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## 4 Information media and telecommunications

### **Key Points**

- The main concerns raised by the information and telecommunications industry about the processes for creating regulation and its administration are that:
  - there is a propensity to approach every issue by creating new regulations, often leading to uncoordinated, overlapping or duplicative regulation
  - the Australian Communications and Media Authority's (ACMA) approach to regulation is overly prescriptive with a focus on legalistic interpretation.
- The Commission's major recommendations are outlined below.

### *Telecommunications*

- In April 2009, the Australian Government released a discussion paper on possible reforms to telecommunications regulations. In light of this, the Commission has decided to focus on regulations which are not addressed by the discussion paper.
- Customer information requirements for the telecommunications sector should be reviewed with the aim of streamlining the requirements and improving the comprehensibility and clarity of the information provided to customers.
- Prepaid mobile phone identity checks should be reviewed with the objective of revising the regime to allow law enforcement agencies to better identify owners at a lower cost to business.

### *Information media*

- ACMA should be given greater discretion to target its investigation activity.
- The regulatory burden from the anti-siphoning regime could be reduced by substantially reducing the anti-siphoning list.
- Radio local content rules should be revised to make them more flexible and to reduce the reporting requirements.
- The radio local presence and content rules triggered by changes in ownership should be abolished.
- The disclosure standard for radio current affairs should be made less prescriptive.

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## 4.1 Industry structure

The information media and telecommunications industry contributes some 2.1 per cent of total employment and 2.3 per cent of gross value added in Australia. Further, a strong information technology industry makes an essential contribution to the efficient operation of other industries. Indeed, the telecommunications industry has been a major driver of productivity growth in the economy both directly and as a facilitator of productivity growth in other industries. Telecommunications is the largest sector within the information media and telecommunications industry, with broadcasting making a smaller contribution (table 4.1).

Table 4.1 **Broadcasting and telecommunications revenues**  
2006-07

| <i>Industry sector</i>               | <i>Revenue</i> |
|--------------------------------------|----------------|
|                                      | (\$ billion)   |
| Commercial television                | 4.0            |
| Subscription television <sup>a</sup> | 2.9            |
| Commercial radio                     | 1.0            |
| Telecommunications carriers          | 25.2           |

<sup>a</sup>estimated revenue for 2008

Source: ACMA (2008a); IBIS World (2009).

For convenience, the industry has often been divided into the broadcasting and telecommunications sectors. However, the distinction between these two areas is not always clear and the internet has characteristics of both sectors. Convergence within the industry is making this distinction less clear, as content which was traditionally available only through broadcasting is becoming available over the internet and through mobile phone services.

### Broadcasting and media

A key feature of changes in the media over recent years has been the emergence of growing competition from new media. The share of advertising revenue being received by both newspapers and television has declined while internet advertising revenues have grown (ACMA 2008a). This places pressure on the business models of the traditional media:

Fragmentation is one of the most significant trends in media. Audience or readership fragmentation erodes the scale and scope of advantages that content producers and distributors have been used to. The migration of advertising expenditures to online mediums has exacerbated the decline in revenues per channel. (ACMA 2008a, p. 41)

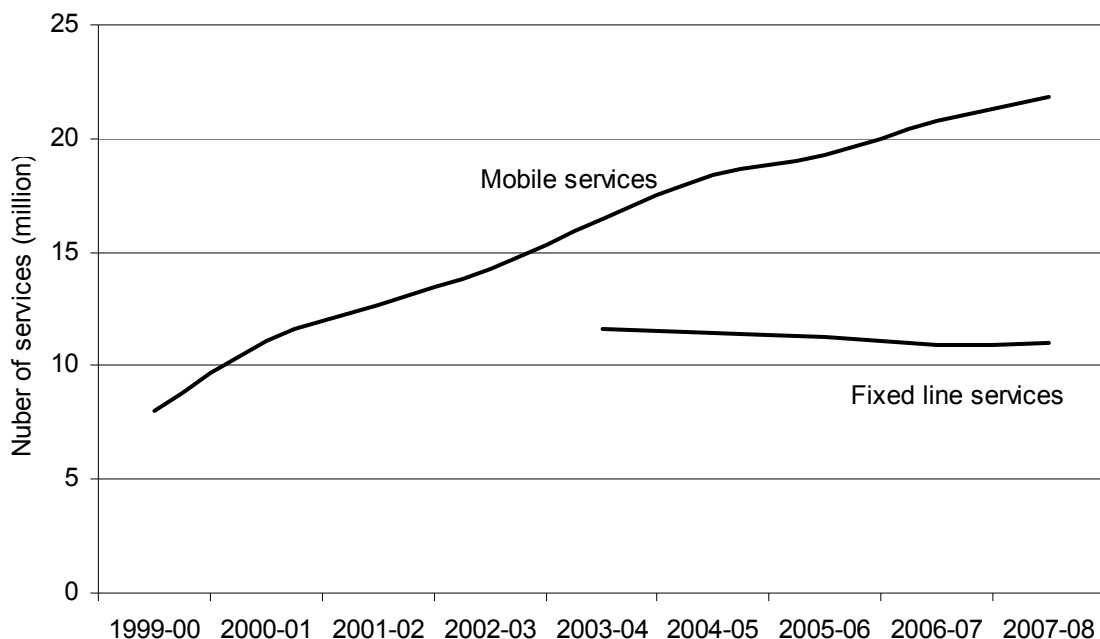
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The growth of subscription television services in Australia has also affected the market share of free-to-air broadcasters. Multichannel subscription services commenced in 1995. Since then the number of subscribers has increased to 2.2 million households by early 2009, or an estimated 6.7 million potential viewers (ASTRA 2009a). In the ratings week commencing 29 March 2009, for example, subscription television accounted for 23.5 per cent of all viewing in metropolitan areas (ASTRA 2009a).

## Telecommunications

Telecommunications has been subject to dramatic changes due to developments in technology and changes in consumer tastes. The number of fixed-line telephone connections has remained relatively stable, experiencing a small decline in recent years since they peaked in 2004. As at June 2008, there were an estimated 11 million fixed-line services. Telstra, through both retail and wholesale services, accounted for 85 per cent of all fixed-lines provided (ACMA 2008a).

Figure 4.1 Australian phone services



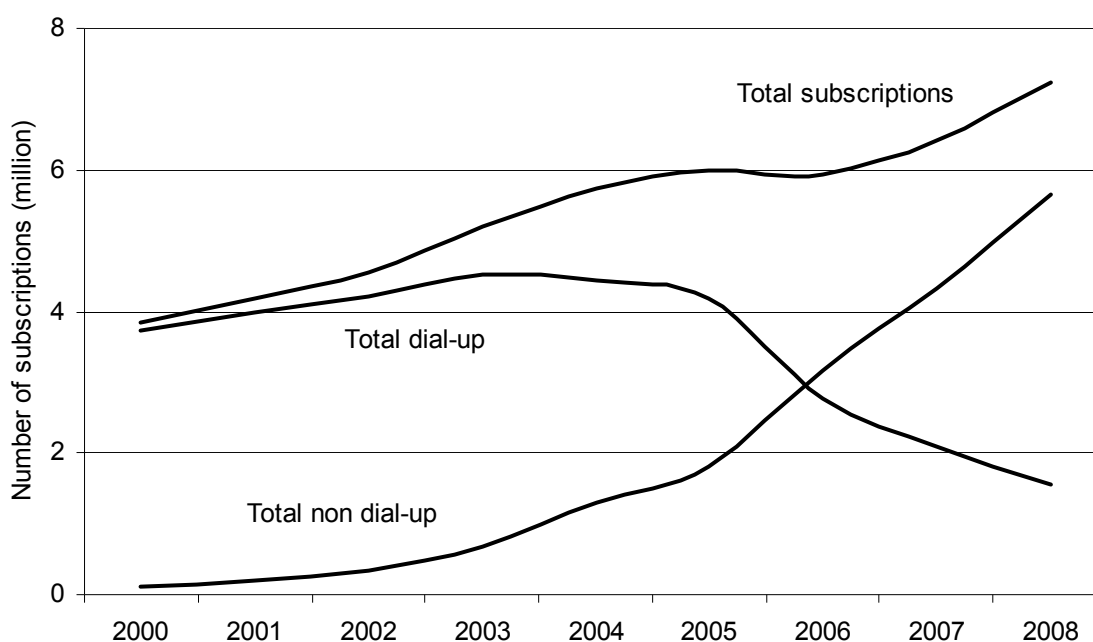
Data source: ACMA (2005, 2008a).

By contrast, there has been substantial growth in the use of mobile phone services over the past decade (figure 4.1). The number of mobile phone services now exceeds the population. A significant number of younger consumers are now choosing to rely solely on mobile phones for voice telephony (ACMA 2009b).

Mobile phone revenue continues to grow while fixed-line revenues decline. In 2007-08 mobile phone revenue for voice services was \$9.4 billion while revenue from fixed-line services was \$7.6 billion (ACMA 2008a). Importantly, while the infrastructure and market for fixed-line services is still dominated by one company, Telstra, the growing mobile phone market is characterised by competition between Telstra, Optus and Vodafone/Hutchinson.

There has also been a substantial change in internet use by Australians in recent years (figure 4.2). In 2000, the majority of internet subscriptions were for dial-up services, with relatively few non dial-up (broadband) subscribers. Since then, the total number of internet subscriptions has almost doubled. This has been accompanied by a dramatic rise in broadband connections coupled with a large decline in dial-up services, to the point where dial-up users now account for just 22 per cent of internet subscriptions.

Figure 4.2 **Australian internet subscriptions<sup>a</sup>**



<sup>a</sup> Based on quarterly data: March (2005, 2007); June (2001, 2006, 2008); September (2000, 2002, 2003, 2004).

Data source: ABS Cat No. 8153.0.

One aspect of the growth in internet use, and an example of technological convergence, has been growth in internet-based communication services such as voice over internet protocol (VoIP) telephone services. In June 2008, a survey indicated that about 17 per cent of internet users had a VoIP service, with a similar proportion planning to take up the service within 12 months. VoIP is more

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commonly used for longer distance calls. In the survey, 67 per cent of users indicated they used the service for international calls, while only 38 per cent used it for local calls (ACMA 2008a). Presently, VoIP is not displacing fixed line services, as fixed telephone lines are still the primary method for broadband internet connections. Increased uptake of broadband connections that do not require fixed telephone lines, such as wireless or naked DSL, could result in increasing substitution of VoIP (and mobile) services for fixed-line telephone services (ACMA 2008a).

## 4.2 Overview of regulation

The information media and telecommunications industries are characterised by rapid technological change. This is resulting in a convergence of industries, as the boundaries between services become increasingly blurred. As a result, the industry structure in place when the current regime was designed has changed significantly.

The regulatory regime has also, in part, been designed to promote competition where natural monopolies have existed. The telecommunications access regime has led to a rise in competition for fixed line services, and those services are now competing with wireless and mobile telephony services.

The Australian Government has the power to regulate telecommunications and broadcasting. It is the primary regulator of this sector although some aspects of the industry are affected by state regulation, such as fair trading and consumer protection laws. The main regulatory instruments are the:

- *Telecommunications Act 1997*
- *Broadcasting Services Act 1992* (BSA)
- *Radiocommunications Act 1992*
- *Telecommunications (Consumer Protection and Service Standards) Act 1999*
- *Trade Practices Act 1974* (TPA), which regulates competition and the telecommunications access regime.

The Australian Communications and Media Authority (ACMA) was established on 1 July 2005 as the primary regulator of telecommunications and broadcasting. It was formed by the merger of the Australian Broadcasting Authority and the Australian Communications Authority. It has powers, duties and obligations under 29 statutes and more than 523 legislative instruments (ACMA 2008a).

Government regulation is supplemented by an extensive network of co-regulatory arrangements involving industry organisations (figure 4.3). Both the BSA and the

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Telecommunications Act provide for the development of industry codes by industry organisations. In 2008, a total of 38 codes were registered with ACMA (ACMA 2008a). These codes cover issues such as:

- technical standards
- consumer protection
- consumer complaints
- advertising
- program content
- transfer of customers between businesses.

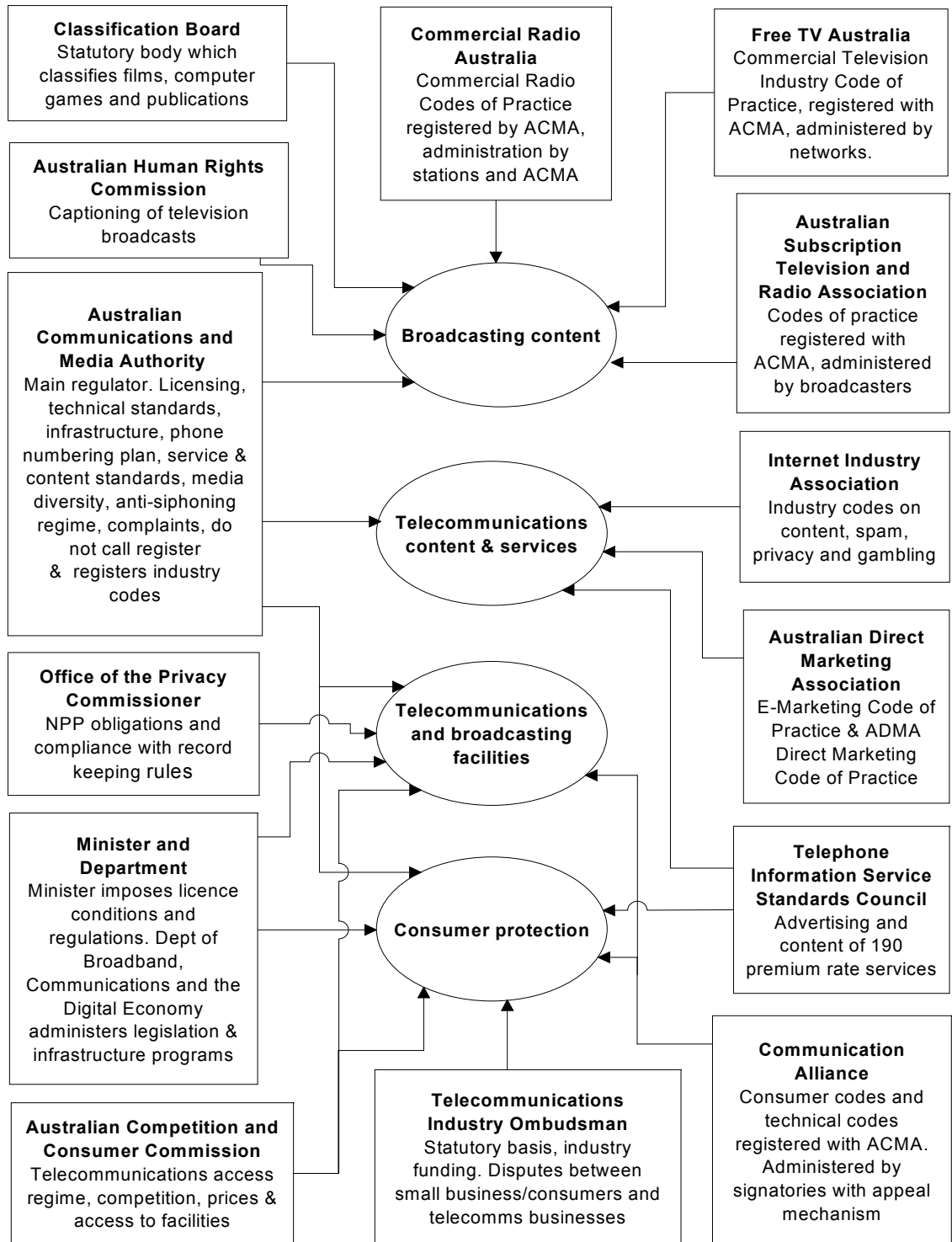
Codes are generally developed in consultation with ACMA and are registered with ACMA. The codes are usually administered by the industry organisations or industry participants. However, where a complaint is not resolved at that level, ACMA can accept a complaint and conduct its own investigation. ACMA may accept an enforceable undertaking where a code has been breached or, following a lengthy procedure, impose an additional licence condition on a broadcaster. ACMA can also promulgate an industry standard if it considers that the codes do not adequately address an issue. Complaints about a licence condition matter or a standard may be made directly to ACMA.

A number of regulatory requirements, such as retail price controls and the universal service obligation, apply only to the incumbent telecommunications carrier, Telstra.

## **Convergence and regulation**

Global developments in communications and the media have led to a complex and dynamic industry and regulatory environment. In 1990, there were essentially only two types of communications services. One was the plain old telephone service which was based on a mature network of copper wire pairs carrying voice communications. The other was the broadcasting of free-to-air television and radio through high powered terrestrial wireless transmitters.

Figure 4.3 Selected key regulatory bodies



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The communications environment today is characterised by a growing number of technologies (copper wire pairs, mobile telephony, optical fibre and cable networks, satellite, television and radio broadcasting, and wireless technologies) each capable of delivering a growing range of competing services. This process is generally referred to as convergence.

The strains that these developments are placing on the regulatory framework have been recognised by ACMA. It has used the term ‘broken concepts’ to encompass the notion of legacy legislation — that is, rules for the communications sector that used to work 20 years ago, but which don’t entirely fit current circumstances (Chapman 2008).

## **Recent reviews of regulation**

Regulation, or potential regulation, of this sector has been the subject of numerous reviews and inquiries. These have dealt with a range of issues including privacy, sexualisation of children in the media, regional telecommunications and the effectiveness of codes. Outcomes of some of these reviews do not appear to have been made public and the processes followed after those reviews are not always transparent.

## **4.3 NBN regulation reforms**

In 2008, the Australian Government made a request for proposals to roll-out and operate a new National Broadband Network (NBN). The objectives of the NBN are to provide high speed broadband services to all Australians and promote competition in telecommunications services. After the closing date for submissions to this review by the Productivity Commission, the Prime Minister and the Minister for Broadband, Communications and the Digital Economy announced the outcome of the NBN Request for Proposal. In announcing its decision, the Government also released a discussion paper *National Broadband Network: Regulatory Reforms for 21<sup>st</sup> Century Broadband* (Australian Government 2009a).

The discussion paper outlines proposed regulatory changes that the Government will progress to facilitate the roll-out of the NBN. It also canvasses options for broader reforms to make the existing regulatory regime more effective in the transition period. Those reforms affect the telecommunications competition framework and the consumer safeguard framework. The discussion paper specifically noted Telstra’s submission to the Commission’s review and sought comments on the issues raised in that submission to the Commission.

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The scope of the consultation process being undertaken by the Department of Broadband, Communications and the Digital Economy (the Department) is quite broad. It deals directly with many of the areas of regulation that are raised in submissions to the Commission. The overlap between this review and the issues canvassed through the discussion paper include:

- regulations to facilitate the physical roll-out of fibre optic infrastructure
- the operation of the telecommunications access regime in Part XIC of the TPA
- the operation of the telecommunications specific competition regime in Part XIB of the TPA
- tariff filing and record keeping rules
- the scope and funding of the universal service obligation
- the Customer Service Guarantee arrangements and associated reporting requirements
- the Network Reliability Framework and associated reporting requirements
- Telstra's industry development plan
- distribution of hard copy telephone directories
- local number portability requirements
- reporting on payphone services
- retail price controls on Telstra.

The possibility that the Commission's annual review may overlap with other reviews dealing with the same issues was envisaged in its terms of reference. The terms of reference for this review state that in proposing a focused annual agenda, and providing options and recommendations, the Commission is to have regard to any other current or recent reviews commissioned by Australian governments affecting the regulatory burden faced by businesses.

In light of the more specific consultation process on significant areas of telecommunications regulation being conducted by the Department, the Commission has decided to focus its efforts on those areas of regulation which lie outside of the scope of the Department's process. Consequently, this report will not examine those areas of regulation covered by the Department's consultation process.

The Commission has forwarded all of the relevant submissions to the Department and the Department has stated that it will consider those submissions in the context of the discussion paper.

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## 4.4 Regulatory environment

Industry raise a range of concerns about the general regulatory environment. These relate to the volume of regulation, how regulations are developed, and the role of the regulator, ACMA, in developing and enforcing regulation. These general concerns, and the impact on industry, are described in the following terms by Commercial Radio Australia:

Broadcasters accept that they will be subject to some level of regulation, designed to maximise the use of the available spectrum and the benefit of the community. However, the level of regulation has become unmanageable in recent years, particularly for the smaller players in the market.

The commercial radio industry is spending an increasing amount of time complying with regulatory requirements, rather than conducting its core business of broadcasting radio. This increasing concentration of resources on compliance – rather than programming – is likely to have a negative effect on radio broadcasting, to the detriment of the listening public. (sub. 6, p. 16)

These concerns, which are echoed in other submissions, relate to the development of regulation, regulator discretion and regulatory reporting.

### Development of regulation

Industry raise numerous concerns about the processes for developing regulation, including industry codes. Those concerns relate to the increasing burden of regulation, the overlap between regulations and the cost and speed of developing industry codes.

The Australian Mobile Telecommunications Association (AMTA) (sub. 5) states that the rise in the volume and complexity of regulation has led to duplication and high industry compliance costs. AMTA has used the process through which the regulations governing mobile content have been developed as an example to outline its concerns. It considers that the public policy outcomes could have been achieved in this case with less regulatory effort and complexity, and with a greater reliance on principled outcomes.

The cost of developing industry codes can be significant. In 2005, the Australian Communications Industry Forum (now the Communications Alliance) estimated that it expended more than half a million dollars developing the Consumer Contracts Code, and that the total cost of developing an industry code could be two million dollars (ACIF 2005).

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AMTA is further concerned that new regulations in this area are now being considered before the most recent changes have even come into force and been given the opportunity to work. More generally it is concerned that there is a predisposition to create new regulations in response to a situation even though the issue may be resolvable by applying existing regulation. AMTA (sub. 5) feels that the regulator and policy department must properly consult each other to ensure that they understand the status quo before making any decision to make amendments or regulate afresh.

These concerns have also been raised by other industry bodies. Free TV Australia (sub. 41) cites the review of the Commercial Television Industry Code of Practice as an example of the problems with the development of codes under the co-regulatory approach. It contends that ACMA has sought to extend its involvement in the development of codes beyond what was envisaged in the Broadcasting Services Act (BSA). It also cites delays in the development of the Multi-Channel Appendix as a result of ACMA's intervention and its interpretations of its powers under the BSA:

Broadcasters are concerned at an apparent shift away from the co regulatory principles underlying the BSA. Broadcasters have seen in recent times a re-emergence of a more interventionist approach, particularly in the area of the review of the Commercial Television Industry Codes of Practice (Code) and to investigations under the code. (sub. 41, p. 3)

Telstra (sub. 16) has expressed the view that the whole regulatory framework exhibits a bias in favour of regulation and that reviews of whether existing regulation remains necessary are infrequent.

Free TV Australia (sub. 41) is also concerned that for some public consultations, the outcomes do not appear to acknowledge or address details contained in the submissions. There is a concern that the consultation process appears to have predetermined outcomes which are published in complete disregard of the submissions made by stakeholders.

Related issues have been raised by other industry participants. Both Optus (sub. 30) and the Communications Alliance (sub. 29) highlight the excessive and uncoordinated requirements to provide information to consumers. This issue is discussed later in this chapter.

Vodafone advocates the desirability of regulatory intervention only occurring where it is directed at a demonstrated durable market failure:

Regulatory processes that lack robustness result in disproportionate regulation where the costs to business outweigh the benefits. (sub. 47, p. 5)

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## *Assessment*

Both the BSA and the Telecommunications Act give general guidance to ACMA about regulatory policy. The BSA provides that the Parliament intends broadcasting services be regulated in a manner that, in the opinion of 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 (BSA, s. 4). Similarly, the Telecommunications Act (s. 4) states that Parliament intends that the industry be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on industry participants.

Both the BSA and the Telecommunications Act provide that industry bodies or associations should develop codes (BSA, s. 130J; Telecommunications Act, s. 112) or that industry groups develop codes in consultation with ACMA (BSA, s. 123). Under the BSA ACMA is unable to register a code unless it is satisfied that the code meets certain conditions such as providing appropriate community safeguards (s. 123(4)(b)(i)).

In response to the comments by Free TV Australia on the consultation process the Department of Broadband, Communications and the Digital Economy states that the government is committed to appropriate consultation with industry and considers all the views expressed through such processes. It goes on to say ‘however, the government reserves the right to determine the most appropriate way to acknowledge and respond to individual views and stakeholders’ (sub. DR54, p. 26). The Government’s best practice consultation guidelines state that ‘to provide credibility to the consultation process, policy agencies should also show stakeholders how they have taken consultation responses into consideration’ (Australian Government 2007a).

In relation to the process for reviewing codes, ACMA says that:

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. (sub. DR73, p. 6)

It is not the role of this review to adjudicate on the specific examples which have been given. However, the concerns being expressed by industry suggest that the

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process for developing regulations may not always follow best practice and may need to be revised. The current arrangements which give ACMA broad discretion to make or approve regulations, and then to enforce those same regulations, are unlikely to represent best practice.

However, Free TV Australia also notes that:

... our relationship with the ACMA is generally constructive. The recent work on the development of the EPG [electronic program guide] principles and guidelines is an example where the ACMA and industry worked together to develop a satisfactory solution. (sub. DR97, p. 11)

The Australian Communications Consumer Action Network (ACCAN) has another perspective:

We have found industry is often unwilling or unable to genuinely negotiate on Code provisions where there is a perceived commercial cost involved. (sub. DR92, p. 4)

It is difficult to reconcile the different views of how the process for developing new regulations has operated. Perceptions about the overall effectiveness of the process may be influenced by particular cases. But, on balance, the Commission considers that the benefits of the co-regulatory approach to developing codes are not always being realised. The speed and efficiency with which new regulations are developed under the co-regulatory model might be enhanced if regulators were to take a more light-handed approach to the development of industry codes and provide industry with more clarity about the outcome of its consultation processes.

## **Regulator discretion**

Industry is concerned about the extent of ACMA's discretion in relation to its regulatory powers under the BSA and how that discretion is exercised. Free TV Australia describes ACMA's approach to enforcement as being 'hardline' and 'interventionist'. Free TV Australia claims that ACMA has generally not followed its own guidelines when assessing the seriousness of a breach and has used its powers to impose maximum penalties in circumstances not warranted by the relevant breach:

Broadcasters are seeing an increasingly legalistic approach to investigations under the BSA. Often the approach is one which places greater weight on legalistic interpretations which have no resultant public benefit. Broadcasters would like to see an increased emphasis on practical solutions. (sub. 41, p. 9)

Free TV Australia (sub. 41) cites a recent example where it considers that ACMA has applied an overly legalistic interpretation to the code when finding breaches. In its view, ACMA's interpretation of what steps broadcasters must take to meet the

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requirements of the code have led to changes in procedures by broadcasters which are unnecessarily burdensome. Free TV Australia is also concerned that its role in administering codes is being diminished by ACMA's approach.

Free TV Australia (sub. 41) notes that in 2006 ACMA developed Draft Guidelines to expand on the provisions of the BSA with the apparent objective of providing certainty and clarity about the way ACMA was to apply some of its powers. Free TV Australia argues that the Draft Guidelines are unsatisfactory as they largely reiterate the enforcement provisions of the BSA.

Free TV Australia is of the view that legislative amendment is required to ensure that there are adequate parameters around the exercise of ACMA's powers in relation to enforcement.

The Australian Direct Marketing Association (ADMA) (sub. DR93) is also concerned about ACMA's approach to regulation. It describes ACMA's approach as being overly prescriptive and focused on legalistic interpretation. ADMA expresses support for the steps taken by ACMA in pursuit of organisations that wilfully and continually flout the law. But it is concerned about the cost to members of formal investigations, the failure of ACMA to share with industry complaints data which might assist them to identify trends in complaints, and the prescriptive nature of ACMA's application of the Compliance Guide. ADMA concludes by saying that:

ADMA remains concerned that Australian business is being forced into excessive compliance measures to meet a zero complaint tolerance level and this is a disproportionate response to social ill which the Do Not Call Register was designed to prevent. (sub. DR93, p. 12)

### *Assessment*

The BSA gives some general guidance to ACMA about the enforcement of regulation. The BSA provides that the Parliament intends that ACMA use its powers, or a combination of its powers, in a manner that, in the opinion of ACMA, is commensurate with the seriousness of the breach concerned (BSA, s. 5).

The concerns of industry are not shared by the Australian Communications Consumer Action Network (ACCAN), who call for more rigorous enforcement:

ACCAN would be extremely pleased for the Commission to recommend a much more rigorous approach to enforcement of existing regulation, as opposed to creating new regulation, which has effectively allowed telcos to shift responsibility for their poor regulatory compliance. We have long believed that enforcement is the missing link in the telecommunications regulation. (sub. DR92, p. 9)

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ACMA strongly rejects the criticisms of industry regarding the use of its enforcement powers and the application of the guidelines. It asserts that:

... 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. (sub. DR73, p. 8)

In relation to its enforcement of the Do Not Call Register Act, ACMA states that:

The ACMA's general approach to DNCR Act compliance is a facilitative one – seeking to resolve a matter, where appropriate, without resorting to formal procedures. The ACMA's main focus is to act to prevent unwanted calls from continuing or recurring by encouraging telemarketers to take appropriate action to avoid breaching the legislative scheme. However, if facilitation is unsuccessful or inappropriate, the ACMA will take appropriate investigatory and enforcement action. (sub. DR99, p. 1)

In the same submission, ACMA outlines its three stage approach to responding to complaints. This involves the use of advisory letters (to inform businesses that complaints have been received and reminding them of their legal obligations), warning letters (containing specific complaint details and encouraging the business to take action to improve compliance), and formal investigation. Throughout the advisory and warning stages of the ACMA process, ACMA states that it provides complaint information to businesses and engages with businesses to identify potential solutions. ADMA's claim that ACMA takes a zero complaint tolerance approach does not appear to be supported by the data provided by ACMA.

**Table 4.2 Do Not Call Register complaints and ACMA enforcement**  
31 May 2007 to 30 June 2009

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|  | (number) |
|--|----------|
| Complaints received that raised potential contraventions | 34 720   |
| Advisory letters sent                                    | 969      |
| Warning letters sent                                     | 301      |
| Formal investigations commenced                          | 33       |

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Source: ACMA (sub. DR99, p. 2).

ACMA (sub. DR73) also draws to the Commission's attention its lack of discretion not to investigate some code complaints. As an example, it refers to some cases when it was required to investigate matters where a complaint had come to it many years after a broadcast, even though the material on which to base an investigation was no longer available.

It is not the role of this review to examine individual examples of ACMA's exercise of its powers. But the concerns expressed by industry through their submissions appear to be broadly based. Moreover, at the least, these concerns suggest that there

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is uncertainty about the approach being taken by ACMA. These concerns might best be addressed through a closer dialogue between ACMA and industry on this issue or, if that approach is not effective, consideration could be given to providing more guidance in the legislation on how ACMA should exercise its discretion.

One way in which the regulatory burden on both industry and ACMA might be reduced is by providing ACMA with greater discretion not to investigate some code complaints. The BSA currently provides that ACMA need not investigate a complaint if it is satisfied that the complaint is frivolous, or vexatious, or was not made in good faith (s. 149). In contrast, the *Ombudsman Act 1976* provides the Commonwealth Ombudsman with additional grounds to not investigate a complaint, or to not investigate a matter further. For example, the Commonwealth Ombudsman may not have to investigate, or to investigate further if:

- the Ombudsman is satisfied that the complainant became aware of the action more than 12 months before the complaint was made
- the complainant does not have a sufficient interest in the subject matter of the complaint
- an investigation, or further investigation, of the action is not warranted having regard to all the circumstances
- where redress has been granted the Ombudsman is only required to investigate the matter if the redress was not reasonably adequate
- where a complainant has the right to have the matter reviewed by a court or tribunal (Ombudsman Act, s. 6).

The limited grounds on which ACMA can use its discretion and decline to investigate a complaint restricts ACMA's ability to target its enforcement activity on those complaints which are of greatest concern. In doing so, the current complaints mechanism imposes unnecessary costs on the industry, who must respond to ACMA's investigations. ACMA should be provided with a broader discretion, similar to that of the Commonwealth Ombudsman, to only investigate code complaints where investigation is justified. If broader discretion to decline to investigate claims was provided to ACMA, it should take a greater risk management approach to the investigation of code issues.

#### RECOMMENDATION 4.1

***The Australian Communications and Media Authority should be provided with a broader discretion, similar to that provided to the Commonwealth Ombudsman, to not investigate some code complaints.***

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## Regulator reporting

Another concern relates to the number of reports the industry is required to submit to government agencies and the overlap in the information requested by different agencies. Vodafone identified ten separate requirements to provide reports to ACMA, the Australian Competition and Consumer Commission (ACCC) and the Australian Bureau of Statistics (ABS). It drew the Commission's attention in particular to the increasing depth of information being sought, the growing number of surveys being issued by the ABS and the degree of overlap with ACMA's Annual Industry Information Request for its Research and Reporting Program.

Vodafone (sub. 47) contends that these requirements impose a significant financial and human resource commitment and are onerous.

### *Assessment*

Over recent years the significant burden imposed on business through multiple requirements to report to regulators, often involving duplicative requirements, has been widely recognised. As outlined in appendix B, COAG has responded to this general business-wide issue by giving its support to the development of Standard Business Reporting (SBR). Although SBR is focussed on financial reporting requirements, the same principles and process can be applied to other areas of reporting.

Some progress on this issue appears to have been made in recent years. Vodafone noted that ACMA and the ACCC have recently made some progress in reducing the overlap between their requirements. In response to the concerns raised by industry ACMA (sub. DR73) outlined some recent developments which have reduced the reporting burden:

- last year information requested from industry pursuant to section 105 of the Telecommunications Act was cut by 30-40 per cent
- this year ACMA has consolidated some reporting requirements further
- ACMA has participated in legislative initiatives to enhance its ability to share information with other agencies including the Department of Broadband, Communications and the Digital Economy and the ACCC.

The Commission also notes that in some areas the information sought by ACMA flows from specific requirements in regulations which give it little flexibility. One example of this, as discussed later in this chapter, is in relation to reporting of High Definition broadcast hours by free-to-air television broadcasters.

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The Commission urges the Government and its agencies, which are imposing reporting requirements on industry, to continue to pursue the harmonisation and streamlining of reporting requirements, drawing as much as possible on the SBR experience (see appendix B).

## 4.5 Interaction with telecommunications consumers

### Customer information

There are concerns about the extent of customer information requirements imposed on the industry, and that new regulations are continually placing additional information provision requirements on the industry. The Communications Alliance submits:

... that the information provision requirements contained in the many regulatory instruments that the communications industry is subject to, should be reviewed to establish:

- What requirements are unnecessary or redundant;
- What alternative mechanisms are available to the provision of information such as "on request" and "online"; and
- Whether a sunset clause should be inserted into the relevant regulations. (sub. 29, p. 5)

Industry highlighted the costs of meeting the customer information requirements and the burden they imposed on business. Optus (sub. 30) outlines the list of material it is required to provide to new residential customers and identifies 21 different regulations under which there are significant consumer information obligations. Optus also indicates that the absence of sunset clauses in the legislation leads to industry being required to send out information which is no longer of interest to consumers.

The concerns by industry about the burden of these requirements also relate to the perceived failure of the current requirements to satisfy the needs of customers. Optus refers to research and anecdotal evidence showing that the large quantity of information provided to customers is confusing and overwhelming. As a result, customers remain unaware of their rights and the consumer safeguards which exist. It has been argued that the requirements are not only burdensome for industry, but are failing to meet their objective of effectively informing consumers.

The concerns of industry are exacerbated, in Optus's view, because new information requirements are being introduced without an assessment of the costs

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and benefits of the new requirements. Nor is the issue of how the new requirements relate to the existing requirements, under both general and telecommunications specific regulations, being considered:

Even though research shows that the provision of this information in its current format is not effective, new regulations in the telecommunications sector continue to be brought into force containing additional customer information requirements, adding to the pool of material provided to customers and adding to the impost on business – without any assessment of the effectiveness or cost-benefit of providing such information to customers in such a format. (sub. 30, p. 42)

### *Assessment*

The effective and efficient provision of information to customers about their rights and obligations ensures that the protections provided for them are effective. To be effective, the information provided to consumers needs to be clear, easily located, and comprehensible. Providing too much information to consumers may be confusing. Important information may be ‘lost’ among the mass of information provided. In its Report on Australia’s Consumer Policy Framework the Commission recommended that:

Where a need for mandatory information disclosure requirements has been established, the regulator concerned should require that:

- information is comprehensible, with the broad content, clarity and form of disclosure consumer tested prior to and/or after implementation, and amended as required, so that it facilitates good consumer decision-making; and
- complex information is layered, with businesses required to initially provide only agreed key information necessary for consumers to plan or make a purchase, with other more detailed information available (including by electronic means) by right on request or otherwise referenced.

Also, the respective roles and responsibilities of regulators and businesses in regard to such matters as consumer testing, content and amendment should be understood and agreed at the outset. (PC 2008b, p. 75)

It appears that the development of information requirements has occurred on a piecemeal basis. While each individual requirement may be reasonable by itself, the cumulative effect has been to create a web of uncoordinated requirements which is duplicative, burdensome to industry, and does not meet its objective of informing customers.

In response to the Commission’s draft report both the DBCDE (sub. DR54) and ACMA (sub. DR73) note that the NBN discussion paper sought views on red tape issues and suggest that it would be pre-emptive to conduct a review until the outcomes of that process are in place. While the discussion paper sought general

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views on red tape issues and the consumer safeguard framework, customer information requirements are not specifically mentioned and may not be fully considered through that process. A comprehensive review of these regulations is required, although that review might be timed to co-ordinate with the NBN process.

A review of the overall requirements is needed to develop a more streamlined, integrated, customer information requirement which is less burdensome to business and more effective for customers. Future changes to the requirements need to be considered in the light of the existing requirements and the need to provide customers with a coherent package of information.

#### RECOMMENDATION 4.2

***The Australian Communications and Media Authority and the Department of Broadband, Communications and the Digital Economy should conduct a comprehensive joint review of all of 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 the 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 that the new requirements form part of a comprehensive and comprehensible package of customer information.***

### **Consumer contracts**

The *Telecommunications Act 1997* and the Telecommunications (Standard Form of Agreement Information) Determination 2003 give telecommunications providers the right to contract with customers through standard forms of agreement. They also set out the rules with which those agreements must comply. Those contracts are also subject to the Trade Practices Act, the Telecommunications Consumer Protections Code, and the various state and territory fair trading laws.

For national operators, the requirement for businesses to comply with each individual state and territory requirement is considered to be burdensome. As Optus states:

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As we operate in each Australian State and Territory, we must ensure that our customer contracts meet the requirements imposed in no less than nine different pieces of legislation and regulation. This is a ridiculous situation and untenable without huge costs to the organisation for legal advice to ensure all contracts comply. (sub. 30, p. 45)

This issue was also raised by the Communications Alliance in its submission to the Commission's study on *Performance Benchmarking of Australian Business Regulation* (Communications Alliance 2006).

### **Assessment**

As Optus notes, COAG has already agreed to a new consumer policy framework, including a provision to regulate unfair contract terms. An information and consultation paper released by the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs in February 2009, described one of the key elements as being:

... the development of a consumer law to be applied both nationally and in each State and Territory, which is based on the existing consumer protection provisions of the *Trade Practices Act 1974*, and which includes a new national provision regulating unfair contract terms, new enforcement powers and, where agreed, changes based on best practice in state and territory laws. (Treasury 2009, p. iii)

The formal process of implementing a new national consumer law began on 24 June 2009 when the Trade Practices Amendment (Australian Consumer Law) Bill 2009 was introduced in the House of Representatives.

The development of a single national consumer law should address many of the concerns of industry about the duplication of laws in different jurisdictions.

### **Prepaid mobile phone identity checks**

Carriage service providers offering prepaid mobile phone services are required to conduct identity checks on purchasers under the Telecommunications (Service Provider Identity Checks for Prepaid Mobile Telecommunications Services) Determination 2000.

Industry has identified concerns with the operation of this regulation. AMTA (sub. 5, pp. 7-11) contends that the regulation is costly to prepaid service providers, but has limited effectiveness. Concerns raised in the AMTA submission are:

- difficulties in ensuring compliance, given identity checks need to be completed by approximately 30 000 retailers
- difficulty for some customers to satisfy identity check, for instance minors

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- inability of point of sale checks to defeat those determined to obtain anonymous services through, for example, identity fraud or theft of phones.

Optus (sub. 30) reports that in 2006 ACMA proposed changes to the Prepaid Determination to improve the overall level of compliance. However, Optus is concerned that the objectives of the change were not clearly identified, there was no cost-benefit analysis conducted, and no benchmark measurement of compliance against which to measure any change.

### *Assessment*

The purpose of the regulation is to avoid the registration of anonymous pre-paid mobile services, allowing law enforcement agencies to identify the owners of mobile phones which are used in conjunction with illegal activities. The importance of this information is emphasised by law enforcement agencies. The Attorney-General's Department states that:

The information gathered under the Determination has been vital to investigations of terrorists, murderers, drug traffickers, kidnappers and those who have committed crimes of violence.

Without accurate purchaser information, investigations by law enforcement and national security agencies could be significantly hindered. It is common practice for individuals seeking to avoid scrutiny from security or law enforcement agencies to try to avoid using properly subscribed pre-paid mobile telecommunications services. The abolition of this policy would allow all persons of interest to purchase mobile devices anonymously, thereby avoiding lawful interception of their communications. (sub. DR86, pp. 1-2)

The Attorney-General's Department also draws the attention of the Commission to the comments of the Parliamentary Joint Committee on the Australian Crime Commission. It said that 'the current requirements for recording SIM card user details are deficient and therefore represent a significant difficulty to authorities needing to accurately track suspect mobile phone users. This is a critical area needing urgent attention' (PJC 2007, p. x). The Committee also commented on the economic costs to Australian society of serious and organised crime:

Along with the tangible cost to law enforcement agencies and government departments, there is the huge yet unquantifiable cost to society of the undermining of confidence in public institutions, the financial sector and the economy. There is also the human cost to individuals, families and communities that are affected by the activities of organised and serious crime, as is the case with drug addiction and people trafficking. (PJC 2007, p. 89)

One of the key issues raised by industry is the difficulty in ensuring compliance with current arrangements. While identity checks are conducted by phone retailers at

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the point of sale, liability for non-compliance rests with the carriage service providers, with no scope for enforcement action against retailers.

It has also been argued that identity checks can be relatively easily circumvented through identity fraud due to the difficulties in validating identity documents by retail sales staff. AMTA states:

... the regime is fundamentally flawed in that while most customers have no motivation to provide false information, the shop assistants are not and could not be expected to validate the identification documents presented by customers at point-of-sale. Thus the whole process is subject to the simplest forms of identity fraud. (sub. 5, p. 8)

There are also other difficulties in identifying the eventual users of the phone. Purchasers of prepaid phones may lend or give them away and an estimated 200 000 mobile phones are lost or stolen each year (AMTA 2009). Prepaid owners may be unlikely to report the loss because the prepaid nature of the service limits the owner's loss. AMTA (sub. 5) also suggests that the whole regime can be avoided by importing prepaid services from overseas.

The evidence given to the Parliamentary Joint Committee on the Australian Crime Commission about the evasion of the regime points at other weaknesses of the regime. Senior Western Australian police gave evidence that criminals used multiple SIM cards to make it more difficult to intercept conversations and also suggested that there was evidence that criminals were buying mobile service retailers so they had a ready supply of untraceable SIM cards (ACCAN, sub. DR92).

Overall, there appears to be considerable difficulty in preventing access to anonymous prepaid services for those determined to do so. The Department of Broadband, Communications and the Digital Economy says that 'Industry, and law enforcement and national security agencies have had long standing concerns regarding the effectiveness of the pre-paid mobile identity checking arrangements' (sub. DR54, p. 8). Concern has also been expressed by consumer groups about the ability of the regime to deliver national interest outcomes (ACCAN, sub. DR92).

While it is not clear that there are substantial benefits from the identity check regime, the process imposes significant costs on both the industry and consumers. AMTA (sub. 5) estimates the cost to industry of the regime to be around \$10 million per year. It also states that the regime could cause higher charges to consumers of prepaid services and raises the issue that onerous identity requirements could make it difficult for some customers, in particular minors, to satisfy the identity check requirements.

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AMTA (sub. 5) is also concerned that, in its view, previous proposals for improving the process have not:

- identified empirical evidence to demonstrate the extent of the problem
- clearly identified the objectives of the changes
- considered the likely effectiveness of the changes
- included a cost benefit analysis
- included benchmark measurement of compliance against which improvements might be measured.

The latest changes to the regime were made in 2004. Those changes provided industry with the option of developing alternative compliance plans to meet their obligations. The Regulatory Impact Statements which accompanied those changes discuss many of the weaknesses which have been raised during this review, incorporated some data on costs to industry and indicated that the Australian Communications Authority would continue to work with industry to find an adequate data source against which to verify customer identity details. But they do not contain any specific information on how effective the regime was at the time, or the extent to which the changes might improve the reliability of the information available to law enforcement agencies (ACA 2003, 2004).

Few countries have implemented similar mobile phone registration policies. A survey conducted for the Office of the Privacy Commissioner of Canada found that only 9 of the 24 countries which responded had regulations that required mobile operators to collect customer information for prepaid services. Six countries considered and rejected a policy following a consultation process (Office of the Privacy Commissioner of Canada 2006).

There appears to be general support for a review of the regulations. The Parliamentary Joint Committee on the Australian Crime Commission recommended in September 2007 that, ‘the Commonwealth Government examine the cost of provision of telecommunications data by telecommunications companies, with particular reference to methods by which that cost can be met or controlled’ (PJC 2007, p. ix). The Department of Broadband, Communications and the Digital Economy has also said that it can see merit in a review (sub. DR54).

In its draft report, the Commission suggested that the current regime should be reviewed with the objective of either abolishing the requirement or substantially revising the regime. In light of the representations from the Attorney-General’s Department and ACMA about the importance of the information to law enforcement agencies, the Commission has removed the reference to possible abolition of the regime from its recommendation. However, the Commission

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remains concerned that there appears to be little evidence that current identity check requirements are resulting in significantly better data than that which would be available through normal sales records.

The submissions received by the Commission indicate that this is not a simple issue, consideration of which is not helped by the lack of objective information. The information being sought by law enforcement agencies is clearly of some value to them. But there are significant questions about whether it is reasonably attainable, and whether the cost of current arrangements are justified by the benefits being delivered. At present there is little evidence on which to make a judgement about the costs and benefits of the regime. Imposing the costs of collecting the data on industry without passing those costs onto the law enforcement agencies means that there is no automatic mechanism to balance the costs and benefits.

The Commission considers that a review of these regulations should commence as soon as possible. The review should be based on evidence, incorporate best practice processes for developing regulation, involve consultations with industry, consumer groups, the Privacy Commissioner and law enforcement and security agencies. The review should examine all the relevant issues, including:

- the impact of any regime on the availability of mobile phones to potential users, such as children, who may have difficulty satisfying proof of identity requirements
- the practical limits on the ability of retailers and network operators to verify the identity of purchasers and users
- evidence of the extent to which the identity check regime, or any proposed regime, improves the reliability of data available to law enforcement agencies
- evidence of the extent to which the data contributes to law enforcement and security activities
- whether the cost of verifying identity and collecting data should be borne by law enforcement agencies or the government, as the data is being collected for public benefit.

RECOMMENDATION 4.3

***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 substantially revising the regime to better achieve its objectives while eliminating unnecessary costs to business.***

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## Privacy

Both the *Privacy Act 1998* and a number of telecommunications regulations contain provisions relating to privacy. The Taskforce on Reducing Regulatory Burdens on Business noted business concerns about the consistency between Australian Government privacy requirements and those under the Telecommunications Act (Regulation Taskforce 2006).

In 2008, the Australian Law Reform Commission (ALRC) published a detailed report on privacy regulation in Australia (ALRC 2008). The ALRC examined in detail the current generic and industry specific regulations relating to privacy. The ALRC's main recommendation was that Part 13 of the Telecommunications Act be redrafted to achieve greater logical consistency, simplicity and clarity (ALRC 2008).

AMTA indicates in its submission to this Review that this was a positive development and that the ALRC recommendations should provide much needed clarification. The costs and benefits of any proposed amendments to the legislation arising from these recommendations will need to be considered in more detail through a Regulation Impact Statement.

## 4.6 Sports anti-siphoning regulations

The sports anti-siphoning list aims to prevent major sporting events from being 'siphoned off' by subscription television to the detriment of free-to-air viewers. Anti-siphoning regulation is contained within the Broadcasting Services Act.

The current regime gives free-to-air television broadcasters preferential access to negotiate the rights to broadcast sporting events on the anti-siphoning list. The Minister for Broadband, Communications and the Digital Economy has discretion to add or remove sporting events from the list. Events are automatically delisted 12 weeks prior to the event, allowing subscription television broadcasters to negotiate with the sporting bodies for broadcast rights, unless exclusive rights have already been acquired by the free-to-air broadcasters.

Free-to-air networks that acquire rights are not obliged to televise the event. However, there are a number of restrictions on free-to-air networks that acquire rights to events on the anti-siphoning list. Networks are required to first broadcast those events on their core channel. There are also anti-hoarding provisions that can be used to require free-to-air broadcasters to offer the rights to events they are not going to broadcast to the ABC or SBS for a nominal fee. Subscription stations can also negotiate to purchase broadcast rights from free-to-air networks.

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The Australian Subscription Television and Radio Association (ASTRA) raises concerns that the anti-siphoning list imposes a significant burden on subscription broadcasters as a result of their having to negotiate with their competitors. These negotiations are more complex, drawn out and burdensome than if subscription broadcasters could negotiate directly with the underlying rights holder. ASTRA (sub. 37) cites, as an example, the negotiations for AFL rights between Foxtel and Network Seven and Ten for the 2007-2011 period. Discussions with free-to-air broadcasters commenced in March 2005 and were not finalised until February 2007.

ASTRA submits that the anti-siphoning list contains too many events. It noted that when soccer was last on the anti-siphoning list the network which bought the rights showed only one game out of the 32 domestic games that it could broadcast. ASTRA claims that 77 per cent of the events on the list are not broadcast by free-to-air broadcasters. They contend that the anti-siphoning regime:

- reduces total consumer access to sport
  - appoints the FTA [free-to-air] networks as brokers for sports rights
  - reduces the value of sports rights to sporting codes
  - imposes a competitive disadvantage on STV [subscription television].
- (sub. 37, p. 5)

Free TV Australia oppose any amendment of the anti-siphoning list, arguing that the list is operating as intended, allowing Australians to watch major sporting events on television for free. Free TV also argue that digital take-up would be enhanced if free-to-air broadcasters were permitted to show listed events on their additional digital channels (sub. DR97).

Under s. 115A of the BSA, the anti-siphoning regime is subject to a statutory review, to be completed by the end of 2009. In commencing this process, the Department of Broadband, Communications and the Digital Economy released a discussion paper on 20 August 2009 and called for submissions by 16 October 2009 (DBCDE 2009b).

## **Assessment**

The anti-siphoning list was introduced with the objective of ensuring broad access to television coverage of major sporting events. However, it appears to be a blunt, burdensome instrument that is unnecessary to meet the objective of ensuring wide community access to sporting broadcasts.

There has been a history of changes to the anti-siphoning regime since it was first established in 1994. There have been a number of changes implemented which may

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have addressed the perverse outcome of listed events not being broadcast at all. Anti-hoarding provisions were introduced in 1999 and stipulate that in the case of designated events, broadcasters must offer unused rights to the ABC or SBS for a nominal charge. However, the provisions have not been widely used. In 2007, the then Australian Government introduced ‘use it or lose it’ guidelines. The guidelines were not in place for long under the previous Government, and the current Australian Government has not announced its approach to these guidelines. There have also been number of changes to the listed events. Several tennis, basketball, golf and motor racing events have been removed from the list, although both the summer and winter Olympic Games have been added.

Reviews of the anti-siphoning regime have been undertaken previously, including by the Commission (PC 2000). The issues raised in this review are largely the same, and so aspects of that analysis remain pertinent. However, there has also been a significant growth in the reach of the subscription television sector that reduces the case for maintaining the current anti-siphoning regime.

#### *Anti-siphoning list is overly burdensome*

The inclusion in the list of events which can not be, or are not, broadcast by free-to-air television broadcasters imposes a protracted negotiation process on subscription television broadcasters. This imposes an unnecessary regulatory burden on those businesses. The protracted negotiation process might be shortened through strengthening the anti-hoarding regime or by introducing a formal ‘use it or lose it process’. However, shortening the existing list would be a more effective approach to this problem, while being consistent with the overall policy objective.

The main concern put forward by ASTRA in their submission is that the anti-siphoning list is too long and that the majority of listed events are not shown by the free-to-air networks. While the list contains a relatively large number of individual events, these are spread across a small number of sports. For instance, the list includes all games in the primary National Rugby League (NRL) and Australian Football League (AFL) competitions, all events in the Commonwealth and Olympic Games and all matches in the Australian Open and Wimbledon tennis competitions. This is relatively long by international standards (box 4.1).

Clearly, given the number of events on the list, it is not feasible for a free-to-air broadcaster to televise all of these events on a single channel. Free-to-air networks regularly on-sell to subscription television that portion of the broadcast rights they are unable to broadcast. These negotiations can happen at any time and in some instances, subscription networks are involved in negotiations from the outset and make joint bids with free-to-air stations to sporting rights holders.

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#### Box 4.1 **Sports broadcasting overseas**

The Australian anti-siphoning list is relatively long compared with those used overseas, such as in a number of European countries — Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Germany and the United Kingdom. In these countries, listed event schemes are conducted in accordance with the Council of European Communities Television Without Frontiers Directive and events must meet certain criteria to comply. The schemes are broadly similar across these countries and generally contain sporting events which involve participation of a national team, finals of domestic competitions or world tournaments, such as the Olympic Games.

Some countries also vary restrictions across listed events. In the United Kingdom, for example, there is a two tiered approach. Events in group A are fully protected to be shown on free-to-air stations, while for those in group B, highlights coverage must be available to free-to-air television. The group A list consists of ten events and, aside from the Olympic Games, it is only the finals of each event that are included in the group A list. The group B list comprises ten events as well. Mostly these are different events to those in group A, although some are non-finals events where the finals are listed in group A, for instance, non-finals coverage of Wimbledon. However, for most events, protected coverage is limited to finals matches. The UK regime is currently being reviewed.

Further, there are no such restrictions in many countries including New Zealand and the United States.

*Source:* DBCDE (2009b); DCMS (2008).

#### *Anti-siphoning regime is anti-competitive*

The anti-siphoning list is inherently anti-competitive. The anti-siphoning provisions directly limit competition between subscription and free-to-air networks. While subscription television providers regularly gain access to listed events, the regime shifts the balance of negotiating power in favour of free-to-air networks, as subscription television broadcasters are unable to compete for exclusive broadcast rights for listed events. The additional constraints on negotiations placed on subscription broadcasters create a significant additional burden in terms of the additional costs of trying to get events delisted or having to deal with free-to-air networks. As ASTRA submits:

... negotiations are more complex, drawn out and burdensome than if STV could negotiate directly with the underlying rights holder ... (sub. 37, p. 7)

As the Commission identified in the broadcasting inquiry, *Broadcasting* (PC 2000), in 2000, access to exclusive rights for sporting events is a significant draw card for attracting subscribers to subscription television. The anti-siphoning regime prevents subscription networks from using exclusive coverage to attract subscribers.

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The anti-siphoning regime also has a negative impact on sporting bodies, as a result of the substantial reduction in competition during negotiations with broadcasters for the rights. The Commission, in the broadcasting inquiry, found that the provisions reinforced the market power of the small number of free-to-air broadcasters, reducing the potential benefits to the sporting bodies. The Commission also concluded that the anti-siphoning regime is likely to distort the relative prices of broadcast rights of listed events relative to non-listed events, potentially reducing the price received by sporting organisations for listed events (PC 2000).

The impact of anti-siphoning restrictions on sporting organisations has been raised in submissions to the current review by the Independent Sport Panel and the recently completed Senate Standing Committee review into the reporting of sports news and the emergence of digital media (box 4.2).

The anti-siphoning measures can also have negative impacts on the broader community. The Australian Association of National Advertisers (AANA) generally supports the reduction of the anti-siphoning list, noting:

AANA has long considered the anti-siphoning regulations to be anti-competitive and not necessarily in the best interests of the community. AANA acknowledges there will be circumstances where broadcasting regulation can be justified to ensure community access to sporting event coverage. However, AANA considers these should preferably be managed as the exception rather than the rule. (sub. DR57, p. 1)

Overall, the anti-siphoning regime imposes considerable anti-competitive distortions and imposes considerable additional burdens on subscription broadcasters in acquiring those rights.

### *Anti-siphoning regime has limited effectiveness*

There are a number of reasons why it could be expected that broad coverage of sporting events would be maintained in the absence of anti-siphoning regulation and that the current regime may not be necessary to ensure broad access to sports broadcasts.

There has been considerable growth in the penetration of subscription television into households. It has been estimated that approximately a third of Australian households now access subscription television. Ratings figures indicate that subscription television accounts for over 20 per cent of all television viewing. Moreover, sport is typically the most popular viewing option of those with subscription television, suggesting that it is those viewers particularly interested in watching sport that are most likely to subscribe. For example, telecasts of sporting events (soccer, NRL and AFL) accounted for the top ten most popular broadcasts on subscription television in the week commencing 29 March 2009 (ASTRA 2009b).

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#### Box 4.2 Impact of anti-siphoning restrictions on sport

Sporting organisations have commented on the impact of anti-siphoning regulations on the returns to sporting organisations from broadcast rights.

For example, the Australian Rugby Union says that:

For sports operating in the mass entertainment business, it is vital that they be able to make their own decisions which balance the twin objectives of optimisation of exposure (say, through free to air television) and maximisation of revenue (perhaps via pay/subscription television and other forms of distribution platforms). Anti-siphoning is a form of regulation which can substantially reduce the competitive tension required for price maximisation and thus lessen the amount of funds available to invest in pathways and grass-roots sport. (Australian Rugby Union 2008, pp. 12-13)

In the view of the Australian Rugby League and National Rugby League:

... the current anti-siphoning regime has held back competition in media rights negotiations which have potentially deprived Rugby League of funding for the game's grassroots level.

The continued operation of the Anti-Siphoning scheme, in its current form, will continue to restrict sports from realising the full value of their media rights and driving for national coverage as part of their broadcasting model.

Whilst, it would be inconceivable for Rugby League to totally move away [from] free to air broadcasting. The growth of media rights sales underpins Rugby League's investment in junior league and the thousands of kids born today who will play Rugby League into the future. (Australian Rugby League and National Rugby League 2008, p. 13)

The National Rugby League also states:

The point that the Anti-Siphoning Legislation fails to take into account is that sports are already in the business of achieving the widest possible coverage within the media landscape. In doing so they are subject to market forces.

... The sports that do achieve free to air network interest need to be able to freely negotiate the extent of coverage and the mix of free to air versus subscription telecasts in order to balance revenue versus public exposure. (National Rugby League 2009, p. 4)

While Cricket Australia states that:

... changes to the anti-siphoning policy in particular need to ensure that new settings do not create market distortions that deny sports their ability to derive a fair market value for the rights that are central to the administration of sport. (Cricket Australia 2008, p. 21)

Despite the expanding audience of subscription television, free-to-air networks still have a considerably higher audience base and hence, can potentially generate large advertising earnings from broadcasting high rating sporting events. As Free TV Australia note in their submission:

Sports programs are consistently among the top rating of all programs on Australian television. ... 3.4 million Australians saw the 1<sup>st</sup> match of the state of origin on free to air television. The AFL Grand Final is consistently one of the top-rating programs on television in any year. (sub. DR97, p. 5)

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Clearly, sporting programs are an important source of broadcast material for free-to-air television. So, for broadcasts that are likely to attract large audiences, free-to-air operators would nevertheless be in a strong position to acquire these rights even without the protection of the anti-siphoning regime. Accordingly, many of the sports on the list would be likely to remain on free-to-air networks in the absence of the anti-siphoning list (box 4.3).

While many events could be expected to remain on free-to-air television if the anti-siphoning list was removed, some events might be taken up by subscription networks. Examining experiences overseas, the Commission noted in the broadcasting inquiry that there had not appeared to be any significant migration in the United States, but there were some high profile cases of migration in the United Kingdom, including that of their Premier League soccer competition (PC 2000). At that time, the Commission noted that migration was most likely in the case of sports that could be used to boost the subscription base, and concluded that it was likely that in the absence of the anti-siphoning regime there could be some migration of sporting events to subscription television in Australia (PC 2000).

The anti-siphoning list is also arbitrary in its content, with the criteria for events to be listed unclear. One proposal to reduce the seemingly arbitrary list of events that are not televised on free-to-air programs is the implementation of a ‘use it or lose it’ policy, whereby events would be removed from the list if they are not taken up, and broadcast, by free-to-air networks. This approach is advocated by the subscription television industry (ASTRA, sub. 37) and guidelines for a ‘use it or lose it’ approach were developed under the former Australian Government (ACMA 2008b).

The ‘use it or lose it’ guidelines provided that a broadcaster had to televise an event live, or near live, unless delay was to facilitate greater audience access, to at least 50 per cent of the population nationally and televise at least half of the event. In the case of multi-round competitions where entire coverage is not feasible it must have facilitated complimentary coverage by making rights available to another free-to-air or subscription broadcaster on a reasonable basis. However, as they were only introduced in 2007, they did not have sufficient time to operate. Further, the current Australian Government has not adopted such a policy. Further, it has directed that ACMA no longer prepare its *Anti-Siphoning Monitoring Investigation* reports (ACMA, sub. DR73).

The effect of anti-siphoning regulations on multichannel broadcasting by free-to-air broadcasters raises another potential issue. The broadcast of events on the anti-siphoning list by free-to-air multi-channels is restricted. Currently, free-to-air broadcasters must first broadcast events on the anti-siphoning list on their main channel, although they can broadcast repeat screenings on their additional channels.

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#### Box 4.3 **Free-to-air networks pay more for sport**

As a rule, the most popular broadcasts on subscription television each week are the broadcasts of live National Rugby League (NRL) and Australian Football League (AFL) matches. Both of these sports are on the anti-siphoning list, but because of the nature of these events it is not feasible for a free-to-air station to broadcast all matches. Both free-to-air and subscription networks have rights to broadcast live matches. It is difficult to accurately determine how much broadcasters pay for the rights to these sports, but press reports indicate that free-to-air broadcasters tend to pay more than subscription television.

For NRL, it was reported that the latest broadcast deal with Network Nine and Foxtel amounted to \$500 million over six years. Of this, the reported price to Foxtel was \$43 million per year for six years, amounting to just over half of the total contract. The split up for content involves three matches broadcast on the Nine network and five on Foxtel each round. The finals are retained on free-to-air. Notwithstanding that the free-to-air network retains rights to the higher rating final games, overall, the average price paid by Foxtel per broadcast match is significantly lower. Foxtel broadcasts around 50 per cent more games than the free-to-air Nine network, for a similar outlay.

Similarly for AFL, the most recent deal involved a consortium of Networks Ten and Seven paying \$780 million over five years. They then sold some of these rights to Foxtel for a reported figure of \$315.5 million. The split up involves four games per round, as well as exclusive coverage of the finals series on the free-to-air stations, while four games per round are allocated to subscription network, Foxtel. These figures indicate that free-to-air networks are paying an estimated 47 per cent more than Foxtel for their share of the AFL broadcasts. While the free-to-air share includes the finals series, it nevertheless appears that they are prepared to pay more for broadcast rights than their subscription television competitor.

These examples suggest that free-to-air broadcasters are able to pay substantial premiums for selected sporting events and generally pay more for matches they broadcast than subscription broadcasters. In the absence of an anti-siphoning regime it appears likely that many very popular events would remain on free-to-air television because free-to-air networks are in a position to pay a premium for broadcast rights to high rating events, given their larger viewing base.

*Sources:* Masters (2007); Sydney Morning Herald (2007).

If the restrictions on multi-channel broadcasting were removed, while the anti-siphoning restrictions on subscription television networks remain, the impact on subscription networks could be significant. Currently, some competitions (AFL and NRL) are broadcast on both free-to-air and subscription networks. In part, this is because it is not feasible for free-to-air networks to broadcast all matches. But if free-to-air networks were permitted to broadcast anti-siphoning events exclusively on their secondary channels, this could impose another competitive disadvantage on subscription broadcasters.

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Another issue is that technological change could have implications for the operation of the anti-siphoning list over time. The increasing speed of broadband internet connections may lead to an increase in services providing live streaming of sporting broadcasts over the internet. The development of subscription internet protocol television (IPTV) services was raised as a potential threat to the effectiveness of the anti-siphoning regime broadcasters by Free TV Australia (2009) in their submission to the National Broadband Network regulatory review. In that submission, Free TV Australia stated that the anti-siphoning regime should be extended to cover subscription IPTV services to prevent migration of major sporting events to internet broadcasting. However, this may be difficult to do, given that subscription IPTV services could be supplied from overseas. Such technological change is likely to decrease the effectiveness of the scheme. Attempts to increase the reach of anti-siphoning regulations could exacerbate the anti-competitiveness of the scheme and may prove difficult to achieve in any case.

As already noted, previous reviews have found the anti-siphoning list to be ineffective and anti-competitive. The Commission's inquiry into broadcasting in 2000 also found that the anti-siphoning regime did not ensure that events were broadcast and could have the perverse impact of reducing sport broadcasting (PC 2000). At that time, the Commission made a number of recommendations with respect to the broadcasting of sport. It recommended that:

- broadcasters in one form of broadcasting should not be allowed to acquire broadcast rights to sporting events of national significance to the exclusion of those in other forms of broadcasting
- criteria for a new and shorter list should include demonstrated national significance, consistent broadcast by free-to-air television stations, and high viewing levels
- responsibility for administration of the anti-siphoning provisions should be transferred from the Minister to the ABA (now ACMA) (PC 2000).

The Commission stopped short of recommending the abolition of the list because there was some risk of migration of events to subscription television. Since the Commission's Inquiry in 2000, there has been no substantive changes to the anti-siphoning regime.

The list was revised in 2004 under the Broadcasting Services (Events) Notice (No. 1) 2004. As part of this process, a Regulation Impact Statement (RIS) was prepared. The RIS canvassed three reform options:

- 
- retain the existing provisions with a revised list of events
  - implement a dual rights scheme — like that proposed by the Commission in the 2000 broadcasting inquiry
  - a two tiered approach, where the top tier would operate under the existing arrangements, while the second tier would be somewhat less restricted.

Ultimately, the RIS concluded that the first option of retaining the existing regime and revising the list was the most appropriate approach. This option was endorsed above the other two on the basis that it was most in keeping with the original intent of the anti-siphoning scheme and that the other options would not provide a sufficient degree of certainty in ensuring free-to-air coverage of significant events. However, the RIS did not canvass the option of completely removing the list, nor did it assess the costs to business.

The anti-siphoning list appears to be unnecessary to meet the objectives of wide consumer access to sports broadcasts (it may actually reduce consumer access to sports broadcasts). Further, it imposes substantial regulatory burdens and competitive disadvantages on subscription television networks. The option to abolish the anti-siphoning regime should be explored.

As an interim measure, the burden imposed by the regime should be alleviated by substantially shortening the list and simplifying the process for enabling access by subscription broadcasters to events not broadcast by free-to-air networks. An objective and transparent approach should be used for determining which events should be included in a reduced anti-siphoning list. Evidence of a history of broadcast on free-to-air networks and a popularity (ratings based) threshold could be used as key criteria in an objective assessment as to whether an event should be listed or not. Additionally, a formal ‘use it or lose it’ mechanism should be considered to ensure that the list retains only those events that are actually shown on free-to-air networks.

As part of this mechanism, consideration would need to be given to the treatment of simultaneous multi-round type events. Whatever the approach adopted for reducing the anti-siphoning list, it is likely to involve the partial delisting of particular sporting competitions. That is, not every match in a particular competition would be included on the list. Instead the list might be restricted to key matches within a competition, such as finals.

***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.***

Subsequent to the release of the Commission's draft report, the Department of Broadband, Communications and the Digital Economy called for submissions to its review of the anti-siphoning scheme. In undertaking its review, the Department should have regard to the Commission's recommendation to reduce the anti-siphoning list and consider the submissions that the Commission has received on this issue.

## **4.7 Broadcasting — local content and facilities**

### **Local content rules for radio**

New local content rules that require regional commercial radio licensees to broadcast minimum quantities of material of local significance each business day commenced on 1 January 2008. They were introduced under the *Broadcasting Services Amendment (Media Ownership) Act 2006*. The daily minimum requirements vary with the class of licence: 5 minutes for racing and remote area stations; 30 minutes for small stations; and 3 hours for other stations. Commercial radio licensees are required to broadcast their prescribed quantity of local content on all business days between 5.00 am and 8.00 pm. They are then required to undertake a number of reporting obligations to demonstrate compliance with the local content obligation, including: an annual report to ACMA; making an audio record of broadcast local content; and compilation of a local content statement for each business day.

Commercial Radio Australia (sub. 6) raises a number of concerns with respect to these provisions including:

- reporting requirements — including: annual reporting requirements; daily local content statements; and maintaining records of local content — are too onerous
- the requirement for racing and remote area stations to provide local content is an unreasonable burden because these services are often networked from other areas
- local content broadcast on weekends should be permitted to count towards content requirements
- complying with local content provisions every week of the year can be difficult for small radio stations.

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## Assessment

The objective of the regulation is to ensure that there is a minimum amount of material of local significance broadcast on regional commercial radio stations. The industry concerns revolve around the rigid nature of the requirements for achieving this level of local content.

A more flexible regime would allow for radio stations to better tailor local content to local listener demands, recognising that local broadcasters are in the best position to judge how their listeners would prefer to have local content scheduled. For instance, coverage of local sporting events could be concentrated on weekends, while coverage of local events or issues may occur on a more *ad hoc* basis. The requirements for uniform daily content levels does not accommodate this flexibility. The objective could be met through a more flexible system, with more aggregated quotas. Licensees should be given a longer period than the current daily requirement to meet their minimum local content requirements. This period could be one week (seven days), to allow licensees to include local content broadcast on weekends. Further flexibility might also be included to allow for exemptions for certain periods, recognising the difficulty facing small regional broadcasters when regular on-air staff are on leave.

The issue of local content obligations for racing and remote area stations is another concern raised by participants. Commercial Radio Australia (sub. 6) says that these services are often networked from outside the broadcast area. Clearly, in many cases access to local content is not the primary reason that listeners tune in to radio broadcasts. In the case of some radio broadcasting, such as racing, local content may not be relevant, or local events not available to be broadcast. This is tacitly acknowledged through the minimal levels of local content required on racing and remote area stations. However, even minimal content requirements impose compliance and administrative burdens on commercial radio broadcasters. Consideration should be given to exempting certain classes of licensee from local content provisions.

A more flexible approach to local content requirements should be accompanied by a less onerous reporting framework. Reporting requirements can impose a significant regulatory burden on broadcasters, without contributing to the production of local content. The administrative burden of the reporting requirements may have the effect of reducing the resources which broadcasters can invest in producing local content. Commercial Radio Australia (sub. 6) submits that one network has estimated external legal costs to be around \$25 000 per annum per radio station.

Reporting requirements are likely to be most cost effective when they are targeted at industry participants who the regulator has grounds to believe may not be

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complying with regulatory requirements. This seems particularly pertinent, given that there does not appear to be a significant problem with regards to local content compliance. In 2007-08, ACMA did not receive any complaints from the public about local content obligations (ACMA 2008d).

Round Table discussions and further submissions subsequent to the release of the draft report indicate that ACMA has attempted to minimise the impact of reporting requirements. Nevertheless, a review should be conducted to determine what reporting requirements are necessary for the regulations to meet their objectives.

#### RECOMMENDATION 4.5

*The policy objective of the local content rules for radio 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.*

### **Effects of trigger events for radio broadcasters**

The transfer of radio licences trigger special local content and presence requirements. These are designed to maintain local broadcasting when a regional radio broadcast licence has changed hands. The provisions were introduced in the context of changes to cross-media ownership regulations, but their effect is broader. Trigger events occur whenever there is a change of ownership or control of a regional commercial radio broadcast licence, or there is the formation of a new registrable media group as a result of restructuring. A trigger event imposes additional conditions upon the licensee, including:

- local presence requirements in relation to staffing and facilities
- additional local content requirements with respect to local news, weather and community service announcements
- reporting and record keeping requirements with respect to the local content and compliance with local presence requirements.

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Commercial Radio Australia (sub. 6) is concerned that these provisions lead to excessive compliance costs, constrain the ability of the industry to operate in an efficient and profitable way, and devalue existing regional commercial radio businesses.

### *Assessment*

The policy objective of the trigger event is to maintain levels of local content and facilities in the light of changes in media ownership. As with the local content provisions, the trigger event provisions were introduced under the *Broadcasting Services Amendment (Media Ownership) Act 2006*. A number of concerns with the trigger event provisions were raised at the time of their introduction with respect to both the breadth of the provisions and the burden imposed when a trigger event occurs.

Commercial Radio Australia (sub. 6) contends that the definition of a trigger event is excessively broad. While the provisions were introduced in the context of cross-media mergers, or an amalgamation of radio stations, the trigger event provisions apply to all licence changes. Any change in ownership or the formation of a new registrable media group is classed as a trigger event. Given the broad scope of the definition of a trigger event, it is likely that the trigger event provisions will eventually be applied quite widely across the commercial radio industry as stations are sold.

Once a trigger event occurs there are a range of additional conditions to which commercial radio licensees must adhere. One of the more restrictive of these is the local presence condition, which requires the licensee to maintain in perpetuity the staffing levels and use of infrastructure within the licence area, as at the date of the trigger event. This can seriously affect the operation of regional radio stations, preventing them from responding to changes in technology, local labour markets, and product market conditions. Stations subject to this trigger event provision are likely to be at increased risk of business failure because of the constraints on their ability to respond to changing circumstances. Such a condition is likely to reduce the value of local licences, affecting the viability of local broadcasters, and potentially undermining the objective of the provisions.

Although local presence and cross media ownership restrictions are aimed at maintaining media diversity, they have the potential to undermine the ability to deliver media efficiently. As the Commission noted when examining cross media ownership rules in its broadcasting inquiry:

By preventing mergers across the boundaries of radio, television and newspapers, the rules potentially have an efficiency cost. (PC 2000, p. 343)

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As convergence continues, uptake of new technologies is likely to foster greater media diversity while increasing the pressures on traditional media. Restrictions that prevent traditional media from utilising economies of size and scope — such as allowing a regional radio station, to combine and share resources with either another radio station, or a local newspaper or television station — could threaten the viability of regional media providers. By limiting the ability of traditional media to adapt to changes in the industry the trigger event provisions, and cross media ownership laws more generally, may have the perverse effect of reducing both diversity and the ability of broadcasters to deliver local content.

As noted above, following a trigger event a radio broadcaster is also required to meet more prescriptive and onerous local content conditions than those contained in the general local content provisions. In addition to the local content requirements imposed on all radio broadcasters, licensees are required to broadcast a minimum number of local news and weather bulletins and community service announcements (BSA, ss. 61CD-61CE). There does not appear to be a valid rationale for this difference in requirements. Local content obligations should be the same for all licensees in the same class.

The change in licensee also triggers substantial reporting requirements, covering local content and compliance with local presence requirements. This imposes additional administrative costs in terms of the time to complete reporting requirements. These can be a substantial burden for a small regional station. Commercial Radio Australia (sub. 6) has stated that the provisions also result in substantial external legal costs for affected stations, which are estimated by one station to be around \$50,000 per annum.

The scope of these provisions is broad and, in combination with their indefinite nature, means that over time they could apply widely across the industry. The requirements imposed by the provision appear to be excessively burdensome, particularly the local presence requirements. On the other hand, the benefits appear to be limited. The standard local content rules should be sufficient to ensure that local content objectives are satisfied. The trigger event provisions should be abolished.

#### RECOMMENDATION 4.6

***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.***

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## 4.8 Broadcasting content

### Regulation across broadcasting platforms

Currently different types of broadcasting are subject to different regulations. Free-to-air television, subscription television and radio broadcasting are each subject to different regulatory regimes. This difference has been the focus of concerns about the lack of even handedness in the regulatory environment.

Free TV Australia (sub. 41) is concerned that commercial free-to-air television is among the most intensively regulated of all Australian industries, and its regulation is more stringent than that of other media. Free TV Australia argues that much of the existing regulation came into place at a time when there were far fewer screen time activities available to the Australian public, but that this is no longer the case:

New platforms are not subject to the same heavy handed regulation as commercial free to air broadcasters. Going forward attention should be paid to moving toward even handed regulation across all platforms. (sub. 41, p. 3)

Similar concerns about differences in the regulation of the two television platforms have been raised by ASTRA, although from a rather different perspective:

The regulatory system for television broadcasting provides protection for the free to air (FTA) networks, discriminates against new players such as STV [subscription television] and creates significant economic inefficiencies. (sub. 37, p. 2)

While ASTRA notes that subscription and free-to-air broadcasters have the same or similar requirements in relation to many obligations, ASTRA and Free TV Australia highlight some areas of significant difference. The main differences are that:

- Commercial television licensees are required to pay annual licence fees of up to 9 per cent of gross earnings. In 2006-07 this amounted to over \$270 million (Free TV Australia, sub. 41). Subscription broadcasters are subject to different requirements.
- Existing free-to-air broadcasters are protected from competition through restrictions on new entry into the free-to-air television market.
- Much of the regulation of advertising on commercial free-to-air television, such as restrictions on advertising to children and advertising of alcohol, is unique to free-to-air. There are some restrictions relating to children's advertising and placement in the subscription television codes of practice.
- Commercial free-to-air television licensees are subject to the Australian Content Standard 2005 which requires them to broadcast an annual minimum quota of

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55 per cent Australian programming between 6.00 am and midnight. In contrast, subscription television operators are subject to a licence condition that requires that at least 10 per cent of program expenditure for drama be spent on new Australian drama. In 2006-07, commercial free-to-air television broadcasters spent \$96 million on Australian drama while subscription television spent just over \$26 million.

- Regional commercial television licensees in the eastern states are subject to licence conditions requiring minimum levels of local news and information. These quotas do not apply to subscription television, although Sky News and the Weather Channel provide local content.
- The Commercial Television Industry Code of Practice contains stringent classification and scheduling restrictions, many of which do not apply to subscription television.
- Free-to-air broadcasters are subject to the Children's Television Standard which imposes minimum programming and scheduling requirements. Subscription broadcasters are not subject to these requirements.
- The anti-siphoning regime and the radio disclosure standard, both of which are considered in more detail elsewhere, are also areas of significant difference in the way different broadcasters are regulated.

### *Assessment*

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

The nature of the broadcasts is also a source of difference. Free-to-air broadcasts are available to anyone with access to a receiver, while subscription services are only available to those who choose to subscribe to the service. Subscribers also have the choice of using parental controls to restrict access to subscription services which are unsuitable for children. Some of the differences might also have originated in the need for regulations which accommodated the early development of subscription broadcasting.

The BSA recognises that there are differences between the different broadcasting platforms and that different regulations may be appropriate. The Act states that the Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services, and internet services according

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to the degree of influence that different types of services are able to exert in shaping community views (BSA, s. 4).

The differences also appear to flow from the operation of the co-regulatory system. Section 123 of the BSA identifies a number of specific industry groups and provides for the development of codes of practice that are applicable to each of those sections of the industry.

In commenting on these matters ACMA says that:

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. (sub. DR73, p. 15)

Both free-to-air and subscription broadcasters provided the Commission with extensive material identifying differences in the regulatory regime which they felt disadvantaged them in comparison with their competitors. While those submissions raise some interesting issues, it is not the role of this Review to re-examine the whole structure of broadcasting regulation in Australia. However, those variations should be examined by the broader review being foreshadowed by Government to ensure that the differences in regulation are not inconsistent with the overall aims of the regulatory system. With increasing convergence of the broadcasting and telecommunications sectors, the need to reconsider the appropriateness of differences in regulations across media platforms will become more important.

### **Radio disclosure standard**

The Disclosure Standard for radio broadcasts is raised as an issue by Commercial Radio Australia (sub. 6). The Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 has been in force since 15 January 2001. It requires on-air disclosure during current affairs programs of commercial agreements with sponsors where the sponsor or their product is mentioned, or an issue is promoted that is favourable to the sponsor. The disclosure must be made immediately and as part of the broadcast. The phrasing of the disclosure must also

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conform to that contained in the standard. In addition, a register of commercial agreements must be maintained.

Commercial Radio Australia (sub. 6) claims that the regulatory requirements for meeting the disclosure standard are too broad in scope and impose an excessive compliance burden. More specifically:

- the requirement for disclosures to be made immediately is considered overly onerous
- prescriptive measures (such as timing and phrasing) are difficult to comply with, particularly in the context of unscripted programming
- the disclosure standard is deemed excessively broad, requiring disclosure where the link is incidental and not contextually relevant
- the register of commercial agreements requires overly detailed publication of commercially sensitive information, in particular information on the value of the commercial agreement.

Commercial radio stations are required to maintain a register of commercial agreements that is made publicly available. The value of the commercial agreement must be listed as being within specified bands. Further, radio stations are required to obtain copies of agreements between presenters and sponsors within seven days. Commercial Radio Australia (sub. 6) submits that these requirements are too detailed and that it disadvantages radio stations in attracting presenters compared with other media, such as television, because of a reluctance to divulge remuneration with other sponsors. They also submit that it can be difficult to obtain copies of agreements within seven days because of confidentiality conditions.

### *Assessment*

The objective of the disclosure standard is to promote fair and accurate coverage of issues by requiring disclosure of commercial agreements that have the potential to affect, or could be seen as affecting, the content of current affairs reporting. It would appear that this objective could be met through more flexible disclosure requirements.

The Disclosure Standard was introduced by the then Australian Broadcasting Authority (now ACMA) in 2000 after an inquiry into the ‘cash for comment’ scandal determined there was systemic failure to comply with the industry’s codes of practice (ACMA 2009a). However, that investigation appears to have been sparked by failure to comply with the existing code by a relatively small number of broadcasters. That a breach by a relatively small proportion of broadcasters has led

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to a prescriptive requirement on all commercial broadcasters is not in keeping with an appropriate risk management approach to regulation. That is, the regulatory remedy captured all radio broadcasters, not just those found to have breached the code. In December 2008, ACMA announced it would undertake a review of the commercial radio standards, including the disclosure standard. The review is expected to conclude in the first half of 2010 (ACMA 2008c).

The current arrangements are very strict. For instance, Commercial Radio Australia cites the following example in its submission:

The ACMA's approach causes significant difficulties for licensees in ensuring compliance with the Disclosure Standard. For example, a presenter who made the on-air announcement within 90 seconds of the relevant material was found by the ACMA to have "breached" the Disclosure Standard. (sub. 6, p. 12)

In addition, Commercial Radio Australia contend that ACMA's insistence on prescriptive detail is unreasonable and unworkable, citing the following example:

... one commercial station was found to have breached the Disclosure Standard when the presenter referred to his sponsor as "sponsors of ours" or "sponsors" rather than "sponsors of mine". The ACMA's view was that only "sponsors of mine" was acceptable. (sub. 6, p. 13)

The prescriptive approach taken by ACMA reflects the requirements of the Disclosure Standard. For example, Part 3 of the Disclosure Standard states that an on air disclosure must contain one of a number of specific phrases:

A disclosure announcement must include at least one of the following phrases:

- (a) [name of sponsor] is a sponsor of mine;
- (b) I have a commercial agreement with [name of sponsor];
- (c) [name of sponsor] is a sponsor of my company, [name of company];
- (d) [name of sponsor] has a commercial agreement with my company, [name of company];
- (e) [name of sponsor] is a sponsor of a company of which I am a director, [name of company];
- (f) [name of sponsor] has a commercial agreement with a company of which I am a director, [name of company].

Changes in the approach taken by ACMA would require amendment of the Disclosure Standard.

Another indicator that the disclosure standard for commercial radio may impose an unnecessary regulatory burden on commercial radio broadcasters is the lack of a similar prescriptive arrangement for television broadcasters. The issues with respect to television appear to be generally similar to those for radio broadcasting, yet

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disclosure requirements in the case of commercial television broadcasting are far less prescriptive and are dealt with through an industry code of practice. However, ACMA submits that there is less evidence of a problem with respect to television:

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. (sub. DR73, p. 18)

Further, ACMA does not agree with the suggestion of industry to move the disclosure requirements into the industry code of practice, as occurs with commercial television, because of the more extensive enforcement options available to it under the standard. For instance, under the standard ACMA can commence civil penalty proceedings or give remedial directions, whereas in the case of code breaches it can only accept enforceable undertakings, impose additional licence conditions or suspend or cancel a licence.

Overall, it appears that the requirement for disclosure of commercial arrangements for commercial radio presenters is overly prescriptive and poses an excessive burden on the commercial radio industry.

A more flexible approach, such as allowing licensees to broadcast regular disclosure announcements, rather than having to do so almost at the exact moment of a potential conflict of interest, would achieve the same outcome while reducing compliance burdens. There should also be further examination of the extent to which commercially sensitive information needs to be divulged to achieve the objectives of the provisions — disclosure of the existence of an agreement may be sufficient of itself.

#### RECOMMENDATION 4.7

***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.***

## Captioning

Both the Broadcasting Services Act (BSA) and the *Disability Discrimination Act 1992* (DDA) impose requirements on free-to-air broadcasters to provide closed captioning for selected parts of their programming. The BSA requires each commercial television broadcasting licensee and each national broadcaster to provide a captioning service for television programs transmitted during prime time viewing hours, and for news or current affairs programs. The Commercial

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Television Industry Code, registered under the BSA, contains provisions about how the hearing impaired should be made aware of captioning.

These specific requirements under broadcasting regulation operate in parallel with those in the DDA, administered by the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission (HREOC)). The DDA does not contain any specific provisions relating to captioning, but contains general provisions which make it unlawful to discriminate against people with disabilities.

The parallel operation of these two regulatory regimes has created uncertainty for free-to-air broadcasters. Free TV Australia states that:

... due to a lack of regulatory certainty, broadcasters have engaged in dual processes of captioning under the BSA and the Disability Discrimination Act 1992 administered by the Human Rights and Equal Opportunity Commission (HREOC).

Given the financial and operational implications of captioning requirements, this uncertainty has been a significant concern for broadcasters. Free TV considers there should be a single set of regulatory arrangements that provides certainty. (sub. 41, p. 8)

A similar issue in relation to overlaps between the DDA and air safety regulations is discussed in chapter 6.

### *Assessment*

This issue is not new. In 1998 HREOC initiated a review of closed captioning and called for submissions based on an issues paper. While that review was underway the then Department of Communications, Information Technology and the Arts was also receiving submissions as part of a review of captioning standards under the BSA. In a submission to the Department's review, the Acting Disability Discrimination Commissioner suggested that:

Broadcasters can best have a single or consistent set of obligations if the present review by the Department leads to issues which would otherwise arise for determination under the DDA being addressed in one of these ways:

- by the Parliament appropriately specifying that the DDA no longer applies to these issues or
- by the Commissioner being satisfied that he should decline complaints under DDA section 71(2)(e) on the basis that the subject matter had already been adequately dealt with or
- by the Commissioner giving more definite legal recognition by granting an application for temporary exemption under section 55 of the DDA on the basis of compliance with captioning standards under the Broadcasting Services Act. (Sidoti 1999, p. 2)

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Those two review processes do not appear to have lead to a resolution of this issue.

Subsequently free-to-air broadcasters have applied for, and received, exemptions for limited periods from the DDA on the basis of agreements they have made to significantly increase captioning. These agreements with the Australian Human Rights Commission require broadcasters to meet higher targets than those required under the BSA.

The issue is one of the subjects of a discussion paper issued in April 2008 by the Department of Broadband, Communications and the Digital Economy (the Department). The discussion paper canvassed a number of issues relating to access to the media including:

- the appropriate roles for the Human Rights and Equal Opportunity Commission and the Australian Communications and Media Authority in relation to access requirement under the DDA and the BSA
- how changes to the regulatory requirements for access to electronic media should be implemented
- the extent to which standards for digital television transmission and domestic digital television receivers should provide for captioning and audio description (DBCDE 2008).

The Department's discussion paper called for submissions by 13 June 2008. At the time of writing there does not appear to have been an outcome from this process.

There seems to be general support for governing captioning through the BSA. In responding to the Department's recent discussion paper, Free TV Australia advocates excluding the operation of the DDA and implementing any future targets through the BSA (Free TV Australia 2008). The Deafness Forum of Australia, while commending the role to date of HREOC, similarly recommends that ACMA have the responsibility for setting standards and enforcing timeframes and that the BSA should be amended if necessary to achieve this (Deafness Forum of Australia 2008).

In its submission to the Commission, the Australian Communications Consumer Action Network (ACCAN) (sub. DR92) agrees with the position of Free TV Australia and suggests that amendments to the BSA should also cover captioning on subscription TV.

ASTRA (sub. DR82) notes that captioning on subscription television is governed solely by agreements reached under the DDA and that this arrangement has successfully delivered the current roll-out of captioning across subscription television channels.

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The Commission has not formed a view about which regulatory regime should govern captioning of free-to-air and subscription television. However, it is clearly time that the uncertainty created by these duplicative regulatory arrangements was resolved.

RECOMMENDATION 4.8

*The Department of Broadband, Communications and the Digital Economy and the Attorney-General's Department, in consultation with stakeholders, should seek agreement on whether requirements for 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.*

### **Reporting on high definition broadcast hours**

Free-to-air broadcasters are required to show 1040 hours of native high definition (HD) content per year and to report on their compliance to ACMA on an annual basis. Free TV Australia (sub. 41) argues that the requirement to report compliance with the HD quota is an unnecessary regulatory burden which provides no benefit to viewers.

Free TV Australia (sub. 41) also states that more and more programs are being broadcast in HD and that all broadcasters have consistently met or exceeded the HD quota. All of the networks recently reported that they have exceeded the quota threefold.

The regulatory burden is said to be significant. Free TV Australia (sub. 41) described the reporting requirements as being highly time consuming and resource intensive.

### **Assessment**

The issue of High Definition quotas has been considered before. In May 2005 the then Department of Communications, Information Technology and the Arts released an issues paper *A Review into High Definition Television Quota Arrangements* inviting submissions from interested parties (DCITA 2005). In response to the issues paper the ACCC said that it, 'contends that the HDTV quota is not necessary to achieve the Government's digital broadcasting policy objectives and may, in fact, be inconsistent with some of those objectives. Thus, in the ACCC's view, the government should remove the HDTV quota.' (ACCC 2005, p. 5).

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A joint submission to that inquiry from the Nine Network and Network Ten stated that ‘all of the metropolitan networks are meeting or exceeding their HD quota’ (Nine Network and Network Ten 2005, p. 6). Although, it noted that the quota may be important in ensuring that viewers who buy HD equipment have high amounts of HD programming available to them.

There does not appear to have been any outcome from that review.

The regulatory burden on industry flows mainly from the reporting requirements. The reporting and record keeping requirements for HD broadcasts are specified in detail in the Broadcasting Services (Digital Television Standards) Regulations 2000. These regulations do not give ACMA the flexibility to target the reporting requirements, or to relieve industry of the requirements when reporting is no longer considered necessary.

ACMA (sub. DR73) advises that, with the exception of one broadcaster in 2005, all affected broadcasters to date have met, and frequently exceeded, the HDTV quotas — although some regional broadcasters were not able to broadcast for a number of months in the first half of 2009 because of technical difficulties related to implementation of new infrastructure requirements.

The Department notes that the high definition quota for commercial and national broadcasters is legislated to end after the switchover to digital television in the relevant licence area (sub. DR54). However, that is not scheduled to be completed until late 2013 (DBCDE 2009a). In light of the progress that has been made with the introduction of high definition broadcasting, the requirement to broadcast a minimum number of hours of high definition television already appears to be unnecessary. Although the requirement itself does not impose a large burden on industry, it is redundant and should be removed.

More importantly there is no justification for the ongoing reporting requirements. Compliance with the requirement to broadcast a minimum number of hours of high definition television appears to be well established. The completion of these reports by broadcasters does not appear to contribute in any way to ensuring that the specified number of HD hours is broadcast. The reporting and record keeping requirements should be repealed immediately.

#### RECOMMENDATION 4.9

***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 television broadcasters to report on compliance with the high definition quota is redundant and should be removed.***

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## 4.9 Other concerns

### **Producer Offsets**

The Producer Offset is a refundable tax offset (rebate) for producers of Australian feature films, television and other projects. Eligibility for the offset is administered by Screen Australia, which will issue a final certificate to a production company after a project is completed. The final certificate is submitted as part of the applicant company's tax return for the income year in which the film is completed. The offset is paid as a rebate against the company's Australian tax liabilities for the income year in which the production was completed, with the remainder refunded to the applicant company.

The South Australian Government (sub. 49) has expressed concern that these arrangements are hindering the industry. Producers have to wait until their tax return is lodged before being able to receive the benefit of the offset. This may delay the start of their next project or prevent more than one big project being undertaken in the one period.

### *Assessment*

In designing assistance for the industry the Australian Government elected to provide support through the tax system, rather than administering payments through a separate grant. The payment of a tax refund to the producer, which can be used to help finance a subsequent project, is dependent not only on the level of production expenditure, but also on the income generated by the project and from other sources. How quickly any tax refund is received will depend to some extent on the point during a producer's tax year when a project is completed. It is an inherent part of the design of the assistance that the benefit to producers from the scheme is received through the tax system. While producers might receive assistance more rapidly through a grant, the current arrangements are an inherent part of the assistance provided and do not appear to impose an excessive administrative burden.

### **Classification under the Children's Television Standard**

Free TV Australia (sub. 41) is concerned that the pre-assessment process for the classification of television programs under the Children's Television Standard (CTS) imposes a higher regulatory burden than is necessary to ensure adequate programming for children.

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In response, ACMA (sub. DR73) observes that there was minimal support from stakeholders for any of the alternative models explored in the issues paper it published in 2007. ACMA now intends to establish bi-annual forums involving industry to explore models for children's and preschool program classification.

The CTS is currently under review. A revised draft standard has been released and a final standard is due to be released in the near future.

### **Internet filtering**

The South Australian Government (sub. 49) has concerns about the potential regulatory burdens associated with the proposal to filter and block internet sites at a global level. The South Australian Government notes that this issue will be discussed by the Australian ICT in Education Committee. It is more appropriate for these concerns to be addressed in that forum, and through the ongoing process of developing regulatory proposals, rather than through this review.

### **Classification of low volume titles**

The South Australian Government (sub. 49) is concerned about the cost of classification for low volume films, DVDs and videos being purchased by public libraries. This issues seems to lie outside of the scope of this inquiry which is reviewing regulatory burdens on business.

### **Regulation of Telemarketing**

The Australian Direct Marketing Association (ADMA) (sub. DR93) is concerned that under the current state based fair trading legislation the telemarketing industry is subject to differing laws in some jurisdictions and no laws in others. It is ADMA's view that this issue should be addressed by repealing all state and territory legislation and incorporating standards for outbound telemarketing under the Do Not Call Register Act, rather than the new uniform Australian consumer law.

This issue was raised at a late stage in the Commission's review. As the Commission has not had an opportunity to explore this issue and seek input from all of the affected stakeholders, it does feel that it is in position to make any recommendations. Moreover, the Commission notes that this area of regulation has been included in the implementation plan for the new national generic consumer law (Australian Government 2009c). That process is likely to lead to the current

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state and territory laws being replaced by a single national regulatory regime. This should address most of the issues raised by ADMA.

### **Extension of the Do Not Call Register**

ADMA (sub. DR93) is concerned about the implications of a Government proposal to extend the scope of the Do Not Call Register to all business and government numbers, fax numbers and emergency service numbers. Its submission outlines some of the possible implications of extending the register and the increased regulatory burden that would be imposed on business.

The proposed extension of the Do Not Call Register was the subject of a discussion paper released in August 2008 by the Department of Broadband, Communications and the Digital Economy (DBCDE 2008b). The Department invited submissions based on its discussion paper and has indicated that it expects the Minister to introduce legislation on this issue later this year.

The possible extension of the Do Not Call Register relates to an expansion of the policy objectives of the current regime, rather than the regulatory burden currently being imposed on business. As such, this issue seems to lie outside of the scope of this review.

In light of the above, and the extensive consultation undertaken by the Department, the Commission does not consider it appropriate to make any recommendation on this issue. The concerns raised by ADMA would be more appropriately addressed through a Regulation Impact Statement accompanying any proposed changes to the regulation.