



REVIEW OF THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

DRAFT REPORT

SUBMISSION BY VODAFONE HUTCHISON AUSTRALIA

JUNE 2016



Contents

1. Introduction	2
2. Competition/Economic regulation	2
3. Governance	5
4. Decision-making processes	6



1. Introduction

Vodafone Hutchison Australia (VHA) welcomes the opportunity to provide feedback to the Department of Communications and the Arts on the Draft Report of the Review of the Australian Communications and Media Authority (ACMA). VHA strongly supports the Review's objectives, namely to inquire into and make recommendations on the objectives, structure and operation of the ACMA to ensure it remains fit-for-purpose for the current and future communications regulatory environment.

In this submission, VHA has provided feedback on those draft proposals which relate to ACMA's role in competition/economic regulation and the ACMA's governance and decision-making processes. We have focused our comments as narrowly as possible. We believe that the broader issues and viewpoints raised in VHA's earlier submission to the Issues Paper remain significant and relevant to the Draft Report. However, as stated in our earlier submission, we believe that an appropriate focus on competition matters and structured decision governance are the two most important factors to optimise the regulator's performance.

2. Competition/Economic regulation

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

As noted in the Draft Report, VHA believes that the promotion of competition must be a clear responsibility of a reformed ACMA. We believe that there are substantial risks in requiring the ACMA to take competition into account, yet have a different standard than the ACCC is required to take into account in the communications competition matters they would both be required to consider. This is what has been recommended in Draft Proposal 18.

We believe it is unarguable that all regulators should assess competition policy principles in their decisions. In our submission to the Issues Paper we outlined options to achieve this, assuming the establishment of a separate national access regulator (as recommended by the Vertigan panel and Harper Review) does not take place. This included the transfer of all responsibility for Parts XIB and XIC of the *Competition and Consumer Act 2010 (CCA)* to the ACMA. The Draft Report finds that if responsibility for access regulation was transferred to the ACMA 'it would likely encourage the ACMA to consider competition issues more generally in exercising its regulatory functions' however it also notes that 'the agency does not at present possess the economic skills needed to administer Part XIC and would require a transfer of staff from the ACCC.'

The skills base of the ACMA with regards to competition/economic regulatory functions must be addressed even without any change to the institutional arrangements for economic regulation of the communications sector as proposed by the Draft Report. The ACMA's existing responsibilities include a range of areas, such as radiofrequency spectrum management, that are critical to the possibilities and limitations of competition in the communications sector, which is one of the potential key drivers of



economic growth, productivity and innovation across the economy. There is a need for the ACMA to have a strong economic and competition analysis capability to make both inter-industry decisions, which typically require consideration of whether a decision will maximise the public benefit, and intra-industry decisions, which typically require consideration of whether a decision will promote competition and the long-term interests of end-users. It is also critical to ensure the ACMA has a formal mechanism in place to seek advice from the ACCC when these issues arise and we make further comments on this later in this submission.

The Draft Report makes two recommendations to improve the ACMA's ability to give sufficient consideration to competition impacts in its decision-making. These are included in Draft Proposals 10 and 18 below. The Draft Proposals relating to Governance (13 – 17) also provide the opportunity to strengthen the ACMA's ability to focus effectively on competition matters and we provide comments on these in Section 3 of this submission.

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

The Draft Report considers that the reinvigoration of existing cross-appointment arrangements between the ACMA and ACCC 'could increase the likelihood that cross-consultation would occur and would bring a more independent sectoral perspective to ACCC decision-making.'

It is VHA's opinion that the cross appointment approach to a large degree embeds the current organisational thinking that the ACMA is not responsible for competition matters and that the ACCC should always be the decision maker for competition matters. We are concerned that a strengthening of these cross-appointment arrangements will be regarded as a substitute for structured engagement between the respective regulators. This will ultimately discourage deeper and more formal cross-consultation between the ACMA and the ACCC that is necessary for some decisions.

We therefore support a structured and formalised engagement between the working levels of the ACCC and the ACMA. This might involve, for example, a joint working group on communications that is overseen by one ACMA member and one ACCC Commissioner. Another option would be to require the ACCC and ACMA to produce guidelines on the manner in which they will engage with each other and jointly work through key issues. As noted in our earlier submission to the Issues Paper, ensuring that one of the ACMA members or Commissioners has clear responsibility for competition issues (in the same way that an ACCC Commissioner has clear responsibility for the communications industry) is one of the most practical ways in which a focus on competition can be clarified and embedded in the ACMA's operations.

Draft Proposal 18: *Legislate the following regulator principle in the ACMA's enabling legislation, proposed draft: The ACMA have regard that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.*

VHA believes it is of critical importance that the ACMA considers whether its regulatory settings will promote competition and the long-term interest of end-users. The Draft Report recommends that the



ACMA continue to not have primary responsibility for competition in the communications industry, and therefore as it is not a competition regulator, contends that it is not appropriate to establish a specific objective requiring the ACMA to promote competition. Instead, the Draft Report concludes that the ACMA could be asked to not hinder competition, unless this is unavoidable in fulfilling its statutory responsibilities, and considers this approach will encourage greater market-based thinking within the regulator's culture.

If adopted, this will introduce an entirely new test in the competition regulatory framework, namely 'do not unnecessarily hinder competition,' which VHA believes is ambiguous and will be difficult to apply in practice. It is also in addition to, rather than aligned with, the 'long term interest of end-users' and 'promote competition' tests already contained in the CCA and administered by the ACCC. VHA contends that the inclusion of a reference to 'promote competition' in the object of the ACMA's enabling legislation would provide the ACMA with much needed clarity regarding its responsibility in relation to its regulatory settings and their potential impact on competition. We believe that the simplest and most practical solution is to align the standards across the two bodies that each will have a significant role to play in ensuring competition in the communications industry. The ACMA should have the same 'long term interest of end-users' test as the ACCC.

VHA believes what is also required is a clear and transparent framework for the ACMA and the ACCC to collaborate and consult on areas including radiofrequency spectrum management, licencing and technical issues where ACMA decisions (or the absence of a regulatory decision) will have fundamental competition impacts. Implicit within any ACMA assessment of whether a decision will have the effect of not hindering or promoting competition is a requirement for the ACMA to make an assessment of the impact of its regulatory settings on competition. However, the ACMA currently has no basis for determining if a decision either hinders or promotes competition and does not have the resources or capabilities to assess the impact of its decisions on competition. As noted earlier in this submission, the skills base of the ACMA with regards to competition/economic regulatory functions needs to be addressed even without any change to the institutional arrangements for economic regulation of the communications sector as proposed by the Draft Report.

The ACMA's responsibility for radiofrequency spectrum management and licencing and technical decisions could potentially impose barriers to entry and limit the growth of new services¹. It is therefore critically important to clearly articulate the role of the ACCC in considering competition issues for areas administered by the ACMA in order to identify the mechanisms by which the ACMA refers matters to the ACCC and to specify the competition criteria the ACMA needs to consider in its subordinate legislation. This will require provision in the ACMA Act to allow the referral of matters to the ACCC. It may also

¹ The Legislative Proposals Consultation Paper for the *Radiocommunications Bill 2016* proposes the ACMA have future responsibility for determining competitions limits for spectrum license issue. It is further proposed that the Minister may, however, have the ability to direct the ACMA on the limits.



require amendments to the CCA to enable the ACCC to examine issues referred to it by the ACMA. In addition there needs to be a structured and formalised engagement between the working levels of the ACCC and the ACMA, as noted earlier in this submission. The purpose of this is not to transfer responsibility for the regulation of competition matters to the ACMA, but to ensure the ACMA has a mechanism in place to seek advice from the ACCC when these issues arise. In the absence of a mechanism for the referral of competition matters from the ACMA to the ACCC, VHA believes there is a risk of diminishing competition considerations in the regulatory matters administered by the ACMA.

3. Governance

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

VHA is supportive of providing the ACMA with clear objectives against which its performance can be measured, noting the need for consistency with the proposed regulator principles in the ACMA's enabling legislation (Draft Proposal 18) as well as the statutory objectives set out in the subordinate legislation the ACMA administers.

Draft Proposal 13: *That the Commission model of decision-making be retained.*

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.*

VHA is supportive of Draft Proposals 13 and 16 and notes that these are consistent with the proposed ACMA structure and governance model in VHA's submission to the Issues Paper (Attachment 1). This model is comprised of a commission which is independent of the government, and includes two Commissioners and a Chair. These Commissioners are supported by a secretariat, led by the CEO, which is responsible for administering government policy within the ACMA administration. The responsible Minister would provide policy guidance to the ACMA secretariat and the commission would delegate certain decision-making to the CEO. The secretariat would also make recommendations to the commission.

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.*

VHA supports a full-time model for the ACMA but questions the requirement for at least five full-time members in the absence of a clear argument in favour of this proposal in the Draft Report. In our submission to the Issues Paper, we propose a model which includes two full-time Commissioners and a Chair. However, to ensure the full-time model provides the depth of experience required in a dynamic and complex communications sector, it is important that there is a mechanism in place to bring in broader experience. This could include the establishment of sub-boards as per Draft Proposal 17.



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

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

As noted earlier in this submission, the ACMA's remit necessitates the ability to undertake complex economic analysis. As noted in our submission to the Issues Paper, VHA contends that all public policy decision makers should undertake some form of cost/benefit analysis and assess whether and how market forces can assist in delivering efficient and optimal outcomes. This is critical in ensuring the ACMA's current lacuna in relation to competition is effectively addressed.

In any proposed model for a reformed ACMA, it is worth considering and specifying the required skills and responsibilities of the Authority members. Given the need to address the skills base of the ACMA with regards to competition/economic regulatory functions, appointing one of the Authority members with specific responsibility for competition matters would be beneficial. VHA is therefore supportive in principle of Draft Proposal 17, noting a sub-group could be established to help support the Chair in his or her role in properly examining the competition impacts of the ACMA's decisions. This will assist in ensuring the ACMA complies with its legislated regulator principle. VHA contends that industry should be consulted on the membership of these sub-groups and have the opportunity to provide input into their work as appropriate.

Draft Proposals 19 & 20: *That the Minister provide the ACMA/ACCC with an annual Statement of Expectations and the ACMA/ACCC respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government's expectations.*

While noting the introduction of a Statement of Expectations for the ACMA will bring it into line with other statutory agencies, its purpose is unclear. This is because there are already statutory objectives set out in the subordinate legislation the ACMA administers.

4. Decision-making processes

As noted in VHA's submission to the Issues Paper, it is essential that the ACMA's decision-making is consistent, transparent, rigorous and timely. The ACMA's decisions must be based on established principles following well understood consultation processes. Of critical importance is the establishment of regulatory precedents to foster certainty and consistency of regulatory decisions. It is therefore encouraging the Draft Report has highlighted this as an area for improvement. VHA considers there to be a real case for mandating a more structured and transparent decision-making process for the ACMA. This would help ensure that all relevant information is gathered, relevant considerations are taken into



account, principles are applied consistently from one decision to the next and decisions are made in a timelier fashion, at least for decisions that have significant implications for industry participants.

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

VHA agrees with the Draft Report's observations that 'the ACMA's decision-making timeframes for significant rule-making and planning processes have been sub-optimal.' VHA therefore supports initiatives to provide timelier decision-making by the ACMA.

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

VHA believes that in addition to initiatives to support more timely decision-making (Draft Proposal 21), that consideration be given to legislative amendments to support greater transparency and accountability in decision-making.

We support the Draft Report's suggestions on steps the ACMA could take to improve transparency and accountability including publishing clear guidance about its decision-making processes, publishing agendas for each of its Authority meetings, publishing processes for ACMA functions and issuing statements of reasons for decisions. However, as noted in VHA's submission to the Issues Paper, the ACMA should be required to publish its reasons for decisions and to make these available in a centralised public repository. The ACMA should also be required to consult on all decisions that have the potential to have a significant impact on stakeholders, as part of a clear and specific process which is stipulated by legislation. These are the accepted, well-understood, key elements of transparency in decision-making widely practised across virtually all areas of government. If there is a compelling argument to the contrary in the case of the ACMA, this should be set out clearly, as we do not believe that this has been articulated to date.

To further improve the accountability of the ACMA's decision-making, where a decision has significant implications for industry participants, we consider there to be a strong argument that effective avenues of review should be available. VHA contends that any package of legislative amendments to support more consistent, transparent, rigorous and timely decision-making must include a right of appeal from all significant decisions made by the ACMA. While there are a range of decisions under the principal legislation for which the ACMA is responsible, there are a variety of important decisions where review is not readily available.

Attachment 1: ACMA - proposed structure and governance model

