



Australian Government

Department of Communications and the Arts

Review of the Australian Communications and Media Authority

Draft Report / May 2016

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Background

On 12 June 2015, the then Minister for Communications, the Hon Malcolm Turnbull MP, announced a review of the Australian Communications and Media Authority (the ACMA) (the Review). The overall objective of the Review was to examine the performance of the ACMA in achieving good regulatory outcomes in the communications and media sectors. In undertaking the Review, the Department of Communications and the Arts (the Department) had regard to the ACMA's objectives, functions, structure, performance, governance and resource base. In doing so, the Review incorporates the broad requirements of the Government's Contestability Programme and Regulator Performance Framework to assess the ACMA's efficiency and effectiveness in administering communications laws and regulations.

The Terms of Reference for the Review can be found at [Appendix D](#).

The Department is carrying out the Review, and is supported by a Reference Group comprised of Australian and international communications and regulatory experts:

- > Fiona Cameron – Chief Operating Officer of Screen Australia, Australia's key funding body for the screen production industry
- > Diane Cornell – Special Counsel to the Chairman, Federal Communications Commission, the USA's authority for communications law and regulation
- > Bridget Fair – Group Chief for Corporate and Regulatory Affairs, Seven West Media
- > Richard Hooper CBE – Former Deputy Chairman of Ofcom, the UK's independent communications regulator and competition authority
- > Dan Lloyd – Chief Strategy Officer and Corporate Affairs Director of Vodafone Hutchison Australia
- > Dr Ross Patterson – former Telecommunications Commissioner and member of the Commerce Commission, New Zealand's competition and regulatory agency
- > Mark Pearson – former Deputy CEO for Deregulation and Regulatory Coordination at the Australian Competition and Consumer Commission
- > Johanna Plante – Chair of the Australian Communications Consumer Action Network, Australia's peak communications consumer organisation
- > Tony Shaw PSM – former Chair of the Australian Communications Authority, a predecessor organisation to the ACMA.

Consultation

An Issues Paper was released on 13 July 2015 for public comment. When submissions closed on 10 August 2015, 40 public submissions had been received. The Department then met with 20 key stakeholders to better understand their feedback on the future role of the regulator. The Department also met with the ACMA members and executive management within the organisation.

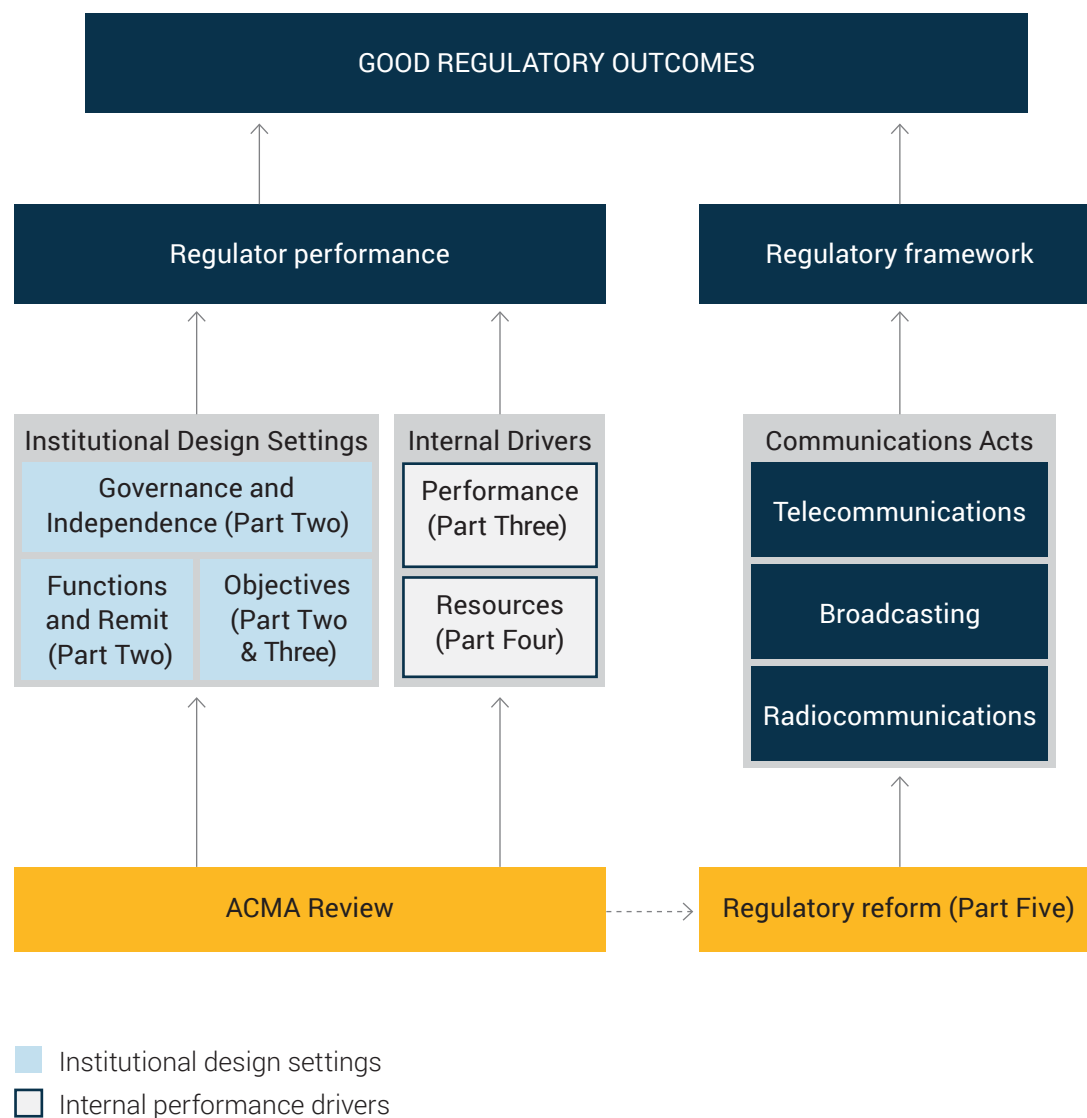
To develop this draft report, the Review assessed proposals put forward in public submissions, held meetings with stakeholders and held discussions with the ACMA and the ACMA Review Reference Group.

The Review is now seeking submissions from stakeholders on the proposals raised in this draft report and any implementation issues these raise before providing the final report to the Minister for Communications and the Arts. Information on how to lodge a submission may be found here: <https://www.communications.gov.au/have-your-say/acma-review>.

Scope of this report

In undertaking the Review, the Department considered that the achievement of good regulatory outcomes can be attributed, broadly, to the combination of regulator performance and the underlying regulatory framework. In turn, regulator performance is determined by the institutional framework within which the regulator operates, as set out in legislation or determined by governments of the day, and the operating model of the regulator itself. This is illustrated in Figure 1 below, along with the parts of the report which address each of these components.

Figure 1: Conceptual framework for the Review



Executive summary

Context

The communications landscape in 2005 – the year that the Australian Communications and Media Authority (ACMA) was established as a converged regulator – is barely recognisable from what it is today.

In 2005, Telstra was the dominant vertically integrated telecommunications company, with 51 per cent Commonwealth ownership. Commercial television and radio broadcasters earned more than \$5 billion in revenue, retaining relatively strong profits as they gradually moved to the full introduction of multi-channelled digital television. Two subscription television suppliers covered Australia via cable and satellite technologies. Most content and services were provided on dedicated networks specifically designed for them. While internet content was increasingly being accessed by Australians and 3G phones were on the increase, the first Apple iPhone and Android smart phones were still three years away and services such as YouTube and Facebook were in their infancy.

The ACMA was formed through a merger of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) in response to “convergence within the communications industry”.¹ However, the functions for the ACMA continued to be described in terms of the ‘traditional’ areas of the communications sector, relating to telecommunications, broadcasting, online content and spectrum management.

In only 10 years, the communications sector, its products and services, and indeed its place in and impact on the Australian economy and the lives of Australians has radically changed. Today, communications infrastructure and services underpin not only how we keep in touch with family and friends but also the way we do business, how we access information, how we work and how we play. It has become a key enabler of productivity and innovation across the entire economy and it has the potential to play a vital role in driving Australia’s future prosperity.

These changes have been enabled through increasing access to high speed, bandwidth-rich networks – mobile and fixed, often converged – the digitisation of content and its carriage across any network. Changes have been accelerated by the development of new and disruptive services through the interconnectedness provided by the internet and the emergence of sophisticated consumer devices that bring together services and content into a single device able to be always on, connected and available.

¹ [Explanatory Memorandum](#) (2004), Australian Communications and Media Authority Bill 2004 (Cth), Outline.

The Government itself has intervened in the market to ensure that Australians will have access to high-speed broadband with the building of the National Broadband Network (NBN). The establishment of the NBN will also see structural separation completed in the Australian telecommunications market, allowing for greater competition in retail services.

In response to the increasing range of devices, services and applications now available, consumers are adopting technology faster 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 carrying out more online transactions.

Disruption, driven by:

- > rapid technological change;
- > growing ubiquity and speed of fixed and mobile broadband networks;
- > availability and uptake of increasingly sophisticated consumer devices;
- > miniaturisation; and
- > virtualisation of physical infrastructure;

is having a profound and enduring impact on the Australian and, indeed, global communication markets. It is driving disintermediation, as evidenced by the rapid growth of IP-based, over the top (OTT) services, such as Skype, Viber, WhatsApp, Netflix, Spotify etc, resulting in significant disruption to the business models of the traditional, integrated companies operating within the sector. The nexus between infrastructure ownership and service provision is rapidly breaking. As a result there is increasing pressure on policy makers to rethink how market failure and “public goods” provision should be addressed.

Implications of structural change in the communications market

The changing structure of the industry (Part One of the report) has significant implications for its regulation. The ACMA itself has identified many of these implications in its research and decisions over the last ten years, in particular the challenges presented by using existing, outdated sectoral based regulatory frameworks to regulate rapidly changing technologies and services.

Good regulatory outcomes in the communications sector are a combination of two factors – how regulation is administered and the regulatory regime itself.

The Review has found the ACMA has generally performed its regulatory role efficiently and well over the last ten years (Parts Three and Four and Appendix B and C). However, its remit, responsibilities and functions lack clarity and cohesion, and its regulatory and performance objectives are unclear (Part Two). There is a lack of clarity as to decisions which are best made by

the regulator and those which are policy decisions for the government, particularly in areas that are increasingly contested such as spectrum allocation. These have made the ACMA's job increasingly difficult in making regulatory judgements and the allocation of its resources, resulting in some frustration for the regulator and the industry.

The importance of the communications sector to the Australian economy, its centrality to the lives of consumers and businesses and the rapid structural change it is undergoing require a regulator that is certain of its remit and functions, can act quickly and decisively, is well-informed, can be agile and has the confidence of stakeholders.

The Review considers that the current ACMA Act and principal legislation for which the regulator is responsible² do not sufficiently empower the regulator or provide it with guidance or the tools to achieve that outcome. Accordingly, the Review is making a number of proposals largely focused on reforming the ACMA Act to allow the regulator to operate with a greater focus on the changing market and the objectives the government wants the regulator to achieve.

These reforms would put in place a contemporary regulator that is able to operate efficiently and with confidence. However, modernising the regulator alone is not sufficient for an industry as vital as communications. Recent experience, industry submissions and the work of the ACMA demonstrate that the communications regulatory framework has not kept pace with the seismic shifts that have occurred in technology and market structure since these laws were developed largely in the 1990s. The ageing regulatory regime maintains a distinction in many areas between technologies which no-longer exist and places excessive emphasis on traditional sectors to achieve public policy outcomes. This distorts investment decisions and the incentives to innovate by local businesses, especially when faced with increasing competition from overseas based OTT services. The extensive, highly detailed legislative regime also imposes significant process requirements on the regulator, with limited and often ineffective enforcement tools. This can constrain the ACMA's ability to move faster, be more agile and responsive.

Accordingly, the Review is also proposing (in Part Five) that the Government commence a regulatory reform programme to reshape the regulatory regime, to build a contemporary framework for the regulation of the rapidly changing communications sector with the objective of supporting the sector in its ambitions while delivering on social and economic objectives to the benefit of all Australians.

² Key pieces of legislation which the ACMA is responsible for administering include the:

- *Australian Communications and Media Authority Act 2005*;
- *Broadcasting Services Act 1992*;
- *Do Not Call Register Act 2006*;
- *Interactive Gambling Act 2001*;
- *Radiocommunications Act 1992*;
- *Spam Act 2003*;
- *Telecommunications Act 1997*; and
- *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

Key reform proposals for the ACMA

The Review considers that urgent reform is needed to ensure that the ACMA can respond effectively to the challenges and opportunities presented by the future communications environment. In the first instance, this will require:

- > Clarifying the remit of the regulator to set the boundaries of its regulatory responsibility and oversight;
- > A number of changes to the functions of the regulator;
- > Clearer formal advice from the Government to the ACMA on its expectations, within the boundaries of its statutory independence, and reporting by the ACMA on its delivery against these;
- > New governance arrangements involving a 'commission' model of full-time, specialist members supported by associate members and sub-boards; and
- > Embedding in its establishing legislation a series of regulator principles to guide performance.

These changes will also result in greater alignment with arrangements for and processes of other domestic regulators, such as the ACCC, while also reflecting best practice examples from international regulators.

Key proposals are further explained in the following sections.

Remit: Infrastructure, Transport, Devices, Applications and Content

Communications networks are vitally important. They enable the delivery of services across the entire economy, support cultural diversity and provide access to news and information. However, the embedded nature of communications networks in an expanding range of economic and social activities makes describing the boundary of the communications sector and the areas of this activity that the ACMA should have responsibility for regulating and overseeing increasingly difficult.

At present the ACMA's remit is not well defined. Sections 8-11 of the ACMA Act describe an extensive list of regulatory functions in sectoral terms; that is, with reference to telecommunications, spectrum management, broadcasting, content and datacasting. But this list of functions does not provide certainty about when the ACMA should act, set the boundaries of its regulatory responsibility and oversight or provide guidance to government as to when it should take on new functions.

In an era where 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,

the Review proposes a change to the way in which the communications market and the remit of the regulator are conceptualised. A future focused regulator would be able to respond more quickly to emerging issues and consumer harms if its remit were not so firmly tied to siloed industry structures.

Instead, the Review considers that it would be more useful to describe the new communications landscape as a horizontal “stack” of services and activities, with each layer in the stack providing services to the layer above and concurrently depending on the layers below. The ACMA’s remit should span across all these layers. Although the layers are not always clearly distinguishable because they are deeply interconnected, the four broad layers are described below:

APPLICATIONS/CONTENT LAYER – This layer includes software such as applications that support additional functionality, including content and the ability to make voice and video calls. Increasingly, services such as voice can be seen as applications in all Internet Protocol networks. This layer also includes applications to access content, such as iView, Netflix, Presto, Stan and the content itself.

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. Networking and routing protocols enable error-free transmission of the bit stream and provide for the quality of service. Technical standards also enable interoperability and any-to-any connectivity between different networks.

INFRASTRUCTURE LAYER – The infrastructure layer includes the passive infrastructure and electromagnetic mediums that support the transmission of raw bit streams over a physical medium.

The Review recommends that reshaping the regulatory framework applying to the communications sector commence with amending the ACMA Act to clearly define its remit as covering all of these layers. This remit should be interpreted from the perspective of the communications industry enabling activity in other sectors of the economy, but it would not extend into these other sectors. Resolving the inevitable boundary issues with other regulators with an interest in the telecommunications, broadcasting and online sectors, is discussed under Functions below. A future reform agenda would similarly amend other communications legislation to better define the market subject to regulation.

Draft proposal 1: That the ACMA’s remit cover all the layers of the communications market, including infrastructure, transport, devices, content and applications.

Functions: Classification, Content Regulation, Online Safety, Technical and Network Regulation, Ownership and Control, Spectrum Planning and Allocation, National Interest and Consumer Protection

As part of the 2014-15 Budget, the Australian Government introduced a Commonwealth-wide Contestability Framework to assess all current government functions with a view to improving the efficiency and performance of existing and proposed government functions.³ This Review has assessed the ACMA's functions consistent with the Contestability Programme.⁴

Although the Review has focused primarily on the ACMA, it has also identified functions and activities related to communications undertaken by other parts of government with a view to determining where these functions would be most efficiently administered.

The Review considers the majority of the ACMA's current functions are appropriate and necessary to ensure its continued smooth and efficient operations. The Review recommends a small number of changes:

- > that the ACMA's well regarded **cybersecurity** programmes (Australian Internet Security Initiative, cyber security news e-bulletin, phishing alert services and the spam and cyber security public awareness websites) be transferred to the Attorney-General's Department to allow them to be better integrated with the Australian Cyber Security Centre;
- > that the Department and the ACMA develop shared strategies for **international engagement** and **research and analysis**, clearly delineating their respective policy and independent regulatory roles to avoid duplication and confusion and make the most of their shared skills and expertise;
- > that further consideration be given to the ACMA's **revenue collection** functions to determine whether it may be more efficient for another body, such as the Australian Taxation Office (ATO), to undertake these functions;
- > that the ACMA explore greater opportunities for industry to self-regulate in areas such as **technical regulation, number allocation and mature regulatory schemes** (such as the Do Not Call Register);
- > that the Department undertake further work to explore the potential to expand the ACMA's remit to take on certain **classification functions** currently administered within the National Classification Scheme in order to harmonise online and offline classification functions; and
- > compliance and enforcement of the **Interactive Gambling Act 2001** be transferred from the Department and the Australian Federal Police to the ACMA.

³ Information on the Contestability Framework is available on the [Department of Finance website](#).

⁴ A list of the principal activities performed by the ACMA is provided in the Remit section of Part Two.

Draft proposals 2 to 8 recommend a range of functional changes occur to improve their efficiency and performance.

Economic regulation

The Review has considered the role of the future communications regulator in economic regulation. This has been perhaps the most complex and challenging part of this review process.

Currently, most communications economic regulation is administered by the Australian Competition and Consumer Commission (ACCC) under a telecommunications-specific regime in the *Competition and Consumer Act 2010*.

It is clear that, in the increasingly complex communications sector, the regulator will need to deeply understand how market players seek competitive advantage across layers, where bottlenecks arise and where significant market power lies. It is most likely that this deep understanding will be held by the sectoral regulator, rather than the general economic regulator. There are therefore sound arguments to have economic regulatory functions related to the communications sector in the ACMA. This would be consistent with a number of international regulators, such as Ofcom in the UK.

However, such a move would be contrary to the proposals from the Vertigan and Harper Review to establish a regulator with its primary focus on economic and access pricing issues. In addition, in a small market like Australia, deep expertise in competition regulation is likely to be relatively limited. The ACMA may find it difficult to build up this expertise quickly and to a sufficient degree to make good regulatory judgements. Changes to current arrangements are also likely to be highly disruptive and take some time to bed down.

On balance, the Review recommends retaining the status quo. However, the Review recommends a number of actions to improve current arrangements to support a competitive communications market into the future. These include:

- > Strengthening formal cross-consultation arrangements between the ACMA and ACCC;
- > An annual Statement of Expectations being provided to the ACCC specifically in relation to its telecommunications functions; and
- > Including a regulator principle in the ACMA Act to make sure the ACMA has regard to the impact of its decisions on competition, innovation and efficient investment.

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

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

Draft 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.

Consumer protection

In accordance with the Contestability Programme, the Review also considered the administrative arrangements for consumer protection in regard to communications services.

Currently, the ACCC, the ACMA and the Telecommunications Industry Ombudsman (TIO) perform functions with regard to communications consumer safeguards and practices. The ACCC is responsible for general consumer protection under the Australian Consumer Law, the ACMA has registered the Telecommunications Consumer Protections Code using its code-making powers under the *Telecommunications Act 1997* and the TIO provides dispute resolution for telecommunications and broadband consumers.

The Review considers there are strong arguments that the unique complexity of communications products and services mean that it is appropriate to retain sectoral regulation to complement general consumer law. As a consequence, the ACCC and ACMA should retain their concurrent roles. In its response to the 2015 Regional Telecommunications Independent Review Committee, the Government proposed further consideration of the overall framework for consumer safeguards, to allow the Government to determine the appropriate regime to apply in the future.⁵

Draft proposal 11: That the current institutional arrangements for telecommunications consumer protections be retained.

In summary, the recommended functions of the ACMA, other regulators and the industry are illustrated in Figure 2 below (also provided as Figure 7 in Part Two of the report).

⁵ Australian Government response to the Regional Telecommunications Independent Review Committee report: February 2016, p.10

Figure 2: Proposed new set of functions

INDUSTRY	ACMA		ACCC	AGD
Self regulatory schemes	Classification	Resource planning and management	Telco competition law	Cyber-security outreach
	Content regulation		Telco economic regulation	Telecommunication interception
	Children's eSafety Commissioner*	Licensing		
		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*.

Government Objectives: Retaining Independence, Legislative Objectives and Government Guidance

Independence

The Review supports the ongoing operation of the ACMA as an independent statutory authority with staff employed under the *Public Service Act 1999*. The Review also considers that in most areas of its regulatory decision-making it is important that the ACMA has statutory independence from Government – this is particularly true for all content-related decisions. However, in increasingly contested areas (such as resource allocation) greater clarity is required as to the respective roles of the government and the regulator. Reform has already commenced in this area through the Government's Spectrum Review which proposes that statements of government policy are provided to the ACMA in relation to spectrum management arrangements.

Legislative objectives

The ACMA is tasked with considering a significant number of policy objectives in the legislation it administers yet it is not provided with clear guidance on how it should weigh these up. A number of submitters to the Review recommended that the ACMA be provided with clear, overarching objectives to guide its priority-setting, resource allocation and the outcomes expected to be achieved from its decision-making.

The Review agrees with these submissions but has found that, while attractive, it is not practical to develop a set of overarching objectives for the regulator until the objectives set out in the legislation it administers are reformed. A set of clear objectives would be an outcome of the regulatory reform programme recommended by this Review.

In addition, the Review recommends that the ACMA would benefit from the provision by government of an annual Statement of Expectations to provide better guidance and certainty about the Government's priorities. In response, the ACMA would develop its own publicly available Statement of Intent. This is a standard practice for contemporary regulators.

Draft 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.

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.

Governance: A commission model of full-time, specialist members supported by associate members and sub-boards

In considering future governance arrangements, the Review analysed other regulators domestically and internationally, the extensive work of the OECD on governance models and was informed by the insights of the Reference Group, public submissions and the ACMA.

While the current governance model has proven robust, the increasing complexity of the communications market and the pace of technological change will require a governance structure that is more flexible and supports timely and well-informed decision-making. It will require decision makers that have a comprehensive knowledge of the communications sector and are expert regulatory practitioners. The significant changes that are occurring in the communications landscape requires members who can consider issues across industry boundaries rather than being specialists, or participants, in a single sector.

The Review recommends retaining the ACMA as an independent statutory authority with a commission structure, where commission members make most substantive decisions. Such a model provides for a range of experience and expertise to be brought to bear on regulatory decisions in a robust but collegiate manner. The commission model would be strengthened by ensuring all members are appointed on a full-time basis and that the commission, as a whole, has a range of appropriate skills and experience. These arrangements are consistent with those covering the ACCC and ASIC in Australia.

Draft proposal 13: That the commission model of decision-making be retained.

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 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.

A number of stakeholder submissions on governance proposed that the Chair and Chief Executive Officer (CEO) positions be separated as this would allow the Chair to focus on strategic direction with the CEO responsible for administration and operational performance.

Taking into account the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the proposed commission model of collective regulatory decision-making, the Review considers that there are benefits to retaining a model where the Chair is the Accountable Authority for the purposes of the PGPA Act, with the ability to delegate functions and responsibilities, to the extent permitted by the PGPA Act, to a CEO. The Review considers this model enables clearer accountability and faster decision-making.

The Review also recommends that the expertise of the Authority would be enhanced, where required, by the appointment of associate members. Sub-boards could also be established by the Authority where it considered that subject matter experts, typically appointed on a part-time or ad hoc basis, could manage issues with an Authority member providing oversight as the Chair of the sub-board.

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.

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

Regulator Performance and Resourcing

As required under its Terms of Reference, the Review has also considered the current performance and resourcing of the ACMA.

The Review used various sources to consider performance including stakeholder submissions and consultations, a self-assessment by the ACMA against the Government's *Regulator Performance Framework*, comparative information from the Reference Group as well as empirical and qualitative information gathered by the ACMA specifically for the Review. In looking at resource allocation, the Review undertook detailed analysis of resourcing by function and compared this against international and domestic regulators.

The Review concludes that the ACMA has performed well and efficiently in its operations, with steady improvements in important areas of business processes over the last ten years. It has developed sound approaches to regulatory issues and has a strong international reputation in areas such as spectrum management. It has pursued efficiencies in corporate and business processes and adjusted its structure as its resource base has declined over time. Its regulatory decision-making has been sound and supported by evidence.

The Review finds improvements could be made to the ACMA's timeliness of decision-making, transparency of Authority decision-making processes, consistency of process for major rule-making and planning activities, and approaches to continuous improvement of the regulatory framework. These areas for improvement become even more critical in the future communications market and form the basis for four regulator principles recommended by the Review. The Review also makes several recommendations to improve the timeliness and transparency of decision-making processes. These are further detailed in Part Three and [Appendix B](#).

Draft proposals 21, 22, 23 and 24:

That the ACMA undertake a range of measures to improve its timeliness and transparency, including reporting on steps taken to improve the transparency and consistency of its decision-making processes and, every two years, on actions to reduce regulatory burden.

Regulator principles

Drawing on the Review's assessment of the ACMA's performance described above, it is recommended that government and the Parliament should provide greater guidance to the regulator about its expectations of its performance outcomes, i.e. how it should administer regulation. Taking into account the future communications environment, the Review proposes four desired performance outcomes for the ACMA:

- > Agile, timely and informed decision maker;
- > Actions are targeted and commensurate with risk;
- > Delivers continuous improvements of regulatory frameworks; and
- > Has the trust and confidence of stakeholders.

The Review consequently recommends a number of performance principles be included in the ACMA Act to provide certainty to the regulator of expectations of its performance. Similar principles have been enacted in legislation to provide guidance to international regulators (such as Ofcom in the UK) and domestic regulators (such as the Australian Securities and Investments Commission). These are further detailed in Part Three and [Appendix B](#).

Draft proposal 18: That the ACMA Act be amended to include regulator principles to identify expectations as to the regulator's performance. These would be directed towards ensuring the regulator takes a risk-based approach to regulation, pursues continuous improvement, is transparent and has regard to the impact of its decisions on competition, innovation and efficient investment.

Resourcing

The ACMA's current resource base compares well to cost indicators in domestic regulatory agencies and its total budget with a number of international regulators. However, in comparing regulator expenditure to population size, the ACMA's costs appear significantly higher than international regulators. The Review notes that this may be a reflection of the regulatory framework being more extensive in Australia rather than the efficiency of the regulator, but may be a useful area for further analysis by the ACMA.

The Review also recommends that it would be timely to review the policy objectives behind the application of taxes, charges, levies and cost-recovery arrangements across the communications sector to ensure they remain fit-for-purpose.

Draft proposal 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.

Draft proposal 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.

Reform of the communications regulatory framework

Finally, the Review recognises that the performance of the regulator is significantly impacted by the regulation that it administers. Poorly designed, excessively detailed or out-of-date legislation can lie behind regulator performance issues. A number of industry submissions highlighted the need for a regulatory regime that would better enable the regulator to do its job efficiently and effectively.

The Australian communications industry is at an extraordinary point in its history. Never before has it been more important to economic growth and social cohesion. Never before have Australians had access to the diversity of content and services now available to them, and never have they expected more from them. It is also the case that never before has the Australian industry faced the level of competition from global players that do not carry equivalent investment or regulatory costs.

The ACMA has a unique remit which involves the delivery of both economic and social objectives by the communications sector. Its ability to deliver these outcomes is reliant on the regulatory objectives, tools and processes embedded in the regulatory framework for which it is responsible.

The regulatory framework has not kept pace with the seismic shifts in the sector in recent years. Only minimal changes were made to the underlying communications regulatory frameworks in 2005 when the ACMA was established, meaning that much of the current regulation of the communications sector is substantially more than 20 years old. While a reform process has commenced in some areas, with the Spectrum and Vertigan Reviews and the recent decision to examine telecommunications consumer regulation, including the USO, the ageing regulatory regime still maintains a distinction in many areas between delivery technologies which no-longer exist and places excessive emphasis on traditional broadcasting and telecommunications providers to achieve public policy outcomes.

Feedback from submitters and an examination of the underlying regulation administered by the ACMA demonstrates the regulatory regime is no longer fit-for-purpose. Public policy goals could be achieved more effectively and at a lower cost to industry if a more coherent and streamlined regulatory regime was established. A more flexible and technology neutral regulatory regime would also better support the communications sector achieve its full potential as an enabler of innovation and productivity growth across the economy.

Achieving this goal would require a regulatory reform process that considered the public policy objectives that are likely to endure in the communications sector. In November 2013, the Department released *Deregulation in the Communications Portfolio Policy Background Paper No 1* which, building on previous work of the ACMA, aimed to identify “the broad groups of public policy objectives for the communications sector that have stood the test of time, regardless of changes in technology and consider the rationale for present and future intervention”.⁶ These can be summarised as follows:

⁶ Department of Communications and the Arts (2013), [‘Deregulation in the Communications Portfolio’ Policy Background Paper No 1](#), p.6.

- > **Access to services/participation in society.** Citizens should enjoy reasonable and equitable access to communications infrastructure, services and the content necessary to enable their effective participation in society and the economy.
- > **Competition.** Markets should be open and competitive so as to encourage investment, innovation and diversity of choice.
- > **Efficient allocation and use of resources.** Policy settings should be coherent, appropriately calibrated and predictable so that public resources are used efficiently over time.
- > **Network reliability and interconnection.** Networks should operate in an efficient and effective manner.
- > **National Interest.** The communications sector settings should reflect the national interest both domestically and through international forums such as those held by the International Telecommunications Union.
- > **Diversity of voices.** There should be a diversity of major information sources and perspectives expressed in the public sphere to foster an informed citizenry and healthy democracy.
- > **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'. In relation to content, children, in particular, should be protected from harmful material.

Whether these remain appropriate public policy outcomes to be pursued and how they are delivered in a future communications environment present challenging decisions for government.

The future reform process would also have to be designed to minimise disruptions to commercial activity, innovation or investment decisions. The Review proposes a set of principles to guide both decisions about when and how to intervene and, once intervention is deemed necessary, how regulation is used to achieve policy objectives.

It may also be timely for the Government to consider the style of regulation applied to the sector. In May 2014, the Department released [*Regulating harms in the Australian communications sector Policy Background Paper No.2*](#) which considered the relative strengths and weaknesses of a range of interventions used to regulate the communications sector. The paper questioned the preference for co-regulation as the preferred regulatory model in the context of evolving technologies, business models and consumer expectations. It also questioned industry commitment to take greater responsibility for its own performance and suggests it may be timely for industry to consider how it could make greater use of self-regulation.

The Review determines that a coordinated programme of reform is required to move to a contemporary regulatory regime. This reform programme could be staggered to manage the transition from the current regime, which has shaped investment decisions in some markets, to incrementally develop a new regulatory framework. It is unlikely that proposals contained in this Review to shape a future communications regulator will fully succeed without such broader regulatory reform.

Draft proposal 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.

Transition Path

The Terms of Reference for the Review require it to provide a transition path to implement preferred alternatives to enable proposed changes (if any) to be put in place by 2016-17.

The Review has proposed a number of changes to the remit, functions and the performance of the ACMA. It also proposes a programme of broader regulatory reform (Part Five).

The Review is seeking views on any implementations issues arising from these proposals to allow these to be included in a comprehensive Transition Path as part of the Review's final report to the Government.

Part One – The ACMA's operating environment

The design of a future-focused regulator should be informed by an understanding of the environment in which it is likely to operate.

The ACMA's operating environment is shaped by two principal factors: the constantly evolving communications market and the regulatory regime it is responsible for administering. This section of the report discusses developments in the communications market and identifies the implications of these for the ACMA. Part Five of the report discusses the regulatory regime.

Communications markets

The importance of the communications sector stems from its role as a source of enabling technology for the broader economy. In this role, the communications sector and the ICT development that it supports are underpinning the long-term transformation of all industries.⁷

OECD data shows innovations spurred by the ICT sector have huge potential to boost growth and drive societal improvements. The biggest impact comes when ICT is applied across the economy and society, including public administration, health, education and research.⁸ The Government's National Innovation and Science Agenda highlights that digital infrastructure is an important enabler of innovation for Australian businesses, students and academics in terms of economic growth and high-wage jobs of the future.⁹ The Department's Bureau of Communications Research (BCR) has examined the impact of ICT on the Australian economy in aggregate and published its findings in February 2016.¹⁰

The OECD has described broadband as a general-purpose technology (GPT) enabler and forecast that it will surpass the transformative effects of other GPTs including electricity and railways.¹¹ Broadband networks as a platform are capable of enabling new services and applications across the entire economy, with their characteristics including pervasiveness, technological dynamism and productivity enhancement.

⁷ Australian Council of Learned Academies (2015), [Technology and Australia's Future](#), p. 39.

⁸ OECD (2014), [Measuring the Digital Economy: A New Perspective](#), p. 75-103.

⁹ Commonwealth of Australia (2015), [National Innovation and Science Agenda](#), p.3.

¹⁰ Bureau of Communications Research, Department of Communications and the Arts (2016), [IT use and Australia's productivity: Where are we now?](#)

¹¹ OECD (2008), [Broadband and the Economy](#), p.9.

The communications sector also plays a vital role in developing and reflecting Australia's identity, character and cultural diversity by providing access to news, information, education and entertainment, consistent with community standards.

The potential of the communications sector will need to be fully realised if Australia's standard of living is to be maintained in the face of the disruption and globalisation being driven by technological change. Australia's future prosperity will be enhanced by the communications sector and its capacity to provide connectivity, mobility and access to information.

The changing communications markets

In the communications market, the distinction between the traditionally well-defined, vertically integrated segments of the telecommunications, media and online industries has now largely disappeared. This deconstruction has been driven by near ubiquitous internet access and the digitisation of content. Content can now be accessed over multiple platforms and devices, anywhere and anytime, and created by individuals themselves.

These previously distinct industries are now more appropriately considered as creators of services and content that meet a public need, whether that is to communicate, facilitate business or provide information and entertainment.

Rather than a number of industry verticals, the communications sector is best described as a series of horizontal layers of services and activities. Each layer, beginning with infrastructure, then transport, devices and finally content and applications, provides services to the one above and relies on services from the layers below. The economics and sources of competitive advantage of businesses in each layer varies. The bottom layers are the most scale and capital intensive (e.g. infrastructure owners), while the upper layers are more innovation intensive (e.g. applications and content).¹²

Telecommunications markets

In the telecommunications segment of the market, fixed and mobile operators are becoming indistinguishable as they seek to provide equivalent and seamless service packages to customers. Increasingly, telecommunications providers are also moving into content distribution. For example, Optus has recently acquired the rights to broadcast the English Premier League, while Telstra has a long-running stake in Foxtel.¹³

¹² See Remit section under Part Two for more detail on these layers.

¹³ Clare Siracusa (5 November 2015), '[Optus snatches English Premier League Rights from Fox Sports in Australia](#)' (Sydney Morning Herald).

As a result, communications businesses are no longer competing within their own traditional sectors, that is, mobile to mobile, telco to telco, or media to media. Instead, they are competing with each other and in a global market. Apple, preeminent in devices, has moved into services (iTunes), while application providers like Google have moved into content (YouTube) and are making preliminary forays into infrastructure (Google Fibre, Project Loon). Facebook is providing one-to-one and one-to-many communications services.

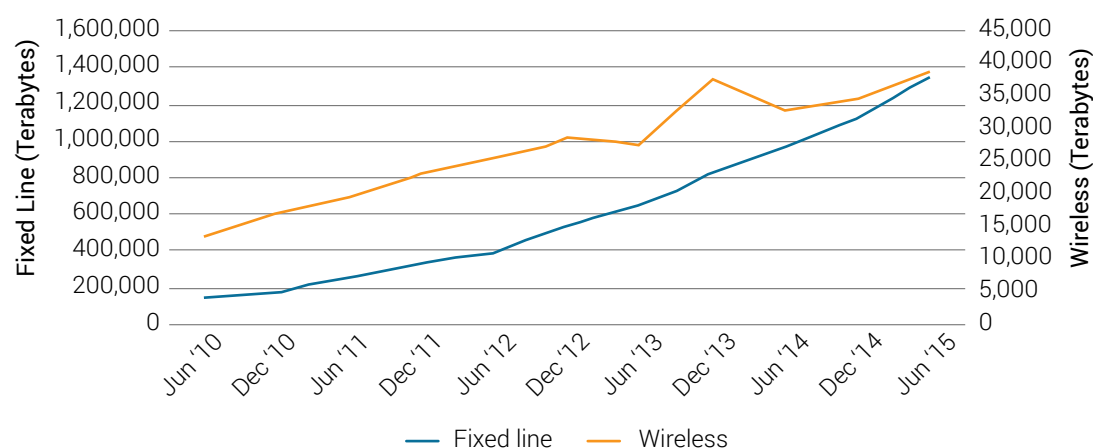
The next wave of change in the communications market is being led by the rapid growth of over-the-top services (OTT). Previously most media and telecommunications services were provided via dedicated end-to-end networks usually developed for a single purpose and often owned by a vertically integrated provider. OTT services are leading to a degree of vertical disintegration, with independent application providers operating at the edge of the network and end users accessing content and services via devices connected to a variety of communications networks. New entrants in this market often have a different business model to traditional telecommunications and media businesses; they are specialised, global in scale and unrestricted by existing service contracts. As a result, many OTT service providers do not necessarily own infrastructure and instead rely on fixed, mobile and wireless broadband networks to connect to the devices owned by their customers.

Another wave of change is the rapidly emerging 'Internet of Things' that will place new demands on networks and impact on the pace of communications, increasing machine-to-machine communications and creating unprecedented volumes of data with special service requirements.

Infrastructure investment is being driven by the need to keep pace with the rapid growth in data use as a result of new services that rely on high data volumes, in sectors such as financial services, media, health, agriculture and tourism. Infrastructure Australia predicts demand for telecommunications infrastructure to grow faster than GDP until at least 2031.¹⁴ As more audio-visual content is accessed via the internet, the telecommunications sector is expected to experience significant growth in demand for data. Cisco forecasts that globally, consumer internet video traffic will be 80 per cent of all consumer internet traffic in 2019, up from 64 per cent in 2014.¹⁵

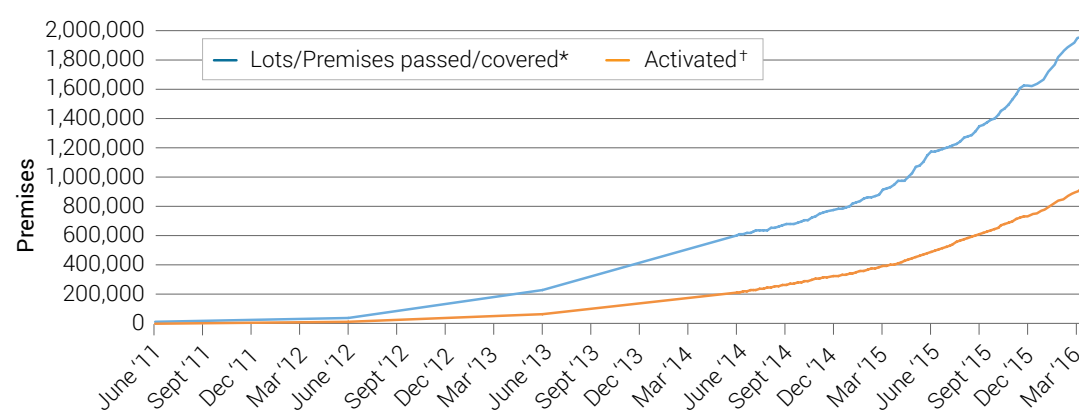
¹⁴ Infrastructure Australia (2015), 'Australian Infrastructure Audit, Our Infrastructure Challenges', p.119.

¹⁵ Cisco (27 May 2015), 'Cisco Visual Networking Index: Forecast and Methodology, 2014–2019' (White Paper), p.2.

Figure 3: Mobile and fixed line data downloads¹⁶

Broadband markets

In the broadband segment of the market, nbn will be the major infrastructure investor, as it delivers broadband access to customer premises on a wholesale basis. At present, industry consolidation between tier two broadband providers, for example TPG's purchase of iiNet and the merger of M2 Group and Vocus Communications, is changing the broadband landscape as providers scale up to compete in an NBN-based industry structure. The structural separation between the wholesale infrastructure owner (nbn) and retail service providers is aimed at addressing the longstanding structural impediments to competition in the broadband market. However, it is not yet clear how this new market structure will evolve.

Figure 4: NBN rollout¹⁷

* Lots/Premises passed/covered is the combined total for fixed-line technology in Brownfields and New Developments plus, fixed wireless premises which are covered by the network, excluding satellite.

† Premises activated refers to homes and business which have an active service installed.

¹⁶ Australian Bureau of Statistics (2015), <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0/>.

¹⁷ nbn (14 April 2016), 'National Broadband Network – Rollout Information'.

Fixed and mobile infrastructure owners who provide vertically-oriented services, while currently benefiting from revenue growth driven by the demand for data, are facing competition from OTT applications like Skype and WhatsApp which are alternatives to traditional voice or SMS communication services. Infrastructure owners are therefore increasingly looking to diversify their business beyond access and devices into the delivery of services, applications and end-to-end solutions. This is both a growth opportunity, as they seek to access revenue going to OTT services, and a defensive strategy, as they run the risk of only receiving utility-type returns for the data traffic on their broadband networks in the longer term.

Growing spectrum demands

The increasing demand for mobile devices (including from the device-to-device nature of the 'Internet of Things') means spectrum allocation decisions are becoming more contentious, as pressure to meet new spectrum uses must be balanced with reallocation demands from existing users. As demand for spectrum grows, so too does the risk of interference to licensed services. Furthermore, management of spectrum by regulators and service providers is made increasingly difficult, particularly given the increasing scarcity of the spectrum resource as demand growth accelerates.

Media markets

Content is increasingly being accessed "on the go" via mobile internet-connected devices and on demand via catch-up television or subscription video on demand (SVOD) services. The on-demand nature of content consumption means that the TV-guide is being replaced by the search engine. For example, Facebook is now the number one referrer of news stories. While the majority of viewing time remains focused on broadcast television in the home and commercial television audiences have been relatively resilient over the past decade, 2015 saw the first signs of audience erosion. In the first quarter of 2015, the average number of hours of broadcast television viewed per capita fell below 90 hours per month for the first time since ratings started in 1991.¹⁸

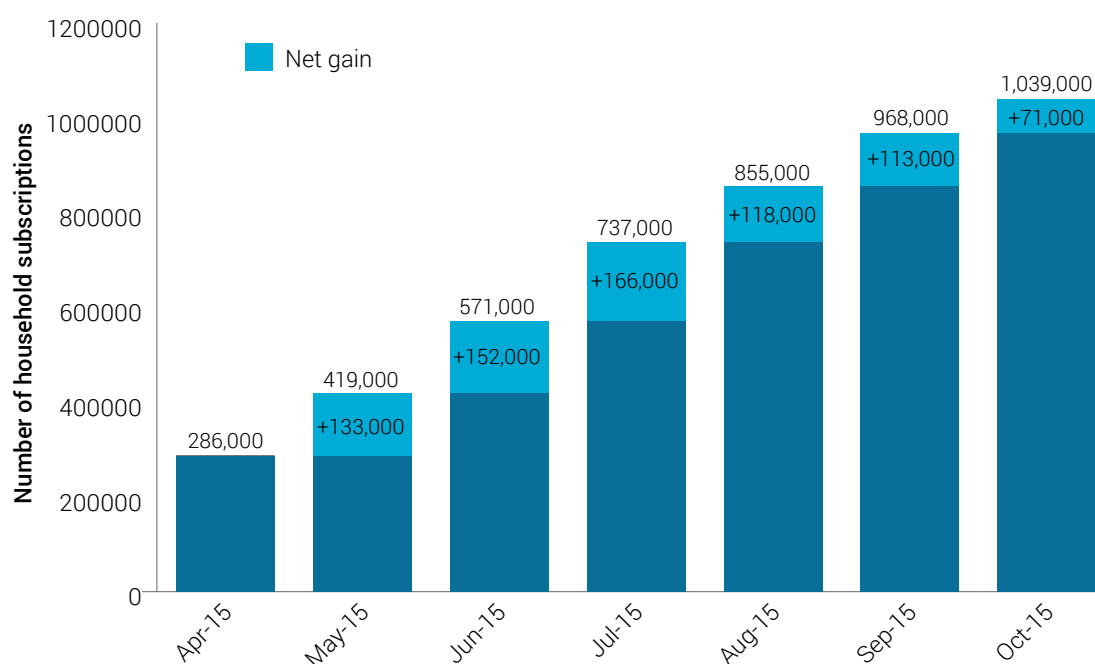
As content is digitised and accessed over broadband networks, payments made to content producers are reducing. Rather than having one source of paid content, households may have multiple cheaper subscriptions. The digital versions of films, music, books and subscription TV are often less expensive for consumers to purchase than their analogue predecessors. The emerging cost for consumers, however, is the cost of downloading increasing amounts of data over their broadband connections.

¹⁸ Nielsen (2015), '[Australian Multi-Screen Report, Quarter 1 2015](#)' and Australian Financial Review 2015, The Sharp Threat to Foxtel, 10 August.

The revenue of commercial television broadcasters has fallen 19.7 per cent over the ten years to 2014, from \$5.52 to \$4.43 billion, and is expected to continue to decline.¹⁹ At the same time, the operating costs for the publicly listed commercial broadcasters have increased by 7.9 per cent at the group level over the five years to 2015.²⁰ These increases are driven by increasing talent fees, high production values and rights costs for content such as live sport.

Subscription television revenues are forecast to increase by 10.8 per cent over the next four years to 2019.²¹ Subscribers will be looking for more flexibility to choose individual programs rather than packages. Commercial and subscription broadcasters will also be under pressure from OTT applications like YouTube, Netflix, Facebook, Pandora and Spotify, which are providing global broadcasting type content direct to Australian households. For example, as seen in Figure 5 below, over one million Australian households have subscribed to the SVOD service Netflix since its launch in March 2015.

Figure 5: Netflix take-up²²



¹⁹ Source: Analysis based on ACMA Broadcasting financial results 2005-2014. Figures adjusted for inflation using the GDP implicit price deflator produced by the ABS.

²⁰ Source: Analysis based on ACMA Broadcasting financial results 2005-2014. These expenses include exceptional or non-recurring items.

²¹ PricewaterhouseCoopers (2015), 'Australian Entertainment & Media Outlook' 2015-19.

²² Roy Morgan Research (12 November 2015), '2.677 million Australians have Netflix as subscriptions surpass one million homes' (Finding No. 6548).

While Australians are spending an increasing amount of time consuming media content, their attention is spread across a rapidly expanding range of content and devices. This is challenging the advertising-driven broadcasting business model that relies on attracting mass audiences. In response, broadcasters are investing in digital platforms to recapture some of the advertising expenditure that is migrating online. For example, the Seven Media Group and Nine Entertainment Group have invested, with partners, in SVOD offerings Presto and Stan. They have also commenced live-streaming of their broadcast television channels. However, the more crowded online advertising market is unlikely to deliver the same returns as traditional broadcast advertising.

Digital disruption

Rapid advancements in ICT have introduced challenges for the communications industry with emerging technology empowering market entrants with new business models to compete across the once well-defined market. This will also lead to disruption in other industries by blurring the boundaries between the communications market, the digital economy and the broader economy.

The disruption in the communications market is likely to continue as it is driven by:

- > Growing ubiquity and speed of fixed and mobile broadband networks;
- > Availability and uptake of increasingly sophisticated consumer devices (handheld or wearable) that can capture a growing range of inputs (text, voice, images, video, location data, medical or health data) and provide seamless connectivity to share and exchange data across global services, data analytics and ubiquitous social networks;
- > Miniaturisation, which is making it economical to embed communications devices in appliances, sensors and logistics supply chains, that is creating the 'Internet of Things'; and
- > Virtualisation of physical infrastructure, which has released service providers from infrastructure ownership and reduced entry costs, for example, cloud computing.

Consumers

In response to the increasing range of devices, services and applications now available, consumers are adopting technology faster 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 in carrying out more online transactions.

In this environment the relationships between the customer, infrastructure provider, carriage service provider, device manufacturer and applications provider become multi-party and interdependent. Individuals and businesses are no longer simply buying a communications service for voice or data; they are buying an integrated and sophisticated health, education, or agricultural service underpinned by communications technology and networks, or relying on online services for payments, e-commerce, entertainment, or social networking.

The increased capacity for consumers to access content through a profusion of sources is fundamentally changing consumer markets. Their attention is spread more thinly and consequently is harder to capture, with effects on upstream markets.

Consumers have a greater choice of devices, services and networks which in many cases has empowered consumers to more readily change products and services if they are unhappy with a supplier. Consumers also benefit from the online environment where they can access information and influence provider behaviour (via online review sites, Twitter and blogs). In response, a number of companies are placing greater emphasis on customer service as they compete to retain customers and seek to leverage their relationship with the customer to expand into new markets.

Consumers continue to expect reasonable and equitable access to communications services and content wherever they live in order to support their economic and social activity. They also value a diversity of information sources that are fair, accurate and transparent. Audiences continue to expect content that is guided by some form of community standards and avenues through which they are able to complain if those standards are not met. Cybersafety and cybersecurity initiatives are seen as important to protect those at risk of harm, particularly children, and to maintain a trusted online environment.

General consumer protection issues also arise in relation to communications services, as they do in other complex, high value industries such as financial services, health insurance and energy, in areas such as contract terms, unfair dealing, billing, consumer credit and accuracy in advertising. Privacy remains an issue for many, yet the experience of the past decade has shown many consumers are willing to share their personal information in exchange for access to services or content.

Implications of market change for the ACMA

Given the changes in the communications market, what implications should be taken into account when designing a fit-for-purpose communications regulator?

Noting the degree of unpredictability and speed of change, the ACMA needs to be agile, responsive and proportionate in its approach. It will need to be able to engage with risk so it can move quickly and with confidence to make sure it does not unnecessarily impede the development of new and innovative services.

The regulator will need to have a remit that spans all four layers of the communications sector. It will need to develop a detailed technical understanding of the interaction between layers, as multiple parties must contribute to achieving an assured level of service. The regulator will also need to understand the market dynamics as the number of parties involved in delivering services to customers is increasing as supply chains lengthen.

In response to the increasingly interconnected and global nature of the sector, the ACMA's decisions will have greater potential to affect competitive outcomes in the market. This means the regulator will increasingly need to understand how previously distinct market players are competing with each other and operating across multiple layers. It will need to recognise when and how its decisions have implications for competition both within the communications sector and more broadly, and take this into account in its decision-making.

The complexity of the market and pace of technological change will require the ACMA's decision makers to have a comprehensive and authoritative knowledge of the communications market and emerging technologies. They will need to be highly capable regulatory practitioners able to judge when intervention is necessary and which of the ACMA's regulatory tools is most appropriate in a given scenario. They will need capacity to actively work with industry, consumer groups and government as potential harms are assessed to determine if they require a regulatory response, as well as the ability to engage with stakeholders to provide transparency of the decision-making process.

The regulator will need to be comfortable in an environment of continuous change. It will need to adapt its regulatory posture to keep pace with changes in the market and technology to make sure it effectively achieves its goals while imposing the minimum impost on the industry and not unnecessarily impeding the development of new services and technology. The ACMA will need to adapt its structure as functions change, develop new capabilities as new functions arrive and continually adapt as the regulatory regime makes greater use of co- and self-regulation.

Part Two – Design of a contemporary regulator

The current ACMA

The ACMA was established by the *Australian Communications and Media Authority Act* in 2005 to be a converged regulator responsible for the broadcasting, telecommunications, radiocommunications and online industries in Australia, in line with the following industry Acts:

- > *Australian Communications and Media Authority Act 2005;*
- > *Broadcasting Services Act 1992;*
- > *Do Not Call Register Act 2006;*
- > *Interactive Gambling Act 2001;*
- > *Radiocommunications Act 1992;*
- > *Spam Act 2003;*
- > *Telecommunications Act 1997;*
- > *Telecommunications (Consumer Protection and Service Standards) Act 1999.*

General functions of the ACMA include industry regulation, reporting to and advising the Minister for Communications and the Arts, managing Australia's input into international standards setting and informing and educating the public.

The ACMA administers licensing regimes covering television and radio broadcasters, telecommunications carriers and users of radiofrequency spectrum. It registers industry codes and standards in relation to broadcasting and telecommunications and monitors compliance with them. The ACMA also possesses a range of enforcement powers, including issuing directions to comply with codes and standards, accepting enforceable undertakings, revoking broadcasting, carrier and spectrum licences and instituting Federal Court proceedings seeking injunctions or pecuniary penalties for contraventions of the legislation which it administers.

The ACMA is a statutory authority and consists of a Chair, Deputy Chair and at least one – and not more than seven – other members (not including associate members).²³ Members are appointed by the Governor-General, while the Minister for Communications and the Arts may

²³ See section 19, *Australian Communications and Media Authority Act 2005*.

appoint as many associate members as he or she thinks fit.²⁴ Appointments are made for a period of up to five years; members may be appointed more than once, though a member's periods of appointment may not exceed ten years in total. The Chair and Deputy Chair must be full-time appointments; other members may be appointed on a full or part-time basis.

The ACMA has a commission structure, under which the Authority itself is the principal decision maker and makes decisions at formal fortnightly meetings at which a majority of members must be present to constitute quorum.²⁵ The Authority can delegate decision-making unless it relates to making, varying or revoking a legislative instrument and certain express decisions under the *Broadcasting Services Act 1992* (in which case, delegations can only be made to a Division of the Authority).²⁶

The ACMA is a non-corporate Commonwealth entity within the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

The Chair of the ACMA is also its CEO. The ACMA states the role of the Chair is to facilitate and manage business, including the performance of its functions and the exercise of its powers.²⁷ The Chair is responsible for governing and managing the ACMA and is the Accountable Authority in accordance with the PGPA Act. The Chair manages the ACMA's resources, including entering contracts on behalf of the Commonwealth.²⁸ The Chair is also responsible for preparing the ACMA's corporate plan, annual report and audited financial statements. The Chair is not subject to direction by the ACMA in relation to his or her performance of functions under the PGPA Act.²⁹

Remit

The increasing importance of communications networks to social and economic activity, combined with convergence, means that describing the communications regulator's remit is difficult. As the ACMA itself notes:

... it is increasingly difficult to clearly delineate between those matters that are appropriately the focus of a communications specific regulator as the networks and services delivered over them become more and more embedded into the economy as a whole, alongside existing telecommunications and media services.³⁰

²⁴ Sections 20 and 24, *Australian Communications and Media Authority Act 2005*.

²⁵ ACMA (2015), *Submission to the ACMA Review issues paper*, p. 6.

²⁶ Sections 50 – 53, *Australian Communications and Media Authority Act 2005*.

²⁷ ACMA (2015), *Submission to the ACMA Review issues paper*, p. 7.

²⁸ ACMA (2015), *Submission to the ACMA Review issues paper*, p. 7.

²⁹ ACMA (2015), *Submission to the ACMA Review issues paper*, p. 7.

³⁰ ACMA (2015), *Submission to the ACMA Review issues paper* p. 44.

Communications networks are vitally important to economic and social activity. These networks enable the delivery of services and applications across the entire economy as well as supporting cultural diversity and access to news and information. At the same time these are dynamic networks where technological change drives innovation and the development of new products and services. The emergence of new products and services constantly generates questions for policy makers and regulators as to whether consumer or technical issues require intervention or whether they will be resolved by the market.

The Department supports a description of the regulator's remit that reflects the reality that these networks underpin almost all economic activity in our society and that the regulator has an integral role in making sure these networks continue to function efficiently while minimising harms arising from their operation.

As noted above, the communications market has transitioned from vertically integrated segments comprising telecommunications, media and online industries to a series of horizontal layers of service where each layer provides services to the one above and concurrently depends on the layers below. Within this market each layer must combine to deliver services to the end user. For example, an end-user needs access to an application, a device to connect to the network and a network connection. A network operator requires the essential inputs to build a network. However, each layer can also be discrete.

The Department considers that the ACMA's remit should span across all of the layers of the communications sector and that it should develop an in-depth understanding of these layers in order to carry out its responsibilities.

The ACMA has been at the forefront of describing these layers. It has done so by referring to what it calls "enablers": infrastructure, devices, services and apps, digital content/information, and users (business and citizens).³¹ This is a useful approach. However, recent OECD work that examines policy and regulatory issues focuses on the centrality of general purpose networks – that is, those IP broadband networks that underpin nearly all economic activity³². The Review has therefore built upon the ACMA's work to arrive at a slightly simplified definition comprising of four layers:

APPLICATIONS/CONTENT LAYER – This layer includes software such as apps that support additional functionality, including content and the ability to make voice and video calls. Increasingly, services such as voice can be seen as applications in all IP networks. This layer also includes applications to access content, such as iView, Netflix, Presto, Stan and the content itself.

DEVICES LAYER – Devices are an essential means to access communications networks. Devices include televisions, radios, mobile phones and tablets.

³¹ ACMA (2011), *Broken concepts: The Australian communications legislative landscape*, p.6.

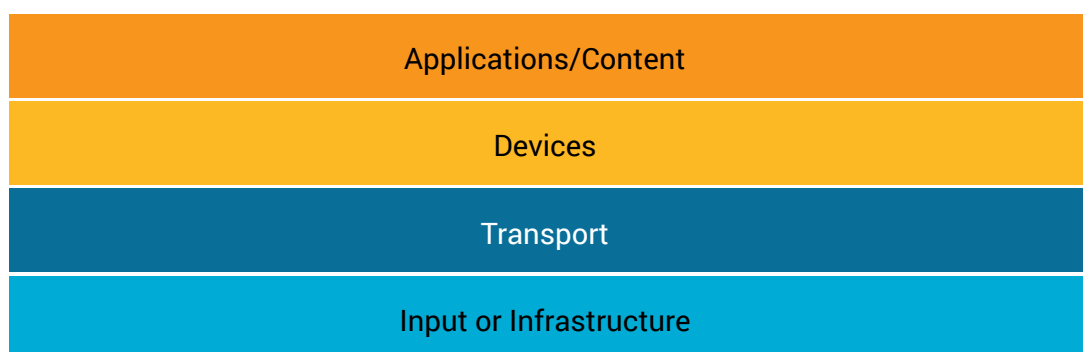
³² See Footnote 10.

TRANSPORT LAYER – The transport layer provides the intelligence needed to support applications and functionality over the network. Networking and routing protocols enable error-free transmission of the bit stream and provide for the quality of service. Technical standards also enable interoperability and any-to-any connectivity between different networks.

INFRASTRUCTURE LAYER – The infrastructure layer includes the passive infrastructure and electromagnetic mediums that support the transmission of raw bit streams over a physical medium.

Importantly, the ACMA's role will require it to monitor activity across all these layers and understand how they interact to deliver services and content to end users. However, this does not mean that it should be involved in all regulation at each layer, as there are other regulators with relevant responsibilities. The ACMA's remit should be interpreted from the perspective of the communications industry enabling activity in other sectors of the economy, but it would not extend into these other sectors. The ACMA is not responsible for regulating a service because it is carried over communications networks, unless it is content or a communications service or application.

Figure 6: Layers of the communications sector



Draft proposal:

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

Institutional ambiguity

When defining the communications regulator's remit there remains a critical distinction between users of the sectors' infrastructure and services and the sector itself. This is particularly important when considering OTT service providers and internet and mobile platforms. The ACMA provides an example of where a mobile phone is used as a mobile wallet where the mobile phone account

is used as an alternative to cash, that potentially raises issues for both the communications and financial services regulators.³³

This has implications for policy makers in determining which regulator is best placed to deal with market power, consumer safeguards or other issues that arise in the delivery of such services.

For these reasons, the Review considers that where an issue arises that does not fit within the remit described above or that may fall to another regulator, ownership of that issue is a matter of policy judgment for the government of the day to determine. This enables the ACMA to maintain vigilance over the communications sector and provide advice to government on whether interventions may be required.

The communications regulator's remit is therefore broad given its responsibility across a range of issues. This has several implications.

Firstly, the communications regulator has a role in understanding industry and consumer activities across the horizontal layers of the communications market. It monitors these markets enabling it to identify harms that arise. This is a forward-looking approach – scanning the environment to ensure the efficient and effective operation of communications networks, as well as the ACMA's unique role in regulating some kinds of digital content.

If the ACMA observes harms emerging in the market which may require interventions outside the remit of the regulator or new powers to address these emerging harms, it has a role in providing advice to government, and it is for the government to consider if the ACMA's remit or powers should be expanded to address these harms, or whether another form of intervention is appropriate. Where governments decide to intervene, the remit of the regulator should always be considered to ensure that new functions do not fall outside it.

This remit remains broadly consistent with the categories of functions carried out by the ACMA. The Review has identified these from the ACMA's statutory responsibilities as:

- > Resource planning and management – activities relating to planning and allocating resources such as radiofrequency spectrum and numbering;
- > Licensing – all licensing activities under the Broadcasting Services Act, including ownership and control, the Telecommunications Act and Radiocommunications Act;
- > Technical regulation – for example, transmission standards for broadcasting, connection rules and permits, cabling and device regulation;

³³ ACMA (2011), ['Broken Concepts – the Australian communications legislative landscape'](#), p. 8.

- > National interest – acts as a technical adviser and arbitrator for national interest and defence purposes, compliance with the Integrated Public Number Database (IPND) and Part 13 of the *Telecommunications Act 1997*;
- > Accessibility – for example, national relay service, universal service obligation, customer service guarantee, payphone;
- > Content regulation – for example, the Australian Children’s Content Standard, quotas for Australian content, local news. Also includes discrete online content such as the Interactive Gambling Act;
- > Revenue collection;
- > Reporting to and advising the Minister;
- > Making information available to the public on certain matters;
- > Consumer protection - for example, compliance and enforcement of rules in the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; and
- > Unsolicited communications – for example, management of the *Spam Act 2003* and Do Not Call Register.

The following section conducts an analysis of the ACMA’s functions to determine whether they fit within this remit.

Functional analysis

Over time, the ACMA has responded positively to government requests for it to take on more functions, but these were not always informed by a coherent view of the regulator’s role.

In examining the ACMA’s functions, the Review has taken into account:

- > a ‘stocktake’ of the ACMA’s legislated functions;
- > identification of functions which the ACMA performs but for which it may not have statutory responsibility;
- > submissions to the Issues Paper and other consultation with relevant businesses and industry representatives; and
- > internal advice from the Department and feedback from the ACMA itself.

Consistent with the Terms of Reference for the Review, an important part of this analysis has been to assess the ACMA’s functions against the Government’s Contestability Programme.³⁴

This programme assumes that while public sector bodies may have been initially delivering their functions both efficiently and effectively, over time this may no longer be the case.

The Programme uses the concept of contestability to consider:

³⁴ More information on the Government’s Contestability Programme can be found on the [Department of Finance website](#).

- > What role the government should have;
- > How functions align to government priorities;
- > How to best achieve a function's intended effect;
- > Who is best placed to undertake a function;
- > How to encourage entities to continue to improve the efficiency and delivery of the function, through the possibility of competition; and
- > Proposed new remit.

The Review has taken the broad parameters of the Contestability Programme into account in considering whether any of the ACMA's functions or services could stop, be provided by other agencies or by the industry itself. It has also considered whether there are functions of, or services provided by, other agencies that may be more efficiently and effectively delivered by the ACMA.

Functions

While many of the ACMA's functions will remain relevant, the Review has found that some arrangements can be refined.

Cybersecurity

The ACMA carries out a number of cybersecurity activities. It undertakes technical and regulatory functions, which primarily concern enforcing Australia's anti-spam law and investigating online content and gambling complaints. It also undertakes cybersecurity outreach activities including the Australian Internet Security Initiative (AISI), cybersecurity news e-bulletin, phishing alert services and the spam and cybersecurity public awareness website.

- > The AISI's objective is to minimise the cybersecurity threat to Australian internet users by providing ISPs and other AISI partners with daily reports listing malware infections and vulnerable services and devices in their networks. Partners can then take action to remove the affected devices or services.
- > The Phishing Alert Service uses information derived from the thousands of spam reports received by the ACMA every day to identify phishing emails. Phishing emails typically masquerade as being sent from critical infrastructure providers (such as banks, telecommunications companies or internet service providers), government agencies (such as the Australian Taxation Office) or other major commercial entities.

These are well-regarded programmes and have been effective within their means. Small business and individuals in particular benefit from assistance to strengthen their cyber defences.

The Review has considered the programmes against the broad parameters of the Contestability Programme and considers there is scope to increase the effectiveness of these initiatives by linking them more closely with Commonwealth Government initiatives with similar objectives.

The Australian Cyber Security Centre (ACSC) opened in November 2014 with the aim of ensuring Australian networks are amongst the hardest in the world to compromise. The ACSC operates on a co-location model – existing capabilities across the Defence portfolio, the Attorney-General's Department, the Australian Security Intelligence Organisation, Australian Federal Police (AFP) and Australian Crime Commission (ACC) operate out of a single location in Canberra.

The ACSC is a hub for greater collaboration and information sharing and the Review considers the existing resources of the ACMA devoted to cybersecurity would be best transferred to the Attorney-General's Department to be co-located within the ACSC. This is more likely to contribute to a coordinated Commonwealth outreach strategy and clear messages on cybersecurity awareness. In addition, there is already some duplication of relationships as ACSC agencies have relationships with some of the same service providers as the ACMA under its programmes.

The Australian Government's Cyber Security Strategy has emphasised the importance of better coordination and sharing of information in order to enhance the effectiveness of existing government programmes. The ACMA already supplies data from the AISI daily to the AFP to support cybercrime investigations. It also supplies AISI data to the ACC, which drew heavily on this resource in the first Australian Cyber Security Centre Threat Report, published in July 2015. Transfer of these cybersecurity programmes to the ACSC would allow them to be integrated with other relevant Australian Government cyber security initiatives to enhance their effectiveness in protecting consumers and business from cyber threats.

In addition, it may lead to better reporting of cybersecurity risks. A recent survey of AISI users identified that while large ISPs have good links to relevant cybersecurity agencies, medium and small ISPs are unsure about which organisation to report cybersecurity incidents to.³⁵

In regard to the Phishing Alert Service and spam public awareness website, while operational responsibility for these programmes would be transferred, the ACMA would retain its regulatory role in its continued responsibility for the Spam Act.

³⁵ ACMA (2015), ['The Australian Internet Security Initiative: Interviews with industry participants'](#), p. 18.

Draft proposal:

2. That the ACMA's cyber-security programmes be transferred, along with staff and funding, to the Attorney-General's Department.

Research and analysis

In its responsibility for a number of programme functions, the ACMA is required to undertake significant research and analysis of the communications environment. The Department has found this to include strategic market/environment scanning research³⁶, in addition to research that informs the agency's rule-making³⁷, its compliance and enforcement activity, and also research pieces that reflect on the effectiveness of governing frameworks³⁸.

However, these priorities on strategic market/environment scanning are not effectively focused, as they neither reflect on the ACMA's regulatory role and responsibilities, nor sufficiently focus on the emerging issues for its role as a regulator. Further, the Department's Bureau of Communications Research (BCR) is a professional, independent, economic and statistical research unit which carries out analysis which supports the development of public policy by:

- > Researching economic, market and technological developments;
- > Analysing communications policy, trends and issues;
- > Publishing communications data and research in an easy-to-read format so government, researchers and the public can use the information; and
- > Working with stakeholders in the communications sector to support informed discussion on policy and regulatory issues.

Given the establishment of the BCR, it is desirable to reduce potential duplication of research and confusion by increasing the focus of the ACMA to carry out research that best aligns with its institutional objectives and promotes better understanding about the effectiveness of regulation.

Draft proposal:

3. That the Bureau of Communications Research assume the lead in taking forward research about the emerging environment and market trends, with the ACMA's regulatory research programme focusing on supporting the effectiveness of regulatory functions and harms that are affecting businesses and consumers.

³⁶ For example: ACMA (2014), 'Six emerging trends in media and communications' – occasional paper.

³⁷ For example: ACMA (2012), 'Reconnecting the Customer' research studies.

³⁸ For example: ACMA (2015), 'Optimal conditions for effective self & co-regulatory arrangements'.

International Engagement

Similarly, there is a risk of overlap between the ACMA and the Department's international engagement strategies. The ACMA has international engagement responsibilities with particular regard to radiofrequency spectrum. It participates in forums which focus on international standard-setting and harmonisation issues, such as those held by the International Telecommunication Union (ITU). Australian delegations to policy-setting meetings of the ITU – the ITU Council, Plenipotentiary and World Conference on International Telecommunications (WCIT) – are headed by the Department and supported by the ACMA. These arrangements work well and are effective.

Another relevant international forum is the ITU Radiocommunication Sector (ITU-R), which meets every three to four years at the World Radiocommunication Conference (WRC) to revise radio regulations, the international treaty governing radiofrequency spectrum use and satellite orbits. The WRC has been considered a technical forum and as such, the ACMA has headed the delegation. However, increasingly, radio regulations have significant implications for use of and investment in spectrum in Australia. In this environment of increasing demand for spectrum, the WRC is transforming from a technical to a policy forum where microeconomic spectrum reform is settled at treaty-level. While the ACMA has played an important role in heading the WRC delegation, it is technically focused, and properly so. However, the ACMA is not always able to identify policy issues and manage competing domestic and international policy issues that arise during negotiations. In this regard, the ACMA may not be as well placed as the Department to escalate matters within government or obtain prompt policy guidance on significant issues which arise 'on-the-floor' in international negotiations.

The Review therefore recommends that head of delegation roles in key international forums, including the WRC, should be transferred to the Department, and that it take responsibility for developing policy positions and signing the final acts. The ACMA should continue to take part in a technical capacity, supporting the delegation. The Review considers the ACMA should continue to lead delegations on primarily technical matters and, in these circumstances, the Department should provide a statement of policy to guide the ACMA's decisions.

Draft proposal:

4. That the Department of Communications and the Arts be responsible for head of delegation roles to key international policy-setting forums, including the World Radiocommunication Conference, and that clear guidance and negotiating parameters be provided by the Department to heads of delegation.

Revenue collection

In 2014-15, the ACMA collected a total of \$654.51 million from six industry-specific revenue streams. These are collected annually via a mixture of resource taxes, cost recovery fees and levies, as well as revenue-based levies. Over time, the ACMA has become the third largest tax collector in the Commonwealth³⁹ and this is arguably not a core function for it to administer.

Some revenues, such as the indirect costs of managing spectrum, have complex charging calculations that have become increasingly opaque over the years. Charges may be broken down into multiple components. For example, the apparatus licence tax includes a fee charged for the apparatus licence and a cost recovery charge for Australia's annual member state contribution to the International Telecommunication Union.

The Review proposes the possible transfer of this function to the Australian Taxation Office be examined. However, the function should only be transferred if efficiencies exist. The ACMA provides this function reasonably efficiently and migration of its data collection to another agency and associated system development costs may mean there is no net benefit in it.

Draft proposal:

5. That further work be undertaken to determine whether it may be more efficient for another body, such as the Australian Taxation Office, to undertake the revenue collection functions currently performed by the ACMA.

Revitalising self-regulation

A key theme of the Review is for the ACMA to revitalise its commitment to encouraging industry self-regulation and to embark on a programme of continuous review. This could be done at many points in the regulatory cycle. Industry could be encouraged to pre-emptively fix the problem before government involvement is necessary and/or develop codes if certain harms are likely to materialise or to ensure consistent consumer practices across firms. Imposing regulation to minimise a harm can encourage compliance and educate consumers. As harms are reduced, regulation could be wound back or transferred to industry for management.

Importantly, industry has a key role in proactively submitting to the regulator when it considers a function could be self-regulated. By committing time and resources to scoping issues and developing strong proposals for self-regulation of particular functions, industry can assist in achieving deregulatory outcomes.

³⁹ Chris Chapman at Environmental and Communications Legislation Committee (Tuesday 9 February 2016), [Senate Estimates](#), p.15.

In the regulatory performance section of this report, the Review proposes the ACMA continuously review regulation to consider whether functions can be outsourced to industry or whether it can be repealed. However, some submissions⁴⁰ to the Issues Paper raised certain functions as being potentially suitable for self-regulation, and the Review considers that the ACMA should explore whether there are opportunities for industry to self-regulate in areas such as technical regulation, number allocation and mature regulatory schemes such as the Do Not Call Register.

The Do Not Call Scheme involves rules applying to telemarketers to prevent or limit unwanted contact for consumers and a Register which allows Australians to 'opt-out' of certain telemarketing calls. The Register is currently run under contract with the ACMA managing not only the contract, but the cost-recovery fees, website and statistics. The Scheme has been in place since 2007 and is mature with high levels of industry compliance (three formal warnings and one infringement notice were issued in 2014). Complaints are handled by the register operator, with potential breaches passed to the ACMA for investigation. It seems likely that the function of managing the Register could be performed by industry, if a relevant coordinating body exists, with the ACMA retaining its regulatory role in the scheme.

There are other technical regulation matters that may be able to be developed and self-regulated by industry. For example, the ACMA has powers under the Telecommunications Act to make technical standards, which could potentially be made by a representative industry body. Submissions considered that elements of spectrum technical coordination could potentially be managed by industry. The Integrated Public Number Database is currently run by Telstra under a licence condition established in 1997. This could potentially be run by industry more broadly.

The Review considers that the ACMA should explore further whether it could outsource certain functions, or parts of functions, and report back to the Minister within twelve months on any legislative or other impediments to doing this. In addition, the ACMA should consider whether any of these arrangements could change and look more like self-regulation, thereby giving effect to a key theme of this Review. This review of the administration and placement of these functions will have the additional benefit of increasing the ACMA's capability to implement continuous review.

⁴⁰ Supporting submissions included [Telstra](#) (pp. 16-17), [Optus](#) (p. 15).

Draft proposal:

6. That, within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self-regulation, in consultation with relevant industry bodies:
 - > technical standards;
 - > Integrated Public Number Database;
 - > Do Not Call Register;
 - > Action on unsolicited communications, including Spam.

Functions which could transfer to the ACMA

The Review also considered whether there are functions currently being administered outside the ACMA that fit within its future remit described above. Content classification, for example, was discussed in the future regulatory regime section as an area where some operational functions could potentially be brought within the ACMA to facilitate ongoing reform.

Classification

The Classification Board is an independent statutory body established under the *Classification (Publications, Films and Computer Games) Act 1995*. It is responsible for classifying films, computer games and certain publications for exhibition, sale or hire in Australia. This national scheme is complemented by state and territory enforcement legislation. The Classification Board also decides what consumer advice will accompany each classification decision. In doing so, the Board is required to reflect contemporary community standards. The Board's classification decisions and consumer advice help consumers make informed choices about what they and their children read, view and play. Decisions of the Board are trusted by consumers, who value the independence and consistency of its decision-making. Decisions of the Classification Board may be reviewed by the Classification Review Board, a separate independent statutory body.

The Classification Board and Classification Review Board are supported by the Classification Branch of the Department of Communications and the Arts. The Classification Branch provides secretariat and operational support to the Classification Board and conducts training for board members, government and industry. The Branch also undertakes research and provides policy advice to the Minister for Communications on classification issues and the National Classification Scheme.

Content classification in Australia is highly fragmented and responsibility for regulation is split across the Classification Board, the ACMA, the Children's eSafety Commissioner and state and territory law enforcement bodies. For example, while films exhibited in cinemas and released on

DVD are classified by the Classification Board, the same content, if broadcast on television, is classified under industry codes administered by the ACMA. There is also regulatory duplication with respect to online films and computer games, which fall under the responsibility of both the Classification Board and the Children's eSafety Commissioner.

The internet and media convergence have eroded the traditional barriers between content delivery platforms to such an extent that the current fragmented approach to classification is no longer feasible. The existing platform-based regulatory environment is leading to confusion and inefficient 'double-handling' of media, creating barriers for industry innovation and the delivery of content to consumers. These challenges are expected to increase as the media landscape and content-delivery technologies continue to evolve.

In 2012, the Australian Law Reform Commission (ALRC) published the report *Classification – Content Regulation and Convergent Media*, which recognised the need for a new classification framework that is responsive to technological change and focused on content rather than platform. The ALRC recommended a single Commonwealth scheme for classifying content across all platforms. The ALRC also noted that there should be a greater role for industry.

The ACMA would be well placed to administer a harmonised classification scheme, including associated industry self-classification arrangements and electronic classification tools. This would unite online and offline classification functions within a modernised classification scheme for the benefit of consumers and industry. The ACMA's background and knowledge of the broadcast and online communications and media sectors, together with the existing expertise in the classification function for films and computer games, can be leveraged to meet the challenges of a converged media environment. This could include taking on the functions of classification currently performed by the Classification Board and the Classification Review Board, in consultation with the States and Territories.

The Department will consult further with consumer, industry and government stakeholders to determine what a modernised scheme should look like. This would recognise the importance to the community of maintaining community safeguards, such as independence from government, transparency and consistency in classification decision-making while considering what and how content should be effectively classified in the future.

Draft proposal:

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.

Interactive Gambling Act

There are a number of issues relating to compliance and enforcement of the *Interactive Gambling Act 2001* (the IGA).

The IGA contains a complaint mechanism for reporting prohibited interactive gambling services to the ACMA but is silent on who should handle complaints relating to the advertising of such services. Consequently, the Department of Communications and the Arts handles these complaints. Both types of complaints are referred to the AFP, which has indicated it would prefer to deal with referrals from one agency.

Regarding IGA investigations, if the content is hosted in Australia, the ACMA refers the content to the AFP. If the content is hosted overseas, the ACMA investigates the complaint and then refers the URL to the AFP and accredited internet filter providers. This inconsistent approach is confusing.

Separately, in the course of our analysis the Review identified that the Department's 2012 review of the IGA recommended civil penalties and other enforcement measures be introduced and operate in addition to the existing criminal penalties. The Review considers that enforcement of the interactive gambling regime could be strengthened if these recommendations were implemented.

On 7 September 2015 the Government announced a Review of the Impact of Illegal Offshore Wagering which is also considering methods to strengthen enforcement of the IGA. The Department has consulted with the Review of the Impact of Illegal Offshore Wagering which is also considering enforcement measures.

Draft 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.

Economic regulation

A review of the ACMA inevitably raises the issue of the proper home for economic regulation of the communications sector. The Review's Issues Paper sought comment on whether the characteristics of the communications sector mean a sector-specific regulator should be responsible for most aspects of industry regulation including economic regulation as is done by the Office of Communications (Ofcom) in the United Kingdom.

Prior to the 1997 telecommunications reforms, Australia had an industry-specific regulator in the Australian Telecommunications Authority (AUSTEL). The reforms merged AUSTEL with the Spectrum Management Agency to become the Australian Communications Authority and its access and pricing functions were moved to the ACCC in light of the National Competition Policy Review (1993) (the Hilmer Review). The rationale for centralisation was that it would allow the ACCC to develop expertise in access pricing issues across sectors and apply knowledge and experience gained in one industry sector to another. In addition, consistency across regulated industries (generally network industries) was thought to reduce investment distortion (where capital would move to the least regulated industry) and would increase allocative efficiency and productivity.

Despite this, it was considered that sufficient justification existed to develop telecommunications-specific competition provisions under the *Competition and Consumer Act 2010* (CCA, formerly the *Trade Practices Act 1974*) in addition to the economy-wide essential infrastructure access provisions under Part IIIA.⁴¹ This was due to the industry being characterised by “the tension between industry participants needing to compete vigorously while simultaneously co-operating to ensure the seamless functioning of the telecommunications network as a whole.”⁴² It also stemmed from the strong residual market position of the incumbent vertically-integrated telecommunications provider, Telstra. Compared with Part IIIA, the telecommunications access regime is quite specific, and this reflects the often competing objectives of promoting competition, ensuring any-to-any connectivity and encouraging efficient investment in and use of telecommunications infrastructure.

The framework for communications competition regulation is primarily contained in the CCA. The ACCC administers the communications access regime contained in Part XIC of that Act (and the digital radio access regime under the *Radiocommunications Act 1992*) and regulates anti-competitive conduct under the telecommunications-specific Part XIB. The ACCC has responsibility for the level playing field rules under the *Telecommunications Act 1997* and nbn’s wholesale-only obligations under the *National Broadband Network Companies Act 2011*. It also administers general competition laws relating to anti-competitive conduct, mergers, restrictive trade practices and consumer protection as set out in the Australian Consumer Law.⁴³

The ACCC is also responsible for administering other industry-specific legislation under the Telecommunications Act and related legislation, including in relation to aspects of pre-selection and number portability, and access to network, service and physical infrastructure (facilities access).

⁴¹ Part IIIA of the CCA deals with access to national significant essential facilities.

⁴² Alasdair Grant and David Howarth (2011), ‘Access and Structural Regulation’ in Alasdair Grant and David Howarth (eds) *Australian Telecommunications Regulation*, 4th edn, CCH Australia, Sydney, p.197.

⁴³ Schedule 2 to the CCA. The ACL is a single, national law concerning consumer protection and fair trading, which applies in the same way nationally and in each State and Territory.

The ACCC also has a number of consultative roles in relation to industry codes and spectrum allocation.⁴⁴ For example, the *Radiocommunications Act 1992* currently provides for the setting of limits by the ACMA (commonly referred to as competition limits) to be imposed at the time a spectrum or apparatus licence is issued. Changes to streamline the power to set competition limits are currently being considered as part of the Spectrum Review.

Submissions

Submissions to the Issues Paper contained a range of views on where communications economic regulation should sit.

- > Telstra argued that moving access and competition functions from the ACCC to the ACMA would result in overlap and inefficiency between the two regulators. Further, it argued it would lead to competition issues being considered by two regulators.⁴⁵
- > ASTRA also believed that moving competition powers to the ACMA would increase duplication of functions, uncertainty and cost to government and industry.⁴⁶
- > Optus thought there was merit in an independent, industry-specific communications regulator and proposed a new independent regulatory body with responsibility for telecommunications-specific functions currently under the *Competition and Consumer Act 2010*, and responsibility for regulating telecommunications, broadcasting and radiocommunications.⁴⁷
- > VHA considered that the ACMA should focus more on competition and provided three options to achieve this: expressly mandate the promotion of competition by the ACMA (see draft proposal 18 in Part Three); maintain a role for the ACCC in setting overarching competition principles but transfer all responsibility for Parts XIB and XIC of the CCA to the ACMA; and transfer all responsibility for competition, except for mergers and the Australian Consumer Law, to the ACMA.⁴⁸ VHA noted that while there are benefits to the generalist Australian approach to competition regulation, a disadvantage is that 'sectoral regulators can develop a culture of avoiding or ignoring competition policy principles in their decision-making, indeed sometime [sic] they feel that that [sic] not qualified to make economic efficiency assessments on a particular issue.'⁴⁹ VHA argued the regulator must have the capacity and capability to carry out economic analysis where required.
- > Dwyer, Fraser, Hitchens and Wilding noted there may be significant benefits in establishing a single regulator, saying that '[i]n time, it may be futile to attempt to keep them separate.'⁵⁰

⁴⁴ Alasdair Grant (2011), 'Industry structure and regulatory bodies' in Alasdair Grant and David Howarth (eds) *Australian Telecommunications Regulation*, 4th edn, CCH Australia, Sydney, p.41

⁴⁵ Telstra (2015), *Submission to the ACMA Review Issues Paper*, p. 16.

⁴⁶ ASTRA (2015), *Submission to the ACMA Review Issues Paper*, p. 8.

⁴⁷ Optus (2015), *Submission to the ACMA Review Issues Paper*, p. 9.

⁴⁸ Vodafone Hutchison Australia (2015), *Submission to the ACMA Review Issues Paper*, pp. 9-10.

⁴⁹ Vodafone Hutchison Australia (2015), *Submission to the ACMA Review Issues Paper*, p. 7.

⁵⁰ Dwyer, Fraser, Hitchens and Wilding (2015), *Submission to the ACMA Review Issues Paper*, p. 5.

Issues Identification

The Review's analysis of this issue has involved investigation of international approaches, related reviews and current academic literature and has identified two potential issues.

First, submissions identified concerns that the ACMA appears to not give sufficient consideration to competition impacts in making regulatory decisions, even though its decisions can have implications for competition and market structures. The key area in which this occurs is radiofrequency spectrum.

Arguably, all regulators need to be sensitive to competition concerns when making regulatory decisions. For example, the recent Financial Services Inquiry recommended the Australian Security and Investment Commission be given a specific competition mandate. It argued that despite the ACCC being the competition regulator:

'The current framework does not systematically identify and address competition trade-offs in regulatory settings. ... Policy makers and regulators need to take increased account of competition when making regulatory decisions.'⁵¹

The Review considers the same can be said of the communications sector. That is, while the ACCC has a specific mandate on telecommunications competition issues, decisions made by the ACMA can also impact competition. This is the case with resource allocation decisions such as the allocation of numbers or radiofrequency spectrum, with one example being that the ACMA often allocates large blocks of numbers which may disincline potential smaller providers from applying for numbers and entering the sector. Even the way in which the ACMA makes decisions can have implications. For example, a lengthy spectrum reallocation process can potentially favour and confer competitive advantage on incumbent licensees.

The ACMA is required to consider impacts on competition for some decisions.⁵² However, it appears broadly reluctant to do so when not required (perhaps due to the ACCC's primacy in this field) and consequently may not, under current arrangements, have the capability to assess the economic impacts of its decisions.⁵³

The second issue relates to the performance of the ACCC and concerns that current telecommunications economic regulation may not be achieving an appropriate balance between consumer outcomes, fostering innovation and encouraging efficient investment.

⁵¹ Financial System Enquiry (2014) '[Final Report](#)', p. 237.

⁵² For example, see Part 21 of the Telecommunications Act.

⁵³ Vodafone Hutchison Australia (2015), '[Submission to the ACMA Review Issues Paper](#)', p. 7.

The manner in which the ACCC exercises its role as the economic regulator in the communications sector and the extent to which it is perceived to influence policy outcomes has been considered in a number of recent reviews. Notably, with regard to policy influence, the Independent Audit of the NBN Public Policy Processes found that the ACCC provided advice beyond its mandate in relation to the original NBN Request for Proposals.⁵⁴

The Vertigan panel, which carried out an independent cost-benefit analysis of broadband and a review of regulation in 2014, recommended responsibility for access regulation of the telecommunications sector should be transferred from the ACCC to a 'networks regulator' with responsibility for regulating all major infrastructure.⁵⁵

The Vertigan panel concluded the access regime administered by the ACCC has 'proved ineffective in promoting innovation and investment, in part because of the way in which regulated prices were determined...'.⁵⁶ Given the Vertigan panel concluded that the Part XIC regulatory framework was generally sound, it indicates that the issue arises in the administration of the framework. Like the Vertigan recommendation, the Competition Policy Review conducted by Professor Ian Harper, put forward a similar recommendation, also finding a separate networks regulator should be established.⁵⁷

A key issue appears to be concerns that the ACCC has not given sufficient weight to the incentives facing communications infrastructure investors in applying the long-term interest of end-users test when making access and pricing decisions, resulting in the regulatory regime not achieving its objective of promoting efficient investment by balancing build or buy decisions.

Reform Options

Based on submissions and previous reviews, the Review has identified three options to address the two issues identified above:

- > give effect to the Harper and Vertigan recommendations of a new networks regulator;
- > transfer economic regulation functions to the ACMA to create a more holistic communications regulator; or
- > maintain the status quo.

⁵⁴ Bill Scales (2014), *'Independent Audit – NBN Public Policy Processes'*, p. ix

⁵⁵ Panel of Experts (the Vertigan panel) (2014), *'Independent cost-benefit analysis of broadband and review of regulation'*, Volume I, p. 141.

⁵⁶ Panel of Experts (the Vertigan panel) (2014), *'Independent cost-benefit analysis of broadband and review of regulation'*, Volume II, p.152.

⁵⁷ Competition Policy Review (2015), *'Final Report'*, p. 472.

These are discussed below.

*Option 1: Transfer the ACCC's economic (access and pricing) regulation functions under Part XIC to a newly-formed networks regulator*⁵⁸

This option is the recommendation of the Vertigan panel and Harper Review.⁵⁹ The rationale for a networks regulator endorsed by the Vertigan panel is that “the sheer scale of the regulatory tasks that lie ahead and the high costs of regulatory error suggest a need for those tasks to be undertaken by an entity whose leadership is focused on regulatory functions (particularly network access regulation) and whose performance is primarily and transparently assessed on the basis of its efficiency and efficacy in the discharge of those functions.”⁶⁰

The Vertigan panel's concern appears to be that the ACCC's responsibilities for competition conduct and consumer affairs as opposed to the real economics of access and pricing has skewed the ACCC's decisions to the detriment of the industry. If this is the cause of the issue, then a networks regulator whose remit is confined to access and pricing would be likely to deliver a more stable environment, conducive to investment.

However, the Review has identified another potential explanation. In an increasingly complex telecommunications sector, the economic regulator needs to deeply understand how market players seek competitive advantage across layers, where bottlenecks arise and where significant market power lies. Under the model of a networks regulator, this breadth of knowledge across the communications markets coupled with a deep understanding of emerging technologies, for example, the increasing demand substitutability of OTT applications for key services such as SMS, voice services and entertainment content distribution, may have led to different decisions. The recent ACCC decision on including SMS within the service description for the declared Mobile Terminating Access Service is a case where affordability concerns regarding low-income consumers appeared to be the primary reason for the ACCC intervening in what is generally regarded to be a dynamic market, once potential demand-side substitutes such as OTT messaging are taken into account.

As Part One of this report outlines, the dynamism of the communications sector exists through changing market conditions and technologies, with increasing ‘plasticity’ in the way services are provided.⁶¹

⁵⁸ Legislative change would be required. Among other things, the recordkeeping rules in Part XIB of the CCA are necessary for a range of Part XIC functions.

⁵⁹ The Government's response to the Harper Review indicated that it remains open to the recommendation to transfer the regulatory functions of the ACCC (including telecommunications and access pricing functions of the ACCC) to a new, national Access and Pricing Regulator (recommendation 50).

⁶⁰ Panel of Experts (the Vertigan panel) (2014), [‘Independent cost-benefit analysis of broadband and review of regulation’](#), Volume I, p 141.

⁶¹ Bauer, J.M. (2014) ‘Platforms, systems competition, and innovation: Reassessing the foundation of communications policy’, *Telecommunications Policy*, 38, pp.662-673.

Research carried out by the ACCC suggests that consistency achieved by economy-wide regulation may come at the cost of innovation. Industry and sector-based regulators in the UK have demonstrated and experimented with innovative approaches that are unlikely to be achieved if consistency across industries is a primary objective.⁶²

The Review has identified practical concerns with this approach, namely that it is unlikely that an additional regulator in the communications sector will lessen the complexity felt by regulated companies. In particular, telecommunications companies who own infrastructure would be regulated by a networks regulator, the economy-wide competition regulator, and the sector-specific technical regulator. Unless there is some degree of coordination between the three regulators, it is likely that this option may impose a significant burden on regulated industries.

The Government is continuing to consider this option as indicated in its response to the Harper Review.⁶³

Option 2: Transfer the ACCC's economic (access and pricing) regulation functions under Part XIC of the Competition and Consumer Act to the ACMA.

Arguments in favour of this option recognise the promotion of investment at the infrastructure, services and applications layers is vital. Communications is a uniquely dynamic and convergent sector, which means investment and access issues should be considered from a holistic market perspective.

If responsibility for access regulation were transferred to the ACMA there would be scope for the ACMA to deal with communications sector issues 'holistically'. It would likely encourage the ACMA to consider competition issues more generally in exercising its regulatory functions and its research activities into other communications markets could be taken into consideration in the decision-making process.

The resulting regulator would be similar in scope to the United Kingdom's Ofcom and the United States' Federal Communications Commission, with the important exception of competition enforcement.

However, if the concerns identified by Vertigan and Harper hold true, then the agency's focus on a larger number of issues, and in particular consumer protection issues, would not deliver the focus on economic and access pricing issues those reviews deemed necessary to deliver a stable investment environment.

⁶² ACCC/AER working paper, no. 10 (2015), ['International Insights for the Better Economic Regulation of Infrastructure'](#), p.26.

⁶³ The Treasury (2015), [Government response to the Competition Policy Review](#).

There are other disadvantages to this model. In terms of the ACMA's capability, the agency does not at present possess the economic skills needed to administer Part XIC and in a small market like Australia, deep expertise in competition regulation is likely to be relatively limited. As a result, such a transfer of functions would likely mean staff transferring from the ACCC to the ACMA. The government would also need to ensure that there are a sufficient number of ACMA members appropriately qualified to consider access and pricing arrangements.

There is also a growing body of research suggesting that the focus of communications regulation in the future may shift to ex post addressing of misuse of market power, and away from ex ante access regulation.⁶⁴ Under this option, access arrangements and pricing would be considered separately to issues of anti-competitive conduct by the ACCC under Part IV and Part XIB of the *Competition and Consumer Act 2010*.⁶⁵ A further consideration is whether the split of competition law enforcement and economic regulation would lead to better outcomes.

Finding

At this time, the Review recommends retaining the status quo. Changes to current arrangements are likely to be disruptive and would take some time to bed down while at the same time, outcomes may be uncertain. Furthermore, in a small market like Australia, competition and economic regulation expertise is likely to be relatively limited. It may be that outcomes remain largely similar as staff transfer between agencies.

It may be that alternative measures need to be looked at again if regulatory outcomes do not remain conducive to efficient investment.

Draft Proposal:

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

Are there other mechanisms that could be adopted to improve outcomes?

If the status quo is maintained, the Review has considered other options that may address the issues outlined above.

⁶⁴ See, for example, Peitz, Schweitzer and Valletti (2014), 'Market Definition, Market Power and Regulatory Interaction in Electronic Communications Markets', CERRE study; and OECD Working Party on Communication Infrastructures and Services Policy (2015), 'Beyond the digital convergence: Innovation, investment, and competition in communication policy and regulation for the 21st century'; Optus (2015), [Submission to the ACMA Review Issues Paper](#).

⁶⁵ In March 2016, the Government agreed to implement the Harper Review's recommendation to replace section 46 of the *Competition and Consumer Act 2010* with a new provision that would add an "effects" test to strengthen the misuse of market power law. The Government agreed to review Part XIB of the *Competition and Consumer Act 2010* in response to Vertigan. However, a review of Part XIB would need to consider the outcome of the Government's consideration of the misuse of market power law.

Option 3a: Include a regulator principle in the ACMA Act requiring the ACMA to have regard that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.

A clearly articulated regulator principle requiring the ACMA to have regard to the impact of its decisions on competition, innovation and efficient investment would enable the ACMA to construct an informed decision-making framework. This is discussed further in Part Three.

Option 3b: Improve cross-consultation between the ACCC and ACMA

Improving cross-consultation arrangements between the two agencies could lead to improved outcomes if there is concern that neither agency is taking a sufficiently broad approach.

If there is concern the ACCC is not taking a broader communications perspective in making decisions, the ACMA could be more involved in ACCC decision-making on such matters. This option would require the ACMA to develop the capability to recognise such issues and that it be provided with guidance on whether there are broader implications, such as the impact on downstream markets. In addition, the ACMA could involve the ACCC more in decisions where efficiency and competition issues are in play.

Mandatory consultation arrangements exist in current legislation where the ACMA must consult the ACCC.⁶⁶ Disadvantages to mandatory consultation are that it can significantly affect lead times if not adequately factored into decision-making processes and can add unnecessary complexity to matters that do not require it.

The ACCC and ACMA have submitted a joint paper to the Department arguing that engagement occurs when needed between the two organisations in three main areas: telecommunications technical regulation, broadcasting issues and consumer protection. It appears the main thrust of engagement is technical advice from the ACMA feeding into the ACCC's decision-making, while on broadcasting mergers and acquisitions, the ACMA may be consulted if required.

While cross-appointment arrangements for the ACCC and the ACMA do exist,⁶⁷ the Review notes they have not been actively used for several years. This mechanism should be reinvigorated, with the associate membership being moved from the chairs of the organisations to the member/commissioner level. For example, the chair of the ACCC's communications committee could attend meetings of the ACMA, with a suitable full-time ACMA member attending the ACCC's communications committee meetings. More specifically, it could be a requirement that the ACMA participate in such meetings to provide an external communications perspective.

⁶⁶ For example, *Broadcasting Services Act 1992* (Cth), s 97 in relation to allocation of a subscription television broadcasting licence; *Radiocommunications Act 1992* (Cth), ss60 and 106; *Telecommunications Act 1996* (Cth) in relation to service provider conduct (s99), pre-selection (ss349 and 352) and numbering (ss 461, 463 and 467).

⁶⁷ Although lapsed.

This could increase the likelihood that cross-consultation would occur and would bring a more independent sectoral perspective to ACCC decision-making. The ACMA's consideration of competition issues when exercising its existing powers could also benefit from the ACCC's expertise. For this option to be effective, each regulator would have to properly resource its capacity to contribute effectively to decisions.

Draft Proposal:

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

Consumer protections

The Review has given detailed consideration to the institutional arrangements that oversee trade practices and consumer protections within the communications sector.

Currently, the ACCC, the ACMA and the Telecommunications Industry Ombudsman (TIO) all perform functions in regard to communications consumer safeguards and protection.

Under the Australian Consumer Law (ACL), the ACCC is responsible for general consumer protection across various industries. Administration and enforcement of the ACL is also the responsibility of the state and territory fair trading agencies. In addition, the ACMA has registered the Telecommunications Consumer Protections Code (TCP Code) using its code-making powers under Part 6 of the Telecommunications Act. The TCP Code provides detailed industry-specific guidelines to be followed by providers of telecommunication services in relation to matters including customer service, contracts, billing, debt management and complaint handling. The TIO provides a resolution mechanism for certain telecommunications and internet consumer complaints. Additionally, a number of codes registered by the ACMA replicate privacy protections that are the responsibility of the Information Commissioner.

Economy wide regulation, such as the ACL, establishes key rights and obligations that apply across all industries within the Australian economy. The protections afforded under the ACL are triggered by certain types of behaviour and conduct, and not by the industry to which it is related. This has many benefits including reducing the cost of regulation to business, providing for consistent economy wide protections and automatically extending existing norms to new products and services.

However, for industries with millions of customers, a threshold of product and service complexity (such as communications), and which are of central importance to the economy, the Review considers that a reliance on high level norms of conduct set out in general consumer law does not provide consumers with sufficient confidence, or industry with sufficient clarity,

about expectations in relation to business practices. This absence of institutional focus on more complex issues unique to the communications sector is likely to lead to poor outcomes and higher volumes of consumer complaints and disputes. Having to engage in complaint and dispute resolution processes imposes significant costs on all parties involved – industry, government and consumers.

Given the complex nature of products, services and devices in the communications sector, the Review has reached the view that the communications consumer protection roles of the ACCC and ACMA complement rather than duplicate one another. Through the TCP Code, the ACMA is able to employ its industry-specific expertise to promote compliance with consumer protections which are tailored to particular requirements of the communications industry and which complements and builds on the core rights and obligations set out in the ACL.

There is however scope to improve the current framework by ensuring legislation and/or statements of regulatory policy provide a clearer articulation of the interface between the economy wide consumer policy framework and industry-specific regulation designed to extend additional protections to consumers. These matters are being considered as part of the review of the ACL currently being undertaken by Consumer Affairs Australia and New Zealand.⁶⁸ The Government proposes to consider further the overall framework for consumer safeguards to allow it to determine the appropriate regime to apply in the future.

Draft proposal:

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

Conclusion

If the proposed reallocation of functions outlined below is adopted, the ACMA's primary regulatory focus will be clearly within the remit identified above. Figure 7 below outlines the new remit of the ACMA and other affected agencies.

⁶⁸ More information on the ACL Review is available from the [Australian Consumer Law website](#).

Figure 7: Proposed new remit

INDUSTRY	ACMA		ACCC	AGD
Self regulatory schemes	Classification	Resource planning and management	Telco competition law	Cyber-security outreach
	Content regulation		Telco economic regulation	Telecommunication interception
	Children's eSafety Commissioner*	Licensing		
		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*.

Objectives

A clear set of objectives gives a regulator the opportunity to construct a robust decision-making framework to guide judgements and weigh trade-offs on complex matters. The ACMA is tasked with considering a number of policy objectives in the legislation it administers, yet the Review finds that it is not provided with clear guidance on how it should weigh these up.

The importance of objectives is clear from our information gathering. As Communications Alliance notes:

'One of the evident weaknesses of the current legislative and regulatory framework ... is that the objectives of the ACMA are not spelled out – neither in the *ACMA Act 2005* (which does, however, provide an extensive list of the ACMA's functions), nor elsewhere ...'⁶⁹

As DigEcon Research observes, "The reality is that the ACMA Act at no time specifies an objective for the organisation."⁷⁰ Vodafone Hutchison Australia considers that the ACMA "must have a clearly-defined, coherent statutory mandate which minimises areas of overlap with other regulators and decision makers."⁷¹

⁶⁹ Communications Alliance (2015), *Submission to the ACMA Review Issues Paper*, p. 3.

⁷⁰ DigEcon Research (2015), *Submission to the ACMA Review Issues Paper*, p. 3.

⁷¹ Vodafone Hutchison Australia (2015), *Submission to the ACMA Review Issues Paper*, p.12.

As the OECD notes, ‘unless clear objectives are specified, the regulator may not have sufficient context to establish priorities, processes and boundaries for its work’.⁷² The Australian National Audit Office (ANAO) recommends objectives of the regulatory regime should be clearly outlined in legislation and communicated to key stakeholders to enable a regulator to meet the Government’s desired policy objectives and respond effectively to regulatory risk.⁷³

A significant number of stakeholders wanted two kinds of objectives for the ACMA – firstly, a set of overarching policy objectives that would give the ACMA clarity of vision for the future, and secondly, legislated regulator principles that would give it guidance about the manner in which it regulates.

The Review has considered how such objectives could be developed. As discussed below, the Review finds that, while it would be desirable for the ACMA to have an overarching set of policy objectives, it is not practical to develop such objectives until the objectives set out in the various pieces of legislation it administers are reformed. The Review does however find that it is possible, and desirable, to set regulator principles guiding the manner in which the ACMA is to regulate. This is discussed further in Part Three of this report and a set of such principles is set out in Draft Proposal 18.

Overarching policy objectives

Any overarching purpose for the communications regulator must be consistent with any policy objectives in the individual pieces of legislation it administers.

The existing aims of broadcasting policy are stated as objects in section 3 of the *Broadcasting Services Act*. There are 19 in total, representing an accumulation of long-standing and more recent cultural, social and economic aspirations for the broadcasting and production industries.

They also reflect the view of Parliaments over more than two decades about (primarily) traditional broadcasting and include elements of the role of these media in ‘nation-building’:

- > expressing a national cultural identity;
- > connecting remote communities;
- > informing the public; and
- > underpinning the democratic process.

⁷² OECD (2014), ‘OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators’, OECD Publishing, p. 31.

⁷³ Australian National Audit Office (2014), ‘Administering regulation: Achieving the right balance, Better Practice Guide’, p. 13.

The breadth of the objects of the Broadcasting Services Act means that unambiguous policy objectives for broadcasting are difficult to discern. It also means that measures often need to be balanced against a number of objectives, which presents issues for administration of regulation, particularly where there is a requirement that regulatory activity be focused specifically on ‘furthering the objectives of the Broadcasting Services Act’.

There are currently 14 regulatory objectives for the telecommunications sector. These are set out in section 3 of the Telecommunications Act and also apply to the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, which brings together consumer specific regulation related to telecommunications.

The objects must be read in conjunction with Parts XIB and XIC of the *Competition and Consumer Act 2010* which provide telecommunications-specific competition and access rules. There are additional specific objectives for nbn included in the *National Broadband Network Companies Act 2011* which set out Parliament’s ownership and wholesale-only intentions for the company.

There are eight objects of the *Radiocommunications Act 1992*, all of equal weight. The most often referred to are the first two objects:

- > to maximise the overall public benefit from using the radiofrequency spectrum by ensuring the efficient allocation and use of the spectrum; and
- > to make adequate provision of spectrum for defence, national security, law enforcement and emergency services agencies, and other public or community services.

Of course, communications legislative objectives describe desired outcomes for the entire communications regulatory regime, and not just the actions of the ACMA. However, the ACMA has responsibility for administering many aspects of the regulatory regime and therefore must take into account at some time most of these existing objectives.

While in principle developing a succinct set of policy objectives in its enabling legislation could be a valuable framework to guide the regulator, under the current communications legislative regime, it would likely add to inconsistency and present additional complexity. The Review therefore does not recommend this approach. The Review does however consider that it should be a priority as future reform of the communications regulatory regime is undertaken that the various objectives in these Acts are reviewed and the ACMA is provided with a clear set of overarching policy objectives to guide its decision-making. For example, the Spectrum Review aims to simplify the spectrum management framework and as such has proposed reforms to the *Radiocommunications Act 1992* to redraft its objectives to promote their clarity and usefulness to guide administration and application of the legislation.⁷⁴

⁷⁴ Department of Communications and the Arts (2016), ‘[Legislative proposals consultation paper](#)’, p.5.

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.

Governance

As noted in the Communications Market segment of this report, there is significant pressure for the regulator to ensure it is knowledgeable, adaptable, and responsive to changes in market dynamics and industry feedback.

The ACMA is already operating and adapting well to these changes and pressures, and has been cognisant of the need to prioritise its resources to meet these demands. However, it is timely to consider alternative models for its governance structure to ensure continued and sustained performance in the face of an increasingly complex operating environment.

There has never been a greater need to make sure government intervention in this sector is appropriately balanced to ensure the best outcomes for both industry and consumers. This is especially the case when it is impossible to foresee the many innovations and changes within the sector yet to come.

To make sure the ACMA can continue to perform its functions effectively in such a dynamic environment, its structure, the skills of members, and its interaction with the industry, consumers and staff that manage its daily operations must be effective, adaptable and insightful.

Other regulators and their structures

A number of other communications regulators were examined in regards to their governance structure as part of the Review. This research was undertaken in the context of the Review's terms of reference which included the requirement to consider the appropriate structure, governance and accountability arrangements of the regulator to ensure they are fit-for-purpose for the future needs of the sector.

Other regulators that were examined included:

- > The UK Office of Communications (Ofcom);
- > New Zealand Commerce Commission;
- > Canadian Radio-television and Telecommunications Commission (CRTC);

- > The US Federal Communications Commission (FCC);
- > Australian Securities and Investment Commission (ASIC); and
- > Australian Competition and Consumer Commission (ACCC).

Organisational model

The 2014 OECD paper, *The Governance of Regulators: Best Practice Principles for Regulatory Policy*, provides guidance on governance models for different kinds of regulators. It makes the comment that the governing structure of a regulator should be determined by the nature of its activities, including its level of risk, the discretion delegated to it, the strategic oversight required and the importance of consistency in decision-making by the regulator over time.

The OECD paper outlines three primary organisational models for regulators:

1. Governance board model. Typically the board will be responsible for strategy, governance and risk management. The board would appoint the chief executive officer (CEO), monitor performance and ensure compliance with the law, the body's governing documents and policies. However, executive staff make regulatory decisions. This structure is used, for example, for the United Kingdom's Water Services Regulation Authority (Ofwat).
2. Commission model. The board makes most substantive regulatory decisions. Examples include the current ACMA and the ACCC.
3. Single member regulator. An individual is appointed as regulator and makes most substantive regulatory decisions and delegates other decisions to staff.⁷⁵

The OECD's *Making Reform Happen: Lessons from OECD Countries*, observed most independent regulators in OECD countries have a governance board or commission structure. Such structures, through having a greater number of people dedicated to decision-making in a collegiate fashion, provide for more robust and reliable fulfilment of the regulator's duties while upholding greater levels of independence and integrity.⁷⁶

The governance board model and commission models provide a diversity of views and a range of experience that can be applied to all decisions. Compared to the governance board model, the Commission model enables the Authority members to be more actively involved in the issues being considered, and therefore, over time to develop deeper expertise. During our consultations the option of retaining the Commission model was also supported by the Authority members and ACMA Executive.

⁷⁵ OECD (2014), *OECD Best Practice Principles on Governance of Regulators*.

⁷⁶ OECD (2010), *'Making reform happen: Lessons from OECD Countries'*.

Draft proposal:

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

Skills and expertise of members

An essential element of ongoing success for the ACMA will be ensuring the appointment of appropriately skilled and qualified Authority members. Discussions between the Department and stakeholders have identified the increasingly rapid rate of change faced by the communications sector and that the ability to identify new areas of concern and respond effectively and rapidly will require a different mix of skills than may have been required in the past.

For example, the submission from Optus said the Authority should be required to ensure it recruits the skills and experience for both the communications industry and economic regulation.⁷⁷ The Australian Communications Consumer Action Network (ACCAN) understandably advocated for the Authority to include expertise across consumer issues. They noted the importance of this skill set to ensure the Authority remains effective in fulfilling its role in advising the Minister on consumer issues.⁷⁸

Clearly outlining the skills and abilities expected to be included amongst members of the Authority as a collective whole will also assist in ensuring that future Government appointments are made in consideration of the strategic needs of the agency. Ensuring that there is broad coverage of a specified skill set across Authority members will also be complementary to the Government's existing policies on merit-based selection of APS agency heads and APS statutory office holders. This approach is also consistent with existing requirements for the appointment of members to the ACCC and ASIC, but goes some way further to ensure that a breadth of skills are covered across the membership in its entirety.

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.

⁷⁷ Optus (2015), [Submission to the ACMA Review issues paper](#), p.19.

⁷⁸ ACCAN (2015), [Submission to the ACMA Review issues paper](#), p.7.

Full-time versus part-time members

As noted above, the increasing complexity of the communications market and pace of technological change will require the ACMA to have decision makers that have a comprehensive and authoritative knowledge of the communications market and emerging technologies. The Commission model of decision-making also requires that all members of the Authority are able to actively contribute to decision-making.

Employing full-time members gives those responsible for regulatory decisions the time needed to be fully informed and up to date on the wide range of issues on which the Authority must make regulatory decisions. The model of full-time membership is one that is currently successfully employed by the ACCC. For the ACMA, the interconnected and global nature of the communications sector will mean that in more and more cases decision makers need to understand specific details of regulatory decisions, which requires a substantial commitment of time.

Higher levels of remuneration for full-time membership and the offer of rewarding roles, are also more likely to attract high calibre members. Given likely increasing workloads of members, the remuneration for full-time members is also likely to more accurately match their time commitment.

While recruiting part-time members potentially offers the chance to bring a broader range of skills and experience to the Authority, conflicts of interest could arise that would need to be managed. There is no doubt that it is important for the Authority to hear from a broad range of views, however, communications stakeholders are often strong and effective advocates for their view through consultation processes, and it is not practical for all voices to be represented on the regulatory authority through its membership.

An increased number of full-time members may mean that existing management structures can be reviewed. If full-time members had oversight of particular areas of regulation, such as content, or network regulation etc, they may be able to supplement some stakeholder engagement and strategic direction setting functions undertaken by senior ACMA executives. A subsequent restructuring of senior executive roles could assist to off-set any increase in costs from appointing more full-time members.

Discussions with stakeholders during the Review provided support for an increase in the number of full-time members within the Authority. For example, Telstra, Optus and the Communications Alliance all supported a model of full-time members for the Authority. They said advantages would include allowing each member to develop the appropriate expertise in specific subject areas managed by the Authority. It is also a possibility that a governance model consisting of full-time members creates additional flexibility to consider alternate governance options regarding the range of regulatory responsibilities for communications issues. For example, under 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.

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 could promote greater informal dialogue and engagement between stakeholders and the Authority members. However, when the matter comes to be considered by the Authority, it retains the commission model of decision-making, where all members are equal in their vote. This would be similar to the approach adopted by the ACCC.

Providing Authority members with oversight of certain subject areas will create greater diversity in expertise on current issues faced by the Authority, and ensure industry and consumers have better access to decision makers on that topic. This in turn could support greater engagement with stakeholders as a better conduit to take on board their views when making regulatory decisions and more readily explain the reasons for making decisions.

Given how fast technologies and market dynamics are evolving in the communications sector, the Review has noted that an essential concern for a regulatory authority is that decision-making be as fast and efficient as possible. This suggests there are advantages in having a smaller number of members, but appointed on a full-time basis to facilitate timely decision-making. The Review notes that the appointment of an all full-time member Authority would not require amendment to the ACMA Act.

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.

Organisational model – Chair/CEO Role

As noted earlier, the Chair of the ACMA is also its Chief Executive Officer (CEO). Several submissions to the Review suggested the separation of the Chair and CEO roles would have benefits for the ACMA. These came from Telstra, Optus, Communications Alliance, Free TV Australia, and ASTRA. As noted in Telstra’s submission, separating these roles has the potential to ensure that ‘... the Chair can focus on longer term strategy and the CEO can give greater focus to administration and performance’.⁷⁹

⁷⁹ Telstra (2015), [Submission to the ACMA Review Issues Paper](#), p. 4.

The ACMA in its submission noted that the appointment of a single person as Chair and CEO ensures that agency resources and management may be directed swiftly and flexibly to delivering the support necessary to enable the regulatory authority to fulfil its roles effectively⁸⁰.

Design of the Chair/CEO roles in a Commonwealth entity involves consideration of not only the purpose of these roles, including the appropriate balance between strategic and operational functions, but also their interaction with the position of Accountable Authority under the *Public Governance, Performance and Accountability Act (2013)* (PGPA Act). The PGPA Act sets out the requirements for the governance, reporting and accountability of Commonwealth entities and Commonwealth companies, and for their use and management of public resources. It also sets out a series of duties that the Accountable Authority must fulfil⁸¹ and which of these cannot be delegated by the Accountable Authority.⁸²

Under section 12 of the PGPA Act, the Accountable Authority of a Commonwealth entity is generally the person or group of persons responsible for, and with control over, the entity's operations. The Chair, the CEO, or the Authority in its entirety could potentially be designated as the Accountable Authority. However, given the duties prescribed to the Accountable Authority and the role of Chair as agency head for the purposes of the *Public Service Act 1999*, it is most appropriate that the Chair continue as the Accountable Authority. This model is also currently adopted by the ACCC and ASIC, where legislation states that the Accountable Authority is the Chair within each agency.

In the situation where the Chair is the Accountable Authority, the Review considers there are material issues with attempting to establish a compulsory separation between the Chair and CEO roles. These arise because the PGPA Act mandates that certain function cannot be delegated by the Chair (including the responsibility for preparing annual performance and financial statements), and hence, even if a separate CEO position were designated these functions, ultimately responsibility for them would still vest with the Chair.

The Review considers having a single person as Chair of the regulatory authority and the head of the agency (and Accountable Authority) means that agency resources and management may be quickly directed to deliver the support necessary for the regulatory authority to carry out its role. This approach also simplifies the governance arrangements and provides clarity of accountability.

⁸⁰ ACMA (2015), *Submission to the ACMA Review Issues Paper*, p. 58.

⁸¹ These duties include establishing and maintaining systems relating to risk and control, encouraging cooperation with others, minimising administrative requirements that are imposed on other parties, and keeping relevant Ministers informed.

⁸² These include matters concerning the management of the Commonwealth entity in a way that promotes the proper use of public resources and is not inconsistent with Australian Government policy; measuring and assessing the performance of the entity in achieving its purpose; preparing annual performance and financial statements and to manage the agency in accordance with other certain principles. Subsection 110(2) of the PGPA Act provides the full detail of such responsibilities.

While the Chair is currently the Accountable Authority, and also fulfils the role of CEO, the existing governance arrangement also provides flexibility. The Chair does have the option to delegate a range of functions to a CEO or to the executives of the agency, so as to allow for a greater focus on strategic issues as needed. This flexibility positions the ACMA well in regard to its options in managing a range of issues and priorities that may change over time and in line with changes in the sectors it regulates.

The Review considers that there would be a more reasonable balance between the Chair (as Accountable Authority) and the Authority members under a governance model that consists entirely of full-time members for the Authority each with specific areas of responsibility.

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.

Boards supporting the functions of the Authority

The complex nature of the modern communications sector places increased demand on regulators to manage a diverse range of issues, as well as significant amounts of routine decision-making. In the UK this workload is managed by allowing content issues to be considered by a Content Board, ensuring that the primary Ofcom Board is not overwhelmed by the wide range of content issues that arise.

The *Australian Communications and Media Authority Act 2005* allows the ACMA to delegate certain decisions to a 'division' of the Authority, or to certain members, associate members, or members of the ACMA staff. However, in the case of a separate decision-making group consisting of members not already part of the Authority or the ACMA staff (such as in the Ofcom Content Board example above), the ACMA Act does not presently contain the mechanisms to facilitate such a structure. There would be benefit in allowing the ACMA to establish such a structure if it was both necessary and cost effective to do so.

Draft proposal:

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

Independence of the regulator

A well-defined relationship between the regulator, its policy department, and the Minister is crucial to the effective functioning of the regulator. The benefits of independence are well established – it can help promote more predictable and objective decision-making which in turn fosters an environment conducive to greater investment and innovation.

Independent decision-making can also strengthen both the perception and actual integrity of the regulatory regime. While there are many aspects to independence, three key areas are: the type of regulatory agency, its regulatory decision-making model and when it can be directed in the exercise of its functions.

This Review supports the ongoing operation of the ACMA as an independent statutory authority with staff employed under the *Public Service Act 1999*. This is consistent with international best practice and with promoting consistency and certainty for a sector involving significant infrastructure investments.

The discussion above on the organisational model has supported the Authority retaining a commission model of decision-making. The Review also supports the ongoing maintenance of the ACMA's independence from Government in most areas of its decision-making – in particular, all content-related decisions – and its governing legislation should be designed accordingly.

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.

The Review acknowledges the ongoing importance of ensuring future reform – particularly in contested areas or market segments where regulatory decisions cannot be readily distinguished from policy choices – provides greater degree of clarity about the role of the regulator and the role of Minister and the Parliament consistent with best practice. The Government has commenced this reform through the Spectrum Review, which includes measures to more clearly define the role of the Minister and regulator in allocating spectrum.

Part Three – Enhancing Regulator Performance

Consistent with the Terms of Reference, the Review assessed the ACMA's current performance against the Regulator Performance Framework (RPF). The Review identified performance attributes that embody best practice in a high performance communications regulator, which are that the regulator:

- > is an agile, timely and informed decision maker;
- > takes actions which are targeted and commensurate with risk;
- > delivers continuous improvements of regulatory frameworks; and
- > has the confidence and trust of stakeholders.

The Review used various sources including stakeholder submissions and consultations, a self-assessment by the ACMA against the RPF and consultation with the Reference Group of regulatory experts to evaluate the ACMA's performance against these attributes and to propose measures to enhance the future performance of the ACMA.

The following sections focus on presenting the key findings and draft proposals arising from this analysis. For the full RPF performance assessment containing the methodology, evidence base, findings, analysis and recommendations refer to [Appendix B](#).

Regulator performance principles

This report discussed earlier the importance of setting clear objectives for the ACMA to enable it to achieve good regulatory outcomes. While such clarity of policy objectives will only be fully achieved through the reform of the legislation administered by the ACMA, it is nonetheless possible to devise a set of principles to address the way in which the ACMA goes about performing its regulatory functions. The Review therefore proposes to establish a series of such regulator principles in the ACMA's enabling legislation to express the unambiguous intention of government and Parliament that the regulation of communications industries will be guided by best practice principles and continuous improvement over time. Guiding regulatory principles of this nature are currently set out in the enabling legislation of Ofcom, requiring the regulator to have regard to principles under which regulatory action should be transparent, accountable, proportionate, consistent and targeted⁸³. Similarly, ASIC's enabling legislation contains provisions

⁸³ See [section 3\(3\), Communications Act 2003 \(UK\)](#).

requiring it to strive to administer laws effectively and with a minimal of procedural requirements and to receive, store and provide to the public information quickly and efficiently⁸⁴.

Technical decisions made by the ACMA can have an important bearing on competition, investment and innovation outcomes in the communications sector. However, there is generally no explicit legislative guidance for the ACMA to consider these factors when making decisions. Accordingly the Review considers in order to increase the certainty of better regulatory outcomes and lessen the impact of unintended consequences it would be useful for the ACMA to strengthen the consideration of competition issues when the ACMA is weighing up regulatory issues. As the ACMA is not a competition regulator it is not appropriate to establish a specific objective that requires the ACMA to promote competition. However, the ACMA's decisions have economic impacts, in particular as a result of its responsibility for spectrum management, and its licencing and technical decisions. As these decisions could potentially impose barriers to entry and limit the growth of new services, the Review concluded that it would be appropriate to establish a regulator principle that required the ACMA to not hinder competition, unless this is unavoidable, in fulfilling its statutory responsibilities. The Review considers this approach would encourage greater market-based thinking within the ACMA's regulatory culture.

It is important to emphasise that the proposed regulator principles do not seek to prescribe policy objectives or outcomes. Rather, they are behavioural in character, and seek to provide guidance to the regulator on how it should approach its regulatory role.

The Review also considers that, consistent with the relationship between the Government and other statutory bodies, it would be appropriate for the Minister to provide the ACMA with a Statement of Expectations to provide better direction and certainty of the Government's priorities. While issued annually, a Statement of Expectations may not necessarily need to change yearly as it is dependent on the Government's current priorities and developments in key policy issues at the time.

In response, the ACMA would be expected to publish a Statement of Intent to outline the steps it would take to support the Government's priorities. To ensure consistency in the Government's approach to outlining its expectations for regulators in the communications sector the Review also considers the Minister for Communications and the Arts should issue a similar Statement of Expectations to the ACCC within the scope of Part XIB and XIC of the *Competition and Consumer Act (2010)*.

Key findings

- > A clearer description of performance expectations relating to the ACMA's regulatory role will support better outcomes for industry and consumers.

⁸⁴ See [section 1\(2\)](#), *Australian Securities and Investments Commission Act 2001*.

Draft proposals:

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.*
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.

A regulator that is an agile, timely and informed decision maker

Given the scope of reform expected over coming years, the Review considers that a fit-for-purpose regulator needs to be agile, responsive and proportionate in its decision-making. Timeliness will be increasingly important given the rapid technology product cycles and service innovation in the communications sector. The Review expects that the regulator will need to have deep expertise in and an understanding of emerging business models and the potential harms they could give rise to, across the layers of the communications markets. The regulator will also need to continue to demonstrate regulatory craftsmanship to design interventions that are targeted to address the harms in an environment better suited to ex post market corrections over ex ante rule-making.⁸⁵

⁸⁵ Larry Downes (2014), ['Managing the Big Bang: The Regulator's Dilemma'](#), Democracy Issue #34

Findings and Draft Proposals

The Review finds the ACMA's regulatory decision-making has been sound and supported by evidence. The Review has also concluded that rigid and prescriptive legislation, and the absence of clear objectives, has impeded the agility of the ACMA.

Stakeholders have broadly expressed a high degree of confidence in the capabilities and performance of the ACMA in the technical management of spectrum. Stakeholders have also broadly expressed a desire for more timely decision-making and planning processes. Consistent with their desire, the Review's analysis of decision-making timeframes indicates there is scope for the ACMA to improve its timeliness. Such improvement could be achieved by introducing greater consistency in process for major rule-making, co-regulatory processes and planning activities.

Further, where it has intervened strongly in telecommunications markets (such as the Telecommunications Consumer Protection (TCP) Code in 2012 and the Mobile Premium Service (MPS) in 2009) the evidence indicates the approach has delivered a positive net-benefit and/or reduced number of complaints by consumers.

The ACMA has also broadly met its service delivery performance indicators across major functions of its remit, and delivered steady improvements to its business processes over time.

Key findings

- > The ACMA's regulatory decision-making has generally been sound and supported by evidence.
- > The ACMA's decision-making timeframes for significant rule-making and planning processes have been sub-optimal. Various factors may be inhibiting the regulator from achieving timely outcomes – including the efficacy of current co-regulatory processes, and other procedural issues which legislation currently prevents from being handled administratively.

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 regulator performance framework, and Government consider legislative amendment to support more timely decision-making, where necessary.

A regulator whose actions are targeted and commensurate with risk

The 2005 Hampton Review of regulatory inspection and enforcement practices emphasised the value of risk as an organising principle for regulatory agencies.⁸⁶ Having a deep and sophisticated understanding of risk will be increasingly important for the ACMA to continue to be an effective regulator.

A sophisticated understanding of risk is demonstrated through the effective use of regulatory tools to achieve compliance, and when enforcement action, within the constraints of the authorising legislation, is consistently proportionate to the seriousness of the harm and the risk being managed. This is also demonstrated through regulatory interventions which are informed by evidence and designed to target harms with accuracy, and in a proportionate manner.

Findings and draft proposals

Feedback from stakeholders and analysis by the Review indicates the ACMA has generally made effective use of its regulatory discretion and exercised forbearance in a pragmatic and sensible manner. The Review also finds the ACMA has established internal risk policies to support its compliance and enforcement activities. This finding is also generally supported by various audits of the ACMA undertaken by the Australian National Audit Office (ANAO) over the past few years (most recently on the effectiveness of the ACMA's regulation of the Do Not Call Register).

Stakeholders in the broadcasting sector are concerned the ACMA's approach to dealing with complaints is disproportionate to the level of harm.⁸⁷ In contrast, consultations identified the ACMA exercises more forbearance when dealing with telecommunications and internet issues. It is important for the ACMA to communicate with stakeholders on the consistency between the actions taken and its compliance and enforcement policy to ensure that they retain confidence in the decisions made.

Key findings:

- > The ACMA's performance in undertaking compliance and enforcement activities has generally been effective and commensurate with risk.
 - > Stakeholders in different industry sectors have differing perspectives on how the ACMA approaches its compliance and enforcement role.
-

⁸⁶ The Hampton Report (2005), 'Reducing Regulatory Burden: effective inspection and enforcement', pp. 4, 8.

⁸⁷ Ian Robertson (2015), [Submission to the ACMA Review issues paper](#), pp. 5-6

Draft proposal:

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.

A regulator that delivers continuous improvements of regulatory frameworks

International and domestic experience across a variety of regulated industries suggests that the problems regulators are trying to address will change over time. As consumers become better educated, and business practices mature, regulatory compliance becomes more embedded in the underlying business model. This presents opportunities to reduce the cost of regulation. Further, the Review has found better practice regulators establish internal scanning processes and stakeholder engagement mechanisms to identify market changes and diminishing risk, and react to them by removing or streamlining redundant regulations.

Findings and draft proposals

Since September 2013 the ACMA has demonstrated a commitment to reducing and streamlining regulation by delivering an estimated \$58 million in compliance cost savings to business and consumers as part of the Government's deregulation agenda (now the Regulation Reform agenda), whilst maintaining the integrity of key consumer safeguards.

However the Review considers that given the range of competing organisational priorities faced by the ACMA at any given time, and the institutional cultures of regulators more generally, it is reasonable to assume that this level of steady commitment to reduce regulatory burden would not endure in the absence of whole-of-government policy commitments.

Accordingly, an objective of this Review is to ensure a future-focused regulator remains committed to reducing the burden on regulated entities beyond the Government's deregulation agenda. This is also supported by draft Proposal 18 which proposes to legislate a regulator principle to promote continuous improvement.

Key findings:

- > The ACMA has demonstrated its commitment to the Government's deregulation agenda.
- > There is scope to implement measures and systems to ensure there is an ongoing commitment to reduce burden on regulated entities.

Draft proposal:

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.

A regulator that has the confidence and trust of stakeholders

The Review has identified that better practice regulators are those that have the confidence and respect of stakeholders. A high-performance regulator recognises how a decision is considered, made and explained is often as important as the decision itself. Experience has shown such regulators achieve trust when the rationale for decisions are clearly communicated and supported by robust analysis, and where processes and objectives are known and understood by stakeholders ahead of time.

Findings and draft proposals

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, and a clearer distinction to be made between the responsibilities of the Minister and Government to set policy and the ACMA to implement policy. Stakeholders have also sought better disclosure of the reasons behind decisions.

The Review considers the ACMA could take a number of steps to improve transparency and accountability, for example:

- > publishing clear guidance about its decision-making processes once any new decision-making or governance structure comes into effect;
- > commence publishing agendas for each of its Authority meetings to enable industry and government stakeholders to stay abreast of matters under consideration;
- > establish and publish processes for functions of significant resource investment and importance to industry in order to ensure regulatory staff, and the decision-making body, are more accountable and consistent in their approach;
- > issuing statements of reasons for decisions with precedence value, where it is efficient to do so.

Stakeholders have also expressed a desire for more direct engagement with the Authority, particularly on substantial matters. During our consultations stakeholders have expressed concerns that engagement with the Authority can be overly formal and dependent on written

exchanges. The Review is not in a position to assess the extent of reliance on certain modes of engagement by the Authority. However, the Review does consider that any over-reliance on formal, written interaction presents a risk of not fully capturing the more nuanced aspects of issues that can be gained through direct discussion.

Key findings:

- > There is scope to strengthen the decision-making transparency of the ACMA.
 - > There is a need for greater consistency in process that underpins significant rule-making and planning activities.
-

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.

For the complete RPF performance assessment expanding on matters contained in this chapter – including the methodology, evidence base, findings, analysis and recommendations – refer to [Appendix B](#).

Part Four – Resources

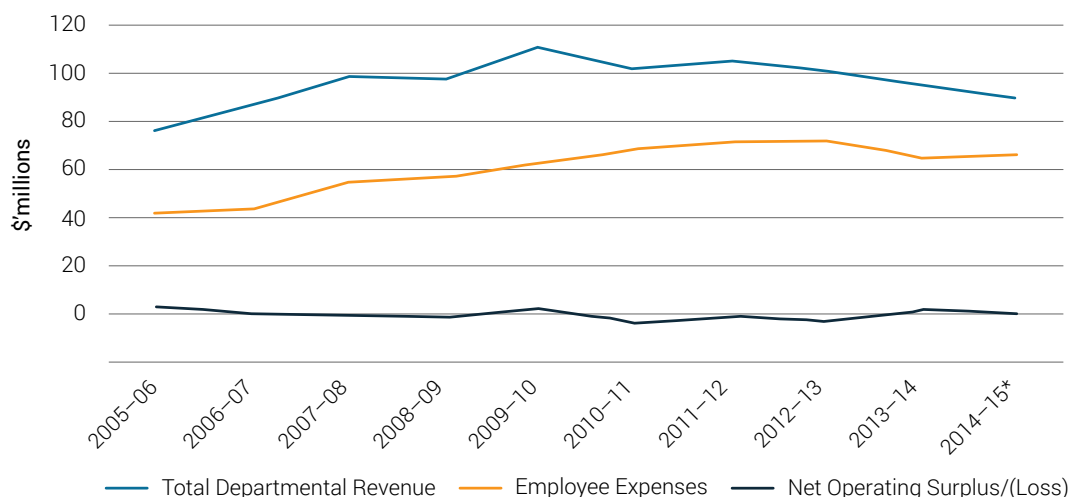
The Review considered the resource base of the ACMA, including the relative contributions from current sources, and evaluated the ACMA's efficiency in delivering its functions consistent with the Government's Contestability Programme. This section provides a summary of the key findings of the Review. For the complete review of resources and efficiency refer to [Appendix C](#). The analysis of remit, objectives and functions in Part Two of the report is also relevant to the Contestability Programme.

Funding and revenue collection

The ACMA receives the majority of its revenue through appropriations from the Australian Government. In 2015-16, the ACMA received \$71.80 million in funding from budget appropriations (excluding funding of \$11.05 million designated for the Office of the Children's eSafety Commissioner (OCeSC)). In addition to these budget appropriations, the ACMA expects to secure own source revenue of \$0.90 million for the year as part of fee-for-service arrangements.

Funding for the ACMA peaked in 2009-10 at \$111.2 million and has since fallen significantly to \$72.7 million in 2015-16.⁸⁸ The peak of the ACMA's activities coincided with the digital television switchover and restack programmes, which are now both completed. Since 2009-10 the ACMA's funding has declined steadily with employee expenses also starting to fall due to reduced overall staffing levels. Lower staff levels are projected to continue with average staffing levels falling from its peak in 2010-11 of 591, to 409 in 2015-16.

Figure 8: Funding for the ACMA 2005-15



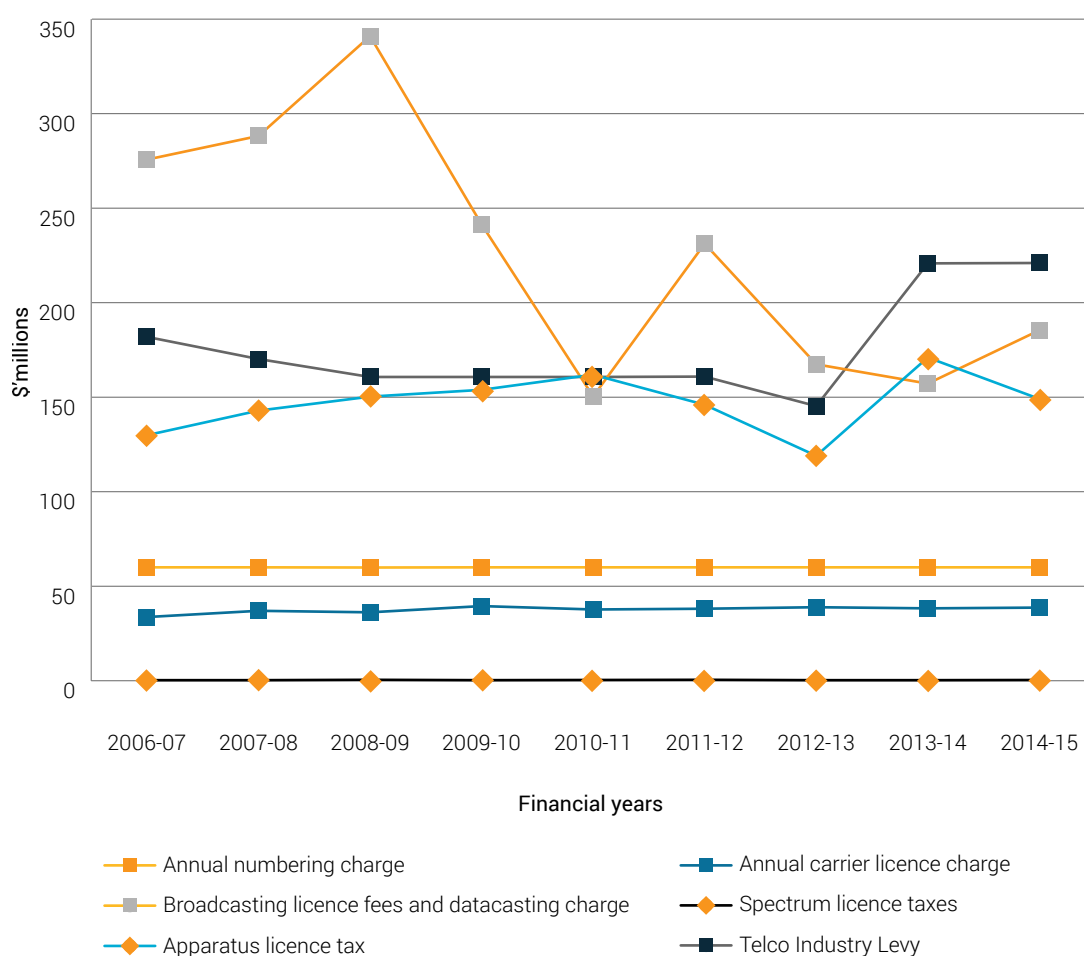
* Note: 2014-15 and 2015-16 budget figures are based on estimates and includes the Office of the Children's eSafety Commissioner budget. The surplus excludes an estimated underspend in 2014-15 of \$1.274m for the Office of the Children's eSafety Commissioner to be rolled over as funding for 2015-16 (with an application to the Department of Finance for an approved loss to be prepared for 2015-16).

⁸⁸ Excluding funding of \$11.05 million designated for the Office of the Children's eSafety Commissioner.

The ACMA generates revenue for the Commonwealth through asset sales, cost recovery, taxes and levies. It collected annual revenues (excluding sale of spectrum) ranging from approximately \$580 million to \$657 million from 2010-11 to 2014-15. With the exception of own source revenue, all of the revenue raised by the ACMA is returned to the Consolidated Revenue Fund and has no impact on the ACMA's operational or capital funding.

The ACMA has collected \$10.33 billion in revenue for the Commonwealth over the previous 10 years from asset sales and the six industry mechanisms which comprise a mix of resource taxes, indirect cost recovery charges and revenue-based levies.⁸⁹ Excluding revenue raised from spectrum licence auctions, the revenue accruing to Government from the communications industry under existing charging arrangements has declined in both nominal and real terms over the last decade.

Figure 9: Trends and forecast for taxes, fees and levies



⁸⁹ Source: Data supplied by ACMA to the Review.

Revenue from the charges applied to the ‘traditional’ elements of the communications sector is likely to remain under pressure as strong competition from subscription and OTT providers emerge. While this relates more to policy considerations, than efficiency, in light of these trends, the Review considers there is a need to consider the objectives underpinning revenue collection to ensure the framework remains sustainable and equitable moving forward.

Draft proposal:

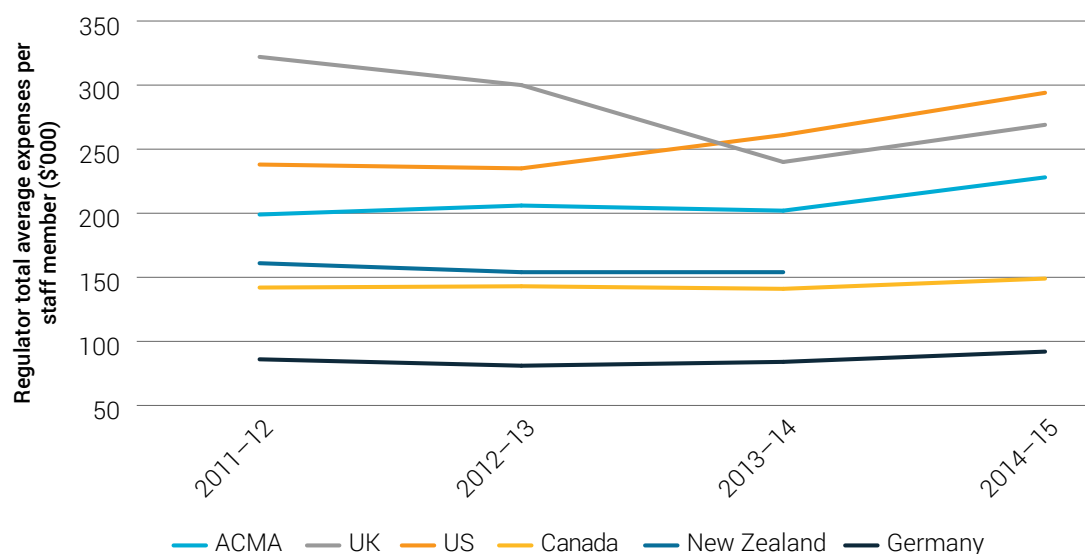
25. That it would be timely to review the policy objectives of revenue collection from the communications sector and evaluate whether new business models and OTT services are contributing appropriately.

Financial performance and organisational efficiency

The Review compared the ACMA and a range of international and domestic regulators to benchmark its efficiency. To complement this high level analysis, the Review also examined a range of the ACMA's operational processes to assess the ACMA's approach to achieving best practice and continual improvement.

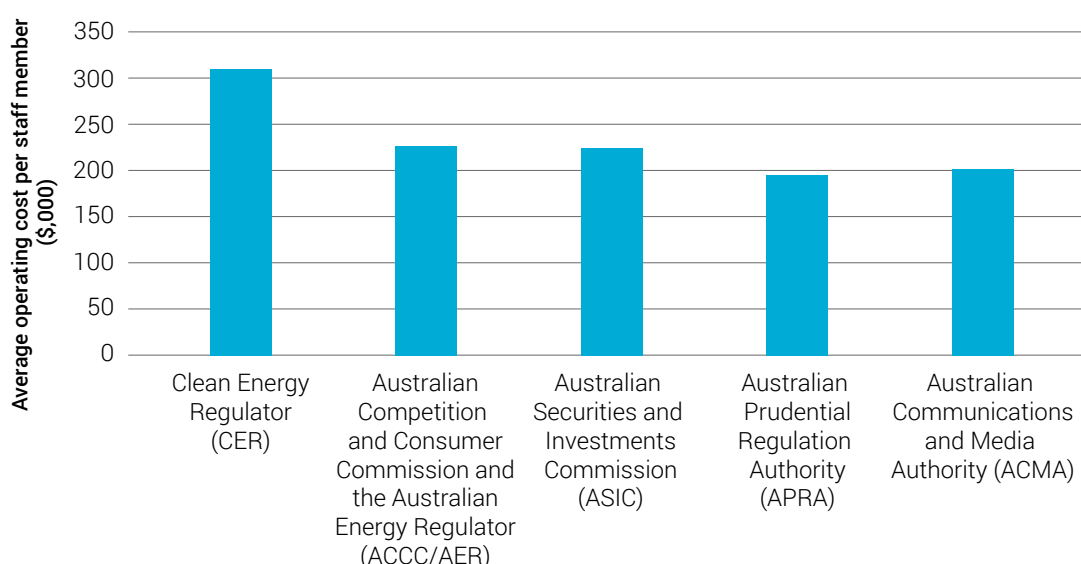
The comparison of the ACMA to international communications regulators provides a high level snapshot of operational costs. Communications regulators from the US, UK, Germany, Canada and New Zealand were examined. The international benchmarking identified that the ACMA performs favourably in comparisons of total agency expenditure to total staffing, but is above the international average in comparisons of total expenditure per 1000 persons in the general population.

Figure 10: Average operating expenses per staff member for international communications regulators (approximate conversions to AUD)



The ACMA was also benchmarked against domestic regulators who have comparable regulatory functions when considering the combined roles and complexity of the industry regulated, size and scope of regulatory reach, as well as influence and role of stakeholders. These included the Clean Energy Regulator, ACCC, Australian Energy Regulator, Australian Securities and Investment Commission and Australian Prudential Regulation Authority. This benchmarking has found that the ACMA has a relatively low cost per average staffing level relative to the average of comparable domestic regulators.

Figure 11: Approximate 3 year average operating cost per Average Staffing Level (\$'000)



The Review also examined the ACMA's service delivery and functional performance. The ACMA has delivered steady efficiency improvements in its service channels, primarily through investing in ICT to automate high volume transactional processes. Further, the ACMA has taken pro-active steps to improve the functional efficiency of planning processes (such as license area plans) with a view to improving efficiency, as well as reducing the cost and time to industry to engage and comply with these processes.

Internal initiatives and restructuring exercises have allowed the ACMA to reduce its fixed-cost base, not only through staffing reductions, which have led to an overall decline in the number of divisions, branches and sections within the agency over the last 10 years, but also by rationalising accommodation and other fixed costs.

Table 12: The ACMA 10-year organisational profile⁹⁰

	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Divisions	5	6	6	6	6	6	6	6	5	4	4
Branches	18	18	18	14	15	16	15	15	14	10	10
Sections	83	84	95	95	96	92	86	84	76	64	64
Average staffing levels	477	501	554	554	591	591	575	559	488	450	409

Conclusion

Overall the Review finds that the ACMA is operating efficiently and has effectively managed its resources and internal structures to deliver the changing scope of its functional remit over time.

Draft proposal:

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.

For the complete review of resources and efficiency analysis, including detailed time series data on expenditure and industry revenue, comparable benchmarking, corporate services, service delivery and functional efficiency refer to [Appendix C](#).

⁹⁰ Source: Data supplied by ACMA to the Review

Part Five – The case for further regulatory reform

The Australian Government is committed to regulatory reform to support innovation, boost productivity and stimulate economic activity and growth. The Government recognises that such reform is critical to support flexibility in the economy and maximise the potential for industry to innovate and grow.

The communications sector can be an important influencer of productivity outcomes (and through these economic growth and living standards) as it plays a critical enabling role in the functioning and ongoing performance of the Australian economy.

Since 2013, the Department and the ACMA have worked together to remove outdated and irrelevant regulation that imposed considerable compliance costs on the communications sector and consumers. More than \$351 million in regulatory savings have been achieved across the communications portfolio in this period with almost \$4.5 billion across the broader economy.

In November 2015, the Government re-committed to its regulatory reform agenda with a renewed focus on reforms that directly enhance innovation, competitiveness and productivity rather than compliance costs alone.

The regulatory reform agenda requires all departments and agencies to reconsider current regulatory settings to ensure they are directed towards these objectives.

In this Part, the Review therefore gives brief consideration to the appropriateness of the current communications regulatory framework and ways in which it may need to adapt to better support productivity and economic growth.

An ageing regulatory regime

The ACMA was established in 2005 to be a converged regulator responsible for regulating the broadcasting, telecommunications, radiocommunications and online industries in Australia. The ACMA has regulatory responsibilities for four primary Acts, 22 secondary Acts and over 400 regulatory instruments. Included within this, the ACMA has responsibilities under the three Acts that make up the core framework for communications regulation in Australia:

- > The *Telecommunications Act 1997* establishes a regulatory framework that promotes the availability of accessible and affordable telecommunication services in Australia and the efficiency and international competitiveness of the Australian telecommunications industry. It does this through the regulation of telecommunications carriers and others who provide carriage services. It also provides a mechanism for regulating communications content service providers.

- > The *Broadcasting Services Act 1992* establishes a regulatory framework for broadcasting which aims to promote the availability to Australian audiences of a diverse range of radio and television services offering entertainment, education and information. It does this by regulating broadcasting services and certain kinds of online services.
- > The *Radiocommunications Act 1992* operates to ensure efficient use of the radiofrequency spectrum and make provision of spectrum for use in broadcasting, telecommunications and by defence, national security, law enforcement, emergency and other public/community services.

The Review's Issues Paper noted that, while consideration of the regulatory regime which the ACMA administers was not explicitly set out in Terms of Reference, the effectiveness and enduring relevance of the regime has a significant impact on the performance of the ACMA.

The majority of the regulatory regime administered by the ACMA was developed in the 1990s and, excluding the recent review of the Radiocommunications Act and planned reforms, it is still fundamentally based on the existence of stand-alone networks delivering specific services and the business models that supported those networks.

The regulatory regime pre-dates ubiquitous internet connectivity, changes in industry structure, the NBN, social media, advances in technology and changes in consumer expectations. These changes pose significant challenges for the regulatory regime and the regulator which have been recognised in a number of contexts, including the ACMA's 2011 *Broken Concepts* report⁹¹ and more recently its 2013 *Broken Concepts* update⁹². Similarly, the final report of the Convergence Review noted that:

Many elements of the current regulatory regime are outdated or unnecessary and other rules are becoming ineffective with rapid changes in the communications landscape.⁹³

A number of submissions to the ACMA Review Issues Paper commented on the importance of regulatory reform. For example:

- > Telstra observed that "...the existing regulatory regime within which the ACMA operates has not kept pace with technological, behavioural and competitive changes in the sectors and is now presenting significant challenges to customers, industry and to the ACMA itself."⁹⁴
- > FreeTV noted "Significant changes are also occurring within the broadcasting industry itself... This environment poses significant challenges for the regulatory framework to keep up, stay relevant and deliver policy outcomes."⁹⁵

⁹¹ ACMA (2011), '[Broken Concepts – the Australian communications legislative landscape](#)'.

⁹² ACMA (2013), '[Broken Concepts – A 2013 update on the Australian communications legislative landscape](#)'.

⁹³ Convergence Review Secretariat (2012) '[Convergence Review Final Report](#)', p. 1.

⁹⁴ Telstra (2015), '[Submission to the ACMA Review issues paper](#)', p.1.

⁹⁵ FreeTV (2015), '[Submission to the ACMA Review issues paper](#)', p.4.

- > AMTA stated “...it is timely to consider the appropriate regulatory framework for a future communications regulator...The objective of the future regulatory framework should be to facilitate industry outcomes that foster rather than inhibit the development of the communications sector and its capacity to contribute to economic and social outcomes.”⁹⁶

A fundamental issue with the current regulatory regime is the distinction which is sought to be maintained in a number of areas between broadcasting, telecommunications and internet services, at a time when the boundaries between these industries are increasingly difficult to define.⁹⁷ With the recent take-up of applications such as Spotify and Netflix, subjecting traditional broadcasters to regulatory treatment on the basis of the broadcast technologies they employ has become difficult to justify. Similarly, traditional voice and mobile phone services are subject to different quality-of-service requirements to similar services which are delivered by providers like Skype and WhatsApp.

The ability for one service provider to deliver the same content to different devices over different networks has led to inconsistent regulatory treatment. For example, the FreeTV Code applies to content delivered over free-to-air television networks, but not to the same content when it is streamed to a “smart” television via the internet. Distinguishing service characteristics or consumer protections based on underlying networks is less meaningful now that technology allows similar services and content to be accessed across a range of networks and devices.

There is also misplaced emphasis in the regulatory regime focusing regulatory attention on traditional broadcasting or telecommunications providers to achieve public policy outcomes. For example, many consumer safeguard measures in the Telecommunications Act and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* are focused on voice telephony and therefore do not reflect the importance of other communications services to consumers.

In the media sector, ownership and control rules for broadcasting, datacasting and newspapers are designed to limit the degree of influence of any one media proprietor. However, the current concept of influence does not consider new forms and suppliers of communications and media content, nor new patterns of consumer behaviour. Further, the use of geographically based licencing and regulatory models in broadcasting is coming under increasing pressure from the growth of internet services which enable content and services to be generated, distributed and accessed from multiple locations nationally and internationally.

⁹⁶ AMTA (2015), [Submission to the ACMA Review issues paper](#), p.3.

⁹⁷ The general definition of ‘broadcasting service’ in the *Broadcasting Services Act 1992* (BSA) does not necessarily presume a particular platform for delivery. However, in 2000 the Minister made a determination [Determination under paragraph (c) of the definition of ‘broadcasting service’, (No.1 of 2000), 12 September 2000] that removed from the definition of broadcasting service in the BSA those services that deliver television or radio programs ‘using the internet’, thereby ensuring that BSA broadcasting service regulation would not apply to the new online platform.

Over time the regulatory regime has been incrementally amended to address changes in technology. While this has extended some consumer protections to new services or mitigated some market distortions, it has reduced the coherence of the regulatory regime and expanded its size substantially, creating additional complexity for industry and consumers.

The ACMA's examination of these issues has led it to conclude that "current media and communications legislation and regulation in Australia are under strain, increasingly 'unfit for purpose', and often unsuited to the goal of promoting the public interest"⁹⁸.

Indeed, the analysis supporting Part Three of the Review has identified that the performance of the ACMA cannot be divorced from the efficacy of the regulatory regime. This is a logical conclusion given the two elements interact with each other and influence one another to produce the regulatory outcomes that are experienced by regulated entities and consumers. Further, it is evident that a regulatory regime unsuited to contemporary market realities will inevitably impair the performance of the ACMA. For this reason regulatory reform is one of the primary pathways towards supporting better performance outcomes by the ACMA.

The Government has already undertaken significant reforms to reduce regulatory burdens on industry across the Communications and Arts portfolio, and is continuing this process through its response to the Vertigan Review and the Spectrum Review, and by undertaking this Review of the ACMA. The re-write of the *Radiocommunications Act 1992*, which is being undertaken as recommended by the Department's 2015 Spectrum Review, will reduce the regulatory burden on spectrum users by making the spectrum framework simpler and more efficient. The discussion above indicates that overall regulatory outcomes would be improved and achieved at lower cost to industry by further reform to update the legacy regulatory framework and bring it into line with a contemporary view of the market structure and principles of better practice regulation.

Principles to guide a regulatory reform process

Noting that the current regulatory regime has shaped commercial decisions in many markets, a reform process would need to be carefully planned so that it did not unnecessarily disrupt commercial activity, innovation or investment decisions.

A first step could be to develop a set of principles to guide the reform process in order to promote a consistent approach and common set of objectives.

The Review has identified two sets of principles. Firstly, high level intervention principles that guide decisions about when and how governments should intervene in the market. Secondly,

⁹⁸ See ACMA (2011), ['Enduring Concepts – Communications and media in Australia'](#).

where it is decided that regulation is the appropriate form of intervention, a set of regulatory design principles are proposed to help guide the way regulation is used.

The high level intervention principles draw on previous work by the Department and include the following:

- > The role of government is to facilitate competitive market environments as the primary mechanism for achieving public policy goals and then to intervene further only where clear evidence exists of market failure, or if a public policy goal is unlikely to be delivered by the market;
- > When government intervenes in the market it should be done in such a way as to impose the minimum cost in order to achieve the public policy goals. Such interventions should produce benefits that outweigh the costs, including costs imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, choice or competition);
- > When market interventions are necessary, a number of regulatory tools should be considered – policy makers should not rely exclusively on ‘black letter’ regulation but also consider other options such as direct and co-investment (for example nbn, Screen Australia and the Mobile Black Spot Programme), contracted service delivery (Universal Service Obligation, National Relay Service), indirect funding (tax incentives) and facilitation and education programmes;
- > Government intervention should be considered from a system-wide view of the interdependence, interconnectivity and feedback relationships between different part of the communications sector and other sectors in the economy.

The regulatory design principles identified by the Review are as follows:

- > Regulation should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical base;
- > Regulation should be competitively neutral such that it achieves parity of treatment of similar services regardless of the underlying medium or device used to deliver or receive the service, unless there are clearly articulated and compelling reasons to do otherwise;
- > Regulation should promote the greatest practical use of co-regulation and self-regulation;
- > Enforcement frameworks in legislation should provide remedies which are proportionate to the nature of the relevant breach.

As a new regulatory framework is established based on these principles, concepts, regulation and reporting regimes that are included in current regulation but which are outdated and no longer relevant should be removed. Any new regulation should be flexible enough to allow for the future removal or amendment of rules for which compliance has been consistent over prolonged periods.

Enduring policy concepts

Principles alone are unlikely to be sufficient to guide the development of communications regulation given societal expectations regarding the wide set of public policy outcomes to be delivered by the communications sector.

The regulatory reform process would also need to consider the public policy objectives that are likely to remain relevant to the communications sector regardless of future changes in the market, society and technology and where regulation is likely to have an ongoing role.

In 2013, the Department published a policy background paper called 'Deregulation in the Communications Portfolio'. It examined the key policy objectives in communications legislation and sought to identify those which have remained relevant in the face of recent technological change.⁹⁹

The paper drew on work by the ACMA to develop seven enduring concepts that could provide a guide for present and future regulatory intervention.¹⁰⁰ The Review's information-gathering has led to the inclusion of a further enduring concept related to the importance of general purpose networks to Australian society and its economy.

Access to services/participation in society

Citizens should enjoy reasonable and equitable access to communications infrastructure, services and the content necessary to enable their effective participation in society and the economy.

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 so as to 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. This would include ensuring that radiofrequency spectrum is allocated and priced efficiently, and that it is managed for technical and dynamic efficiency over time. This should be balanced with rights holders being able to secure an appropriate return on their investment and/or intellectual property.

⁹⁹ Department of Communications (2013), 'Deregulation in the Communications Portfolio', Policy Background Paper No. 1, pp. 4–5.

¹⁰⁰ ACMA (2011), 'Enduring Concepts – Communications and media in Australia'.

Network reliability and interconnection

Networks should operate in an efficient and effective manner. A unique feature of communications networks is their interconnected nature where multiple and co-dependent parties all require, and must themselves contribute to, an assured level of service. The requirement to offer any-to-any connectivity is critical to the efficient functioning of most communications networks.

National interest

The communications sector settings should reflect the national interest both domestically and through international forums such as those held by the International Telecommunications Union. Citizens should be confident that their use of these services is secure and they are protected, for example, from electronic attacks and fraud. Ensuring adequate access to spectrum resources for defence, national security, law enforcement, emergency services and other public and community services (such as meteorology and scientific research) is also of importance.

Diversity of voices

There should be a diversity of major information sources and perspectives expressed in the public sphere to foster an informed citizenry and healthy democracy. It is important that these information sources 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. In relation to content, children in particular should be protected from harmful material.

The reform process would need to assess whether these concepts, or others, are likely to remain in the public interest and how best to achieve them based on the principles outline above.

Once the policy objectives are understood the final step would be analysing the existing regulatory regime to look at the fundamental commonalities across the primary acts and how they can be streamlined to establish a coherent framework that promotes these objectives in a manner consistent with the agreed principles.

Co- and self-regulation

Best practice regulatory design also suggests that in the communications sector, with its fast pace of change and innovation, greater reliance on co-regulatory and self-regulatory models should lead to better outcomes for consumers and industry.

The Department described in some detail the role of co- and self-regulation in its paper on regulating harms in the Australian communications sector. This paper noted that while both forms of regulation are available, in reality the dominant form of intervention in the communications market has been through black letter law and co-regulatory codes of practice. While co-regulation has a range of strengths, there are questions as to whether it should be the default approach to dealing with regulatory harms as it will not succeed unless a range of factors are in place. The Department's paper concluded with the observation that, in the complex and ever-changing communications sector, it may be most appropriate to employ a small number of rules-based obligations in some areas while allowing greater use of self-regulation in others¹⁰¹.

This suggests that a reform process should aim to reinvigorate the use of self-regulation. This approach would involve:

- > Primary legislation incorporating the core rules that Government had determined should apply to all participants in the industry and which are directed towards minimising harms;
- > The majority of technical rules and standards being dealt with in self-regulatory codes agreed between relevant industry stakeholders, with the flexibility to change and adapt as technology and practices evolve over time;
- > Industry being empowered to deal with a broader range of issues in self-regulatory codes, if it determined this was necessary to do so but without the imposition of mandatory obligations to develop these codes; and
- > As always, Government having the power to 're-enter the field' in the case of any perceived need to regulate due to a failure of self-regulatory codes or technical standards.

In order for a greater reliance on self-regulation to be effective, an essential element will be a strong commitment from industry so that it will remain responsive to consumer needs and will support codes through high levels of voluntary compliance.

It will be necessary for self-regulatory codes to incorporate effective compliance processes, with those processes being supported by the establishment of independent industry bodies to implement complaint handling procedures.

¹⁰¹ Department of Communications (2014), '[Regulating harms in the Australian communications sector](#)', Policy Background Paper No. 2.

Draft proposal:

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.

Appendices

Appendix A: Draft proposals

Remit

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

Functions analysis

2. That the ACMA's cyber-security programmes be transferred, along with staff and funding, to the Attorney-General's Department.
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.
4. That the Department of Communications and the Arts be responsible for head of delegation roles to key international policy-setting forums, including the World Radiocommunications Conference, and that clear guidance and negotiating parameters be provided by the Department to heads of delegation.
5. That further work be undertaken to determine whether it may be more efficient for another body, such as the Australian Taxation Office, to undertake the revenue collection functions currently performed by the ACMA.
6. That, within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self-regulation, in consultation with relevant industry bodies:
 - > technical standards;
 - > Integrated Public Number Database;
 - > Do Not Call Register;
 - > Action on unsolicited communications, including Spam.
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.

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.
9. That the current institutional arrangements for economic regulation of the communications sector be retained.
10. That cross-appointment arrangements between the ACMA and ACCC be strengthened in order to benefit both ACMA and ACCC decision-making.
11. That the current institutional arrangements for communications consumer protections be retained.

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.

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.

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

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.
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.

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.

Appendix B: Regulator performance assessment

The changing communications market means that the balancing act for regulators is more challenging than ever before. Several decades of experience have heightened the expectations of both policy makers and regulated entities, while communications markets have continued to become more sophisticated, dynamic and complex.

The conflicting demands regulators are asked to juggle were well described by the Harvard academic and author Professor Malcolm Sparrow:

- 'be less intrusive – but more effective
- be kinder and gentler – but don't let the charlatans get away with anything
- focus your efforts – but be consistent
- process things quicker – and be more careful next time
- deal with important issues – but do not stray outside your statutory authority
- be more responsive to the regulated community – but don't get captured by industry.'¹⁰²

Similarly, the task of establishing performance expectations requires reflection and judgement about how best to balance an array of competing aims. Parts 1 and 2 of the report have sought to describe the communications market, the remit, functions, objectives and governance of the regulator. These sought to answer the question about *what* the ACMA should be doing. The purpose of this Appendix is to set expectations about *how* it should be doing it.

Elements that influence performance

Good regulatory outcomes are a combination of two factors – the regulatory regime and how the regulation is administered. As noted by the Productivity Commission, the way regulation is administered and the approach of regulators have as significant an impact on businesses as the regulatory regime itself.¹⁰³

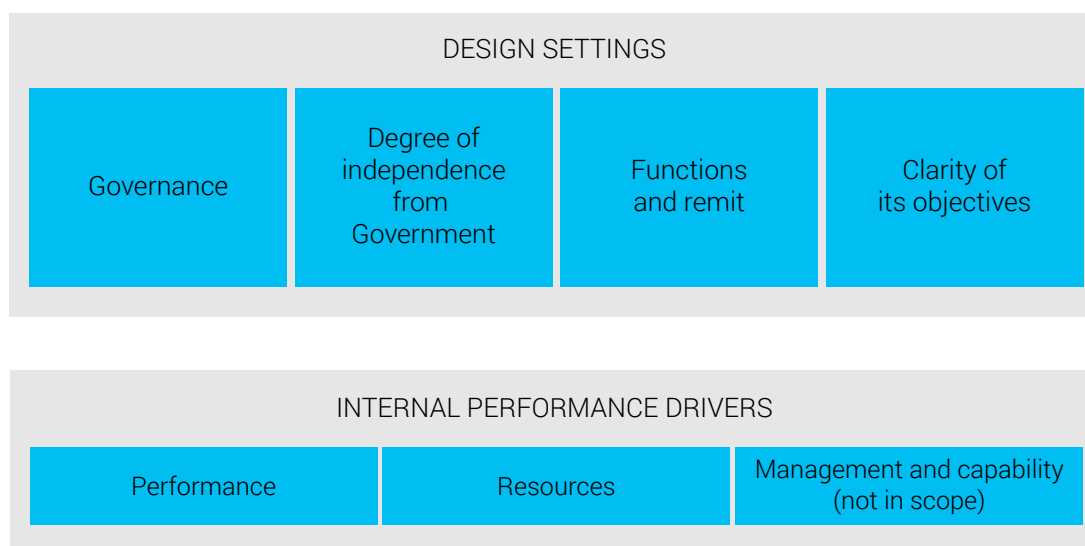
How effectively a regulator performs its role is influenced by both its external institutional design and its internal operating approach. These two elements, one of which must be designed, and the other of which is an operational achievement of the organisation, must work together to support and reinforce the performance expectations of Government and the broader community.

¹⁰² Malcolm K. Sparrow (2011), *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*, p. 17

¹⁰³ Productivity Commission (2014), ['Regulator Audit Framework'](#), p. 4.

To develop a framework to analyse the factors that drive performance, and their interdependencies, the Review has drawn on a diverse body of literature and expertise.¹⁰⁴ During this process the Review identified a number of key elements that influence performance. These are comprised of institutional design settings which are largely determined by governments and parliaments, and internal drivers which capture the internal operating approach, management and capability of the regulator. This chapter will focus on internal performance, but with consideration to the broader context and factors that influence it. These elements are set out in Figure B1 below.

Figure B1: The elements of regulatory performance



Approach

To facilitate better outcomes, it is necessary to understand how the current design of the regulator and its internal operating approaches are interacting to shape overall regulatory performance outcomes. To do this, the Review undertook analysis to understand what is driving performance outcomes and drew on these insights to inform possible design choices.

Broadly, our analysis involved a three step process.

¹⁰⁴ Key sources include the OECD, the Australian and New Zealand productivity commissions, the Australian National Audit Office and the UK Hampton Review on regulatory inspections and enforcement.

Step one identified performance outcomes and operating attributes of the ACMA.

Some attributes are specific to a regulator operating in a communications environment while others are more general best practice traits. In our view best practice is not necessarily a universal nor static concept; rather it represents the design choices and operating attributes best suited to the remit and context of the regulator, and the domestic market and political structure it operates within.

The four desired performance outcomes the Review has identified for a future focused communications regulator are that the regulator:

- > is an agile, timely and informed decision maker;
- > takes actions which are targeted and commensurate with risk;
- > delivers continuous improvements of regulatory frameworks; and
- > has the confidence and trust of stakeholders.

Step two assessed current performance by analysing performance data and stakeholder feedback.

The Review used various sources including stakeholder submissions and consultations, a self-assessment by the ACMA against the Regulator Performance Framework (RPF), discussions with the reference group of regulatory experts, as well as empirical and qualitative information provided by the ACMA at the request of the Review.

The RPF was used to structure our information requests for data and stakeholder input.¹⁰⁵ This information was analysed to generate insights and communicate findings about whether:

- > The ACMA's operating approach is effective and aligned with our aspirations for the regulator; and
- > The four performance outcomes from step one are being promoted or inhibited by current design settings.

It is important to note that whilst the RPF focuses on the regulator itself the assessment the Review has undertaken aims to be more systemic by exploring how the current design of the regulator and its internal operating approaches are interacting to shape performance outcomes.

Step three draws on the insights gained from the previous two steps to propose measures to enhance the future performance of the ACMA.

¹⁰⁵ In October 2014, the Australian Government announced the introduction of the [Regulator Performance Framework](#) as part of its commitment to reduce the cost of unnecessary or inefficient regulation imposed on individuals and businesses.

The remainder of this Appendix aims to establish a vision and description of the performance objectives that would guide the communications regulator into the future. Further, this Appendix undertakes an assessment of current performance against the RPF and further describes the draft proposals to enhance future performance in line with the performance objectives described.

Regulator Performance Principles

The report earlier identifies the importance of a clear set of objectives for the ACMA to the achievement of good regulatory outcomes. While achieving this for the ACMA's policy objectives will require regulatory reform, it is possible to legislate a set of principles addressing the way in which the ACMA goes about performing its regulatory functions. The Review proposes to establish a series of regulator principles in the ACMA's enabling legislation to express the unambiguous intention of government and Parliament that the regulation of communications industries will be guided by best practice principles and continuous improvement over time. This approach is similar to the general duties and guiding regulatory principles set out in Ofcom's enabling legislation¹⁰⁶.

The review proposes a set of guiding principles with a focus that the regulator should:

- > apply a risk-based approach to regulation, compliance and enforcement activities. Regulatory intervention should be targeted, evidence-based and commensurate with risk
- > be transparent in its actions and clearly indicate the priorities and objectives which inform its decision-making to regulated entities and the broader public; and
- > implement continuous review of regulation to reduce burden and streamline approaches where the benefits exceed the costs.

It is important to emphasise that the proposed regulator principles do not seek to prescribe policy objectives or outcomes. Rather, they are behavioural in character, and seek to provide guidance to the regulator on how it should approach its regulatory role.

Consideration of competition, innovation and investment

Licensing, and technical and resource allocation decisions can impose barriers to entry and limit the growth of new players, or apply regulatory costs disproportionately across different segments of the sector. These regulatory decisions can influence the competitive dynamic in the market between firms as well as impede the ability of Australian firms to compete in what is now a global communications market.

¹⁰⁶ See [General Duties of OfCom](#) – *Communications Act 2003*.

A number of stakeholders noted the importance of promoting competition, innovation and investment as a way of achieving good regulatory outcomes. ASTRA argues that:

the objective of the regulator should be to maximise consumer benefit by ensuring regulatory conditions which encourage innovation, investment and competition. These are the preconditions for a vibrant, agile and high quality communications sector which delivers services with a broader social, as well as commercial/economic benefits.¹⁰⁷

Similarly, Telstra argues that the ACMA's objectives should include:

promoting the long term interest of end users; promoting investment in the communications and broadcasting sectors that facilitates the social and economic development of Australia; promoting the efficient use of public resources (e.g. spectrum); supporting Government policy for the communications and broadcasting sectors; and facilitating industry's contribution to the Australian economy.¹⁰⁸

Communications Alliance believes the regulator's objectives should be to:

- (i) Maintain a bias against intervention, driven by a positive obligation to de-regulate
- (ii) Achieve a culture of continuous self-improvement
- (iii) Remain committed to facilitating competition, innovation and investment in the telecommunications and other regulated sectors and to promoting consequent consumer benefit.¹⁰⁹

In light of these factors there may be merit in strengthening consideration of competition issues when the ACMA is weighing up policy objectives.

Further, the Review also noted that technical decisions made by the ACMA can have an important bearing on competition, investment and innovation. In response to these factors the Review explored options to strengthen consideration of competition issues when the ACMA is weighing up regulatory objectives. As the ACMA is not a competition regulator it is not appropriate to establish a specific objective which requires the ACMA to promote competition. However, the ACMA is an economic regulator, as a result of its responsibility for spectrum management, and its licencing and technical decisions could potentially impose barriers to entry and limit the growth of new services.¹¹⁰ The Review concluded that the ACMA could be asked to not hinder competition,

¹⁰⁷ ASTRA (2015), [Submission to the ACMA Review Issues Paper](#), p. 5.

¹⁰⁸ Telstra (2015), [Submission to the ACMA Review Issues Paper](#), p. 16.

¹⁰⁹ Communications Alliance, [Submission to the ACMA Review Issues Paper](#), p. 4.

¹¹⁰ The Legislative Proposals Consultation Paper for the Radiocommunications Bill 2016 proposes the ACMA have future responsibility for determining competition limits for spectrum license issue. It is further proposed that the Minister may, however, have the ability to direct the ACMA on the limits.

unless this is unavoidable in fulfilling its statutory responsibilities. The Review considers this approach will encourage greater market-based thinking within the regulatory culture.

The Review has also considered whether the Minister could provide the ACMA with a Statement of Expectations to provide better direction and certainty about the Government's priorities. In response, the ACMA would be expected to publish a statement of intent to outline the steps it would take to support the Government's priorities. To ensure consistency in the Government's approach to outlining its expectations for regulators in the communications sector the Review considers the Minister for Communications should also issues a similar statement of expectations to the ACCC within the scope of Part XIB and XIC of the *Competition and Consumer Act (2010)* (the CCA).

Key findings

- > A clearer description of performance expectations relating to the ACMA's regulatory role will support better outcomes for industry and consumers.

Draft proposal:

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.*
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.

A regulator that is an agile, timely and informed decision maker

Desired attributes

Given the scope of reform expected over coming years, the Review considers that a fit-for-purpose regulator would need to be agile, responsive and proportionate in its decision-making. It would need to develop an adaptive culture and be well positioned to adjust its approach as the regulatory regime is reformed.

Timeliness will be increasingly important given the rapid technology product cycles and service innovation, and a radiofrequency spectrum regime whose true economic value can only be realised when fully utilised and allocated towards its highest value use.

The Review expects that the regulator will need to have deep expertise and an understanding of business models and potential harms across the layers of the communications markets. It will increasingly need to understand the way previously distinct market players are competing with each other and operating across multiple layers. It will need to recognise when and how its decisions have implications for competition and the capacity to take this into account in its decision-making.

Significantly, the ACMA will require decision makers who are steeped in the facts and able to exercise judgement based on evidence and an assessment of the costs and benefits. The regulator will need to continue to demonstrate regulatory craftsmanship to design interventions that are targeted to address the harms in an environment better suited to ex post market correctives over ex ante rule-making.¹¹¹

Assessment of current performance

The ACMA has broadly met its service delivery performance indicators when it comes to responding to enquiries, issuing radiocommunications licenses and other high-volume functions such as the Do Not Call Register. Steady improvements have been achieved in these service delivery operations with many of the high-volume functions now being semi to fully-automated.

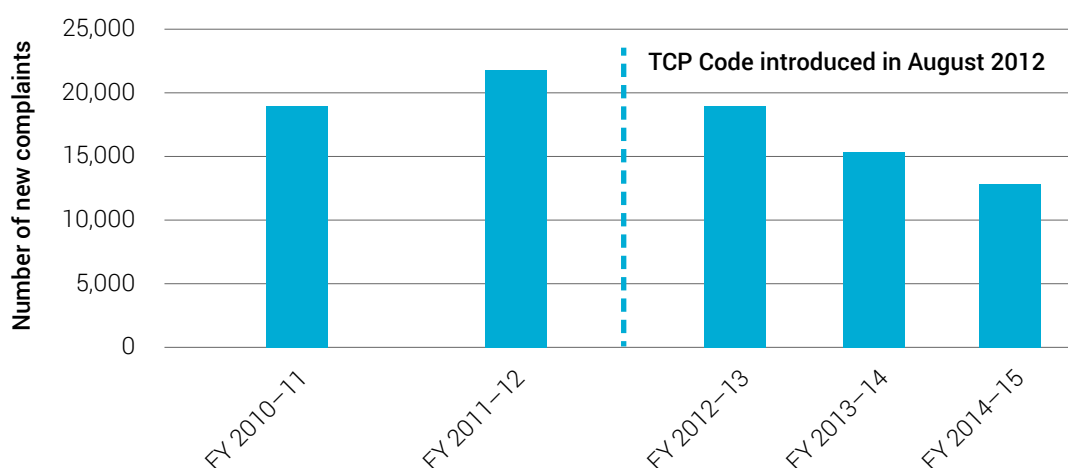
Where the ACMA has intervened strongly in telecommunications markets the evidence indicates the approach delivered a positive net-benefit and/or reduced the number of complaints. For example, the ACMA research from the Reconnecting the Customer inquiry informed significant revisions to the Telecommunications Consumer Protections (TCP Code) in 2012. This took place at a time when product complexity in fixed line and mobile services was increasing and consumers were complaining in increasing numbers about bill shock and unexpected charges.

¹¹¹ Larry Downes (2014), [‘Managing the Big Bang: The Regulator’s Dilemma’](#), Democracy (34).

Commissioned analysis by the ACMA estimated consumers have benefited by \$545 million each year since the revised Code was introduced in 2012.¹¹² This is supported by statistics published by the Telecommunications Industry Ombudsman (TIO): Figure B2 shows a fall in complaints relating to unexpectedly high charges received by the TIO following the introduction of the TCP Code in August 2012.

The average annual reduction in new TIO complaints for the two financial years following the registration of the code was 27,378.¹¹³ Further, as shown in Figure B3, TIO complaint statistics on Mobile Premium Services peaked in 2008–09 with over 13,000 new complaints over that period. With the introduction of the Mobile Premium Services Code in July 2009, there was a substantial decrease in new complaints to just over 4,000 in 2009–10.¹¹⁴ Complaint numbers continued to decrease to their lowest level of around 1,600 in 2013–14.¹¹⁵

Figure B2: TIO statistics showing number of new complaints relating to bill shock following introduction of relevant codes by the ACMA¹¹⁶



¹¹² Source: ACMA input to Review team

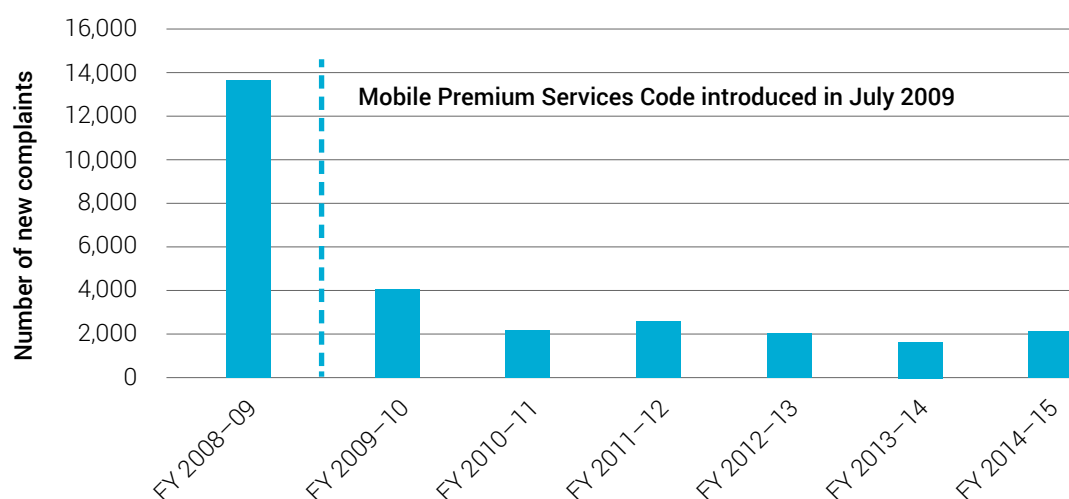
¹¹³ TIO (2014) [Annual Report 2013-14](#), p. 24.

¹¹⁴ TIO (2010) [Annual Report 2009-10](#), p. 13.

¹¹⁵ Change to: TIO (2014) [‘New complaint and investigations issues 2013-14’](#).

¹¹⁶ TIO (2010) [Annual Report 2009-10](#), p. 13.

Figure B3: TIO statistics showing number of new complaints relating to Mobile Premium Services following introduction of relevant codes by the ACMA¹¹⁷



Stakeholders have broadly expressed a desire for more timely decision-making outcomes and planning processes. The Australian Subscription Television and Radio Association (ASTRA) has also expressed concerns about lengthy process in decision-making and notes the recent ASTRA Code Review took three years and three months (longer than the intended life of the Code) to complete. A submitted case study identified over 18 iterations of exchanging formal consultation comments throughout the process.¹¹⁸ During consultation several stakeholders have expressed concerns, which are shared by the Review, about the lack of consistent process for major rule-making, code-registration and planning activities. The Review notes that the commitment of industry itself is central to timely outcomes in co-regulatory processes. During consultations stakeholders have expressed a desire for processes to be designed for consistent use within classes of decision-making, with the objective to provide more visibility and predictability around the sequence of key decision points and a greater integration of Regulation Impact Statement principles into the decision-making processes.

The ACMA has supplied the Review with data on the timeframes for rule making and planning activities between 2011 and 2015. The Review notes the timeframes in Table B1 are based on when the formal process of working on a rule making instrument began, or when the first version of a Code was formally submitted to the Authority, and does not incorporate the prior engagement and negotiation with stakeholder groups that can accompany some of the more significant activities the ACMA undertakes. For this reason the data underestimates, in some instances substantially, the felt experience of stakeholders engaged in the process.

¹¹⁷ TIO (2010) [Annual Report 2009-10](#), p. 13.

¹¹⁸ ASTRA (2015), [Submission to the ACMA Review issues paper](#), p. 5

Table B1: ACMA rulemaking timeframes

Act	Instrument type	Number of decisions made	Minimum decision time	Maximum decision time	Average decision time
ACMA Act	Determinations	10	2 months	5 months	4.75 months
BSA	Determinations	1	8 months	8 months	8 months
	Declarations	3	5 months	6 months	5.5 months
	Standards	8	3 months	21 months	7.6 months
	Instruments	1	3 months	3 months	3 months
	Industry codes	10	2 months	32 months	6 months
Do Not Call	Determinations	4	3 months	6 months	3.8 months
Radiocommunications	Determinations	50	1 day	13 months	5.4 months
	Standards	24	3 months	11 months	7.5 months
	Declarations	1	15 months	15 months	15 months
Telecommunications Act	Determination	17	1 month	13 months	6.9 months
	Standards	23	2 months	12 months	4.7 months
	Service Provider rules	7	1 month	12 months	10.5 months
	Industry codes	7	1 month	16 months	5.5 months
TCPSS Act	Standards	2	1 months	3 months	2 months
	Determinations	6	3 months	10 months	5.8 months

Stakeholders have broadly expressed a high degree of confidence in the capabilities and performance of the ACMA in the technical management of radiofrequency spectrum.

A review of key Regulation Impact Statements prepared by the ACMA indicates its regulatory decision-making is supported and guided by a sound foundation of empirical evidence.

The ACMA has made steady improvements to business processes and monitoring approaches. This includes the reduction in scope of various information collection requests on the telecommunications and broadcasting sectors and the simplification of forms for regulated entities. Telstra noted progress in streamlining spectrum licensing but indicated there was scope for further improvements by fully automating spectrum and apparatus licensing transactions through a single online self-help portal¹¹⁹, a process which is understood to be currently underway.

¹¹⁹ Telstra (2015), [Submission to the ACMA Review issues paper](#), p. 4.

Stakeholders have expressed a desire for greater involvement in the design of forms and information requests when they are first being developed. This may present an opportunity, as part of future regulatory reforms, in the event new compliance regimes are established or existing arrangements substantially changed, to seek to design approaches that minimise costs to industry.

Some stakeholders expressed concerns that information collection requirements are onerous. However, the Review considers this challenge is not unique to the ACMA and is borne by all regulators that need to collect information or monitor compliance with an appreciation for the costs imposed on market recipients. The Review accepts that while there is scope for improvement the ACMA must exercise important judgements about how best to prioritise and allocate resources across its continuous improvement and review programmes. Nonetheless, it is important for regulators to embrace a continuous improvement culture and establish the necessary internal systems to deliver steady, meaningful and visible improvements for stakeholders over time.

Key findings

- > The ACMA's regulatory decision-making has generally been sound and supported by evidence.
- > The ACMA's decision-making timeframes for significant rule making and planning processes have been sub-optimal. Various factors may be inhibiting the regulator from achieving timely outcomes – including the efficacy of current co-regulatory processes, and other procedural issues which legislation currently prevents from being handled administratively.

Draft Proposals

Timeframes for current spectrum reallocation processes, licence area planning and various rule making and code registration activities do not appear to regularly meet the expectations outlined earlier in this section. However, the Review is not of the view that timeframes are solely determined by the performance of the regulator. Our consultations and analysis have identified several factors that may be contributing to these timeframes which are discussed below.

The Review recognises the rigidity of governing legislation has constrained faster planning and decision-making, particularly in spectrum and broadcast planning processes. The implementation of the Spectrum Review will address some of these past constraints. In particular, a single licencing system and simpler legislative regime should speed things up. However, there remains scope for the regulator to improve outcomes through a more sophisticated level of engagement with risk, consistent with the Government's Risk Management Policy. To achieve this, the Review considers a Ministerial Statement of Expectations – as outlined in Draft Proposal 19 – could assist the ACMA to achieve a better understanding of the Government's priorities and risk appetite, as they work towards improving processes..

A regulator whose actions are targeted and commensurate with risk

Desired attributes

The Review considers that a deep understanding of risk and a sophisticated application of risk principles should be the central organising principle of how the ACMA approaches its role.

The value of risk as an organising principle for regulatory agencies was emphasised in the 2005 Hampton Review of regulatory inspection and enforcement practices. It found the application of risk processes and systems was patchy across the UK and recommended the system as a whole should use comprehensive risk assessments to make sure regulatory resources were targeted to areas needing the most attention.¹²⁰

A sophisticated understanding of risk is best expressed when the full suite of available tools are effectively used to achieve compliance, and when enforcement action, within the constraints of the authorising legislation, is consistently proportionate to both the seriousness of the breach and the risk being managed. It is also expressed through the design and implementation of tailored interventions, informed by evidence, that target harms with accuracy. In a reactive environment, as argued by a growing body of literature that points to the need for regulators to favour ex-post approaches to regulating communications and digital economy industries, this capability is increasingly important.¹²¹

A high-performance regulator should also be provided with fit-for-purpose powers that allow it to move up and down the enforcement pyramid in a way that reflects the seriousness of the regulatory risk and desired level of deterrence.

Assessment of current performance

Feedback from stakeholders and our analysis indicates the ACMA has generally made effective use of its regulatory discretion.

In many instances this approach has been seen as a practical response to the emergence of new business models driven by technological change. The exercise of forbearance is consistent with how the ACMA has communicated publicly about its operating philosophy. The ACMA adopts forbearance to facilitate practical outcomes, as a strategic tool to facilitate market innovations and evolutions in business models where it considers the legacy regulatory framework lacks

¹²⁰ The Hampton Report (2005), 'Reducing Regulatory Burden: effective inspection and enforcement', pp.4, 8.

¹²¹ World Bank (2010), 'Telecommunications Regulation Handbook', p.223; International Telecommunication Union (2013), 'Competition and regulation in a converged broadband world', p.3.

utility.¹²² The Review supports this approach provided the discretion exists to do so. It is worth noting many international regulators, such as the FCC in the US, have a broad legal power to forbear whereas the ACMA does not. The Review has given consideration as to whether an explicit legal power would be useful. However, at this point the Review does not think it would, as it would not add practical value beyond the discretion the ACMA already retains.

The ACMA has made effective use of flexibility afforded by the *Omnibus Repeal Day (Autumn 2014) Act 2014*, which provided a general discretion to investigate broadcasting complaints. Previously, the ACMA was required to investigate every single valid complaint. In the period 17 October 2014 to 30 June 2015, it declined to investigate in 30 per cent of cases that in turn relieved industry of the administrative and resource burden to formally respond.

Some stakeholders in the broadcasting sector have expressed concerns about approaches by the regulator in dealing with broadcasting complaints being disproportionate to the level of harm.¹²³ Conversely, our consultations identified a greater degree of forbearance exercised by the ACMA when dealing with telecommunications and internet issues.

A review of internal documentation has found the ACMA has established internal risk policies to support its compliance and enforcement activities. The Review notes that the ACMA has developed tailored risk guidance for some of its compliance and enforcement functions consistent with best practice. The Review considers there is scope to extend this practice and tailor guidance across other areas of its remit.

Consultations with stakeholders have also indicated they generally consider the ACMA's approach to its investigations to be professional and proportionate. A recent audit by the ANAO of the effectiveness of the ACMA's regulation of unsolicited communications under the Spam Act and Do Not Call Register Act found that sound guidance on risk management had been developed through a risk management framework review that had been underway at the ACMA between 2011 and early 2014. The ANAO found that the ACMA had implemented: effective processes to ensure that risks are identified and managed; generally sound policies, processes and practices to support its communication of regulatory requirements and its compliance monitoring activities; and a graduated approach to addressing and resolving non-compliance identified through its regulatory activities. The ANAO however identified scope for improvement, noting that written investigation plans and risk assessments were not prepared for any of the 16 investigations finalised in 2013-14 and, in general, complainants were not notified when investigations had been completed.¹²⁴

¹²² ACMA (2015), *Submission to the ACMA Review issues paper*, p. 25.

¹²³ Ian Robertson (2015), *Submission to the ACMA Review issues paper*, p. 5-6

¹²⁴ ANAO (2015), *Regulation of Unsolicited Communications*, paras [14], [21], [25].

The ACMA has identified several examples where legislative powers have constrained its ability to achieve compliance in a way that is commensurate with the breach. This includes areas of their remit that establish criminal law penalties without appropriate mid-tier powers, and instances where the law grants powers for the regulator to suspend or cancel a licence without a more proportionate mid-tier sanction. While, a number of the ACMA's powers are specific to certain circumstances, the Review considers it generally has a broad range of enforcement powers available to respond to code or licence condition breaches. Where its powers are more limited, the ACMA has demonstrated its ability to utilise other approaches. For example, a 2008 ANAO audit found for most breaches of TV and Radio Codes the ACMA considered its enforcement powers were not appropriate to the breach and as a result used negotiated agreements with broadcasters¹²⁵. The Review considers enforcement frameworks in legislation should provide remedies that are proportionate to the nature of the breach. The Government will seek to achieve this goal in the rewrite of spectrum legislation and other future regulatory reforms.

Key findings:

- > The ACMA's performance in undertaking compliance and enforcement activities has generally been effective and commensurate with risk.
- > Stakeholders in different industry sectors have differing perspectives on how the ACMA approaches its compliance and enforcement role.

Draft Proposals

To support an enduring and disciplined commitment to risk-based approaches as a guiding principle for a future communications regulator the Review considers it would be valuable to establish a regulator principle in the ACMA's enabling legislation. This has been put forward in draft Proposal 18 as a regulator principle – that 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.*

It will also be important for the ACMA to communicate with stakeholders from time to time to ensure they retain confidence in the consistency between the actions taken and the compliance and enforcement policy. The Review considers the compliance and enforcement policy should be the frame of reference to assess the regulator's consistency, rather than comparisons between approaches to different industries.

¹²⁵ ANAO (2008), [Regulation of Commercial Broadcasting](#), p.21.

Draft proposal:

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.

A regulator that delivers continuous improvements of regulatory frameworks

Desired Attributes

Regulation must be regularly reviewed to ensure it remains fit-for-purpose over time. As industries and services mature, consumers become better educated, and commercial incentives align with regulatory objectives, then often we observe compliance becoming embedded in the underlying business model. These cycles offer opportunities for the regulator to reduce burden. Better practice regulators establish internal scanning processes and stakeholder engagement mechanisms to identify and take advantage of such opportunities. They demonstrate an organisational commitment to reduce burden on regulated entities and help inform the development of better regulation by sharing information with policy departments.

Further, in areas where strong competition has emerged, or industry has sufficiently matured its practices over time, the regulator should assume the initiative to explore the conditions under which regulatory interventions could transition from rules based regulation to co-regulation, and from co-regulation to self-regulation.

Assessment of current performance

The ACMA has demonstrated its commitment to the Government's deregulation agenda by delivering an estimated \$53 million in compliance cost savings to business and consumers, and repealed over 130 redundant legislative instruments. This is a commendable achievement given the size and scope of the ACMA's remit.

The Review considers there is an opportunity to create internal systems to make sure the regulatory stock is subject to appropriate levels of continuous review. This may involve the ACMA making changes to regulation or providing advice to the Government on proposals for regulatory reform.

Stakeholders and the Government have acknowledged the value of various papers published by the ACMA which explore how technological change and new business models are increasing pressure on existing regulatory concepts. The *Broken Concepts* and *Enduring Concepts* papers have been widely referenced by stakeholders and have provided a valuable conceptual

framework to facilitate discussion and inform policy makers in the process of considering and implementing reforms.

In addition, the ACMA has published reflection papers to synthesise its experience on the conditions in which self and co-regulatory arrangements can operate effectively as alternatives to black letter law. Future reforms would also benefit from the regulator's insights about the conditions under which self-regulatory arrangements may become a viable alternative to co-regulation. The Review encourages the regulator to continue to share its reflections and insights about the efficacy of the regulatory regime.

Key findings:

- > The ACMA has demonstrated its commitment to the Government's deregulation agenda.
- > There is scope to implement measures and systems to make sure there is an ongoing commitment to reduce burden on regulated entities.

Draft Proposals

Given the range of competing organisational priorities faced by the ACMA at any given time, and the institutional cultures of regulators more generally, it is reasonable to consider that a commitment to reduce regulatory burden would not endure in the absence of whole-of-government policy commitments. An objective of this review is to ensure a future-focused regulator remains committed to reducing the burden on regulated entities beyond the current Government's deregulation agenda.

One option to strengthen the longevity of continuous improvement culture is to establish an objective in the regulator's enabling legislation. If established in law, this principle would express the unambiguous intention of government and Parliament that regulation of communications industries will be subject to continuous improvement over time. This would be given effect by draft Proposal 18 which proposes to legislate a regulator principle to promote continuous improvement. The Review notes that a commitment to reducing burden is not intended to diminish regulatory objectives, nor is it intended to imply a continuous and definite ratcheting down of regulation over time. Rather, where risks have receded or regulation is no longer necessary this objective will seek to ensure there is an ongoing and consistent commitment by the regulator to reduce that burden on industry in a steady manner.

Draft proposal:

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.

A regulator that has the confidence and trust of stakeholders

Desired Attributes

A high-performance regulator recognises how a decision is considered, made and explained is often as important as the decision itself. The regulator should have the respect of stakeholders even if they do not always agree with the decisions made. Transparency is central to achieving this aim. The Review aspires for the ACMA to be acknowledged by stakeholders as having a sincere and consistent commitment to transparency and engagement throughout the decision-making process, and its ability to communicate a clear link between objectives, process, analysis and reasons for decisions.

Assessment of Current Performance

Stakeholders have expressed a desire for more direct engagement with the Authority, particularly on substantial matters. During our consultations stakeholders have expressed concerns that engagement with the ACMA can be overly formal and dependent on written exchanges. The Review is not in a position to assess the extent of reliance on certain modes of engagement by the ACMA. However, the Review does consider that any over-reliance on formal, written interaction presents a risk of not fully capturing the more nuanced aspects of issues that can be gained through direct engagement.

The ACMA has published a series of documents to explain its regulatory approach on various matters across its remit, including its compliance and enforcement policy and a suite of regulatory guides to explain how the regulator will exercise its powers across its remit.¹²⁶ The guides cover powers such as infringement notices, remedial directions and explain when it will accept an enforceable undertaking. The Review also notes the ACMA publishes its decisions and reasons related to investigation and enforcement outcomes, which explain how it approaches broadcasting complaints. In addition to this, stakeholders may benefit from the publication of material to explain decision-making processes of the decision-making body.

One of the key findings of the Spectrum Review was stakeholders want greater transparency and accountability in decision-making, and a clear distinction to be made between the responsibilities of the Minister/Government to set policy and the ACMA to implement policy. This also includes transparent disclosure of decisions and the reasoning behind decisions, regular updates on processes and explanations when things change. Vodafone has also observed that decisions tend to be publically available and more readily accessible in other jurisdictions and proposed that legislation be amended to require the regulator to publish its reasons for a decision and publish them in a central repository.¹²⁷ The Review has explored this issue and, when adjusting

¹²⁶ ACMA, 'Regulatory guides and guidelines', accessed in October 2015.

¹²⁷ Vodafone (2015), [Submission to the ACMA Review issues paper](#), pp. 5-6.

for the ACMA's remit, it is not clear that the current approach differs materially from international regulators, however there may be scope to improve the accessibility of its decisions through a centralised decisions register.

Consultation with stakeholders has identified a broad level of concern about a lack of consistency in process for significant spectrum and code registration activities. There is also concern about industry not understanding what information is presented to the decision maker and how decisions are made.

The ACMA currently has in place a range of programmes which use industry engagement and consumer information initiatives. The ACMA also notes that since 2013 it has used a Targeted Outreach Programme (TOP) to send direct communications to stakeholder executives. From November 2014, ACMA Authority members sent 708 separate communications and received 58 feedback responses, including positive endorsement for TOP as a valued tool for keeping stakeholders informed about relevant issues and developments.¹²⁸ The extent to which these communications strategies have been effective in securing compliance or influencing behaviour is difficult to measure and remains unclear.

The ACMA currently has 55 Memorandums of Understanding (MOUs) in place with external entities and other Australian regulators. The Review considers the value of selected MOUs could be increased by making them public where there is perceived or actual overlap of regulatory functions (such as in privacy, consumer protection and security). This would provide stakeholders with greater confidence that efforts are being made to coordinate activities and minimise duplication.

Key findings:

- > There is scope to strengthen the decision-making transparency of the ACMA.
- > There is a need for greater consistency in process that underpins significant rule-making and planning activities.

Draft Proposals

The Review recognises the tension between the desire to achieve faster and more flexible decision-making, and trying to improve transparency. Achieving a good balance between these outcomes is, more than anything else, an operational achievement of the regulator informed by good judgement. It is essential for regulators to ensure stakeholders have a clear understanding of the process that will guide decision-making and an understanding after-the-fact about the reasons for the decision.

¹²⁸ ACMA (2015), [Submission to the ACMA Review issues paper](#), p. 77

A 2013 study of content and media regulators in the EU has identified seventeen countries whose regulators are required to publish all of their decisions. Another ten countries require their regulators only to publish certain decisions such as those to sanction or revoke a license. A further ten regulators do not have a legal obligation to publish any decisions, but nine out of ten choose to publish decisions regardless.¹²⁹ The Review has considered whether it would be beneficial to require the ACMA to publish a statement of reasons for its regulatory decisions however the Review does not consider a broad based requirement would be the most effective allocation of the regulator's resources. This view is partly informed by stakeholder feedback which has been primarily concerned with improving process, and partly by the ACMA's limited role in economic regulation (compared to economy-wide competition regulators) where the impact of such decisions typically warrants a more rigorous standard of transparency.

In this regard the Review considers resources in the short term are best directed towards improving process transparency and consistency. Nonetheless the ACMA should consider whether it would be useful to issue statements of reasons for decisions with precedence value, where it is efficient to do so. As noted earlier, communicating how a decision-making body makes a decision is often as important for stakeholders as the decision. The Review considers it would be beneficial for the regulator to publish further guidance about its decision-making processes once any new decision-making or governance structure comes into effect. Further, it may be worth testing stakeholder views on the ACMA publishing an agenda of each of its Authority meetings to enable industry and government stakeholders to stay abreast of matters under consideration. This approach is also adopted by Ofcom.¹³⁰ Given the market sensitive and confidential nature of some matters considered by the Authority it is anticipated, if the publications of agenda's were adopted, that the ACMA would exercise its discretion to determine what matters are made public.

Further, establishing and publishing processes for functions of significant importance to industry (TCP code-registration for example) will ensure regulatory staff and the decision-making body are more accountable and consistent in their approach. Ideally these processes will integrate regulatory impact assessment principles outlined by the Office of Best Practice Regulation into the early stages of regulatory processes.

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.

¹²⁹ European Commission (2013), 'Audio-visual Media Services Regulatory Authorities Independence and Efficiency Review', p.98

¹³⁰ OfCom, 'Agendas for OfCom board meetings'.

Appendix C: Review of resources and efficiency analysis

The terms of reference for this review require that the Department consider the resource base of the ACMA, including the relative contributions from current sources, and to evaluate the ACMA's efficiency in delivering its functions consistent with the Government's Contestability Programme.

The Review has compared the ACMA against a number of other regulators to provide a high level perspective on resource allocation. Across jurisdictions there are obvious differences between government policy, the nature of markets, and the interaction with its stakeholders, which should be taken into account when comparing results.

In addition, several specific activities carried out by the ACMA have been investigated in detail to gain insight into how efficiently those activities are carried out, and how the ACMA reviews its processes and outputs in order to improve efficiency over time.

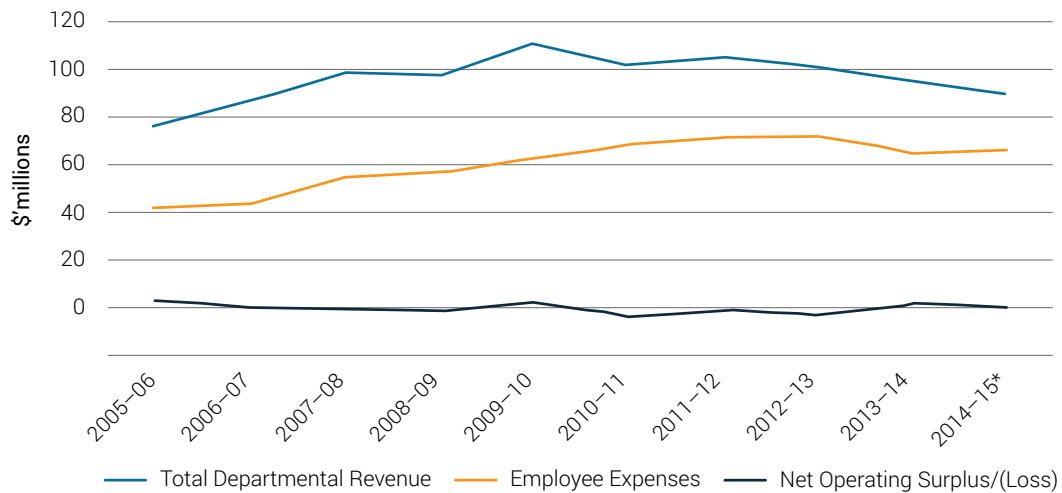
This section draws on factual information provided to the Department by the ACMA as part of its submission, and other directly-sourced data provided by the ACMA. The Review also notes other concurrent Government processes that are currently underway to improve the efficiency of government bodies.

Funding and Revenue Collection

The ACMA receives the majority of its revenue through appropriations from the Australian Government. In 2015-16, the ACMA has \$71.80 million in funding from budget appropriations, (excluding funding of \$11.05 million designated for the Office of the Children's eSafety Commissioner (OCeSC)).

In addition to these budget appropriations, the ACMA expects to secure own source revenue of \$0.90 million for the year as part of fee-for-service arrangements.

Funding for the ACMA peaked in 2009-10 at \$111.2 million, and has since fallen to \$72.7 million in 2015-16 (excluding OCeSC). The peak of the ACMA's activities coincided with the digital television switchover and restack programmes, which are now both completed. Funding has declined steadily with employee expenses also starting to fall due to reduced overall staffing levels. Lower staff levels are projected to continue with average staffing levels falling from its peak in 2010-11 of 591, to 409 in 2015-16.

Figure C1: Funding for the ACMA 2005-15

* Note: 2014-15 and 2015-16 budget figures are based on estimates and includes the Office of the Children's eSafety Commissioner budget. The surplus excludes an estimated underspend in 2014-15 of \$1.274m for the Office of the Children's eSafety Commissioner to be rolled over as funding for 2015-16 (with an application to the Department of Finance for an approved loss to be prepared for 2015-16).

The ACMA significant revenue for the Commonwealth through asset sales, cost recovery, taxes and levies. It collected annual revenues (excluding sale of spectrum) ranging from approximately \$580 million to \$657 million between 2010-11 to 2014-15. With the exception of own source revenue, all of the revenue raised by the ACMA is returned to the Consolidated Revenue Fund and has no impact on the ACMA's operational or capital funding.

APPENDIX C: REVIEW OF RESOURCES AND EFFICIENCY ANALYSIS

Table C1: Eleven-year funding profile for the ACMA, 2005-06 to 2015-16 (\$m)¹³¹

Budget Year >	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15*	2015-16*
Appropriations (Base)	71.454	74.656	72.208	75.526	76.726	62.903	67.609	64.128	63.911	63.161	59.141
Add NPPs	1.403	7.433	25.021	19.790	31.497	36.032	35.917	35.143	28.476	26.072	12.675
OCeSC											11.051
Approved loss		2.592	0.049			1.600	0.531				
Total Appropriation	72.857	84.681	97.278	95.316	108.223	100.535	104.057	99.271	92.387	89.233	82.867
Other revenue	3.971	2.554	1.860	2.329	2.977	1.029	1.050	1.976	2.916	2.541	0.900
Minus OCeSC											-11.051
Total	76.828	87.235	99.138	97.645	111.200	101.564	105.107	101.247	95.303	91.774	72.716
Expenses	73.798	86.583	99.128	98.971	109.037	111.216	112.769	111.252	102.527	99.837	81.744
Employee expenses	41.670	44.267	54.650	57.334	62.570	68.939	71.270	71.467	65.263	61.783	54.129
Employee percentage of total expenses (excluding depreciation)	61%	54%	58%	61%	60%	66%	67%	69%	70%	69%	74%
Supplier and other expenses	26.426	37.305	40.287	37.416	41.441	35.275	35.155	32.397	28.629	28.019	18.587
Depreciation	5.702	5.011	4.191	4.221	5.026	7.002	6.344	7.388	8.635	10.035	9.028

¹³¹ Source: Data supplied by ACMA to the Review

Budget Year >	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15*	2015-16*
Surplus/(Loss)	3,030	0,652	0,010	-1,326	2,163	-9,652	-7,662	-10,005	-7,224	-8,063	-9,028
add depreciation loss						7,002	6,344	7,388	8,635	10,035	9,028
OCeSC Unspent Rollover										-1,274	
Net Surplus/Loss	3,030	0,652	0,010	-1,326	2,163	-2,650	-1,318	-2,617	1,411	0,698	0,000
Revenue Raised	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15*	2015-16*
Total Administered Income	751,247	703,891	708,454	757,142	687,683	580,135	646,375	2,022,046	656,983	2,789,176	800,541
Other Revenue (BLF, TIL, ACLC, ANC, etc.)	751,247	703,891	708,454	757,142	687,683	580,135	646,375	538,669	656,983	660,948	677,241
Sale of assets (Spectrum – Digital Dividend)								1,483,377		2,128,228	123,300
Return on Appropriation Ratio (Administered Income/Total Appropriation)	10.3	8.3	7.3	7.9	6.4	5.8	6.2	20.4	7.1	31.3	9.7

* Note: 2014-15 and 2015-16 budget figures are based on estimates and includes the Office of the Children's eSafety Commissioner budget. The surplus excludes an estimated underspend in 2014-15 of \$1.274m for the Office of the Children's eSafety Commissioner to be rolled over as funding for 2015-16 (with an application to DoF for an approved loss to be prepared for 2015-16).

Over 10 years, the ACMA has collected \$10.33 billion in revenue for the Commonwealth, from asset sales such as spectrum auctions, but also from the six industry mechanisms noted below in Figure C2 that comprise a mix of resource taxes, indirect cost recovery charges and revenue-based levies.

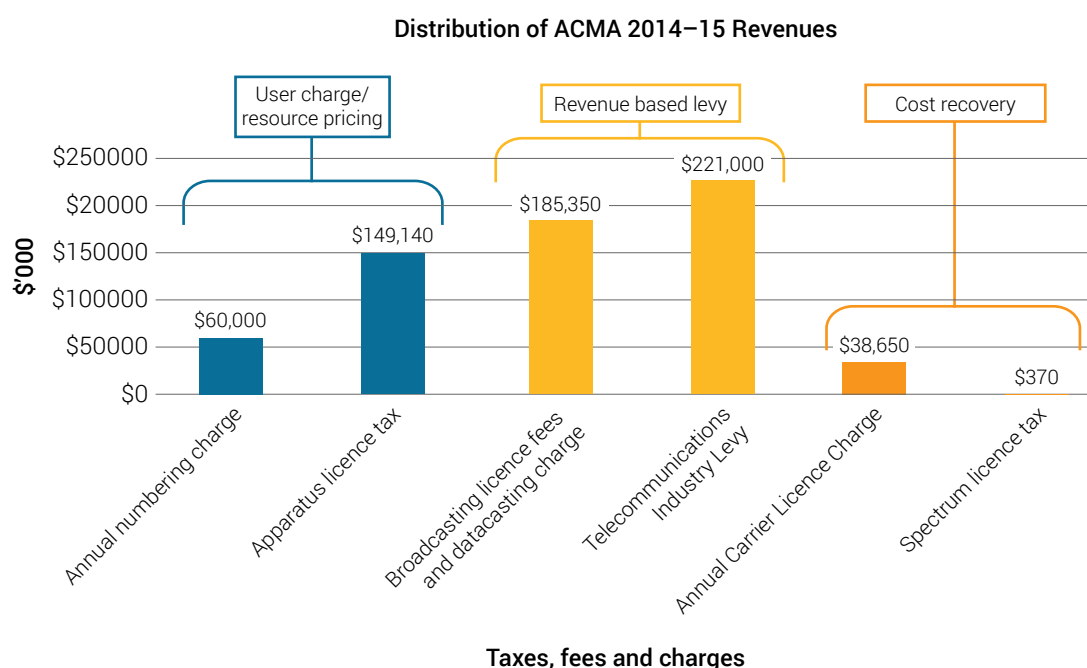
Industry-based revenue

In the context of the ACMA's operating budget, it is important to put into perspective its functions in managing a range of industry fees, taxes and charges. The ACMA's revenue-collection and charging authority is contained in a range of legislation.

Apart from the specific provisions made in individual legislation for the application of fees, taxes and charges, Section 60 of the *Australian Communications and Media Authority Act 2005* provides a general authority for the ACMA to make determinations fixing charges for services it provides.

In 2014-15, the ACMA collected over \$650 million from six industry-specific taxes, charges and levies.

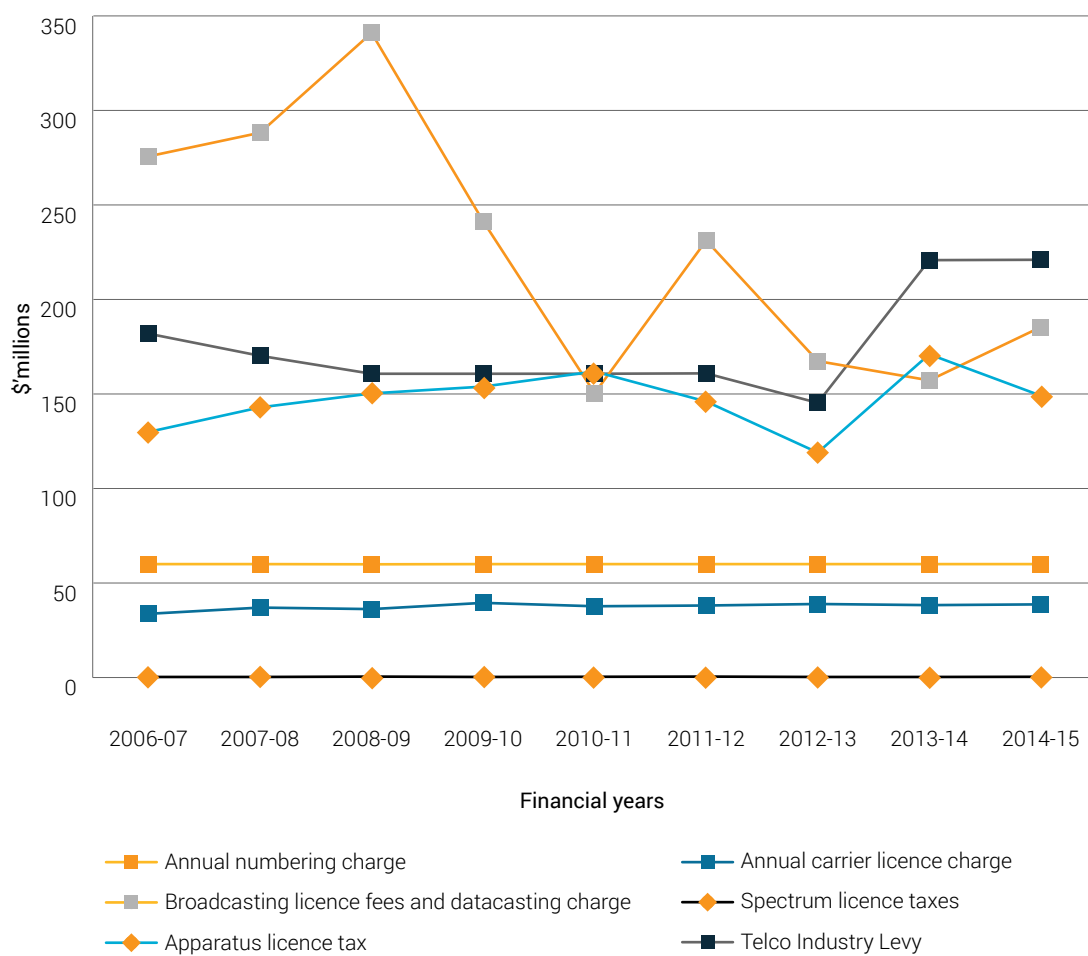
Figure C2: 2014-15 Breakdown of broadcasting, radiocommunications and telecommunications industry taxes, charges and levies revenues¹³²



¹³² Source: Data supplied by ACMA to the Review

The Review's analysis of the ACMA's revenue collection function has highlighted that the revenue accruing to Government from the communications industry under existing charging arrangements has declined significantly in both nominal and real terms over the last decade. The decline excludes revenue raised from spectrum licence auctions, which are commercial transactions based on an assessment by purchasers of the value of the available spectrum and associated licencing arrangements.

Figure C3: Trends for taxes, fees and levies¹³³



¹³³ Source: Data supplied by the ACMA to the Review.

Revenue from a range of charges applied to the 'traditional' elements of the communications sector – fixed-line telephony and commercial free-to-air broadcasting – is likely to remain under pressure. Existing regulations, revenue collection and cost recovery arrangements focus on owners of infrastructure or broadcasting licensees and impose obligations on those entities. These segments of the communications sector have experienced relatively static revenue growth, or in some cases, revenue declines as competition from subscription and OTT providers emerge.

The Department found in its 2015 Portfolio Charging Review little rationale for additional charges being applied to the traditional sectors of the industry, and indeed that the free-to-air commercial broadcasting sector was likely to argue for further licence fee relief as it faces increased competition and costs.

At the same time, there are new business models and services that earn revenue from activity in the communications sector that do not contribute to industry specific levies, cost recovery or taxation.

Draft proposal:

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.

Financial performance and organisational efficiency

The ACMA has delivered a small surplus or deficit in each of the last 11 years, with a surplus of \$0.053m over its life. The ACMA has generally taken the approach to review and reorganise its internal structure and resources to achieve its outcomes in line with available resources.

Net operating losses have been recorded four times since it was established. Losses have largely been driven by redundancy payments associated with the winding down of the significant digital dividend work programme from its peak in 2011–12, asset write-offs and changes made by the Department of Finance to the valuation of employee leave provisions.

The ACMA's funding has declined significantly comparing 2015-16 to 2005-06. Fluctuations in the funding profile have occurred from the new and terminating funding associated with specific initiatives such as the digital television switchover and digital dividend auction.

From time to time, the ACMA has been required to absorb additional unfunded cost pressures arising from new initiatives or changes in priorities. An example of this is the absorption of additional efficiency dividends associated with the establishment of the Office of the Children's eSafety Commissioner, the establishment of the Digital Transformation Office (DTO) and the

ACMA's reporting role in relation to telecommunications data retention. The ACMA's ongoing contribution to the DTO for the years 2015-16 to 2018-19 will total \$2.3 million.

The ACMA has been able to manage unforeseen cost and priority changes within its existing appropriation. It has a number of initiatives in place including a rolling five-year analysis of affordable staffing profiles, continuous major restructuring to prioritise activities and rolling flexible recruitment to manage its staffing profile, address fluctuations in workload and provide surge capacity (wherever possible) to deliver outcomes to mitigate emerging harms.

These initiatives have allowed the agency to reduce its fixed-cost base, not only through staffing reductions, but by rationalising accommodation and other fixed costs. Fixed costs (such as accommodation lease costs) have reduced as a proportion of the ACMA's total costs, from 10 per cent of total expenditure in 2005-06 to 7.8 per cent in 2014-15. This reduction has been achieved through long-term management of leases, relocation of staff, renegotiation with property owners and appropriate closure of regional offices in line with more mobile field operations made possible with new digital equipment and evolving field operations models.

Changes in organisation profile to meet priorities

Since its establishment, the ACMA has endeavoured to structure itself to effectively balance its expectations to perform and achieve its objectives with available staff and resources. This has seen an overall decline in the number of divisions, branches and sections within the agency over the last 10 years, providing the opportunity for more streamlined management of decisions and procedures at the operational level.

The current structure comprises four divisions, 10 branches and 64 sections. Changes since 2005-06 are shown below.

Table C2: The ACMA 10-year organisational profile¹³⁴

	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Divisions	5	6	6	6	6	6	6	6	5	4	4
Branches	18	18	18	14	15	16	15	15	14	10	10
Sections	83	84	95	95	96	92	86	84	76	64	64
Average staffing levels	477	501	554	554	591	591	575	559	488	450	409

¹³⁴ Source: Data supplied by ACMA to the Review

Corporate services

The Government is currently carrying out a broad review into shared and common services across all non-corporate Commonwealth entities under the Shared and Common Services Programme. The Programme aims to drive efficiencies through a focused and planned consolidation of transactional and other common, non-core activities.

The Programme is guided by the findings of the National Commission of Audit and the 'Investigation into Optimising Enterprise Resource Planning Systems across the Public Sector'. The areas included are Human Resources, Finance and any other corporate service.

In order to avoid duplication, the Review has not examined the range of matters within the scope of the Shared and Common Services Programme in this review of the ACMA, as they will be reported on separately under that process. However, the Review notes that the ACMA has been taking a strategic approach to considering these issues. The ACMA has been working closely with the Australian Financial Security Authority, Murray Darling Basin Authority, Clean Energy Regulator, Australian Competition & Consumer Commission and Austrade to provide a business case for Medium Agency Corporate Shared Service (MACSS).

The ACMA has been working closely with the MACSS consortium to develop a shared services offering that is fit-for-purpose across the consortium agencies with a focus on being a provider for other medium sized agencies. The MACSS consortium has proposed a hybrid shared services model including internal Commonwealth resources and outsourced services where appropriate. The ACMA is liaising with the Department of Finance regarding the feasibility and potential implementation of these arrangements.

Information and communications technology

Australian Government entities subject to the *Public Governance, Performance and Accountability Act 2013* take part in annual benchmarking of their Information and Communications Technology (ICT) activities. To avoid duplication, the ACMA's ICT activities were not examined as part of this review. Further information about ICT benchmarking can be found on the [Department of Finance website](#).

International benchmarking

A broad comparison of the ACMA to international communications regulators provides a high-level snapshot of comparable operational costs. Recognising there is a wide variation in the remit of regulators, this broad comparison provides a perspective on the resource allocation and relative efficiency each jurisdiction achieves in the number of staff needed to fulfil regulatory functions.

The graphs below provide some broad comparisons with the FCC in the US, Ofcom in the UK, Canadian Radio-Television and Telecommunications Commission (CRTC) in Canada, Bundesnetzagentur (BNA) in Germany and the Commerce Commission in New Zealand (Comcom).

The Review acknowledges that there are similar functions carried out by these regulators, and that there are also numerous differences. The size of the industries regulated, overall population size and differences in government priorities and agency resourcing vary across each jurisdiction. However, as a general guide, the comparisons provide some insight into the overall balance of resources dedicated to agency deliverables compared to agency size, the complexity of issues dealt with, and potential consumer base (using population size as a proxy for the latter). It should be noted that ComCom is responsible for regulatory matters beyond just the communications sector in New Zealand. It is included below as a comparison due to the nature of its regulatory activities, rather than just as a communications specific comparison.

The figures below have been derived from data sourced from public information and financial statements and have been verified with individual agencies where possible. Across jurisdictions fiscal years begin and end at different times and have been aligned as closely as possible for the comparisons below, with the trends over several years being shown to provide context of likely variations. Agency costs have sought to include permanent and contract staff. Data was converted to Australian dollars for these comparisons using an annual average exchange rate for each financial year.

As can be seen in Figure C4 below, the ACMA compares favourably in comparisons of total agency expenditure to total staffing. The graph indicates that the ACMA is able to manage a much higher proportion of agency costs per staff member than other regulators, indicating possible greater efficiency in the utilisation of staff to manage and fulfil the range of agency functions.

Figure C4: Average operating expenses per staff member for international communications regulators (approximate conversions to AUD)

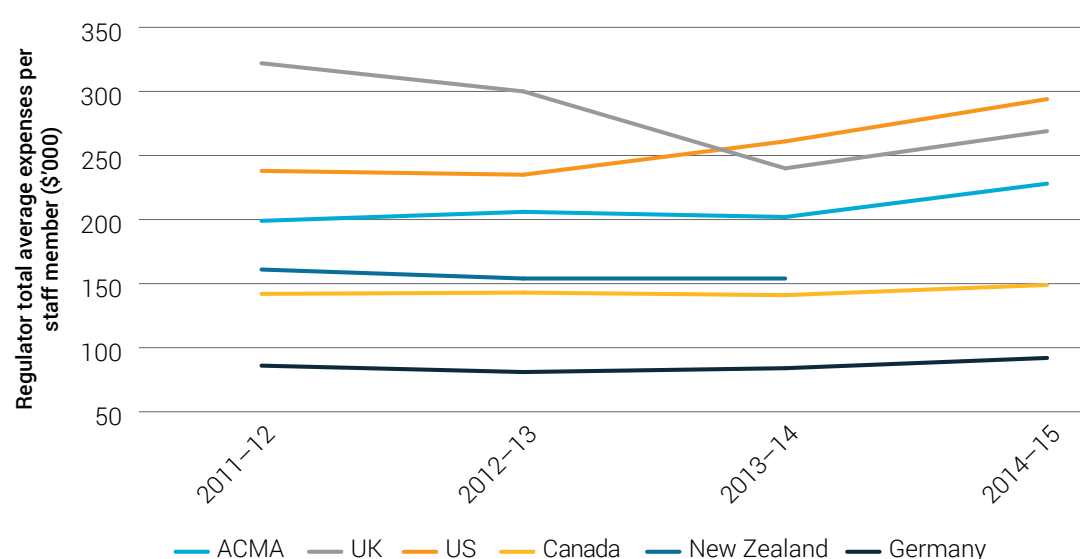
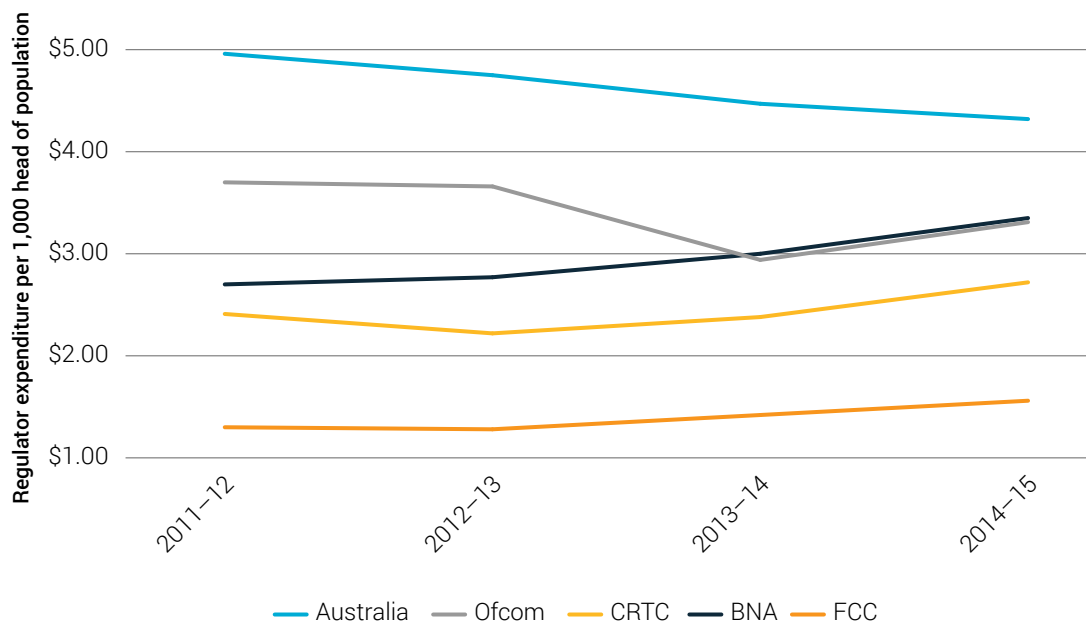


Figure C5: Regulators' expenditure (approximate conversions to AUD)

In comparing regulator expenditure to total population size consideration must be given to potential economies of scale achieved for those regulators operating in larger economies and markets, and with a larger affected consumer base. This graph excludes Comcom, recognising that it regulates a broader range of issues beyond just communications, and therefore is a less useful comparison.

As illustrated in Figure C5, despite broad variations in population size, Ofcom, CRTC and the BNA show a similar level of expenditure per 1000 population. While this graph represents government commitments to resourcing of these regulators, and does not directly demonstrate operational efficiency, it shows that there may be scope for further examination and comparison with the ACMA to the broad range of functions carried out by overseas regulators. This would examine possible approaches to more effective delivery of similar functions within Australia without reducing the quality of services and functions provided.

Domestic benchmarking

The ACMA was also benchmarked against domestic regulators who have comparable regulatory functions when considering the combined roles and complexity of the industry regulated, size and scope of regulatory reach, as well as influence and role of stakeholders. They included the:

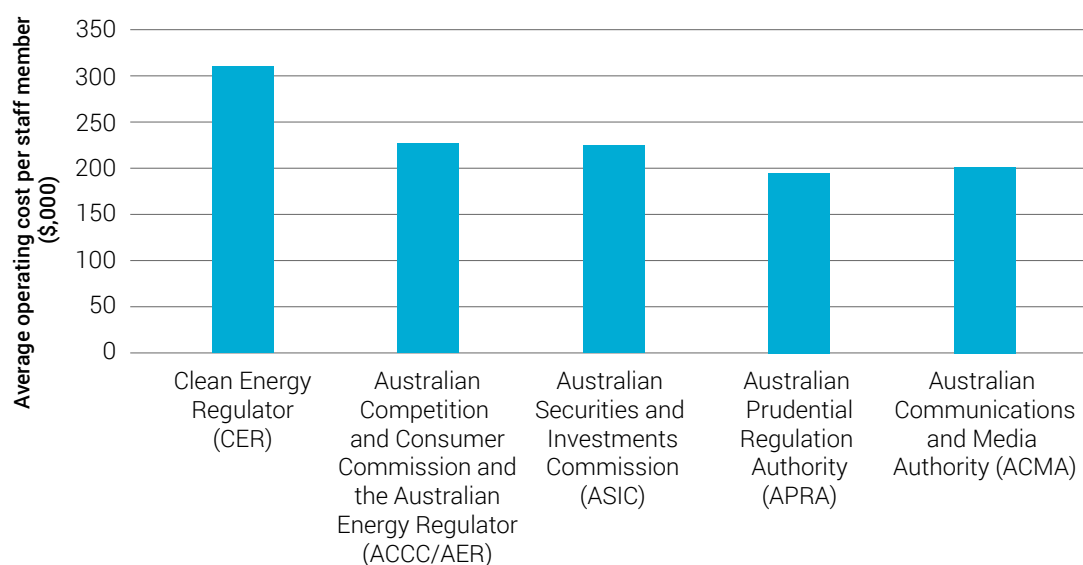
- > Clean Energy Regulator
- > Australian Competition and Consumer Commission

- > Australian Energy Regulator
- > Australian Securities and Investments Commission
- > Australian Prudential Regulation Authority.

Comparing average operating expense per average staffing level (ASL) indicates the overall resource allocation needed to deliver the objectives of each regulator¹³⁵.

Compared to these other regulators, the ACMA has a relatively low average cost per ASL. Over the three years to 2014-15, it was found to have an average operating expense per average staffing level of approximately \$202,000. The other domestic regulators considered ranged between \$195,000 and \$310,000. The ACMA's average operating expense per ASL is about four per cent above the lowest comparable benchmark.

Figure C6: Approximate 3 year average operating cost per ASL (\$'000)



Digital transformation and efficiencies in managing high transactional volumes

During 2014-15, the ACMA processed 10.3 million transactions, excluding Do Not Call Register operations. Approximately 174,000 transactions were not automated and involved staff analysis and processing. In broad terms, the types of interactions the ACMA dealt with varied across:

- > Simple transactions such as information provision and some registrations that are able to be automated.

¹³⁵ ACMA (2015), [Submission to the ACMA Review issues paper](#), p. 12

- > More complex interactions between staff and regulated entities and citizens that involve complaint taking, information-gathering and investigation resolution where these activities are able to be delegated under legislation.
- > Matters that require Authority decision, because of complexity, the level of public interest or where the matter is not able to be delegated. In the 2015 calendar year, the Authority made 281 non-delegated decisions.

The ACMA has been active in investing in ICT systems to manage and automate transactions and allow greater online interaction with stakeholders. The centralisation of contact points through the ACMA Customer Service Centre (CSC) is an example of this, with the centre responding to over 30,000 enquiries in 2014-15. Before the CSC initiative, the ACMA had upwards of 100 different entry points into the agency.¹³⁶

The ACMA is adopting more opportunities to improve digital service channels through the Government's Digital Transformation Agenda, which is led by the DTO. Under this program of work, the ACMA will be required to consider which of its services are not yet fully digital end-to-end, and develop a Digital Transformation Plan to improve digital service delivery and engagement channels with stakeholders.

Functional efficiencies and the role of regulatory review

When considering how the ACMA carries out its functions, it is also useful to look at the regulatory requirements it must follow, and the potential for changes to this regulation and related processes, to create efficiencies that would benefit its operations and stakeholders.

The Review has examined the current framework governing broadcasting licences.

The ACMA is responsible for establishing radio and television licence area plans (LAPs) that determine the number, category and characteristics of broadcasting services to be available in particular areas of Australia that use broadcasting services bands.

The ACMA has a thorough process in place to manage changes to plans that comply with its regulatory responsibilities. However, the existing process is lengthy and it can take over eight months to make decisions for changes to LAPs.

General functions carried out by the ACMA throughout the process include:

- > Policy assessment against legislative and planning criteria;
- > Engineering assessment to determine compliance with planning guidelines;

¹³⁶ ACMA (2015), [Submission to the ACMA Review issues paper](#), p. 76

- > Briefing Authority members on variation proposals;
- > Drafting licence area plan and discussion paper for public consultation;
- > Brief the Authority members on any submissions received from public consultation;
- > Finalise licence area plan instrument, explanatory statement, licence area designation; and
- > Incorporate the variation within the existing registered LAPs.

The process above can be extended depending on specific scenarios. For example, additional consultation that may be carried out for LAPs that affect numerous stakeholders, or which for other reasons are contentious.

As an example of where changes to regulation may benefit both the ACMA and stakeholders, and achieve greater efficiencies in fulfilling its functions, there is potential to streamline the processes above by building greater flexibility into the LAP framework. For example, these could provide licensees with more scope to make minor changes to technical specifications of their services without the need to vary a LAP.

For example, a set of nominal technical specifications in LAPs could be developed that allow a certain level of tolerance for change. These nominal technical specifications would allow for minor deviations from the absolute specifications in LAPs based on an 'envelope' of permitted deviations specified in technical planning guidelines.

Consistent with our observations that the ACMA is taking a pro-active approach to finding efficiencies within the organisation, the ACMA has in place a group of staff from the policy, engineering and legal branches to investigate options for improving the processing currently employed for managing the LAP process, with their focus being on ways to reduce the cost and time to industry in complying with technical regulation of broadcasting.

Conclusion on financial performance and organisational efficiency

Overall the Review found that the ACMA pursues efficiency as a part of its ordinary functions, and that this comes from a focus on evaluation of functions to ensure quality services and outputs, and also from necessity in the face of diminishing staff numbers and pressures on overall funding.

The ACMA has experienced a reduction to funding due to whole-of-government targeted saving measures, efficiency dividends and creation of new entities such as the DTO. This has been achieved with review and restructuring of the organisation efficiently to meet the outcomes required by government.

In comparisons with domestic regulators, and overseas communications regulators, the data indicates that the ACMA is managing its overall resources effectively when comparing total staff available to administer agency functions. Total expenditure compared to population size is relatively higher in Australia than the UK, Germany and Canada, but this could represent current government priorities and investments in regulating these sectors. Nonetheless, further examination to compare agency functions with overseas regulators in the context of overall resourcing, industry needs and consumer expectations would be a useful area of focus for the ACMA.

Draft proposal:

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.

Appendix D: Terms of Reference

The Terms of Reference directed the Review to examine and provide a report to the Minister for Communications and the Arts 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; and
- > 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 was also directed to provide recommendations to the Minister for Communications and the Arts on options for reform in relation to:

- > The future objectives and functions of the regulator;
- > Design settings to enhance performance and the achievement of good regulatory outcomes;
- > 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; and
- > A proposed transition path to implement preferred alternatives to enable proposed changes (if any) to be put in place by 2016/17.

The Review was directed to 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; and
- > Other relevant government policies or matters identified through consultation or research.

The Review does not consider any changes to current conditions for ACMA staff as set out in Part 5 of the *Australian Communications and Media Authority Act (2005)* (the ACMA Act).