



# **REVIEW OF THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY**

**SUBMISSION BY VODAFONE HUTCHISON AUSTRALIA**

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## 1. Introduction

Vodafone Hutchison Australia (VHA) welcomes the opportunity to make a submission to the Department of Communications' Review of the Australian Communications and Media Authority (ACMA). VHA strongly supports the Review's objectives, namely to inquire into and make recommendations on the objectives, structure and operation of the ACMA to ensure it remains fit-for-purpose for the current and future communications regulatory environment.

In making this submission, VHA has not only drawn upon the experience and insights from Vodafone's global experience in 25 countries, but has also commissioned Corrs Chambers Wessgarth to provide detailed comparisons of best practice communications and media regulators and regulation across the UK, USA, Canada and Hong Kong. We attach these insights and a case study of a specific example of the opportunity for better regulation to this submission.

An important point that VHA wishes to highlight in this submission is that key sectors of the Australian economy, such as communications, that should be driving Australian productivity growth are not currently realising their full potential.

Communications is a critical area of the economy and VHA agrees it is timely to review the effectiveness and efficiency of regulatory arrangements in the current and future digital environment. Given its importance to the economy, VHA submits that regulation of the communications sector needs to be more transparent and accountable and decisions based on clear, established principles following well understood consultation processes.

Ultimately, any reform of the ACMA must be outcomes focused, with a clear understanding of the objectives that are to be achieved. Based on a review of other "best practice" jurisdictions and some of the more successful Australian regulators, VHA considers that in order for any reforms to result in a more effective communications and media regulator they will need to promote the following six outcomes:

1. Proactive engagement with areas of responsibility;
2. Consistency, predictability, rigour and timeliness in decision making;
3. Transparency;
4. Forbearance on unnecessary regulation;
5. Accountability; and
6. Consideration of competition implications.

In relation to accountability, VHA submits that the current overlap in responsibilities between the ACMA, the ACCC, the TIO and the Government itself needs to be addressed. The ACMA also needs to have clarity and certainty about the scope and purpose of its mandate.



## 2. Objectives of the Review

Since its inception, the ACMA has suffered from a lack of a clearly defined mandate. Its responsibilities are diverse and the legislation it administers (including the *Radiocommunications Act 1992* (Radcomms Act), *Telecommunications Act 1997* (Telco Act) and *Broadcasting Services Act 1992* (BSA) incorporate equally diverse objects and there is some overlap in ACMA responsibilities with other entities, such as the ACCC and the Department of Communications. Things are complicated further by the fact that both the telecommunications and media sectors are undergoing profound structural and technological change. The Review is therefore timely and vitally important to sustain an effective, considered, strategic and independent communications and media regulator.

In this context, the objective of this review and any reform proposals must be to guarantee optimal regulatory outcomes in the telecommunications and media sectors and a regulator that is capable of effectively pursuing the Australian Government's microeconomic and social policy agendas.

VHA submits that this can only occur if:

- The communications and media regulator has a clearly defined, coherent statutory mandate;
- That mandate minimises areas of overlap with other regulators and decision makers; and
- A decision making framework is implemented that guarantees minimum standards of rigour, timeliness, consultation, transparency and accountability for **all** decisions that will have a significant impact upon stakeholders.

It will also be critical that any reform proposal be part of a coherent policy response, not only in relation to the areas identified in the terms of reference,<sup>1</sup> but also to the recommendations of the Convergence,<sup>2</sup> Vertigan<sup>3</sup> and Harper<sup>4</sup> reviews.

VHA welcomes the Government's aspiration to undertake "a full 'root and branch' review of the objectives, functions, structure, governance and resource base of the ACMA to ensure that regulatory and operating arrangements are efficient, effective and fit for purpose in the current and future

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<sup>1</sup> Review of the Australian Communications and Media Authority – Terms of Reference, section entitled "Context".

<sup>2</sup> Convergence Review Final Report:

[http://webarchive.nla.gov.au/gov/20140212091723/http://www.archive.dbcde.gov.au/2013/august/convergence\\_review](http://webarchive.nla.gov.au/gov/20140212091723/http://www.archive.dbcde.gov.au/2013/august/convergence_review).

<sup>3</sup> Independent cost-benefits analysis of broadband and review regulation, Statutory review under section 152EOA of the Competition and Consumer Act 2010:

[https://www.communications.gov.au/sites/g/files/net301/f/3.\\_Section\\_152EOA\\_Report\\_1.pdf](https://www.communications.gov.au/sites/g/files/net301/f/3._Section_152EOA_Report_1.pdf); Independent cost-benefit analysis of broadband and review regulation, Volume I – National Broadband Network market and regulatory report: <https://www.communications.gov.au/sites/g/files/net301/f/NBN-Market-and-Regulatory-Report.pdf>.

<sup>4</sup> Competition Policy Review Final Report: <http://competitionpolicyreview.gov.au/final-report/>.



communications and media environment.”<sup>5</sup> VHA notes that the initial Issues Paper does not put forward any firm proposals for reform, rather it invites stakeholders to put forward *priorities* for reform. We agree that this is a worthwhile approach as it is important to undertake a principle based assessment of the opportunities for organisational reform.

This submission therefore focuses on the principles that should underpin reform. It outlines why organisational and governance reform should be the foundation of improved regulatory arrangements and put forward an organisational structure that incorporates the best elements of the high performing media/communications regulators. It is recommended that the Review release a further Issues Paper that outlines a detailed reform proposal.

### **3. Outcomes that any reform proposal must promote**

This section takes a principles-based approach to prioritising the key areas the Review should seek to deliver in any proposed institutional reform.

#### **3.1 Proactive engagement with areas of responsibility**

As the Issues Paper suggests, the sectors that the ACMA is responsible for (telecommunications and media) are evolving extremely rapidly.<sup>6</sup>

In this context, an effective regulator would be one that is both forward-looking and proactive. Any reform proposal must therefore ensure that the ACMA has the appropriate powers and, more importantly, promote the necessary culture to address emerging issues as required.

While it is important that a regulator not unnecessarily impede the efficient operation of regulated entities,<sup>7</sup> it is equally important that it have the foresight and willingness to intervene early and decisively when challenges arise.

#### **3.2 Consistency, predictability, rigour and timeliness in decision making**

The ACMA’s remit currently extends to decision making across an extremely broad range of areas including technical regulation of telecommunications, the management and allocation of spectrum, licensing functions, media content and media diversity to name a few. In many of these areas its decisions will have highly significant commercial and financial implications for carriers, broadcasters and their suppliers and customers.

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<sup>5</sup> Review of the Australian Communications and Media Authority— Terms of Reference p2

<sup>6</sup> Issues Paper, pp 5-6.

<sup>7</sup> As suggested at p 9 of the Issues Paper.



There is always a balance to be struck between according a regulator flexibility in its decision-making to allow it to be nimble and responsive and ensuring that certain minimum standards are met. However, while an overly prescriptive legislative framework can bring its own challenges, the current regime arguably does not provide an adequate structure for ACMA decision making. Accordingly, it is essential that any reforms ensure that the ACMA's decision making is consistent, predictable, rigorous and timely. Unfortunately, in the past these qualities have on occasion been lacking.

By way of example, because the ACMA's decision making in the area of spectrum management derives primarily from a general permission to manage radiofrequency spectrum,<sup>8</sup> the ACMA is accorded an extremely broad discretion as to how this can best be done. Accordingly, the range of matters that the ACMA must consider when making decisions in this area is often limited to the extremely general objects of the Radcomms Act. This has led to some of its decision making in this area lacking consistency and rigour (see the 1800MHz case study in Attachment 2). It has also led to an unwarranted focus on matters that are not relevant to its regulatory functions, such as building consensus between parties with diametrically opposed interests. It has also meant that important elements of an appropriate assessment, such as market structure, regulatory forbearance and the promotion of competition have not been a central part of the decision making process.

VHA considers there to be a real case for mandating a more structured decision making process for the ACMA to ensure that all relevant information is gathered, relevant considerations are taken into account, principles are applied consistently from one decision to the next and decisions are made in a timely fashion, at least for decisions that have significant implications for industry participants.

This would likely require legislative change. It is true that some regulators have managed to implement administrative arrangements that give stakeholders a level of confidence in terms of how decisions are made, for example the Australian Competition and Consumer Commission's *Informal Merger Review Process Guidelines 2013*. However, without a clear legislative and administrative framework the capacity of the ACMA to implement such arrangements must be questioned.

### **3.3 Transparency**

Transparency is important not only because it enables stakeholders to have confidence in the operations and decisions of a regulator, but also because it promotes more rigorous and consistent decision making.<sup>9</sup>

It emerges clearly from comparative analysis that international "best practice" jurisdictions incorporate substantially more transparency and consultation into decision making processes than the ACMA. In

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<sup>8</sup> Australian Communications and Media Authority Act 2005, section 9.

<sup>9</sup> The Issues Paper also draws attention the importance of transparency, p 9.



addition, decisions tend to be publicly available and more readily accessible in other jurisdictions. See, for example, the discussion of the FCC's rule-making processes at 4.2 below.

VHA considers that any reform proposal for the ACMA should seek to ensure greater levels of transparency, for example, by introducing legislation requiring that the ACMA publishes its reasons for decisions as a default position and makes them available in a centralised repository. The ACMA should also be required to consult on all decisions that have the potential to have a significant impact on stakeholders. The form of this consultation may also be stipulated by the legislation.

### **3.4 Forbearance on unnecessary regulation**

It is an established best practice principle that regulatory requirements must be established in a way that delivers the desired outcome with the minimum imposition. Indeed there is a long established and entirely appropriate element of the Australian telecommunications regime that self-regulation is preferred.

Of course regulation can prove to be the optimal option but the decision to use heavy handed regulatory solutions should be carefully considered. The Office of Best Practice Guidelines must be embedded into decision making processes and the recently established Regulator Performance Framework must ensure decisions are made in a timely fashion and (most importantly) made within a clear, well established strategic framework. Section 4.2 of this paper outlines some international practices that warrant consideration.

### **3.5 Accountability**

There are two aspects of accountability that any reform proposal should seek to promote. They are the availability of effective avenues of review and independent operation and a clearly defined demarcation of responsibility between the ACMA, the ACCC and the Minister.

In relation to the first issue, there are a range of decisions under the Radcomms Act, the Telco Act and the BSA that are susceptible to internal, administrative and/or judicial review. However, there are also a variety of important decisions where review is not readily available, for example, because the discretion accorded the ACMA is so broad as to exclude review for anything but the most fundamental decision making errors such as unreasonableness or bias. An example of such a decision is the issuing of spectrum embargos which have no specific legislative authorisation beyond the ACMA's general function of managing spectrum.<sup>10</sup> On occasion these embargoes have severely limited positive industry and competitive outcomes and because they are based on the ACMA's broad discretions they are very difficult to change or to seek a formal review.

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<sup>10</sup> Australian Communications and Media Authority Act 2005



Where a decision has significant implications for industry participants, we consider there to be a strong argument that effective avenues of review should be available. It is arguable that their absence has prevented stakeholders from holding the ACMA to account for less rigorous or inconsistent decision making under the current arrangements. It has also deprived the ACMA of a useful “quality control” mechanism which any regulator will benefit from.

In relation to the second issue, there are a range of decisions whereby input is required from the ACMA, the ACCC and the Minister, for example the setting of competition limits for spectrum auctions.<sup>11</sup> The Minister also has broad scope to issue directions to the ACMA about the performance of its functions and exercise of its powers.<sup>12</sup>

Because the ACMA does not have direct responsibility for competition issues, unlike its counterparts in the US, UK and Canada, this is perhaps unavoidable. However, it does create the potential for a lack of clarity, if not as to who the ultimate decision maker is, then at least as to who is responsible for considering certain aspects of a decision. It also allows each of the participants in the process to effectively “pass the buck” when difficult issues arise.

This factor, along with the broad Ministerial power to issue directions seems to have contributed to a slightly passive decision making culture within the ACMA. These are issues that any reform proposal should seek to address.

### **3.6 Consideration of competition implications**

Currently the ACMA does not have responsibility for competition matters associated with telecommunications and broadcasting. The ACCC is responsible for considering mergers in these sectors (except to the extent that the media diversity restrictions are triggered), regulated access to telecommunications facilities and potential contraventions of the competition law.

This is notably different from the position in the USA, UK and Canada where the relevant national regulatory authority typically has responsibility for these matters either alone or concurrently with other agencies. This is in large part due to Australia’s decision (emanating from the Hilmer Review of the early 1990’s) to establish a ‘generalist’ as opposed to ‘sectoral’ competition regulator. There are some benefits to the generalist approach but one significant disadvantage is that sectoral regulators can develop a culture of avoiding or ignoring competition policy principles in their decision making, indeed sometime they feel that that are not qualified to make economic efficiency assessments of a particular issue. It can also mean that the general competition authority only considers a subset of the issues which have significant competition implications, and do so at a fairly late stage of the communications regulator’s process. This is clearly contrary to appropriate modern regulatory practice. All public policy decision

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<sup>11</sup> Radcomms Act, section 60.

<sup>12</sup> Australian Communications and Media Authority Act 2005, section 14.





makers should undertake some form of cost/benefit analysis and assess how market forces can assist in delivering efficient and optimal outcomes.

It is VHA's view that a communications and media regulator must have the capacity to recognise when and how its decisions have implications for competition and the capability to undertake the economic analysis required to effectively address those issues in its decision making. This is because, even without any change, its current responsibilities include a range of areas that are critical to competition in the telecommunications and media sectors, for example, spectrum management and technical regulation.

There have certainly been instances in which the ACMA's unwillingness to engage with the competition impacts of their decision making has resulted in poor outcomes in the relevant markets. For example, the ACMA, the ACCC and the Minister each had a role in determining competition limits for the upcoming regional 1800MHz spectrum auction.<sup>13</sup> In setting competition limits, the determination fails to take into account the existing contiguous spectrum holdings of potential bidders. This results in Optus, VHA and any other potential bidder being capped at 2x25MHz of spectrum while Telstra is allowed to take up to 2x40MHz – 60 percent more spectrum than any other bidder can achieve. If each of Telstra, Optus and VHA bid up to the proposed competition limits, this will result in Telstra ultimately controlling substantially larger regional LTE spectrum holdings than VHA or indeed Optus. This outcome will, in turn, affect the ability of other carriers to effectively compete with Telstra in regional mobile markets. Ultimately, it is consumers who lose out when regulatory decisions harm competition.

It is therefore crucial that the Review considers how roles and responsibilities of a telecommunications and media regulator best assess competition and efficiency matters. In the following section we discuss this further.

#### **4. Best practice regulator structures and governance in other jurisdictions**

Corrs Chambers Wessgarth has been engaged by VHA to conduct an exhaustive comparison between the ACMA and other, arguably best practice, jurisdictions, especially the USA, UK and Canada. Hong Kong was also reviewed to some extent. The research is included in Attachment 1.

In undertaking this research, each jurisdiction's regulator was reviewed in relation to:

- Scope of regulation;
- Organisational structure;
- Interaction/overlap with other regulators;
- Independence and funding;

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<sup>13</sup> Radcomms Act section 60 and *Radiocommunications (Spectrum Licence Limits – Regional 1800 MHz Band) Direction 2015*.



- Decision making processes;
- Level of stakeholder engagement
- Publication of documents;
- Transparency and accountability;
- Timeliness; and
- Appeals.

The research indicates there are significant similarities between the structures of the ACMA, the US Federal Communications Commission (FCC), the UK Office of Communications (Ofcom) and the Canadian Radio-television and Telecommunications Commission (CRTC).

Each of these regulators is presided over by an executive or board responsible for the overall strategic direction of the organisation. These are generally made up of a combination of full-time and part-time members. Likewise, each of these regulators tends to have a diverse range of responsibilities from technical regulation, licensing, content regulation, media diversity and spectrum management.

Notwithstanding these similarities, there are significant differences across these jurisdictions in terms of outcomes. Ofcom and the FCC are arguably the two most effective telecommunications and media regulators anywhere in the world. They are known for their proactive management of their areas of responsibility, rigour of decision-making, transparency and accountability. Accordingly, the key question for the current review is: What drives these very different outcomes in regulators with, at least superficially, similar structures? We believe that an appropriate focus on competition matters and structured decision governance are the two most important factors to optimise regulatory performance.

## 4.1 Responsibility for competition matters

As outlined above, it is crucial that the communications and media regulator **must** consider the implications of their decisions on the promotion of competitive market structures. At a minimum there should be an explicit requirement that the promotion of competition and modern regulatory decision making best practice (such as cost benefit analyses and Regulatory Impact Statements) are embedded into the objectives and assessment requirements of the regulator.

The Review should also consider how to make the promotion of competition a clear responsibility of the reformed media and telecommunications regulator. There are a range of approaches that could be taken to address the issue of responsibility for competition matters. It is important to note that any decisions in this regard should be taken in a holistic manner, especially given the Harper Review recommends the establishment of a separate national access regulator that would assume responsibility for access and pricing issues across multiple infrastructure industries. If this were to eventuate, this would have significant implications for the resulting recommendations in relation to competition matters and the ACMA. The following options assume that this does not take place.

The first option would be to expressly mandate the promotion of competition through the ACMA's decision making processes. This could be done either through changes to the objects of the Radcomms Act, Telecommunications Act, BSA and other relevant legislation to mandate consideration of



competition impacts when making decisions or to mandate a greater level of consultation with the ACCC.

The second option would be to retain a role for the ACCC in setting overarching competition principles in the telecommunications and media sectors, but transfer responsibility for implementing those principles to the ACMA. This would see the ACMA primarily responsible for decisions currently made by the ACCC under Part XIC and Part XIB of the CCA as well as the bulk of the functions currently performed by the ACCC under the Telco Act and Radcomms Act.

The third option would be to transfer all responsibility for competition matters in the telecommunications and media sectors to the ACMA, with the possible exceptions of merger clearances and the Australian Consumer Law. While this is a model that works well in other jurisdictions, such as the UK, it would require more substantial institutional changes.

In any model, it is also worth considering the responsibilities of individual members of the ACMA. The ACCC model of giving each Commissioner a specific responsibility seem to produce an additional level of focus and clarity. Appointing one of the ACMA members as having specific responsibility for competition matters could well replicate that additional focus.

It is also worth reviewing the ongoing working relationship between the ACMA and other regulatory authorities. VHA questions, for example, whether the current model of cross-appointing the Chairs of the ACMA and ACCC to the other authority is workable given that the Chairs of the organisation are less likely to have sufficient time to dedicate to a deep ongoing engagement. It is worth considering therefore whether one of the members of each authority/commission should be cross-appointed rather than the Chairs. It also appears to us that the current cross appointment approach to a large degree embeds the thinking that the ACMA is not responsible for competition matters and that the ACCC should always be the decision maker for competition matters. As discussed above, all regulators should assess competition policy principles in their decisions. They must own the competitive impacts of their decisions and not outsource a small number of competition considerations to another organisation. As outlined in the 1800MHz case study in Attachment 2 the current approach has resulted in a poor policy outcome and minimal means for redress.

Whatever mechanism is ultimately decided upon, it is critical that the ACMA's "blind spot" in relation to competition is effectively addressed. It is an area of regulation that is far better managed in other jurisdictions and improvements should be a priority for the Review.

## **4.2 Decision making processes**

It emerges clearly from the comparative analysis that the international "best practice" jurisdictions in this area have substantially more transparency, consultation and accountability incorporated into their decision-making processes than Australia, where these processes are left to the regulator's discretion in many areas. In addition, decisions tend to be publicly available and more readily accessible in other jurisdictions. This facilitates principles being applied consistently.



By way of example, the FCC is empowered to make a range of legislative and non-legislative rules. Legislative rules are rules that it is specifically empowered to make by statute, while non-legislative rules include guidance on how legislation will be interpreted, policy statements and organisational and procedural rules.<sup>14</sup>

The making of legislative rules is subject to a stringent “notice and comment” process<sup>15</sup> whereby:

1. Notice must be given of the intention to make a new rule and the FCCC must articulate why it is needed and the source of authority for making it;
2. The public is then given an opportunity to comment;
3. A further round of consultation enables interested parties to respond to the comments of others;
4. A further notice will be issued where necessary to allow public comment on any modifications to the proposal;
5. Any changes to the final rule must be a “logical outgrowth” of the proposal that was consulted on, otherwise further consultation is required;<sup>16</sup>
6. Each final rule must include an explanatory preamble which responds to any significant issues raised in public comments;
7. Relevant documents and the final rule are publicly available; and
8. Dissenting statements are also published.

VHA understands that adherence to this process is not strictly required when making non-legislative rules. However, it is generally followed nevertheless.<sup>17</sup>

It may not be desirable or feasible to implement identical arrangements in relation to the ACMA. However, the level of rigour and transparency required by the process stands in stark contrast to the approach the ACMA generally takes to its decision making functions (as discussed further in the case study attached to this submission). Moreover, the routine publication of decisions (including dissenting statements) ensures that principles are applied consistently and that the public can hold the FCC to account if this is not being done.

Although decision making and consultation processes are less formalised at Ofcom in the UK, it seems that there is nevertheless a stronger culture of transparency and accountability there also. In particular Ofcom’s strategic review processes have delivered outcomes of high quality.<sup>18</sup>

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<sup>14</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>

<sup>15</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>

<sup>16</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>

<sup>17</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>

<sup>18</sup> <http://stakeholders.ofcom.org.uk/telecoms/policy/digital-comms-review/>



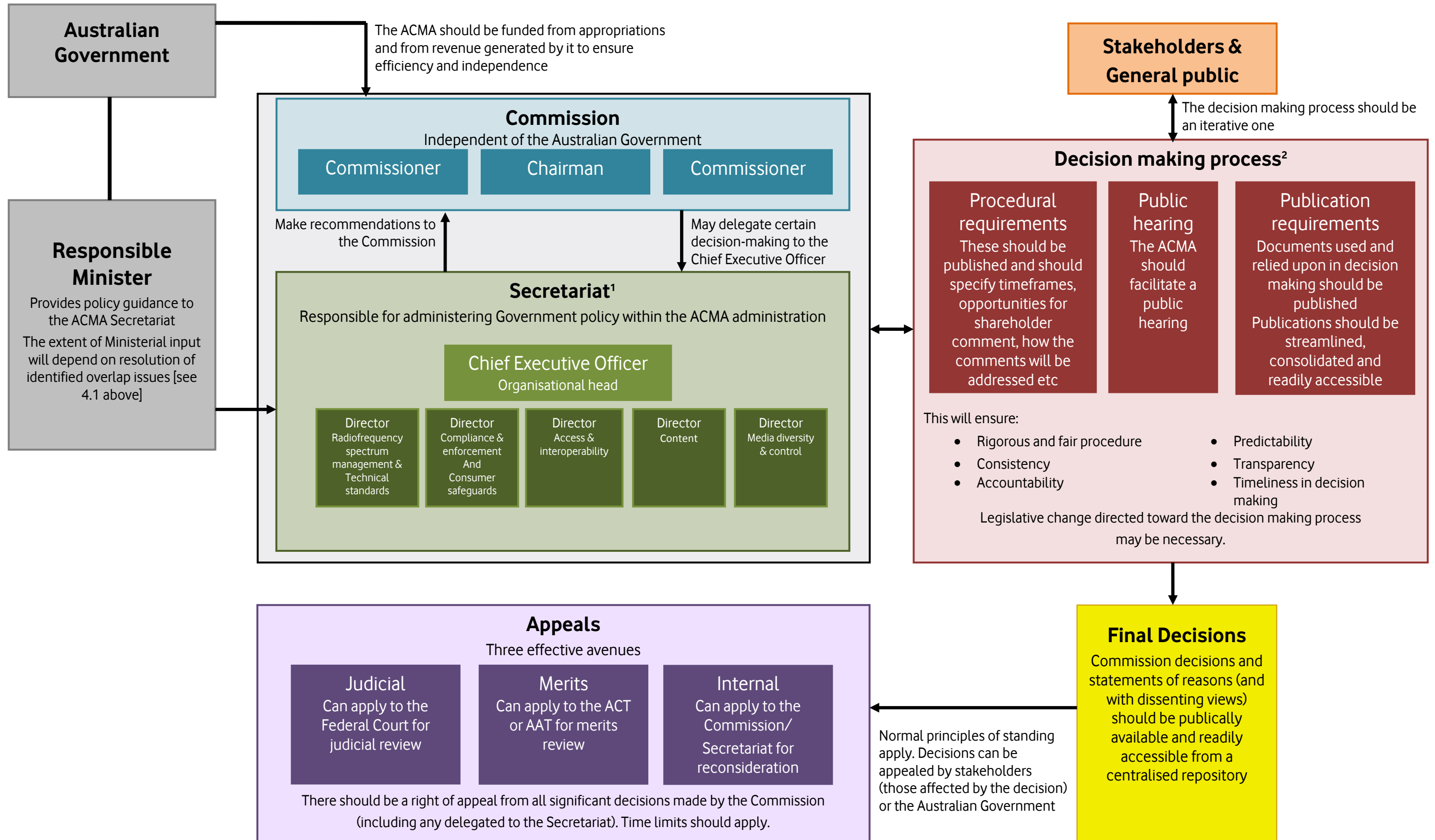
## **5. Proposed structure and governance model for the ACMA**

As outlined above, VHA considers that the ACMA must have a clearly defined, coherent statutory mandate which minimises areas of overlap with other regulators and decision makers.

Drawing on the findings of the comparative analysis of international “best practice” jurisdictions, VHA proposes the following ACMA structure and governance model which is intended to provide for a more independent, efficient, transparent and accountable communications and media regulator. We have considered also the opportunity to ensure that the regulator structure more properly reflects the realities of the convergence of media and telecommunications.

Because roles and responsibilities are clear and consultation requirements are embedded in the governance structure, VHA submits that the suggested structure best delivers the principles outlined in Section 3 namely:

1. Proactive engagement with areas of responsibility;
2. Consistency, predictability, rigour and timeliness in decision making;
3. Transparency;
4. Forbearance on unnecessary regulation;
5. Accountability; and
6. Consideration of competition implications.



1. The structure of the Secretariat set out in this diagram reflects the ACMA's existing functions. It does not set out any additional functions that the ACMA may assume to address the identified overlap issues (see 4.1 above).
2. This decision making framework should apply for any decisions that may have a material impact on stakeholders.



## Attachment 1: Comparative analysis of other jurisdictions

The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
Overview			
The Australian Communications and Media Authority (ACMA) is the independent statutory authority tasked with ensuring that most elements of Australia's media and communications legislation, related regulations, and numerous derived standards and codes of practice, operate effectively and efficiently, and in the public interest. <sup>19</sup>	The Federal Communications Commission (FCC) regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories. The FCC is the United States' primary authority for communications law, regulation and technological innovation. <sup>20</sup>	UK's Office of Communications (Ofcom) is the communications regulator in the UK. It regulates the TV and radio sectors, fixed line telecoms, mobiles, postal services, plus the airwaves over which wireless devices operate <sup>21</sup>	The Canadian Radio-television and Telecommunications Commission (CRTC) is an administrative tribunal that regulates and supervises broadcasting and telecommunications in the public interest. The CRTC, which is administered through the Minister of Canadian Heritage, supervises and regulates over 2,000 broadcasters, including TV services, AM and FM radio stations, and the companies that deliver those services. It also regulates telecommunications carriers. <sup>22</sup>
Scope of Regulation			
<p>The ACMA is responsible for:</p> <ul style="list-style-type: none"> <li>Regulating media and communications</li> <li>Regulating TV and broadcasters</li> <li>Regulating radio broadcasters</li> <li>Telecoms regulations and reports</li> <li>Internet regulation</li> <li>Annual regulatory plans</li> <li>Regulation and consultation</li> <li>Compliance and enforcement<sup>23</sup></li> </ul>	<p>The FCC's regulatory responsibilities are carried out through its bureaus:<sup>24</sup></p> <ul style="list-style-type: none"> <li>Consumer and Governmental Affairs Bureau—addresses all types of consumer related matters including responding to complaints and distributing education materials.</li> <li>Enforcement Bureau—enforces FCC rules, orders, and authorisations.</li> <li>International Bureau—administers the FCC's international telecommunications policies and obligations.</li> <li>Media Bureau—develops, recommends, and administers the policy and licensing programs relating to electronic media, including cable television, broadcast television, and radio.</li> <li>Public Safety and Homeland Security Bureau—addresses issues such as public safety communications, alert and warning of U.S. citizens, continuity of government operations and continuity of operations planning, and disaster management coordination and outreach.</li> <li>Wireless Telecommunications Bureau—handles all FCC domestic wireless telecommunications programs and policies.</li> </ul>	<p>Ofcom's main responsibilities are<sup>25</sup></p> <ul style="list-style-type: none"> <li>the UK has a wide range of electronic communications services, including high-speed services such as broadband;</li> <li>a wide range of high-quality television and radio programmes are provided, appealing to a range of tastes and interests;</li> <li>television and radio services are provided by a range of different organisations;</li> <li>people who watch television and listen to the radio are protected from harmful or offensive material;</li> <li>people are protected from being treated unfairly in television and radio programmes, and from having their privacy invaded;</li> <li>a universal postal service is provided in the UK - this means a six days a week, universally priced delivery and collection service across the country; and</li> <li>the radio spectrum (the airwaves used by everyone from taxi firms and boat owners, to mobile-phone companies and broadcasters) is used in the most effective way.</li> </ul>	<p>The CRTC's regulatory activities include:<sup>26</sup></p> <ul style="list-style-type: none"> <li>Licensing - the CRTC issues, renews and amends broadcasting licences. It also issues licences for international telecommunications services whose networks allow telephone users to make calls into and from Canada.</li> <li>Compliance - the CRTC promotes compliance with the Unsolicited Telecommunications Rules, including the National Do Not Call List and Canada's anti-spam legislation.</li> <li>Ownership decisions - the CRTC makes decisions on mergers, acquisitions and changes of ownership in the broadcasting sector.</li> <li>Tariffs - the CRTC approves tariffs and certain agreements for the telecommunications sector.</li> <li>Encouraging competition</li> </ul> <p>Providing information - the CRTC responds to requests for information and concerns about broadcasting and telecommunications issues.</p>

<sup>19</sup> The ACMA – meeting our standard, December 2014: <http://www.acma.gov.au/~media/Research%20and%20Analysis/Report/Word%20Document/Meeting%20our%20standard%20docx.docx>.

<sup>20</sup> <https://www.fcc.gov/what-we-do>

<sup>21</sup> <http://www.ofcom.org.uk/about/what-is-ofcom/>

<sup>22</sup> <http://www.crtc.gc.ca/eng/acrtc/acrtc.htm>

<sup>23</sup> <http://www.acma.gov.au/theACMA/About/Corporate/Responsibilities>

<sup>24</sup> <https://www.fcc.gov/bureaus-offices>

<sup>25</sup> <http://www.ofcom.org.uk/about/what-is-ofcom/>

<sup>26</sup> <http://www.crtc.gc.ca/eng/acrtc/acrtc.htm>





The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
	<p>This bureau also is responsible for implementing the competitive bidding authority for spectrum auctions.</p> <ul style="list-style-type: none"> <li>Wireline Competition Bureau—administers the FCC’s policies concerning common carriers.</li> </ul>		
Organisational structure			
<p>The ACMA’s day-to-day activities are managed by an executive team comprising the Chair, Deputy Chair, the full-time member, four General Managers and 11 Executive Managers.<sup>27</sup></p> <p>Each member is appointed by the Governor-General by written instrument for a period not exceeding five years.<sup>28</sup></p> <p>The General Managers are responsible for:</p> <ul style="list-style-type: none"> <li>Communications infrastructure</li> <li>Content, consumer and citizen</li> <li>Corporate and research</li> <li>Legal services.<sup>29</sup></li> </ul> <p>The Authority is the ACMA’s ultimate decision-making body for regulatory matters. It comprises the Chair, the Deputy Chair and at least one, and not more than seven, other Members.<sup>30</sup> There are currently three full-time and four part-time Members.<sup>31</sup></p> <p>The ACMA Committees comprise:</p> <ul style="list-style-type: none"> <li>Radiocommunications Consultative Committee</li> <li>Consumer Consultative Forum</li> </ul>	<p><b>Decision making bodies:</b><sup>33</sup></p> <p>The FCC is directed by 5 commissioners who are appointed by the President of United States (who also selects one of the commissioners to serve as chairman) and confirmed by the U.S. Senate. Only 3 of the 5 commissioners can be of the same political party at any given time and none can have a financial interest in any commission-related business.</p> <p>All commissioners, including the chairman, have 5-year terms, except when filling an unexpired term</p> <p>Bureaus and offices<sup>34</sup></p> <p>The FCC is organised into bureaus and offices based on function. Bureaus include:</p> <ul style="list-style-type: none"> <li>Consumer and Governmental Affairs Bureau</li> <li>Enforcement Bureau</li> <li>International Bureau</li> <li>Media Bureau</li> <li>Public Safety and Homeland Security Bureau</li> <li>Wireless Telecommunications Bureau</li> <li>Wireline Competition Bureau</li> </ul>	<p><b>Decision making bodies:</b><sup>35</sup></p> <ul style="list-style-type: none"> <li>Ofcom board – Ofcom’s main decision making body which meets monthly and provides strategic direction for the organisation. Members include: <ul style="list-style-type: none"> <li>a non-executive Chairman; and</li> <li>up to 9 other members including executive and non-executive directors.</li> </ul> </li> </ul> <p>6 of the members are part time (appointed by the Secretary of State for Culture, Media and Sport) and 3 are full time executive members. The Chairman and other non-executive members of the Board appoint the Chief Executive, subject to the approval of the Secretary of State, and also appoint any other executive Board members. The composition of Ofcom’s Board is determined in accordance with the Office of Communications Act 2002 and is published. Ofcom must have a majority non-executive Board and do not include anyone who is actively engaged in the regulated industry<sup>36</sup></p> <ul style="list-style-type: none"> <li>The Policy and Management Board meets weekly and oversees the management of Ofcom as well as its regulatory duties.</li> <li>The Content Board is a committee of the main Board and it sets and enforces quality and standards for television and radio</li> <li>Committees - the work of both the Ofcom Board and Executive is informed by the contribution of a number of committees and advisory bodies, which are required by the Communications Act. Committees</li> </ul>	<p><b>Decision making bodies:</b><sup>37</sup></p> <p>The Chairman and CEO oversee the organisation. There is also a Vice-Chairperson of Broadcasting and a Vice-Chairperson of Telecommunications. These are full-time positions. The Secretary General, Corporate Services and Operations and Senior General Council, support the CRTC’s operational activities (e.g. HR and Finance) and report to the Chairman. These positions are all “designated public office holders”.</p> <p>The Executive Director Telecommunications, the Executive Director Broadcasting and the Chief Consumer Officer all report to the Chairman. They are supported by the Executive Director Communications and External Relations and the Chief Compliance and Enforcement Officer.</p> <p>There are up to ten additional national and regional Commissioners.<sup>38</sup> Commissioners are appointed by the Governor in Council (Cabinet). They are appointed for renewable terms of up to five years. The Governor in Council designates one of the members to be Chairperson and two to be Vice-Chairpersons.<sup>39</sup></p> <p>Commissioners must be Canadian citizens ordinarily resident in Canada.<sup>40</sup></p> <p>The Commissioners are responsible for:</p> <ul style="list-style-type: none"> <li>Establishing rules, policies and guidelines for licences</li> <li>Participating in public hearings and consultations</li> </ul>

<sup>27</sup> <http://www.acma.gov.au/theACMA/About/Corporate/Structure-and-contacts/organisational-structure-acma>

<sup>28</sup> *Australian Communications and Media Authority Act 2005* sections 20 and 21.

<sup>29</sup> <http://www.acma.gov.au/theACMA/About/Corporate/Structure-and-contacts/organisational-structure-acma>

<sup>30</sup> *Australian Communications and Media Authority Act 2005* section 19.

<sup>31</sup> <http://www.acma.gov.au/theACMA/About/Corporate/Authority/the-role-of-the-authority>

<sup>33</sup> <https://www.fcc.gov/leadership>

<sup>34</sup> <https://www.fcc.gov/bureaus-offices>

<sup>35</sup> <http://www.ofcom.org.uk/about/how-ofcom-is-run/>

<sup>36</sup> <http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board/>

<sup>37</sup> <http://crtc.gc.ca/eng/acrtc/org.htm>

<sup>38</sup> <http://crtc.gc.ca/eng/acrtc/org.htm>

<sup>39</sup> *Canadian Radio-television and Telecommunications Commission Act R.S.C., 1985, c. C-22, section 3.*

<sup>40</sup> *Canadian Radio-television and Telecommunications Commission Act R.S.C., 1985, c. C-22, section 5.*





The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
<ul style="list-style-type: none"> <li>• Technical Advisory Group</li> <li>• Emergency Call Service Advisory Committee</li> <li>• Australian ENUM Discussion Group</li> <li>• National Relay Service Consultative Committee</li> <li>• Numbering Advisory Committee<sup>32</sup></li> </ul>		<p>include the Communications Consumer Panel, Ofcom Spectrum Advisory Board etc.</p> <p><b>Offices:</b></p> <ul style="list-style-type: none"> <li>• Legal group</li> <li>• Content, consumers &amp; external affairs group</li> <li>• Strategy, International, Technology, Economist Group</li> <li>• Competition Group</li> <li>• Spectrum Group</li> <li>• Corporate Services/Operations Group</li> </ul>	<ul style="list-style-type: none"> <li>• Developing regulations and participation in issuing CRTC decisions</li> <li>• Consulting with members of the broadcasting and telecommunications industries, the public and other interested parties</li> <li>• Meeting with licensees, industry organisations or other interested parties (regional Commissioners in particular)</li> </ul> <p>Considering directions to the CRTC from the Governor-in-Council<sup>41</sup></p>
Interaction/overlap with other regulators			
<p><b>The Australian Competition and Consumer Commission (ACCC)</b></p> <p>The ACMA and the Australian Competition and Consumer Commission (ACCC) have some parallel jurisdiction. In particular, the ACCC has powers to facilitate competition in telecommunications and facilitate the resolution of access disputes.<sup>42</sup></p> <p><b>Department of Communications and industry bodies</b></p> <p>The jurisdiction of the ACMA also overlaps with the Department of Communications, which has responsibility for telecommunications policy and industry bodies including the Communications Alliance, which develop and register industry codes.</p> <p><b>Telecommunications Industry Ombudsman</b></p> <p>There is also some parallel jurisdiction between the ACMA, the Telecommunications Industry Ombudsman, which primarily considers consumer complaint and protection, and the State and Territory Fair Trading Offices, which also protect consumers.<sup>43</sup></p>	<p><b>The National Telecommunications and Information Administration (NTIA)</b></p> <p>The National Telecommunications and Information Administration (NTIA), located within the Department of Commerce, is the Executive Branch agency that is principally responsible by law for advising the President on telecommunications and information policy issues. NTIA's roles include managing the Federal use of spectrum and identifying additional spectrum for commercial use;</p>	<p><b>Competition and Markets Authority (CMA)</b></p> <p>Ofcom and CMA have a memorandum of understanding regarding their concurrent powers to enforce:<sup>47</sup></p> <ul style="list-style-type: none"> <li>• certain consumer laws under Part 8 of the Enterprise Act 2002 (EA02);</li> <li>• the Unfair Terms in Consumer Contracts Regulations 1999; and</li> <li>• Regulation (EC) No 2006/2004 on consumer protection cooperation.</li> </ul> <p><b>Information Commissioner's Office (ICO)</b></p> <p>Ofcom and ICO have a letter of understanding regarding their concurrent powers to enforce in these areas:<sup>48</sup></p> <ul style="list-style-type: none"> <li>• ICO has primary responsibility for enforcing the Regulations using the discrete powers conferred on it under Part V and Schedules 6 and 9 of the Data Protection Act 1998.</li> <li>• Additionally, Ofcom and ICO share concurrent powers as designated enforcers of the Regulations under Part 8 of the Enterprise Act 2002.</li> <li>• Ofcom in turn has discrete enforcement powers in relation to persistent misuse of an electronic communications network or service under sections 128 to 130 of the Communications Act 2003. Ofcom can take action under these provisions where Ofcom has reasonable grounds for</li> </ul>	<p><b>The CRTC Interconnection Steering Committee (CISC)</b></p> <p>The CISC is an organisation established by the CRTC to assist in developing information, procedures and guidelines as may be required in various aspects of the CRTC's regulatory activities.<sup>49</sup></p> <p><b>The Competition Bureau (Bureau)</b></p> <p>The Bureau is Canada's competition regulator, which deals with anti-competitive conduct and merger reviews. There is some parallel jurisdiction between the two bodies.<sup>50</sup> In particular, they both have authority in relation to merger reviews of telecommunications service providers and broadcasters and in relation to marketing practices of the industry. The CRTC deals exclusively with interconnection and access issues, while the Bureau deals exclusively with conduct that lessens competition such as price fixing, bid rigging and price maintenance.</p> <p><b>The Canadian Broadcast Standards Council (CBSC)</b></p> <p>Appeals from decisions of the Canadian Broadcast Standards Council (CBSC) an independent, non-governmental organisation created by the Canadian Association of Broadcasters, are made to the CRTC. The matter will be heard de novo by the CRTC.<sup>51</sup></p>

<sup>32</sup> <http://www.acma.gov.au/theACMA/About/Corporate/Structure-and-contacts/acma-committees-acma>

<sup>41</sup> <http://crtc.gc.ca/eng/acrtc/commissioners.htm>

<sup>42</sup> The Regulatory Framework and ACMA's Role: [http://www.acma.gov.au/webwr/\\_assets/main/lib310131/the\\_regulatory\\_framework\\_and\\_acma.doc](http://www.acma.gov.au/webwr/_assets/main/lib310131/the_regulatory_framework_and_acma.doc)

<sup>43</sup> The Regulatory Framework and ACMA's Role: [http://www.acma.gov.au/webwr/\\_assets/main/lib310131/the\\_regulatory\\_framework\\_and\\_acma.doc](http://www.acma.gov.au/webwr/_assets/main/lib310131/the_regulatory_framework_and_acma.doc)

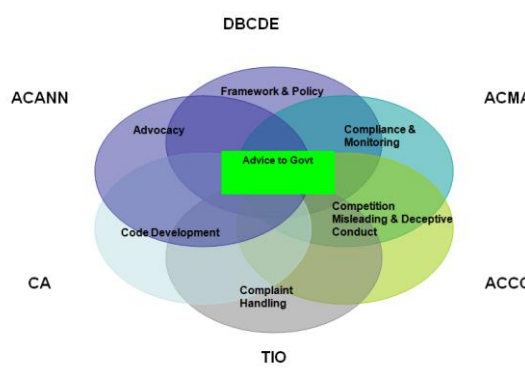
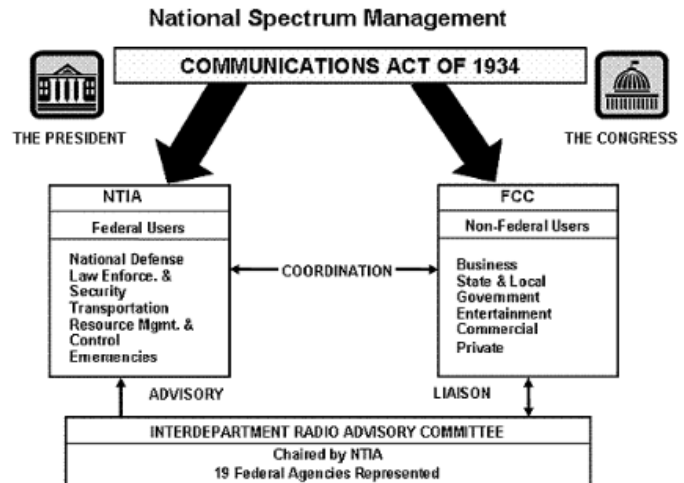
<sup>47</sup> <http://www.ofcom.org.uk/about/how-ofcom-is-run/organisations-we-work-with/>

<sup>48</sup> <http://www.ofcom.org.uk/about/how-ofcom-is-run/organisations-we-work-with/>

<sup>49</sup> <http://crtc.gc.ca/eng/cisc-cdci.htm>

<sup>50</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01598.html>

<sup>51</sup> <http://www.cbbsc.ca/english/faqs/decisions.php#6>

The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
 <p>See pages 10 and 11 below in relation to references to:</p> <ul style="list-style-type: none"> <li>The ACCC in the <i>Radiocommunications Act 1992</i></li> <li>The ACMA in the <i>Competition and Consumer Act 2010</i></li> <li>The ACCC in the <i>Telecommunications Act 1997</i></li> </ul>	 <p><b>The Federal Trade Commission (FTC)</b></p> <p>The FTC is a quasi-judicial, independent regulatory agency led by five commissioners. It has a unique dual mission to protect consumers and promote competition.<sup>44</sup> The FTC has jurisdictional overlap with the FCC on broadcasting and advertising. The FCC has a broad mandate to assure the public convenience, interest and necessity in the broadcast media and whereas the FTC have primary jurisdiction over all matters regulating unfair or deceptive advertising in all media, including the broadcast media.</p> <p>The FCC will take into account considerations relating to unfair and deceptive advertising in determining whether a broadcaster's application for a license or renewal of a license will be granted or denied.<sup>45</sup></p> <p><b>Department of Justice (DOJ)</b></p> <p>The DOJ is part of the executive branch, operating under the U.S. Attorney General. An Assistant Attorney General, nominated by the President and confirmed by the Senate, leads the Antitrust Division. Investigations are conducted by staff within the DOJ's Civil Sections, Criminal Sections, and Economic Sections.</p> <p>DOJ shares jurisdiction with the FCC in reviewing telecommunications mergers.<sup>46</sup></p> <p>DOJ also shares with the FTC the authority to prosecute certain antitrust violations including price discrimination, exclusive dealing, and acquisitions of stock or assets and interlocking directorates.</p>	<p>believing that a person has persistently misused an electronic communications network or service in any way that causes, or is likely to cause, unnecessary annoyance, inconvenience or anxiety to consumers.</p>	
Independence and funding			
Funding:	Funding:	Funding:	Funding:

<sup>44</sup> <https://www.ftc.gov/about-ftc/what-we-do>

<sup>45</sup> Ward, PC, *Federal Trade Commission: Law, Practice and Procedure*, ALM Properties Inc, Law Journal Press, New York 2014

<sup>46</sup> <http://www.justice.gov/atr/annex-3-b>



The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
<p>The ACMA does not have a legal identity separate to the Commonwealth, under sections 6 and 62B of the <i>Australian Communications and Media Authority Act 2005</i> (Cth).</p> <p>The ACMA collects revenue on behalf of the Australian Government through taxes, charges and licence fees.<sup>52</sup></p> <p><b>Independence:</b></p> <p>Under section 14 of the <i>Australian Communications and Media Authority Act 2005</i> (Cth) the Minister may give written direction to the ACMA in relation to the performance of its functions and the exercise of its powers. However, such a direction can only be of a general nature if it relates to the ACMA's broadcasting, content and datacasting functions. The ACMA must perform its functions or exercise its powers consistently with directions given by the Minister.</p>	<p>Since 2009 the FCC's budget has been derived from regulatory fees collected by the agency rather than through a direct appropriation. The fees, often referred to as "Section (9) fees," are collected from license holders and certain other entities (e.g., cable television systems), and deposited into an FCC account. The FCC is authorised to review the regulatory fees each year and adjust them to reflect changes in its appropriation from year to year. Most years, appropriations language prohibits the use by the commission of any excess collections received in the current fiscal year or any prior years. These funds remain in the FCC account and are not made available to other agencies or agency programs nor redirected into the Treasury's general fund.<sup>53</sup></p> <p>The FCC requested an FY2016 budget of \$388,000,000, all to be derived from regulatory fees collected by the agency. That amount is \$48 million more than the enacted FY2015 budget.</p> <p>The majority of the 2016 funding will be shouldered by regulatory fees. The FCC FY2016 Budget Estimate does not mention potential funding from litigation.<sup>54</sup></p>	<p>Ofcom is funded by a combination of fees from industry for regulating broadcasting and communications networks, and grant-in-aid from the Government. Grant-in-aid from the Government covers Ofcom's functions in relation to managing the radio spectrum and to those functions Ofcom must carry out, but for which legislation has provided no matching revenue stream. For example, the statutory public interest test for media mergers and Competition Act investigations are funded through this mechanism.</p> <p>The administrative costs for carrying out functions in relation to broadcasting is funded by broadcast licensees and do not come from grant-in-aid from the Government. The basis on which Ofcom collects its administrative costs for these functions is set out in Ofcom's Statement of Charging Principles.<sup>55</sup></p> <p>In 2010 Ofcom commenced its internal Expenditure Review Project, during which a set of measures was developed to deliver a 28.2% real term reduction in costs over four years, while continuing to deliver against all Ofcom's commitments.</p> <p><b>Independence:</b></p> <p>Ofcom is a national regulatory authority. The independence provisions in the Framework Directive require Member States to ensure that national regulatory authorities (NRAs) act independently and do not seek or take instructions from any other body in relation to the exercise of certain key regulatory tasks assigned to them.<sup>56</sup></p> <p>Independent funding and budget control, to ensure the regulator can deliver its public purposes with sufficient resources and without fear of interference from industry or government. Typically this should mean budgets are agreed for a significant period, such as four years. During this period the regulator should be required to manage within the set budget limits (excluding exceptional events), but it should also have security in relation to this funding and not be subject to financial pressure that would undermine its ability to act independently.<sup>57</sup></p> <p>While the Chairman and non-executive members of the Ofcom Board are appointed by the Secretary of State, there are safeguards in place to ensure their independence and consequently the independence of Ofcom as an organisation. For example, Ofcom's Chairman is appointed for a fixed term of five years. The appointment process for the Chairman involves an open competition and is subject to a confirmation hearing by Parliament, conducted by the relevant House of Commons Select Committee. The removal of the Chairman or any other member of the Ofcom Board is subject to the protections afforded by European law, in particular Article 3(3a) of the Framework Directive.<sup>58</sup></p>	<p>The CRTC is funded partly through Parliamentary authorities of the Government of Canada (e.g. Statutory Vote for Employee Benefits Plans, Budgetary Vote for the Anti-spam legislation activities) and the balance by vote-netted fees it collects from the broadcasting, telecommunications and telemarketing industries.<sup>59</sup></p>

<sup>52</sup> ACMA 2013-2014 Annual Report, page 24: <http://www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/annual-report>

<sup>53</sup> Figliola PM, *The Federal Communications Commission: Current structure and its role in the changing telecommunications landscape*, Congressional Research Service, 29 June 2015

<sup>54</sup> Federal Communications Commission, *Fiscal Year 2016 Budget Estimates submitted to Congress*, February 2015

<sup>55</sup> OFCOM, *OFCom response to European Commission consultation on the independence of audiovisual regulatory bodies*, June 2013 ([http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=2463](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2463))

<sup>56</sup> OFCOM, *OFCom response to European Commission consultation on the independence of audiovisual regulatory bodies*, June 2013 ([http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=2463](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2463))

<sup>57</sup> OFCOM, *OFCom response to European Commission consultation on the independence of audiovisual regulatory bodies*, June 2013 ([http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=2463](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2463))

<sup>58</sup> OFCOM, *OFCom response to European Commission consultation on the independence of audiovisual regulatory bodies*, June 2013 ([http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=2463](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2463))

<sup>59</sup> <http://www.crtc.gc.ca/eng/publications/finance/fr141231.htm>



The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
Decision making processes			
Overview			
<p>The processes for decision-making within and delegation by the ACMA are established under the <i>Australian Communications and Media Authority Act 2005</i> (Cth).<sup>60</sup> Generally, decisions are made in formal meetings with matters being decided by the majority of its members in attendance. Meetings are held about twice a month.<sup>61</sup></p> <p>In relation to spectrum decisions, the ACMA applies the following principles:</p> <ol style="list-style-type: none"><li>1. Allocate spectrum to the highest value use or uses.</li><li>2. Enable and encourage spectrum to move to its highest value use of uses.</li><li>3. Use the least cost and least restrictive approach to achieving policy objectives.</li><li>4. To the extent possible, promote both certainty and flexibility.</li><li>5. Balance the cost of interference and the benefits of greater spectrum utilisation.<sup>62</sup></li></ol> <p>The ACMA's spectrum management decision-making framework is set out below:</p>	<p>The FCC has authority to issue, modify or rescind legislative rules and non legislative rules (such as rules governing how legislation should be interpreted, policy statements and organisational and procedural rules). Most FCC rules follow the process known as “notice and comment”.</p> <p>The FCC will generally initiate the rulemaking process if:</p> <ul style="list-style-type: none"><li>• it is required under legislation</li><li>• it is to address a problem identified by the FCC</li><li>• the public petitions for the FCC to issue, modify or rescind a rule.</li></ul> <p><b>The “notice and comment” process</b></p> <p>The “notice and comment” process generally do not apply to non-legislative, procedural or organisational rules.</p>	<p>The Ofcom has published a guide on its consultation process. However, it states that each consultation will be different. The process of consultation will depend on the type of industry issue and the type of people and organisations likely to take an interest.</p>	<p><b>Broadcasting and Telecom Processes Generally</b></p> <p>An application may be brought before the CRTC by an applicant, complaint or on the CRTC’s own initiative.<sup>64</sup> Generally the process allows for the applicant to provide the CRTC with information/evidence relating to their application, and for any respondent or intervener to provide the CRTC with information. The applicant has the opportunity to file a reply to an answer or submission made by an intervener. An applicant can also apply for the resolution of a matter under an alternative dispute resolution process.<sup>65</sup></p> <p><b>Conduct of investigation</b></p> <p>The CRTC has the power to conduct investigation or hearing in the manner in which it sees fit. The CRTC may dispense with, or vary the rules, if the public interest or fairness permits.<sup>66</sup> In addition, the CRTC can adjourn a proceeding, combine two or more proceedings, and decide whether to admit a document into evidence, amend or strike out a document that might prejudice or delay a hearing on the merits and stay a proceeding pending a Federal Court decision.<sup>67</sup> The CRTC can request information, particulars or documents, or ask parties to make written or oral representations.<sup>68</sup> If the CRTC is of the opinion that it is in the public interest to permit requests for information from one party to another, it may give that permission in the notice of consultation.<sup>69</sup></p> <p>The CRTC may also request the parties to appear before one of its members before a public hearing in order to simplify the issues, or consider the necessity or desirability of amending the application, answer, intervention or reply, or the making of admissions of certain facts, or the procedure to be followed at hearing, or the mutual exchange of documents to be submitted at the hearing or any other matter that might aid the simplification of evidence and disposition of the proceedings.<sup>70</sup></p>

<sup>60</sup> <http://www.acma.gov.au/theACMA/About/Corporate/Authority/the-role-of-the-authority>

<sup>61</sup> <http://www.acma.gov.au/theACMA/About/Corporate/Authority/the-role-of-the-authority>

<sup>62</sup> <http://www.acma.gov.au/theACMA/About/The-ACMA-story/Facilitating/decisionmaking-process-fyso-25-1>

<sup>64</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 3.

<sup>65</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 52.

<sup>66</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 7.

<sup>67</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 10.

<sup>68</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 28.

<sup>69</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 72.

<sup>70</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 37.





The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
<div></div> <p>The ACMA's spectrum management decision-making framework is informed by its 2013 publication, Five-year Spectrum Outlook 2013-2017.<sup>63</sup></p>			<p>In a broadcasting matter, the CRTC may approve the whole or part of an application or grant any relief in addition to or in substitution for the relief applied for.<sup>71</sup></p> <p>A party can make an application for interim costs to be awarded, if they consider that they do not have sufficient financial resources to participate effectively.<sup>72</sup> A party that has been awarded interim costs must file an application for final costs.<sup>73</sup></p>
Level of stakeholder engagement			
<p>Under section 59 of the <i>Australian Communications and Media Authority Act 2005</i> (Cth) the Consumer Consultative Forum is to assist the ACMA in its functions in matter affecting consumers.</p> <p>Under section 58 of the <i>Australian Communications and Media Authority Act 2005</i> (Cth) the AMCA may establish advisory committees to assist it in carrying out its functions.</p> <p>The ACMA has also recognised the importance of stakeholder engagement. It undertook its initial stakeholder survey in 2008 and in 2013-2014 conducted 24 integrated online targeted campaigns.<sup>74</sup></p>	<p>The Administrative Procedure Act (<b>APA</b>) sets out the following minimum requirements/steps:<sup>75</sup></p> <ol style="list-style-type: none"><li>the FCC may choose to issue a notice of inquiry (<b>NOI</b>) or public notices (<b>PNs</b>) prior to issuing a notice of proposed rulemaking (<b>NPRM</b>). NOIs and PNs may be issued by the FCC if it wants comments on how to address a problem before making a proposal or requires additional information etc.</li><li>the FCC must issue a NPRM which explains the need, source of authority and reasons for the proposed rule changes and may include specific questions it would like comment on</li><li>The public will generally be given 30 days to file comments on an NPRM with the Commission.</li></ol>	<p>There are seven principles which the Ofcom will normally follow for each written consultation.<sup>76</sup></p> <p>Before the consultation</p> <ol style="list-style-type: none"><li>Where possible, the Ofcom will hold informal talks with people and organisations before announcing a big consultation to find out whether Ofcom and the stakeholders are all thinking in the right direction. If there is insufficient time to do this, Ofcom will usually hold an open meeting to explain Ofcom's proposals shortly after announcing the consultation.</li></ol> <p>During the consultation</p> <ol style="list-style-type: none"><li>The Ofcom will clarify who they are consulting, why, on what questions and for how long.</li><li>The consultation document will be as short and simple as possible with a summary in plain English. If the consultation is complicated, the Ofcom</li></ol>	<p><b>Broadcasting and Telecom Processes Generally<sup>77</sup></b></p> <p>The CRTC may provide an opportunity for the parties to make written or oral representations.<sup>78</sup> A respondent (a person that is adverse in interest to the applicant) may file an answer with the CRTC after it posts the application on its website.<sup>79</sup> In addition, any interested party may intervene in a proceeding, once the application has been posted on the CRTC website.<sup>80</sup> The applicant may in turn file a reply to an answer or to the intervener with the CRTC.<sup>81</sup> The CRTC can request information, particulars or documents, or ask them to make written or oral representations.<sup>82</sup></p> <p><b>Consumer Complaints</b></p> <p>If the CRTC decides to consider a consumer complaint, it must send a copy of the complaint to the person against whom it is made.<sup>83</sup> That</p>

<sup>63</sup> <http://acma.gov.au/theACMA/About/The-ACMA-story/Facilitating/spectrum-management-decision-making-framework-fyso-2-1>

<sup>71</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 11.

<sup>72</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 60.

<sup>73</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) rr 64 and 65.

<sup>74</sup> The ACMA – meeting our standard, December 2014, pages 569 - 70: <http://www.acma.gov.au/~media/Research%20and%20Analysis/Report/Word%20Document/Meeting%20our%20standard%20docx.docx>.

<sup>75</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>

<sup>76</sup> <http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>

<sup>77</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277)

<sup>78</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 10.

<sup>79</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 25.

<sup>80</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 26.

<sup>81</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 27.

<sup>82</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 28.

<sup>83</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 46.



The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
There is no requirement to engage stakeholders in decision-making processes.	<ol style="list-style-type: none"> <li>The FCC generally permits reply comments in which members of the public may respond to each other's initial comments.</li> <li>The FCC allows oral and written presentations in addition to initial and reply comments.</li> <li>The FCC may choose to issue a further notice of NPRMs if it wants public comment on a new or modified proposal.</li> <li>The final rule must include an explanatory preamble and the rule text. The preamble includes a response to the significant, relevant issues raised in public comments and a statement providing the basis and the purpose (i.e., an explanation) of the rule. The FCC is not required to respond to each commenter.</li> <li>The FCC may use public meetings or hearings before or after a proposal is issued to facilitate a way for discussions to take place.</li> <li>The FCC can also use social media, such as blogs, to allow more interchange between stakeholders.</li> </ol>	<p>may provide a shortened plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.</p> <ol style="list-style-type: none"> <li>The Ofcom will consult for up to 10 weeks depending on the potential impact of Ofcom's proposals.</li> <li>A person within Ofcom will be in charge of making sure the guidelines are followed and reach out to the largest number of people and organisations interested in the outcome of Ofcom's decisions. Ofcom's Consultation Champion will also be the main person to contact with views on the way Ofcom runs its consultations.</li> <li>If Ofcom is not able to follow one of these principles, it will explain why.</li> </ol> <p>After the consultation</p> <ol style="list-style-type: none"> <li>The Ofcom would usually publish all the responses it has received on its website.</li> </ol> <p>As well as asking people for written responses to formal consultations, the Ofcom will normally also do the following.</p> <ul style="list-style-type: none"> <li>use research to understand the views, needs and behaviour of people and organisations involved in or concerned about the communications industry. Some research will be based on surveys and opinion polls. Other studies will be based on techniques such as focus groups. The Ofcom may also hold public meetings, on occasion.</li> <li>The Ofcom will continue to make sure that the independent Ofcom Consumer Panel has the people and resources that it needs to support Ofcom's work, both before a consultation and during it.</li> <li>The Ofcom will speak regularly to a number of different people and organisations in an informal way to help us understand their concerns. There may be a period of pre-consultation in some circumstances with stakeholders who might potentially be particularly affected so that Ofcom can understand the issue better. Any stakeholders views gathered during pre-consultation may help inform Ofcom's initial thinking but will not be treated as formal consultation responses, as these informal discussions will apply as well as not instead of the formal consultation process. Ofcom undertakes pre-consultation through a mixture of informal meetings and seminars.</li> </ul>	<p>person may file a response with the CRTC.<sup>84</sup> If the CRTC is not satisfied with the response, it may take any measure that it considers necessary.<sup>85</sup> The CRTC may place a copy of a complaint, and response to it, on the licensee's file to be considered at the time of their licence renewal.<sup>86</sup></p> <p><b>Broadcasting</b></p> <p>In relation to a proceeding initiated by the CRTC to inquiry into, hear and determine a matter under section 12 of the Broadcasting Act (e.g. failure to comply with a licence condition), the CRTC must allow the licensee to review the documents relied upon by it in its decision, and to provide comments and file supporting documents with the CRTC.<sup>87</sup></p> <p><b>Approval processes for tariff applications and intercarrier agreements</b></p> <p>Group B filings applications (those that do not relate to changes to previously approved rates for retail services where the revised rates meet the price cap, or those that are not 'housekeeping' changes or that do not incorporate forborne exchanges or routes) are to be lodged with the CRTC and are usually on the public record.<sup>88</sup> Interested parties may file interventions and the applicant may file a reply.<sup>89</sup></p> <p>For competitor tariffs, interested parties may file interventions and the applicant may file reply comments.<sup>90</sup> For applications for the destandardisation and/or withdrawal of tariffed services the applicant must provide a notice to each customer affected which includes information about how the customer can participate in the CRTC's process. Interested parties may also file interventions and the applicant may file reply comments.<sup>91</sup></p> <p>For applications relating to intercarrier agreements that are not subject to the forbearance, interventions may be filed and parties may reply.<sup>92</sup></p> <p><b>Ownership and Control Review under the Telecommunications Act</b></p> <p>Where a review pursuant to the Ownership and Control Regime involves complex or novel ownership or governance structures, particularly those involving complex or novel financing arrangements, the public interest may be served in some instances by conducting that review via a public, multi-party process or a process that results in</p>

<sup>84</sup> Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277) r 48.

<sup>85</sup> Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277) r 49.

<sup>86</sup> Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277) r 50.

<sup>87</sup> Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277) r 57.

<sup>88</sup> Approval processes for tariff applications and intercarrier agreements: <http://crtc.gc.ca/eng/archive/2010/2010-455.htm>

<sup>89</sup> Approval processes for tariff applications and intercarrier agreements: <http://crtc.gc.ca/eng/archive/2010/2010-455.htm>

<sup>90</sup> Approval processes for tariff applications and intercarrier agreements: <http://crtc.gc.ca/eng/archive/2010/2010-455.htm>

<sup>91</sup> Approval processes for tariff applications and intercarrier agreements: <http://crtc.gc.ca/eng/archive/2010/2010-455.htm>

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The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)																									
		<ul style="list-style-type: none"><li>Ofcom will communicate as widely as possible throughout each consultation. This may involve:<ul style="list-style-type: none"><li>holding as many face-to-face meetings as possible in the time available;</li><li>using the Ofcom website (www.ofcom.org.uk) to gather feedback online and to provide detailed background information;</li><li>briefing the media using news releases and so on; and</li><li>communicating directly through the media by writing articles for magazines and newspapers.</li></ul></li></ul>	<p>a public record and public decision.<sup>93</sup> However, there is no legal obligation that the CRTC conduct a public review. The CRTC has established a flexible framework for public review. This is summarised in the table below:</p> <table><tr><th></th><th>Oral Component</th><th>Multi-party</th><th>Public Record</th><th>Public Decision</th></tr><tr><td>Type 1</td><td>No</td><td>No</td><td>No</td><td>No</td></tr><tr><td>Type 2</td><td>No</td><td>No</td><td>Yes</td><td>Yes</td></tr><tr><td>Type 3</td><td>No</td><td>Yes</td><td>Yes</td><td>Yes</td></tr><tr><td>Type 4</td><td>Yes</td><td>Yes</td><td>Yes</td><td>Yes</td></tr></table> <p>Type 1: Confidential, bilateral review</p> <p>Type 2: Written, bilateral review, resulting in the release of a public record and decision</p> <p>Type 3: Written, public, multi-party proceeding</p> <p>Type 4: Oral, public, multi-party proceeding</p> <p><b>Changes in effective control of broadcasting undertakings</b></p> <p>The CRTC’s objective is to ensure fairness and transparency in determining procedure.<sup>94</sup> For share transfer, there is an administrative, public notice or public hearing route.</p> <p>Public notice route will be taken when the application does not meet the administrative route requirements or the importance of the transaction is such that it warrants the issuance of a public notice.</p> <p>The public hearing route will be taken when the application has been dealt with via a public notice and generates interventions that raise substantive concerns as determined by the Commission and which warrant further discussion in an oral public hearing; or the importance of the transaction is such that it warrants further discussion in an oral public hearing.<sup>95</sup></p> <p>An acquisition of assets which requires the issuance of a new licence will be considered at a public hearing. Other acquisitions will be considered at a public hearing where the importance of the transaction warrants.<sup>96</sup></p> <p>Applications, related correspondence, interventions, notices and decisions are all made public to ensure transparency, subject to confidentiality exceptions.<sup>97</sup></p>		Oral Component	Multi-party	Public Record	Public Decision	Type 1	No	No	No	No	Type 2	No	No	Yes	Yes	Type 3	No	Yes	Yes	Yes	Type 4	Yes	Yes	Yes	Yes
	Oral Component	Multi-party	Public Record	Public Decision																								
Type 1	No	No	No	No																								
Type 2	No	No	Yes	Yes																								
Type 3	No	Yes	Yes	Yes																								
Type 4	Yes	Yes	Yes	Yes																								

<sup>93</sup> <http://crtc.gc.ca/eng/archive/2009/2009-428.htm>

<sup>94</sup> A guide to the CRTC application process for changes in effective control and certain transfers of shares of broadcasting undertakings as well as for the acquisition of assets of broadcasting undertakings: <http://crtc.gc.ca/eng/archive/2008/c2008-8.htm>

<sup>95</sup> A guide to the CRTC application process for changes in effective control and certain transfers of shares of broadcasting undertakings as well as for the acquisition of assets of broadcasting undertakings: <http://crtc.gc.ca/eng/archive/2008/c2008-8.htm>

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The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
Publication of documents			
<p>Under section 43 of the <i>Australian Communications and Media Authority Act 2005</i> (Cth) the ACMA must keep minutes of its meetings. Under section 45, the ACMA must also keep a record of decisions made without a meeting under section 44.</p> <p>The <i>Telecommunications Act 1997</i> (Cth) section 105 also imposes reporting requirements on the ACMA. Significant matters relating to the performance of carriers or carriage service providers, including consumer satisfaction, consumer benefits and quality of service, must be reported.<sup>98</sup></p> <p>In relation to broadcasting complaints, the ACMA will not routinely publicise that it is investigating a complaint. In most cases, the ACMA will publish an investigation report on its findings, on its website or as part of its reporting requirements.<sup>99</sup></p>	<ul style="list-style-type: none"> <li>The Federal Advisory Committee Act ensures that advice by advisory committees is objective and accessible to the public. The Act put in place a process for establishing, operating, overseeing, and terminating these committees that provide valuable input from consumer groups, industry stakeholders, public safety officials and other interested parties.</li> <li>The NPRM is published in the Federal Register which provides access to the official text of federal laws, presidential documents and agency regulations and notices.</li> <li>The rulemaking docket is the electronic file in which the Commission places all of the rulemaking documents it issues (e.g., the NPRM, any extensions of comment periods, and final rules), supporting documents that it prepares, and public comments, replies, and ex parte presentations related to the rulemaking.</li> <li>The final rule is published in the Federal Register or in rare cases personally served on affected entities. In addition, a copy is placed in the rulemaking docket. Legislative rules generally become effective at least 30 days after they are published in the Federal Register. This delay allows affected parties time to come into compliance with the new rules.</li> <li>Dissenting statements are also published</li> <li>Licensing decisions are also published on the Universal Licensing System website.</li> </ul>	<p>The Ofcom will:</p> <ul style="list-style-type: none"> <li>list these seven principles in every consultation document that Ofcom publishes;</li> <li>run a consultation helpdesk to help organisations such as small businesses and consumer and community groups make their views heard in response to Ofcom's consultations; and</li> <li>keep a table on Ofcom's website at <a href="http://www.ofcom.org.uk">www.ofcom.org.uk</a> listing all current consultations and those recently closed. Annually, the Ofcom will also publish a list of projects, and whether these have an associated consultation document, indicating whether Ofcom will be publishing these in quarter 1, 2, 3 or 4.</li> </ul> <p>The Ofcom website does list out list of previous applications for TV broadcast licences<sup>100</sup> and digital and analogue radio licences<sup>101</sup>. Whilst past licence applications are not centrally located on the Ofcom's website, and is therefore more difficult to locate, it does appear that Ofcom publishes previous licence applications on its website.</p>	<p>The CRTC may issue information bulletins regarding matters within its jurisdiction, including decisions.<sup>102</sup></p> <p><b>Broadcasting and Telecom Processes Generally</b></p> <p>If a matter is brought before the CRTC of its own initiative, the CRTC must post a notice of consultation on its website.<sup>103</sup> Notice must also be posted on the parties' websites.<sup>104</sup> Where a public hearing is held in respect of an application, the applicant must post the notice of consultation on their own website until the deadline for intervening in the proceeding has passed. The applicant must also give notice of the consultation in any manner that the Commission directs, including through broadcast. Where the public hearing relates to regulatory policy, the CRTC must determine which licensees and telecommunications service providers must post the notices (r 35).<sup>105</sup></p> <p>The CRTC must post on its website a consultation notice in relation to an application for the issuance or renewal of a licence under subsection 9(1) of the Broadcasting Act or for the approval of the transfer or ownership or the change in control of a broadcasting undertaking, and must provide an electronic link to the application.<sup>106</sup></p> <p><b>Approval processes for tariff applications and intercarrier agreements</b></p> <p>Group B filings applications are usually on the public record.<sup>107</sup> For applications for the destandardisation and/or withdrawal of tariffed services the applicant must provide a notice to each customer affected which includes information about how the customer can participate in the CRTC's process.<sup>108</sup></p>
Transparency and Accountability			
The Department of Finance and Deregulation and the Australian National Audit Office set down	<b>Peer review:</b> <sup>111</sup>	Ofcom is a statutory corporation. It is required to report annually to Parliament. Although independent of Government, Ofcom has links to the	Under section 12 of the Telecommunications Act the Governor in Council may refer back to the Commission for reconsideration a

<sup>98</sup> <http://www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report>.

<sup>99</sup> <http://www.acma.gov.au/theACMA/Library/Industry-library/Broadcasting/broadcasting-investigation-reports>; see also <http://www.acma.gov.au/theACMA/ACMAi/Complaints/Broadcast-complaints/faqs-broadcasting-rules-and-complaints-acma-1#39>

<sup>100</sup> <http://licensing.ofcom.org.uk/tv-broadcast-licences/local/applicants/previous-applicants/>

<sup>101</sup> <http://licensing.ofcom.org.uk/radio-broadcast-licensing/digital-radio/small-scale-trial-multiplex-licensing/closed-application-round-docs/applicants/> ; <http://licensing.ofcom.org.uk/radio-broadcast-licensing/analogue-radio/apply-for-licence/applications/preston/list/>

<sup>102</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 6.

<sup>103</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 21.

<sup>104</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) rr 23 and 35.

<sup>105</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 35.

<sup>106</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 53.

<sup>107</sup> Approval processes for tariff applications and intercarrier agreements: <http://crtc.gc.ca/eng/archive/2010/2010-455.htm>

<sup>108</sup> Approval processes for tariff applications and intercarrier agreements: <http://crtc.gc.ca/eng/archive/2010/2010-455.htm>

<sup>111</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>





The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
<p>statutory budgeting and reporting requirements relating to the ACMA's financial management.<sup>109</sup> The ACMA operates under the <i>Financial Management and Accountability Act 1997</i> (Cth). The ACMA is also subject to the <i>Public Governance, Performance and Accountability Act 2013</i> (Cth).<sup>110</sup></p>	<p>Draft agency products containing important scientific (and social scientific) information should be peer reviewed by qualified specialists in the field who were not involved in producing the draft before it is disseminated by the federal government. The purpose of peer review is to ensure that the quality of published information meets the standards of the scientific and technical community.</p> <p><b>Logical outgrowth test:</b><sup>112</sup></p> <p>Importantly, the U.S. courts have required that any changes made in the final rule be of a type that could have been reasonably anticipated by the public – a logical outgrowth of the proposal. If a change is not a logical outgrowth of the proposal in the NPRM, an agency is required to provide the public with a further opportunity for comment.</p> <p><b>Congress:</b></p> <p>The FCC publishes four reports for Congress.</p> <ol style="list-style-type: none"><li>1. Strategic Plan - the Strategic Plan is the framework around which the FCC develops its yearly Performance Plan and Performance Budget. The FCC submitted its current four-year Strategic Plan in February 2014</li><li>2. Performance Budget - the annual Performance Budget includes performance targets based on the FCC's strategic goals and objectives, and serves as the guide for implementing the Strategic Plan. The Performance Budget becomes part of the President's annual budget request.</li><li>3. Agency Financial Report - the annual Agency Financial Report contains financial and other information, such as a financial discussion and analysis of the agency's status, financial statements, and audit reports.</li><li>4. Annual Performance Report - at the end of the fiscal year, the FCC publishes an Annual Performance Report that compares the agency's actual performance with its targets.</li></ol> <p>All of these reports are available on the FCC website, <a href="http://www.fcc.gov/encyclopedia">http://www.fcc.gov/encyclopedia</a>.</p> <p><b>U.S. Government Accountability Office (GOA)</b></p> <p>The GOA is an independent, nonpartisan agency that works for Congress. Often called the "congressional watchdog," GAO investigates how the federal government (including the FCC) spends taxpayer dollars.</p>	<p>Department for Culture, Media and Sport (<b>DCMS</b>) and to the Department for Business, Innovation and Skills (<b>BIS</b>), and the Secretary of State is required to lay Ofcom's annual report before Parliament. Ofcom is also subject to inspection by the National Audit Office and accountable to the Public Accounts Committee for propriety and value for money.<sup>114</sup></p> <p>In addition to the Annual Reports and Annual Plans, the Ofcom also publishes the tariff tables, financial penalties, board and executive committee expenses, salary scales, senior salary disclosure, gifts and hospitality register etc.<sup>115</sup></p> <p><b>National Audit Office (NAO)</b></p> <p>Ofcom is audited by the National Audit Office (NAO), which body approves Ofcom's annual accounts. The role of the NAO is to scrutinise public spending on behalf of Parliament. It reports the results of its audits to Parliament, and holds government departments and bodies to account for the way they use public money, thereby safeguarding the interests of taxpayers. The Comptroller and Auditor General and the NAO staff are independent of government and they do not report to any Minister.<sup>116</sup></p>	<p>decision by the CRTC, and under section 14, it may require the CRTC to make a report on any matter within the CRTC's jurisdiction under that Act or any special Act.</p> <p>Under section 15 of the Broadcasting Act, the Governor in Council may request the Commission to hold hearings or make reports on any matter within the jurisdiction of the CRTC under that Act. Under section 28, the Governor in Council may refer back to the CRTC for reconsideration and hearing of the matter a decision by the CRTC to issue, amend or renew a licence.</p>

<sup>109</sup> ACMA 2013-2014 Annual Report, page 143-44: <http://www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/annual-report>

<sup>110</sup> ACMA 2013-2014 Annual Report, page 144: <http://www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/annual-report>

<sup>112</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>

<sup>114</sup> <http://www.politics.co.uk/reference/ofcom>

<sup>115</sup> <http://www.ofcom.org.uk/about/annual-reports-and-plans/>

<sup>116</sup> OFCOM, *OFCOM response to European Commission consultation on the independence of audiovisual regulatory bodies*, June 2013 ([http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=2463](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2463))



The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
	For example, GOA was asked to provide information on FCC's reform efforts for the Universal Service Fund's (USF) high-cost program. <sup>113</sup> In July 2014, it published its findings that the FCC should improve the accountability and transparency of the program funding and recommended that the FCC demonstrate how high-cost funds were used to improve broadband availability, service quality, and capacity, such as by conducting analyses of carrier data and reporting the information in an accessible manner. In response, FCC concurred with GAO's recommendation and intends to take action to address it.		
Timeliness			
	Generally, the FCC will allow at least 30 days for the public to file comments on an NPRM with the FCC. Sometimes, especially for highly technical and complex matters, the FCC provide much longer periods. The FCC may also use shorter periods where there is a need to act quickly. The public may also request more time to comment. <sup>117</sup>	The length of Ofcom consultations range from 4 weeks (technical consultations) to 10 weeks (major policy initiatives) Under the law, Ofcom must allow at least one month for consultation on many issues relating to electronic communications networks and services. <sup>118</sup>	
Appeals			
<p><b>Radiocommunications Act 1992(Cth)</b> Certain decisions made by the ACMA under the <i>Radiocommunications Act 1992</i>(Cth) can be appealed directly to the Administrative Appeals Tribunal under section 292A. These include decisions not to issue a datacasting transmitter licence under section 102B(b), section 106(6A), section 114(3C), a decision to suspend a datacasting transmitter licence under section 128C(1), a decision to cancel the licence under section 128D or a decision not to transfer a datacasting transmitter licence under section 131ACA(b).</p> <p>Certain decisions made by the ACMA must be reconsidered by the ACMA before they can be appealed to the Administrative Appeals Tribunal under section 292 of the <i>Radiocommunications Act 1992</i>(Cth). These include decisions relating to spectrum licences, apparatus licences and datacasting transmitter licences.</p>	<p>Parties who disagree with the final rules or accompanying analysis issued by the FCC may file a petition for reconsideration explaining why they believe the FCC was wrong. The FCC will then issue an order granting or denying the petition. Alternatively, as long as the FCC has addressed an issue, parties who disagree with a rule that affects them may seek court review of the decision.</p> <p><b>Congress</b> Under the Congressional Review Act, agencies must submit final rules to Congress. After submission, Congress can begin a process to overturn the rule. Congress can also use a variety of processes as part of its oversight of agency action, including holding hearings, issuing reports, or adopting legislation.</p> <p><b>Courts</b> Under the APA, a rule can be challenged in court on the basis that it is arbitrary, capricious, an abuse of discretion; contrary to the Constitution or a statute; or the agency failed to follow required legal procedures. Even if a court does not overturn an agency's rule for one of these reasons, it may send the matter back for further consideration or explanation by the agency. The agency can also be</p>	<p>Ofcom also advises on Parliamentary Questions from Departments and responds to letters and questions it receives directly from Parliamentarians. Any evidence and recommendations provided to Ministers and Parliament are made public, transparent and contestable.</p> <p><b>Competition Appeal Tribunal (Tribunal)</b> Part 2 of the Communications Act confers power on the Ofcom to regulate electronic communications networks and services by the setting, modification or revocation of general or specific conditions of entitlement to provide such networks or services in accordance with section 45 of that Act. Part 2 of the Communications Act also confers power on Ofcom relating to the use of the radio spectrum.</p> <p>Decisions by the Ofcom that may be appealed to the Tribunal include:</p> <ul style="list-style-type: none"> <li>Decisions in relation to a condition of entitlement made by OFCOM under Part 2 of the Communications Act;</li> <li>Decisions under the Communications Act and the Wireless Telegraphy Acts 1949 and 1998 governing the use of the radio spectrum.</li> </ul> <p>Decisions that may not be appealed to the Tribunal are specified in Schedule 8 to the Communications Act and are principally either decisions that do not have an immediate effect on a person, but are of a legislative or quasi</p>	<p>A party can make an application to the CRTC to review, rescind or vary a decision made by it pursuant to section 62 of the Telecommunications Act.<sup>120</sup></p> <p>An appeal to the Federal Court of Appeal lies from a decision or order of the CRTC on a question of law or jurisdiction with leave relating to the Broadcasting Act.<sup>121</sup></p> <p>An appeal from a decision of the CRTC lies to the Federal Court of Appeal on any question of law or jurisdiction.<sup>122</sup></p>

<sup>113</sup> <http://gao.gov/products/GAO-14-587>

<sup>117</sup> <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc>

<sup>118</sup> <http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>

<sup>120</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) r 71.

<sup>121</sup> *Broadcasting Act* S.C. 1991, c. 11, section 31.

<sup>122</sup> *Telecommunications Act* S.C. 1993, c. 38, section 64.



The ACMA	The FCC (U.S.)	Ofcom (UK)	CRTC (Canada)
<p><b><i>Telecommunications Act 1997(Cth)</i></b> Under the <i>Telecommunications Act 1997</i>(Cth) the Administrative Appeals Tribunal may review certain ACMA decisions following internal reconsideration by the ACMA. Decisions which can be reviewed are set out in Schedule 4, Part 1. Appealable decisions include, decision relating to carrier licences, service provider determinations, industry codes, the Telecommunications Industry Ombudsman scheme, the integrated public number database scheme, pre-selection requirements, calling line identification requirements , connection permits, cabling licences, exemption certificates and facility and protection zone installation permits.</p> <p>There is no review for a decision to refuse to grant a carrier licence or a cabling licence, or to impose, vary or revoke a condition of a cabling licence under Schedule 4, Part 2 of the <i>Telecommunications Act 1997</i>(Cth).</p> <p><b><i>Broadcasting Services Act 1992(Cth)(BSA)</i></b> Under the BSA, the Administrative Appeals Tribunal may review certain decisions by the ACMA include in relation to:<sup>119</sup></p> <ul style="list-style-type: none"><li>• the ACMA's power to make a determination in relation to a commercial radio broadcasting licence;</li><li>• the ACMA's associated powers to allocate, cancel, vary or impose licence conditions with regards to commercial television licences, commercial television broadcasting licences or commercial radio broadcasting licences;</li><li>• approval of transactions that result in an unacceptable 3-way control situation and associated powers in relation to granting extension of time for compliance with prior approval notice; and</li><li>• applications for reconsideration of the ACMA's decisions under section 61AZE(1) of the BSA.</li></ul>	<p>sued to “compel action unlawfully withheld or unreasonably delayed.”</p>	<p>legislative nature that require a further act or decision to be given effect, or decisions on matters which fall outside the scope of the EC Communications Directives. They include decisions to institute bring or carry on any criminal or civil proceedings, or to carry out any preliminary steps towards instituting such proceedings.</p> <p>The Tribunal must decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal (section 195(2)) and in accordance with the Tribunal's Rules of Procedure.</p> <p>The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision maker to take in relation to the subject-matter of the decision under appeal and shall remit the decision under appeal to the decision maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision (section 195(3) and (4)).</p> <p>Decisions of the Tribunal may be appealed to the Court of Appeal or the Court of Session.</p> <p><b>Broadcasting Act Licences: Conditions relating to competition matters</b> Ofcom has power by virtue of section 316 of the Communications Act and the Broadcasting Acts (of 1990 and 1996) to impose or vary the conditions of a Broadcasting Act licence to ensure fair and effective competition.</p> <p>Section 317(6) of the Communications Act provides that any person affected by a decision by OFCOM to exercise any of its Broadcasting Act powers for a competition purpose may appeal to the Tribunal against so much of that decision as relates to the exercise of that power for that purpose.</p> <p><b>Appeals under The Mobile Roaming (European Communities) Regulations 2007 (S.I. 2007 No. 1933) (“the 2007 Regulations”)</b> The 2007 Regulations implement Articles 8 and 9 of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (“the EU Mobile Roaming Regulation”) (OJ No. L171, 29.6.2007, p32) and designate Ofcom as the national regulatory authority for the purposes of the EU Mobile Roaming Regulation.</p> <p>Regulation 14 of the 2007 Regulations provides that a person affected by a decision of OFCOM under the EU Mobile Roaming Regulation or the 2007 Regulations may appeal that decision to the Tribunal. Regulation 15 of the 2007 Regulations provides that the Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.</p>	

**Sections of the *Radiocommunications Act* referring to the ACCC:**

- 60 - the ACMA may, after consultation with the ACCC, need to give the ACCC information relating to the procedures for allocating spectrum licences
- 106 - in determining a price-based allocation system for allocating and/or issuing specified transmitter licences, the ACMA may, after consultation with the ACCC, need to give the ACCC information

<sup>119</sup> See *Broadcasting Services Act 1992* (Cth), section 204 for full list of decisions that may be reviewed by the Administrative Appeals Tribunal



- 118B - a person must give the ACCC an access undertaking to be eligible to apply for a channel B datacasting transmitter licence. The ACCC also has powers associated with those undertakings including requesting more information (s118C), enforce the undertaking (s118K), make procedural rules (s118L) so on.
- 118ND - a digital radio multiplex transmitter licensee must give the ACCC an undertaking within 3 months after the issue of the licence. As above, the ACCC has various powers and functions in relation to that undertaking.
- 118PI - the ACCC may apply to the Federal Court for a mandatory or restrictive injunction
- 118Q - the ACCC may arbitrate disputes relating to terms and conditions of access to broadcasting transmission towers, designated associated facilities and sites of broadcasting transmission towers
- 118QH – the ACC may create a Code setting out access conditions
- 118QJ – the ACCC may be the arbitrator in relation to the acquisition of property

**Sections of the *Competition and Consumer Act 2010* referring to the ACMA:**

- 152M - the ACCC must give the ACMA a copy of the report prepared about a public inquiry into a proposal to declare a service in accordance with section 505 of the *Telecommunications Act 1997*(Cth)

**Sections of the *Telecommunications Act 1997* referring to the ACCC:**

- 69AAA - the ACCC may give a carrier who has contravened a carrier licence condition a written direction requiring the carrier to take certain steps to avoid future contravention
- 70 - the ACCC may give the carrier a formal warning for a breach of certain carrier licence conditions
- 99 - before making a service provider determination in relation to specified carriage and content services, the ACMA must consult the ACCC
- 103 - ACCC may issue a formal warning if a person contravenes certain service provider rules.
- 105C - ACCC is to monitor and report each financial year to the Minister on, breaches by Telstra of an undertaking about structural separation.
- 117 - ACCC must be consulted in order for an industry code to be registered
- 133 - the ACMA must consult with the ACCC and the Telecommunications Industry Ombudsman before determining or varying an industry standard.
- 141A - before a person can be exempted from the supply of Layer 2 Bitstream services under section 141, the Minister must consult the ACCC and the ACMA.
- 144 - before a person can be exempted from the supply of eligible services on a wholesale basis under section 143, the Minister must consult with the ACCC and the ACMA.
- 152 - ACCC can determine when persons are associates of each other.
- 284, 276 and 277 - do not prohibit disclosure of information or a document to the ACCC.
- 335 - where parties cannot agree on the appointment of an arbitrator in relation to determining the terms and conditions of a requirement to supply carriage services for defence purposes or for the management of natural disasters, the ACCC is to be the arbitrator.
- 349 – before making a decision in relation to pre-selection, the ACMA must consult with the ACCC. Where a pre-selection determination is made under section 349, under section 351 the ACCC is to be the arbitrator where the parties cannot agree on the appointment of an arbitrator and there is a dispute as to the terms and conditions upon which the pre-selection is to be provided.
- 352 - ACCC must be consulted before the ACMA makes a declaration of any exemptions to providing pre-selection under section 349.
- 350A - ACCC may declare that a specified carriage service is a declared carriage service.
- 367 - the Minister may make Rules of Conduct to prevent, mitigate or remedy unacceptable conduct of international telecommunications operators. The Rules of Conduct may authorise the ACCC to make determinations of a legislative character which imposes requirements, prohibitions or restrictions on either carriers or carriage service providers. The Rules of Conduct may also authorise the ACCC to make information available to the public or a class of persons or a specified person if the disclosure would promote the fair and efficient operation of the market or would otherwise be in the national interest. The ACCC must consult the ACMA before making a determination. Under section 368 the ACCC is to administer the Rules of Conduct. The ACCC may investigate a contravention of the Rules of Conduct under section 371. It must inform the ACMA of the investigation and consult with it about developments in the course of the investigation. Under section 372, the ACCC must review and report to the Minister each financial year on the operation of the Division 3- Rules of conduct about dealings with international telecommunications operators.
- 372L - ACCC may issue a certificate stating that, in the ACCC's opinion, compliance with the third party access regime to fixed-line facilities, is not technically feasible. The ACCC may consult with the ACMA before issuing the certificate. If there is a dispute about the terms and conditions of access, and the parties cannot agree on an arbitrator, the ACCC is to be the arbitrator under section 372M. Under section 372N the Minister may exempt a fixed-line facility from third party access by legislative instrument. That instrument may confer functions or powers on the ACCC. Under section 372NA, the ACCC may, by legislative instrument, make a Code setting out the conditions to be complied with in relation to the provision of access.
- 384 - the ACMA may make technical standards relating to the interconnection of facilities where it is directed to do so in writing by the ACCC. Where the Minister exempts a specified carrier or carriage service provider from the technical standard, the Minister must first consult with the ACCC and the ACMA under section 389B.
- 458 - the ACMA must not make a numbering plan that sets out rule about the portability of allocated numbers unless directed to do so by the ACCC.





- 461 - before making or varying a numbering plan, the ACMA must consult with the ACCC. Where there is a dispute as to the terms and conditions of the numbering plan, and the parties fail to agree on the appointment of an arbitrator, under section 462 the ACCC is the arbitrator.
- 463 - ACMA must consult with the ACCC before determining an allocation system for allocating specified numbers to carriage service providers.
- 467 - ACMA must consult with the ACCC before giving a direction to a body corporate who has powers delegated by the numbering plan.
- 474 - ACMA may determine that a specified person or association is a declared manager of electronic addressing if the ACCC directs it to do so.
- 475 - ACMA may give directions to a declared manager of electronic addressing after consultation with the ACCC.
- 476 - ACCC may also give directions to a declared access manager after consultation with the ACMA.
- 477 - where the directions are inconsistent, the ACCC's directions prevail.
- 496 - Minister may direct the ACCC to hold a public inquiry about a specified matter concerning carriage services, content services or the telecommunications industry. Under section 497, an inquiry about a matter relating to the ACCC's telecommunications functions and powers may be held if the ACCC considers it appropriate and practicable. Under section 505, if the ACCC holds an inquiry it must prepare a report setting out the findings which must be published or given to the Minister, if the inquiry was held because of a direction given by the Minister. The ACCC's powers under the *Competition and Consumer Act 2010* (Cth) are not otherwise limited by the Division, under section 506.
- 515 - ACMA may refer an investigation of a complaint made to it to the ACCC, where it could be more conveniently or effectively dealt with by the ACCC.
- 564 - the Minister, the ACMA and the ACCC may apply to the Federal Court for an injunction where the Act is being contravened. Under section 571, the Minister, the ACMA or the ACCC may institute proceedings in the Federal Court for recovery on behalf of the Commonwealth of a pecuniary penalty for a contravention of a civil penalty provision of the Act.
- Part 33 – Voluntary Undertakings given by Telstra, the ACCC may accept undertaking relating to structural separation, hybrid fibre-coaxial networks and subscription television broadcasting licences. The ACCC has the power to enforce undertakings in the Federal Court under section 577G. Under section 577M, the ACCC has the power to determine if a person is not an associate of Telstra in relation to the control of a hybrid fibre-coaxial network, another telecommunications network or a company.
- Schedule 1, clause 18 - ACCC is to be the arbitrator where parties cannot agree on an arbitrator to determine a dispute in relation to terms and conditions of access, relating to standard licence carrier conditions. Under Schedule 1, clause 26, failing an agreement relating to security procedures to protect information given by the first carrier to the second carrier, the ACCC may determine the procedures.
- Schedule 1, clause 27 - where there is a dispute between a first carrier and second carrier on the terms and conditions of compliance, and the parties cannot agree on the appointment of an arbitrator, the ACCC is to be the arbitrator. Under Schedule 1, clause 27A, the ACCC may, by legislative instrument, make a Code setting out conditions that are to be complied with in relation to the provision of information or access to information under clauses in Schedule 1. Under Schedule 1, clause 29, where a second carrier does not comply with the requirement to consult before modifying or reconfiguring the first carrier's telecommunication network, and the parties cannot agree on the appointment of an arbitrator, the ACCC is to be the arbitrator. Under Schedule 1, clause 29A, the ACCC may, by legislative instrument, make a Code setting out conditions that are to be complied with in relation to consultations under clause 29.
- Schedule 1, clause 33 - a first carrier is not required to give a second carrier access to a telecommunications transmission tower if the ACCC has issued a certificate stating that compliance is not technically feasible. The ACCC must consult with the ACMA before issuing a certificate. Under Schedule 1, clause 34, a first carrier is not required to give a second carrier access to a site of a telecommunications transmission tower if the ACCC has issued a certificate stating that compliance is not technically feasible. The ACCC must consult with the ACMA before issuing a certificate. Under Schedule 1, clause 35, a first carrier is not required to give a second carrier access to eligible underground facilities, if the ACCC has issued a certificate stating that compliance is not technically feasible. The ACCC must consult with the ACMA before issuing a certificate. Where the parties cannot agree on the terms and conditions of access to the above facilities, and fail to agree on the appointment of an arbitrator, the ACCC is to be the arbitrator under Schedule 1, clause 36. Under Schedule 1, clause 37 the ACCC may by legislative instrument make a Code setting out conditions that are to be complied with in the provision of access.
- Schedule 1, clause 46, - carriers must obtain designated interconnection services from carriage service providers for the purpose of ensuring any-to-any connectivity. If there is a dispute as to the terms and conditions of the interconnection service and the parties fail to agree on the appointment of an arbitrator, the ACCC is the arbitrator. Under Schedule 1, clause 47, before the Minister may declare that a specified eligible service is a designated interconnection services, the Minister must request the ACCC to give a written report about whether the proposed declaration would promote the achievement of the objective of any-to-any connectivity.
- Schedule 1, Part 9 - gives the ACCC powers in relation to the functional separation of Telstra.
- Schedule 2, clause 5 - if the first carriage service provider provides operator services to end-users of its standard telephone service and other carriage service providers do not provide that service, the first carriage service must comply with a request to supply it to end-users of the second carriage service provider on agreed terms and conditions. If the providers cannot agree on the terms and conditions of access and the parties fail to appoint an arbitrator, the ACCC will be the arbitrator. Under Schedule 2, clause 8 if the first carriage service provider provides directory assistance services to end-users of its standard telephone service and other carriage service providers do not provide that service, the first carriage service must comply with a request to supply it to end-users of the second carriage service provider on agreed terms and conditions. If the providers cannot agree on the terms and conditions of access and the parties fail to appoint an arbitrator, the ACCC will be the arbitrator.
- Under Schedule 3, clause 29 - ACMA must consult with the ACCC before issuing or refusing to issue a facility installation permit.



## Attachment 2: Case study - 1800MHz allocation

In this section we consider what we see as some of the shortcomings of the ACMA's decision making around the regional 1800MHz band and how some of these could perhaps have been addressed through reforms to the current regulatory framework.

Spectrum is the life-blood of the wireless communications and broadcasting industries and therefore critical to industry development, competition, productivity, innovation and positive outcomes for consumers. Maximising the utility of internationally harmonised spectrum bands is essential as these spectrum bands allow companies to make use of internationally standardised network equipment and receivers/handsets. All mobile carriers use the 1800MHz spectrum band to deliver 4G services in metropolitan areas however regional Australia is only able to access 20 percent of the amount of 1800 MHz spectrum for mobile use compared to the major capital cities.

A large portion of 1800MHz spectrum is not available for use by mobile services in regional Australia because it is utilised for fixed point-to-point services. Since 2012, the ACMA has been considering how to best use the available radio spectrum in the 1800MHz band. VHA has been advised by the ACMA that it does not regard the current use of the 1800MHz spectrum as the highest value use and that there are parts of the country where the spectrum is not being used at all. Despite acknowledging as early as 2012 that the spectrum was not being put to its highest value use<sup>123</sup>, as it stands the earliest possible date new access to the spectrum will be permitted is 2017.

The ACMA Principles for Spectrum Management require that it must balance the needs of incumbent licence holders with demand for access by new services. To do this, one of the factors the ACMA must consider is whether its action (or non-action) will maximise the public benefit derived from using the spectrum. Consumers are missing out on the benefits of 4G mobile services competition because the ACMA process has so far taken three years and it will be nearly two further years before the spectrum licences enabling the operation of mobile services commence. Despite the ACMA's stated use of the Total Welfare Standard for assessing costs and benefits,<sup>124</sup> its consultations on mobile service use of regional 1800MHz have not included any quantification of the public benefit from use of the regional 1800MHz spectrum for mobile services. We are not aware whether the ACMA has been using the Total Welfare Standard for its internal decision-making process or whether it made any attempt to consult with citizens in regional 1800MHz areas to gauge their preferences. Consequently, the ACMA has not

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<sup>123</sup> The ACMA, Issues Paper 1, Regional and Remote Apparatus Licences in the 1800 MHz band – a Shared Strategy, December 2012, page 5

<sup>124</sup> ACMA (2009), *Principles for Spectrum Management*, p1.



been required to account for the foregone benefits that arise from its delays to transitioning spectrum to its highest value use due to delays in its processes.

In January 2011, the ACMA issued an embargo on all new apparatus licence frequency assignments in the ranges 1710-1785 MHz and 1805-1880MHz. The purpose of the embargo was “to preserve future planning options in the defined frequency ranges for terrestrial mobile services.” The reasons provided for issuing the embargo are only two paragraphs long.<sup>125</sup>

In 2012, the ACMA commenced a consultation process for the 1800MHz band which contemplated an initial workshop, the release of three separate issues papers for comment, consideration of the inputs from those three rounds of consultation and a decision on the appropriate way forward for the band in the third quarter of 2013<sup>126</sup>.

The ACMA held the workshop and the first two rounds of consultation and released a paper summarising the submissions received<sup>127</sup>. While the ACMA staff engaged in several informal consultations with industry stakeholders during 2014, no further public action was taken until February 2015 when a new timeline was released canvassing the steps toward a spectrum auction for 1800 MHz spectrum. This made a brief reference to the 2012 consultation but gave no indication as to why the previous timetable was abandoned or how input from 2012 is to be used in the current consultation<sup>128</sup>.

At this time, the ACMA released a further issues paper Interim access to regional 1800MHz band. Again, this paper gives no indication of how, or if, the material from the previous 2012 consultation has been taken into account, except to note that it has not been possible to achieve a consensus position. The need for “consensus” is arguably irrelevant to the ACMA’s decision making process; the ACMA’s reliance on a desire for “consensus” in contestable industries is deeply problematic and likely to be contrary to maximising the public benefit from the allocation and use of the spectrum.

The lack of consideration for the 2012 consultation on regional 1800MHz is administratively inefficient. Numerous taxpayer and industry resources have been spent on ACMA consultations that have turned into lengthy, indecisive regulatory processes spanning several years. The lack of timely decision-making by the ACMA on mobile access to regional 1800MHz has caused enormous business

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<sup>125</sup>[https://www.google.com/url?q=http://www.acma.gov.au/webwr/radcomm/frequency\\_planning/spectrum\\_embargo/embargo\\_62.doc&sa=U&ved=0CAQQFjAAahUKEwiji7LAI4LHAhXRI5IKHTK8DfU&client=internal-uds-cse&usg=AFQjCNH2BCsKf4tDGHpav\\_gjofjecuqlrw](https://www.google.com/url?q=http://www.acma.gov.au/webwr/radcomm/frequency_planning/spectrum_embargo/embargo_62.doc&sa=U&ved=0CAQQFjAAahUKEwiji7LAI4LHAhXRI5IKHTK8DfU&client=internal-uds-cse&usg=AFQjCNH2BCsKf4tDGHpav_gjofjecuqlrw)

<sup>126</sup> <http://www.acma.gov.au/Industry/Spectrum/Spectrum-projects/1800-MHz-band/responses-to-1800-mhz-a-shared-strategy-issues-paper-1-and-2>

<sup>127</sup> <http://www.acma.gov.au/Industry/Spectrum/Spectrum-projects/1800-MHz-band/responses-to-1800-mhz-a-shared-strategy-issues-paper-1-and-2>

<sup>128</sup> <http://www.acma.gov.au/Industry/Spectrum/Spectrum-projects/1800-MHz-band/regional-1800-mhz-band-allocation>



uncertainty and ultimately delayed the public benefit from use of regional 1800MHz spectrum for mobile services by at least two years.

The uncertainty regarding mobile access to regional 1800MHz continued into this year. For instance, the 2015 paper gave a strong indication that the ACMA proposed to implement interim access to the 1800MHz band, however the ACMA subsequently decided not to do so (on or about 14 May 2015). No reasons for this decision have been published.

Because the ACMA's decision making power in this area derives from a general permission to manage radiofrequency spectrum<sup>129</sup> and these processes are not subject to any specific legislative requirements or standards, there are only very limited circumstances in which its decisions can be challenged. This is notwithstanding the fact that those decisions have significant financial and business implications for mobile telecommunications carriers and other stakeholders and there is a clear welfare loss as a result of the inefficient use of spectrum.

This case study demonstrates the need for more prescriptive, rigorous decision making processes to be implemented, at least on "big ticket" issues such as spectrum management.

Such processes must ensure that:

- A decision making process including timelines is laid out and adhered to unless there is a sound reason to deviate from it;
- A clear proposal is put to stakeholders and that those stakeholders have sufficient opportunity to respond to it (including the opportunity to respond to significant variations to a proposal);
- The ACMA provides reasons for decisions which:
  - expressly address the issues raised in any consultation and provide a clear statement of how those matters have been reflected in its final decision, or if they have not, why not; and;
  - explain how the decision promotes the statutory objectives of the relevant legislation;
- The ACMA's reasons are publicly available in a centralised location to enable stakeholders to satisfy themselves that the ACMA is applying law and policy consistently from one decision to the next.

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<sup>129</sup> Australian Communications and Media Authority Act 2005, section 9