



Australian Government
Department of Communications

Review of the Australian Communications and Media Authority

Issues paper / July 2015

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Introduction

On 12 June 2015, the Minister for Communications, the Hon Malcolm Turnbull, MP, announced a review of the Australian Communications and Media Authority (ACMA). The ACMA is responsible for the regulation of the broadcasting, telecommunications, radiocommunications and internet industries in Australia.

The purpose of the review is to examine the objectives, functions, structure, governance and resource base of the ACMA to ensure it remains fit-for-purpose for both the contemporary and future communications regulatory environment. The ACMA review will also incorporate the broad requirements of the Government's Contestability Programme and Regulator Performance Framework to assess the efficiency of the ACMA and its administration of communications laws and regulations.

The review is being undertaken by the Department of Communications, supported by a Reference Group of Australian and international communications and regulatory experts. The Department will report to the Minister for Communications by the end of 2015.

Background to the review is available at

www.communications.gov.au/what-we-do/television/media/acma-review.

Terms of reference

The review will examine and provide a report to the Minister for Communications on:

- > The current objectives of the entity as determined by the Government's forward priorities, other reviews and contemporary pressures of the broadening 'digital' character of the sector;
- > The efficiency of the ACMA in delivering its functions to support these priorities, any areas requiring improvement, and potential alternative arrangements (including costs/benefit analysis and implementation actions required) that could improve efficiency, where required;
- > The recent performance of the ACMA set broadly against the Government's Regulator Performance Framework and any areas for improvement;
- > The current resource base of the organisation and relative contributions from current sources— i.e. government funding, industry cost recovery and/or levy arrangements and funding from other sources.

The review will also provide recommendations to the Minister for Communications on options for reform in relation to:

- > The future objectives and functions of the regulator;
- > The appropriate structure, governance and accountability arrangements of the regulator;

- > An appropriate resource base for the regulator and the expected relative contribution from government, industry and other sources;
- > A proposed transition path to implement preferred alternatives to enable proposed changes (if any) to be put in place by 2016-17.

The review will have regard to:

- > The market structure of the communications sector in Australia and relevant changes since 2005;
- > The impact of digital network technologies changing media forms and communications platforms;
- > Enduring public interest objectives relevant to citizens and consumers as well as industry;
- > National and international best practice models of sectoral regulation and regulator governance structures;
- > Any announced deregulatory proposals, recognising that these are subject to agreement by the Parliament;
- > Evidence and views of the ACMA and its stakeholders in relation to its performance;
- > Future spectrum policy and management arrangements under the Spectrum Review being undertaken by the Department;
- > Any changes to the regulation of infrastructure access arrangements proposed or agreed by Government under the Competition Policy Review;
- > Other relevant government policies or matters identified through consultation or research.

This issues paper aims to provide additional information to inform submissions from interested parties. You may choose to address your submission against the questions raised in this paper or against any or all of the terms of reference for the review. Further public consultation will be held as the review proceeds, including with members of the public and small businesses that engage directly with the ACMA.

The review focuses on the shape and responsibilities of the future regulator. However, the review recognises that this cannot be considered in complete isolation from the future regulatory framework. The issue paper predominantly focuses on the former but invites general commentary on the regulatory framework for the communications sector in section 2.5.

The Department is aware that stakeholders may have made submissions on issues related to the ACMA Review in recent reviews commissioned by the Government. Where relevant, views raised in submissions to the NBN Cost Benefit Analysis and Review of Regulation (the Vertigan Review), Competition Policy Review (Harper Review) and Spectrum Review will be taken into account by this review.

The Department is planning to undertake further consultation with interested stakeholders. To be kept informed of future opportunities to contribute, and to keep up with the progress of the review, email ACMAreview@communications.gov.au with the subject 'SUBSCRIBE'.

Structure of this paper

This paper has five main areas of discussion:

- > The communications sector in Australia – stakeholders are asked to provide views on the likely changes in the communications sector over the next 5-10 years and the impact on the role of the regulator.
- > What should a future-focused communications regulator look like? – this section seeks views on the objectives, functions, structure and governance of a best practice regulator.
- > Enhancing the regulatory performance of the ACMA – how does the ACMA perform currently? Stakeholders are also asked to comment on what are the optimal forward-looking attributes and risk-based approach of a best practice communications regulator.
- > Maximising the ACMA's efficiency – this section seeks submissions on the efficiency of the ACMA in delivering its functions to support its priorities, any areas requiring improvement, and potential alternative arrangements that could improve efficiency, including functions that could be performed elsewhere, or would be better performed by the ACMA.
- > The communications regulatory framework – how will the ACMA's functions be affected by reforms in the communications regulatory framework being considered by the Government? Stakeholder views are sought on the value of 'enduring concepts' to the regulatory regime.

Issues

The Australian communications market

Technological advancements, changes in consumer demand and policy-induced structural change continue to ensure that Australian communications markets are dynamic and complex.

The pace of change in these markets is potentially greater than many other industries and makes forecasting future outcomes challenging. At an economy-wide level it is possible to identify the following broad trends:

- > Technology is becoming more capable, ubiquitous and connected. These developments are leading communications industries to evolve from local, technology defined 'silos' into global, interoperable layers of services;
- > Consumers are taking full advantage of new digital technologies;
- > Enterprises are adopting new digital technologies and changing business practices to respond to consumer demands, drive productivity and compete. This is extending the reach of the 'digital economy' across all sectors and enterprises and creating more uncertainty in consumer behaviour and business models;
- > Social practices and institutions are adapting to the implications of digital technologies in a variety of ways and at different rates.

Consumers are adopting technology at a faster rate and earlier, although this is not uniform. Media consumption in multiple forms is increasing and consumers tend to be more engaged online, both in consuming and producing content, and undertaking more online transactions.

There are a greater and more diverse number of businesses involved in the Australian communications sector, many based offshore. Communications networks are increasingly utilised for the delivery of health, education and other services. Consumer and citizen interactions with the digital economy are increasingly central to their participation in society both economically and socially.

At a structural level the distinction between the traditional well-defined, vertically integrated segments of the telecommunications, broadcasting and online industries is breaking down. This deconstruction is being driven by the digitisation of content which has enabled it to be accessed over multiple platforms and devices. The heterogeneous nature of digital services and the any-to-any connectivity of communications networks is distinguishing them from more traditional networked industries, such as utilities.

It is now more accurate to consider the communications sector as a series of horizontal layers of services and activities, with each layer (beginning with infrastructure, then digital/IP transport, applications/services and finally content) providing services to the layer above.

Key economic regulation issues such as how to provide sufficient incentives for private sector investment while providing consumer benefits, increasingly need to be considered in the context of an interdependent communications economic eco-system. Internationally, debate has centred on whether all economic regulation should be handled by a single specialist regulator irrespective of the industry (on the basis that it is essential to maintain a consistent approach across all industries), or whether, where an industry specific regulator is used for communications (that is, broadcasting, telecommunications, radiocommunications and internet industries), it should be responsible for all aspects of industry regulation, including economic regulation.

Questions

1. *Are there unique characteristics of the communications sector that require a particular style of regulation and regulator?*
2. *Do the characteristics of the communications sector mean that a sector-specific regulator should be responsible for all aspects of industry regulation including economic regulation? Would switching models enable the regulator to strike the optimal balance between investment and consumer outcomes?*
3. *What developments in the communications sector over the next 5-10 years are likely to affect the role of the regulator? In what ways will that role be affected?*

What should a future-focused communications regulator look like?

The primary purpose of this review is to examine the purpose, objectives, functions and governance of the ACMA to ensure that it is fit-for-purpose and able to deliver good regulatory outcomes in the dynamic environment described above.

Regulatory best practice suggests that an effective regulator must have a clear purpose and objectives, with clear and linked functions and the mechanisms to co-ordinate with other relevant bodies to achieve the desired regulatory outcome.¹

¹ OECD (2014), 'The Governance of Regulators', OECD Best Practice Principles for Regulatory Policy, OECD Publishing, pp.29-31.

A regulator's functions should enable it to meet relevant public policy objectives. Its establishing legislation should clearly define its purpose, objectives, functions and powers. Ideally, it should not assign conflicting functions or, if it does, it should identify the mechanism for resolving such conflicts. The legislation should also identify functions on which the regulator can, and cannot, receive directions from the government.

The *Australian Communications and Media Authority Act 2005* lists the ACMA's telecommunications, spectrum management, broadcasting, content and datacasting functions. General functions involve industry regulation, reporting to and advising the Minister, managing Australia's input into international standards setting and informing and educating the public. Specific functions are also listed by reference to relevant legislative instruments.

Questions

4. *What should be the unifying objective and purpose of the communications regulator—is there a succinct way to describe what the regulator should achieve?*
5. *Looking at both national and international trends, what are considered the optimal objectives, functions and structures for a best practice regulator in the communications sector?*
6. *What functions are unique to the ACMA (that is, not present or relevant to other regulators or industry sectors) and will these remain relevant in the future?*
7. *Are new functions likely to emerge over time?*
8. *When should the Minister be able to give directions to the ACMA in relation to the performance of its functions?*

Regulators require a structure and governance arrangements that ensure their effective functioning, independence and ability to deliver their objectives.

The ACMA has a 'commission' structure, under which the Authority itself is the principal decision-maker. The Authority has a Chair, deputy Chair and at least one but not more than seven other members. The Authority is the regulator and makes decisions, although it can delegate decision-making (noting that it cannot delegate certain powers). The Chair of the ACMA is also its CEO. Authority members can be either full or part-time potentially enabling industry, consumer or technical experience to be reflected on the decision-making body.

These governance arrangements are similar to comparable international regulators, such as the United States' Federal Communications Commission. In Australia there are variations on the

commission model. For example, while the Australian Competition and Consumer Commission has a similar arrangement to the ACMA with its chair also acting as CEO, the Australian Energy Regulator has a separate Chair and CEO arrangement.

An alternative arrangement is the 'governance board model'. This is where the board delegates most regulatory decision making functions to the chief executive officer and staff. The board appoints the CEO, oversees the organisation and is responsible for strategic guidance and operational policy. An example provided by the OECD is the United Kingdom's OFWAT (Water Services Regulation Authority).²

Importantly, while the ACMA Authority is the regulator and makes decisions, it delegates a significant number of routine decisions to ACMA staff.³ Decisions that are not routine are usually reserved for the Authority itself (noting that it cannot delegate certain of its powers). The Authority uses a formal assessment approach to determine which decisions it reserves to itself by balancing the impact and significance of the decision and any associated risks against the practical efficiencies and other benefits which may be gained by delegation.

Questions

This review seeks to understand how differences in structure and governance arrangements can affect the way in which a regulator performs its functions.

9. *What are the optimal structure and governance arrangements for the Authority and Executive?*
10. *What are the optimal arrangements to support good decision-making and maintain trust (including for managing conflicts of interest for decision makers and delegating decision-making)?*

² OECD (2014), 'The Governance of Regulators', OECD Best Practice Principles for Regulatory Policy, OECD Publishing, p. 69.

³ For example, 158,000 apparatus licences were issued under the Radiocommunications Act in the 2013-14 financial year by ACMA staff using delegated power.

Enhancing the regulatory performance of the ACMA

An important feature of this review is to assess the ACMA's current regulatory performance.

In October 2014 the Government released its Regulator Performance Framework (RPF) which recognises that the way regulators administer regulations can have a major effect on productivity. The RPF establishes a common set of performance measures that allow for the assessment of how regulators perform. The Framework forms an important part of the Government's deregulation agenda which aims to reduce the cost of unnecessary and inefficient regulation. The RPF consists of six outcomes-based key performance indicators:

KPI 1 – Regulators do not unnecessarily impede the efficient operation of regulated entities

KPI 2 – Communication with regulated entities is clear, targeted and effective

KPI 3 – Actions undertaken by regulators are proportionate to the regulatory risk being managed

KPI 4 – Compliance and monitoring approaches are streamlined and coordinated

KPI 5 – Regulators are open and transparent in their dealings with regulated entities

KPI 6 – Regulators actively contribute to the continuous improvement of regulatory frameworks

More detail on the RPF can be found here: www.cuttingredtape.gov.au/resources/rpf

The ACMA has received feedback from industry stakeholders on a set of indicators and a self-assessment methodology it has developed to support implementation of the RPF and is intending to publish the self-assessment methodology and indicators in July 2015 on commencement of the first cycle of the RPF. As the ACMA is not required to report under the RPF until December 2016, this review has been tasked to report on the performance of the ACMA set broadly against the RPF. The Review is seeking preliminary views from stakeholders on how the ACMA is performing against the KPIs and any areas for improvement.

The review is also seeking to identify the optimal forward looking attributes and risk-based approach of a best practice communications regulator. These attributes and approach should enable the regulator to adjust its operating techniques over time as the regulatory regime and its operating environment evolve, noting that these may not happen in unison. The review will aim to understand how these attributes and approach might be shaped or influenced by the objectives and functions considerations canvassed elsewhere in this paper.

Questions

11. *How does the ACMA perform against the Regulator Performance Framework KPIs? Please provide examples.*
12. *Has the ACMA been effective in progressing or influencing regulatory reform initiatives where there has been a change in risk or market characteristics to warrant change?*
13. *What are the forward looking risk characteristics of the communications landscape? In this environment what is the optimal mix of capabilities and cultural attributes for a high performance communications regulator? Are these characteristics unique to communications?*

Maximising the ACMA's efficiency

The review is also examining ways in which the efficiency of the ACMA can be maximised. It will consider the efficiency of the ACMA in delivering its functions to support its priorities, any areas requiring improvement, and potential alternative arrangements that could improve efficiency, where required.

The review will also incorporate the broad requirements of the Government's Contestability Programme to assess the efficiency of the ACMA and examine ways in which this can be maximised. The Programme is aimed at comprehensively testing whether the activities undertaken within an agency could be more effectively and efficiently undertaken by other parties. More information on the Contestability Programme, can be found here: www.finance.gov.au/resource-management/governance/contestability/resources/#guidelines

The review will consider whether any of the functions of, or services provided by, the ACMA can cease, be provided by other agencies or the industry itself. It will also consider whether there are functions of, or services provided by, other agencies that may be more efficiently and effectively delivered by the ACMA.

The review will also consider current resourcing from government and recovered from industry. As part of this, feedback is sought on stakeholder views on the current resource base of the organisation and relative contributions from current sources—that is, government funding, industry costs recovery and funding from other sources.

The Government's Cost Recovery Guidelines set out when costs may be able to be recovered from industry. Generally, a fee can be charged that is based solely on the cost of providing a specific

good, service or regulatory activity. A levy, a form of a tax imposed on an identified group or industry sector, can be used for a specific activity relating to the group. The revenue raised should be closely related to the cost of delivering the activity.

Questions

Contestability

14. *What functions currently undertaken by the ACMA could be more efficiently or effectively delivered by someone else?*
15. *What functions currently undertaken by other organisations could be more efficiently or effectively delivered by the ACMA?*
16. *Would additional quality assurance arrangements be required where a function is provided by another party?*

Efficiency

17. *What system improvements should be made to the ACMA? System improvements includes structural changes, process changes, requirements changes, and products or services changes.*
18. *What engagement improvements should be made to the ACMA? Engagement improvements include stakeholder engagement, contractual practices, behavioural and policy incentives to promote compliance or take up of government initiatives.*
19. *What market improvements should be made to the ACMA? Market improvements include partnering with others and outsourcing.*

Resourcing

20. *What funding model would best resource an Australian communications regulator, now and in the future?*
21. *What activities should be cost recovered from industry? Are user charges administered by the ACMA cost effective and efficient?*
22. *How should the ACMA's resources be allocated between functions (that is, education, facilitation, enforcement and compliance)?*

The communications regulatory framework

While the main focus of the review is the shape and responsibilities of the future regulator, the regulatory regime it administers is a relevant factor in considering its performance. The regulatory regime identifies the 'harms' that the ACMA is required to deter, as well as the regulatory tools it uses to reduce these harms or enable new activities.

The ACMA administers some 26 communications Acts relating to telecommunications, broadcasting, radiocommunications and online content.⁴ These laws are currently being updated through the Government's deregulation program and other regulatory reform initiatives, including in relation to spectrum management and digital television regulations.

The ACMA has published a series of papers highlighting the pressure placed on the regulatory regime by the convergence of previously distinct communication platforms.⁵ The ACMA points out that many laws are now quite dated and the concept behind many, that content could be controlled by how it is delivered, is breaking-down.

In the context of this evolving environment, the ACMA has identified what it considers 'enduring concepts'—public policy objectives that have stood the test of time, regardless of changes in technology and where regulation is likely to have an ongoing role.⁶ The ACMA has grouped these under four broad headings: market standards (competition, quality, redress and efficiency); social and economic participation (access, confidence and digital citizenship); cultural values (diversity of voices, Australian identity, community values, localism and ethical standards) and safeguards (protection of the public, protection of children, digital information management and the national interest).

The following list of concepts draws on this work.

- > **Access to services / participation in society.** Citizens should enjoy reasonable and equitable access to communications infrastructure, services and the content necessary to promote their effective participation in society and the economy. Increasingly this extends to 'digital literacy'.
- > **Competition.** Markets should be open and competitive so as to encourage investment, innovation and diversity of choice. Regulatory settings should embody competitive neutrality across platforms and among market participants and minimise potential market distortions.
- > **Efficient allocation and use of resources.** Policy settings should be coherent, appropriately calibrated and predictable so that a minimum level of service is available to all and public resources are used efficiently over time.

⁴ ACMA, Annual Report 2009-10, pp. 214-5.

⁵ ACMA (2011), 'Broken Concepts—The Australian communications legislative landscape'. <http://www.acma.gov.au/theACMA/About/The-ACMA-story/Connected-regulation/broken-concepts>

⁶ ACMA (2011), 'Enduring Concepts—Communications and media in Australia'. <http://www.acma.gov.au/theACMA/enduring-concepts-building-blocks-for-a-converged-media-and-communications-future>

- > **Diversity of voices.** There should be a diversity of major sources of information and perspectives expressed in the public sphere to provide and sustain an informed citizenry and healthy democracy. It is equally important that this information be fair, accurate and transparent.
- > **Australian identity.** Australians should be able to experience Australian voices and stories when using or consuming media and communications services.
- > **Values and safeguards.** Services should reflect community standards, meet community needs and be 'fit-for-purpose'. Users should be provided with effective and accessible avenues of complaint and redress if standards are not met. Children, in particular, should be protected from harmful material.
- > **National Interest.** The communications sector settings should reflect the national interest both domestically and through international forums (for example, radiocommunications planning is governed by treaty).

In addition to discussion about which harms should be regulated, it is also relevant to consider the regulatory interventions used in the communications sector to achieve policy objectives. While there are a range of mechanisms used, including direct funding and awareness raising, there are three dominant styles of regulatory intervention in the communications sector —black letter law, co- and self-regulation.

The Department has previously asked whether the reliance on co-regulation as the preferred intervention model remains appropriate for the communications sector.⁷ It appears that the increasing number of industry players, diverse products, new business models and changing consumer preferences has made the ACMA's task of establishing and promoting compliance with industry codes more complex and time consuming.

Questions

23. *How are the ACMA's functions likely to change as a result of reforms to the communications regulatory framework?*
24. *Does the list of 'enduring concepts' capture the policy concepts that are likely to continue to be central to the communications regulatory regime in the future? What are the most important communications sector public policy aims that are likely to require regulation?*
25. *What combination of regulatory interventions might be needed in the future?*
26. *How should a contemporary communications regulator retain flexibility to adapt its style of regulatory intervention to reflect the changing regulatory regime?*

⁷ Department of Communications (2014), 'Regulating harms in the Australian communications sector', Policy Background Paper No.2. www.communications.gov.au

Consultation process

The Department is seeking submissions from stakeholders on the specific questions raised in this issues paper and other issues relevant to the terms of reference. Further public consultation will be held as the review proceeds, including with members of the public and small businesses that engage directly with the ACMA. The Department will report to the Minister for Communications by the end of 2015.

Submissions should be received by Monday, 10 August 2015 and can be lodged in the following ways:

WEBSITE: www.communications.gov.au/have-your-say

EMAIL: ACMAreview@communications.gov.au

POST: ACMA Review
Department of Communications
GPO Box 2154
CANBERRA ACT 2601

Submissions must include the respondent's name, organisation (if relevant) and contact details. Submissions with no verifiable contact details will not be considered.

Respondents should be aware that submissions will be generally made publicly available, including on the Department's website. The Department reserves the right not to publish any submission, or part of a submission, in its absolute discretion. No correspondence will be entered into with respondents in relation to any decisions by the Department not to publish a submission in whole or in part.

All submissions will be treated as non-confidential information, and therefore able to be made publicly available by the Department, unless a respondent specifically requests its submission, or a part of its submission, is kept confidential, and acceptable reasons accompany the request. Email disclaimers will not be considered sufficient confidentiality requests. The Department is subject to the *Freedom of Information Act 1982* and submissions may be required to be disclosed by the Department in response to requests made under that Act.

The Privacy Act 1988 establishes certain principles with respect to the collection, use, and disclosure of information about individuals. Any personal information respondents provide to the Department through their submission will be used for purposes related to consideration of issues raised in this paper in accordance with the Australian Privacy Principles in the Privacy Act. If a submission, or any part, is made publicly available by the Department the name of the respondent will be included with that submission, or part. Respondents should clearly indicate in their submission if they do not wish to have their name included in any publication relating to the review that the Department may publish.

Questions about the submission process can be directed to ACMAreview@communications.gov.au.

