



SUBMISSION TO THE DEPARTMENT OF COMMUNICATIONS

Review of the Australian Communications and Media Authority

Comment on Draft report May 2016

June 2016

Introduction to ACCM

The ACCM is the peak not-for-profit national community organisation supporting families, industry and decision makers in building and maintaining an enjoyable media environment that fosters the health, safety and wellbeing of Australian children.

ACCM has a national Board representing the states and territories of Australia, and a membership of individuals and organisations including Early Childhood Australia, the Australian Council of State Schools Organisations, the Australian Primary Principals Association, the Australian Education Union, the Parenting Research Centre, the South Australian Primary Principals Association, and the Council of Mothers' Unions in Australia.

ACCM's core activities include the collection and review of research and information about the impact of media on children's development, and advocacy for the needs and interests of children in relation to the media.

This submission has been prepared on behalf of the Board of the Australian Council on Children and the Media by Prof Elizabeth Handsley (President) and Ms Barbara Biggins OAM (Hon. CEO).

Enquiries about this submission should be directed to Ms Barbara Biggins.

A. Summary Comment on draft proposals:

The overall objective of the review in 2015 was to examine the performance of the ACMA in achieving good regulatory outcomes in the communications and media sector. (Draft report summary doc, p1)

The thrust of the Discussion Paper is towards "modernising" the ACMA and its functions. There is great emphasis on making the path easier for industry and reducing their costs, and an assumption that self-regulation is the better path.

The Discussion Paper was informed by its Reference Group and by consultations with industry stakeholders. It is unclear whether the Discussion Paper was also informed by submissions to the earlier stage of the review, but we assume it was.

The current regulatory framework includes object (j) in the *Broadcasting Services Act*: ‘to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them’.¹ If, as seems likely, the classification of literature, films and computer games is taken over by the ACMA, principle (b) in the *National Classification Code* will also become relevant to its work ie ‘minors should be protected from material likely to harm or disturb them’.² Yet the Reference Group contained no person with a brief, or the expertise, to represent children as stakeholders. The commissioned essays contained only a brief mention or two in regard to the areas of content and classification (Hooper, Richard). If, as we hope and trust to be the case, children’s interests are still considered to be a legitimate and important factor in media regulation, we have to ask where and how these are given proper focus in this review. If the plan is to move away from the protection of children’s interests, we submit that this should be made explicit, and defended.

B. Comment on selected proposals: (*those selected are in italics and bold*)

Remit

1. ***That the ACMA’s remit cover all the layers of the communications market, including infrastructure, transport, devices, content and applications.***

ACCM’s principal area of interest and engagement with the ACMA is content, in particular children’s content but also extending to that which (many more) children are exposed to, including advertising and program promotions. As children are a relatively small and economically powerless audience, it is appropriate for the government to use its regulatory powers to protect their interests. The current framework recognises this in principle, but the practice has left a good deal to be desired. The reasons for this are complex, but one important area for improvement is in ensuring that decisions on matters such as classification are made by people have expertise on, for example, what material is ‘harmful’ to children. Such decisions should be based on scientific evidence, not received wisdom or moral judgment. ACCM submits that is an important enough principle to be built into the regulatory framework.

Functions analysis

2. That the ACMA’s cyber-security programmes be transferred, along with staff and funding, to the Attorney-General’s Department.
3. That the Bureau of Communications Research assume the lead in taking forward research about the emerging environment and market trends, with ACMA’s regulatory research programme focusing on supporting the effectiveness of regulatory functions and harms that are affecting businesses and consumers.
4. That the Department of Communications and the Arts be responsible for head of delegation roles to key international policy-setting forums, including the World Radiocommunications Conference, and that clear guidance and negotiating parameters be provided by the Department to heads of delegation.
5. ***That further work be undertaken to determine whether it may be more efficient for another body, such as the Australian Taxation Office, to undertake the revenue collection functions currently performed by the ACMA.***

¹ *Broadcasting Services Act 1992* (Cth), s 3(1)(j).

² *National Classification Code*, s 1(b).

The ACMA's independence would be enhanced if it were funded out of Consolidated Revenue, rather than by direct industry contributions. This is the only way in which the public can be assured of such a regulator's complete and robust independence from industry. At the moment we believe there is a perception in some quarters that the industry 'owns' the ACMA, because of this direct financial relationship. The above proposal could prove salutary in this regard.

6. That, within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self-regulation, in consultation with relevant industry bodies:

- technical standards;
- Integrated Public Number Database;
- Do Not Call Register;
- Action on unsolicited communications, including Spam.

7. ***That the Department will undertake further work on the potential to expand the ACMA's remit to include the functions of the Classification Board and Classification Review Board Scheme.***

ACCM could support this proposal provided that the section within the ACMA tasked with this function is independent and specialised, and that the checks and balances within the present system, and opportunity for community input, are maintained.

However, ACCM realises that at present this area is in a state of flux, and is unable to put a firm view about where classification should be done and by whom, until this is settled.

As the peak body representing children's interests in relation to media use, ACCM should be considered as a key stakeholder in any such further work by the Department. This is because classification is a critical tool in the area of child protection. The present classification system is in urgent need of an evidence-based review, and ACCM has considerable expertise and interest in this issue.

8. That the *Interactive Gambling Act 2001* be amended to require the ACMA to:

- Handle all complaints relating to interactive gambling services and advertisements;
- Conduct the same investigation process irrespective of whether the content is hosted in Australia or overseas; and
- Enforce civil penalties for breaches of the Act.

9. That the current institutional arrangements for economic regulation of the communications sector be retained.

10. That cross-appointment arrangements between the ACMA and ACCC be strengthened in order to benefit both ACMA and ACCC decision-making.

11. ***That the current institutional arrangements for communications consumer protections be retained.***

ACCM submits that those arrangements should be expanded to cover consumers of broadcasting and online content. The significance of converging media platforms was recognised in the merger of the previous telecommunications and broadcasting regulators (ACA and ABA), but this recognition has not had an impact in the field of consumer protection. ACCM has difficulty seeing how this can be justified. It is true that communications products and services are complex, but the same goes for the other

platforms (especially since the introduction of the exceptionally complex new *Commercial Television Industry Code of Practice*), and in any case with growing diversity in access arrangements (eg watching television content online, on a mobile device) the justification for the differentiation continues to diminish.

Objectives

12. That, as a priority as future reform is undertaken, the government provide the ACMA with a clear set of overarching policy objectives to guide its decision-making.

The 4 proposed in draft report are

- expressing a national cultural identity;
- connecting remote communities;
- informing the public; and
- underpinning the democratic process.

ACCM considers that an important objective is missing from this list: protecting the interests of children. The protection of children is at least as important a goal as any of the others discussed in the paper, and currently served by the co-regulatory regime. As noted above, it has been an objective of the *Broadcasting Services Act* since 1992, and any proposal to move away from it should be expressly stated and defended.

In ACCM's view the co-regulatory regime in recent years has tended to emphasise the protection and enhancement of the broadcasting industry's profits, rather than the protection of the public interest. Although it is important for the broadcasting industry to be viable and vibrant, this is not an end in itself. Regulation is necessary to ensure that audience interests – especially those of relatively powerless sectors of the audience – are given appropriate weight. Within that, the interests of children in having access to content that enhances their development should be treated as a primary concern, in accordance with article 3(1) of the *UN Convention on the Rights of the Child*.

We note further that the Australian government has certain obligations relating to children's engagement with the mass media under the UNCROC, in particular to:

*ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.*³

Any weakening of the *Children's Television Standards*, including by dispensing with the objective of protecting children, would risk putting Australia in breach of this obligation. Further obligations under article 17 include:

- (a) *Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;*
- (b) *Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;*
- ...
- (d) *Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous; [and]*

³ *United Nations Convention on the Rights of the Child*, art 17.

- (e) *Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.*

Article 29 lays down the principles that are to guide children's education, namely:

- (a) *The development of the child's personality, talents and mental and physical abilities to their fullest potential;*
- (b) *The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*
- (c) *The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;*
- (d) *The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;*
- (e) *The development of respect for the natural environment.*

It is unlikely that an unregulated commercial mass media sector would voluntarily produce material that served these ends.

Article 13 deals with children's freedom of expression, which is stated to be subject to, among other things, 'public health [and] morals'. Article 18 imposes obligations to provide support for parents' role, specifically to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'. Another important provision is article 3, which as noted provides that children's interests should be a primary consideration in all decisions affecting them.

The connection between a healthy media environment and children's healthy development is universally recognised, even if there may be different views about what constitutes a healthy media environment. Therefore media regulation to protect the interests of children is of significance, not just to individual children and their families, but to the whole of society, as these are the leaders of the future. Broadcasting can be a powerful influence on children's development, especially in the crucial early years, but also as a shared family activity for older children.

Such regulation can fulfil the dual functions of protecting children directly and supporting parents in providing that protection as required by article 18 of the *United Nations Convention on the Rights of the Child* (see above). As not all parents are able to fulfil their responsibility of protecting their children from inappropriate content themselves it is important to have protections at a population level, that only government regulation can provide.

As to the principles listed, ACCM supports 'expressing a national cultural identity' as a key policy objective. This an important concept for children. Dramas and programs which commonly feature animation, and a mid-Atlantic look and accents, do not allow Australian children (in all their diversity) to see their own culture reflected and to be able to see that it's important. As noted in a recent blog, even watching an excellent US program such as Sesame Street tends to make Australians 'feel like a New Yorker born in the wrong city'.⁴

⁴ Bron Bates, 'Five reasons we love little lunch' 26 May 2016 <https://childmagsblog.com/2016/05/26/5-reasons-we-love-little-lunch/>.

In summary, ACCM believes that the purpose and objective of the ACMA should be to serve the public interest in relation to broadcast media ownership, control and content, as defined from time to time by the Australian people's elected representatives and based on the most up to date scientific and social research.

Governance

13. That the commission model of decision-making be retained.

14. That the skill set to be covered by Authority members be outlined in legislation to ensure an appropriate and diverse mix of abilities to respond to the future needs of the ACMA.

ACCM suggests that because the media landscape will continually change, the important skills for Authority members should include critical and creative thinking; and the capacity to keep up with and apply the latest research about audience needs.

Further, there should be at least one Authority member who has the qualifications, skills and experience to serve the needs and interests of the child media consumer. In particular, that person or people should have the capacity to keep up with, and apply, scientific evidence about the influence of media content and experiences on children's thoughts, attitudes and behaviour. Such an appointment would reflect the objective of the protection of the rights of the child, as recommended by ACCM.

15. That all members of the Authority be appointed on a full-time basis and that the Authority consist of a Chair, a Deputy Chair and at least three other full-time members.

16. That the existing arrangements are maintained where the Chair is the Accountable Authority with an ability to delegate powers, duties and functions, to the extent permitted by the PGPA Act, to a CEO.

17. That provision be made in the ACMA Act for the Authority to establish sub-boards to manage subject matter not requiring the full commitment of the Authority, or to manage issues that would otherwise diminish the Authority's capacity to focus on its key decision-making or direction setting responsibilities. That the Chair of any such sub-boards be a member of the Authority but not be the Chair of the Authority.

ACCM questions why this is considered desirable, in the absence of evidence as to how well it works and the impact it has in the UK. The proposal is particularly puzzling in the way it seems to contradict the proposals to bring everything together under ACMA's roof.

ACCM would be concerned if Proposal 17 led to the delegation of the power to classify C and P quota programs for children to some other body that was lacking in independence from industry and commercial pressures.

These quotas are relatively small, quality is obligatory, and the needs of Australian children for age- and culturally-appropriate, diverse content are very significant for their development. It is vital that the assessment of such quota content remain with a body that is independent of industry and commercial pressures.

Enhancing regulator performance

18. Legislate the following four regulator principles in the ACMA's enabling legislation, proposed draft:

- The ACMA have regard that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.
- The ACMA should apply a risk-based approach to regulation, compliance and enforcement activities. Regulatory intervention should be targeted, evidence-based and commensurate with risk.
- The ACMA should implement continuous review of regulation to reduce burden and streamline approaches where the benefits exceed the costs.
- The ACMA should be transparent in its actions and clearly indicate the priorities and objectives which inform its decision-making to regulated entities and the broader public.

ACCM has reservations about the concept of ‘continuous review of regulation’. It gives the impression that the goalposts will be constantly shifting, making it difficult for community organisations such as ourselves to keep up and to provide an effective voice on behalf of our constituencies. There is something to be said for stability.

We also wonder whether transparency should be treated as an end in itself, or whether the principles should envisage a ‘closing of the loop’ where regulated entities and (especially) the broader public have opportunities to give feedback and influence future directions.

ACCM also sees a need to ensure that certain key terms in the principles are appropriately defined. For example at least some principle, if not a clear definition, is needed to indicate what hindrances to competition, innovation or efficient investment are ‘necessary’.

‘Efficient investment’ should be defined so as to remove any suggestion it means ‘maximum profit guaranteed’. Rather it should be expressly stated to account for values and principles, including the public interest.

The concept of a ‘risk-based approach’ should also be explained and defined.

19. That the Minister provide the ACMA with an annual Statement of Expectations and the ACMA respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government’s expectations.
20. That the Minister provide the ACCC with an annual Statement of Expectations and the ACMA respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government’s expectations
21. ***That timeliness of decision-making be established as a key area of focus and accountability for future cycles of the ACMA’s regulator performance framework, and Government consider legislative amendment to support more timely decision-making, where necessary.***

While ACCM supports the need for timely decision making, it considers that legislating for this could be unnecessarily prescriptive and a cause of rushed decision making. We suggest that ensuring timeliness should be a matter of ongoing oversight and sensitive to the context, in order to ensure the right decision is made – even if that decision takes longer.

22. ***That the ACMA publish information on the steps it takes to ensure stakeholders have a clear understanding of the relationship between its actions and its compliance and enforcement policy.***

ACCM has no objection to such a proposal, but would also suggest that those steps themselves are a matter of interest; they should be appropriate for a situation where some stakeholders are lacking resources or otherwise vulnerable, and explained in such a way that such stakeholders can use the information. In other words it is not enough simply to publish information on the steps.

23. ***That the ACMA publish a report to the Minister every two years on initiatives undertaken to identify and reduce regulatory burden on industry and individuals***

ACCM is bemused at the idea of a regulator whose main commitment is not to regulate too much. Indeed, an 'ongoing commitment to reduce burden on regulated entities' sounds like the ACMA is intended to deregulate itself out of existence. This is like designing a car with the primary objective of making sure its brakes work. There needs to be a frank acknowledgement of the legitimacy and benefits of regulation, and deregulation always needs to be balanced against these. Otherwise there is no point having a regulator at all.

In addition, we take issue with the way that deregulation is treated as coterminous with continuous improvement. This means that the review is effectively using 'continuous improvement' as a euphemism for deregulation. In the interests of transparency, such euphemisms should be avoided.

24. ***That the ACMA produce a public report on steps taken to improve the transparency and consistency of its decision-making processes, and that implementation and stakeholder satisfaction be independently assessed by the end of 2017.***

ACCM supports the need for ACMA to provide the rationale for its decisions, ensure decisions and their rationales are clearly communicated and supported by robust analysis, to make their processes and objectives known and ensure these are understood by stakeholders.

Resources

25. That it would be timely to review the policy objectives of revenue collection from the communications sector and evaluate whether new business models and OTT services are contributing appropriately.
26. That the ACMA should further analyse its cost base, in light of the proposed function changes, to ensure it is efficiently delivering on its responsibilities and minimising costs to industry.

Regulatory reform

27. **To enable the communications sector to reach its full potential as an enabler of innovation and productivity, the Government commence a coordinated programme of regulatory reform to establish a contemporary communications regulatory framework.**

Such regulatory reform must protect the rights of the child (as outlined above) and be science-based.

END

