory structure, to ensure that the economic regulation of telecommunications markets is further aligned to best practice.

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<sup>13</sup> While the AER has three Board members, one is also an ACCC Commissioner.

<sup>14</sup> Dr Michael Vertigan, Prof George Yarrow, Euan Morton, 2015, *COAG Energy Council Review of Governance Arrangements*, pages 25-6.

## Recommendations:

- The Department adopts its draft proposal to retain the institutional arrangements for economic regulation, that is, to not bring economic regulation into the remit of the ACMA.
- The Department engages with the broader Government, as it determines how to implement the Harper recommendations that relate to regulatory structure, to ensure that the economic regulation of telecommunications markets is further aligned to best practice.

### 4.3 Improving accountability

Regulators should be accountable for how their decisions in a given sector over time affect the interests of consumers, industry participants and taxpayers. Mechanisms that assign strong and direct accountability for outcomes to regulators are the most effective means for delivering sustainable regulatory best practice. The need for more stringent and transparent regulatory accountability has been well addressed by the OECD, which emphasises the importance of confidence in economic regulators and of effective review processes.<sup>15</sup>

At present, there are limited means for people affected by regulation to hold communications regulators to account for the decisions they make. In the absence of merits based review, the sole means for providing accountability is Ministerial or Parliamentary oversight and the limited opportunity to review regulatory decisions on administrative law grounds.

The Department considers draft proposals 12 and 18-20 would potentially provide greater transparency and clarity in relation to the ACCC and the ACMA's objectives, statements of expectations and the regulators' interpretations of these things. Also, in introducing the Regulatory Performance Framework, the Government has made some important improvements to the measurement of communications regulators' performance relative to their objectives and best practice, and requiring the reporting of that performance to the relevant Minister.

While these proposals would strengthen Ministerial and Parliamentary oversight, these means for providing accountability are generally considered inadequate, particularly in relation to agencies that are intended to be independent of government, such as the ACMA and the ACCC. Maggetti, in his review of accountability, characterises this inadequacy as a 'democratic deficit':

*"Democratic systems can be conceptualised as chains of delegation from voters to parliament, to government, to ministers, and eventually to bureaucracy...Delegation to [Independent Regulatory Agencies (IRAs)] constitutes an additional step, which is qualitatively different since IRAs are not directly responsible to either voters or elected officials...As a consequence, with the development of the regulatory state, the significance of political participation appears undermined, producing a 'democratic deficit'.<sup>16</sup>*

<sup>15</sup> OECD, 2012, *Recommendation of the Council on Regulatory Policy and Governance*, page 4-5.

<sup>16</sup> Maggetti, Martino (2010), *"Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review"*, *Living Reviews in Democracy*, page 2.

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Mulgan argues that Ministers are not in a position to, and might face a disincentive to, act as the sole person holding independent statutory authorities to account:

*“The importance of external answerability and internal control to departmental accountability are reinforced by their absence or at least significant diminution in the case of other types of government agency. With independent statutory authorities, for instance, ministers are not expected to answer for day-to-day matters and they routinely, and without controversy, refer such issues to the chief executive or board concerned. Similarly, ministers are not constrained from publicly criticizing independent public agencies, though they may run the risk of provoking a counter-attack if the agency’s leaders consider the fault to lie with government policy. Such open distancing between ministers and non-departmental agencies reflects the inner reality that ministers do not have the same unquestioned rights of intervention and control that they have over their departments.”<sup>17</sup>*

And Kinley, in his summary of literature applying to government departments that can be equally applied to independent regulators, supports the inadequacy of Parliament as a body to provide accountability:

*“Where the prevailing understanding of the notion (or at least that prevailing in ministerial offices) is that the government’s primary responsibility is to govern, then relying on the Parliament alone to ensure accountability is simply inadequate.*

*“Admittedly, Parliament will continue to play an important role in this respect, but crucially, it cannot and will not be the only player.”<sup>18</sup>*

Kinley also refers to literature that argues Ministers are ‘too narrow a conduit’ to hold government departments to account, which would more so apply to independent government agencies:

*“In consequence, the already strained credibility of ministers being responsible for the actions of civil/public servants operating at the extremities of the command hierarchy has been brought to the point of collapse. ‘Ministers, by themselves,’ as Gavin Drewry and Tony Butcher have noted, ‘are manifestly too narrow a conduit through which to secure adequate public accountability for large and complex government departments’.”<sup>19</sup>*

*“Clearly, the actions of members of the administration, even those at senior levels, cannot be effectively scrutinised by way simply of the responsible minister being available for questioning before Parliament. The question remains, therefore, how such scrutiny can be established.”<sup>20</sup>*

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<sup>17</sup> Mulgan, Richard (2002), [“Public accountability of provider agencies: the case of the Australian ‘Centrelink’”](#), *International Review of Administrative Sciences*, Vol. 68(1), page 47.

<sup>18</sup> Kinley, David (1995), [“Governmental Accountability in Australia and in the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices”](#), *UNSW Law Journal*, Volume 18(2), at page 425.

<sup>19</sup> Kinley, David (1995), [“Governmental Accountability in Australia and in the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices”](#), *UNSW Law Journal*, Volume 18(2), page 418.

<sup>20</sup> Kinley, David (1995), [“Governmental Accountability in Australia and in the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices”](#), *UNSW Law Journal*, Volume 18(2), page 419.



Kinley goes on to categorise three general means with which to improve governmental accountability:

*“The first category comprises those that seek to bolster the authority of Parliament in its role as a watch-dog of the government. In the second category are those that seek to bolster the means by which the other arm of government – the administration – might be made more accountable. The third grouping is centred on the role played, or to be played, by the courts and tribunals within the broad field of judicial or quasi-judicial [that is, tribunal] review of administration action...”<sup>21</sup>*

There is currently an over-reliance on the first of these categories in the regulation of communications markets, and an absence of the second and third categories. Further, the Department’s draft proposals seek to bolster the first category, but do not address the other two. For instance:

- There is no opportunity for merits review of major regulatory decisions in the communications sector;
- Prior to the establishment of the Regulator Performance Framework, there was no consistent assessment of regulator performance with external input and, while the Regulatory Performance Framework is a good step forward, it is another form of Ministerial oversight without a clear path between potential poor performance and resolution;
- The ACCC and the ACMA have both established divisions within their agencies to focus on telecommunications regulation and so can be captured by specific interests, that a cross-sector regulator would less likely be captured by; and
- In the case of the ACCC, decisions relating to the regulator’s scope of powers are made by the same people setting the rules of regulation who are the same people that enforce those rules.

This can be contrasted to the regulation of the financial sector in Australia. The Interim Report of the Financial System Inquiry summarised the different methods of ensuring accountability for independent financial regulators, covering all three of Kinley’s categories:

*“Australian regulators are subject to similar external accountability arrangements to comparable peer jurisdictions. They are held accountable through a range of mechanisms, including Parliament, courts and tribunals, public media reporting and freedom of information, and reviews by international bodies, such as the IMF FSAP. The Inquiry recognises that there is room to further strengthen or implement new accountability mechanisms for regulators, particularly in light of proposals to increase independence.”<sup>22</sup>*

Notwithstanding the broad means with which financial regulators are held accountable, in its final report, the Financial System Inquiry considered a number of additional mechanisms. These included establishing: an Assessment Board to advise Government annually on how regulators have implemented their mandates, based on regulator self-assessments, periodic capability reviews and

<sup>21</sup> Kinley, David (1995), “Governmental Accountability in Australia and in the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices”, *UNSW Law Journal*, Volume 18(2), at page 425.

<sup>22</sup> <http://fsi.gov.au/publications/interim-report/07-regulatory-architecture/independence-accountability/>

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industry consultation; providing clearer guidance to regulators in statements of expectations, and increasing the use of performance indicators to strengthen regulator reporting; appointing an Inspector-General of Regulation or unified oversight authority for financial system regulators; formalising the Council of Financial Regulators and tasking it to hold regulators accountable for performance against their mandates; and placing APRA and ASIC under the control of boards comprising executive and non-executive directors.<sup>23</sup> The Financial System Inquiry ultimately recommended the first two mechanisms be adopted to improve regulatory accountability.

The ACMA review provides the Department with the opportunity to further address the lack of accountability of regulators in the communications sector. Beyond draft proposals 12 and 18-20, which strengthen the role Ministerial and Parliamentary oversight has in assigning accountability to the ACCC and the ACMA for their decisions, there are a number of structural improvements that could be made to improve the accountability of communications regulators. The notable means of providing accountability used in other sectors but missing from the communications sector include:

- The introduction of a tribunal or panel to provide efficient and effective merits-based review of major regulatory decisions;
- Similar to that recommended in the Financial System Inquiry, the establishment of an independent body to report on the performance of regulators against their objectives and provide recommendations for improvement; and
- A delineation of regulatory functions so that a regulator responsible for one function is accountable to the regulators responsible for other functions (as discussed above in section 4.2).

Recommendation:

- The Department considers additional means to ensure communications regulators are accountable for the decisions they make.

#### 4.4 Aligning the ACMA principles to best practice

The Department has proposed several means to enhance the performance of the ACMA, including by legislating the following four principles (draft proposal 18):

- 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; and

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<sup>23</sup> <http://fsi.gov.au/publications/final-report/chapter-5/regulator-accountability/>

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- 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.

Telstra supports these principles, which broadly coincide with the Department's earlier principles of regulatory best practice<sup>24</sup>. However, they are only a subset of what it takes to align to best practice. The Department should consider including all their principles of regulatory best practice, as set out below, in the ACMA enabling legislation:

- Regulation should be consistent with other regulations and policies, including those relating to competition, trade and investment;
- Regulation should serve clearly identified public policy goals, and be effective in achieving those goals;
- Regulation should produce benefits that outweigh the costs, including those imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, fewer services, and higher prices);
- Regulation should be as technologically neutral as possible, to avoid creating regulatory distinctions between similar services that are delivered differently;
- Regulation should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical basis; and
- Regulation should minimise market distortions and harness competition to deliver policy outcomes by aligning market incentives with regulatory objectives.

Recommendation:

- The Department considers including all their principles of regulatory best practice in the ACMA enabling legislation.

#### 4.5 Effective self-regulation needs a formal framework

A greater focus on self-regulation within the regulatory framework could provide considerable efficiency benefits to industry, government and customers. In particular, a regulatory regime that emphasises the role of self-regulation, aligns with best practice principles, reduces costs for industry and government, and provides for flexible solutions to policy issues will ultimately benefit industry and customers.

A framework for self-regulation should contain key elements including transparency of roles and responsibilities, policy advocacy, code development and compliance/monitoring arrangements where

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<sup>24</sup> Department of Communications, 2013, *Deregulation in the Communications Portfolio*, page 5.

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required. This ensures that a self-regulatory regime has the confidence of the Government and regulators, and can provide a credible, flexible alternative to prescriptive black-letter regulation.

#### 4.5.1 Benefits of self-regulation

Draft proposal 6 recommends 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; and
- Action on unsolicited communications, including Spam.

The current regulatory regime can be costly and inflexible, due to its reliance on black-letter law. By comparison, a self-regulatory regime can often solve problems and deliver policy outcomes more efficiently, as well as making the regulation more flexible and fit for purpose.

Communications Alliance already delivers some examples of effective self-regulation through its publication of unregistered industry codes, guidelines, specifications and guidance notes.

However, the most recent and relevant example is the development of the TCP Code. The 2012 version of the TCP Code was ground breaking in that it set out a clear structure for industry code compliance (chapter 9). Chapter 9, which resulted in the creation of CommCom, was the subject of recent review, public consultation and subsequent endorsement by the ACMA in 2015. The then ACMA Chairman, Mr Chris Chapman, stated:

*“Since the ACMA shone the spotlight on telco customer service through the RTC inquiry and the registration of the TCP Code, telcos have improved customer service, reduced complaints, ramped up compliance, reigned in unexpectedly high bills and allowed customers to make more informed choices about mobile phone plans and pricing.”<sup>25</sup>*

The overall recognised success of this approach combined with the fact that compliance with the TCP Code has been embraced by in excess of 350 suppliers of telecommunications services to residential and small business customers proves that self-regulation can and does work effectively in the right context.

It is acknowledged that the TPC Code was subject to the ACMA Code registration requirements and thus it is arguable that the TCP Code is better described as part of a co-regulatory rather than a self-regulatory regime. However, the primary purpose of having an industry code registered is the fact that it becomes binding on all participants in the sector. It is clear that with the maturity of the telecommunications market (as evident by about 350 suppliers being subject to the TCP Code) and the

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<sup>25</sup> Telco consumers are the big winners – ACMA media release 59/2015 18 November

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subsequent high levels of industry compliance, the registration requirement is not critical to achievement of policy objectives.

There are several potential reforms that could build more confidence in and encourage greater use of self-regulation. For example, the proposed reform currently under consideration by Parliament, which would allow industry to make greater use of self-regulation in the management of numbering resources. This provides an opportunity for industry to demonstrate the effectiveness and potential broad application of self-regulation across the sector.

#### **4.5.2 Regulatory best practice requires self-regulation to be considered as a legitimate option**

The principles of regulatory best practice seeks to identify approaches to regulation that, empirically, have been shown to support economically optimal outcomes over time. Key among these principles is that regulation should minimise market distortions and harness competition to deliver policy outcomes by aligning market incentives with regulatory objectives.

Application of the principles would require an approach where all relevant stakeholders consider the problem to be addressed, and review all potential non-regulatory and regulatory solutions (including their costs and benefits) to ensure that an effective solution that imposes the minimum cost is adopted.

To promote best practice regulation, the regulatory framework needs to incorporate a defined process to assess these potential solutions, including developing and promoting effective industry self-regulation options.

#### **4.5.3 A framework to support self-regulation**

For self-regulation to be an effective alternative to black-letter regulation, and to avoid the inefficiency of multiple inconsistent self-regulatory mechanisms, a framework needs to be designed to ensure the confidence of customers, industry, regulators and government.

Telstra supports the Department's proposal to give the ACMA a 12 month period to review whether certain functions can be moved to self-regulation. However, we consider it would also be prudent to use this time to ensure that there is a stable self-regulatory framework ready to accept those functions. The key building blocks that would need to be considered for a self-regulatory framework are outlined below.

##### **a) Government /ACMA should be required to express clear objectives for any self-regulatory solutions**

Government/ACMA objectives for regulation need to be carefully determined and should be based upon a transparent and substantive review process. Government/ACMA should expressly consider and explore with industry the option of industry self-regulatory solutions before determining the preferred approach. If a self-regulatory option is selected, the Government's objectives would be used by industry to develop the self-regulatory solution. The Regulator Performance Framework for the ACMA should measure the extent to which ACMA considers and explores self-regulatory options.

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**b) Transparent Role Relationships**

Confidence in the self-regulatory approach is enhanced by all stakeholders having clear visibility of their roles and accountabilities. For example, industry associations can have complementary and/or potentially competing roles, so they will need clarity of their role to avoid potential conflict and/or overlap. Potential roles range from membership communication, industry policy advocacy, developing self-regulatory solutions, and compliance and monitoring roles.

It will be important that all participants in the regulatory ecosystem respect and support the role of self-regulation. Relationships between regulatory, self-regulatory and other stakeholders should be formally articulated (e.g. in a memorandum of understanding) to maintain that clarity, and provide for information sharing where appropriate to assist other participants in the ecosystem to perform their functions efficiently and effectively. For example, rather than developing its own complaint reporting and monitoring process, the self-regulatory body should seek effective and efficient access to TIO (Telecommunications Industry Ombudsman) complaint data trend information.

**c) Compliance and Monitoring Arrangements**

Self-regulation needs to have transparent arrangements for compliance and monitoring. Whether incorporated into the industry association or not, it will be important to be able to demonstrate the independence of the compliance and monitoring role. One example is the creation of CommCom to undertake this role relation to the TCP Code. Similar arrangements are currently being explored in relation to numbering. There may be efficiency in adopting a broader industry-wide compliance and monitoring role for self-regulatory processes.

**d) Industry Commitment**

Industry associations that are responsible for the development of self-regulation need to develop mechanisms that ensure their members are committed to relevant compliance and monitoring arrangements. These mechanisms can include membership rules, codes of conduct or specific rules in particular codes. The absence of an effective industry commitment invites the need for a mandated regulator enforcement role to be maintained in parallel with the self-regulatory framework. The consequences for non-members who have not committed to the self-regulatory scheme also need to be clarified.

**e) Sustainable Funding**

To ensure the success of a self-regulatory framework a sustainable and adequate source of funding needs to be developed and implemented. Industry association membership fees are currently the primary source of funding, however, these are not considered adequate given:

- The desire to increase the role of industry self-regulatory bodies;
- Increased complexity and range of issues to be addressed; and

- Increasing numbers of carriage service providers and over-the-top players operating in the communications sector.

One option is to re-direct current industry funding of the regulated framework via the carrier licence fee to relevant industry associations. This would particularly apply in those circumstances where industry is taking over responsibility for functions previously undertaken by the regulator. This funding option could replicate existing arrangements used to fund ACCAN and could be formalised with the Government via contractual arrangements for specific tasks. The quantum and allocations for specific needs should be transparent, auditable and subject to annual reporting.

#### **f) Community Awareness**

The ongoing awareness of the self-regulatory processes is another key factor in ensuring that any framework is effective. Whilst industry associations will have the responsibility of informing suppliers, and suppliers in turn will be able to communicate information to their customers, there is still a need for Government to allocate responsibility and funding to improve broad community awareness of good self-regulatory outcomes. This awareness material would be linked to the achievement of the underlying Government policy objective. This could be an ongoing function of the ACMA.

#### **g) Continuous Improvement**

The self-regulatory arrangements need to be subject to regular review and assessment. Transparent key performance indicators (KPIs) and a performance reporting mechanism should be developed by relevant industry associations using independent reviewers as necessary.

##### Recommendations:

- The Department, the ACMA and Communications Alliance work cooperatively to set out the optimal design of a self-regulatory framework including all building blocks needed to ensure the efficiency of self-regulation.
- The Department requires the ACMA to report on its costs of delivering functions that can potentially be moved to self-regulation, and commits to reduce or re-direct carrier licence fees commensurately with the cost savings from moving those functions to industry self-regulation.

## **4.6 Efficiency and effectiveness of the ACMA**

In draft proposals 18 through to 24, the Department has proposed several ways to enhance the efficiency and effectiveness of the ACMA.

Of particular note, Telstra considers that consumers and industry would benefit from the Department's draft proposal 23 that the ACMA provide a report every two years on the initiatives it has undertaken to identify and reduce the regulatory burden. Regulatory burdens, particularly those that outweigh any benefits, come at a direct cost to industry but also reduce the flexibility and resources of companies to provide better services and experiences for customers.

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The Department could consider extending this requirement to also cover the ACCC, to measure its contribution to the reduction in the regulatory burden. Under the Regulatory Performance Framework the ACCC already identifies the following measures of 'good regulatory performance':<sup>26</sup>

- The ACCC establishes cooperative and collaborative relationships with stakeholders to improve the efficiency and effectiveness of the regulatory framework;
- The ACCC engages stakeholders in the development of options to reduce compliance costs, including changes to the overarching regulatory framework; and
- The ACCC regularly shares feedback from stakeholders and performance information with policy departments to improve the operation of the regulatory framework and administrative processes.

The Department's draft proposal 24 for the ACMA to produce a public report on steps it has taken to improve the transparency and consistency of its decision-making processes would be beneficial.

Recommendation:

- The Department considers extending the proposal for bi-annual reporting on initiatives undertaken to identify and reduce the regulatory burden to also cover the ACCC, consistent with its existing Regulatory Performance Framework, to measure its contribution to the reduction in the regulatory burden.

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<sup>26</sup> ACCC, *ACCC self-assessment methodology, measures and evidence*, June 2015.



## Appendix A: Principles of best practice regulation

Council of Australian Governments	Department of Prime Minister and Cabinet	Department of Communications
Establishing a case for action before addressing a problem.	Every substantive regulatory policy change must be the subject of a Regulation Impact Statement.	Regulation should serve clearly identified public policy goals, and be effective in achieving those goals.
Government action should be effective and proportional to the issue being addressed.	Regulators must implement regulation with common sense, empathy and respect.	Regulation should be consistent with other regulations and policies, including those relating to competition, trade and investment.
Adopting the option that generates the greatest net benefit for the community.	Regulation should be imposed only when it can be shown to offer an overall net benefit.	Regulation should produce benefits that outweigh the costs, including those imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, fewer services, and higher prices).
Ensuring that regulation remains relevant and effective over time.	The cost burden of new regulation must be fully offset by reductions in existing regulatory burden.	Regulation should be as technologically neutral as possible, to avoid creating regulatory distinctions between similar services that are delivered differently.
Consulting effectively with affected key stakeholders at all stages of the regulatory cycle.	All regulation must be periodically reviewed to test its continuing relevance.	Regulation should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical basis.

<p>A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed.</p>	<p>Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option.</p>	<p>Regulation should minimise market distortions and harness competition to deliver policy outcomes by aligning market incentives with regulatory objectives.</p>
<p>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.</p>	<p>The information upon which policy makers base their decisions must be published at the earliest opportunity.</p>	
<p>In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:</p> <ul style="list-style-type: none"> <li>a) the benefits of the restrictions to the community as a whole outweigh the costs, and</li> <li>b) The objectives of the regulation can only be achieved by restricting competition.</li> </ul>	<p>Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals.</p>	
	<p>Policy makers must work closely with their portfolio Deregulation Units throughout the policy making process.</p>	
	<p>Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens.</p>	

## Appendix B: Summary of Telstra's Response to the Draft Proposals

No.	Draft Proposal	Telstra Response
1	That the ACMA's remit cover all the layers of the communications market, including infrastructure, transport, devices, content and applications.	<p>While the service layer framework is a useful way of framing the communications sector, the remit of the ACMA should not be left as broad as contemplated in draft proposal 1, otherwise consideration should be given to ensuring that the risk of regulatory overreach is mitigated.</p> <p>Given the draft proposal for the Government to commence a coordinated programme of regulatory reform to establish a contemporary communications regulatory framework, we consider the proposed changes to the ACMA remit should be introduced as a temporary approach pending the establishment of the new framework.</p> <p>Please see section 4.1 for more information.</p>
2	That the ACMA's cyber-security programmes be transferred, along with staff and funding, to the Attorney-General's Department.	Telstra supports this draft proposal. Dealing with the Federal Government on cyber-security matters can be complicated, as it can be difficult to determine which of the 13 agencies to approach in the first instance.
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.	Telstra supports this draft proposal. Given the ACMA's regulatory research programme would be reduced to focus only on supporting the effectiveness of regulatory functions and harms that are affecting businesses and consumers, we would expect to see a reduction in overall ACMA costs and thus a reduction in industry licence fees.

4	<p>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.</p>	<p>Telstra supports this draft proposal with the following caveat:</p> <p>The Department should be mandated to consult with industry before developing its input into international policy-setting forums, and its input must be developed with the objective of supporting the interests of the Australian industry and consumers.</p>
5	<p>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.</p>	<p>Telstra supports this draft proposal. If it is determined that it would be more efficient for another body, such as the Australian Taxation Office, to undertake the revenue collection functions currently performed by the ACMA, we consider the efficiency dividend should be returned to industry in the form of reduced fees.</p>
6	<p>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:</p> <ul style="list-style-type: none"> <li>&gt; technical standards;</li> <li>&gt; Integrated Public Number Database;</li> <li>&gt; Do Not Call Register;</li> <li>&gt; Action on unsolicited communications, including Spam.</li> </ul>	<p>Telstra supports this draft proposal but believes it should be strengthened by:</p> <ul style="list-style-type: none"> <li>• The Department, the ACMA and Communications Alliance working cooperatively to set out the optimal design of a self-regulatory framework, including all building blocks needed for industry to ensure self-regulation is efficient; and</li> <li>• The Department requiring the ACMA to report on its costs of delivering functions that can potentially be moved to self-regulation, and committing to reduce carrier licence fees commensurately with the cost savings from moving those functions to industry self-regulation.</li> </ul> <p>Please see section 4.5 for further information.</p>

7	<p>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.</p>	<p>Telstra supports this draft proposal.</p> <p>In particular, we would support the simplification and streamlining of the fragmented classification framework under a single regulator with a single set of objectives and compliance powers. However, we would want to ensure a central role for industry codes (e.g. <i>Subscription Television Code of Practice</i>) and that the necessity to classify is proportionate to the type and nature of the content.</p>
8	<p>That the Interactive Gambling Act 2001 be amended to require the ACMA to:</p> <ul style="list-style-type: none"> <li>&gt; Handle all complaints relating to interactive gambling services and advertisements;</li> <li>&gt; Conduct the same investigation process irrespective of whether the content is hosted in Australia or overseas; and</li> <li>&gt; Enforce civil penalties for breaches of the Act.</li> </ul>	<p>Telstra supports this draft proposal with the following caveat:</p> <ul style="list-style-type: none"> <li>• While noting that discussion of the issues in the paper is limited, Telstra is in principle supportive of the ACMA handling all complaints relating to interactive gambling services and advertisements. However, we consider the impact on internet filter providers of the proposed common investigation process for domestic and international content would need to be fully assessed. We may be supportive of the mandatory enforcement of civil penalties in certain circumstances, however, we believe these circumstances should be subject to further consultation and then set out in guidelines.</li> </ul>
9	<p>That the current institutional arrangements for economic regulation of the communications sector be retained.</p>	<p>Telstra supports the Department's preference not to transfer economic regulation functions to the ACMA.</p> <p>However, the Vertigan and Harper reviews strongly indicate that economic regulation could be reformed to align more with best practice by changing the structure of economic regulation to address a number of key issues, including the very high workload of the ACCC and lack of accountability by regulators. These issues are yet to be addressed. Telstra recommends that the Department continues to engage with the broader Government, as it</p>

		<p>determines how to implement the Harper recommendations that relate to regulatory structure, to ensure that the economic regulation of telecommunications markets is further aligned to best practice.</p> <p>Please see section 4.2 for more information.</p>
<p>10</p>	<p>That cross-appointment arrangements between the ACMA and ACCC be strengthened in order to benefit both ACMA and ACCC decision-making.</p>	<p>Telstra supports this draft proposal with the following caveat:</p> <ul style="list-style-type: none"> <li>• While noting that the ACMA already consults with the ACCC on some competition issues (e.g. spectrum competition limits), we consider it imperative that the ACMA consult with the ACCC on any other competition issues (and that the ACMA must adhere to the ACCC's ruling).</li> </ul>
<p>11</p>	<p>That the current institutional arrangements for communications consumer protections be retained.</p>	<p>Telstra supports this draft proposal with the following caveats:</p> <ul style="list-style-type: none"> <li>• Self-regulation should be viewed as the first solution and this principle should be enshrined in ACMA enabling legislation;</li> <li>• More definition is required in the delineation of overlapping functions to avoid double jeopardy and the inefficiency of dealing with multiple regulators. This could be achieved by requiring one regulator to take the lead on a matter where there is overlap. Formal and transparent memorandums of understanding could be easily developed to support this (e.g. the ACMA and the Office of the Australian Information Commissioner have done so, as have the ACMA and TIO); and</li> <li>• More alignment is required with the Department in terms of reforms to the existing consumer safeguards.</li> </ul>

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.	Telstra supports this draft proposal. We consider the Department should also consider additional ways to improve the accountability of communications regulators for the decisions they make.
13	That the commission model of decision-making be retained.	Telstra supports this draft proposal, however, where decision making can be delegated, responsibility for the delegated decision should ultimately lie with the Commission (similar to the Board model).
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.	Telstra supports this 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.	Telstra supports this 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.	Telstra supports this 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.	Telstra supports this draft proposal if responsibility for delegated decision making is ultimately held by the Authority.

18	<p>Legislate the following four regulator principles in the ACMA's enabling legislation, proposed draft:</p> <ul style="list-style-type: none"> <li>&gt; The ACMA have regard that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.</li> <li>&gt; 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.</li> <li>&gt; The ACMA should implement continuous review of regulation to reduce burden and streamline approaches where the benefits exceed the costs.</li> <li>&gt; 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.</li> </ul>	<p>Telstra supports this draft proposal, however, the four proposed regulator principles in the ACMA's enabling legislation are only a subset of what it takes to align to best practice. Telstra recommends the Department should consider including all their principles of best practice regulation in the ACMA enabling legislation.</p> <p>Please see section 4.4 for more information.</p>
19	<p>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.</p>	<p>Telstra supports this draft proposal, however, the Statement of Expectations should also be examined to provide greater clarity as to how regulatory risk is mitigated and regulatory certainty is achieved.</p>
20	<p>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.</p>	<p>Telstra supports this draft proposal. The Department should also consider additional ways to improve the accountability of communications regulators for the decisions they make.</p>
21	<p>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.</p>	<p>Telstra supports this draft proposal.</p>



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.	Telstra supports this draft proposal. Noting that stakeholders in different industry sectors have differing perspectives on how the ACMA approaches its compliance and enforcement role, we suggest the ACMA consult more on its compliance and enforcement policy.
23	That the ACMA report to the Minister every two years on initiatives undertaken to identify and reduce regulatory burden on industry and individuals.	Telstra supports this draft proposal. The Department could consider extending this requirement to also cover the ACCC, consistent with the ACCC's Regulatory Performance Framework measures of 'good regulatory performance'.
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.	Telstra supports this draft proposal, noting that the public report should be built into the annual regulatory performance framework.
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.	<p>Telstra supports this draft proposal with the following caveats:</p> <ul style="list-style-type: none"> <li>• All industry 'taxes' be assessed for efficiency against funding from the general base;</li> <li>• The breadth of tax collection be broadened to include:             <ul style="list-style-type: none"> <li>○ All telecommunications providers by a registration process; and</li> <li>○ All non-telco competitors; and</li> </ul> </li> <li>• Savings generated from efficiencies gained be used to fund self-regulation.</li> </ul>



26	That the ACMA should further analyse its cost base, in light of the proposed function changes, to ensure it is efficiently delivering on its responsibilities and minimising costs to industry.	<p>Telstra supports this draft proposal with the following caveats:</p> <ul style="list-style-type: none"> <li>• The ACMA should be more transparent about the allocation of its resources to a breakdown of the functions and objectives – to demonstrate alignment between priorities and expenditure; and</li> <li>• Spectrum compliance and enforcement is under resourced and will be even more inadequate as the demand for spectrum and massive growth in devices (e.g. internet of things) increases the risk of interference.</li> </ul>
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.	Telstra supports this draft proposal.