

Reviews of the *Enhancing Online Safety Act 2015* and the Online Content Scheme

Australian Communications and Media Authority submission

AUGUST 2018

Introduction

The Australian Communications and Media Authority (the ACMA) is a statutory authority within the Commonwealth Communications and the Arts portfolio. It operates as a non-corporate Commonwealth entity and is subject to the requirements of the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act).

The ACMA is a converged regulator, created to bring together and regulate four key elements of the communications and media regulatory landscape—telecommunications, broadcasting, radiocommunications and online content.

Ensuring Australians have the necessary information and tools to engage with, and navigate through, the online environment confidently and safely is an important regulatory consideration. The ACMA welcomes the opportunity to raise matters pertaining to the current regulatory structures and broader communications market to inform the statutory review of the *Enhancing Online Safety Act 2015* and the review of the Online Content Scheme under schedules 5 and 7 to the *Broadcasting Services Act 1992* (the EOS and OCS Reviews).

Context

The online environment is a key social and economic component of modern life in Australia. This is increasingly so as emerging digital technologies have resulted in an exponential growth in over-the-top services, creating an explosion of data, and data-use, delivering potential benefits to consumers and businesses, while also exposing them to new harms.

In this context, online safety is fundamental to building confidence in the use of these powerful communications technologies. This is particularly so where children, or those in vulnerable circumstances, are concerned where the potential for harm may be increased. However, delivery of government safeguards, support, education and the regulatory frameworks for online safety is complex and various models for their delivery have been used over time.

In 1999, the Australian Government enacted the Online Content Scheme, to deal with online content with direct reference to the National Classification Scheme.¹ The Online Content Scheme was administered by the ACMA (and predecessor agencies) and included associated functions to provide community education.

In 2008, the government committed to a comprehensive cybersafety plan to combat online risks and to help parents and educators protect children from inappropriate material. One of the measures in this package included increased funding for cybersafety education and awareness raising activities which the ACMA delivered through its respected Cybersmart Outreach Program.

In 2015, the government established the Office of the Children's eSafety Commissioner (the eSafety Office) under the *Enhancing Online Safety for Children Act 2015* to provide a new scheme for dealing with cyberbullying harms and provide national leadership in online safety for children. The Online Content Scheme and the CyberSmart program were transferred from the ACMA to the Children's eSafety Commissioner at this time.

¹ <https://www.legislation.gov.au/Details/C2004B00465/Explanatory%20Memorandum/Text>, accessed July 2018.

However, the EOS Act provides that the ACMA must assist the eSafety Commissioner to perform the functions and powers of the eSafety Office to such extent as is reasonably required. Such assistance can include, but is not limited to, the provision of administrative resources such as payroll, human resource services, information technology and executive assistant services.

In 2017, the role was expanded to enhance safety for all Australians under a revised *Enhancing Online Safety Act 2015* (the EOS Act), including in relation to new educational initiatives and a proposed scheme for dealing with the non-consensual sharing of intimate images (or image-based abuse).

The arrangements, including the provision of a dedicated statutory eSafety Commissioner, have increased public visibility and focus in relation to online safety.

Given the expanded remit of the eSafety Commissioner, the rapid pace of change in digital platforms, online content delivery and changing community expectations and behaviours, it is timely that the EOS and the OCS are reviewed to ensure that the eSafety Office and its functions and governance arrangements continue to be fit for purpose in the contemporary and future contexts.

It is also timely to consider the role of the eSafety Commissioner's office in the context of the various private and public sector organisations undertaking what could be considered similar activities. For example, the private sector, the ACMA and other agencies, including the Australian Federal Police (AFP) and the Computer Emergency Response Team Australia (CERT Australia, within the Department of Home Affairs), also play roles that address a broad range of online safety issues and provide important online safeguards.

The private sector provides education materials; the ACMA administers safeguards in relation to spam and online gambling²; the AFP³ provides the ThinkUKnow education program for parents, carers, teachers and young people; CERT Australia⁴ manages the Stay Smart Online program and provides information, advice and support in relation to threats to infrastructure and systems of national interest.

The 2016 Review of the ACMA⁵ (the ACMA Review) by the Department of Communications and the Arts (the Department) directly explored matters for consideration in this context, including in relation to an expanded remit for the ACMA that includes all communications and media content and online safety regulation. The government has supported (or supported in principle) the recommendations to help ensure the ACMA's role and responsibilities remain fit-for-purpose.

This submission sets out matters for consideration in the EOS and OCS Reviews, including options for revised fit-for-purpose models to enhance the delivery of the functions.

² The ACMA administers the *Interactive Gambling Act 2001*, the *Spam Act 2003*, and the *Broadcasting Services (Online Content Service Provider Rules) 2018*.

³ <https://www.thinkuknow.org.au/>, accessed July 2018.

⁴ <https://www.cert.gov.au/>, accessed July 2018.

⁵ <https://www.communications.gov.au/what-we-do/television/media/acma-review/acma-review-final-report>, accessed July 2018.

Response to discussion paper

The ACMA's response to the EOS and OCS Reviews covers areas relating to:

1. the ACMA's revised remit
2. key matters relevant to the roles of the eSafety Commissioner and the ACMA
3. models to address key matters and enhance the delivery of the functions.

The ACMA's remit

The Department's broad review of the ACMA in 2016 explored the role and remit of the ACMA and made recommendations aimed at ensuring it remains effective and fit for purpose in the modern and future communications environment.

It discussed that the distinction between the traditionally well-defined industries of telecommunications, broadcasting and online is now largely redundant and the business models and nature of the firms operating in the broader communications sector are rapidly changing. Further, it noted the ability for one service provider to deliver the same content to different devices over different networks has led to inconsistent regulatory treatment.

In response, the review made several recommendations that would facilitate a more contemporary focus for the ACMA. These changes would allow it to achieve the government's objectives while operating with a greater focus on the changing market.

One of the key recommendations reframes the new communications landscape as a layered 'stack' of services and activities, with each slice providing services to the layer above and concurrently depending on the layers below. It sees the ACMA's remit as spanning all these layers. The four broad layers are described below:

- > **Applications/content layer**—This includes content delivered on online platforms or delivered over applications. It also includes software applications or platforms that support additional functionality, including the ability to make voice and video calls.
- > **Devices layer**—Devices are an essential means to access communications networks. Devices include televisions, radios, mobile phones and tablets.
- > **Transport layer**—The transport layer provides the intelligence needed to support applications and functionality over the network.
- > **Infrastructure layer**—The infrastructure layer includes the passive infrastructure and electromagnetic mediums that support the transmission of raw bit streams over a physical medium.⁶

The ACMA Review recommended that the ACMA's functions be reconsidered by reference to this clarified remit, including through:

- > confirming the ACMA's role with respect to spectrum resource planning and management, content regulation, telecommunications regulation and unsolicited communications
- > transferring the cyber security program then delivered by the ACMA to an agency with broader and complementary cyber security responsibilities (CERT Australia)

⁶ *Review of the Australian Communications and Media Authority Final Report 2016 - Recommendation 1.*

within the Attorney-General's Department, now within the Department of Home Affairs portfolio)

- > conferring additional content regulatory functions on the ACMA, including classification functions.

The review also examined how the ACMA's functions interact with and complement those of other agencies and presented a revised distribution of regulatory responsibilities (as set out in Figure 1 below).

Figure 1: ACMA Review distribution of responsibilities

INDUSTRY	ACMA		ACCC	AGD
Self regulatory schemes	Classification	Resource planning and management	Telco competition law	Cyber-security outreach
	Content regulation		Telco economic regulation	Telecommunications interception
	Unsolicited communication	Licensing	Consumer protection (Australian Consumer Law)	
	Children's eSafety Commissioner*	Technical regulation		
		National interest		
		Accessibility (USO, CSG)		
		Revenue collection		
	Consumer protection (TCP Code)			

*The Office of the Children's eSafety Commissioner is an independent statutory office created by the Enhancing Online Safety for Children Act 2015

The ACMA Review noted that once key recommendations (specifically, those for revised organisational structure) had been implemented there would be additional flexibility to consider alternate governance options regarding the range of regulatory responsibilities for communications issues. This included the opportunity for the ACMA to take on responsibility for online safety regulation.⁷

Since the final report of the ACMA Review was published, its recommendations have been substantially progressed⁸, including in relation to revised structural arrangements and conferring additional functions on the ACMA, including the regulation of online content through:

- > end-to-end responsibilities for regulating interactive (online) gambling
- > responsibilities for the regulation of gambling promotional material on online content services in line with Schedule 8 of the *Broadcasting Services Act 1992*.

The eSafety Commissioner's role

The ACMA acknowledges that the EOS Act and the eSafety Commissioner serve important functions that enhance the online safety of Australians. Specifically, the quality delivery of programs that address cyberbullying and empower children, parents, women and senior citizens in the online environment have successfully promoted and raised the profile of online safety in the community.

The ACMA makes observations below that relate to the distinctive aspects of the online safety role and its placement within the broader communications regulatory frameworks.

⁷ Review of the Australian Communications and Media Authority Final Report 2016 (page 63).

⁸ <https://www.communications.gov.au/documents/acma-review-implementation-tracker>, accessed July 2018.

Regulation of social media in broader context

The discussion paper for the EOS and OCS Reviews notes the need to consider 'related aspects of the government's online safety regulation ... to ensure that any recommendations made are comprehensive and support an efficient and effective overall outcome'. In line with this approach, the ACMA notes broader regulatory considerations in relation to the regulation of online content.

The two-tiered rapid removal scheme for cyberbullying material is intended to provide a 'light-touch' regulatory regime where Tier 1 large social media sites are primarily voluntarily responsible for removal of material upon request by the eSafety Commissioner. Tier 2 large social media sites are legally required to removal material and may face civil penalties for non-compliance.

The ACMA notes that in the context of the broader communications environment, other harms potentially associated with social media sites (as well as other online platforms or delivery technologies), may require very different, potentially direct, regulatory models that consider the layers of the communications stack. This includes where the harms may concern unsolicited communications (spam and scam activity), breach of privacy, data protection, and the accuracy of news.

As per the ACMA's submission to the Australian Competition and Consumer Commission's Digital Platforms Inquiry⁹, the ACMA considers that:

[M]any of the communications and media public policy objects that underpin the current regulatory framework remain highly relevant in digital environments. These include access to services, competition, network reliability and interconnection, efficient allocation and use of resources, national interest, diversity of voices, Australian identity, and values and safeguards.

Developing a consistent and coordinated approach to addressing harms associated with social media sites may be made more difficult if responsibilities are fragmented across the Commonwealth. As the communications sector regulator, the ACMA considers it is most appropriately placed to develop such a coordinated approach.

Individual redress and behavioural change

The protections in the EOS Act appropriately and effectively provide avenues for individual complaint and remedy in relation to cyberbullying activity. Cyberbullying is defined as material targeted at an Australian child if a reasonable person would consider it likely:

- > that the material was intended to have an effect on a particular Australian child
- > the material would be likely to have a seriously threatening, seriously intimidating, seriously harassing or seriously humiliating effect on the Australian child.

Similarly, the proposed scheme to regulate non-consensual sharing of intimate images is aimed at ensuring individuals who have been impacted have avenue for complaint and redress.¹⁰

These harms concern distressing images, messages or information of a sensitive personal nature to those effected, and consequently, involve related support services. As noted in the EOS and OCS Reviews discussion Paper:

Cyberbullying and other content may be very distressing, the eSafety Commissioner provides support for victims through referral to mental health services. For example, the

⁹ <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>, accessed July 2018.

¹⁰ https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1113, accessed July 2018.

eSafety Office has a referral agreement with Kids Helpline and since 2015 has referred over 6,940 young people.

The eSafety Office also has important roles to play as the lead agency promoting behavioural change in relation to the online environment through educational and awareness raising activities, and to coordinate and lead online safety initiatives across the Australian Government.

These behavioural and individual redress aspects of the online safety role are substantially different in key aspects to the general approach of an industry regulator, such as the ACMA, working across the layers of the communications stack.

Classification of online content

In contrast to the above functions, the Online Content Scheme does not generally provide avenues for individual complaint and remedy. Rather, it is fundamentally a classification and content regulation function, including through the provision of the current family friendly filter list arrangements and associated educational functions.

Past ACMA commissioned research¹¹ has indicated that consumers see content regulation, particularly the classification of content, as a key safeguard in the modern communications environment. While consumers may have realistic expectations about the extent to which classification should apply to all online content, a framework that makes distinctions about how the classification of content is treated based on the platform it is delivered on, is increasingly problematic. This is particularly so given over-the-top services, the rapid pace of technological innovation and changes to viewing behaviour and expectations since the inception of the Online Content Scheme in 1999.

The ACMA's role

As noted, the ACMA is the communications and media industry regulator with wide-ranging responsibility for telecommunications, broadcasting, radiocommunications and certain online content. Its remit covers an increasing role in, and focus on, the regulation of a broad range of online content, including gambling, news, diversity of views and the privacy protections at the heart of the unsolicited communications regulatory regimes.

Classification and content regulation

As raised in the discussion paper, the Department will shortly undertake consultation on modernising the National Classification Scheme. In this context, the ACMA notes the ACMA Review recommendation that classification functions move to the ACMA under its revised remit as well as the Australian Law Reform Commission's (the ALRC) 2012 recommendations¹² regarding a modernised classification scheme, administered by a single Commonwealth Regulator.

The ACMA remains supportive of key ALRC recommendations as the shift to a consolidated classification regulator would be:

- > better for citizens: ensuring a single approach to the application of community standards and protections within the new scheme
- > better for industry: supporting decision-making with increased expertise and a consistent approach

¹¹ *Digital Australians—Expectations about content in a converging media environment* October 2011.

¹² *Classification—Content Regulation and Convergent Media (ALRC Report 118)*.

- > better for government: allowing cost savings from economies of scale
- > more logical: improving alignment between the regulator and converging platforms.

Moreover, co-locating classification regulation with broader content regulatory functions will enable functional efficiencies and the overall effectiveness of the schemes due to the inherent complementarity of:

- > complaints handling, investigations and enforcement
- > the development of contemporary and harmonised regulatory rules (such as industry codes and standards)
- > liaison with relevant Australian and overseas regulators and law enforcement agencies
- > holistic, platform agnostic advice to government to inform policy
- > public and industry education.

Consistent with the findings in the ACMA Review and ALRC report on classification, the ACMA is well placed to take on the role of single content regulator. As contemplated by the ALRC, the role would subsume the classification arrangements currently contained in the Online Content Scheme.

Fundamentally, the Online Content Scheme is directly aligned to broadcasting content regulation and other content regulation under the National Classification Scheme as it is concerned with regulating access to content by reference to 'community standards'.

New ACMA governance arrangements

To help ensure the ACMA continues to perform its functions effectively in a dynamic communications market, several ACMA Review recommendations have been implemented in relation to the structure of the Authority and the full-time status and skills of its members, including those related to full-time membership and subject matter expertise:

It would be appropriate for any new governance model consisting of full-time members to provide flexibility for members to have oversight of a specific subject matter, for example by acting as the contact point for industry on the issue and taking a leading role on the Authority's work in this area.

This approach provides Authority members with oversight of subject areas and creates greater diversity in expertise when addressing current issues. The ACMA will also retain the commission model of decision-making, where all members are equal in their vote. The review contemplated that this would bring a range of deep experience and expertise to bear within a framework for robust, informed decision making.

As noted above, the review discussed full-time member governance arrangements facilitating taking on an increased range of regulatory responsibility for communications issues, including, for example:

[U]nder a full-time member model, consideration could be given to making the Children's eSafety Commissioner a member of the Authority at some stage in the future. This could see the ACMA taking on responsibility for online safety regulation, with a full-time member specialising in this area.

Such an arrangement would enable the eSafety Commissioner to contribute to the broader suite of online content issues considered by the ACMA.

The ACMA notes that these governance arrangements have been finalised and the new Authority structure is much better suited to support alternative models for delivery

of online safety, while retaining the important public profile of the eSafety Commissioner.

Provision of support and staffing to the eSafety Commissioner

The current arrangements whereby the ACMA assists the eSafety Commissioner to perform his/her functions raise considerations about the ongoing efficiency and independence of the governance arrangements for both entities given the requirements of the EOS Act and the PGPA Act.

Under the PGPA Act, the Chair of the ACMA is the Accountable Authority who is required to administer funding provided to the ACMA in accordance with that Act and this includes the ACMA's funding for the operations of the Office of the eSafety Commissioner.

The Chair of the ACMA is only able to delegate the ability to commit or spend public money to an 'official' (section 13 of the PGPA Act) and the eSafety Commissioner does not meet the definition of an 'official'. Accordingly, the Accountable Authority responsible for committing or spending any eSafety Office funding is the Chair of ACMA not the e-Safety Commissioner.

In addition, the EOS Act sets out arrangements whereby the eSafety Commissioner is unable to directly exercise powers in relation to important aspects of staffing and administrative support, including provision of information technology, legal services and property to support the eSafety Office. While the ACMA and eSafety Commissioner have established working arrangements, these entail inherent risks, inefficiencies and complexity for both parties. For example, the risk tolerance of the eSafety Commissioner and the Chair may be quite different and create issues where processes and systems do not align to the decided tolerance,

In relation to all eSafety Office staff and contractors, except for the eSafety Commissioner, they are employees of the ACMA over which the Chair of the ACMA has responsibility as Agency Head under the *Public Service Act 1999*. This includes responsibility for their conditions of service, staff policies, workplace health and safety and duty of care. Under the current arrangements, the Chair of the ACMA carries the risk for these staffing matters but has no oversight of staff from a day-to-day management perspective.

While these arrangements have not impeded the work of the eSafety Commissioner to date, they do create complexity and, as a result, some inefficiencies in the working arrangements. It may be that alternative models could address these issues.

New models for enhanced delivery

The ACMA suggests that consideration be given to alternate models that would address the matters raised in this submission, while also enhancing the public interest outcomes involved in the delivery of the online safety functions.

Model 1—A standalone eSafety agency

Under this model the eSafety Office would be established as a stand-alone agency, with a dedicated focus on education and behavioural change activities in relation to online safety as well as providing complaint, remedy and associated support in relation to material where the person involved is personally impacted.

If this model were to be considered, the ACMA considers there remains a strong case for the it to assume the classification arrangements currently in place under the Online Content Scheme to form part of a modernised, holistic and fit-for-purpose classification scheme. This would align with the ACMA Review recommendations on the revised remit of the ACMA and earlier ALRC report on classification.

The ACMA notes that the establishment of very small standalone agencies has not been generally favoured by the government given that they can also create inefficiency in the delivery of activities.

Model 2—Incorporate online safety into the ACMA

Under this model, the online safety functions would formally move into the ACMA. This approach would provide the work with an overall greater level of support through operational efficiencies; streamlined complaints handling, investigations and enforcement across the sector; facilitate development of contemporary and harmonised regulatory rules (such as industry codes and standards); have an integrated international and law enforcement presence; and provide holistic, platform agnostic advice to government to inform policy.

This model would also maintain the important distinctive online safety public profile, leadership and organisational focus from which this valuable work benefits. This could be achieved by adopting an approach whereby the eSafety Commissioner becomes a full-time member (or Associate Member) of the Authority with a focus on matters to do with online safety. It is noted that the ACCC have adopted a similar approach with their remit and function for small business matters.¹³ The Commissioner would also be able to contribute to the broader work of the ACMA and bring to it their deep understanding of online safety issues.

Conclusion

For Australia to reap the economic and social benefits of communications technologies, consumers must have trust and confidence in the online world. The ACMA, as the sector regulator, has put in place a wide range of rules to ensure that industry deals effectively with harms presented by online services, such as gambling and spam. The ACMA considers that it is best placed to also consider the future regulatory arrangements required to ensure trust and confidence in broader online services.

The ACMA will continue to support the important behavioural change work of the eSafety Commissioner and welcomes the opportunity to contribute to this review.

¹³ See for example section 10(1B) of the *Competition and Consumer Act 2010* that requires the appointment of a Deputy Chairperson with expertise in small business matters.