

Australian Broadcasting Corporation

submission to the

Department of Communications

**Review of the Australian Communications
and Media Authority**

August 2015

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Introduction

The ABC welcomes the opportunity to make a submission to the Department of Communications' review of the Australian Communications and Media Authority (the ACMA). The Corporation has had a solid working relationship with the Authority since its establishment as a converged regulator for the communications sector in 2005 and regards itself as a key stakeholder. The ABC's interaction occurs across a range of the ACMA's functions, including spectrum management, broadcasting and content regulation.

The review seeks to consider the objectives, structure, and operation of the ACMA to ensure it remains fit-for-purpose, both now and into the future, and to assess the efficiency of the ACMA and its administration of communications laws and regulations. The ABC believes that the regulator should be empowered as an enabler within the communications and media sector, efficiently administering its regulatory obligations and providing sound advice to the Minister to ensure positive outcomes for audiences without creating undue compliance costs for stakeholders.

The ABC considers that the ACMA operates well and has done much work to improve its interactions with industry. The Authority has regularly sought and obtained feedback from its major stakeholders and, from time to time, has provided detailed papers on issues and/or developments in the communications sector.

As noted in the Review Issues Paper, this review must be seen in conjunction with the 2014 Spectrum Review, which addressed the respective roles of the Minister, the Department and the ACMA in policy formation and canvassed significant change proposals in relation to spectrum management, one of the ACMA's core functions. The ABC submission to that review should be read alongside this one.

The changing market

The Review Issues Paper contains numerous references to the dynamic and complex changes occurring in the Australian communications market. Unarguably, the communications sector has been enormously disrupted by the forces of technology and the consequent impact on consumer patterns and business models.

What used to be a well-defined, segmented and linear market dominated by a small number of established players has become complex and multi-layered, with many content providers. These changes have affected the ABC in myriad ways. Like other media companies, the Corporation has had to adapt its operations, including investing significantly in new technology, up-skilling its workforce for the new environment and creating cross-platform content. It has also had to adapt its audience strategies to attract and retain audience in an increasingly-fragmented market.

Audiences are no longer willing to be locked into linear television and radio schedules. They are increasingly seeking content specifically tailored for devices and formats of their choice, which poses new challenges for the ABC's content divisions.

The Corporation expects increasing global competition to remain a constant in the near future. In addition, audience fragmentation, rapidly-advancing technology and changing audience behaviours will also feature heavily. The ABC considers that the increasing prevalence in the digital space of foreign media providers that are not constrained by the same regulatory requirements as local media organisations is the single largest issue facing media proprietors, audiences, regulators and lawmakers.

Preserving independence

The Issues Paper raises the pressures imposed on the regulator through its administration of its "preferred" co-regulation model. The ABC supports this model and endorses the co-regulatory role that the ACMA plays in relation to the ABC in investigating complaints and enforcing decisions where required.

The Corporation recognises that this review may result in industry-wide regulatory changes and notes that it is important that any changes to the role, responsibilities or powers of the ACMA as industry regulator continue to recognise the independence of the public broadcasters.

Similarly, any regulatory changes as a result of the review should continue to ensure the independence of the regulator from the industry that it regulates.

Under subsection 8(1)(e) of the *Australian Broadcasting Corporation Act 1983* (the ABC Act), the ABC Board is required to develop codes of practice relating to programming matters and any

datacasting service that the Corporation operates under section 6A of the ABC Act, and to notify those codes to the ACMA. Unlike other media organisations licensed under the BSA, the Corporation is not required to develop its code of practice in consultation with the ACMA. This helps to safeguard the ABC's independence.

At the same time, the Corporation is required under subsection 6(2)(a)(ii) of the ABC Act to take account of "the standards from time to time determined by the ACMA in respect of broadcasting services". This provision ensures an appropriate degree of harmonisation between ABC Codes and the content standards applying to the wider industry.

The Corporation believes that the determination of the content standards that apply to its programming is, and must remain, a matter solely for the ABC Board to determine through the process of setting codes of practice in relation to the Corporation's programming matters.

In a similar fashion, the ACMA is not, in the first instance, empowered to hear complaints in relation to alleged breaches of the ABC's Code of Practice by programs and services. Instead, the ABC has a robust and well-established complaints handling process related to alleged breaches of its Code. It is only in the event that the ABC fails to respond to a complaint within specified timeframes or if the complainant does not consider the Corporation's response to their complaint to be adequate, that a person may bring their complaint to the ACMA under Division 2 of Part 11 of the BSA and the ACMA may consider the complaint. The Corporation welcomes and endorses the ACMA's new discretionary power to elect not to investigate complaints made to it, ensuring that regulatory attention is applied to only those matters that merit it, and public funds are used more effectively.

Additionally, this arrangement provides an appropriate balance between preserving ABC independence and providing members of the public with a process of review for complaints about the Corporation's programs and services.

A single regulator

The ABC believes there is merit in retaining the concept of a single, whole-of-sector regulator and that this is preferable to the alternative of a collection of agencies, each charged with specific regulatory roles. This alternative could lead to a lack of transparency and potentially to conflicting or over-lapping requirements being imposed on industry participants.

The effectiveness of a single, unified point of contact for industry regulation hinges on its independence from industry and, in the administration of regulation, from government in order to ensure that all industry participants are treated equally.

The ABC notes that the Department of Communications has established an economic and statistical research arm, the Bureau of Communications Research, to analyse policy trends and issues. While there may be some efficiencies in combining the research work of the Department and the ACMA to provide one whole-of-sector research unit, its success would be

contingent upon having the necessary technical knowledge in all areas of communications policy, including spectrum management.

Governance

The ABC believes that retaining the independence of the Regulator is necessary. However, there is a high level of complexity in the Authority's structure and there may be some merit in considering whether this could be reduced. Doing so may, in turn, reduce confusion in relation to decision-making and process.

A governance model based on an independent board that delegates most regulatory decision-making functions to a Chief Executive Officer and staff, as canvassed in the Issues Paper, provides the best mix of flexibility and efficient decision-making. Under this arrangement, the board's key role would be to appoint the CEO, oversee the direction and performance of the agency and to exercise responsibility for strategic guidance and operational policy.

Maximising efficiency

The Corporation is aware that the ACMA has recently consulted with the industry on its operations. The ABC response below is consistent with the feedback provided directly to ACMA in that consultation process.

The Corporation believes that the industry as a whole would benefit from the ACMA championing a customer-centric service model. For example, the licence-application process can appear overly complex and opaque, rather than simple and direct, with clarity provided to applicants at every step of the process, including whether they will be granted a licence and, if they have failed to satisfy the licensee requirements, what they must do to ensure compliance.

In regards to the interaction of the ABC and the ACMA on complaints handling, the Corporation notes that the number of complaints reaching the ACMA and its predecessor, the ABA, since the introduction of the current regulatory regime in 1992 has consistently been very small, both as a proportion of total audience feedback and in relation to the substantial volume of content that the Corporation provides to audiences. Likewise, the number of complaints about ABC programming upheld by the ACMA has been consistently low. This serves as a demonstration of the effectiveness of the Corporation's complaints-handling processes and the current configuration of ABC and ACMA responsibilities in relation to editorial complaints.

Historically, the Corporation has raised some concerns about aspects of the ACMA's management of complaint reviews, the majority of which have been primarily procedural, rather than a reflection on the appropriateness of the Authority's overarching complaints-review function. For example, there have been instances where the Authority has failed to

give early, specific advice about issues of concern in relation to complaints that it has been investigating. As a result, the ABC has been unable to properly address those issues in its initial submissions to the ACMA and has been instead required to draft detailed supplementary submissions once the substantive issues are revealed in the ACMA's preliminary investigation report. Such situations are inefficient, creating unnecessary work for both ABC and ACMA staff, and could be avoided through greater transparency on the ACMA's part.

The ACMA's administration of the captioning regime has also raised issues of efficiency and client service. Under the requirements of section 130ZZZC of the *Broadcasting Services Act 1992* ("BSA"), the Corporation provides the ACMA with eight annual compliance reports that outline output and technical difficulties experienced in each state and territory. The ABC is then required to re-enter this data into a form specified by the ACMA, which is a resource-intensive process that duplicates information previously provided. These reporting requirements are particularly onerous because the Corporation is obliged by the BSA to caption 100% of its programs on its primary service between 6 am and midnight.

The ABC has submitted captioning compliance reports in this template format since 2012. Following the first report, the ACMA sought feedback from broadcasters on the templates and at that time (January 2013), the ABC expressed concern about the level of detail required and resource intensive nature of the work. In consideration of this feedback, the ACMA has been consulting on the layout and composition of the templates for the past three years. This has delayed the finalisation of reporting requirements and resulted in additional work for broadcasters.

Under the regime, broadcasters have 90 days from the end of the financial year to complete the compliance report. In 2013, 2014 and 2015, the process to amend and simplify forms was not completed before the 90-day preparation period commenced, meaning that, in each of the last three years, the ABC had less than three months to complete the report, instead of gradually contributing to it over the course of a year.

Funding models

The Issues Paper raises the prospect of cost-recovery models to help fund a communications sector regulator. The ABC is a publicly-funded entity. Any system that involves the ACMA transferring the costs of administering the regulatory regime onto those it regulates via increasing licensing or processing fees would disadvantage the national broadcaster. Unlike commercial media organisations, the ABC has no ability to pass on such costs to its consumers and would have to consider how it could meet these costs.

This issue is particularly relevant in the context of spectrum planning and management (see the Corporation's Spectrum Review response). If there is widespread outsourcing of the ACMA's spectrum-management and other functions to third parties, the ABC considers that there should be safeguards put in place to manage any conflicts of interest that may arise in

what is a very small industry; additionally, the Corporation believes that there should be established avenues for review of outsourced administrative decisions.

Broader regulatory framework

The Corporation believes the “enduring concepts” fashioned by the ACMA serve as useful bedrock principles in any reconsideration of the communications regulatory regime. The ABC supports the idea that reasonable and equitable access, open markets and minimum levels of service are crucial elements of a sustainable twenty-first-century policy framework.

The Corporation also believes a strong and vibrant media is crucial to any working democracy and is keen that Australia retains regulatory support for a diversity of voices in the sector. Through its reach and range of programming, the national broadcaster plays an important role in sustaining an informed citizenry and healthy democracy.

The emerging dominance of large, international media companies and the subsequent pressure that this places on local business models should also be borne in mind in considering policy settings for the future. It is vital that the sector continues to create and curate Australian voices and stories for Australian audiences and that Australian voices are not unduly diluted by the influx of foreign content. The ABC considers itself the national town square and, in an increasingly converged world, recognises the responsibility it carries into the future.

Conclusion

The ACMA has a broad and complex remit with a great number of stakeholders. Given the role that communications play in the lives of Australians today, wherever they live, the regulator’s role is of critical importance. It is vital that the ACMA’s objectives, structure, and operation are fit-for-purpose, both now and into the future, and that it efficiently and effectively discharges its responsibilities.

Across all areas of its operations, the ABC considers that it has a constructive working relationship with the ACMA and recognises the work that the ACMA has done over recent years to improve its processes and its interactions with industry. The ABC hopes that the regulator comes out of this review with a renewed clarity of purpose and vision for the future and it looks forward to working with it to that end.