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ACMA Review
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ACMA Review – response to issues paper released 13 July 2015

Thank you for the opportunity to provide this submission regarding the Australian Communications & Media Authority (ACMA) Review (the **Review**).

Introduction

The Association for Data-driven Marketing & Advertising (ADMA) is the principal industry body for data-driven marketing and advertising in Australia. Data-driven marketing and advertising includes any marketing communication which uses data-insights, including personal information, to engage with a consumer with a view to producing a tangible and measurable response. Data-driven marketing is platform neutral.

ADMA's primary objective is to help companies achieve better results and efficiencies through the enlightened use of data-driven insights. ADMA serves its members interests by protecting, supporting and championing excellence in data-driven marketing and advertising in Australia and beyond. Originally the Australian Direct Marketing Association, ADMA evolved with the times and became the Association for Data-driven marketing and advertising. Where our previous focus pertained to initiatives such as the *Spam Act* and the Do Not Call Register we now have a much broader remit which encompasses digital, data, security, communications, media and convergence within those areas.

Over 500 member organisations from a broad spectrum of Australian industries belong to ADMA. Members range in size from SMEs to multinational corporations. They include banks and telecommunications companies, advertising agencies, specialist suppliers of marketing services, statutory corporations, retailers, specialist industries such as travel and automotive, charities (both large and small) and educational institutions.

Almost every Australian company and not-for-profit organisation markets to its current and potential customers using data-driven insights as a normal and legitimate part of its business

activities. The ability to continue to conduct this activity underpins a large proportion of Australia's economic activity.

The importance of the digital economy for the future of Australia cannot be understated and this notion has been embraced by the marketing and advertising community and incorporated into its lexicon. In March 2015, Australia's digital economy was valued at \$79 billion or 5.1% of its gross domestic product¹.

Digitisation represents both the now and the future for ADMA and its members and we have a vested interest in ensuring that the right regulatory framework is in place to enable Australia to progress into the future.

Context of the ACMA Review

The stated purpose of the review is "to examine the objectives, functions, structure, governance and resource base of the ACMA to ensure it remains fit-for-purpose for both the contemporary and future communications regulatory environment."

The Australian communications industry today is unrecognisable from the one that existed at the inception of ACMA as a new converged regulator for the sector in 2005. The changes of the last 10 years are likely to pale against the changes that are to come over the next 10. It is understandable then that the Government considers this review timely.

ADMA understands that the review is being undertaken by the Department of Communications, supported by a Reference Group of Australian and international communications experts, and that following the submission period (13 July 2015 to 10 August 2015), the Department of Communications will report to the Minister for Communications by the end of 2015.

We also understand that this review is not undertaken in isolation and that, contextually it dovetails with the Government's broader regulatory reform initiatives as outlined in the Review's Terms of Reference, including: the deregulation agenda and the Regulatory Performance Framework (RPF).

General comments on the ACMA Review

ADMA's interest relates specifically to where the regulator's powers impact on the area of data-driven marketing and advertising. The ACMA Review Issues Paper July 2015 (the **Issues Paper**) affords ADMA an opportunity to advocate for deregulation (with a move towards co-regulation or self-regulation) and to provide input on ACMA's performance against the Government's Regulator Performance Framework.

ADMA has a number of concerns regarding the review process itself, specifically:

1. The breadth of the review itself – between the issues paper and the terms of reference potentially every aspect of ACMA and its operations is up for review.

¹ Deloitte Access Economics, *The Connected Continent II - 2015*

2. The length of the review period – particularly in light of the breadth of the review. Submissions on the issue paper are open for only 29 days.
3. Notice regarding the review itself. As an industry association ADMA would have welcomed the opportunity to seek input from its members prior to making a submission. However given the length of the review period and the lack of communication about the review no member consultation has been possible.
4. Transparency – it is disappointing that there was no word of the review in the ACMA newsletter as this would have been a means of reaching stakeholders in a timely fashion.

Also, of concern is the ACMA Convergence Review, conducted in 2012. The agenda of the government of the time was clearly to disband ACMA. There appears to be no mention of that review or the Finkelstein inquiry in the current review material, in one respect this is understandable but in another it renders the previous consultation meaningless which in turn calls into question the legitimacy of the current review.

On one hand we see a genuine need for a discussion to future-proof regulation of the broader digital, communications and media environment yet on the other we question whether this is simply paying lip-service to the deregulation agenda. Many departments and statutory authorities have been subject to similar rapid and broad-sweeping reviews and ACMA has already recently experienced significant cuts to both funding and staffing levels. That being the case it seems evident that a revision of function and structure must have already occurred and a cynic may say that the dominant purpose of this review is to realign ACMA’s objectives and governance structure in light of its diminished capacity and resourcing.

On the issue of governance, ADMA does question whether having the ACMA Chairman also hold the office of CEO is sound from a governance perspective. However, we are given to understand that the roles are likely to be split after the current Chairman and CEO stands down at the end of 2015.

Specific comments on the ACMA Review

The Issues Paper identified five specific issues for discussion. Addressing each in turn:

1. The communications sector in Australia – stakeholders are asked to provide views on the likely changes in the communications sector over the next 5-10 years and the impact on the role of the regulator.

Even with the benefit of hindsight it is difficult to fathom the changes experienced in the digital and communication’s sector over the last 10 years, to anticipate what comes next is even harder. What we are clear on however, is the need to future-proof both regulators and regulation. We need legislation that is technology neutral and platform agnostic. To be responsive enough to the rate and breadth of change we need to move towards self-regulation as industry itself is best-placed and agile enough to take on this role.

Conceptually, this has already been considered by ACMA itself in its paper *Optimal conditions for effective self- and co-regulatory arrangements*: occasional paper September 2011.

2. What should a future-focused communications regulator look like? – This section seeks views on the purpose, objectives, functions and governance of a best practice regulator.

The key to future-focused regulation in the communications sector is agility. To achieve this ADMA advocates for a move to self and co-regulation. As discussed previously, this approach allows agility through industry responsiveness. The role of the regulator would be to oversee self-regulation by holding industry to account for alignment with broad regulatory principles, to provide guidance as to regulatory interpretation when it is needed and to facilitate complaint resolution if industry-based resolution fails.

3. Enhancing the regulatory performance of the ACMA – how does the ACMA perform currently? Stakeholders are also asked to comment on what are the optimal forward-looking attributes and risk-based approach of a best practice communications regulator.

ADMA has considered ACMA's performance broadly in the context of the Government's Regulatory Performance Framework² which sets out the six KPI's below.

- KPI 1 – Regulators do not unnecessarily impede the efficient operation of regulated entities
- KPI 2 – Communication with regulated entities is clear, targeted and effective
- KPI 3 – Actions undertaken by regulators are proportionate to the regulatory risk being managed
- KPI 4 – Compliance and monitoring approaches are streamlined and coordinated
- KPI 5 – Regulators are open and transparent in their dealings with regulated entities
- KPI 6 – Regulators actively contribute to the continuous improvement of regulatory frameworks

We understand that ACMA entered into a Memorandum of Understanding (the **MOU**) with the Office of the Australian Information Commissioner in October 2014.³ The purpose and scope of which was to:

- “establish a framework for mutual assistance to enable the Parties to:
 - a. effectively perform their respective functions in relation to privacy matters that arise in the context of the:
 - i. regulation of telecommunications, spam and telemarketing by the ACMA, according to law; and

² <https://www.cuttingredtape.gov.au/resources/rpf>

³ <http://www.oaic.gov.au/about-us/corporate-information/memorandums-of-understanding/memorandum-of-understanding-between-the-australian-communications-and-media-authority-acma-and-the-australian-privacy-commissioner-2014>

- ii. handling of Personal Information by APP entities by the Commissioner, according to law; and
- b. minimise duplication of regulatory activity by the Parties where possible.”

ADMA is supportive of the MOU in principle, and it goes a long way to achieving several of these KPI's, however we are yet to see the practical outputs of the relationship.

In 2014 the eMarketing Code of Practice was de-registered despite ADMA's entreaties not to. This created a deficiency in the regulatory guidance available to industry. Similarly we have not been able to illicit a clear guidance update in relation to referral campaigns.

These are two examples in circumstances where ADMA would welcome the opportunity to work more closely with ACMA in order to provide definitive guidance to industry. However, as mentioned previously ADMA now has a broader remit that encompasses digital, data, security, communications, media and convergence within those areas and wishes to foster a meaningful and ongoing dialogue with ACMA with a view to establishing a best practice regime for both the regulatory and industry. Indeed, that dialogue is one that needs to be fostered with Government generally as it underpins the foundation of our digital economy.

4. Maximising the ACMA's efficiency – this section seeks submissions on the efficiency of the ACMA in delivering its functions to support its priorities, any areas requiring improvement, and potential alternative arrangements that could improve efficiency, including functions that could be performed elsewhere, or would be better performed by the ACMA.

This question is extremely broad in its scope and is largely covered by question two above.

5. The communications regulatory framework – how will the ACMA's functions be affected by reforms in the communications regulatory framework being considered by the Government? Stakeholder views are sought on the value of 'enduring concepts' to the regulatory regime.

ACMA administers more than 20 Acts⁴. Given the level of the reform to date there is no doubt that there has been and will be significant impact on ACMA's activities.

The enduring concepts previously espoused⁵ are - market standards (competition, quality, redress and efficiency); social and economic participation (access, confidence and digital

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

⁵ ACMA (2011), 'Enduring Concepts—Communications and media in Australia'.

<http://www.acma.gov.au/theACMA/enduring-concepts-building-blocks-for-a-converged-media-and-communications-future>

citizenship); cultural values (diversity of voices, Australian identity, community values, localism and ethical standards) and safeguards (protection of the public, protection of children, digital information management and the national interest).

The enduring concepts are still relevant as broad concepts. Whether they could be better articulated is academic; at their essence though they capture the prevailing legislative principles that protect consumers viz those pertaining to competition, safety, transparency and inclusion.

Regulation needs a cautious hand, as otherwise we may find that over-regulation serves only to detract from its intended purpose by causing confusion and creating an unnecessary burden. There is already regulatory overlap within the digital space, for example with the activities of the OAIC. ADMA would welcome an ongoing dialogue regarding the duality of regulation and to move towards self-regulation where a more agile and timely response is possible, as ultimately this will benefit both industry and consumers.

Closing comments

ADMA thanks the Department for the opportunity to provide input regarding the ACMA Review Issues Paper.

We note that further public consultation will be held as the review proceeds; as the preeminent association for data-driven marketing and advertising in Australia, ADMA would welcome the opportunity to take part with the Department of Communications and the ACMA Review Reference Group.

Yours sincerely

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