



**Submission to the Department of Communications Review of the
Australian Communications and Media Authority**

Issues Paper

1. About ASTRA

The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription media in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) television (STV) and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major STV operators, as well as over 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations.

Now in its 20th year, STV is one of Australia's most popular industries, enriching the lives of millions, creating 6600 jobs, investing more than \$600 million annually in production and adding \$40 million to the economy every week. In 2015, one third of Australians subscribe, along with millions more who watch subscription content in public venues. Every week more than 1000 hours of first-run locally produced content is broadcast, as well as the best international content.

This success has been achieved without public subsidy, largely without public spectrum and despite regulatory handbrakes. It has been achieved through extensive investment and innovation, with the consumer always at the centre.

2. Executive Summary

- ASTRA's members take very seriously their obligations under the various regulatory regimes which apply to their services and have a strong compliance record, which includes a constructive working relationship with the Australian Communications and Media Authority (ACMA).
- However, a number of improvements to the objectives, structure, powers and operation of the ACMA are warranted in the interests of reducing the regulatory burden on industry and ensuring the regulator is well equipped to respond to market and consumer changes.
- The objective of the regulator should be to maximise consumer benefit by ensuring regulatory conditions which encourage innovation, investment and competition. This should be written into the ACMA's establishing legislation.
- A future communications regulator should also have written into its establishing legislation a preference for non-regulatory or co-regulatory approaches and should be required to apply the least level of regulation required to achieve stated public policy aims.
- In order to increase the efficiency of ACMA processes and decision-making, ASTRA supports an increased use of delegation. Empowering staff to make decisions and take positions without having to engage with the rigid and elongated process of seeking Board authority should be considered as a means of increasing efficiency and lessening the impact of regulatory processes on industry.
- The governance of the ACMA would be improved through splitting the Chair and CEO roles and through legislating for a merit-based selection of members (currently provided via Government policy).
- As identified in the Department of Communications Spectrum Review, there are some ACMA spectrum management functions which could be devolved to industry. That review also highlighted the need to ensure the division of spectrum management powers between the regulator and the Minister remains appropriate.

- The current division of broadcasting powers and responsibilities between the ACMA and the Australian Competition and Consumer Commission (ACCC) remains appropriate.

3. The subscription television industry's interface with the ACMA

The subscription television industry is regulated under the *Broadcasting Services Act 1992* (BSA) and *Radiocommunications Act 1992* and as such has a range of interactions with the ACMA on key aspects of business practice.

ASTRA develops codes of practice, which become active upon approval and registration by the ACMA. The process of drafting, developing and consulting on codes therefore involves significant liaison and iterative consultation with ACMA staff. The length of the codes development process, and consequently the business impact of the process, is predominantly shaped by the involvement of the ACMA and its internal processes. Because of the length of the codes development process, this is an area of interaction with the ACMA that involves a very substantial investment of staff time and effort. The last review of the ASTRA Codes took three years and three months (refer to case study on page 4). This process should be made more efficient to reduce resource impacts on both industry and the ACMA.

Relatedly, ASTRA's members also interface with the ACMA through the codes complaint investigation process. This typically involves the licensee, upon request from the ACMA, providing a copy of the material complained about and a series of submissions on the merits of the complaint. Because of the relatively low number of Subscription Television Codes of Practice complaints which progress to investigation by the ACMA, this process does not impose undue administrative burdens, but nevertheless involves some business impact. However, underlying the relationship between subscription television and the ACMA in relation to complaints handling are the potential enforcement powers the ACMA holds, which include suspension or cancellation of licence, making this a very significant relationship.

Licensee behaviour can also be impacted by the stance taken by the ACMA on other industry sectors' codes and by public ACMA statements on its attitudes towards certain compliance issues. For example, the ACMA has recently released a series of 'Investigation Concepts' papers, which set out the ACMA's approach to interpreting code provisions that are common or substantially similar across broadcasting sectors. Given that the ACMA is an administrative body not bound by its previous decisions, the clarity provided in these papers has been useful. Statements in these papers about how the ACMA interprets various provisions have been included in codes of practice training modules and will impact on licensee approaches to compliance. However, it would greatly assist business planning if the ACMA were required to make its decisions as consistent as possible with previous decisions, to give regulated entities as much certainty as possible.

The ACMA also has a range of powers relating to the captioning legislative framework, which include the discretion to approve exemptions for certain channels and the power to set minimum quality guidelines. ASTRA's members have had significant dealings with the ACMA in relation to these powers and the manner in which the ACMA uses its discretion to provide exemptions and set quality standards has a material financial impact on channel providers.

Another area where business practices are influenced by ACMA process and practice is in the fulfilment of certain reporting requirements with respect to compliance with captioning and local content obligations. Whilst the reporting obligations are set down in primary legislation, the ACMA develops the forms and processes which give effect to these obligations and the complexity and ease of use of the forms certainly have an impact on licensees.

The final area in which the industry is impacted by ACMA practices and procedures is through the spectrum planning, management and licensing processes. ASTRA's members utilise spectrum in the 'C-Band' for satellite receive earth stations and are also soon to access

television outside broadcasting spectrum in the 2268–2300 MHz band. As these spectrum assets are a crucial part of the production supply chain, it is evident that ACMA decisions in this space have the potential to have significant impacts on licensees.

It is not just the final planning and/or licensing decisions of the ACMA which will significantly impact subscription television licensees. For example, the positions and views indicated by the ACMA in such documents as its Five-year Spectrum Outlook regarding the long term prospects for earth station infrastructure in the C-Band can greatly impact the certainty with which industry plans and manages key assets.

4. Assessing the performance of the ACMA

ASTRA's experience in dealing with the ACMA has on the whole been constructive, however there have been instances where the ACMA's processes and procedures have led to delays and inconsistent outcomes.

The experience of ASTRA members in dealing with the ACMA on captioning exemption applications suggests efficiency and flexibility could be improved through better ongoing dialogue with industry. The outcome of an exemption application can have significant consequences for channel providers and licensees including, in some cases, the removal of an entire channel from broadcast. Applicants should have an opportunity to respond to the ACMA's queries or issues before a final decision is made. Our members' experience to date is that such an opportunity was not afforded to them.

ASTRA supports an increased use of delegation to achieve efficiency in process and decision-making. This may be useful in enhancing the efficiency of processes such as Code of Practice reviews, which can take years to complete. Empowering staff to make decisions and take positions without having to engage with the rigid and elongated process of seeking Board authority should be considered as a means of increasing efficiency and lessening the impact of regulatory processes on industry. A further possibility would be to amend the requirements in the BSA so that industry can develop the codes independently, prior to their consideration by the ACMA – this would remove the requirement that the codes be developed in consultation with the ACMA, freeing up the process significantly, without removing the safeguard of ultimate ACMA approval.

CASE STUDY – Review of subscription television and radio Codes of Practice

The most recent ASTRA Code review process is illustrative of the immense investment of time and resources that process requires (for both industry and the ACMA).

The last Code review process ran for three years and three months, which is just longer than the intended life of each Code (Code reviews are required every three years). This represents a very significant component of the regulatory burden on licensees and is an area of regulatory practice which should be a priority target for deregulatory reform.

A summary of the process follows:

- August 2010 – ASTRA meets with the ACMA and provides draft Codes of Practice
- September 2010 – March 2011 – iterative exchange of comments (x 4)
- May 2011 – Authority considers proposed Codes
- September 2011 – October 2011 – iterative exchange of comments (x 2)
- November 2011 – February 2012 – negotiation between ASTRA and ACMA on possible delay of process pending resolution of Live Odds issue (x 4)
- March 2012 – April 2012 – Public consultation on proposed Codes

- May 2012 – ASTRA provides ACMA with copies of public submissions
- October 2012 – ASTRA provides ACMA with revised Codes following public consultation
- December 2012 – Authority considers revised Codes
- December 2012 – October 2013 – iterative exchange of comments (x 8)
- October 2013 – ACMA approves and registers Codes

NB each iterative exchange of comments represents an immensely time-consuming and costly process of internal consideration for both the ACMA and ASTRA.

Issues Paper question - Has the ACMA been effective in progressing or influencing regulatory reform initiatives where there has been a change in risk or market characteristics to warrant change?

The ACMA has been proactive in identifying pressure on regulatory frameworks arising from technological and industry developments and changing consumer expectations. This is evidenced in the release of the 'Broken Concepts' and 'Enduring Concepts' papers and the Digital Australians report. Whilst these have been useful and timely contributions to policy debates (with opportunities for stakeholders to contribute their views), ASTRA questions whether it is appropriate that the regulator be as active as this in the policy space.

Whilst the ACMA's legislated functions include advising the Minister on the broadcasting industry and the operation of the BSA, ASTRA is of the view that taking a position on the adequacy or otherwise of the existing regulatory framework should be the domain of Government. Advising the Minister on policy matters is a function which should be reserved for the Minister's Department. The role of the regulator should be to enforce the regulatory framework, rather than to advocate for its reform.

5. Functions and objectives of the ACMA

The objective of the regulator should be to maximise consumer benefit by ensuring regulatory conditions which encourage innovation, investment and competition. These are the preconditions for a vibrant, agile and high quality communications sector which delivers services with broader social, as well as commercial/economic benefits.

Given the potential for legacy regulation to inhibit innovation and investment in new technologies and customer offerings, and to apply inconsistently to existing operators and new services in a way that imposes compliance costs unevenly, a future communications regulator should have written into its establishing legislation a preference for non-regulatory or co-regulatory approaches. As the ACMA noted in September 2011, self-regulation and co-regulation can offer a number of advantages over traditional command and control regulation including: greater flexibility and adaptability; potentially lower compliance and administrative costs; an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly; and quick and low-cost complaints-handling and dispute resolution mechanisms.¹

An obligation to prefer non-regulatory or co-regulatory approaches also maximises the flexibility of the regulator to respond to developments in technology, consumer offerings and community standards.

¹ ACMA, *Optimal conditions for effective self- and co-regulatory arrangements*, September 2011, p.5.

It should also be explicitly stated that the regulator must look to apply the least level of regulation required to achieve stated public policy aims and to minimise the impost on industry. This would be consistent with the Government's deregulatory agenda and outlook, aptly demonstrated by the Assistant Treasurer's 2013 speech² on the Government's deregulation agenda and priorities:

Questions must be asked first before new regulations are passed.

What is their purpose? What is their cost? What is their impact on productivity? What is their impact on new entrants? And what is their effectiveness in managing risk?

Only then, when it is absolutely necessary and with no sensible alternatives available, should we proceed to regulate.

We need a new conception of acceptable risk and we need to much better understand the cumulative impact of regulation on business decision making.

Business is not sentimental and capital is mobile.

An adverse regulatory regime can make all the difference to the productivity of an enterprise and to a decision when, or whether, to proceed with any major investment.

This would also be consistent with the approach currently taken in s 4(2)(a) of the BSA – which requires public interest considerations be addressed *'in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and datacasting services'*.

A useful model may be the duty imposed on Ofcom in the United Kingdom³ to continuously operate with a duty to avoid or repeal unnecessary regulation:

6 *Duties to review regulatory burdens*

- (1) *OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve—*
 - (a) *the imposition of burdens which are unnecessary; or*
 - (b) *the maintenance of burdens which have become unnecessary.*
- (2) *In reviewing their functions under this section it shall be the duty of OFCOM—*
 - (a) *to have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and*
 - (b) *in the light of that, to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by OFCOM.*
- (3) *In determining for the purposes of this section whether procedures for self-regulation are effective OFCOM must consider, in particular—*
 - (a) *whether those procedures are administered by a person who is sufficiently independent of the persons who may be subjected to the procedures; and*
 - (b) *whether adequate arrangements are in force for funding the activities of that person in relation to those procedures.*
- (4) *OFCOM must, from time to time, publish a statement setting out how they propose, during the period for which the statement is made, to secure that*

² <http://www.joshfrydenberg.com.au/guest/SpeechesDetails.aspx?id=225>

³ *Communications Act 2003* (UK)

regulation by OFCOM does not involve the imposition or maintenance of unnecessary burdens.

We acknowledge that this is a principle the ACMA has previously supported,⁴ however, to ensure the principle endures any change in leadership or culture at the regulator, it should be enshrined in legislation.

The KPIs identified in the Government's Regulator Performance Framework could also be incorporated into the functions and objectives component of establishing legislation:

KPI 1 – Regulators do not unnecessarily impede the efficient operation of regulated entities

KPI 2 – Communication with regulated entities is clear, targeted and effective

KPI 3 – Actions undertaken by regulators are proportionate to the regulatory risk being managed

KPI 4 – Compliance and monitoring approaches are streamlined and co-ordinated

KPI 5 – Regulators are open and transparent in their dealings with regulated entities

KPI 6 – Regulators actively contribute to the continuous improvement of regulatory frameworks

This would make a clear and enduring statement about the manner in which the ACMA should conduct itself.

5.1 ACMA's spectrum management functions

Management of spectrum – a scarce resource with the potential to carry services delivering significant social and economic benefits – will necessarily involve decisions which have significant impacts on consumers, private industry and Government. Decisions can range from micro level issues such as interference management and reception, through to macro level decisions on the designation of large amounts of spectrum for use by certain technologies and the manner in which that spectrum is sold or allocated (matters on which the Government might seek to make policy decisions). It is therefore important to carefully assess and divide responsibility for spectrum management decisions between the regulator and the Government.

ASTRA supports examination of the various roles of the Minister, the ACMA, the Department and industry stakeholders involved in spectrum management. In particular, it is important that there is an appropriate balance between the role of the Minister (as supported by the Department) in providing an overall policy framework and direction for spectrum management, and the ACMA as the independent regulator and manager of radiofrequency spectrum. The regulatory framework should promote an approach to spectrum management (including any necessary powers for the Minister) that ensures consistency in outcomes for all commercial spectrum users and does not favour one industry sector over another.

We note the Review of the ACMA is to have regard to the Spectrum Review undertaken by the Department of Communications. ASTRA would draw the ACMA Review's attention to the findings of the Spectrum Review that the Minister should retain responsibility for spectrum planning and management decisions with significant policy implications. ASTRA also supports the recommendation that the Minister should have the ability to issue policy statements which set the parameters for ACMA's management of spectrum.

Consideration could be given to limiting the ACMA's broadcasting spectrum planning powers to technical and transmission issues, at least to the extent it relates to commercial and national FTA broadcasters. ASTRA acknowledges that, where there are government policy objectives for the terrestrial provision of national broadcasting and other non-commercial broadcasting

⁴ ACMA Contemporary Community Safeguards Inquiry Issues Paper, p 8.

services, the ACMA's planning powers may continue to need to make specific provision for spectrum required for these services. However, ASTRA questions the continuing need for the ACMA to have regard to matters such as the social, economic and demographic characteristics of a particular geographically defined area, or the "demand for new services" in a particular area, in its broadcasting planning processes, as is currently required under section 23 of the BSA, in relation to commercially-based services. ASTRA submits that the extent to which there is a "demand" for additional services in a particular geographic location is best left for the market to determine. While there would be a continuing role for the ACMA to minimise interference between services and to ensure adequate reception for consumers, the nature of the services themselves should be left the market (and ultimately the consumer) to decide.

Issues Paper question - What functions currently undertaken by the ACMA could be more efficiently or effectively delivered by someone else?

In its submission to the Department of Communications Spectrum Review, ASTRA proposed certain of the ACMA's spectrum planning and coordination functions could be devolved to the private sector through the use of the 'private park' model.

ASTRA therefore welcomed the findings of the review that the ACMA should have increased ability to delegate spectrum management functions, including the authority to facilitate private band management. ASTRA views private band management as a means of developing and administering effective and efficient spectrum sharing arrangements. Private band management would also create the opportunity for businesses to have more flexibility in planning spectrum and choosing technologies.

Further detail on ASTRA's position on delegation of powers and private band management can be found in its submission to the Spectrum Review.⁵

ASTRA is aware of proposals that the communications regulator should take on responsibility for sector-specific competition issues. ASTRA supports the current division of regulatory responsibility for the media industry as between the ACMA and the ACCC, with the ACCC retaining responsibility for competition issues and the ACMA acting as an expert body on media-specific issues such as community safeguards and expectations and spectrum management. In the ACCC, Australia has a regulator that is well experienced in all manner of competition issues. Conferring any sort of competition-related powers on the ACMA would create unnecessary duplication, uncertainty and cost to government and industry. It is also undesirable to have the industry regulator also responsible for approving merger activity as there is a risk regulated entities could perceive a connection between compliance with industry-specific regulation and their prospective success in seeking anti-trust approvals.

There are some issues covered by the ASTRA Codes of Practice which are duplicative of other laws and regulations and, insofar as the ACMA oversees the ASTRA Codes, results in a doubling up of functions across the ACMA and other regulators. For example, the ASTRA Codes include provisions dealing with subscriber/consumer issues, all of which are otherwise addressed via fair trading and consumer protection laws. Similarly, the ASTRA Codes contain privacy provisions which are duplicated in privacy laws, and also contain provisions addressing discrimination and vilification which are dealt with elsewhere. Ultimately, the content of the Codes is a matter for negotiation between industry and the ACMA, however the issue of duplication could be dealt with by a legislative requirement that in considering Codes (and developing standards), the ACMA should be required to take into account the objective of avoiding duplicate regulation.

⁵ http://astra.org.au/images/pages/ASTRA_submission_-_Spectrum_Review_-_Directions_Paper_-_2_December_2014.pdf

6. Structure of the ACMA

As a matter of principle, ASTRA supports reform to the structure of the ACMA to separate the combined CEO and Chair role into standalone roles. This is preferable as a matter of good governance practice and ASTRA's comments should not be taken as reflective of concerns regarding the regulator's performance.

A standalone Chair can provide independent oversight of the CEO's performance in managing the organisation and thus builds in additional safeguards against sub optimal performance. When the roles are combined, authority is vested in one individual who is charged with monitoring him or herself. This is an obvious conflict of interest. There should be a clear division of responsibilities between the running of the board and the executive responsibility for the running of the ACMA's operations. An independent Chair has more scope to challenge the agency on its functions and activities, and is therefore more likely to provide effective checks and controls.

Whilst other regulatory agencies (such as the ACCC and the Australian Securities and Investments Commission (ASIC)) also employ a combined agency head/Chair model, there is a strong view held in the corporate governance field that the roles should be separate. For example, the ASX Corporate Governance Principles and Recommendations⁶ advocate for a split. Whilst this publication is concerned with publically listed companies, the principles embodied in the advice are applicable more broadly:

Recommendation 2.5

The chair of the board of a listed entity should be an independent director and, in particular, should not be the same person as the CEO of the entity.

Commentary

The chair of the board is responsible for leading the board, facilitating the effective contribution of all directors and promoting constructive and respectful relations between directors and between the board and management. The chair is also responsible for setting the board's agenda and ensuring that adequate time is available for discussion of all agenda items, in particular strategic issues. Having an independent chair can contribute to a culture of openness and constructive challenge that allows for a diversity of views to be considered by the board.

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

[...]

The role of chair is demanding, requiring a significant time commitment. The chair's other positions should not be such that they are likely to hinder effective performance in the role.

⁶ <http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf> p 18

The Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance⁷ take a similar position:

“[T]he objectivity of the board and its independence from management may be strengthened by the separation of the role of chief executive and chairman.

[...]

Separation of the two posts may be regarded as good practice, as it can help to achieve an appropriate balance of power, increase accountability and improve the board’s capacity for decision making independent of management.”

ASTRA also believes it would be preferable to have a more clearly delineated distinction between the part of the organisation which drives investigations and those who have final approval of Authority decisions. A simple analogy is the distinction between a police investigation and a decision by the Director of Public Prosecutions to prosecute.

Consideration should also be given to including in regulation merit-based selection criteria for the appointment of Board members, as is provided for the appointment of ABC Board members.⁸ Whilst merit-based recruitment is presently addressed via Government policy and as such, the ACMA Board has been appointed on merit,⁹ a legislated requirement would be preferable. This would allow for the inclusion of selection criteria specific to the functions and objectives of the communications regulator.

For example, it would be appropriate to require appointees to demonstrate substantial experience or knowledge in the communications or media industry, business or financial management or corporate governance. It would be ideal if the criteria also provided for appointments to the authority to have reference to experience in the private sector in regulated entities. One approach may be to require that members comprising a set proportion of the Board have private sector experience in the communications industry.

ASTRA is not arguing that the current make-up of the Authority is deficient, but rather argues for legislated safeguards to ensure an appropriate mix of experience and skills into the future.

7. Resourcing of the ACMA

ASTRA would not support a move to a cost-recovery model of funding the regulator. The industry already faces significant financial burdens in complying with regulatory requirements and does not believe it should then also be required to fund monitoring and compliance by the Government. If the regulator is established with reference to the protection of the public good then it is appropriate that funding for it is drawn from the public sphere.

ASTRA notes that if meaningful deregulatory reform were achieved, resulting in a reduction in the ACMA’s role in regulating the industry, this would also have the effect of reducing the ACMA’s running costs.

8. The future communications regulatory framework

The Review Issues Paper raises a number of questions relating to the future communications regulatory framework and the implications for the future communications regulator.

⁷ <http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf> p 63

⁸ See Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013

⁹ <http://www.apsc.gov.au/publications-and-media/current-publications/merit-and-transparency>

ASTRA made a number of extensive contributions to the Convergence Review regarding what a future regulatory framework should look like. ASTRA has also made submissions to the Government's deregulatory agenda, the Minister's communications deregulation roadmap, the Department of Communications Digital Television Regulation Review and the Department of Communications Spectrum Review.

This submission does not seek to expand upon these complex, contentious and detailed issues, which are being or have been dealt with by other Government reviews. However, at a principles level, ASTRA's overriding concern is to ensure a de-regulatory bias in policy-making, an equitable regulatory playing field and open competition in the provision of consumer services. These are the preconditions for further investment, innovation and job creation in the communications sector.

Issues Paper question – How are the ACMA's functions likely to change as a result of reforms to the communications regulatory framework?

Deregulatory reform would necessarily impact on the ACMA, who would ideally scale back certain functions, particularly if reform of the regulator successfully instituted a less interventionist ACMA.

An example would be a change in the style of regulatory intervention used to promote Australian content production. A change from expenditure obligations to a broader incentive-based scheme (administered through the tax system) would make the ACMA's compliance, monitoring and enforcement functions in this area obsolete, with responsibility for administering financial incentives likely to fall on Screen Australia.

In addition, a simpler framework for subscription television captioning would not only reduce the administrative burden on licensees, but would also significantly reduce the amount of time invested by the ACMA.