SUBMISSION

DRAFT REPORT ON THE REVIEW OF THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

Joint Submission on the Draft Report by

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Submission
Draft Report on Review of the Australian Communications and Media Authority

Introductory comments

Thank you for the opportunity to comment on the Draft Report. This submission was prepared by Derek Wilding, along with Tim Dwyer, Michael Fraser and Lesley Hitchens. As in our earlier submission on the Issues Paper, our comments are addressed to media regulation only.

In our submission on the Issues Paper we said:

> '… while the Issues Paper recognises digital disruption has had profound effects on media businesses, it does not ask whether new digital enterprises should be subject to some form of regulation (statutory, co-regulatory or self-regulatory) or whether traditional media should be relieved of some regulatory obligations in the face of new competition. Addressing the threshold questions of who and what are subject to regulation is a crucial first step in considering how the regulator should act.'

We note that Part Five of the Draft Report considers the need to review the regulatory framework more generally. While we reiterate our earlier comments on the desirability of addressing the regulatory framework before changing the functions and governance of the regulator, we offer the comments below on the understanding that the government has decided to proceed with changes to the ACMA while also commencing the broader review.

Comments on draft proposals

Remit

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

   We support this proposal.

Functions analysis

2. **No comment.**

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.**

   In our view, the ACMA has produced high quality and timely research. Its work has helped inform our thinking on developments within the communications industry, and its more targeted research reports have provided important evidence for regulatory decisions.

   That said, we appreciate that the investment in the Bureau of Communications Research enhances overall research capacity within the portfolio. We also understand the rationale for focussing the research activity of the ACMA on regulatory functions and addressing harms.

   Accordingly, we support the Draft Proposal, on the following conditions:

   - The BCR at least maintains the current research capacity and output of the ACMA and that responsibility for research be returned to the ACMA if the BCR is abolished or its functions downgraded.
   - The scope of the ACMA's own research functions (focussed on 'supporting the effectiveness of regulatory functions and harms') continues to include work such as its research on local content, news and current affairs and children's television viewing, along with the research conducted for Contemporary Community Safeguards.

   We also recommend that the ACMA be given responsibility for undertaking a research program monitoring media diversity, including availability, consumption and impact of news media. This would provide a valuable source of information in an environment where the cross-media rule

(the '2 out of 3 rule') and the 75 per cent audience reach rule could be repealed; it would also provide the necessary data for any future review of media regulation. The research could be undertaken in the context of the ACMA's periodic work on news and current affairs, and would ensure that expertise is further developed and located within the independent regulator.

Ofcom's *Measurement Framework for Media Plurality* (November 2015) provides an example of such a research program.[1]

It was evident in the Senate Committee public hearings on the Media Reform Bill that the kind of information gathered by Ofcom is lacking in Australia, and that the community would benefit from having an independent source of such information.

4. **No comment.**

5. **No comment.**

6. **No comment.**

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

   We support this proposal.

8. **That the *Interactive Gambling Act 2001* be amended to require the ACMA to:**

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

   We support this proposal.

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

   We support this proposal. In the absence of any enhanced role for the ACMA in relation to media ownership and control, and with no convincing evidence that public policy objectives on diversity of sources of news and current affairs can be adequately regulated under competition law, we think the current arrangements should remain until the primary legislation is reviewed.

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

    We support this proposal.

11. **That the current institutional arrangements for communications consumer protections be retained.**

    We support this proposal.

Objectives

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.**

    In addition to Proposal 12:

    Enhancing regulator performance – Proposal 19. That the Minister provide the ACMA with an annual Statement of Expectations and the ACMA respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government's expectations.

    Enhancing regulator performance – Proposal 20. That the Minister provide the ACCC with an annual Statement of Expectations and the ACCC respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government's expectations.

[1] http://stakeholders.ofcom.org.uk/consultations/media-plurality-framework/

Draft Report comments on 'Independence of the regulator' – pages 50-51. 'The degree of independence the ACMA is afforded will depend on the nature of its remit and may vary with its functions over time. For example, in economic regulation, where credible commitments to long term policy settings are required, greater independence is appropriate. On matters of national interest, allocation of public resources, or in fast changing environments where regulatory decisions cannot be readily distinguished from policy choices, it may be appropriate for the Minister to have a greater role. These powers may be contained in primary legislation that the ACMA administers and are appropriately considered in light of the objects of that legislation. The Review does not consider, based on an analysis of the remit described earlier in this chapter, that any material change in the degree of independence under which the ACMA currently maintains is necessary. However, if the ACMA were to acquire an economic regulation function in the telecommunications sector it would necessitate a higher degree of independence particularly given the Commonwealth's shareholding in the NBN.'

We have considered these proposals together as they all invoke aspects of the ACMA's independence from government. We are concerned that they create a closeness in the relationship that, while appropriate for a departmental agency, may be inappropriate for a non-departmental agency such as the ACMA.

Roger Wettenhall has explained the motivation behind establishing and ascribing functions to a non-department agency:

> 'At the most general level, every decision to establish such a body is in some sense a decentralising decision, for it represents a move away from the centre, from the executive core of government. At least in theory, it follows that, in those parts of the public sector affected in this way, the executive's hold is more tenuous, so that accountability requirements will prescribe a more direct reporting line to the parliament.'[2]

Accordingly, we do not support these proposals at this time; we think they should be reconsidered and possibly revisited when the regulatory framework is more fully reviewed and any changes have been submitted to Parliament.

Specifically:

- On Proposal 12 for the government to provide a set of overarching policy objectives – we consider the setting of overarching policy objectives should be a matter for Parliament in amendments to/replacement of the Broadcasting Services Act and the ACMA Act.
- On Proposal 19 for an annual statement of expectations – it is not clear how the ACMA would manage potential conflicts between its statutory obligations and a statement of government priorities. This is of particular concern in the period before any amendments to the objectives in the BSA and the ACMA Act, or any extension to the existing powers of the Minister to direct the ACMA to conduct investigations. The ACMA, as an independent agency, needs to maintain an appropriate level of autonomy. It also needs the capacity to respond to issues of community concern as they arise, whether or not they conflict with current government priorities.
- On 'Independence of the regulator' (pp 50-51) – we note the Draft Report's statements supporting the principle of independence and the observation that the degree of independence may vary over time with a (statutory) change in functions and with the nature of the remit given to the ACMA by Parliament. However, we think evidence is needed to support the proposition that 'in fast changing environments where regulatory decisions cannot be readily distinguishable from policy choices, it may be appropriate for the Minister to have a greater role'. The ACMA has a clear understanding of its role in relation to streaming services, for example, which applies the Ministerial determination on the definition of 'broadcasting service'. Any greater role for the Minister is a matter for Parliament.

[2] Roger Wettenhall, 'Integrity Agencies: The Significance of the Parliamentary Relationship' (2012) 33 (1) *Policy Studies* 65, 67. Though Wittenhall's concern in this article is primarily for bodies that oversee decisions of the executive, his comments on the place of departmental and non-departmental agencies are of general application.

Governance

13. **That the commission model of decision-making be retained.**

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.**

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.**

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.**

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.**

    We support all of these proposals. We restate our earlier comment, in response to the Issues Paper, that it would be desirable for an independent appointments committee to be used for appointments to the Authority.

Enhancing regulator performance

18. **Legislate the following four regulator principles in the ACMA's enabling legislation, proposed draft:**

    The ACMA have regard that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.

    The ACMA should apply a risk-based approach to regulation, compliance and enforcement activities. Regulatory intervention should be targeted, evidence-based and commensurate with risk.

    The ACMA should implement continuous review of regulation to reduce burden and streamline approaches where the benefits exceed the costs.

    The ACMA should be transparent in its actions and clearly indicate the priorities and objectives which inform its decision-making to regulated entities and the broader public.

    We support in principle the proposal that a set of regulatory principles be introduced into the ACMA enabling legislation.

    However, we disagree with the Department's observation that the principles are only 'behavioural in character' and therefore do not include aspects of policy objectives (p.74). The second and fourth principles can be described as behavioural. The first principle, however, could have been expressed as 'The ACMA have regard that its regulatory settings do not unnecessarily hinder citizens' access to complaint-handling procedures'. We are not proposing such a principle; in fact, we support the recognition of competition, innovation and investment. But these are policy objectives and the principles themselves should be more balanced and include some consideration of the interests of citizens and consumers.

    Accordingly, we think these principles require further development and consultation and that implementation should be deferred under other aspects of the regulatory framework are reviewed.

    Timing/further regulatory reform – registering broadcasting codes of practice

    The ACMA's function is to register codes if it considers they 'provide appropriate community safeguards' (s. 123). These codes are among the principal sources of content rules for commercial broadcasting services. The ACMA's approach to applying community safeguards could conceivably change under the regulatory principles proposed in the Draft Report. It is not unreasonable to think the tests for registration would become more lenient. This would certainly appear to be the effect of the approach recommended by Free TV in its submission on the Issues Paper.

    In our view, there is deep dissatisfaction in the community with some of the provisions of these codes, and any further dilution would need to have the strong support of Parliament by way of

specific amendments to this part of the BSA. We think that is unlikely to occur, and it is undesirable for such a move to occur without Parliament's approval.

Further comments on code registration are made in response to Proposals 24 and 27 below.

The public interest

The Draft Report refers to Ofcom's enabling legislation and to the requirement for it to have regard to actions being transparent, accountable, proportionate, consistent and targeted. But the Draft Report does not explain that the Communications Act requires Ofcom to apply these principles in a specified context; that is, when performing its duties under subsection 1 of section 3 of the Act. This section reads as follows:

> 3 General duties of OFCOM
> (1) It shall be the principal duty of OFCOM, in carrying out their functions-
> (a) to further the interests of citizens in relation to communications matters; and
> (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

Until the 'principal' duties of the ACMA are designed in the forthcoming review of the regulatory framework, it is inappropriate to specify the approach it should take in performing them. If there is a strong emphasis on citizen and consumer in the principal duties (as we think there should be), then it would clearly be appropriate to emphasise these other concepts in the regulator principles.

As it stands, transparency is the only aspect of the draft principles in which there is a direct duty to the public. While the fostering of innovation, competition and investment will likely benefit the public in broader terms, one of the key functions of the communications regulatory framework (and of the regulator) is to protect citizens and consumers from regulatory harms. Unless this changes, it is insufficient to make transparency the sole protector of the public interest.

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

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

    See comments under 'Objectives' above.

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

    While we support the call for timeliness, we have reservations about some of the observations made in support of this proposal.

    - The comment that the regulator will need to develop 'regulatory craftsmanship' is directed at interventions 'that are targeted to address the harms in an environment better suited to ex post market corrections over ex ante rule-making' (p.54, also p.77), referencing an article by Larry Downs.[3] Downes also supports self-regulation, or at least regulation by multi-stakeholder, non-governmental bodies and favours regulations over statutes and standards over regulations. He also values competition law and 'laws prohibiting practices with demonstrable consumer harms (but not competitor harms)'. Accordingly, his comment about ex post corrections is limited in application and in any event, his opinion is contestable. It seems premature to make a generalised statement about such action being preferable to ex ante rule-making.
    - It is unclear what is intended by the comment that legislation prevents some matters from 'being handled administratively'. If this is intended as a proposal that some matters should be decided by ACMA staff rather than Authority members, those matters need to be specified. There is also a need to consider this proposal in the light of proposed changes to the ACMA's functions, its governance arrangements (including the appointment of full-time

[3] Larry Downes, 'Managing the Big Bang: The Regulator's Dilemma' (2014) 4 (Fall) *Democracy Journal*.

Authority members and of sub-boards) and the impact of any reductions in the agency's budget.

- As a statutory regulator, the ACMA will always need to operate in an environment where it provides an appropriate degree of fairness. A substantial amount of time in the decision-making process can be taken with the various stages of providing procedural fairness to licensees. In broadcasting matters, including investigations, decisions on licence area boundaries, and compliance and enforcement action, delays have been caused by legal action by a licensee, which a licensee is entitled to pursue and the ACMA is entitled to defend.

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.**

We have no objection to the proposal per se, and we note that the ACMA's 'investigation concepts' series is a useful guide to this aspect of its decision-making.[4] However, we question the finding that stakeholders in the broadcasting sector are concerned that the ACMA's approach to dealing with complaints is disproportionate to the level of harm. The assumption that underpins this statement – and certainly, the view proposed in the submission referred to – is that the ACMA has overreached in its compliance and enforcement actions in relation to broadcasting.

There is no matter of which we are aware in which the ACMA has taken enforcement action on a broadcasting matters that is disproportionate – in the sense of being excessive – to the harm caused.

Further, we consider it dangerous to make findings and recommendations on such a narrow evidence base. A view held by some should not be implicitly approved unless the Department is also able to say whether the community regards action taken by the ACMA as excessive, adequate or insufficient.

23. **That the ACMA publish a report to the Minister every two years on initiatives undertaken to identify and reduce regulatory burden on industry and individuals.**

We support this proposal, but we think each aspect of deregulation or reduction in regulatory burden should be accompanied by an explanation of any potential impact on the protection of the public interest.

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.**

We support this proposal but for different reasons and to different ends than those advanced in the Draft Report. Our comments are limited to the code registration activities and, specifically, the following statement:

> 'Consultation with stakeholders has identified a broad level of concern about a lack of consistency in process for significant spectrum and code registration activities at the Authority level. There is also concern about industry not understanding what information is presented to the decision maker and how decisions are made. One of the key findings of this Review is that stakeholders want greater transparency and accountability in decision-making … Stakeholders have also sought better disclosure of the reasons behind decisions.' (p.56)

On the issue of code registration, we think the problem extends beyond consistency and transparency. A more fundamental concern is with the application of the test under section 123(4)(b)(i) of the BSA to ensure a code provides 'appropriate community safeguards'. This issue is addressed in our comments on Proposal 27 below.

In relation to consistency and transparency, we support Proposal 24, but from a public interest perspective, rather than that of a licensee. In the 2015 review of the Commercial Television Industry Code of Practice, the Communications Law Centre made a substantial submission to Free TV in April 2015, copied to the ACMA, attempting to take into account the changing nature of the industry as well as the interests of citizens and consumers. For example, the CLC opposed the removal of the only criterion relating to fairness in current affairs programs (the requirement to not misrepresent included viewpoints) and to a change that allowed even substantial errors of

[4] http://www.acma.gov.au/theACMA/investigation-concepts-series

fact in news and current affairs programs to be corrected on a website, rather than in a program. Only the second of these proposals made it into the final code.

These are significant aspects of the regulation of news and current affairs in Australia, yet the CLC received no feedback from either Free TV or the ACMA.

In announcing the registration of the new code in November 2015, the ACMA said 'The new code continues to include important obligations upon commercial television broadcasters in areas such as news and current affairs, advertising, privacy and complaints handling'.

On the process involved in registering the code, the ACMA said:

> 'This code is the product of a robust engagement between the ACMA, the commercial television sector and its audiences, manifest in submissions made by individual viewers and advocacy groups,' Mr Chapman said. 'The ACMA is precluded by law from registering a code which does not contain appropriate community safeguards. The ACMA is satisfied that the process of engagement with Free TV and the wider community has resulted in a new code which, taken as a whole, meets this requirement.'[5]

In our view, the code does not contain appropriate community safeguards in relation to news and current affairs. This has been seen most recently in the public condemnation of the newsgathering activities of *60 Minutes* in relation to the Sally Faulkner matter, which the ACMA has conceded are essentially outside its jurisdiction.[6]

We think this is inadequate for a statutory scheme charged with protecting the public interest and we are concerned that the Draft Report's extensive and legitimate regard for the burdens placed on licensees is not balanced by attention to the public interest in ensuring codes of practice are fit for purpose.

On the issue of transparency, one of the steps the ACMA could take is to address the void left by Free TV and other peak bodies by publishing on its own website submissions made during code reviews.

On the issue of assessment of stakeholder satisfaction, we consider it would be manifestly inadequate to test licensees' satisfaction with improvements to transparency and consistency without also testing the public's view.

Resources

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.**

    We support this proposal, but it is dependent on the scope of the review of the regulatory framework foreshadowed in Part Five of the Draft Report.

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.**

    This recommendation needs to incorporate a more explicit reference to the ACMA's functions in protecting the public interest. Naturally, it should seek to minimise costs to industry, but 'delivering on its responsibilities' should be effective as well as efficient.

Regulatory reform

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.**

    We support this proposal.

    We agree with the statement in the Draft Report that the current regulatory regime, being 'still fundamentally based on the existence of stand-alone networks delivering specific services and the business models that supported those networks', requires review. As indicated above, in our

[5] http://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/the-acma-registers-new-commercial-television-industry-code-of-practice
[6] http://www.acma.gov.au/theACMA/recent-events-in-lebanon-involving-60-minutes

submission on the Issues Paper we observed that answering threshold questions of who and what are subject to regulation should be a precursor to any reform of the role and functions of the regulator.

Principles and policy goals

We note the proposal in the Draft Report to conduct this review within a three-part framework comprised of public policy goals, principles about when government should intervene, and principles dealing with the design of any such interventions.

As we expect the drafting of these goals and principles will be the subject of future consultation, we will not comment in detail here. We understand the government's emphasis on innovation and we think the three-part structure proposed in the Draft Report is an appropriate way to address government policy objectives and longer-term public policy goals.

In commenting on the drafting of the goals and principles in a future round of consultation, we would consider whether the promotion of innovation, investment and competition in the principles has, in each instance, sufficiently addressed the public interest articulated in the policy goals. For example, we agree that remedies provided by enforcement frameworks need to be 'proportionate', but in meeting the policy goals of 'diversity of voices' and 'values and safeguards', effectiveness should also be emphasised. More effective outcomes may emerge if some matters, but not all, are removed from the threat of civil penalties, offences and loss of licence. Some matters could be better addressed through the mid-tier powers sought by the ACMA, while others could be the subject of self-regulation with referral to the ACMA in limited cases (for example, repeated breaches).

Co- and self-regulation

We agree with the observations in the Draft Report that the effectiveness of co-regulatory mechanisms should be reviewed.

We think that at least some of the broadcasting codes of practice constitute failures in co-regulation. We will provide a more comprehensive review of these failings in the forthcoming review; for now, some examples are provided below:

- there are no privacy rules applying to commercial television or commercial radio apart from news and current affairs programs;
- there are no rules governing the conduct of commercial television news and current affairs reporters and producers, only what is depicted in a program;
- for commercial television, even substantial factual inaccuracies can be corrected on a website, not in a program;
- for commercial television, commercial endorsements disguised as editorial comments need only be disclosed on a website, not in a program.

We think that codes of practice containing these provisions, fail the obligation in section 123 of the BSA to ensure there are 'appropriate community safeguards'. They also undermine the following public policy goal the ACMA defined in 2011:

> 'Ethical standards: Information reporting should be fair, accurate and transparent so that citizens may participate constructively in Australian democratic processes.'[7]

We consider these and other shortcomings mean co-regulation has failed, at least in some key aspects.

The system needs review.

We are not suggesting these matters need necessarily be the subject of more formal regulation – i.e. legislation or ACMA standards and licence conditions. But some, such as news and current affairs, might be effectively managed by removing them from the statutory scheme, provided there is an appropriate industry-based scheme with a suitable degree of independence (for example, in the way the decisions are made by the committees of the Advertising Standards Board and the Australian Press Council).[8] In our earlier submission, we noted an industry-based scheme could be given additional authority by making access to statutory rights such as the

[7] ACMA, *Enduring Concepts: Communications and Media in Australia* (November 2011).

[8] We assume this is what is meant by the reference to 'independent industry bodies to implement complaint handling procedures' on p. 68 of the Draft Report – if so, we support it. We do not support in-house self-regulatory arrangements that do not include independent complaints handling.

exemptions from the Competition and Consumer Act and the Privacy Act dependent upon participation in the scheme, as proposed by the Convergence Review.

This would at least provide an opportunity to standardise the rules relating to accuracy, fairness and privacy across commercial television and commercial radio. Beyond this, it could result in one independent scheme that operates across platforms, including those that are not currently part of any regulatory framework. This approach has the potential for better code provisions, more transparent complaint handling and more targeted remedies. It could remove from licensees the threat of onerous statutory punishments and allow the ACMA to focus on matters for which it is given a clear, legislative mandate.

These proposals are far-reaching and merit further consideration. In raising these issues, we recognise there is an urgent need to review the regulatory framework, based on a full and appropriately timed consultation process.