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Australian Communications and Media Authority

Submission to Productivity Commission *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*

JULY 2009

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Introduction

This submission provides the Australian Communications and Media Authority's (ACMA's) response to issues raised in the Productivity Commission's draft research report, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*. This submission is intended to inform the development of the Productivity Commission's final report and recommendations, and should not be taken as an Australian Government response to the draft report.

There have been a number of assertions put forward in industry submissions in relation to the way the ACMA conducts its compliance and enforcement activities which are disputed by the ACMA. Many of these claims are lacking in specifics, incomplete or may reflect disagreement with the outcomes of regulatory processes, rather than providing evidence of excessive regulatory burden.

This submission provides clarification around the ACMA's approach to the co and self regulatory model, and to its compliance, enforcement and regulatory powers more generally.

The ACMA notes that a number of the specific recommendations are matters that go to the policy agenda and/or are flagged as matters to be taken forward within the context of the NBN – Regulatory Reforms for 21st Century Broadband – Discussion Paper.

Regulatory framework

The ACMA is responsible for the regulation of broadcasting, radiocommunications, telecommunications and online content in accordance with a number of key Acts of Parliament, including the *Broadcasting Services Act 1992* (the BSA) and the *Telecommunications Act 1997* (the Telecommunications Act).

These Acts require the ACMA to monitor and enforce compliance with core regulatory obligations and to encourage the development of, and assess the efficacy, of co-regulatory arrangements to provide a range of consumer safeguards. The Acts also provide a broad range of guidance and parameters for the regulator in exercising regulatory discretion, where Parliament intends the regulator to have such discretion.

The ACMA acts within the remit given to it by the Parliament, is transparent and consultative with industry, takes action which is proportionate and adopts a risk management approach to its regulatory responsibilities.

ACMA commitment to best practice regulation

The ACMA is committed to best practice regulation and consultation and all of its proposed delegated legislation complies with Office of Best Practice Regulation (OBPR) requirements. Regulation Impact Statement (RIS) processes are documented and RIS reports are tabled with the appropriate legislation. The ACMA takes account of the principles of good regulatory process outlined in *Rethinking Regulation: Report of the Taskforce on Reducing the Regulatory Burden on Business* (the Banks report) and the Government response to the Banks report.

In assessing the "public interest", the ACMA has adopted a total welfare standard where discretion permits.[1] When a total welfare standard is applied, the impact of a regulatory proposal on the public interest is measured as the sum of the effects on consumers, producers, government and the broader social impacts on others in the community. A total welfare standard requires that, to the extent possible, all significant benefits and costs arising from the regulatory proposal will be given the same weight regardless of the identity of the recipient; and the approach expected to generate the greatest net benefits for the community is the preferred approach.

The ACMA is sensitive to the burden that regulation can place on industry, even relatively light touch regulation such as reporting requirements. The ACMA regularly reviews and consults with industry

[1] See ACMA Media Release 112/2008 of 4 September 2008. http://www.acma.gov.au/WEB/STANDARD/pc=PC_311378

about reporting requirements. More information about this issue is provided below in the ACMA's response to the *Regulator Reporting* section of the Commission's report.

Commitment to evidence informed regulation

Since its inception in 2005, the ACMA has continued to enhance its capacity and capability to gather and use evidence appropriately to inform itself about changes in the communications environment including technological change, introduction of new platforms and services, changes in industry structure and changes in availability and use of communications and the media. This is evident in the increased research publications program[2] undertaken by the ACMA which is regularly cited in discussion papers and commentary on the communications sector.

The ACMA gathers and analyses a diverse range of evidence to inform its regulatory decision-making. The ACMA's processes are conducted in accordance with statutory requirements and guided by the objects of the applicable Acts. In making regulatory decisions or exercising other key functions, the ACMA analyses and considers all of the available information and material in developing a balanced and appropriate response to regulatory issues.

Regulatory approach

The ACMA adopts a risk management approach to its regulatory responsibilities consistent with the self-regulation and co-regulation principles in the primary telecommunications and broadcasting industry legislation. In many cases, the arrangements are complaints-based with the ACMA only becoming involved in cases where the regulated entities have failed to satisfy complainants. Monitoring and data collection is related to the perceived seriousness of breaches or failure to perform in accordance with standards/regulations for either the community generally or for the individuals affected.

In exercising its enforcement powers, the ACMA seeks to use the minimum power or intervention necessary to achieve a sustained and ongoing commitment to compliance from regulated entities, consistent with the scale, risk and urgency of the breach. This graduated approach enables the ACMA to choose enforcement action considered appropriate to achieve compliance, given all the circumstances. The approach is entirely consistent with the 'proportionate' guidance prescribed by the BSA and the regulatory policy of the Telecommunications Act.

[2] As set out in the ACMA Annual Operating Plan. http://www.acma.gov.au/WEB/STANDARD/pc=PC_311726

Response to issues raised in Chapter 4 – Information media and telecommunications

This section of the ACMA's submission responds to relevant issues raised in Chapter 4 of the Productivity Commission's draft research report, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services* (the Draft Report). The subheadings below correspond to those in Chapter 4 of the Draft Report.

Industry structure

Due to the scope of the review, the Productivity Commission's draft report could give only a very broad assessment of industry structure and environment. The analysis reflects the traditional broadcasting/telecommunications split, and the Internet is captured largely in terms of it being another telecommunications service.

The communications industry structure is subject to constant change and pressure with the introduction of new technologies and new ways of conducting business. The ACMA appreciates it is difficult to take into account these new pressures on the communications industry but notes that the Productivity Commission's approach may not necessarily allow for issues relating to new industry participants and sectors to be fully considered.

Overview of regulation

The scope of the review appears to have limited the Productivity Commission's ability to gather independent evidence on such issues as industry performance in areas subject to regulation or industry input to code making. In describing the regulatory framework, the Productivity Commission outlines some competition provisions but it is important to note that much of the regulation for which the ACMA is responsible is related to social, cultural and community objectives which are reflected in industry codes and standards.

In administering legislation, the ACMA is required to consider the long term interests of end-users in telecommunications and community attitudes in broadcasting. This focus on user/audience interests often involves tensions with the commercial interests of regulated entities which must be assessed and balanced. The draft report does not distinguish between the differing regulatory requirements applying to broadcasting and telecommunications which complicate the achievement of regulatory consistency, particularly in a period of rapid change and transition to digital and IP environments.

Regulatory environment

Development of regulation

Statement from Draft Report *- Industry raise numerous concerns about the processes for developing regulation, including industry codes.*

ACMA response

Development of regulation

The ACMA develops regulation in line with the parameters set out in enabling legislation. Its approach to developing regulation, discussed on pages 3 and 4 of this submission, accords with best practice and is consistent with the intention expressed in the legislation.

Code development

Industry codes are an essential part of an effective co-regulatory framework. To work effectively, it is necessary for industry codes to have regulatory oversight during the development and registration process. The DBCDE is currently undertaking a review of the industry code development process. The ACMA's role in respect of code development is clearly set out in the legislation under which it is

responsible for registering codes. In the case of both telecommunications and broadcasting, there are certain statutory pre-conditions about which the ACMA must be satisfied before registering a code. In considering registration of an industry code, the ACMA approaches its responsibility within the existing co-regulatory arrangements and balances both the capability of industry and the needs of the community in deciding whether a code lodged for registration meets the statutory requirements.

Telecommunications

Industry codes under the Telecommunications Act are currently being reviewed by DBCDE. Once a code has been registered on behalf of an industry, all industry members must comply with it. This may be contrasted with the usual code process under the Corporations Act, where individual corporations must indicate that they have adopted the code in order to be subject to its provisions.

While the registration process can take some time, this is largely a reflection of the policy objective to ensure that codes are subject to public comment before being submitted for registration. It is the public consultation process which materially informs whether the codes adequately provide for community safeguards—which is one of the statutory pre-conditions that must be satisfied before a code is registered.

Once registered, all industry members are required to comply with the code. However, in keeping with the co-regulatory nature of the regulatory scheme, if an entity does not comply, then the ACMA can issue a direction requiring that entity to comply. At that stage, the code in effect becomes a regulatory requirement and the entity will be subject to compliance or enforcement action if there is further non-compliance with the code.

Broadcasting

Page 111 of the Draft Report states that compliance with a broadcasting industry code, once it has been registered by the ACMA, is a licence condition for broadcasters. This is not the case. Licence conditions are imposed by statute and are set out in Schedule 2 to the BSA. Compliance with a code obligation may become a condition of a broadcaster's licence only if the ACMA decides to make it an additional licence condition under section 43 of the BSA. It should be noted that prescribed consultation (often lengthy) and legal consideration inevitably cause this decision to be infrequently made.

Broadcasting codes are developed by the relevant industry group (for example, Free TV Australia, Commercial Radio Australia, ASTRA) in consultation with the ACMA. It is clearly stated in subsection 123(1) of the BSA that it is Parliament’s intention that the relevant industry code be developed in consultation with the ACMA and take into account relevant research conducted by the ACMA.

Under subsection 123(4) of the BSA the ACMA is unable to register a code unless it is satisfied certain statutory pre-conditions have been met. One of these is that the code of practice provides appropriate community safeguards for the matters covered by the code (s.123(4)(b)(i)). This statutory obligation requires that the ACMA ensure that the matters dealt with by the code are in accordance with community standards and reflect prevailing community attitudes towards broadcasting content.

The ACMA notes concerns by some industry bodies about the costs of the code development process. The cost of the code development process must be weighed against the important role codes play in the co-regulatory environment. A co-regulatory scheme can only work effectively if it meets community needs in a manner that does not impose an onerous cost on industry. This requires at the minimum, an obligation to consult widely to ensure the community input is included in the code development process and to consult with the ACMA to ensure that the code addresses regulatory concerns. This of course, requires industry bodies to respond to issues raised by the ACMA in a timely way.

In the code review process the ACMA follows best practice. It identifies early in the process the matters that are of concern and meets with broadcasters to discuss these matters and other regulatory issues. The ACMA rejects outright claims by Free TV Australia that the ACMA has sought to extend its involvement in the code development process beyond what was envisaged by the BSA. The ACMA undertakes its responsibilities in assessing and registering codes in accordance with its obligations under the relevant legislation. The ACMA’s power to register a code is not enlivened unless it is satisfied that the statutory pre-conditions to registration are satisfied.

Broadcasting licensees occupy a privileged place in Australian society. In exchange for a licence fee, they are permitted to use a valuable public asset, that is, radiofrequency spectrum. The legislation prescribed that privilege carries with it reciprocal obligations. When Free TV criticises the manner in which the ACMA considers submissions made by stakeholders, it appears to misunderstand the regulatory function played by the ACMA and the regulator's obligation to consider all submissions on a proposed code, that is, from the stakeholders who are members of the community as well as those stakeholders who hold broadcasting licences. Ultimately, the ACMA seeks to balance those competing interests as it is obliged to do by the BSA.

Commercial Television Industry Code of Practice

The ACMA rejects outright Free TV Australia's criticism of its review of *the Commercial Television Industry Code of Practice*. The ACMA has been aware of Free TV's views on these matters throughout the code development process and has previously provided explanations of its concerns to Free TV and its members.

Under the BSA, the ACMA is responsible for registering industry codes of practice if it is satisfied that, amongst other matters, the code provides appropriate community safeguards for matters covered by the code. The ACMA has a range of concerns on the draft code presented by industry which, it has indicated to Free TV Australia, may influence its decision as to whether it will ultimately register the proposed code. This included the ACMA's assessment that certain proposals by Free TV were inconsistent with legislation or went to policy issues which were for the consideration of government.

The ACMA has also requested the industry's consideration on a range of matters prior to consultation on the code. This has been standard practice in the development of codes over a long period of time and the ACMA considers it mitigates against a code coming before it that it cannot register and on which further consultation is therefore required. The ACMA received a comprehensive draft of the code addressing its concerns in June 2009 and this is currently under formal consideration.

Regulator discretion

Statement from Draft Report – *There are concerns about the extent of ACMA's discretion in relation to its regulatory powers under the BSA, and how that discretion is exercised. Free TV describes the ACMA's approach to enforcement as 'hardline' and 'interventionist'.*

ACMA response

The ACMA rejects outright Free TV Australia's criticisms in regard to the way it exercises its discretion in relation to its enforcement powers under the BSA.

ACMA's role in dealing with complaints under industry codes is prescribed by the BSA. ACMA's performance of its role is informed by section 5 of the BSA, which requires ACMA to, among other things:

> produce regulatory arrangements that are stable and predictable;

> deal effectively with breaches of the legislation; and

> use its powers in a manner that is commensurate with the seriousness of the breach concerned.

This requires ACMA to use its enforcement powers appropriately and to identify the most effective and proportionate way of dealing with breaches. This is further reinforced in the Explanatory Memorandum to the BSA.

It [section 5] promotes the ABA's [now ACMA's] role as an oversighting body . . . rather than as an interventionist agency hampered by rigid, detailed statutory procedures and legalism . . . It is intended that the ABA [now ACMA] monitor the broadcasting industry's performance against clear, established rules, intervene only where it has real cause for concern, and has effective redressive powers to act to correct breaches.

This statement reflects Parliament's intention in enacting the co-regulatory framework and ACMA's prescribed role within that framework.

ACMA's approach to compliance and enforcement remains entirely consistent with this co-regulatory framework.

In 2006, the ACMA was provided by the Parliament with additional enforcement powers through amendments to the BSA. These included new so-called 'mid-tier' enforcement powers, such as infringement notices, remedial directions and civil penalties for some provisions.

This followed an independent review of the ACMA's powers by Professor Ian Ramsay which concluded that the absence of a range of enforcement 'tools' impacted on its ability to effectively regulate the broadcasting industry.

The ACMA administers these powers in accordance with the regulatory policy set out in the BSA and in accordance with the *Guidelines relating to ACMA's enforcement powers* which were published in January 2007. The ACMA has exercised, and will continue to exercise, its enforcement powers within the existing co-regulatory arrangements and in line with the factors and relevant matters set out in the Guidelines.

Free TV's submission provides no support for the assertion that the ACMA has acted inconsistently with its published Guidelines. To the contrary, the ACMA considers the matters which are set out in those Guidelines in each of the matters in which it has exercised its powers and has actively considered whether or not the exercise of its enforcement powers would foster stable and predictable regulatory arrangements and deal effectively with breaches.

An area where the ACMA does not currently have discretion is the requirement under the BSA that it must investigate code complaints unless they are considered vexatious or frivolous. For example, the ACMA has been required to investigate matters where a complaint has come to it many years after the broadcast, where tapes and associated material are not available to the broadcaster, nor any corporate history. In these circumstances, it is unlikely that an investigation can be resolved efficiently or to the satisfaction of the parties. The ACMA considers that some flexibility in the legislation—such as that allowed for other regulators and the Commonwealth Ombudsman—would allow the regulator to take a greater risk management approach to the investigation of broadcasting code issues.

Statement from Draft Report - *The ACMA's approach to regulation results in overly prescriptive regulation and a focus on legalistic interpretation.*

ACMA response

The ACMA rejects outright criticism that it approaches regulation in an overly prescriptive and legalistic way. The ACMA operates within a co-regulatory framework, in which there are clear and established rules in place and where intervention is pursued where legitimate concerns are identified through complaints or investigations. The ACMA seeks to exercise its powers appropriately and in a manner that is effective and proportionate to the breach. It operates in a way that is transparent and where decisions are clearly explained.

The ACMA makes no apology for resorting to the use of dictionary definitions where circumstances warrant or where the code is otherwise silent on the particular clause's intention. To do otherwise is to invite instability and unpredictability.

The ACMA, in common with any regulator, seeks to ensure that its actions and decisions are in accordance with the legislation for which it is responsible.

Statement from Draft Report - *The breadth of discretion provided to the ACMA in the BSA could be balanced by providing more guidance in the legislation on how that discretion should be exercised.*

ACMA response

The BSA determines areas in which the ACMA can or cannot exercise regulatory discretion.

The ACMA has developed and published Guidelines in relation to its enforcement powers under the BSA. Similarly, the ACMA has published guidance as to its general enforcement approach for codes of practice under the *Telecommunications Act 1997*.

The ACMA is committed to providing useful guidance to the industries that it regulates. However, such guidance will inevitably be of a general nature, given the breadth of decision-making powers provided to the Authority by the Parliament and the different circumstances of each individual issue.

Further, as the Guidelines note, it would be inconsistent with the broad discretion given to the ACMA in the BSA for the ACMA to purport to confine or limit the matters in which it would seek an appropriate sanction.

The ACMA publishes reports of individual investigations which also provide extensive guidance to the industry on how it has exercised its discretion in particular circumstances. Just over a year ago, the ACMA also began publishing reports of non breaches, specifically to further extend the guidance provided.

Regulator reporting

Statement from Draft Report - *The Commission urges all of the agencies which are imposing reporting requirements on industry to pursue the harmonisation and streamlining of reporting requirements.*

ACMA response

Issues relating to reporting requirements under the *Telecommunications Act 1997* are being considered within the Government's National Broadband Network discussion paper regarding regulatory reform. The ACMA supports the exploration of further reform options in this area.

The ACMA is also considering reporting requirements in relation to regulatory instruments for which it has direct responsibility, such as the Customer Service Guarantee Standard.

The ACMA seeks to balance the impost on industry of reporting requirements with its obligations to monitor the industry and ensure compliance with regulation.

Specific industry reporting requirements generally relate closely to specific regulatory obligations such as the Customer Service Guarantee and the Network Reliability Framework and have been reviewed periodically. The ACMA is required by section 105 of the *Telecommunications Act 1997* to report annually to Parliament on the performance of the telecommunications industry. The ACMA consults regularly with those entities subject to annual requests for information to assist in the section 105 reporting process and has reduced the breadth and detail of this reporting over recent years. Last year the information requested from industry pursuant to section 105 was cut substantially by approximately 30-40 per cent. This year the ACMA has consolidated the reporting requirement further, shifting from monthly to annual totals for a number of questions. The ACMA has sought to develop broader sources of information for both this reporting and its ongoing requirement to inform itself about developments in the communications environment. This has included obtaining access to other commercial data collections and the undertaking of primary research.

The ACMA has also participated actively in legislative initiatives to enhance its ability to share information with other agencies including DBCDE and the ACCC. Prior to the passage of data sharing amendments to the *Australian Communications and Media Authority Act 2005*, the ACMA had sought information from carriers and carriage service providers (CSPs) separately for the purposes of modelling consumer benefits which is a core part of the section 105 reporting requirements. The ACMA now obtains the same information as is provided to the ACCC. The ACMA liaises regularly with other agencies involved in collecting information about the communications sector including the ACCC and the ABS. The ACMA's data collection activities are subject to the scrutiny of the ABS Statistical Clearing House.

Interaction with telecommunications consumers

Customer information

Draft recommendation 4.1

The Australian Communications and Media Authority and the Department of Broadband, Communications and the Digital Economy should conduct a comprehensive joint review of all the customer information requirements imposed on telecommunications businesses, and the processes used in developing new requirements. Specifically they should:

> review all of the current customer information requirements in consultation with industry and consumer organisations, with the aim of streamlining the requirements to remove duplication, reduce the burden on business, and improve the comprehensibility and clarity of information provided to customers, consistent with principles set out in the Productivity Commission's Report on its Review of Australia's Consumer Policy Framework

> review the processes for developing new customer information requirements to ensure that such processes take account of the existing requirements and the new requirements form part of a comprehensive and comprehensible package of customer information.

ACMA response

The Department of Broadband, Communications and the Digital Economy released a discussion paper in April 2009, *National Broadband Network: Regulatory Reform for 21st Century Broadband*. The discussion paper canvassed various options to reform the telecommunications regulatory framework being considered by the Government. Specifically, the discussion paper sought comment on the current telecommunications consumer safeguard framework, and the potential for removal of requirements on telecommunications providers that may be redundant or ineffective.

Comment was invited from interested parties by 3 June 2009.

Since the Department's discussion paper deals with issues closely related to or overlapping with requirements for provision of customer information, it would be pre-emptive and inefficient to contemplate a specific review of the latter until after consideration of submissions on the discussion paper is complete.

Consumer contracts

The *Trade Practices Amendment (Australian Consumer Law) Bill 2009* was introduced into Parliament on 24 June 2009. The Bill proposes a single national consumer law, which includes provisions regulating unfair contract terms and is based on the consumer protection provisions of the *Trade Practices Act 1974 (Cth)* and, in the case of contracts, the Victorian fair trading legislation.

The Productivity Commission estimates that the reforms will generate efficiencies of up to $4.5 billion a year, largely by reducing the number of differing regulatory regimes governing consumer transactions in Australia.

The Bill introduces a national unfair contract terms law that will apply to standard form business-to-consumer contracts and which will make the inclusion of unfair terms in standard form, non-negotiated contracts consumers void. The Bill lists contract terms which may be unfair, including terms permitting the supplier to unilaterally: avoid or limit performance of the contract; terminate the contract; vary the terms of the contract; vary the upfront price payable under the contract without the consumer being able to terminate it; renew or not renew the contract; and vary the characteristics of the goods or services supplied under the contract.

The ACMA notes and welcomes the development and introduction of the new Australian Consumer Law which includes national unfair contract terms provisions. It is anticipated that the implementation

of these provisions will lessen the need for the existing telecommunications specific regulations which currently provide protections against unfair contract terms.

Prepaid mobile phone identity checks

Draft recommendation 4.2

The Australian Government should review the costs and benefits of identity checks for prepaid mobile phone services in consultation with law enforcement and security agencies. The review should have the objective of either abolishing the requirement, or substantially revising the regime to better achieve its objectives while eliminating unnecessary costs to business.

ACMA response

Longstanding government policy has been that fixed and mobile services should not be anonymous, i.e. they must be associated with a customer and a service address. This information populates the Integrated Public Number Database, which is used for various purposes, including national security, law enforcement and emergency service response. Pre-paid services by their nature do not provide the regular validation of customer name and address through post-paid billing systems employed for fixed lines and post-paid mobile services – so additional processes were implemented when pre-paid mobile services entered the Australian market. Any change to the existing policy framework is a matter for the government.

In the ACMA's role of developing and administering the current regulation, it is required under legislation to ensure that obligations balance the interests of consumers, industry and government interests in national security, law enforcement and emergency services.

The ACMA has undertaken audits in 2008 and 2009 to assess the level of industry compliance and worked proactively with industry to address concerns. Various changes have been implemented to improve the identity check process, but the systemic weaknesses of the current processes for identity checking are noted. Some of these can be better managed by the industry; for example, in enforcing the contractual obligations of its dealers and agents in complying with the regulatory obligations or applying the similar effort given to ensuring the identity of its post-paid customers. Notwithstanding the gaps in compliance, the information provided for pre-paid services continues to be valued and any review should be undertaken on a 'first principles' basis, rather than presuming the outcome would be to abolish or minimise the current requirements.

Privacy

The ACMA made submissions to the various consultation processes culminating in the Australian Law Reform Commission (ALRC) Report - *For Your Information- Australian Privacy Law and Practice.* In summary, the ACMA broadly supported the ALRC recommendation that a review of Part 13 of the Telecommunications Act be considered in terms of it clarity and application and particularly in regard to its intersection with the National Privacy Principles and the *Privacy Act 1988*.

Sports anti-siphoning regulations

Draft recommendation 4.3

The anti-siphoning regime imposes regulatory burdens because of the protracted commercial negotiations required in respect of listed events. To address this issue the Australian Government should substantially reduce the anti-siphoning list.

ACMA response

The ACMA is responsible for ensuring compliance by the industry with the anti-siphoning rules established under the BSA. Policy issues raised by the Commission (such as the reduction of the anti-siphoning list) are matters for government. A statutory review of the anti-siphoning regulations is to be conducted by the Department of Broadcasting, Communications and the Digital Economy in the second half of 2009. The review is expected to take into account emerging digital platforms.

From January 2006 to March 2008, the ACMA's responsibilities also included providing detailed reports to the Minister on free-to-air broadcasters' acquisition and use of broadcast rights to events on the anti-siphoning list. The ACMA subsequently published these anti-siphoning reports.[3]

In August 2008 the Minister directed that the ACMA should no longer conduct these regular anti-siphoning monitoring investigations, given the evidence already provided.

The ACMA's current role in relation to administering the anti-siphoning scheme is to conduct general monitoring, compliance, and investigations functions and other relevant requirements under the BSA. It may be directed by the Minister to undertake a specific investigation. The ACMA also receives and responds to enquiries from the public about the anti-siphoning provisions.

The report's commentary is not completely accurate and includes some interpretative comments from other parties. For example, the subscription broadcasting industry is able to negotiate subscription rights at an early stage, if free-to-air broadcasters have already purchased rights (i.e industry participants do not necessarily need to wait for 12 weeks prior to the event in each case each year). The discussion about the increased penetration of subscription broadcasting is relevant but another justification for the anti-siphoning scheme was to increase the likelihood that the listed events would be available free-of-charge. The option to reduce the scope of the list (i.e. to only finals) has already been done for some listed sports, but may be complex in operation where the rights owner does not provide for such options.

[3] available for download from the ACMA's website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_91821

Broadcasting – local content and facilities

Local content rules for radio

Draft recommendation 4.4

The policy objective of the local content rules could be met through more flexible rules. The Australian Government should introduce amendments to make provision for regional broadcasters to meet their local content obligations over the course of a longer time period, rather than through rigid daily content obligations. For certain categories of licence, such as racing and remote area licences, consideration should be given to whether there is a need for local content requirements.

More flexible local content obligations should be accompanied by streamlined reporting requirements which target compliance activity on broadcasters who have been identified as having a high risk of non-compliance.

ACMA response

Following amendments to the BSA, from 1 January 2008 regional commercial radio broadcasting licensees must broadcast specified levels of material of local significance (local content). Any changes to this overarching requirement for local content on regional commercial radio are a matter for government.

Broadcasters report annually to the ACMA on their compliance with these obligations. The ACMA is also required under the BSA to make available to the Minister information about regional commercial radio broadcasters' compliance with these obligations. This information is required for the purpose of facilitating a review of the operation of local content requirements that is to be laid before each house of Parliament.

The ACMA has worked extensively with broadcasters to minimise the impost of reporting requirements while ensuring that it receives sufficient timely information to effectively perform its regulatory and advisory role. At this relatively early stage of reporting on compliance, the ACMA does not have sufficient evidence to move to more targeted reporting based on a history of non-compliance. However, this may be considered in future years once greater historical evidence is available. In the meantime, the ACMA will continue to consult with broadcasters on these reporting obligations.

Effect of trigger events for radio broadcasters

Draft recommendation 4.5

The Australian Government should introduce amendments to abolish the trigger event provisions for radio broadcasters. Instead, local content provisions should be relied on to ensure broadcast of locally significant material.

ACMA response

The trigger event provisions of the BSA were introduced as a result of changes introduced to the BSA by the *Broadcasting Services Amendment (Media Ownership) Act 2006*. These changes provide that following a trigger event, affected licensees must meet minimum service standards for local news, local weather, local community service announcements, emergency warnings and, where applicable, designated local content programs. Any policy changes to the compliance and reporting requirements for local content are a matter for government.

Trigger event affected broadcasters report annually to the ACMA on their compliance with these obligations. The ACMA is required under the BSA to make available to the Minister information about regional commercial radio broadcasters' compliance with these obligations. This information is required for the purpose of facilitating a review of the operation of local content requirements (including trigger event requirements) that is to be laid before each house of Parliament.

The ACMA has worked extensively with broadcasters to minimise the impost of reporting requirements while ensuring that it receives sufficient timely information to effectively perform its regulatory and advisory role.

Broadcasting content

Regulation across broadcasting platforms

Statement from Draft Report - *Variations in regulation across different broadcasting platforms could be examined to ensure they are not inconsistent with the overall aims of the regulatory system.*

ACMA response

The BSA specifically provides that Parliament intended that different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that the different types of broadcasting services are able to exert in shaping community views.

The regulatory system reflects this intention by imposing different regulatory controls across different platforms. The ACMA supports the view that regular reviews should be undertaken of the regulatory framework to ensure that regulation remains effective and consistent with the changes in technology.

It is consistent with both the existing regulatory policy implemented by section 4 of the BSA and with evidence commissioned by the ACMA that the free-to-air commercial television sector is subject to more intense scrutiny than other, less influential, broadcast media. In relation to the *Children's Television Standards 2005*, for example, there is evidence that commercial free-to-air television remains the dominant form of media consumption for children.[4] Children also spend a significantly higher amount of time watching television than they spend on any other type of media activity.[5]

In regard to classification, the BSA requires that all visual broadcast media ensure that the relevant industry code applies the film classification system provided for by the *Classification (Publication, Films and Computer Games) Act 1995*. This obligation applies regardless of the level of influence of the medium and is tied to certain objectives in the BSA including protecting children from exposure to program material which may be harmful to them. In that sense, the classification and scheduling restrictions which apply to the commercial free-to-air television sector are not unique to that sector but apply to other sections of the broadcasting industry.

The ACMA has observed significant change in the communications policy environment in recent years, including across broadcasting platforms. These changes have generated considerable pressure on communications regulation. The ACMA response to date has largely been facilitated by utilising regulatory flexibility within the existing legislative framework (with minor legislative amendment where possible, including for online services under the BSA).

The ACMA considers that the communications regulatory framework as a whole requires review as there is an increasingly fragmented approach taken for new policy and communications developments and the regulatory flexibility the ACMA has available is near exhaustion. The ACMA's current approach to managing the increasing pressure on the communications regulatory environment has a limited capacity to maintain the efficiency, effectiveness and appropriateness of communications regulation.

However, chapter 5 of the DBCDE's recent NBN discussion paper (*National Broadband Network: Regulatory Reform for 21st Century Broadband*) signals that the government will consider whether to look again at its overall approach to regulation in a converged environment in 2011. The ACMA is keen to work with the government in identifying the regulatory issues that will arise in the implementation of NBN and the possible subsequent review of communications regulation.

Broadcast licence fees

Statement from Draft Report – *Some of the differences highlighted by the industry can be attributed to differences in the way in which the two television platforms operate. Free-to-air broadcasts use radiofrequency spectrum which is a scarce public resource. The licensing fees they pay, and some of*

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[4] *Media and Communications in Australian Families 2007 – Report of the Media and Society Research Project*. The ACMA, Sydney, 2007

[5] Brand, Dr Jeffrey *Television Advertising to Children 2007*. Independent literature review undertaken for the ACMA, Sydney, 2007.

the other regulations to which they are subject, reflect the benefit they derive from having preferential access to that public resource.

ACMA response

Description of the broadcast licence fee regime

The obligation to pay broadcast licence fees is imposed on commercial radio and television broadcasters as a condition of their broadcast services licences. The ACMA collects broadcast licence fees from commercial radio and television broadcast licence holders under the *Television Licence Fees Act 1964* and the *Radio Licence Fees Act 1964*. Supporting documentation is required under section 205B and subsection 205C(2) of the BSA. Fees are calculated as a percentage of the gross earnings of the licence holders for each financial year.

The ACMA collected $258.6m in broadcast licence fees from commercial television broadcasters in the 2007-08 financial year. The following table shows the broadcast licence fees collected during the period 2004-05 to 2007-08.

	Broadcast licence fees collected ($m)			
	2004–05	**2005–06**	**2006–07**	**2007–08**
Radio licence fees paid	17.9	20.3	21.3	22.4
TV licence fees obligation	248.7	274.5	278	282
Less digital TV conversion rebate	23.5	23.3	23.4	23.4
TV licence fees paid	225.2	251.2	254.6	258.6
Total broadcast licence fees	**243.1**	**271.5**	**275.9**	**281**

In his second reading speech in relation to the Television Licence Fees Amendment Bill 1997, Senator Ian Campbell, the then Parliamentary Secretary to the Treasurer, stated that:

These fees provide a method of recompensing the nation for access by broadcasters to the broadcasting service bands and for the benefits granted to licensees who operate in a closed market created by legislative restrictions on the number of licences made available.[6]

Efforts by the ACMA to reduce the compliance burden

Since the ACMA was created in July 2005, it has put considerable effort into reducing the compliance burden imposed on broadcasters by the broadcast licence fees framework. These efforts have resulted in:

> Improved guidance notes to assist broadcasters to complete the BLF (broadcast licence fees) forms

> Introduction of electronic lodgement of the BLF forms

> Introduction of payment of the licence fees by EFT

> Increased staff resources available to provide telephone support to broadcasters when completing BLF forms

ANAO conclusions regarding administration of Broadcast Licence Fees

In its 2007-08 performance audit of the ACMA's regulation of commercial broadcasting, the ANAO found that the ACMA's fee calculations (which are based on broadcasters' gross earnings as reported by broadcasters) were generally correct. However, correct calculation of the amount of fees

[6] Senator Ian Campbell, second reading speech, Television Licence Fees Amendment Bill 1997, 15 May 1997.

requires the ACMA and broadcasters to have a common understanding of the nature of broadcasters' revenue sources and their applicability to licence fee calculations. Broadcasters have accessed new revenue sources since the licence fee guidelines were first developed by the ACMA's predecessor, the ABA, some 16 years ago. The ANAO strongly supported a proposal by the ACMA to conduct a targeted audit program for broadcast licence fees.[7]

An alternative to broadcast licence fees

Collecting the fees payable in respect of commercial television and radio licences is a function that the ACMA undertakes in accordance with the relevant legislation. Any reform of, or changes to broadcast licence fees are a matter for government rather than the ACMA.

The Productivity Commission recommended a resource-based tax as an alternative to broadcast licence fees in its 2000 report on broadcasting:

Licence fees for existing commercial radio and television broadcasters should be converted to fees that reflect the opportunity cost of the spectrum involved[8].

The Productivity Commission argued that:

> Because licence fees are not directly related to the amount of spectrum used, they do not reflect the opportunity cost to the community of broadcasters holding spectrum, nor do they provide any incentive for operators to pursue more efficient ways of delivering their services. As licence fees are based on revenues, different commercial broadcasters pay different amounts for the same access to spectrum in the same licence area (that is, for an equivalent resource)[9].

It may be worth reconsidering this recommendation in the context of government consultation and decision-making about broadcasting regulation, including the size and potential uses of the digital dividend that will become available once the switchover to digital television is completed[10].

Radio disclosure standard

Draft recommendation 4.6

A greater risk management approach should be taken to the radio Disclosure Standard. The Australian Communications and Media Authority should revise the Disclosure Standard to make it less prescriptive. The Australian Communications and Media Authority should engage in further consultations with industry with the objective of incorporating the Disclosure Standard into Commercial Radio Codes together with greater alignment with requirements in other media platforms.

ACMA response

The ACMA considers that it already applies a risk management approach to the radio Disclosure Standard.

The ACMA considers that the Disclosure Standard is fundamentally important in encouraging the fair presentation of current affairs by licensees. Listeners of commercial radio current affairs programs should be confident that the current affairs content they hear has not been influenced by third parties. Where commercial arrangements exist, listeners should be informed about them. This will allow them to make an informed judgement on the issue being discussed. It also allows them to better recognise and, if necessary complain about, any content which is of concern to them.

As the Commission notes in its report, the introduction of the Disclosure Standards followed a long history of non-compliance with industry codes. In these circumstances, it was open to the ACMA's predecessor to apply licence conditions on particular licensees or to apply an industry standard. The high level of syndication of current affairs programming (meaning that many licensees broadcast

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[7] ANAO Audit Report No.46 2007–08, *Regulation of Commercial Broadcasting*, p.25

[8] Recommendation 6.2 of the *Broadcasting Inquiry Report*. See page 33 of the report at http://www.pc.gov.au/projects/inquiry/broadcasting/docs/finalreport.

[9] Ibid p.187

[10] Senator Conroy, the Minister for Broadband, Communications and the Digital Economy, announced that the Rudd Government would release a green paper about digital dividend spectrum on 29 April 2009 at the ACMA's Radcomms09 conference. See http://www.minister.dbcde.gov.au/media/speeches/2009/14.

current affairs programs which they do not make themselves), the capacity of, and interest by, many licensees to broadcast current affairs programming and the importance placed on the issue were all considerations in choosing to apply an industry standard. As the standard only applies to 'current affairs programs', it does not impose a regulatory burden on broadcasters that do not broadcast such programming.

In addition, there are specific enforcement reasons for the manner in which the Disclosure Standard is currently applied. Compliance with the Disclosure Standard is a condition of a commercial radio broadcasting licence under the BSA and may be enforced by the ACMA in a number of ways[11]. Similar enforcement action is not available to the ACMA for breaches of the Commercial Radio Codes and would therefore not be available to the ACMA if the Disclosure Standard were incorporated into the Commercial Radio Codes.

The desirability of the ACMA being able to commence civil penalty proceedings for breaches of the Disclosure Standard was firmly underscored recently in a Federal Court decision in which it was stated that:

> The Disclosure Standard was a key instrument to ensure transparency in current affairs radio broadcasting. Failures to disclose could violate the public's ability to trust in the quality and nature of information conveyed …… the [BSA] creates the right to hold a licence but regulates the licensee's exploitation of that right for its own benefit, by imposing limitations crafted in, and to secure, the public interest. A commercial radio broadcasting licence confers an economic privilege on a licensee exercisable in accordance with the [BSA], standards and the conditions of the licence.[12]

The options for the ACMA in cases of code breach are limited to accepting an enforceable undertaking or, after considerable consultation and the satisfaction of lengthy legal considerations, imposing an additional licence condition or suspending or cancelling a licence. These options are directed toward individual licensee compliance rather than protecting the public interest.

For these reasons, the ACMA considers that it has applied an appropriate risk management approach to the issue.

The ACMA has had no evidence of similar practices being used in current affairs programming on commercial television. It has therefore not needed to take any additional action in this area.

The ACMA agrees that regular reviews of the regulatory framework to ensure that regulation remains effective and consistent with the changes in technology and industry practices are required.

For this very reason, in December 2008, the ACMA announced its decision to undertake a comprehensive 'first principles' review of three program standards which apply to commercial radio licensees to ensure they deliver appropriate and contemporary community safeguards. As part of its review, the ACMA will consider whether requirements under the Disclosure Standard are in keeping with current community standards, and remain the most effective and efficient means of achieving disclosure. In the course of the review, the Disclosure Standard will be considered in light of the objects and regulatory policy of the BSA whereby Parliament intends that:

> commercial radio broadcasters be responsive to the need for a fair and accurate coverage of matters of public interest; and respect community standards in the provision of program material;[13] and

> broadcasting services in Australia be regulated in a manner that, in the opinion of the ACMA, enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services.[14]

The issues identified by the Productivity Commission in its draft recommendation on the Disclosure Standard are a subset of a broader range of issues to be considered by the ACMA and consulted upon broadly.

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[11] Including by civil penalty proceedings or the giving of remedial directions.
[12] Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2) [2009] FCA 754 at para 42
[13] Section 3(1) (g) and 3(1)(h) of the BSA. The objects of the BSA are set out at section 3.
[14] Section 4(2)(a) of the BSA. The regulatory policy of the BSA is set out at section 4.

Captioning

Draft recommendation 4.7

The Department of Broadband, Communications and the Digital Economy and the Attorney-General's Department, in consultation with stakeholders, should seek agreement on whether captioning of broadcasts are most appropriately dealt with through broadcasting regulations or the Disability Discrimination Act. The legislation should then be amended accordingly so that broadcasters are only required to comply with a single set of regulations.

ACMA response

The Commission's recommendation comes to policy issues which are a matter for government.

The ACMA currently investigates complaints about broadcasters' compliance with the captioning requirements contained in the BSA. Clause 38 of Schedule 4 to the BSA requires all commercial television licensees[15] and national broadcasters to provide a captioning service for television programs transmitted during prime viewing hours (6.00pm – 10.30pm) and for all news and current affairs programs broadcast outside of prime viewing hours.

The legislation does not define a 'captioning service', nor does it provide guidance as to what is regarded as an acceptable quality for a captioning service. The ACMA's approach to assessing whether a broadcast complied with the captioning provisions is to balance the need for broadcasters to provide a captioning service with the practical difficulties that can be faced by broadcasters in providing that service.

The *Disability Discrimination Act 1992* (DDA) could be an alternative avenue of ensuring that people with a disability have equitable access to television services, however the DDA is currently best suited to giving individuals a direct and personal remedy. Other than by example, it is generally not an instrument designed to ensure broad community access to necessary services for the hearing impaired.

Reporting on high definition broadcast hours

Draft recommendation 4.8

The Australian Government should introduce amendments to abolish the requirement for a minimum number of hours of high definition television to be broadcast by free-to-air television broadcasters. Whether abolished or not, the requirement on free-to-air broadcasters to report on compliance with the high definition quota is redundant and should be removed.

ACMA response

The Commission's recommendation comes to policy issues which are a matter for government.

The ACMA is responsible for monitoring broadcasters' compliance with annual HDTV quota requirements. Broadcasters submit half-yearly returns to the ACMA outlining monthly totals for the hours of HDTV broadcast.

With the exception of one broadcaster in 2005, all affected broadcasters to date have met, and frequently exceeded, the HDTV quotas. However, the ACMA is aware that some regional broadcasters were not able to broadcast HDTV for a number of months in the first half of 2009. The ACMA understands this was due to technical difficulties relating to implementation of new infrastructure requirements. In some licence areas implementation of infrastructure requirements is not yet complete.

[15] For commercial television licensees, compliance with the requirements of clause 38 of Schedule 4 is a condition of their licence (pursuant to clause 7(1)(o) of Schedule 2 to the BSA).

Other concerns

Classification under the children's television standard

Statement from Draft Report - *Free TV is concerned the pre-assessment process for classification of C and P programs imposes a higher regulatory burden than is necessary to ensure adequate programming for children*

ACMA response

This issue has been addressed in the ACMA's review of the Children's Television Standards. The ACMA expects to release its revised standards shortly.

The Children's Television Standards (CTS) require that children's (C) and preschool (P) programs claimed for C and P quota purposes are classified prior to broadcast.

In the ACMA's CTS Issues Paper, published in June 2007 as part of the CTS Review, the ACMA explored a range of classification models, including classification by a body other than the ACMA and the removal of the pre-classification process. There was minimal support from stakeholders for any of the alternative models explored in the CTS Issues Paper.

In response to consultation on the draft CTS published in August 2008, one submitter, the Australian Children's Television Foundation (ACTF), noted that there was clear benefit in having a body such as the ACMA accountable for classification decisions.

The ACMA intends to establish bi-annual forums involving the ACMA and industry to explore models for C and P program classification.

Internet filtering

The ACMA expects the Government to settle the detail of its policy in relation to internet filtering in coming months.

Rules for online content have been in place under the BSA since 1 January 2000. These include the ACMA notifying filter software providers of prohibited content hosted outside Australia, under a procedure developed by the internet industry and formalised in a registered code of practice.