DIGECON RESEARCH

Review of the Australian Communications and Media Authority

Response to the announced Terms of Reference

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Review of the Australian Communications and Media Authority

On 12 June 2015 the Minister for Communications Malcolm Turnbull announced a review of the Australian Communications and Media Authority.[1]

The Minister announced that "The Government is conducting a review of the Australian Communications and Media Authority (ACMA) to ensure the regulator is able to effectively deal with challenges arising from a rapidly changing communications sector."

The announcement said that the Department would be calling for submissions in the near future. This submission is made in advance of that call because experience from previous reviews is that the shape of initial consultation papers significantly impacts the scope of the inquiry.

The submission begins with an analysis of the scope and terms of reference of the review, and the particular methodology that seems to have been adopted for the review.

This submission then turns to a threshold question of understanding the position of "regulators" in the Australian constitutional framework. The approach to regulators is inconsistent in the Australian context. In the specific context of the review it is relevant to question whether regulators are creatures of the Executive, of the Parliament or are quasi-judicial.

Finally the submission will look at the consultation that occurred at the formation of the ACMA and other subsequent reviews to indicate the pitfalls that can be avoided by this review.

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Terms of Reference for the Review

The terms of reference for the review are very tightly focussed on the ACMA as an entity. This is initially outlined in the Scope of the review – which is to consider the **objectives and function**s of the ACMA, its **structure and governance**, the **performance** of the ACMA in administering regulation and its level of **resourcing**.

Each of these focuses on the efficiency and effectiveness of the ACMA. Inherent in them is the assumption that somewhere there is a great degree of clarity about the role of the ACMA.

Objectives and functions of the ACMA

The scope notes the actual vagaries of the of the ACMA's "reason for being" by referring to the "wide ranging" objectives and functions that are supposedly contained in the ACMA Act.

The reality is that the ACMA Act at no time specifies an objective for the organisation. The financial management constructs are determined under s6(2) of the Act by reference to the *Public Governance, Performance and Accountability Act 2013.*

The functions of the ACMA are laid out in detail in section 8 to 10 by reference to activities that are required of the ACMA by various other Acts. These are principally the *Telecommunications Act 199*7 (the TA), the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the TCPSSA), the *Radiocommunications Act 1992* (the RadcommsA) and the *Broadcasting Services Act 1992.* (the BSA)

To the extent that there are objectives specified for the ACMA these are, by extension, the various objects of these other Acts. That is the objectives of the ACMA are to be inferred from s3 and s4 of the TA, (the objects of the TCPSSA are defined by reference to these sections), s3 of the RadcommsA and s3 of the BSA. (see Appendix 1)

These objects themselves vary quite dramatically. In addition the Broadcasting services Act uniquely specifies a Role for the ACMA.

The Telecommunications Act and the Broadcasting Services Act both also include statements of Regulatory Policy. In the case of the Telecommunications Act this is very precise instruction for the regulator to make "the greatest practicable use of self-regulation." In the case of the Broadcasting Services Act there is a precise instruction that regulatory controls be applied according to the "degree of influence" services "are able to exert in shaping community views." The BSA also includes a separate clause on regulatory policy in relation to industry codes.

The difference in detail about the legislative provision in terms of codes, and the approach taken by the ACMA in handling them, is an instructive inquiry for understanding the complexity that has been imposed on the ACMA by creating a converged regulator working with separate legislation.

That said, it can be also argued that the ACMA has also followed in the path determined by its predecessor, the Australian Communications Authority, in not properly understanding the concept of self-regulation and how it is not the same as

co-regulation. (The Executive Director of DigEcon Research, David Havyatt, prepared a paper on this topic in 2010)[2]

The position in relation to the functions of the ACMA is even more extreme than the objects. While the functions of the ACMA are neatly listed in its Act, and repeated in the terms of reference, this short list masks a wealth of detail. Appendix 2 is a simple listing of the functions of the ACMA as detailed in the Telecommunications Act.

The implications of this longer list will be further explored later in this submission.

The practical implication of the above is that were a review of the ACMA to determine that it was not the case that "the wide ranging objectives and functions of the ACMA remain relevant now and for the immediate future" the remedy for that is amendment to an Act other than the ACMA Act. If, however, the review found that the function remained appropriate but was more appropriately located elsewhere that may be possible with minimal amendment.

Expectation of the Review

The more detailed terms of reference break the review into two components. The first is a review of current (recent) performance and the second is recommendations to the Minister about options for reform having regard to a number of specific elements.

Three of the four dimensions for consideration of current performance are quite unexceptional. These are to report on efficiency, performance against the *Regulator Performance framework* and resources. There is, however, some question of the relationship between the ACMA review and that process described in the handbook. A Departmental Review aided by experts is neither an annual self-assessment, but nor does it seem to fit the cycle and mode of external assessment outlined in the framework.

The issue of substance is exactly what the first dimension is – which, written in full to include the stem, reads "The review will examine and provide a report to the Minister for Communications on the current objectives of the entity as determined by the Government's forward priorities, other reviews and contemporary pressures of the broadening 'digital' character of the sector."

This is a confusing sentence, in particular the reference to "current objectives" and "forward priorities."

As discussed above the objectives of the ACMA is to perform its functions as guided by the objects specified in the various Acts. The objectives of the ACMA aren't determined by the executive (the Government) they are determined by the legislature (the Parliament). This reflects, in part, the confused status of "regulators" in the Australian constitutional order, which is the subject of the second section of this submission.

The forward looking component of the Terms of Reference requires the review to provide recommendations to the Minister for reform options that fall under three of the dimensions – the future objectives and functions, the governance arrangements and the appropriate resource base and how that should be sourced. The fourth aspect is to include an implementation plan to be put in place by 2016-

17. It is assumed that "by 2016-17" means that the changes are to have effect in the resourcing decisions included in the 2016 Budget.

A critical question for the review is the extent to which recommendations will need to be trimmed to fit into the proposed transition path. It is hard to envision a report delivered at the end of 2015 making recommendations that required anything other than the most cursory of legislative changes being able to be implemented by 2016-17.

As will be discussed in the third section of this submission the history of regulatory reform to reflect (to paraphrase the ToR) "the [changing] market structure of the communications sector and the impact of digital network technologies changing media forms and communications platforms" has been compromised by short-term and expedient decision making.

As also will be detailed it is not for want of analysis. The analysis available includes:

> "Next Generation Networks (NGNs) and Their Policy, Regulatory and Wider Implications for Australia" Report prepared by Access Economics provided to Government in June 2007 at a cost of $194,040. [3]
>
> The outcome of the contract commenced on 27 April 2012 with PricewaterhouseCoopers for the value of $161,987 described as "Examines telecommunications regulation in light of anticipated developments in service delivery."[4]
>
> The advice provided to the Department r under a contract awarded to Boston Consulting Group for $500,000 described by the Secretary at May 2014 estimates as "a piece of work that I commissioned last year as part of the strategic context for the next version of the Department of Communications—the logical development of the department. It was a review that scanned the communications sector environment—broadband, digital economy and communications—and gave us advice on what major issues we could expect to be dealing with over the next several years. It started the process of considering how best we could organise ourselves in dealing with it. So it was more of a strategic policy review at that stage. [Senator: What kinds of issues did they bring up?] The complete landscape, Senator, from market structures and how they are evolving in broadband and telecommunications, the convergence issues that are happening across the media sector and the entire gamut of the portfolio's interests."[5] (It is understood this is the work Tom Burton was referring to in *The Mandarin* when he wrote "Drew Clarke, the secretary at Communications, has made great strides — with help from the Boston Consulting Group — to re-orientate the department's world around digital.")[6]

The terms of Reference state that "The Department will consult widely and may commission data and/or research to assist the Review process." For consultation to be effective it needs to be on the basis of shared knowledge. For any research expenditure to be efficient it needs to be informed by previous research.

Finally in this section there is some reason to be concerned about the structure of the "ACMA Review - Reference Group of Australian and international communications and regulatory experts." While the idea of a Departmental review

with external guidance is probably a better reflection of reality than the historic structure of external reviewers with a Departmental secretariat, there are three specific elements of the arrangement that could be problematic:

1. Technically the review is more directly under the control of the Minister through his Department and hence cannot be described as "independent" in any way.
2. The inclusion of international experts with direct experience within the Federal Communications Commission and Ofcom continues the practice of the Minister for (an unwarranted) deference to both of these markets and their regulatory and policy constructs. It is surprising that a Minister whose family traces its presence to the earliest days of the colony (the reason for the Minister's middle name) and who led a campaign for an Australian Head of State continues to see these two nations as appropriate benchmarks. (Comparisons to Ofcom and the FCC that were made at the commencement of the ACMA will be highlighted in the third section.)
3. Two of the domestic experts are currently employed by firms subject to the regulator and regime. They will presumably be in charge of the preparation of submissions by those firms. It raises the question of whether those two firms are deriving some significant additional ability to have their views considered – or to comment on the views of others.

None of these are reasons why the review should not be eagerly embraced. They do indicate, however, reasons why there may be scepticism about its outcomes.

Understanding regulators

The function of a regulator

The Australian National Audit Office in its Best Practice Guide (the ANAO Guide) defines a regulator as "Any Australian Government agency or department empowered by legislation to administer and enforce regulation. This can be an agency specifically established for this purpose or a function within a department."[7]

The Victorian Competition and Efficiency Commission defines a regulator as "A State Government entity (either independent or within a department) that draws from primary or subordinate legislation one of more of the following powers in relation to businesses and/or occupations: inspection, referral, advice to third parties, licensing and accreditation or enforcement."[8]

The definition of "regulatory agency" provided on Wikipedia includes that the agency is "responsible for exercising autonomous authority over some area of human activity in a regulatory or supervisory capacity." The concept of autonomous authority is important in understanding regulatory functions separately to other administrative functions that might more normally occur in a Department.

When a regulator under the ANAO definition is a function within a department it is a part of executive government. To genuinely be a regulator it needs to be able to exercise its functions without seeking Ministerial approval, but it may still be subject to Ministerial direction.

When the regulator is referred to as a statutory regulator or an independent regulatory agency it derives its authority from the statute that establishes it and, in theory at least, is responsible directly to the legislature for the performance of its regulatory functions.

However, independent regulators are still usually dependent on the executive for funding. (In the USA where independent regulators have a longer tradition of being independent reducing funding is a means by which their activity has been curtailed.[9])

The ANAO Guide identifies four key regulatory activities: licencing, monitoring compliance, managing non-compliance and responding to an adverse event (that is the outcome when an adverse outcome occurs because either the rules were deficient or the rules weren't followed).

There are other functions that regulators can and do perform. They are frequently provided with delegated rule-making powers and charged with the allocation of government resources (for example, spectrum).

The function of the regulator usually includes responsibility for education of citizens and provision of information to an accountable Minister, including on the effectiveness of the regulatory regime in meeting objectives.

In summary, an independent statutory regulator might have responsibility for each of the following things:

- Licencing

- Rule-making (including standards)
- Monitoring compliance (including inspection)
- Managing non-compliance (enforcement or referral)
- Responding to regulatory failure (i.e. a negative community outcome)
- Community education and awareness
- Provision of information and advice

The challenge in the Australian context is that independent regulators are designed to be independent of the executive, but the degree to which they are held directly accountable to the Parliament varies from those that have special hearings (ACCC, RBA) to others that at least face scrutiny at estimates and then others that might only provide annual reports. (Indeed it is hard to identify a list of all the agencies that might fit the definition of regulator provided in the ANAO Guide).

How the functions listed above can vary from regulator to regulator (or even function to function within one regulator) will be discussed shortly. Before that it is worthwhile having a short discussion of what is meant by "regulation."

Understanding regulation

Distinguishing policy and regulatory functions

Policy is a definite course or line of action, in this case, as adopted by a Government. Good policy is a coherent framework for individual actions.

Policy includes a number of elements; it includes objectives, legislation, institutional structures, and programs. It also includes the rhetoric or dialogue by which policy makers shape and influence the expectations of others in society.

The importance of framing is well understood by politicians in the context of winning elections, but is frequently underestimated in the policy context. Inflation targeting is a case where the framing itself has had a direct impact on behaviour – knowing that the consequence of high wage demands and hence high inflation will be high interests rates mitigates against those wage demands.

Policy in this sense is the activity that creates the regulatory framework within which regulatory functions takes place. In Federal legislative parlance, the Parliament makes Acts which establish certain powers, and executive government makes Regulations under these Acts. Capital R Regulations are a particular kind of sub-ordinate rule. There are also (at least) Determinations, Directions and Codes. All of these are regulations.

Sometimes an independent regulator is given the power to make regulations of this kind – referred to as rule making.

Regulators are sometimes described as having a policy role, most often in their own self-description. The exercise of a rule-making power can lead to the thought that this is a policy action, but in a well performing system rule-making is an application of policy rather than being policy.

In the specific context of the ACMA the Telecommunications Act the 'Regulatory Policy" is an instruction to the regulator on how to perform its functions.

Distinguishing between policy functions and regulatory functions is a key element in the design of any regulatory framework.

Regulation and markets

Sometimes it is hard to understand where various commentators stand on regulation because on the one hand we are supposed to value the "rule of law" while on the other "regulation" is decried as being red tape or interfering in the market.

A distinction is drawn by theorists between regulation and private law in the sense that private law is a matter between market participants, whereas regulation deals with a collective organisation.[10] Under this view regulation is directive, public and centralised.

In an era of general acceptance of the "efficiency of markets" there has grown a theory of regulation that justifies regulation where there are instances of "market failure" – "the failure of a more or less idealized system of price-market institutions to sustain "desirable" activities or to estop "undesirable" activities."[11]

Classical causes of market failure include monopoly, externality, public goods and information asymmetry.

However, it is a poor approach because all markets suffer from some of these "imperfections." The "failure of market failure" can be ascribed to either the fact that since all markets are "imperfect" the principle authorises regulation everywhere or because the theory of markets assumes costless transactions which don't occur anywhere.[12]

A better approach is to think of regulation as the function of "market design." Different markets have different design rules – including the difference between sticker price retail, bargaining, and auctions. The ASX operates as a version of sticker price trading, but the rules (including market information) were co-operatively defined over time.

Ultimately so-called "private law" is also regulation, "property rights" are a social construction and the law of contract is that part of market design that enables the two parts of a market transaction (what A gives B, and what B gives A) to occur at different times, and that warrants that what is being given is what is purported to be given, etc.

Another example of where public law "regulates" to create markets is in the application of "standards." The ACMA is responsible for the regulation of certain standards.

It is salutary to note in this 800th anniversary of the Magna Carta that this document, revered as a seminal document in forming a state typified by the rule of law, included a standard. Clause 35 states ") There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russet, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly."[13]

Regulatory quality depends on both the underlying regulation and the performance of the regulator. Poor regulatory outcomes often result in the

executive blaming the regulator and the regulator arguing the problem is with the statute.

The regulatory functions of the ACMA

As outlined in the previous section the functions of the ACMA are far more extensive than the short list that appears in the Terms of Reference. The individual functions run to the hundreds. All of them, however, can be categorised into one of the class of functions listed above.

However, within that there is a variety of specific approaches. For example in licencing there is an explicit process for licencing carriers, two types of specific radiocommunications licences and there are various broadcasting licences. The ACMA also licences cable installers. There are "class licences" for carriage service providers and for some categories of radiocommunications.

Similarly diverse characteristics apply to the rule-making powers of the ACMA, with different time scales required and different consultation processes, publication and review requirements. This includes the "rule making" inherent in "registered codes."

A proper review of the ACMA would begin by listing all the functions of the ACMA and identifying which of them fall into the wider categories. To give the ACMA any chance of being effective the review would then consult widely and identify how many of these could be simplified to rely on common processes and procedures.

An area that is under-developed in Australian regulatory practice is the creation of regulatory discretion and forbearance.

In the area of discretion there is much of the conduct of the ACMA that is proscribed in legislation that could be left to the ACMA to develop its own procedural rules. Another aspect of discretion is to allow the regulator to specify a rule that it will not enforce if certain other conduct occurs.

An example of the application of discretion that could apply from the joint activity of the ACMA would be in relation to misleading and deceptive conduct. An industry code specifying the form of advertising could be regarded as creating a form of safe harbour. Transgression could be responded to by the ACMA issuing an infringement notice with penalty. If the provider wanted to dispute the notice they would need to demonstrate that the ad did not breach the code or, if it did breach the code, it was still not misleading or deceptive.

Australia's System of Regulators

The Monash Business Policy Forum, under the provocative title *Rationalising rustic regulators* has argued that there is an incentive for Government to create independent regulators. The incentive is argued to be that the arm's length agency can be blamed for outcomes.

This doesn't accord with the reality that it is often business that demands the regulator be free from political interference.

More particularly most Australian regulators have been established with the model that appointments are made for five years enabling a degree of quasi-judicial

status. Certainly in the case of the ACMA the power to make certain enforcement decisions has been supported by the courts.

The report outlines five basic principles that "should apply to regulators and their operations in order to address concerns about their design and operation:

- Ongoing relevance
- Clear and appropriate objectives and functions
- Independence and clarity in decision making
- Accountability and transparency
- Efficient and expeditious processes"[14]

These are reasonable standards, though always simpler to pronounce than apply in detail. The report singles out the ACMA as failing many of them.

Nonetheless the proposal to restructure the regulatory landscape into just four has merit. The four regulators proposed are:

- Australian National Markets Commission
- Australian Competition Commission
- Australian Consumer Protection Commission
- Australian Essential Services Commission.

Given the complexity of achieving even one reform in the case of merging the ACA and ABA to make the ACMA, and the failings that accompanied the restructure of financial regulators following Wallis, this is probably too ambitious a program.

It does, however, suggest an additional lens through which the functions of regulators should be examined. If the internal operation of each regulator can be structured to reflect this four way division then communities of practice, cross-membership and other devices can be developed to improve individual regulatory performance.

History of the Formation of the ACMA

This section simply addresses some of the history from the formation of the ACMA and hence lessons to be learnt in the current review.

The report of the Senate Environment, Communications, Information Technology and the Arts References Committee inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters was titled "A lost opportunity?" That title reflected the concerns raised by many participants that a converged regulator was being created without converging the regulations.

The AAPT submission recommended that the Bill be amended requiring a review of "the policy objectives and regulatory policy in the principle legislation" to be completed and tabled by 1 July 2006.[15]

Unfortunately the Committee itself recommended:

> *The Committee recommends that the main bill be amended to require that within 18 months of establishment ACMA commence a review of its operations, and systematically review the entire regulatory policy for communications in light of future challenges. The review report should be tabled in Parliament within two months of its receipt by the Minister. The review should reconsider the recommendations of both the Productivity Commission Report on Broadcasting and the ACCC Report on Emerging Market Structures in the Communications Sector, as well as any policy reviews currently underway* [16]

This was an illogical conclusion, based as it was on the concept that the executive would allow an independent regulator to review its own legislation. The Government argued that such reviews would occur – but they didn't.

Even the Convergence Review commissioned by Senator Conroy was hamstrung by a confusing, and ultimately inadequate, terms of reference. The telecommunications industry knee deep in NBN implementation issues had no appetite for such a review.

The formation of the ACMA also took place in the context of the Uhrig report. The corporate governance principles recommended for statutory authorities were inappropriate for authorities that functioned as independent regulators.[17]

Fundamentally the Government should establish a Regulatory Agencies Act that specifies the general principles that will apply to the structure and governance of independent regulators.

Conclusion

This submission has not sought to direct itself to the specific questions in the review issues paper. The review's focus on the regulator rather than the regulatory functions is disappointing.

Meaningful review of the ACMA should start with an agreed list of the actual functions of the ACMA at the level of detail of Appendix 2 but for the entire set of Acts that empower the ACMA.

Appendix 1

Objects of the Principle Acts that empower the ACMA

Objects

Each of the Broadcasting Services Act, Radiocommunications Act and Telecommunications Act (and the TCPSS act) include objects sections. These are detailed below

Objects of the Broadcasting Services Act (s3)

The objects of this Act are:

(a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information; and

(aa) to promote the availability to audiences and users throughout Australia of a diverse range of datacasting services; and

(b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; and

(ba) to provide a regulatory environment that will facilitate the development of a datacasting industry in Australia that is efficient, competitive and responsive to audience and user needs; and

(c) to encourage diversity in control of the more influential broadcasting services; and

(e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity; and

(ea) to promote the availability to audiences throughout Australia of television and radio programs about matters of local significance; and

(f) to promote the provision of high quality and innovative programming by providers of broadcasting services; and

(fa) to promote the provision of high quality and innovative content by providers of datacasting services; and

(g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance; and

(h) to encourage providers of broadcasting services to respect community standards in the provision of program material; and

(ha) to ensure designated content/hosting service providers respect community standards in relation to content; and

(i) to encourage the provision of means for addressing complaints about broadcasting services; and

(j) to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them; and

(ja) to ensure that international broadcasting services are not provided contrary to Australia's national interest; and

(k) to provide a means for addressing complaints about certain internet content; and

(l) to restrict access to certain internet content that is likely to cause offence to a reasonable adult; and

(m) to protect children from exposure to internet content that is unsuitable for children; and

(n) to ensure the maintenance and, where possible, the development of diversity, including public, community and indigenous broadcasting, in the Australian broadcasting system in the transition to digital broadcasting.

Objects in Radiocommunications Act

The object of this Act is to provide for management of the radiofrequency spectrum in order to:

(a) maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum;
(b) make adequate provision of the spectrum:
  (i) for use by agencies involved in the defence or national security of Australia, law enforcement or the provision of emergency services; and
  (ii) for use by other public or community services;
(c) provide a responsive and flexible approach to meeting the needs of users of the spectrum;
(d) encourage the use of efficient radiocommunication technologies so that a wide range of services of an adequate quality can be provided;
(e) provide an efficient, equitable and transparent system of charging for the use of spectrum, taking account of the value of both commercial and non-commercial use of spectrum;
(f) support the communications policy objectives of the Commonwealth Government;
(g) provide a regulatory environment that maximises opportunities for the Australian communications industry in domestic and international markets;
(h) promote Australia's interests concerning international agreements, treaties and conventions relating to radiocommunications or the radiofrequency spectrum.

Objects in the Telecommunications Act

(1) The main object of this Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, is to provide a regulatory framework that promotes:
  (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
  (b) the efficiency and international competitiveness of the Australian telecommunications industry; and
  (c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.

(2) The other objects of this Act, when read together with Parts XIB and XIC of the Competition and Consumer Act 2010, are as follows:
  (a) to ensure that standard telephone services and payphones are:
    (i) reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and
    (ii) are supplied as efficiently and economically as practicable; and
    (iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;
  (c) to promote the supply of diverse and innovative carriage services and content services;

(d) to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community;
(e) to promote the effective participation by all sectors of the Australian telecommunications industry in markets (whether in Australia or elsewhere);
(f) to promote:
    (i) the development of the technical capabilities and skills of the Australian telecommunications industry; and
    (ii) the development of the value-adding and export-oriented activities of the Australian telecommunications industry; and
    (iii) research and development that contributes to the growth of the Australian telecommunications industry;
(g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:
    (i) the provision of telecommunications networks and facilities; and
    (ii) the supply of carriage services;
(h) to provide appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants in sections of the Australian telecommunications industry;
(i) to promote the placement of lines underground, taking into account economic and technical issues, where placing such lines underground is supported by the affected community;
(j) to promote responsible practices in relation to the sending of commercial electronic messages;
(k) to promote responsible practices in relation to the making of telemarketing calls;
(l) to promote responsible practices in relation to the sending of marketing faxes.

Regulatory Policy

The Broadcasting Services Act and the Telecommunications Act both include statements of Regulatory Policy. These can only be interpreted as guidance to the ACMA.

Regulatory Policy in the Broadcasting Services Act

(1) The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.

(2) The Parliament also intends that broadcasting services and datacasting services in Australia be regulated in a manner that, in the opinion of the ACMA:
(a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and datacasting services; and
(b) will readily accommodate technological change; and
(c) encourages:
    (i) the development of broadcasting technologies and datacasting technologies, and their application; and
    (ii) the provision of services made practicable by those technologies to the Australian community.

(3) The Parliament also intends that internet carriage services supplied to end-users in Australia, be regulated in a manner that:
- (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on internet service providers; and
- (b) will readily accommodate technological change; and
- (c) encourages:
  - (i) the development of internet technologies and their application; and
  - (ii) the provision of services made practicable by those technologies to the Australian community; and
  - (iii) the supply of internet carriage services at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community.

(3AA) The Parliament also intends that designated content/hosting services be regulated in a manner that:
- (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on the providers of those services; and
- (b) will readily accommodate technological change; and
- (c) encourages:
  - (i) the development of communications technologies and their application; and
  - (ii) the provision of services made practicable by those technologies to the Australian community.

Also covered in s130J -
The Parliament intends that bodies or associations that the ACMA is satisfied represent sections of the industry should develop codes (***industry codes***) that are to apply to participants in that section of the industry in relation to the industry activities of the participants.

Regulatory Policy in the Telecommunications Act

The Parliament intends that telecommunications be regulated in a manner that:
- (a) promotes the greatest practicable use of industry self-regulation; and
- (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;

but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.

Role of the ACMA

The Broadcasting Services Act uniquely has a reference to the role of the ACMA.

(1) In order to achieve the objects of this Act in a way that is consistent with the regulatory policy referred to in section 4, the Parliament:
- (a) charges the ACMA with responsibility for monitoring the broadcasting industry, the datacasting industry, the internet industry and the commercial content service industry; and
- (b) confers on the ACMA a range of functions and powers that are to be used in a manner that, in the opinion of the ACMA, will:
- (i) produce regulatory arrangements that are stable and predictable; and
- (ii) deal effectively with breaches of the rules established by this Act.

(2) Where it is necessary for the ACMA to use any of the powers conferred on it by this Act to deal with a breach of this Act or the regulations, the Parliament intends that the ACMA use its powers, or a combination of its powers, in a manner that, in the opinion of the ACMA, is commensurate with the seriousness of the breach concerned.

(3) This section does not, by implication, limit the functions and powers of:
(b) the Australian Competition and Consumer Commission; or
(c) any other body or person who has regulatory responsibilities in relation to the internet industry.

Appendix 2

Functions of the ACMA under the Telecommunications Act

The functions of the ACMA under the *Telecommunications Act* are widespread and varied. It is deceptively simple to refer to them as they have been in the Terms of Reference for the review as a single item.

Many of these functions could be simplified, refined or include additional regulatory discretion. Without reviewing the functions in detail no significant reform of the ACMA can realistically occur.

The ACMA's Functions Under the TA

1. Carrier licences (Part 3 Division 3)
    a. To grant, refuse or cancel carrier licences
    b. To provide a copy to the Communications Access Co-ordinator (in AGD) and act on direction including informing applicant.
    c. The ACMA may give written direction to a carrier that has contravened a condition of its licence (Schedule 1 or specific) to take specified action directed towards ensuring that the carrier does not contravene the condition in the future (subject to a lot of exemptions).
    d. The ACMA may issue a formal warning if a carrier contravenes a condition of the carrier licence held by the carrier.
    e. Collect charges payable in respect of carrier licences and if not paid cancel the licence. May charge late payment penalties.
    f. (Division 4) Make or revoke "nominated carrier declarations" in respect of network units.
    g. (Division 5) Maintain a register of carrier licences and nominated carrier declarations.
2. Service providers (Part 4) (Note Service Providers are defined by the actions they perform and not by the ACMA or a licence).
    a. Division 2 – SPs must comply with rules in Schedule 2 or in force under s99. An s99 determination is rule-making by ACMA setting out rules that apply in relation to supply of a service. S99 rules can only cover matters in the "regulations" or in s346. A s99 determination may empower ACMA to make decisions of an "administrative character."
    b. (If an SP contravenes) ACMA may give written direction requiring the provider to take specified action directed towards ensuring that the provider does not contravene the rule.
    c. (If an SP contravenes an SP rule) ACMA may issue a formal warning.
3. Monitoring Performance of C/CSPs (Part 5)

a. ACMA must monitor and report annually on all matters with particular reference to customer service, consumer benefits and quality of service.
b. ACMA must have regard to worlds best practice indicators it considers appropriate.
c. The report MUST include matters listed at s105(3)
d. Must report on CSPs carrying out obligations under Part 5 of the TCPSSA (CSG)
e. Must report on operation AND COSTS OF COMPLIANCE of Part 14 (National Interest Matters)
f. Must monitor and report on any matters specified in writing by Minister

4. Industry Codes and Industry Standards (Part 6)
    a. ACMA may determine that persons carrying on a certain kind of telecoms(or telemarketing, fax marketing) activity constitutes a section of the industry for this part.
    b. Parliament intends that bodies the ACMA is satisfied represent sections of the (three industries) should develop codes that are apply to those industries.
    c. The Parliament intends that the ACMA, in exercising its powers under (this Part) will act in a manner that enables public interest considerations to be addressed in a way that does not impose undue financial and administrative burdens on participants.
    d. (There follows a list of requirements of things codes can't cover – but all of this is before the concept of "registration" is introduced.)
    e. If the ACMA is given a (suitable) code by an association it must register the code (very long list of things it has to be satisfied of including consultation by industry – structure doesn't actually say it can't register codes that don't meet this list)
    f. The ACMA may request an association to develop a code, or advertising seeking an association to write such a code.
    g. The ACMA must vary a code on application by body that developed it (slightly shorter list of requirements)
    h. If the ACMA is satisfied that a person has contravened a registered code the ACMA may direct them to comply.
    i. The ACMA may issue a formal warning if a person contravenes an registered code.
    j. ACMA may de-register codes
    k. If the ACMA made a request for a Code and none was forthcoming or there is no industry body the ACMA may make an industry standard. If the ACMA is satisfied that a code has failed, or by direction of the Minister, the ACMA may make a standard. By legislation ACMA had

to make telemarketing standards for telemarketing for the Do Not Call Register and fax marketing.

l. The ACMA may issue formal warnings for breach of a standard.
m. ACMA may vary or revoke standards.
n. ACMA must consult before making a standard.
o. ACMA must maintain a register of industry codes(http://www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-codes) and industry standards (http://www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-telco-industry-standards)
p. The ACMA may re-imburse association for costs of a consumer-related industry code.

5. Layer 2 bitstream service (Part 7) and superfast fixed-line networks (Part 8) make requirements about use of certain networks, no specific monitoring function assigned. (in only instance ACCC formed view on compliance)
6. Protection of communications (Part 13) – requirements on not disclosing information including IPND data, providing info to ACMA is a category of exemption.
    a. ACMA must make a scheme for the granting of authorisations for access to the IPND for research or directory creation – ACMA may be empowered to make administrative decisions and must consult.
    b. ACMA may give direction to take action to rectify contravention of the authorisation made under the scheme.
    c. ACMA may issue formal warnings for contravention.
    d. At time of providing the ACMA Annual report under the PGPA Act ACMA must give separate report on compliance under this scheme. (Why the annual report not the Communications Report?)
    e. If an emergency management person discloses information must give a written report to the ACMA (and Info Commissioner)
    f. Carriers and SCPs must keep records of information disclosure and must give copy to ACMA annually.
7. National Interest Matters (Part 14) – the ACMA must do its best to prevent telecoms being used in the commission of offences, and must give assistance to law enforcement. (Carriers and CSPs have same obligation)
    a. The ACMA is to appoint an arbiter if C/CSP and agency can't agree on terms of access.
8. Defence and disaster (Part 16) –
    a. defence authorities can issue directive about supply of specific services "A notice issued by a defence authority requiring a carriage service provider to supply a carriage service in particular circumstances is of no effect if there is in force a written certificate issued by the ACMA stating that, in the ACMA's opinion, it would be

unreasonable for the provider to be required to supply the service in those circumstances.

   b. Defence authorities may prepare draft agreements for network survivability – ACMA may certify the agreement is reasonable and in doing so must consult and may vary or withdraw certification.
   c. If the agreement is certified C/CSP may be required to enter into the agreement.
   d. Carrier licence condition under s63 and SP determinations under s99 may make provision for compliance with a disaster plan. (no ACMA role other than enforcement of licence condition or SP rule)

9. Pre-selection (part 17) ACMA makes determinations requiring pre-selection (must do so for services declared for the purpose by the ACCC). ACMA may incorporate codes and standards in determination.
   a. ACMA may provide exemptions from pre-selection and use of over-ride codes.
10. CLI (Part 18) CLI must be provided from STS. ACMA may determine services other than STS for which CLI is required. ACMA may exempt an STS from requirement.
11. ACCC administers Rules of Conduct about dealing with international telecommunications operators (Part 20, Division 3) – must consult ACMA before making a determination or giving a direction.
12. Deployment of fibre (greenfields) (Part 20A) ACMA may have powers or functions conferred in relation to developments in instrument of Minister, must be consulted by ACCC in making a certificate exempting a facility from carrier access,
13. Technical Regulation (Part 21) ACMA may make standards and may require labelling of equipment. ACMA may grant cable licences, make cabling provider rules and authorise cabling work. ACMA may prohibit supply or possession of dangerous equipment.
   a. S376 standard making power, s380 disability equipment power , Div5A Layer 2 standards, S384 Can make interconnection standards if directed by the ACCC to do so (hasn't been)
   b. must make standard if directed by Minister,
   c. ACMA may incorporate voluntary or "industry" standards
   d. S378 must consult in making standards
   e. S390 May issue connection permits
   f. S404 may make connection rules
   g. S407 may require equipment to be labelled – labelled equipment may not be refused connection
   h. Supply of unlabelled equipment prohibited
   i. Protected symbols not to be used other than as approved
   j. ACMA may declare what cabling work is covered and may make rules covering the work.

k. ACMA may licence cabling providers
l. Cabling licences may be suspended or revoked
m. May delegate the licencing power
n. Must maintain a register of cabling licences (not that I can find it)
o. Remedies – ACMA only has power to order reconnection of equipment disconnected from a network on erroneous grounds that it is dangerous
p. ACMA may prohibit specified equipment or cabling
q. Division 13 provides mid-tier powers for certain cabling offences

14. Numbering (Part 22) ACMA makes a numbering plan , allocates numbers
    a. Makes numbering plan
    b. Must consult on numbering plan
    c. Can make rules about number portability under direction of ACCC
    d. ACCC can arbitrate on costs of portability
    e. Providers must comply with plan (inc portability)
    f. Allocates numbers
    g. Consults on allocation system
    h. Maintain a register of allocations
    i. Collect numbering charges
    j. ACMA may declare someone a manager of electronic addressing
    k. ACMA may direct the manager
15. Part 23 SFOA – permits contracting by standard form (ACMA no longer has role)
16. Part 24 – establishes carrier powers and immunities under Schedule 3
17. Part 24A – establishes Schedule 3A
18. Part 25 – ACMA may hold public inquiries, Minister may direct
19. Part 26 – establishes that the ACMA may investigate a long list of things:
    May refer complaints to ombudsman or ACCC or Information Commissioner

    (a) a contravention of this Act;

    (aa) a contravention of the Telecommunications (Consumer Protection and Service Standards) Act 1999 or regulations under that Act;

    (aaa) a contravention of Part 6 of the Telecommunications Universal Service Management Agency Act 2012;

    (ab) a contravention of the Spam Act 2003 or regulations under that Act;

    (ac) a contravention of the Do Not Call Register Act 2006 or regulations under that Act;

    (b) a contravention of a code registered under Part 6;

    (c) a failure by a carriage service provider to comply with an obligation, or discharge a liability, under Part 5 of the

Telecommunications (Consumer Protection and Service Standards) Act 1999;

(d) a matter relating to the supply of, or a refusal or failure to supply, a carriage service;

(e) a matter relating to the connection of, or a refusal or failure to connect, customer equipment;

(f) a matter relating to the performance of the ACMA's telecommunications functions, or the exercise of the ACMA's telecommunications powers; except to the extent (if any) to which the matter relates to the content of a content service

20. ACMA has information gathering powers and may make record keeping rules
21. ACMA may appoint "inspectors", may get search warrants under Spam Act, search and seizure under Spam Act and Part 21 (technical regulation)
22. Part 30 ACMA may seek injunctions for breach of Act
23. Part 31 ACMA may institute proceedings for civil penalties
24. Part 31A ACMA may accept enforceable undertakings
25. Part 31B Officers may give infringement notices for civil penalty provisions – such notices create ability for recipient to avoid action if payment is made
26. Part 33 – structural separation guff
27. Part 34 – wide ranging power to give directions,
28. (additional enforcement obligations under schedules and possibly community education)

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[1] The Hon Malcolm Turnbull. Minister for Communications. 2015 Media Release 'A future-focused regulator for the communications market' 12 June 2015 Available at http://www.minister.communications.gov.au/malcolm_turnbull/news/a_future-focused_regulator_for_the_communications_market

[2] David Havyatt 'Self-regulation in telecommunications didn't fail – it was never really tried' http://www.havyatt.com.au/docs/wps/Self_Regulation.pdf

[3] Referred to in David Havyatt Next Generation Policy and Regulation: Paper presented to the ATUG Future Forum " 2008 Available at http://www.havyatt.com.au/docs/speeches/ATUG2.pdf

[4] Department of Communications SENATE ORDER ON DEPARTMENTAL AND AGENCY CONTRACTS 2012 at https://www.communications.gov.au/sites/g/files/net301/f/Accessibility_Version.pdf

[5] Estimates Hansard Environment and Communications Wednesday, 28 May 2014 Page 5.

[6] Tom Burton 2015 "Tom Burton: is Turnbull just putting lipstick on the ACMA pig?" *The Mandarin* 15 June 2015 http://www.themandarin.com.au/39623-tom-burton-turnbull-lipstick-acma-media-regulation/

[7] Australian National Audit Office *Administering Regulation: Achieving The Right Balance (Better Practice Guide)* June 2014

[8] Victorian Competition and Efficiency Commission 2013 *The Victorian Regulatory System 2013* Available at http://www.vcec.vic.gov.au/Publications/Victorian-Regulatory-System/VRS-2013

[9] Thomas Frank 2008 *The wrecking crew: how conservatives rule* Trove entry http://trove.nla.gov.au/work/33924798

[10] Anthony Ogus 1994 *Regulation: Legal form and economic theory* Clarendon Press Trove reference *http://trove.nla.gov.au/version/209265935*

[11] Bator, Francis M 1958 'The Anatomy of Market Failure' *The Quarterly Journal of Economics* Vol 72 No 3 Pp351-379

[12] Kay, John 2007 'The Failure of Market Failure' *Prospect Magazine* August 2007 and Richard O. Zerbe Jr. and Howard E. McCurdy 1999 'The Failure of Market Failure' *Journal of Policy Analysis and Management*, Vol. 18, No. 4, 558–578. Kay adopts the former position and Zerbe & McCurdy the latter. That market failure can be attributed to transaction costs can be identified in two simple cases. Information asymmetry can be overcome by further information discovery but this dramatically increases search costs. Monopoly power can be overcome by entering into sufficiently long term contracts so that the profit maximising incentive includes the dynamics of more rapid utilisation, but longer term the contract the higher the transaction cost.

[13] See more at: http://www.bl.uk/magna-carta/articles/magna-carta-english-translation#sthash.uTFZOS26.dpuf

[14] Monash Business Policy Forum 'Rationalising rustic regulators' P.15

[15] The submission was written by David Havyatt, now Executive Director of DigEcon research.

[16] Senate Environment, Communications, Information Technology and the Arts References Committee *A lost opportunity?: inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters*

[17] Dept of Finance *Review of the Corporate Governance of Statutory Authorities and Office Holders* See http://www.finance.gov.au/archive/financial-framework/governance/review_corporate_governance.html