Submission by Free TV Australia

Department of Communications

Review of the Australian Communications and Media Authority

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EXECUTIVE SUMMARY

- Free TV welcomes the opportunity to contribute to the Department's review of the Australian Communications and Media Authority (ACMA).
- The media landscape has undergone radical transformation since the ACMA first came into operation in 2005. Digital technology has completely transformed content distribution and consumption and differentiating between telecommunications, broadcasting and online services has become increasingly difficult. There are no indications that the pace of change will abate any time soon.
- By contrast, the regulatory framework for broadcasters has been in place for more than 20 years and has undergone very little change during that time. It is drastically out-of-date.
- While free-to-air television is the only platform that delivers high quality Australian programs to all Australians for free, and is the major underwriter of the Australian production sector, it remains the most heavily regulated media platform in Australia,
- This places commercial free-to-air broadcasters at a significant commercial disadvantage with its competitors, including online and internationally-based players that are subject to very little regulation. It also renders many of the regulations that only apply to terrestrial commercial free-to-air channels as ineffective as they are easily bypassed simply by accessing content from other unregulated platforms.
- This regulatory disparity puts at risk the significant contributions that commercial free-to-air broadcasters make to Australian content production, the Australian production industry, jobs investment and the economy.
- There is an urgent need to reform the regulatory framework and the regulatory approach of the ACMA so that it is fit-for-purpose and not asymmetrically skewed against commercial free-to-air broadcasters.
- Policy-making functions should be streamlined and should lie clearly with the Government and Department of Communications. The ACMA should be focussed on regulating.
- Duplicate and overlapping legal and regulatory requirements (such as licence conditions that require compliance with other laws) should be eliminated.
- Primary responsibility for regulating the National Classification Scheme should lie with a single regulator, the ACMA.

Introduction

Free TV Australia (Free TV) represents all of Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, commercial free-to-air television is watched by more than 13.4 million Australians.

Free-to-air television is the only platform that delivers high quality Australian programs including news, current affairs, drama, children's programs, sport and culture to all Australians for free.

In 2013-14, commercial free-to-air broadcasters spent a record $1.54 billion on Australian content, despite the increased competition for audiences and downward pressure on advertising revenues. In the same year Australian content represented 79 percent of commercial free-to-air networks' total content spend. Over the last five years, Free TV broadcasters have invested $6.62 billion in Australian content.[1]

Free TV networks are the major underwriters of the Australian production sector, employing over 15,000 people both directly and indirectly.[2] A report by Venture Consulting, *The Value of Free TV*, released in May 2015 found that the commercial free-to-air television industry:

- generates $3.2 billion per annum of economic surplus;
- puts $2.8 billion per annum of economic investment back into the Australian economy;
- contributes $6 out of every $10 spent on Australian content;
- directly employs 7,232 people across technical, operational, financial and management roles; and
- pays significant taxes in Australia.[3]

To continue to contribute to the Australian economy in this way and provide the highly valued Australian content that Australians enjoy, the industry requires a regulatory environment that enables commercial free-to-air television to compete on a more level regulatory playing-field with other new content services.

Commercial free-to-air television remains the most heavily regulated media platform in Australia. The existing regulatory framework has been structured by reference to the analogue media environment and asymmetrically skewed against commercial free-to-air broadcasting services. As a result, there are systemic legacy issues that require careful consideration, and which should ultimately be excised from the regulatory framework.

There is an urgent need to ensure that the regulatory environment is fit for purpose and does not disadvantage local media players. The role and functions of the regulator are critical to ensuring that existing media players are able to fully compete in a rapidly changing and highly dynamic and complex media environment.

[1] Australian content expenditure figures are compiled by Free TV, figure for 2012-13 is adjusted (up from the previously reported figure of $1.36 Billion).

[2] Venture Consulting, *The Value of Free TV: The contribution of commercial free-to-air television to the Australian economy*, May 2015, 6.

[3] Ibid, 2.

The Communications Regulatory Environment

1. Challenges for the regulatory framework

The media environment has undergone radical transformation since the Australian Communications and Media Authority (ACMA) first came into operation in 2005. It is worth noting that when the ACMA was established the Explanatory Memorandum noted that "minimal changes" had been made to the underpinning legislation guiding the two regulators being merged (the Australian Broadcasting Authority and the Australian Communications Authority).[4] This means that the ACMA has effectively been operating on legislation introduced in the 1990s. This is the first formal review of the ACMA's functions, powers or founding legislation.

As noted in the Issues Paper, technologies have advanced and are continuing to advance at a rapid rate. The distinctions between telecommunications, broadcasting and online industries are becoming increasingly less relevant, and communications markets are increasingly dynamic and complex. Consumers are adopting technology earlier and at a faster rate, and are accessing more content on multiple platforms and devices, often without knowing or caring from which platform content originated.

Significant changes are also occurring within the broadcasting industry itself. In the last year we have seen the introduction of new platforms such as Freeview Plus, Netflix, Stan and Presto. Broadcasters are already streaming news services and over the next 5 to 10 years, Free TV expects that the rate of this type of convergence, and the complexity of media markets will only increase.

This environment poses significant challenges for the regulatory framework to keep up, stay relevant and deliver policy outcomes. The existing regulatory framework is riddled with inefficiencies and does not reflect today's radically transformed media environment. This has been recognised in a number of contexts, including the ACMA's 2011 Broken Concepts report,[5] and most recently in its 2013 Broken Concepts update:

> *Sector-specific consumer safeguards struggle to reflect changing service use and expectations.*[6]

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 the rapid changes in the communications landscape.*[7]

2. Principles to guide a future-focused regulator

The legislation underpinning the operations of the ACMA needs to be amended to ensure that the regulator is responsive, flexible and proportionate in its approach to regulating industry. It must also ensure that regulation does not impede the development of new and innovative services or distort the market.

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[4] Explanatory Memorandum, The Australian Communications and Media Authority Bill, 2004.

[5] ACMA, *Broken Concepts - The Australian communications legislative landscape*, August 2011.

[6] Ibid, as updated in June 2013.

[7] Department of Broadband, Communications and the Digital Economy, Final Report of the Convergence Review, 2012, 6.

The principles underlying any new legislation setting the objectives of the ACMA should include the following:

- that the regulator ensures that it applies regulations efficiently and consistently,
- that it takes into account that it is now operating in an environment where like services are subject to asymmetric regulation,
- that therefore the regulator operates on the basis of the minimum amount of regulation necessary to achieve a public policy outcome,
- that regulated entities are not placed at a commercial disadvantage to like services which are not regulated,
- that duplication and overlap of regulation is eliminated,
- that regulation achieves its objectives at least cost and any new regulation is subject to cost-benefit analysis;
- that the role of the regulator is clearly defined as regulating not policy making.

The existing framework is out of date and has not provided sufficient flexibility. As a result, it is too focused on specific delivery platforms, in some instances providing layers of regulations while leaving other platforms unregulated.

The legislative framework needs to expressly discourage the ACMA from imposing a disproportionate level of regulation on broadcasters compared to other platforms unless there is a strong justification for doing so.

3. Legislative amendment

There is significant scope for specific legislative amendment to reduce the disproportionate regulatory burden on broadcasters.

Influence test

Section 4 of the BSA refers to regulatory intervention being commensurate with the 'degree of influence' of a particular platform. This legislative concept underlies the ACMA's approach to its regulatory functions with respect to broadcasting. Section 4 provides that:

> *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.*[8]

The Explanatory Memorandum (EM) to the Bill sets out the intention of the Parliament in enacting this provision back in 1992. At that time, the provision did not refer to internet services. The EM provides:

> *A high level of regulation is to apply to commercial broadcasting services as those services are considered to exert a strong influence in shaping views in Australia. At the other end of the scale, narrowcast broadcasting services are*

[8] BSA, s 4(1).

> *expected to play a minor role in shaping views in Australia and will be subject to low barriers to entry. Different levels of regulation are also provided for television and radio services.*

When Schedule 5 was added in the *Broadcasting Services Act 1992* (BSA) in 1999, s 4 was also amended to make reference to 'internet services'. However, as the EM to the *Broadcasting Services Amendment (Online Services) Bill 1999* indicates, at the time that this legislation was introduced, the degree of influence of internet services was not considered to be comparable to the degree of influence of broadcasting services, and as such, a lesser degree of regulatory intervention was expected in relation to 'internet services':

> *The Parliament intends that different levels of regulatory control be applied across the range of Internet services as well as broadcasting services according to the degree of influence that different types of these services are able to exert in shaping community views in Australia.*[9]

While it appears that the intention was for this concept to be applied flexibly by the ACMA in the exercise of its powers under the Act, Free TV is concerned that it is not being applied in this way. The regulatory framework has continued to be applied by the regulator with a focus on regulating broadcasting services:

- without any recalibration to take into account the increasing penetration and influence of internet based services; and
- without any regard to the impact of this regulatory disparity, or to the financial and administrative burden being placed on broadcasting service providers.

An inherent issue with regulating according to influence is that if it is not applied in a future focussed manner then it inherently places incumbent media and content providers at a significant disadvantage to new services.

Therefore, the concept of regulating according to influence requires rethinking. If this concept remains then it needs to be applied by the regulator in a forward focussed manner and with due regard to a competing regulatory objective of limiting regulatory disparity between competing businesses.

Duplication

The regulatory framework should not impose duplicate legal and regulatory requirements on broadcasters. In practice, this duplication creates uncertainty and unnecessary costs.

In particular, laws and regulations that broadcasters are subject to should not be replicated as licence conditions or incur additional penalties beyond those applied by the primary source legislation or regulation. The duplication of legal requirements via licence conditions significantly reduces business confidence because of the lack of clarity around ACMA decision making processes and exercise of the ACMA's discretion. Broadcasters should be subject to the law in the same way as any other business.

Example - Clause 7(1)(h) of Schedule 2 to the BSA

This clause is a key example of the regulatory framework imposing overlapping requirements on broadcasters through a licence condition. It should be repealed.

Clause 7(1)(h) provides that:

[9] Explanatory memorandum, *Broadcasting Services Amendment (Online Services) Bill 1999*, Items 3 and 4.

> *"a licensee will not use the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory."*

In light of the High Court decision in *ACMA v Today FM*,[10] this provision allows the ACMA, an administrative body, to form an opinion about whether a broadcaster has committed a criminal offence, in the absence of any determination by a criminal court.

It can exercise this power regardless of:

- The fact that the ACMA does not have expertise in criminal law or the numerous State and Territory Acts which contain offence provisions;
- The fact that those Acts are administered by other regulatory bodies who have regulatory responsibility for those matters;
- Whether a criminal court subsequently finds that no criminal offence has been committed, or
- Whether a police investigation is not pursued because there is insufficient evidence to establish that there is any case to answer.

Where the ACMA exercises its power to form such an opinion, it can impose serious penalties as a consequence; including cancellation or suspension of a broadcaster's licence.[11]

Due to the large range of offence provisions in State and Territory Acts, this provision is extremely broad in scope, creating significant risk for broadcasters.

Free TV notes that repeal of this provision would not alter the fact that broadcasters would be in breach of the law if they used their broadcasting services in the commission of an offence against a law of a State or Territory. It would simply mean that broadcasters would be subject to the law in the same way as other citizens (including its competitors).

Other examples

There are numerous examples of overlapping and inconsistent regulations across the many areas of law that regulate Free TV members' activities. While we do not provide an exhaustive list here, Free TV is of the view that as a starting point, the BSA should cover the field in relation to the matters which it regulates (including through the Code), so that broadcasters are not subject to different obligations in each state in relation to matters such as gambling, alcohol and food advertising. Also, as indicated below, the regulator should have a role in pro-actively reviewing the regulatory burden of those it regulates and this role should be defined in legislation.

Requirement to review regulatory burdens should be set out in legislation

The requirement to review regulatory burdens should be set out in legislation by government.

Section 6 of UK *Communication Act 2003* provides an example of how this requirement has been incorporated in legislation in the UK. The provision requires OFCOM to review regulatory burdens to ensure that they are not, or have not become, unnecessary. The explanatory Note to the provision provides that:

> *This section imposes on OFCOM a duty to review their functions so that regulation by OFCOM does not lead to the imposition or maintenance of burdens that are or have become unnecessary. OFCOM must from time to time*

[10] *ACMA v Today FM (Sydney) Pty Ltd [2015] HCA 7.*

[11] BSA, s 143.

> *publish a statement setting out how they propose to comply with this duty and must have regard to that statement when carrying out their functions. When reviewing their duties under this section, OFCOM must consider whether or not their general duties set out in section 3 may be furthered or secured, or are likely to be furthered or secured, by effective self-regulation and, in the light of that, whether it would be appropriate to remove or reduce regulatory burdens.*[12]

Free TV would support a similar approach being taken in Australia, with an express requirement to consider the commercial impacts of regulatory disparity and provide justification.

Enhancing the Regulatory Performance of the ACMA

1. Approach to regulatory intervention

The approach to implementation of the legislative framework can often amplify the issues with the framework itself.

There is significant scope for reducing the disproportionate regulatory burden on broadcasters by ensuring that the legislative framework is applied in a manner which is proportionate, flexible and consistent. It should not be applied in a manner which imposes a disproportionate burden on broadcasters compared to other platforms, unless there is a strong justification for doing so.

Where the ACMA is empowered to exercise its discretion, it should take an approach that does not incur unnecessary compliance costs.

Proportionate regulatory responses in the context of the broader media landscape

In Free TV's experience, in the years since its establishment the ACMA has become increasingly more interventionist. This is contrary to the purpose of introducing the co-regulatory approach in the first place, which was to promote a streamlined and cost-efficient regulatory framework.[13]

The Government has indicated that regulation will not be the default position, and will only be imposed where unavoidable.[14] Free TV strongly supports this sentiment however considers that there is significant scope for the ACMA to:

- adopt a less interventionist approach when applying existing regulations; and
- be more proactive in assessing areas for de-regulation.

Example - Commercial Television Industry Code of Practice (Code of Practice)

Registration of the Code of Practice under Part 9 of the BSA provides an example of a regulatory process where the ACMA could adopt a less interventionist approach and support industry to develop a code with increased flexibility and fewer prescriptive requirements.

Broadcasters are required to develop and comply with the Code of Practice, which contains a range of complex requirements around matters such as classification and scheduling (program matter and commercials), complaints handling, news and current

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[12] Explanatory Notes, *UK Communications Act 2003*, section 6.

[13] Explanatory Memorandum, *Broadcasting Services Bill 1992*.

[14] The Hon. Tony Abbott MP, Prime Minister (2013) *Media Release: Boosting Productivity and Delivering Effective, Efficient Government*, 8 November 2013.

affairs and advertising restrictions. It must be reviewed every 3 years and is subject to public consultation.

The ACMA will only register the code if it is satisfied that it meets appropriate community safeguards. However, many of the "safeguards" that currently exist are no longer relevant in a converged media environment. For example, time-zones are increasingly irrelevant when consumers are accessing the same content across platforms which are not subject to the same restrictions and are often not aware of which platform is delivering their chosen content.

This is another example where broadcasting services cannot continue to be regulated in isolation, without reference to the wider media landscape. Community safeguards should not be platform-specific. In as much as there are common community standards, they should apply regardless of the delivery mechanism that the consumer/citizen is using to access content. Over-regulating the free-to-air platform will be increasing ineffective as consumers are able to bypass regulated free-to-air television services simply by accessing content from unregulated platforms (any platform other than commercial free-to-air television).

In addition, merely identifying that community concern exists in relation to a particular matter does not necessarily provide a sufficient basis for regulatory intervention. In some circumstances, the regulatory impost in addressing a particular concern may be excessive when considered against what may be a marginal benefit in ameliorating a minority community concern. All of the cost and benefits of regulation must be adequately considered.

Free TV notes that complaints figures show that a less-interventionist approach is warranted. In 2013-14, commercial free-to-air broadcasters received 2142 complaints under the Code, a decline on the previous two years.[15] The vast majority of these complaints were resolved satisfactorily between the complainant and the broadcaster. During the same period, the ACMA made just 4 breach findings under the Code against commercial free-to-air television broadcasters.[16] These figures demonstrate that broadcasters have very high levels of compliance and are meeting community standards in the delivery of their services.

It is also worth noting that, in contrast to the Code of Practice, equivalent codes developed by the national broadcasters, the ABC and SBS, are merely required to be notified to the ACMA and do not need to be registered. As such, the process for development of those codes is much simpler and less onerous and means that those codes can be amended and modernised much more easily. For example, both the ABC and SBS already have PG all day in their codes.[17]

Example - Regulatory discretion

There should be greater use of, and greater transparency in relation to the use of, the ACMA's discretion to exercise "regulatory forbearance". Use of the ACMA's discretion where appropriate will allow for the prioritisation of more serious complaints and regulatory issues and will lead to more efficient and practical regulatory outcomes. This is particularly important in relation to broadcasting complaints which take up significant public and industry resources, in circumstances where some complaints are of questionable importance.

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[15] Figures compiled by Free TV, Complaints data 2013-2014.

[16] ACMA Annual Report, 2013-2014.

[17] ABC Code of Practice 2011, as revised in 2014; SBS Code of Practice 2014.

Complaints in relation to material broadcast several years prior to the complaint being lodged, or complaints brought by individuals based overseas who do not reside in Australia and would not otherwise be subject to Australian law, should not be investigated.[18]

Example – Previous rulings should be binding

The current regulatory regime for broadcasters is not always applied consistently. In particular, the ACMA does not consider itself bound by previous rulings or advice which it subsequently considers incorrect, resulting in a situation where broadcasters may be found in breach of the law despite the fact that they acted in good faith and in accordance with the regulator's previous rulings or advice.[19] Retrospective changes to the manner in which regulations are implemented leads to inconsistency, increased business costs and decreased business confidence.

Example - Investigations under section 170

Section 170 enables the ACMA to initiate investigations for the purposes of the performance or exercise of any of its broadcasting, content and datacasting functions.

This provision as drafted is currently too broad and therefore creates unnecessary regulatory uncertainty. In exercising this power, the ACMA should not investigate matters which are dealt with by existing codes or standards.

Example - Merits review process should be available for investigation outcomes

There is no procedure for merits review of the ACMA's decisions on whether to investigate, or investigation outcomes. While decisions set out in s 204 of the BSA are reviewable on the merits, there is no provision for administrative review of decisions made pursuant to s 149 or s 170 (investigation of complaints by the ACMA).

Rather, the process for review involves applying to the Federal Court in relation to jurisdictional, procedural or legal errors under the *Administrative Decisions (Judicial Review) Act 1977*.

Free TV is of the view that there is no justification for excluding decisions made pursuant to these provisions of the BSA from a merits review process, and that the availability of a merits review process is important for efficient and effective decision making. This should be incorporated in to the Act.

2. Research functions

Compiling industry data

There is currently a lack of data around the structure of the Australian media market, market trends and consumer behaviour.

We noted above that the concept of regulation according to influence under s 4 of the BSA requires rethinking given that the media environment has completely changed since the introduction of the BSA in 1992. In order to apply the regulatory framework according to degree of influence in any meaningful way, it is critical for the regulator to have a detailed understanding of the media market and consumer behaviour within the market.

[18] For example, see ACMA Investigation Report No. 2369 - ACMA2010/693.

[19] For two examples of this see: ACMA Investigation Report No. 1888 (ACMA 2007/1680) at 12; and ACMA Investigation Report No. 2379 (2010/0523) at 8.

While some data has been published, for example, the ACMA publishes 'Research snapshots' and other research reports, the availability of more of this type data would be valuable. While industry members can and do commission their own data, an independent source of information would enable all of industry to work from the same information.

Under the UK *Communications Act 2003*,[20] Ofcom is required to undertake consumer research and publish the outcomes of that research. In accordance with these requirement, Ofcom publishes *The Communications Market Report* annually which contains a range of factual and statistical information and analysis in relation to the state of the UK communication sector, market, market trends, and data specific to television, radio, telecommunications and the internet. This report provides an invaluable reference for Government, industry and consumers and provides context to Ofcom's regulatory work.

While there is some provision in the ACMA Act for performance of research functions (for example see section 10(1)(h)), those obligations much less detailed compared to the obligations imposed on Ofcom under section 14 of the UK Act.

Drawing on experts from industry

It is critical that the regulator can and does draw on experts and current practitioners from across regulated industries to ensure it has a practical understanding of the environments in which decisions are made and regulations applied. It is essential that legislation requires the regulator to be well informed of current practice given the intensely competitive nature of the media and communications sector combined with the pace of technological change.

An accessible source of information and expertise for industry and others

A key role that the ACMA could be performing is to establish a portal of useful and accessible information and expertise for the media industry and others. It is currently very difficult, even for industry participants, to find useful information on the ACMA website.

While a large number of forums, consultations and internal research is conducted, there needs to be a greater focus on ensuring that the information resulting from that is useful and is provided in an accessible manner.

3. Regulator Performance Framework

Key Performance Indicators

Free TV supports the Government's Regulator Performance Framework (RPF), and the KPIs that form part of the RPF. Free TV would also support these KPIs being incorporated in legislation. They are fundamental to how the ACMA should perform its functions.

The Issues Paper also seeks feedback from stakeholders in relation to how the ACMA is performing against the KPIs. We have addressed these KPIs above with specific examples of areas that could be improved.

[20] *Communications Act 2003* (UK) ss 14, 15, and 358.

What should a Future-Focused Communications Regulator look like?

1. Policy functions should be streamlined and lie with the Government

Policy-making functions should be streamlined and should lie clearly with the Government. The regulator should be focussed on regulating and any policy-making should be within defined parameters that the Government has set out and limited to the extent necessary to carry out regulatory functions. This is appropriate in the context that the Government is accountable to the Parliament and to the public, whereas the regulator is independent.

Spectrum

In relation to spectrum matters, the Minister and the Department should have overarching responsibility for setting spectrum policy, while the ACMA should have authority and flexibility in relation to day-to-day spectrum management matters.

Content

Similarly, in relation to Australian content policy and regulation, the Department should have responsibility for determining policies and creating and administering standards in relation to Australian content on commercial free-to-air television, leaving the regulator to ensure compliance with these policies and standards. Under this proposal, responsibility for reviewing and amending the existing Australian Content Standard and the Children's' television Standard would rest with the Department.

2. Structure of the regulator

Separation of role or chief executive officer and chairman

Free TV considers that the roles of CEO and Chair should be separate. This is consistent with best practice.

The ASX corporate governance principles and recommendations,[21] recommend that the Chair of a board of a listed entity should be an independent director and, in particular, should not be the same person as the CEO of the entity:

> *"Having an independent chair can contribute to a culture of openness and constructive challenge that allows for a diversity of views to be considered by the board. Good governance demands an appropriate separation between those charged with managing a listed entity and those responsible for overseeing its managers. Having the role of chair and CEO exercised by the same individual is unlikely to be conducive to the board effectively performing its role of challenging management and holding them to account. If the chair is not an independent director, a listed entity should consider the appointment of an independent director as the deputy chair or as the "senior independent director", who can fulfil the role whenever the chair is conflicted."*[22]

[21] ASX Corporate Governance Council, Corporate Governance Principles and Recommendations, 3rd Edition, 2014.

[22] Ibid at 18.

The same principles apply to governance structures in the public sector and the roles of CEO and Chairperson in the context of public sector governance structures should, as a general rule, also be separate.

3. Forward-looking attributes of a best practice regulator

The Issues Paper also seeks to identify the optimal forward-looking attributes of a best practice communications regulator. In order to ensure that regulations are effective in achieving regulatory objectives at minimal cost and in the public interest, and to avoid regulation creep, optimal forward-looking attributes should include the following:

Accountability

A best practice communications regulator must be accountable. Free TV supports the introduction of a requirement for the ACMA (or any future regulator) to publicly report against its KPIs.

The key piece of legislation regulating broadcasters, the BSA, is outdated and complex, and does not place concrete accountability requirements on the ACMA as the regulator. Similarly, the *ACMA Act 2005* contains only minimal requirements in relation to reporting.[23] It does not provide for any mechanism to measure the regulator's performance, either in relation to administrative efficiency or in relation to compliance costs on regulated entities.

Transparency

A best practice communications regulator must conduct all of its activities in a transparent way.

Audit plans and reports should be required to be made public on the regulator's website and performance measures should provide data and metrics to properly demonstrate how the relevant measure has been achieved.

Regulations should be as minimal, simple and consistent as possible. Australia's current broadcasting regulatory framework and the BSA in particular, has been amended, supplemented and reworked to the point where it is complex, convoluted and burdensome. This is not conducive to transparency.

Information about how regulatory activities are conducted should also be made available in a transparent way. For example, the ACCC publishes information in relation to its enforcement policies and priorities. This should be required of regulatory agencies generally.

Consultation

A best practice communications regulator must be consultative and adopt a collaborative approach to regulatory challenges, to produce outcomes that are constructive, practical and take account of established practices.[24]

Consistency

A future focussed communications regulator must regulate in a consistent manner.

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[23] The ACMA Act, ss 56 and 57.

[24] The ACMA's paper on Connected Citizens highlights some of the different strategies and principles for rebalancing regulatory practice in the digital environment, including greater flexibility, and an increased emphasis on facilitation and communication strategies.

Consistent treatment of like services regardless of the platform or technology used to deliver the service is essential to ensuring that regulation remains relevant with evolving market conditions and technological developments. Applying an inconsistent regulatory approach undermines the public policy principles underlying the relevant regulations and is thus ineffective and inefficient in terms of achieving public policy outcomes.

4. Classification

Currently, the operation of the National Classification Scheme ("the Scheme") involves a number of Commonwealth agencies (the Attorney-General's Department, the Classification Board and Classification Review Board, the Department of Communications, the ACMA, the Australian Customs and Border Protection Service, as well as State and Territory bodies.

There is scope for streamlining the administration of the Scheme. Free TV supports the approach taken in the ALRC's report '*Classification – Content Regulation and Convergent Media (ALRC Report 118)*' that primary responsibility for regulating the Scheme should lie with a single regulator, the ACMA.[25]

This is a more logical place for regulatory responsibility to lie in a converged media environment, and will allow one regulator to have responsibility for all forms of media content regulation (not just classification matters). It will reduce the likelihood of overlap of regulator functions and duplication of regulation.

It also makes sense in light of the ALRC's other recommendations that the classification regulator should have expanded functions in respect of approving of industry classification codes and issuing industry standards and notices in relation to online content.[26] The Regulator should be responsible for all regulatory activities related to the classification of all media content, including online content. In addition to providing efficiencies and cost savings, this would facilitate a more flexible and consistent framework across classification of all media.

If the ACMA becomes the sole regulator responsible for regulation of classification matters, policy responsibility in relation to classification matters should be transferred to the Department of Communications.

5. Future approaches

In the context of the current media environment and the progressive moves from 'black-letter' regulation prior to 1992, to co-regulation under the BSA, Free TV is open to consider a move to self-regulation

However, Free TV is not supportive of a simple transfer of existing regulatory burdens and the associated compliance costs from the ACMA to industry. This approach would not produce overall cost-savings or efficiencies; it would simply shift them and substantially increase the regulatory costs burden on broadcasters in the process.

Any move to self-regulation would only be considered in the context of substantial deregulation.

[25] ALRC, *Classification – Content Regulation and Convergent Media*, ALRC Report 118, 321.

[26] Ibid, 329.

Conclusion

Free TV welcomes the Department's Issues Paper examining the objectives, functions, structure, governance and resource base of the ACMA in the context of the contemporary communications regulatory environment.

This is a timely opportunity to consider how the regulatory framework should be updated so that it is fit-for-purpose and how a future-focussed communications regulator can best manage a highly dynamic and complex media environment.

The status quo, where local media providers are overregulated while international competitors are subject to nearly no regulation, is not sustainable and is actively disadvantaging Australian companies. Local content production, the fostering of local culture and the jobs that the industry creates risk being lost if the regulatory environment continues to impose such a heavy burden on some players while others remain unregulated.