

The Auditor-General
Audit Report No.46 2007-08
Performance Audit

Regulation of Commercial Broadcasting

Australian Communications and Media Authority

© Commonwealth
of Australia 2008

ISSN 1036–7632

ISBN 0 642 81028 1

COPYRIGHT INFORMATION

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth.

Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration,
Attorney-General's Department,
Robert Garran Offices,
National Circuit
Barton ACT 2600

<http://www.ag.gov.au/cca>



Canberra ACT
27 June 2008

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit in the Australian Communications and Media Authority in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit and the accompanying brochure. The report is titled *Regulation of Commercial Broadcasting*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee'.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:

The Publications Manager
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Telephone: (02) 6203 7505
Fax: (02) 6203 7519
Email: webmaster@anao.gov.au

ANAO audit reports and information about the ANAO are available at our internet address:

<http://www.anao.gov.au>

Audit Team

Grant Caine
David Spedding
Barbara Cass

Contents

Abbreviations and Acronyms	8
Glossary	9
Summary and Recommendations	11
Summary	13
Introduction	13
Audit objective and scope	14
Overall conclusion.....	14
ACMA response	17
Key findings by chapter.....	17
Recommendations	29
Audit Findings and Conclusions	33
1. Background and Context	35
Introduction	35
Co-regulatory approach	37
Audit objective, scope and methodology	39
Structure of the report	41
2. Commercial Broadcasting Complaints.....	42
Introduction	42
Publicising the Code and its complaints procedures	42
Code complaints received by commercial broadcasters	43
Making complaints to ACMA.....	44
ACMA’s management of complaints.....	48
Reporting on complaint management performance.....	53
Stakeholder feedback on complaints handling	54
3. Commercial Broadcasting Investigations.....	56
Introduction	56
Broadcasting investigations undertaken by ACMA.....	56
ACMA’s management of broadcasting investigations	59
Compliance and enforcement action	72
Stakeholder consultation.....	74
Reporting on broadcasting investigations.....	74
4. Broadcasting Content Claims and Disclosures.....	77
Introduction	77
Australian, children’s and local content.....	77
Anti-siphoning provisions	83
Verification of broadcasters’ claims	85
Commercial radio current affairs disclosure	86

5. Other Regulatory Activities	88
Media ownership and control	88
Broadcast licence fees	92
Requirements of broadcasters' internal operations	95
6. Governance Arrangements	97
Introduction	97
ACMA's corporate governance framework	97
Risk management	101
Performance management and reporting	102
Appendices	107
Appendix 1: ACMA Response	109
Appendix 2: ACMA's Process for Handling Broadcasting Complaints	114
Appendix 3: ACMA's Process for Undertaking Broadcasting Investigations	115
Appendix 4: Subject Matter of Commercial Broadcasting Investigations for the Period 2005–06 and 2006–07	116
Appendix 5: Australian Music Requirements Under the Australian Music Code	118
Appendix 6: ACMA's Powers to Grant Temporary Approval to Breach, or Direct Parties to Comply with, Media Ownership and Control Rules	119
Index	120
Series Titles	121
Current Better Practice Guides	125

Tables

Table 2.1	Commercial broadcasting complaints by program type received for 2005-06 and 2006–07	47
Table 2.2	Classification of all broadcasting complaints for 2005–06 and 2006–07	49
Table 3.1	Issues common to many commercial broadcasting investigations	59
Table 3.2	Broadcasting investigation timeframes	63
Table 5.1	Provisions insufficiently monitored by ACMA	96
Table 6.1	ACMA's outcomes and outputs	103
Table 6.2	Performance indicators related to the regulation of commercial broadcasting	104

Figures

Figure 1.1	Context for ACMA's regulation of commercial broadcasting.....	36
Figure 1.2	Filtering of Code complaints through the co-regulatory approach over 2005–06 and 2006–07.....	38
Figure 1.3	Report structure.....	41
Figure 2.1	Code complaints received by commercial broadcasters for the period 2001–02 to 2006–07.....	44
Figure 2.2	All broadcasting complaints received by ACMA for the period 2001–02 to 2006–07.....	46
Figure 3.1	Broadcasting investigations commenced and completed between 2001–02 and 2006–07.....	57
Figure 3.2	Average (mean) duration of completed broadcasting investigations for the period 2001–02 to 2006–07.....	62
Figure 3.3	Duration of commercial broadcasting investigations (in descending order) completed between January 2005 and July 2007.....	63
Figure 6.1	ACMA's organisational structure.....	98
Figure 6.2	ACMA's corporate governance framework.....	99

Abbreviations and Acronyms

ABA	Australian Broadcasting Authority
ACA	Australian Communications Authority
ACMA	Australian Communications and Media Authority
ACMA Act	<i>Australian Communications and Media Authority Act 2005</i>
AIMS	ACMA's Information Management System
AMPCOM	Australian Music Performance Committee
ANAO	Australian National Audit Office
BSA	<i>Broadcasting Services Act 1992</i>
CAD	Commercials Advice Pty Ltd (a wholly-owned subsidiary of Free TV Australia)
Code complaints	complaints related to an alleged breach of the TV or Radio Codes of Practice
FTA	free-to-air
HDTV	high definition digital television
Minister	Minister for Broadband, Communications and the Digital Economy
non-Code complaints	Complaints related to an alleged breach of the BSA, subordinate legislation (including standards and notices) or licence conditions
PBS	Portfolio Budget Statement
Radio Code (of Practice)	<i>Commercial Radio Australia Codes of Practice and Guidance (2004)</i>
RCMG	Register of Controlled Media Groups
TAP Act	<i>Tobacco Advertising Prohibition Act 1992</i>
TV Code (of Practice)	<i>Commercial Television Industry Code of Practice (2004)</i>

Glossary

anti-siphoning provisions	Provisions under the BSA that prevent subscription (pay television) broadcasters acquiring the exclusive broadcasting rights to particular sporting events determined by the Minister for Communications, Information Technology and the Arts
the Authority	Comprises the ACMA Chairman, Deputy Chair, one full-time Member and four part-time Members appointed under Division 2 of the ACMA Act
Executive Management Group	Comprises the ACMA Chairman, other full-time Authority members and the General Managers heading ACMA's five Divisions.

Summary and Recommendations

Summary

Introduction

1. The Australian Communications and Media Authority (ACMA) is a statutory authority within the Australian Government portfolio of Broadband, Communications and the Digital Economy. ACMA was formed on 1 July 2005 following the merger of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA).

2. ACMA's regulatory functions are set out in the *Australian Communications and Media Authority Act 2005* (ACMA Act) and include the regulation of broadcasting, radiocommunications, telecommunications and online content. Under this Act, responsibility for decisions about the agency's regulatory functions rests with ACMA as an Authority.¹ Under the *Financial Management and Accountability Act 1997*, responsibility for the governance and management of ACMA rests with the ACMA chair in his capacity as Chief Executive Officer.

3. When it was established, ACMA assumed the ABA's functions in relation to broadcasting regulation. These include:

- regulating broadcasting services in accordance with the *Broadcasting Services Act 1992* (BSA);
- monitoring and investigating complaints relating to broadcasting services; and
- monitoring compliance with industry Codes of Practice and standards.

4. The BSA adopted a co-regulatory approach to broadcasting services. This approach requires broadcasters to respond, in the first instance, to complaints relating to their adherence to their Codes of Practice (Code complaints). Where complainants are not satisfied with the broadcasters' response or do not receive a response, complaints can be escalated to ACMA. ACMA must investigate all complaints it receives that are within its jurisdiction unless it is satisfied that the complaints are frivolous, vexatious or not made in good faith. ACMA relies on television viewers, radio listeners and other industry stakeholders to inform it of alleged non-compliance. In the absence of complaints or other evidence of

¹ For the purposes of this audit, 'the Authority' is used to describe members of ACMA appointed under the *Australian Communications and Media Authority Act 2005* and 'ACMA' is used to describe the staff and management of ACMA, which may include Authority members.

alleged breaches, broadcasters are, by default, assumed to be complying with their broadcasting requirements.

5. The co-regulatory approach ‘filters’ the number of Code complaints received and investigated by ACMA. The 2575 Code complaints received by commercial broadcasters during 2005–06 and 2006–07 resulted in 165 investigations by ACMA. Non-Code complaints (for example, those related to potential non-compliance with the BSA or licence conditions) are made directly to ACMA. In addition to the co-regulatory approach, broadcasters are required to provide compliance reports for: Australian, children’s and local content quotas; and anti-siphoning information.² They are also required to provide annual returns and change notifications under the media ownership and control rules.

Audit objective and scope

6. The audit objective was to examine if ACMA is, in respect of commercial broadcasting services, effectively discharging its regulatory responsibilities under the BSA. The audit examined ACMA’s:

- monitoring of commercial broadcasters’ compliance with the BSA;
- addressing non-compliance with, and enforcement of, the BSA;
- collection of broadcast licence fees; and
- monitoring and reporting of its regulatory performance in respect of commercial broadcasting.

Overall conclusion

7. ACMA has regulatory responsibilities for media and communications across Australia. It administers a complex and disparate regulatory regime across its four areas of responsibility: broadcasting; radiocommunications; telecommunications; and online content. For commercial broadcasting, this means ensuring compliance with legislative requirements, industry standards and Codes of Practice. ACMA interacts with a wide range of stakeholders, including metropolitan and regional commercial broadcasters, peak representative bodies, and the viewing and listening public. Its regulatory role

² The anti-siphoning provisions prevent subscription broadcasters acquiring the exclusive broadcasting rights to particular sporting events determined by the former Minister for Communications, Information Technology and the Arts.

and responsibilities have continued to expand, putting pressure on its existing resource base.

8. As previously noted, the co-regulatory approach relies on television viewers, radio listeners and other industry stakeholders to identify alleged non-compliance with industry Codes of Practice. Their complaints are initially made to the broadcasters and ACMA is only required to investigate those Code complaints that have not been resolved. It is therefore important that ACMA and the broadcasters have effective systems, processes and procedures in place to handle complaints in a way that engenders stakeholder confidence and meets expectations. For the co-regulatory approach to operate effectively, the ANAO considers more attention needs to be given to the following areas:

- the considerable level of stakeholder dissatisfaction with the broadcasting complaints process reported in ACMA's *Reality Television Review*³;
- the high number of complaints handling breaches identified by ACMA (and prima facie breaches identified by the ANAO that were not fully investigated);
- monitoring whether broadcasters are publicising the Codes and their complaints procedures; and
- verifying the accuracy of the complaints data broadcasters report, on a risk assessment basis.

9. While ACMA has adequately addressed the majority of complaints it has received, the timeliness of its response to these complaints has deteriorated in the last couple of years. The time taken to complete commercial broadcasting investigations has also increased, with each taking, on average, 21 weeks in 2006–07. There is also the potential for investigations to take even longer, given ACMA's increased investigations workload in the first half of 2007–08. ACMA advised that it will continue to prioritise its investigations based on the risks they present and resourcing capability.

10. The ANAO has identified a number of areas where ACMA's management of its investigations could be improved. These include investigating all prima facie complaints handling breaches by broadcasters or recording the decision not to investigate, documenting consideration of past decisions and precedents, offering complainants the opportunity to comment

³ ACMA 2007, *Reality Television Review: Final Report*, p.87.

(in terms of procedural fairness), and advising complainants the results of the investigations. Improving the quality and accuracy of the data in its complaints and investigations management system would increase its effectiveness as a management tool. ACMA has recently advised the ANAO that it is implementing a number of initiatives to improve its complaints and investigations processes. This includes producing an operations manual as business rules and procedures have not been documented to date.

11. ACMA has not taken (and does not propose to take) enforcement action to address identified non-compliance with the change notifications under the old media ownership and control rules. In relation to the new rules introduced in February 2007, ACMA initially took an educative approach and, more recently, has issued formal warning notices for non-compliance with these rules. Broadcasters are generally not required to confirm that they have implemented compliance and enforcement actions arising from breaches found in broadcasting investigations and non-compliance with media ownership and control rules. Also, unless it is a requirement of the enforcement action, ACMA does not follow-up with broadcasters to ensure these actions have been implemented as intended. However, some recent enforceable undertakings have required broadcasters to report regularly to ACMA on their progress towards compliance. The ANAO suggests that, where relevant, ACMA apply this approach more broadly to its broadcasting compliance and enforcement actions to reduce the risk of non-compliance recurring.

12. Most programming data reported by broadcasters to demonstrate their compliance with broadcasting content quotas and the anti-siphoning provisions, is not independently verified by ACMA. It considers that the potential costs of independent verification outweigh the assurance benefits. While appreciating that there is a balance to be struck, a risk based approach to monitoring would normally be applied in such circumstances to provide some assurance that broadcasters are meeting their regulatory requirements. This may involve ACMA gaining an appreciation of broadcasters' compliance processes and evaluating other industry intelligence.

13. ACMA has acknowledged that its governance arrangements in the 18 months following its establishment were not as effective as they could have been, particularly in terms of a coordinated framework. For this reason, ACMA has reviewed and is currently implementing revised corporate governance, performance management and risk management frameworks. The ongoing management of regulatory and operational risks needs to be incorporated into ACMA's risk management strategies. This will position ACMA to respond to

changing risks and, where necessary, adjust compliance strategies, priorities and activities. In addition, expanded performance reporting would improve ACMA's management of, and accountability for, the regulation of commercial broadcasting.

14. The ANAO has made five recommendations to improve ACMA's regulation of commercial broadcasting services. These recommendations relate to investigations, broadcasters' complaints handling processes, monitoring compliance with industry Codes of Practice, compliance and enforcement action and ACMA's performance management and reporting.

ACMA response

15. The Australian Communications and Media Authority (ACMA), welcomes and supports the review undertaken by the Australian National Audit Office (ANAO) of the Regulation of Commercial Broadcasting. As a relatively new organisation, the ACMA is seeking to review its processes and approaches to ensure that they continue to meet the expectations of industry, government and the community.

16. ACMA acknowledges that the ANAO's findings in areas that can be improved upon, will further enhance ACMA's program of transformational change and continuous improvement. The audit has enabled ACMA to demonstrate the extent of the internal improvement and commitment in risk management, co-regulatory and investigation areas that has taken place within resource constraints and the benefits that this work delivers through the co-regulatory approach to industry and government participants.

Key findings by chapter

Commercial broadcasting complaints (Chapter 2)

17. Under the co-regulatory approach, the effective handling of commercial broadcasting complaints requires:

- broadcasters to publicise the industry Codes and complaint procedures; and
- broadcasters and ACMA to appropriately address complaints in a timely manner.

Publicising the Code and its complaint procedures

18. The TV and Radio Codes require licensees to provide regular on-air information about the Code and complaints procedures. As ACMA has not received any complaints about this matter, it does not believe it is an issue of concern to the community. However, it would be difficult for members of the public to detect any non-compliance by broadcasters with their requirement to publicise the Codes. ACMA would have greater confidence in broadcasters' compliance were they required to advise annually: that they have met their publicising requirement; and the dates and times of broadcasts, or announcements, publicising the Codes.

Code complaints received by commercial broadcasters

19. Broadcasters are required to report regularly to their peak industry associations, Free TV Australia and Commercial Radio Australia, on the number and substance of Code complaints they receive. This process is designed to keep the industry associations and ACMA informed of emerging or systemic issues in program content or complaints resolution. This information is not verified by ACMA prior to publishing in its *ACMASphere* magazine, or analysed to identify any trends in Code complaints to broadcasters.

ACMA's complaints management

20. ACMA relies on the Code and non-Code complaints it receives to identify potential breaches of the BSA, regulations and standards, licence conditions and Codes. In 2006–07, ACMA received 487 commercial broadcasting complaints, an increase of 12 per cent on the previous year.

Complaints within and outside of ACMA's jurisdiction

21. ACMA usually classifies complaints as either being within jurisdiction or outside its jurisdiction, as they are received. Within jurisdiction complaints are either investigated, or complainants are directed to take their complaints to broadcasters. Out of jurisdiction complaints are referred to the broadcasters or other responsible bodies, such as the Advertising Standards Board. Over half the broadcasting complaints ACMA received in 2005–06 and 2006–07 were classified as being out of ACMA's jurisdiction or were not classified at all. The reasons for classifying complaints as out of jurisdiction were not documented in most cases.

22. Responding to out of jurisdiction complaints consumes ACMA's resources that could otherwise be directed towards addressing relevant

complaints. To further reduce and streamline its handling of out of jurisdiction complaints, ACMA could better classify complaints as either within or out of jurisdiction, revise the jurisdiction reason codes to cover the most common categories, and periodically analyse the reasons for complaints being received and develop strategies to address them.

Complaint handling procedures

23. ACMA (and its predecessor, the ABA) have not documented internal procedures and business rules for handling complaints. ACMA advised that a procedures manual for handling broadcasting complaints will be developed during 2008.

Deciding whether to undertake a formal investigation

24. The majority of commercial broadcasting complaints received by ACMA do not result in a formal investigation. Of the 923 complaints made to ACMA during 2005–06 and 2006–07, only 193 (21 per cent) resulted in a formal investigation.⁴ Decisions on whether to investigate complaints, and their reasons, were generally adequately documented in ACMA's Information Management System (AIMS). However, the ANAO identified a number of instances (relating to broadcasters not meeting complaints handling requirements) where it was difficult to understand the reasons for ACMA's decision not to investigate the complaints. ACMA's management of complaints would be improved if it periodically examined whether broadcasters' responses met the complaints handling provisions of the industry Codes.

Timeliness and completeness of actioning complaints

25. The timeliness of ACMA's initial response to complainants has deteriorated in the last couple of years—from 92 per cent in 2005–06 being within ACMA's target of seven calendar days, to 63 per cent in 2006–07. Data in AIMS was often missing for some relevant fields (including classification of the complaint as either within or outside ACMA's jurisdiction and the type of broadcaster). At times, inaccurate data were also recorded in some date fields. The database was not routinely updated to indicate that complaints had been appropriately actioned and 'closed'.

26. ACMA advised that a senior officer within the Investigations Section performs an undocumented monthly check to ensure that all complaints have been actioned. Documenting these checks in future would demonstrate that

⁴ Similar complaints are often combined into the one investigation. During this period, 178 investigations were conducted.

they have been performed. Given the delays in responding to complaints observed during the audit, more frequent checking for overdue responses also appears warranted.

Commercial broadcasting investigations (Chapter 3)

27. Under the BSA, ACMA must investigate all broadcasting complaints that are within its jurisdiction⁵, unless it is satisfied that the complaint is frivolous, vexatious, or was not made in good faith. ACMA can also self-initiate investigations, and the Minister for Broadband, Communications and the Digital Economy (the Minister) can direct ACMA to investigate matters.

28. About 20 per cent of commercial broadcasting complaints to ACMA in 2005–06 and 2006–07 generated an investigation. Over this period, ACMA completed 162 commercial broadcasting investigations (128 television and 34 radio), 78 per cent (126) of which did not result in breaches being found against broadcasters. Over three-quarters of television breaches (31 in 24 investigations) involved complaints handling, news and current affairs, and the classification of television programs. Nearly three-quarters of radio breaches (15 in 12 investigations) involved complaints handling and programs unsuitable for broadcast.

ACMA's management of broadcasting investigations

29. The ANAO identified deficiencies in the timeliness and management of commercial broadcasting investigations, including the absence of documented investigation policies and procedures. Nearly one-quarter of investigations have exceeded ACMA's target of completing all investigations within 24 weeks. The average time for completing investigations in 2006–07 was 18 weeks. This timeframe increases to 21 weeks were ACMA to include all elapsed time between receiving a complaint and informing the complainant of the investigation result. The increase in ACMA's investigations workload during the first half of 2007–08 suggests that there is the potential for investigations to take even longer.

30. The co-regulatory approach to commercial broadcasting relies on complaints to detect non-compliance. When commercial broadcasters breach the complaints handling provisions of the industry Codes of Practice the integrity of the approach is undermined. ACMA's investigations have

⁵ After Code complaints have first been responded to by broadcasters or no response is received within stipulated time limits.

identified a high number of complaints handling breaches (28) and the ANAO's analysis identified further prima facie complaints handling breaches that were not fully investigated (14). Other issues relating to ACMA's management of its investigations included ACMA:

- deciding not to investigate five dated cases, after obtaining legal advice to the contrary, without documenting the reasons for these decisions;
- not documenting, for most investigations, any consideration of past, relevant investigation decisions or precedents;
- not assessing whether complainants should be afforded the opportunity to comment on draft investigation findings and conclusions, for procedural fairness purposes;
- not informing all complainants of the result of the investigations, as required by the BSA; and
- applying inconsistent records management practices.

Compliance and enforcement action

31. When regulatory non-compliance is found, ACMA should take action to address the risks posed by the non-compliance that is commensurate with the seriousness of the breach. For most breaches of the TV and Radio Codes, ACMA considers that the use of its enforcement powers (licence conditions and enforceable undertakings) may not be appropriate to the breach. Rather, it uses negotiated agreements with broadcasters to address non-compliance and generally accepts the compliance actions broadcasters have taken or proposed to prevent recurrences. These commonly include training for staff on the Code requirements and improvements to broadcasting procedures.

32. For most compliance and enforcement actions, ACMA does not require broadcasters to confirm that the actions have been implemented nor does ACMA follow-up to ensure this has occurred. Compliance and enforcement actions are not recorded centrally. This inhibits ACMA's ability to follow them up, and bring past compliance and enforcement actions to bear on current enforcement considerations. Some form of broadcaster advice and checking by ACMA would provide greater assurance that compliance and enforcement actions have been implemented as ACMA intended.

Reporting on broadcasting investigations

33. The statistics ACMA publishes in its annual reports on broadcasting investigations are substantially less informative than that of its predecessor, the

ABA. The information reported for each investigation, summarised in the annual reports, could be enhanced to better inform readers of compliance issues and ACMA's performance. Investigations that result in breaches being found against broadcasters are published on ACMA's website, while only summaries of those investigations where no breaches are found are published. The Authority decided in December 2006 to publish in full a number of non-breach reports of 'public interest' each year. ACMA advised in June 2008, that the release of such reports is being progressed.

Broadcasting content claims and disclosures (Chapter 4)

34. ACMA requires commercial broadcasters to provide programming information to assess their compliance with the BSA, standards and Codes of Practice covering: Australian, children's and local content quotas; and anti-siphoning provisions.⁶ Commercial radio broadcasters are also required to make on-air disclosures during current affairs programs of any commercial agreement between sponsors and presenters, and payment of production costs by advertisers and sponsors.

Australian, children's and local content

35. Commercial television and radio broadcasters are required to meet common minimum conditions and quotas in respect of the Australian and children's programming they broadcast. For example, commercial television broadcasters are to broadcast each year a minimum of 55 per cent Australian programming between 6:00 a.m. and midnight. Commercial television broadcasters in regional areas are also subject to additional local broadcasting requirements. From information provided by broadcasters, ACMA has determined that in the 2005 and 2006 calendar years, television broadcasters met all requirements for Australian, children's and local content; Australian advertising, and high definition television quotas. ACMA addressed the underperformance of two broadcasters who fell just short on meeting one quota each.

36. Under the Australian Music Code of Practice, all commercial radio broadcasters are required to broadcast minimum quotas of Australian music. The Australian Music Performance Committee (AMPCOM—a voluntary association comprising representatives from the Australian music industry) is

⁶ The anti-siphoning provisions prevent subscription broadcasters acquiring the exclusive broadcasting rights to particular sporting events determined by the Minister. Commercial broadcasters are required to report to ACMA on their broadcasting of these sporting events.

required to monitor and report annually on radio broadcasters' compliance with the Code. As of May 2008, the 2006–07 AMPCOM Annual Report was not publicly available (although AMPCOM provided the ANAO with the data that will be reported). In reviewing these reports, the ANAO made the following observations:

- compliance was high for the period 2004–05 to 2006–07, but between six and 13 per cent of broadcasters did not fully comply or were omitted from the reports; and
- some licensees were reporting against incorrect quota requirements, which resulted in two to four percent of broadcasters not meeting their correct quota requirements between 2004–05 and 2006–07.

37. Under the BSA, ACMA has a broad oversight role to ensure that registered Codes of Practice are 'operating to provide appropriate community safeguards'. Therefore, ACMA should identify and address any impediments to the timely production and publication of the annual reports on Australian music, and monitor broadcasters' reported compliance with the Code.

Anti-siphoning provisions

38. The former Minister for Communications, Information Technology and the Arts has determined that the television rights to 30 listed events covered in 12 sports are to be available to free-to-air television for viewing by the general public. This prevents subscription broadcasters from acquiring exclusive broadcasting rights to these events. From information broadcasters provide, ACMA determines the extent to which broadcasters 'use' their rights by broadcasting the listed events, and provides regular reports to the Minister.

39. Notwithstanding the differences between listed events, there is great variability in the type of information reported and their methods of presentation—within and between reports. ACMA agrees that there is a need for greater consistency of reporting. A reporting model consistently applied, will assist stakeholders to compare more easily the extent to which events covered by the anti-siphoning provisions have been broadcast.

Verification of broadcasters' claims

40. Local content is the only area where ACMA independently verifies the broadcasters' claims of compliance. For the Australian Music Code and Australian advertising standard, intermediaries monitor Australian music on commercial radio, and determine the Australian content of advertising

broadcast on commercial television.⁷ ACMA does not independently verify other claims from broadcasters. It advised that the scrutiny provided by third parties and the lack of other intelligence (such as upheld viewer complaints) indicate that the accuracy of broadcasters' claims is not an area of concern. ACMA also considers that the potential costs of independent verification outweigh the assurance benefits. While appreciating that there is a balance to be struck, a risk based approach to monitoring would normally be applied in such circumstances, to provide some assurance that broadcasters are meeting their regulatory requirements.

Commercial radio current affairs disclosure

41. Commercial radio broadcasters are required to provide ACMA with summaries of commercial agreements between sponsors and presenters of current affairs programs. ACMA publishes the summaries in a register on its website. ACMA advised that it has taken no action in response to receiving late notification of 15 commercial agreements and numerous other notifications with the dates of the agreements not specified.

42. ACMA advised that it relies on complaints to trigger any investigations into any potential breaches of the disclosure standard. However, without an up-to-date and complete register, listeners are inhibited from lodging complaints should they consider radio presenters are not making all relevant on-air disclosures of commercial agreements. ACMA should communicate with the broadcasters to encourage them to disclose commercial agreements in a more timely manner.

Other regulatory activities (Chapter 5)

43. ACMA has responsibility for monitoring the media industry's adherence to the ownership and control rules established by the BSA. These rules changed during the period covered by the audit. Under both the old and new rules, the parties covered by them must notify ACMA when controlling interests change (within seven days and five days, respectively), and lodge annual returns with ACMA outlining the people in control of the licences.

Media ownership and control

44. For the period July 2005 to mid-July 2007 (which covers both the old and new rules), there was major prima facie non-compliance by broadcasters

⁷ The intermediaries are associated with the peak commercial broadcasting associations and broader industry associations.

in lodging change of control notifications within the legislated timeframes. Many were lodged a month, and some over a year, after the relevant transaction. Although the broadcasters' submission of 2005–06 annual returns was satisfactory, some 2006–07 annual returns were either late or not lodged at all. Further, comparisons between change of control notifications and annual returns identified an additional eight cases where ACMA had not been informed of a change of control event at the time it occurred.

45. ACMA has not taken (and does not propose to take) enforcement action to address identified non-compliance with the change notifications under the old media ownership and control rules. In relation to the new rules introduced in February 2007, ACMA initially took an educative approach and, more recently, has issued formal warning notices for non-compliance with the new rules. An absence of timely action creates a risk that non-compliance will continue unnecessarily or not be properly addressed. Early enforcement action sends a message to broadcasters that non-compliance is not acceptable. ACMA committing to implementing a standard operating procedure will help to address broadcasters' non-compliance in a more timely manner. Developing standard timeframes to impose compliance and enforcement action will also assist in this regard.

Broadcast licence fees

46. Collecting the fees payable in respect to commercial television and radio licences is a primary function of ACMA. In 2006–07, ACMA collected \$275.9 million in licence fees. The ANAO found that ACMA's fee calculations, which are based on broadcasters' gross earnings, were generally correct. However, to calculate the correct amount of fees requires ACMA and broadcasters to have a common understanding of the nature of broadcasters' revenue sources and their applicability to licence fee calculations. Broadcasters have accessed new revenue sources since the licence fee guidelines were first developed by ACMA's predecessor, the ABA, nearly 16 years ago. A revision to the guidelines would aid both ACMA and the broadcasters.

47. The former ABA conducted an audit program of broadcast licence fees during 2001 to 2004. The audits found a generally high level of compliance, but raised questions about the treatment of various items of revenue. In October 2007, the Authority decided to recommence a targeted audit program for broadcast licence fees. The ANAO strongly supports this initiative as part of an integrated risk-based strategy to maximise licensees' compliance.

Requirements of broadcasters' internal operations

48. Commercial broadcasters' compliance (or non-compliance) with most provisions of the BSA, standards and Codes of Practice is demonstrable to the public and/or ACMA through their broadcasts and the information they provide to ACMA. However, two provisions—emergency broadcast procedures and commercial radio compliance programs—are related to broadcasters' internal operations and are not visible to ACMA or the public. Requiring broadcasters to publish their emergency broadcast procedures and compliance programs on their websites, as well as the results of their annual review/audit, would demonstrate broadcasters' compliance with these provisions.

Governance arrangements (Chapter 6)

49. ACMA's governance arrangements in the 18 months following its establishment lacked cohesion, as elements of corporate governance were considered in isolation rather than within a coordinated framework. ACMA is currently developing and implementing revised corporate governance and risk management frameworks to address identified shortcomings.

Corporate governance framework

50. In June 2007, ACMA's executive endorsed a new corporate governance framework and a process for its implementation. A preliminary assessment of its existing arrangements against desired governance practices identified shortcomings in business planning, risk management, procedural documentation, and performance measurement and reporting. ACMA advised that it expects to complete a more comprehensive assessment in May 2008 and to develop a workplan soon after to address the gaps in its governance arrangements. The ANAO supports ACMA's approach to implementing its revised corporate governance framework.

Risk management

51. Effective risk management will assist ACMA to appropriately manage the risks posed by its co-regulatory approach to commercial broadcasting services. An important part of this approach is the handling of Code complaints by commercial broadcasters before investigation by ACMA, and the processes it has in place to gain assurance that broadcasters are meeting legislative requirements and industry Codes of Practice.

52. ACMA has identified the timeliness of investigations and the quality of programming data received from broadcasters to assess regulatory compliance

as the risks facing its regulation of commercial broadcasting. These risks have been rated low. However, the ANAO considers that there are also potential risks to the overall integrity of the co-regulatory approach, given the following:

- ACMA does not monitor the requirement for broadcasters to publicise the Codes of Practice and their complaints handling procedures;
- broadcasters potentially restricting the number of complaints they receive by not accepting emailed complaints;
- the considerable level of stakeholder dissatisfaction with the broadcasting complaints process reported in ACMA's *Reality Television Review*;
- ACMA does not verify the accuracy of the complaints and compliance data reported by broadcasters; and
- the high number of complaints handling breaches by broadcasters identified by ACMA, coupled with prima facie breaches not fully investigated.

53. In re-assessing the risks facing commercial broadcasting, ACMA should also consider the timeliness of addressing complaints, and the quality and completeness of complaints and investigations data. A further consideration is the risk of non-compliance not being properly addressed if enforcement action is not timely or followed-up by ACMA.

Performance management and reporting

54. Under the outcomes and outputs framework, agencies are expected to report annually against the performance indicators outlined in their Portfolio Budget Statements (PBS). ACMA plans its activities and monitors its performance against performance indicators in its divisional business plans. The relationship between performance indicators in the PBS and the relevant business plan was unclear. Without a reasonable degree of alignment between the two sets of performance indicators, and an explanation of the relationship between the two, it is difficult for ACMA to demonstrate that it has measured and reported against its regulatory outcomes and outputs.

55. Although ACMA has four distinct areas of regulatory responsibility—broadcasting, radiocommunications, telecommunications and online content, the PBS outcomes, outputs and (most of the) performance indicators are common to all. The context and relevance of each generic outcome and output differ for each area of regulation. Regulating telecommunications is very

different to regulating broadcasting, and so some performance indicators are more relevant and important to some areas of regulatory responsibility and less so to others. ACMA's future annual reporting would be more effective if it included reporting separately on its performance for each key area of regulatory responsibility.

Recommendations

Recommendation No.1 To improve the quality and transparency of investigations, the ANAO recommends that ACMA:

Para. 3.42

- (a) investigate all prima facie breaches of the complaints handling provisions of the commercial television and radio Codes of Practice;
- (b) improve the quality of the investigations data recorded in AIMS, to increase its effectiveness as a management tool; and
- (c) regularly analyse the investigations information in AIMS to identify any patterns or trends in non-compliance and to reduce the time taken to complete investigations.

ACMA response: Agreed

Recommendation No.2 To improve the effectiveness of the co-regulatory approach to broadcasting services, the ANAO recommends that ACMA review the complaints handling processes of broadcasters or networks where it identifies, through complaints and regular analysis of investigations data, a pattern of complaints handling breaches.

Para. 3.46

ACMA response: Agreed

**Recommendation
No.3**

Para. 4.21

To more effectively monitor compliance with the *Commercial Radio Code of Practice 4: Australian Music* by commercial radio broadcasters, the ANAO recommends that ACMA:

- (a) identifies and addresses any impediments to producing the annual reports so that they can be published within six months of the end of the financial year;
- (b) examines the reports for completeness and significant Code non-compliance and investigates as appropriate; and
- (c) includes a summarised report on compliance with the Code in its annual reports.

ACMA response: Agreed

**Recommendation
No.4**

Para. 5.13

To improve compliance with the requirement to notify ACMA of change of control events under Part 5 of the *Broadcasting Service Act 1992*, the ANAO recommends that ACMA:

- (a) finalise and implement a standard operating procedure for handling late or incomplete notifications; and
- (b) develop standard timeframes for imposing compliance and enforcement action, based on the seriousness of the breaches, and monitor performance against the timeframes.

ACMA response: Agreed

**Recommendation
No.5**

Para. 6.20

To further improve its performance management and reporting, the ANAO recommends that ACMA's future annual reports include regulatory performance reports for each area of regulatory responsibility using the key performance indicators in its Portfolio Budget Statements and business plans.

ACMA response: Agreed

Audit Findings and Conclusions

1. Background and Context

This chapter outlines the context for, and the broad approach to, ACMA's regulation of commercial broadcasting, as well as the audit's objective, scope and methodology. The chapter concludes with an outline of the report's structure.

Introduction

1.1 The Australian Communications and Media Authority (ACMA) is a statutory authority within the Australian Government portfolio of Broadband, Communications and the Digital Economy. ACMA was formed on 1 July 2005 following the merger of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA).

1.2 ACMA's regulatory functions are set out in the *Australian Communications and Media Authority Act 2005* (ACMA Act) and include the regulation of broadcasting, radiocommunications, telecommunications and online content. Under this Act, responsibility for decisions about the agency's regulatory functions rests with ACMA as an Authority.⁸ Under the *Financial Management and Accountability Act 1997*, responsibility for the governance and management of ACMA rests with the ACMA chair in his capacity as Chief Executive Officer.

1.3 ACMA's total expenditure in 2006–07 was \$89.6 million. As at June 2007, ACMA employed 552 staff located in Canberra, Sydney, Melbourne, and regional offices and operations centres in most States and the Northern Territory.

1.4 When it was established, ACMA assumed the ABA's functions in relation to broadcasting regulation. These include:

- regulating broadcasting services in accordance with the *Broadcasting Services Act 1992* (BSA);
- monitoring and investigating complaints relating to broadcasting services;
- monitoring compliance with industry Codes of Practice and standards;
- collecting fees for broadcasting licences;

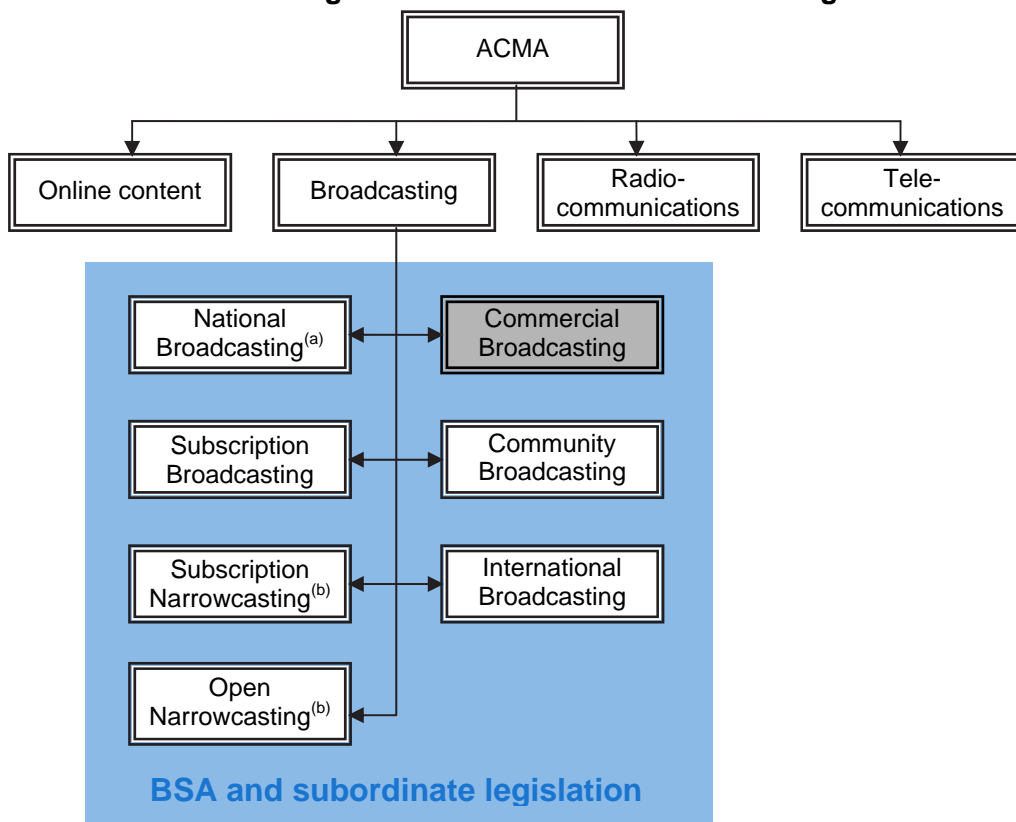
⁸ For the purposes of this audit, 'the Authority' is used to describe members of ACMA appointed under the *Australian Communications and Media Authority Act 2005* and 'ACMA' is used to describe the staff and management of ACMA, which may include Authority members.

- complying with the written directions of the Minister for Broadband, Communications and the Digital Economy (the Minister)⁹; and
- other functions conferred on ACMA by the BSA.

1.5 The BSA, its subordinate legislation (standards, regulations and notices) and industry Codes of Practice are the basis of ACMA’s regulation of Australia’s broadcasting industry. The Act classifies broadcasting services according to seven categories, which are outlined in Figure 1.1.

Figure 1.1

Context for ACMA’s regulation of commercial broadcasting



(a) The Australian Broadcasting Corporation and Special Broadcasting Service.

(b) Narrowcasting relates to services that are: targeted to special interest groups; only intended for limited locations or a limited period; or of limited appeal. For example, the Australian Motorcycle Grand Prix.

Source: ANAO analysis of ACMA data

⁹ For example, conducting investigations as directed by the Minister under s.171 of the *Broadcasting Services Act 1992*.

1.6 Commercial broadcasting is seen as one of the most influential categories of broadcasting services. As at June 2007, ACMA reported that there were 328 commercial broadcasters (274 radio and 54 television) whose combined revenue approached \$4 billion in 2005–06.¹⁰ Profits generated by commercial broadcasters during the same period totalled \$840 million.¹¹

Co-regulatory approach

1.7 The *Broadcasting Act 1942* provided for complaints to be made directly to the regulator. The BSA, however, adopted a co-regulatory approach to broadcasting services, which requires most complaints to be handled, in the first instance, by the bodies who have primary responsibility—the broadcasting licensees. This approach is intended to promote more streamlined, cost effective complaints resolution. Complaints may also be escalated to ACMA for review. In summary, the co-regulatory approach involves:

- the broadcasting industry developing their own Codes of Practice, against which their performance will be judged;
- ACMA approving the Codes of Practice, or developing legally-enforceable industry standards in the face of inadequate or absent Codes of Practice;
- broadcasters responding to complaints concerning their adherence to their Codes of Practice (Code complaints); and
- ACMA investigating:
 - those Code complaints where the complainants are not satisfied with the broadcasters' response, or do not receive a response; and
 - all other complaints (non-Code complaints) within its jurisdiction (for example, complaints related to standards, licence conditions, and media ownership and control).

1.8 The co-regulatory approach 'filters' the number of Code complaints received and investigated by ACMA. The 2575 Code complaints received by commercial broadcasters during 2005–06 and 2006–07 resulted in only 165 investigations by ACMA. Figure 1.2 demonstrates the filtering effect of this

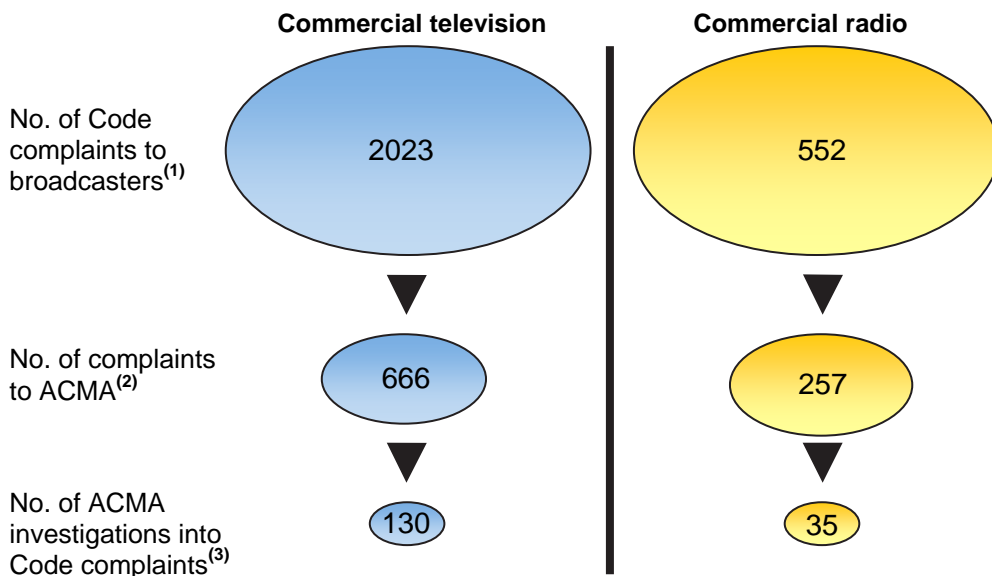
¹⁰ ACMA 2007, *ACMA Communications Report 2006–07*, pp. 86–88.

¹¹ *ibid.*

approach. Putting commercial broadcasting complaints into perspective, each year ACMA investigates about one commercial television complaint for every 6700 hours of television broadcasting and about one commercial radio complaint for every 126 000 hours of radio broadcasting.

Figure 1.2

Filtering of Code complaints through the co-regulatory approach over 2005–06 and 2006–07



Note 1: Broadcasters receive other complaints not related their Codes of Practice.

Note 2: Includes some complaints that are referred to broadcasters and other organisations. A small proportion of complaints relate to non-Code matters.

Note 3: Multiple complaints may be combined in one investigation.

Source: ANAO analysis of ACMA data

1.9 In undertaking its broadcasting services regulatory role, ACMA relies on television viewers, radio listeners and other industry stakeholders to inform it of alleged non-compliance with the BSA, its subordinate legislation and industry Codes of Practice. In the absence of complaints or other evidence of alleged breaches, broadcasters are, by default, assumed to be complying with their broadcasting requirements.

1.10 The current Codes relevant to commercial broadcasters are the *Commercial Television Industry Code of Practice (2004)* (TV Code) and *Commercial Radio Australia Codes of Practice and Guidelines (2004)* (Radio Code). Both Codes are being reviewed and are expected to be reissued in the second half of 2008. Matters covered by the existing Codes include:

- programming unsuitable for broadcast;
- programming classifications;
- news and current affairs programming;
- advertising and program promotions;
- Australian music (Radio Code only);
- complaints handling;
- interviews and talkback programs; and
- broadcasting of emergency information.

1.11 ACMA's experience has been that a co-regulatory approach—with registered codes as the industry's key contribution—makes it easier for the regulator and industry to adapt to the ongoing challenge of changes in technology and shifts in business models. It places industry closer to consumers and consumer views, places obligations on industry to deal with consumers concerns effectively and positions the regulator to deal with elevated disputes, systemic issues and contraventions of the law.

1.12 In addition to the co-regulatory approach, the BSA requires broadcasters and other sections of the media to lodge annual reports and notify changes in media ownership and control. Broadcasters are also required to provide programming information to ACMA to enable the regulator to assess compliance with: Australian, children's and local content quotas; and anti-siphoning legislative provisions.¹²

1.13 ACMA's regulatory approach to broadcasting services differs from those of other international regulators. Complaints about broadcasting services in the United States of America, United Kingdom and New Zealand go directly to the respective regulators. Canada has established an independent, non-government organisation to consider broadcasting complaints in its jurisdiction.

Audit objective, scope and methodology

1.14 The audit objective was to examine if ACMA is, in respect of commercial broadcasting services, effectively discharging its regulatory responsibilities under the BSA. The audit examined ACMA's:

¹² The anti-siphoning provisions prevent subscription broadcasters acquiring the exclusive broadcasting rights to particular sporting events determined by the Minister.

- monitoring of commercial broadcasters' compliance with the BSA;
- addressing non-compliance with, and enforcement of, the BSA;
- collection of broadcast licence fees; and
- monitoring and reporting of its regulatory performance in respect of commercial broadcasting.

The audit did not examine ACMA's role in:

- establishing the requirements that commercial broadcasters must meet;
- monitoring regional commercial radio broadcasters' compliance with local presence licence conditions, as these were being implemented at the time of the audit; and
- issuing and renewing commercial broadcasting licences. Licence renewal is automatic. ACMA has issued only a small number of new commercial licences since it was established and these related to digital television services.

1.15 The audit methodology included:

- analyses of databases and spreadsheets supporting the regulation of commercial broadcasters, including ACMA's Management Information System (AIMS);
- documentation and file reviews; and
- discussions with ACMA staff and the two peak industry associations representing commercial broadcasters.¹³

1.16 The audit was conducted in accordance with ANAO auditing standards and cost approximately \$370 000.

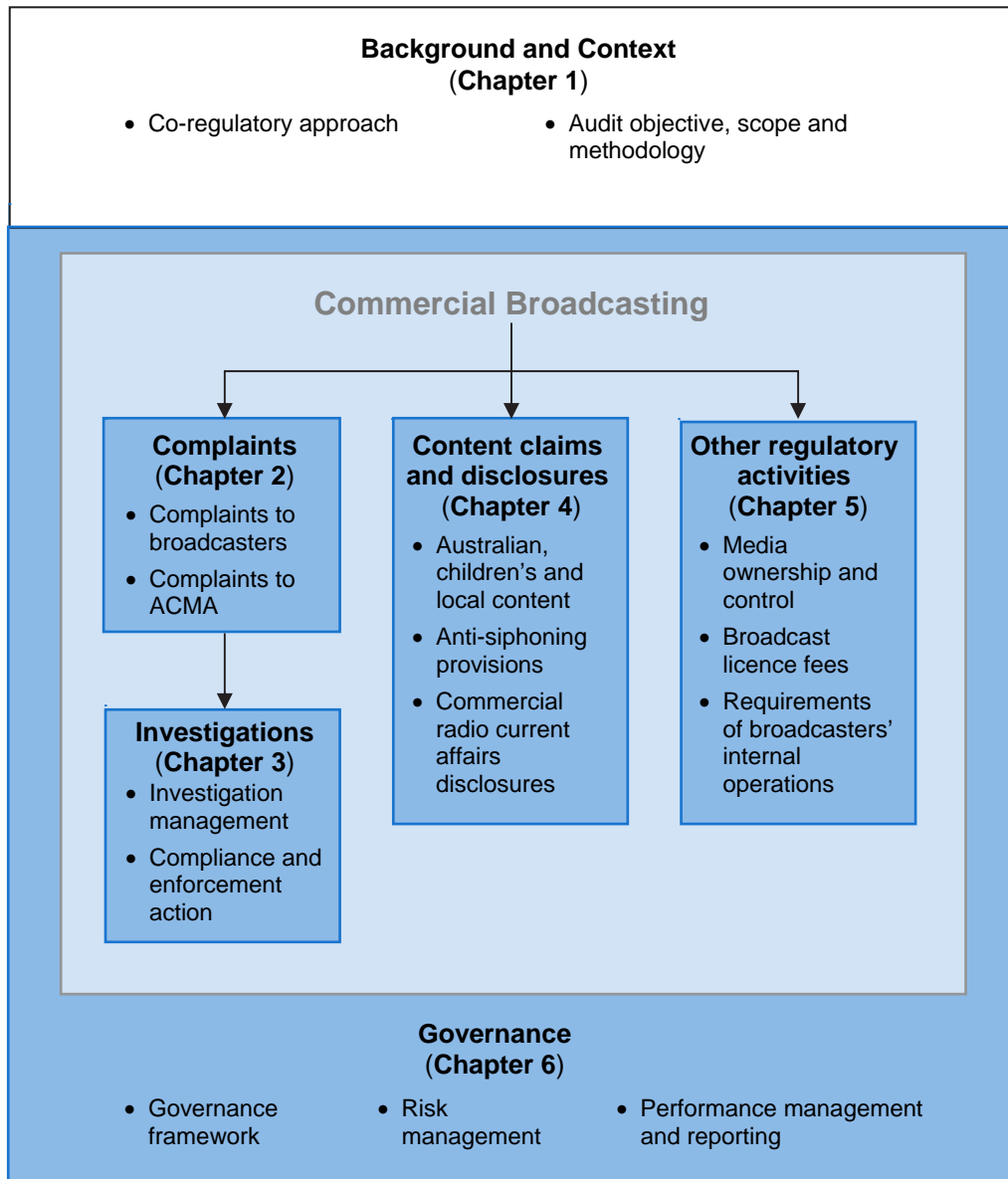
¹³ Free TV Australia and Commercial Radio Australia.

Structure of the report

1.17 The structure of this report is outlined in Figure 1.3.

Figure 1.3

Report structure



2. Commercial Broadcasting Complaints

This Chapter examines the complaints made to broadcasters in relation to program content and compliance with a Code of Practice (Code complaints). It also reviews ACMA's systems and processes for managing the Code and non-Code complaints it receives.

Introduction

2.1 The *Broadcasting Services Act 1992* (BSA) established a two-tiered approach for handling complaints about program content and compliance with a Code of Practice (referred to as Code complaints). Under these arrangements, Code complaints must be made to the relevant broadcaster in the first instance. The complaint may be escalated to ACMA if the complainant considers the broadcaster's response to the matter is inadequate, or if a response is not received within 60 days.¹⁴

2.2 Complaints about broadcasters committing offences against the Act or regulations, or breaching licence conditions or civil penalty provisions, are considered to be non-Code complaints. These complaints can be made directly to ACMA.¹⁵

Publicising the Code and its complaints procedures

2.3 For the co-regulatory approach to work effectively, the public needs to be aware of the process for lodging complaints about broadcast material. The TV and Radio Codes require licensees to provide regular on-air information about the Code and its complaints procedures. Commercial television broadcasters must broadcast 360 on-air notices each calendar year, across all viewing time zones.¹⁶ Commercial radio broadcasters must broadcast an announcement publicising the Code at least once every week, at different times and in different programs from week to week.¹⁷

¹⁴ S.148 of the *Broadcasting Services Act 1992*.

¹⁵ S.147 of the *Broadcasting Services Act 1992*.

¹⁶ TV Code clause 7.5.1. Clause 7.5.2 requires that the on-air information also explain how viewers may obtain copies of the Code.

¹⁷ Radio Code clause 7.2.

2.4 ACMA relies on complaints from the public to identify if broadcasters are not publicising the Code as required. As ACMA has not received any complaints about this matter, it does not believe it is an issue of concern to the community. However, it would be difficult for members of the public to detect any non-compliance by broadcasters with their requirement to publicise the Codes. ACMA would have greater confidence in broadcasters' compliance were they required to advise annually: that they have met their publicising requirements; and the dates and times of broadcasts, or announcements, publicising the Codes. Such information would allow ACMA to verify broadcasters' claims on a sample basis.

Code complaints received by commercial broadcasters

2.5 For a complaint to have the status of a formal Code complaint it must be made in writing to the licensee concerned, adequately identify the material broadcast, the nature of the complaint and the identity of the complainant.¹⁸ Unlike complaints made to ACMA, emailed complaints are not accepted. At the time of the audit, the TV and Radio Codes were under review and ACMA foreshadowed its intention to seek amendments to enable the electronic lodgement of complaints.¹⁹

2.6 Broadcasters are required to report regularly to their peak industry associations, Free TV Australia and Commercial Radio Australia, on the number and substance of Code complaints they receive. This information is then consolidated and provided to ACMA quarterly, and published in its *ACMASphere* magazine.²⁰ This process is designed to keep the industry associations and ACMA informed of emerging or systemic issues in program content or complaints resolution. The information is not verified by ACMA prior to publication, or analysed to identify any trends in Code complaints to broadcasters.

2.7 Code complaints made to commercial television broadcasters had been trending upwards; from 746 complaints in 2001–02 to a peak of 1109 in 2005–06, before recording an 18 per cent reduction to 914 complaints in 2006–07. Complaints against commercial radio broadcasters peaked at 413 in

¹⁸ TV Code Clause 7.2 and Radio Code 5. TV Code Clause 7.3.2 allows telephoned complaints and audio complaints where a complainant cannot lodge a written complaint by reason of disability.

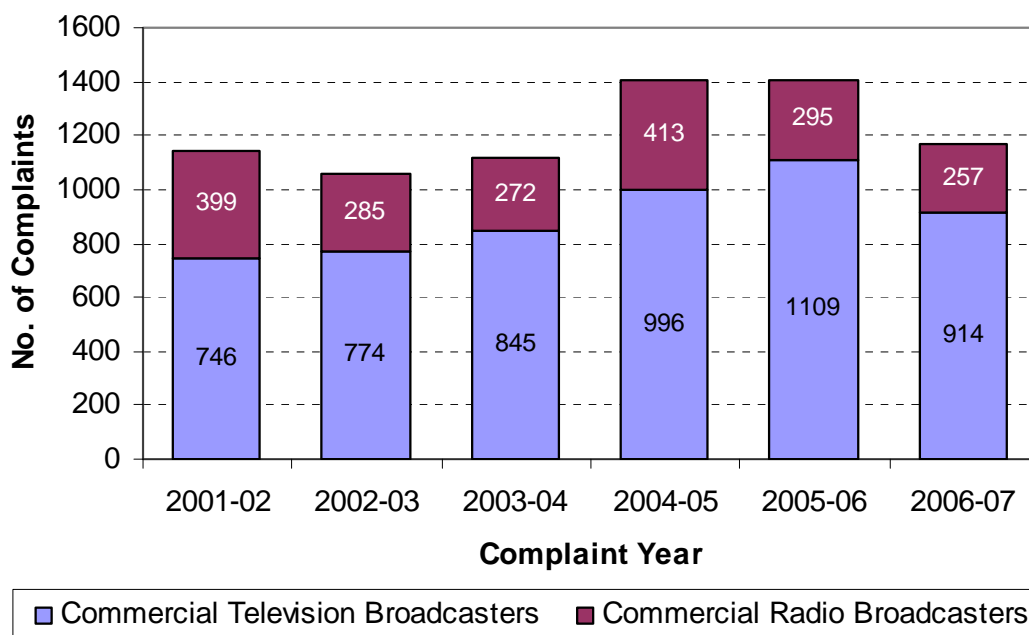
¹⁹ ACMA 2007, *Reality Television Review: Final Report*, Recommendation No.2, which is discussed later in this chapter.

²⁰ The *Reality Television Review* recommended that such statistics be provided to ACMA on a monthly basis in future.

2004–05, and the 257 complaints received in 2006–07 were the lowest number in six years. Figure 2.1 illustrates the number of Code complaints received by commercial broadcasters in the last six years.

Figure 2.1

Code complaints received by commercial broadcasters for the period 2001–02 to 2006–07



Source: ANAO analysis of figures published in Free TV Australia Annual Reports, and *ABA Update* and *ACMASphere* magazines

Making complaints to ACMA

2.8 Although ACMA has the power to initiate its own investigations²¹, in practice, it relies on the Code and non-Code complaints it receives to identify potential breaches of the BSA, regulations and standards, licence conditions and Codes. Complaints made to ACMA have wide-ranging content and may include: the loudness of advertisements; programs running over scheduled times; programs being inappropriate for the time broadcast; the factual accuracy of broadcasted material; and programs unsuitable for broadcast.

2.9 ACMA accepts broadcasting complaints by letter, email, telephone and fax. Email was the most popular method of lodging complaints in 2006–07. All

²¹ Under s.170 of the *Broadcasting Services Act 1992*.

broadcasting complaints are recorded in the 'Complaints' module of ACMA's Information Management System (AIMS), with each complaint allocated a unique registration or complaint number.

2.10 To aid potential complainants, ACMA provides a generic broadcasting complaints proforma on its website. It estimates that around 10 per cent of complainants used this proforma in 2006–07. However, it is not an online form and complainants must print the form before completing and posting/faxing to the broadcasters or ACMA. The form provides only a postal address for ACMA. Complainants would have easier access to ACMA were it to create an on-line complaints form and provide a fax number and email address.

Number of complaints received by ACMA

2.11 The ANAO examined the commercial broadcasting complaints received by ACMA since it has been established and the extent to which ACMA analysed complaints to identify any emerging trends.

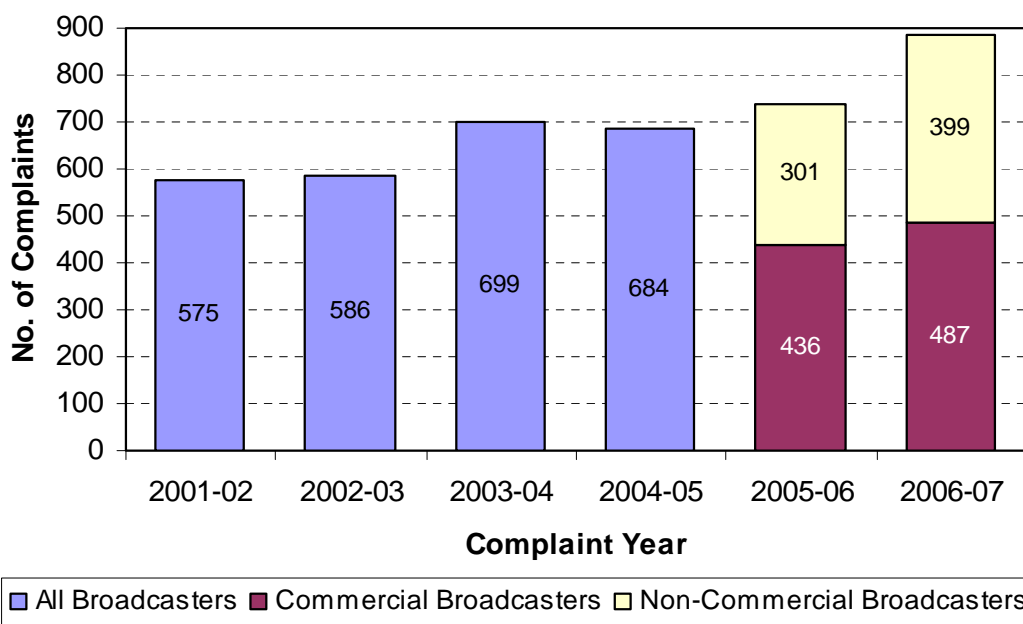
2.12 ACMA does not publish the breakdown of complaints received by type of broadcaster. The number of broadcasting complaints made to ACMA and its predecessor (for both commercial and non-commercial broadcasters) has been trending upwards over recent years. In 2001–02, 575 complaints were received and, in 2006–07, 886 complaints were received.

Commercial broadcasters

2.13 The ANAO's analysis of AIMS data identified 436 complaints (59 per cent) received during 2005–06 related to commercial broadcasters, and this increased to 487 complaints (55 per cent) during 2006–07. Figure 2.2 outlines all Code and non-Code complaints received by ACMA for the period 2001–02 to 2006–07.

Figure 2.2

All broadcasting complaints received by ACMA for the period 2001–02 to 2006–07



Source: ANAO analysis of data in ACMA and ABA Annual Reports.

Complaints by program type

2.14 ACMA classifies complaints by program type, where there is sufficient information in the complaints to do so. Complaints about advertisements, and current affairs and reality programs, have made up half of the commercial television broadcasting complaints received by ACMA during 2005–06 and 2006–07. Over the same period, talkback radio has dominated the classified complaints received for commercial radio broadcasting. Table 2.1 summarises the type of program complaints received during 2005–06 and 2006–07.

Table 2.1**Commercial broadcasting complaints by program type received for 2005–06 and 2006–07⁽¹⁾**

Program Type	Commercial TV		Commercial Radio	
	No.	Per cent	No.	Per cent
Advertisements	153	23	21	8
Current Affairs	86	13	3	1
Drama	50	8	-	
Information/Infotainment	13	2	1	<1
Light Entertainment—Reality	102	15	-	
Light Entertainment—Other	61	9	8	3
News	40	6	2	1
Program Promotions	28	4	-	
Religion	3	<1	-	
Sports	21	3	5	2
Talkback	-	-	123	48
Other Program	16	2	3	1
Not classified ⁽²⁾	93	14	91	35
TOTAL	666	100⁽³⁾	257	100⁽³⁾

Note 1: Includes complaints within and outside of ACMA's jurisdiction (see para. 2.17).

Note 2: Many of these complaints relate to programming or scheduling issues or complaints about ACMA's investigations.

Note 3: Does not add to 100 per cent due to rounding error.

Source: ANAO analysis of ACMA data

Identifying emerging trends

2.15 ACMA advised that, since July 2007, it has been formally documenting its analysis of, and responses (if any) to, emerging trends in the volume and nature of complaints received each month. From discussions with ACMA it is apparent that other relevant, but undocumented, intelligence (such as its knowledge of the content of the programs subject to complaints) also influenced its responses to these trends. Documenting all relevant considerations as part of its analyses in future would better demonstrate the appropriateness of ACMA's responses to emerging complaint trends. This analysis should also be considered when assessing the risks associated with regulatory compliance.

ACMA's management of complaints

2.16 It is important for ACMA to promptly determine whether complaints are within its jurisdiction or outside of its jurisdiction, and advise the complainants accordingly. It should also promptly action those complaints within its jurisdiction, either by referring complaints to the broadcaster to respond or by initiating an investigation. Any negative perceptions about the number of 'hoops to jump through', timeliness and the ultimate effectiveness of the complaints process will affect public confidence, and therefore their willingness to participate, in the regulatory process.²² ACMA's complaints handling process is illustrated in Appendix 2.

Complaints within and outside of ACMA's jurisdiction

2.17 ACMA usually classifies complaints as either being within jurisdiction or outside its jurisdiction, as they are received. This decision determines how ACMA will process the complaint. For complaints within its jurisdiction, ACMA will:

- ask complainants to take their Code complaints to broadcasters in the first instance; or
- initiate an investigation into Code complaints where the complainant is not satisfied with the broadcaster's response or where broadcasters provide no response within 60 days of complaint lodgement; or
- initiate an investigation into non-Code complaints.

2.18 The ANAO's analysis revealed that ACMA considered that over 40 per cent of all broadcasting complaints received during 2005–06 fell outside its jurisdiction. The number of these complaints decreased in 2006–07. However, there was a significant increase in the number of complaints that were not classified as either being within or outside of ACMA's jurisdiction (although most unclassified complaints would be the latter) (refer Table 2.2).

²² *Stakeholder feedback on complaints handling* is discussed later in this chapter.

Table 2.2**Classification of all broadcasting complaints for 2005–06 and 2006–07⁽¹⁾**

	2005–06		2006–07	
	No. ⁽²⁾	Per cent	No. ⁽²⁾	Per cent
Within jurisdiction	367	49	393	44
Out of jurisdiction	315	42	256	28
Not classified	70	9	254	28
TOTAL	752	100	903	100

Note 1: Complaints can contain more than one complaint subject. For the purposes of this analysis, complaints with at least one within jurisdiction matter have been classified as within jurisdiction, and complaints with no within jurisdiction matters and at least one out of jurisdiction matter have been classified as out of jurisdiction.

Note 2: The total number of complaints recorded in AIMS during 2005–06 and 2006–07 was slightly higher than reported in ACMA's Annual Reports (by 15 and seven, respectively).

Source: ANAO analysis of AIMS 'Complaints' module data

2.19 Responding to out of jurisdiction complaints consumes ACMA's resources that could otherwise be directed towards addressing relevant complaints. It is, therefore, in ACMA's interest to reduce the number of outside jurisdiction complaints it receives and to streamline its response to these. ACMA's website provides advice on the complaints it will handle and lists the other bodies responsible for various other types of complaints. However, further reducing out of jurisdiction complaints requires a good understanding of the types of complaints ACMA receives.

2.20 ACMA categorises out of jurisdiction broadcasting complaints into 16 categories. For example, the top three reasons relate to complaints covering:

- the content of advertisements (complainants are advised by ACMA to refer these matters to the Advertising Standards Bureau);
- program scheduling, including program selections (complainants are advised by ACMA to refer these matters to the broadcaster); and
- management issues in community broadcasting (complainants are advised by ACMA to refer these matters to the broadcaster).

2.21 However, more than half of all out of jurisdiction broadcasting complaints were coded under the 'other' reasons category. To further reduce and streamline its handling of these complaints, ACMA could:

- develop business rules for classifying complaint subject matters as either within or out of jurisdiction and encourage staff to consistently record the appropriate details of all complaints in the database;

- revise the out of jurisdiction reason codes to cover the most common categories, with a view to reducing the proportion of complaints classified under the 'other' reasons category; and
- periodically analyse the reasons for complaints and seek to identify mechanisms for minimising the number of out of jurisdiction broadcasting complaints received, where practicable.

Complaints handling procedures

2.22 Other than basic filing instructions, ACMA and its predecessor, the ABA, have not documented internal procedures and business rules for handling complaints—many years after the introduction of the co-regulatory approach. ACMA advised that a procedures manual for handling broadcasting complaints will be developed during 2008.

2.23 The ACMA website and brochure advise complainants that their name and address will usually be disclosed to the broadcaster concerned during the course of investigating the complaint and may also be published in a report or on the ACMA website.²³ Complainants can indicate if they do not want their details to be given to the broadcaster concerned, or used in any publication. ACMA routinely provided Code complainants' details to broadcasters where the complainants had requested it to maintain confidentiality. ACMA advised that it is modifying the confidentiality clauses on its complaints form, and information in its brochures and on its website, to include a clear statement:

- of the usual confidentiality practice for Code complaints; and
- that ACMA will consider all confidentiality requests from non-Code complainants on their merits.

2.24 The ANAO observed that ACMA's letters responding to complaints do not advise complainants of their rights to take the matter further if they are dissatisfied with ACMA's decision not to investigate. ACMA advised that, in future, it would inform complainants in its standard letters that complaints can be referred to the Commonwealth Ombudsman if they are dissatisfied with ACMA's decision not to investigate.

²³ Although the ANAO is not aware of any instances where ACMA has published a complainant's name and address in a report or on the ACMA website.

Deciding whether to undertake a formal investigation

2.25 The majority of commercial broadcasting complaints received by ACMA do not result in a formal investigation. Of the 923 complaints made to ACMA during 2005–06 and 2006–07, only 193 (21 per cent) resulted in a formal investigation.²⁴ Investigation team members recommend for investigation those complaints they consider are within jurisdiction and where broadcasters have had an opportunity to respond to Code complaints. The responsible senior executive confirms or rejects the team members' recommendations. Team members are, in effect, the decision makers when they decide not to investigate complaints.

2.26 Decisions on whether to investigate complaints, and their reasons, were generally adequately documented in AIMS. However, the ANAO identified a number of instances where it was difficult to understand the reasons for the decision not to investigate the complaints. For example, complaints that did not result in investigations included:

- a broadcasters' response to the complainant that did not advise that the matter could be referred to ACMA—a prima facie breach of the Code;
- complaints made to broadcasters that the broadcasters claim they never received (copies of which were provided to ACMA) where there may have been evidence to ascertain whether they had been received by the broadcasters; and
- a late response to a complainant from a broadcaster (where ACMA intervened on the complainant's behalf)—a prima facie breach of the Code.²⁵

In these three instances, ACMA advised that, contrary to its normal practice of conducting investigations, it forwarded the complaints to the broadcasters to provide a practical resolution for the complainants.

2.27 The ANAO considers that ACMA's management of complaints would be improved if it periodically examined whether broadcasters' responses met the complaints handling provisions of the industry Codes.

²⁴ Similar complaints are often combined into the one investigation. Consequently, only 178 investigations were conducted over this period.

²⁵ Chapter 3 contains further examples of matters contained in complaints that the ANAO considers were not adequately addressed in ACMA investigations.

Timeliness of complaints process

2.28 The former ABA had a target of actioning all broadcasting complaints within two days of their receipt. This target was varied when ACMA was established in 2005 to within seven calendar days of receipt. ACMA's annual reports indicate that the proportion of complaints actioned within this timeframe has deteriorated in the last couple of years—from 92 per cent (678 complaints) in 2005–06 to 63 per cent (554 complaints) in 2006–07.²⁶ For the period July to October 2007 this had fallen slightly further to 61 per cent.²⁷

2.29 There were often delays in responding to complainants while ACMA decided whether to investigate the matter. Some of these delays have meant that ACMA's advice to complainants to approach the broadcaster can be, and have been, received more than 30 days after the relevant broadcast. Under the TV and Radio Codes, broadcasters are not required to respond to complaints received more than 30 days after broadcast. To address any flow-on effect that the delay in processing complaints may have, ACMA advised that it would place advice to complainants on cut-off dates in its standard telephone message, standard letters and on its website.

Completeness of complaints data

2.30 Data in the AIMS 'Complaints' module was often missing for some relevant fields (including classification of the complaint as either within or outside ACMA's jurisdiction and the type of broadcaster). At times, inaccurate data were also recorded in some date fields. The database was not routinely updated to indicate that complaints had been appropriately actioned and 'closed'. At the time of the audit, over 40 per cent of commercial broadcasting complaints in AIMS (411 out of 995 complaints) were still listed with a status of 'new' or 'pending' although these complaints were more than three months old. ACMA advised that a senior officer within the Investigations Section performs an undocumented monthly check to ensure that all complaints have been actioned. Documenting these checks in future would demonstrate that they have been performed. Given the delays in responding to complaints observed during the audit, more frequent checking for overdue responses also appears warranted.

²⁶ No information was provided in ABA Annual Reports on the timeliness of actioning complaints.

²⁷ However, only 27 per cent of complaints were actioned within the timeframe during October 2007.

Conclusion

2.31 The absence of substantive, documented procedures for handling broadcasting complaints has contributed to the shortcomings in ACMA's management of complaints. Many years after the introduction of the co-regulatory approach, a procedures manual is being developed.

2.32 Although the majority of commercial broadcasting complaints were adequately addressed, the ANAO found that they were not always actioned within the seven day target. The underperformance in meeting the timeliness target would suggest that the current undocumented checks by management on the actioning of complaints are not always effective. Reducing the number of out of jurisdiction complaints and streamlining their handling would also free up resources for addressing relevant complaints.

2.33 The completeness and accuracy of complaints data would be improved if ACMA were to incorporate some basic automated error-checking routines into AIMS. Greater use could also be made of AIMS to control the processing of complaints and detect overdue responses. For example, AIMS could produce reports regularly to highlight due dates for responses and the current status of complaints.

Reporting on complaint management performance

2.34 ACMA has provided monthly consolidated performance reports to its Executive Management Group since July 2007. These reports include information on the number of complaints received and the number of complaints responded to, within its target of seven days. Regular monthly reporting will enable management to monitor complaints handling processes and performance more closely and initiate appropriate and more timely corrective action, where relevant.

External reporting of complaints

2.35 ACMA's annual reports include the number of complaints received in the reporting year and the number and percentage actioned within the seven day target. Nevertheless, the transparency and accountability of ACMA's complaints process could be improved by including the following details in future annual reports:

- a breakdown of the complaints total, such as the number and/or percentage of complaints received about commercial, community and national radio and television broadcasters;

- some contextual information, such as comparative figures for prior periods;
- the number and/or percentage of complaints that were considered by ACMA to be out of jurisdiction;
- a brief commentary on any emerging trends;
- if ACMA did not meet its target level of performance, a brief explanation of the reasons; and
- a discussion of any actions taken or proposed and the expected timeframes to address such under-performance, where applicable.

Stakeholder feedback on complaints handling

2.36 Stakeholder feedback can be a valuable tool for improving complaints processes and demonstrating its effectiveness. ACMA has no formal mechanisms for obtaining feedback from broadcasters, complainants or the general public on their perceptions of ACMA's complaint handling processes for broadcasting matters. The ANAO's examination of ACMA's call logging data, complaints data and written complaints identified some dissatisfaction with the broadcasting complaints process. The recent findings of the Reality Television Review reinforce the view that some members of the public are not entirely happy with the process. In April 2008, ACMA advised that it is in the process of initiating a client satisfaction survey covering its broadcasting complaints process. The information from this survey should be used to improve ACMA's complaints handling processes.

Reality Television Review

2.37 In October 2006, the then Minister for Communications, Information Technology and the Arts directed ACMA to investigate whether the TV Code was providing appropriate community safeguards and reflecting community standards in relation to reality television programming.²⁸ Among the specific matters to be investigated was whether the complaints mechanism in the Code was operating effectively and in a timely manner in relation to reality television programming.

²⁸ A Direction under s.171 of the BSA was issued as a result of 'public disquiet about some of the content of the Big Brother program in both its 2005 and 2006 seasons.' See page 5 of Reality Television Review Volume 1 Final Report.

2.38 Some 37 per cent of the public submissions received expressed dissatisfaction with the complaints handling process.²⁹ Reasons included the: duration of the complaints process; length of time taken by licensees to respond to initial viewer complaints; inability to refer matters directly to ACMA; and inconvenience of having to make a written complaint.³⁰

2.39 ACMA recommended to the then Minister that, to expedite and raise awareness of complaints processes, the TV Code be strengthened by industry through the following amendments:

- licensees allow formal Code complaints to be lodged electronically;
- licensees report to ACMA within three days of observing any significant variations in viewer complaints; and
- Free TV Australia provide ACMA with monthly reports on Code complaints, containing sufficient detail to enable ACMA to analyse complaints trends on an ongoing and timely basis.³¹

ACMA advised that it is pursuing these changes during the current review of the commercial television industry Code of Practice.

²⁹ ACMA 2007, *Reality Television Review: Final Report*, p.87.

³⁰ *Ibid*, p.95.

³¹ *Ibid*, p.95.

3. Commercial Broadcasting Investigations

This chapter examines how ACMA undertakes and reports its commercial broadcasting investigations. The compliance and enforcement activities resulting from these investigations are also reviewed.

Introduction

3.1 Under the BSA, ACMA must investigate all broadcasting complaints that are within its jurisdiction³² unless it is satisfied that the complaint is frivolous, vexatious, or was not made in good faith.³³ It may also self-initiate investigations for the purposes of performing or exercising any of its broadcasting, content and datacasting functions and related powers.³⁴ As well, the Minister may direct ACMA to investigate a matter under s.171 of the BSA. Broadcasting investigations are conducted in three Sections across two Branches in ACMA. It is therefore important that ACMA has efficient and effective systems, processes and procedures in place to undertake and manage these investigations.

3.2 The Chair of ACMA has publicly acknowledged that investigation is a core ACMA function and it needs to build on its experience and ensure that it has high quality procedures, standardised systems and methodologies, supported by better risk management practices.³⁵

Broadcasting investigations undertaken by ACMA

3.3 As previously noted³⁶, about 20 per cent of commercial broadcasting complaints to ACMA in 2005–06 and 2006–07 generated an investigation. Figure 3.1 shows that, over the last six years, ACMA (and its predecessor, the ABA) have commenced, on average, 133 broadcasting investigations annually, and completed, on average, 137 broadcasting investigations each year.

³² After Code complaints have first been responded to by broadcasters or no response is received within stipulated time limits.

³³ s.149 of the *Broadcasting Services Act 1992*.

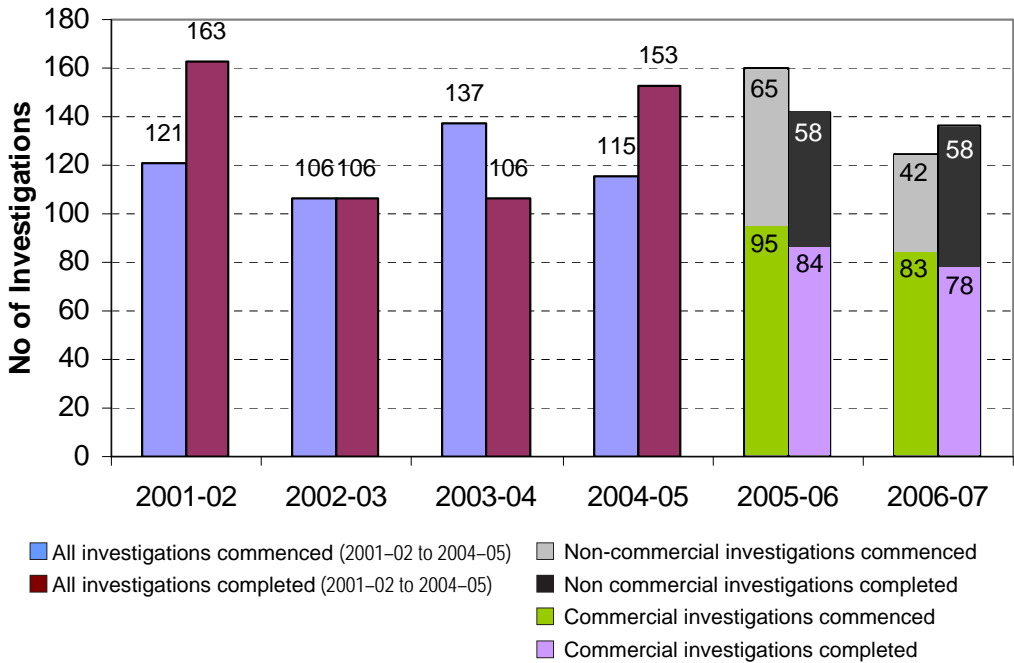
³⁴ Under s.170 of the *Broadcasting Services Act 1992*.

³⁵ *The legal challenges facing ACMA as regulator*, Speech by the ACMA Chair Chris Chapman, Sydney, 30 March 2007.

³⁶ Refer to para. 2.25 in Chapter 2.

Figure 3.1

Broadcasting investigations commenced and completed between 2001–02 and 2006–07



Source: ANAO analysis of data in ABA Annual Reports and data supplied by ACMA

3.4 In 2006–07, ACMA reported that it had commenced 125 broadcasting investigations³⁷, a 22 per cent decrease from the peak of 160 investigations started in the previous year. It also completed 136 broadcasting investigations in the same year, slightly lower than the 142 investigations concluded in the previous year.

3.5 ACMA does not publish breakdown figures on the number of broadcasting investigations undertaken by each broadcasting class. However, data in AIMS indicates that during 2006–07, ACMA:

- commenced 83 commercial broadcasting investigations (11 radio and 72 television), down from 95 investigations (27 radio and 68 television) the previous year; and

³⁷ However, the total number of investigations recorded in AIMS during 2006–07 was 134. ACMA advised that reconciling both sets of figures would require an unnecessary diversion of resources, but it was committed to adequately documenting future reconciliations.

- completed 78 commercial broadcasting investigations (15 radio and 63 television), down from 84 investigations (19 radio and 65 television) the previous year (refer Figure 3.1).

Commercial broadcasting investigations resulting from complaints

3.6 Although ACMA does not publish statistics on the types of investigations conducted, AIMS data indicates that for 2005–06 and 2006–07:

- nearly 90 per cent of broadcasting investigations (146) resulted from Code complaints;
- eight per cent resulted from non-Code complaints (13 investigations); and
- two per cent of investigations (three) were self-initiated by ACMA.³⁸

Issues covered by commercial broadcasting investigations

3.7 Ninety per cent of completed commercial television investigations involved: programs unsuitable for broadcast; the accuracy of reporting in news and current affairs programs; the classification of television programs, program promotions or advertisements; or complaints handling. Eighty-five per cent of completed commercial radio investigations involved programs unsuitable for broadcast or complaints handling. Table 3.1 expands on these issues. A complete list of the subject matters of investigations, the relevant legislation and the number of breaches found are outlined in Appendix 4.

³⁸ Examples of which include: those related to media ownership and control; whether Network Ten's *Big Brother Uncut* met the MA television classification; and whether prominent radio presenters adhered to the Commercial Radio Disclosure Standard.

Table 3.1**Issues common to many commercial broadcasting investigations**

Code subject matter	Description
Programs unsuitable for broadcast	Incite violence/brutality; hatred/vilification/discrimination; indecency; gratuitous language; offend cultural sensitivities; simulate news
News and Current Affairs	Inaccuracy; non-correction of errors; misrepresent viewpoints; failure to present significant viewpoints; gratuitous emphasis; fact and comment indistinguishable; create public panic; breach privacy
Complaints handling	No substantive response; no response within 30 days; failure to advise matters can be referred to ACMA
Classification: Program promotions and advertisements (<i>TV only</i>)	Inappropriate for G viewing periods; inappropriate intimate advertising; inappropriate advertising during sporting events
Classification: TV Programs (<i>TV only</i>)	Inappropriate for G; PG; M; or MA time zones; unsuitable for TV

Source: TV and Radio Codes

Number of breaches identified through investigations

3.8 The majority of commercial broadcasting investigations do not result in breaches being found against broadcasters. In addition, many investigations that identify breaches also contain other investigated matters that do not result in breaches. For example, out of the 162 investigations completed during 2005–06 and 2006–07, 126 (78 per cent) did not result in breaches being found against broadcasters. Over three-quarters of television breaches (31 in 24 investigations) involved complaints handling, news and current affairs, and the classification of television programs. Nearly three-quarters of radio breaches (15 in 12 investigations) involved complaints handling and programs unsuitable for broadcast. Appendix 4 outlines the results of investigations in more detail.

ACMA's management of broadcasting investigations

3.9 To assess ACMA's commercial broadcasting investigations, the ANAO:

- analysed data from the AIMS 'Investigations' module. This system records the key actions taken by ACMA during its investigations of broadcasting complaints since January 2005; and

- reviewed the case files for an indicative sample of 35 investigations. The ANAO also reviewed aspects of a further 53 commercial broadcasting investigations where the initial sample identified substantive issues such as in relation to complaints handling and providing final reports to complainants.

3.10 The ANAO examined the quality of ACMA's commercial broadcasting investigations from the aspects of their timeliness, thoroughness and completeness. To determine the thoroughness of investigations, the ANAO examined key decisions and actions common to all investigations.

Investigation policies and procedures

3.11 Similar to complaints handling, there is little documentation available covering the investigation practices and procedures that have evolved over the many years that ACMA and its predecessor have been conducting investigations. An Investigations Review commissioned by ACMA in mid-2007 also identified this shortcoming and recommended that ACMA develop and document its investigations procedures.³⁹

3.12 There is also no policy guidance for staff covering the circumstances under which ACMA should consider initiating its own investigations under the BSA. ACMA advised that a procedures manual for conducting broadcasting investigations will be developed during 2008. It also advised that, in future, its standard letter to broadcasters and complainants on the conclusion of investigations will inform them that they can refer the matter to the Commonwealth Ombudsman for review if they are dissatisfied with the result of ACMA's investigation. Appendix 3 outlines the processes for undertaking broadcasting investigations.

Delegated decision-making process for investigations

3.13 At the start of each investigation, ACMA decides whether the outcome will be determined by the Authority or a delegated officer.⁴⁰ In December 2006, ACMA began using a set of criteria, approved by the Authority, for determining the level at which investigation decisions should be delegated, if at all. These criteria refer to the broadcaster's and program's past compliance

³⁹ Hugh Watson Consulting 2007, *Report on the Review of Investigations Activities*, Recommendation 5, p. 6.

⁴⁰ Although investigation outcomes may be delegated, Authority members are sometimes given copies of their draft reports. Comments received, if any, are taken into account in the final report.

history, the seriousness of the issues to be investigated, potential political or media sensitivity, and the number of similar complaints.

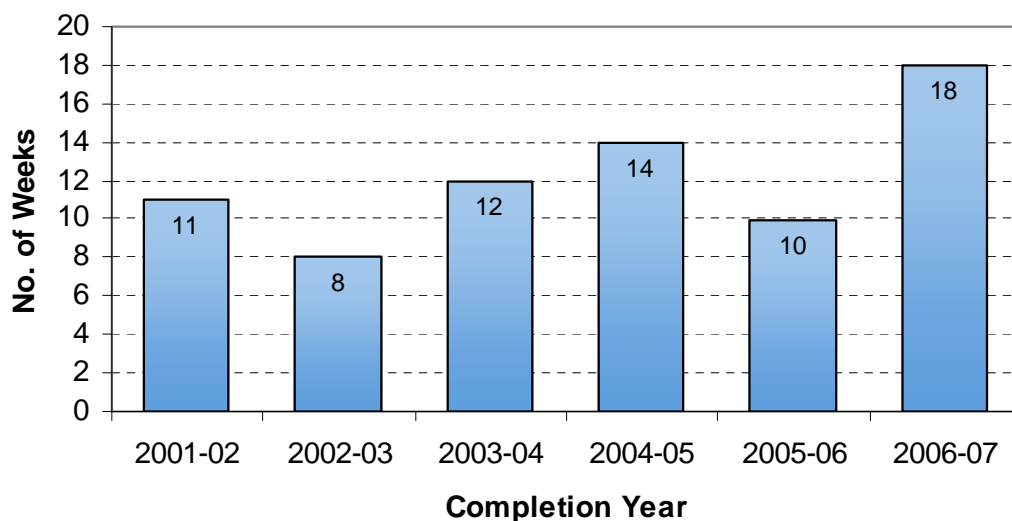
3.14 The ANAO found that about one-quarter of commercial broadcasting investigations were identified as Authority decisions (60 out of 256 investigations started and/or completed since January 2005). Nevertheless, as an investigation progresses, the level of delegation is reviewed regularly and may be varied as circumstances warrant. However, the decisions to alter the delegation of investigations were not always documented.

Timeliness of broadcasting investigations

3.15 An investigation process that swiftly determines whether broadcasters have breached or not breached their requirements under the Codes of Practice, standards, or legislation is a desirable outcome of the co-regulatory approach. Over the last few years, ACMA has used four months as the 'rule of thumb' for the length of time most investigations should take—with an expectation that the small number of more complex investigations would take longer to complete. The average duration of investigations finalised in the last five years was 10 to 14 weeks. ACMA indicated that the average time taken to complete all broadcasting investigations during 2006–07 has increased to 18 weeks (as outlined in Figure 3.2).

Figure 3.2

Average (mean) duration of completed broadcasting investigations for the period 2001–02 to 2006–07



Source: ABA Annual Reports (2001–02 to 2004–05) and ACMA data (2005–06 to 2006–07)

3.16 In reporting the duration of investigations, ACMA excludes the periods from when a complaint is received to when the investigation starts and from when the investigation report is signed to when the report is provided to the complainant. The ANAO notes that complaints generate broadcasting investigations and the BSA requires ACMA to inform complainants of the result of each investigation. For investigations completed between January 2005 and July 2007, these pre- and post-investigation periods averaged over three weeks per investigation. In addition to its current method of calculating investigation timeframes, ACMA should consider reporting investigation timeframes from the perspective of complainants by factoring in the pre- and post-investigation periods.

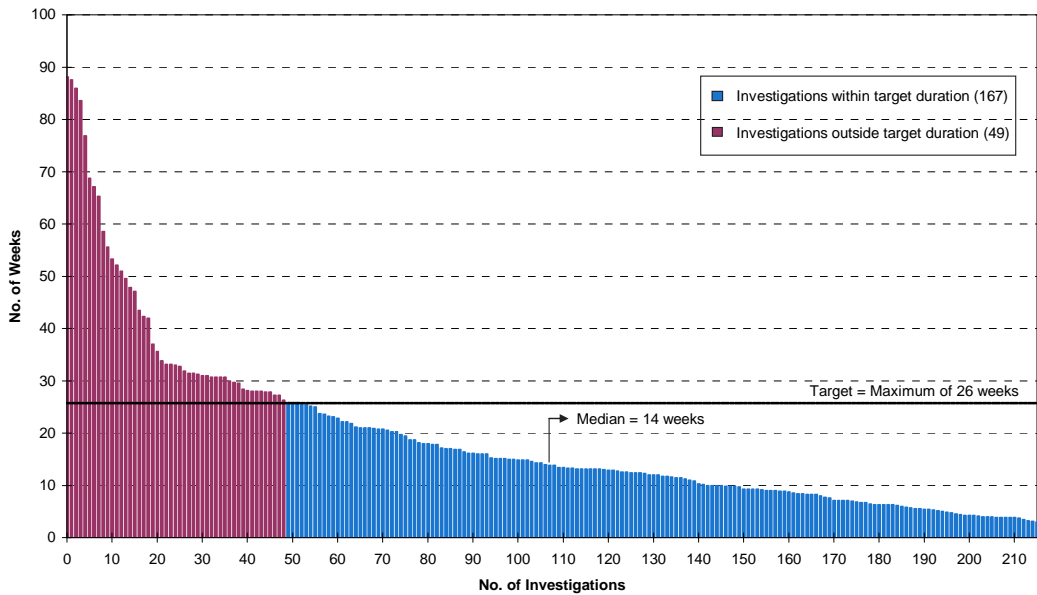
3.17 The ANAO found that the median time ACMA took to complete commercial broadcasting investigations was 97 days (almost 14 weeks)⁴¹, with nearly one-quarter exceeding 24 weeks. Figure 3.3 gives the duration of all commercial broadcasting investigations.⁴²

⁴¹ This figure takes into account the pre- and post-investigation periods noted above.

⁴² Commercial broadcasting investigations completed by ACMA ranged from three weeks to 88 weeks.

Figure 3.3

Duration of commercial broadcasting investigations (in descending order) completed between January 2005 and July 2007⁽¹⁾



Note 1: Excludes terminated investigations

Source: ANAO analysis of AIMS data.

3.18 In December 2006, the Authority formalised the timeframes in which investigations were to be completed. The timeliness targets (outlined in Table 3.2) are based on the number of broadcasts or issues investigated and whether breaches were involved. However, ACMA took over a year to begin monitoring the timeliness of broadcasting investigations against the revised timeframes approved by the Authority.

Table 3.2

Broadcasting investigation timeframes⁽¹⁾

Type of investigation	Duration
Non-breach investigation involving one broadcast or one issue	10 weeks (2.3 months)
Non-breach investigation involving several broadcasts or several issues	14 weeks (3.2 months)
Breach investigation involving one broadcast or one issue	22 weeks (5.0 months)
Breach investigation involving several broadcasts or several issues	24 weeks (5.5 months)

Note 1: Time between ACMA's decision to investigate and approval of the investigation report.

Source: ACMA Authority meeting papers

Reasons for delays

3.19 For those investigations that took longer than ACMA's timeliness targets, the reasons for their lack of progress were often not evident from the documentation available. For example, ACMA was not awaiting information or responses from complainants or broadcasters. ACMA also took six months to finalise one investigation into the single issue of an inappropriate word broadcast in a program promotion. ACMA advised that, in this instance, priority was given to other investigations. The ANAO also noted that ACMA's month-to-month broadcasting investigation workload (covering all classes of broadcasters) nearly doubled during the first half of 2007–08 (from around 35 investigations a month during the second half of 2006–07 to 69 investigations in progress in December 2007). This increased workload suggests that there is the potential for investigations to take even longer.

3.20 The ANAO observed three factors that contributed to delays during investigations:

- the time taken to obtain legal advice. Unnecessary delays occurred through miscommunications between the investigations areas and ACMA's Legal Unit, as well as there being limited legal resources in-house;
- the clearance of correspondence through the mailroom, which often took three to six days; and
- obtaining agreement between ACMA and the broadcaster for any enforcement action.

3.21 ACMA advised that it has now addressed the delays in obtaining legal advice. Its Legal Unit now meets frequently with the Investigations Branch to discuss priorities and timelines for providing legal advice on investigations matters. The cost of contracting-in lawyers or outsourcing legal advice when internal legal resources are not available to manage the workload is weighed against the urgency of the legal advice.

3.22 The ANAO considers that a greater use of electronic communications with broadcasters and complainants would help reduce some of the delays associated with clearing correspondence. ACMA could also release the investigation reports separate to the enforcement actions, where the broadcasters do not agree to the actions proposed by ACMA.

3.23 Reports on commercial broadcasting investigations are released, on average, some six months (26 weeks) after the date of the relevant broadcast.

The ANAO attempted to analyse AIMS data to determine the length of time taken for the various steps in the investigations process, but this was not possible because of the inconsistent and unreliable recording of information in AIMS. Improvements to ACMA's data recording would allow it to better:

- identify any patterns or trends in non-compliance with legislative requirements; and
- analyse the time spent on each component of an investigation to look for opportunities to streamline the process and reduce the time taken to complete investigations.

Thoroughness of broadcasting investigations

3.24 The ANAO examined the thoroughness of broadcasting investigations and identified shortcomings that were impacting on most stages of investigations, including:

- demonstrating consistency of decision-making;
- procedural fairness;
- releasing final investigation reports; and
- investigation record management practices.

Demonstrating consistency of decision-making

3.25 ACMA uses its expertise and experience to determine whether each issue investigated breaches the broadcasting legislation, Codes of Practice, or standards. Over many years, ACMA and its predecessor, have built up an extensive repository of decisions and precedents, which should be brought to bear on current investigations. Although ACMA is not bound by its precedents, referring to them while considering the facts of each new investigation will promote consistency of decision-making, and aid ACMA's accountability. ACMA's referral to the decisions made in the past was evidenced in only complex investigations, which make up a small number of all investigations. If reference was made in other cases, this was not documented. Past, relevant investigation decisions should be taken into account in ACMA's deliberations during investigations, and appropriately documented.

Procedural fairness

3.26 ACMA is required to seek and consider comments from persons adversely affected by their broadcasting investigation reports.⁴³ ACMA routinely gives draft reports to broadcasters for comment when it has made a preliminary determination that breaches have occurred. However, ACMA does not give the same draft reports to complainants for comment. In addition, complainants are not given an opportunity to comment when ACMA determines that no breaches have occurred. During the audit, ACMA's Legal Unit acknowledged that s.180 of the BSA is relevant to both complainants and broadcasters. It becomes particularly relevant for complainants in many news and current affairs investigations, where complainants have a personal interest.⁴⁴ The ANAO considers that ACMA should assess, on a case-by-case basis, whether complainants should be afforded the opportunity to comment on draft investigation findings and conclusions.

Releasing final investigation reports

3.27 ACMA is required to notify complainants of the results of its investigations.⁴⁵ It is ACMA's policy to provide complainants with a copy of the investigation report, following its approval by the Authority or delegate. In nearly one-third of the commercial broadcasting investigations (77) completed by ACMA between January 2005 and July 2007, there was insufficient data recorded in AIMS to determine whether the complainant had been sent a copy of the final investigation report. The ANAO identified three instances in the case files reviewed where a copy of the final investigation report had not been sent to the complainant, even though a copy had been given to the broadcaster. To prevent this situation from recurring, ACMA could enhance the effectiveness of AIMS as a management tool and mandate the entry of key investigation information (including the date final reports are sent to complainants) before an investigation can be recorded as finalised in AIMS.

Investigation records management practices

3.28 The areas within ACMA conducting broadcasting investigations adopt varying records management practices. For example, one Section creates separate registry files for each investigation, allocates an investigation number and records the key actions taken to progress the investigation in AIMS as they

⁴³ Under s.180 of the *Broadcasting Services Act 1992*.

⁴⁴ For example, where complainants were the subject of an adverse news or current affairs report.

⁴⁵ Under s.149 of the *Broadcasting Services Act 1992*.

occur. However, in another Section, registry files were not routinely created for all investigations and where files had been created, they did not contain all relevant documentation. A third Section tended not to allocate investigation numbers or enter details in AIMS until investigation reports were close to finalisation.

3.29 ACMA has developed a number of checklists designed to ensure that all required actions have been taken before closing a broadcasting investigation. However, the ANAO sited numerous cases where:

- there were no checklists, blank checklists or partially completed checklists on the investigation file; or
- the actions recorded as taken on the checklists had not actually been performed.

3.30 To address these inconsistent practices, ACMA advised that a record-keeping policy for broadcasting investigations would be developed and implemented. This policy should be included in the new broadcasting investigations procedures manual being developed during 2008. In addition, ACMA would have greater assurance of the quality of its records management practices were it to check regularly that all key documentation had been retained for a sample of completed investigations.

Completeness of broadcasting investigations

3.31 As previously discussed, under the respective Codes, commercial television and radio broadcasters must:

- provide a substantive written response to a complaint made about material broadcasted where the complaint is received within 30 days of the relevant broadcast;
- respond, generally, within 30 *days* for radio broadcasters or 30 *working days* for television broadcasters, of receiving the complaint; and
- advise the complainant that he/she can refer the matter to ACMA if he/she is not satisfied with the broadcaster's response.

3.32 ACMA found breaches of the complaints handling requirements of the Codes in 24 of the 220 broadcasting investigations finalised between January 2005 and July 2007. Overall, about one-third of all commercial broadcasting breaches (28) involved complaints handling issues. However, complaints handling breaches may be more prevalent than ACMA has

identified. It is ACMA's standard practice to investigate only breach allegations drawn to its attention by complainants. The ANAO identified, from the case files reviewed, a further:

- six instances where broadcasters had, prima facie, breached the requirement to respond within the required 30 days or 30 working days; and
- eight instances where broadcasters did not advise complainants that they may refer the matter to ACMA.

3.33 In addition, ACMA was slow to recognise the emerging pattern of particular broadcasters claiming that they did not receive the original complaint. The ANAO noted 13 instances where broadcasters claimed they had not received the original complaint, and therefore did not provide a response to the complainant within the required 30 days. In these cases, ACMA either did not investigate the matters or did not find breaches of the complaints handling Code provisions—giving broadcasters' the benefit of the doubt. ACMA could have investigated these cases more thoroughly. In some cases, complainants provided ACMA with a copy of their original complaint to the broadcaster. In others, ACMA could have requested copies of both the sender's and receiver's fax log records. Minor enhancements to AIMS could automate, and therefore improve, ACMA's identification of potential breaches of broadcasters' complaint handling.

Investigating all valid complaints

3.34 As previously discussed, ACMA must investigate every broadcasting complaint it receives that is within its jurisdiction, unless it is satisfied that the complaint is frivolous, vexatious, or not made in good faith. ACMA declines to investigate very few complaints using this exemption. The ANAO identified five within-jurisdiction complaints (each lodged months, and sometimes years, after the relevant broadcast) that ACMA declined to investigate, after it had obtained legal advice to the contrary. ACMA did not document its reasons for not investigating these matters. ACMA advised that there were significant practical impediments in undertaking investigations of dated complaints. These included the availability of the broadcast and, perhaps more importantly, of staff, reporter's notes and other material that would be relevant to the investigation. ACMA is currently investigating one of these matters after the Commonwealth Ombudsman reviewed ACMA's original decision.

3.35 In a further three cases, the ANAO raised concerns about the decisions taken by ACMA when conducting its investigations. These included:

- a television broadcaster providing two sets of amendments to the final broadcast schedule that supported its compliance with maximum hourly limits for advertising. ACMA did not examine the circumstances that led to the broadcaster's records requiring corrections due to scheduling changes;
- ACMA posing an ambiguous question to a broadcaster, resulting in a response that may not have addressed the substantive issue of the complaint; and
- a complaint of subliminal cigarette advertising, potentially breaching the Code and the TAP Act (and, therefore, the broadcaster's licence conditions), where ACMA conducted a limited investigation addressing the potential TAP Act breach, but did not address the potential Code breach.

Attributing breaches to broadcasters

3.36 The way breaches are recorded against broadcasters for upheld complaints does not adequately recognise programs broadcast by networks and syndicated radio programs. There are many commercial radio and television programs where the same episode or program content is broadcast across Australia, often simultaneously or near simultaneously. Well known examples include talkback programs on commercial radio and programs such as the Seven Network's *Today Tonight*, Nine Network's *A Current Affair* and Network Ten's *Big Brother* on commercial television.

3.37 When ACMA investigates and upholds a complaint, a breach is recorded against the licensee to whom the original complaint was made⁴⁶, notwithstanding that:

- the same program may have been broadcast by other licensees across Australia without breaches being recorded against them; and
- the licensee against whom the original complaint was made may not have control over the content of the program being broadcast.

3.38 Of the 56 investigations completed between January 2005 and July 2007 that found breaches against broadcasters, the ANAO identified 32 (57 per cent) where the offending program or program promotion is likely to have aired in

⁴⁶ Although in practice ACMA may deal with the network or program source when investigating the complaint.

multiple service areas.⁴⁷ Half of these are likely to have been broadcast nationally or near nationally.

3.39 ACMA needs to design a more equitable methodology for recording the breach history of broadcasters that takes into consideration the realities of networks, affiliates and syndicated programming. ACMA has acknowledged this is an issue and may consider raising it in the context of the current review of the commercial television industry Code of Practice.⁴⁸ If the review finds that refinements to the current legislation are required to implement improvements, ACMA should consider raising these with the Minister, with a view to seeking Parliamentary approval.⁴⁹

Conclusion

3.40 The ANAO identified deficiencies with the timeliness and management of commercial broadcasting investigations. Nearly one-quarter of investigations have exceeded ACMA's target of completing all investigations within 24 weeks. The average time for completing investigations in 2006–07 was 18 weeks, the longest it has ever been. This timeframe increases to 21 weeks were ACMA to include all elapsed time between receiving a complaint and informing the complainant of the investigation result. The increase in ACMA's investigations workload during the first half of 2007–08 suggests that there is the potential for investigations to take even longer. ACMA advised that it will continue to prioritise its investigations based on the risks they present and resourcing capability.

3.41 In summary, the issues relating to ACMA's management of its investigations included ACMA:

- lacks documented procedures for conducting broadcasting investigations;
- not fully investigating all prima facie breaches of the Codes relating to broadcasters' complaints handling;
- deciding not to investigate five dated cases, after obtaining legal advice to the contrary, without documenting the reasons for these decisions;

⁴⁷ The latter figure excludes investigations whose only breach relates to complaints handling.

⁴⁸ A new commercial television code is expected to be released in the first quarter of 2008–09.

⁴⁹ ACMA advised that under current legislation, it is open for it to designate investigations under s.170 of the BSA and record breaches against all licensees who broadcast offending programs. ACMA has never chosen this path.

- not documenting, for most investigations, any consideration of past, relevant investigation decisions or precedents;
- not assessing whether complainants should be afforded the opportunity to comment on draft investigation findings and conclusions, for procedural fairness purposes;
- not informing all complainants of the result of the investigations, as required by the *Broadcasting Services Act 1992*; and
- applying inconsistent records management practices.

Recommendation No.1

3.42 To improve the quality and transparency of investigations, the ANAO recommends that ACMA:

- investigate all prima facie breaches of the complaints handling provisions of the commercial television and radio Codes of Practice;
- improve the quality of the investigations data recorded in AIMS, to increase its effectiveness as a management tool; and
- regularly analyse the investigations information in AIMS to identify any patterns or trends in non-compliance and to look for opportunities to reduce the time taken to complete investigations.

ACMA response

3.43 ACMA agrees with the recommendation. ACMA considers that it is critical that consumers understand that they can escalate their concerns to the regulator if not appropriately handled by the broadcaster. ACMA will also undertake a body of work in 2008–09 to improve the data capture, validation and reporting capabilities of AIMS. ACMA regularly reviews investigations outcomes in order to identify patterns or trends which are included in new investigations reports and considered by ACMA’s senior management team on a regular basis. ACMA anticipates that improvements to AIMS will further enhance its capacity to capture trend and performance information relating to breach and non-breach data in a more timely and comprehensive manner.

Broadcasters’ complaints handling processes

3.44 Under the co-regulatory approach, ACMA views itself as a complaints-driven organisation. This approach to commercial broadcasting relies on complaints to detect non-compliance. When commercial broadcasters

breach the complaints handling provisions of the industry Codes of Practice the integrity of the co-regulatory approach is potentially undermined. ACMA's investigations have identified a high number of complaints handling breaches (28) and the ANAO's analysis identified further prima facie complaints handling breaches that were not fully investigated (14). Dissatisfaction with complaints handling processes was also raised in the recent ACMA Reality Television Review.

3.45 Although ACMA does not analyse completed investigations data, it is aware of the compliance history of broadcasters when undertaking investigations. However, past non-breach decisions where ACMA gave broadcasters the benefit of the doubt do not form part of the broadcasters' compliance history. These decisions should be taken into account in any regular analysis undertaken to identify systemic non-compliance with complaints handling provisions. Where deficiencies are identified, ACMA could then assess the effectiveness of the broadcaster's complaints handling processes and recommend improvements, where necessary.

Recommendation No.2

3.46 To improve the effectiveness of the co-regulatory approach to broadcasting services, the ANAO recommends that ACMA review the complaints handling processes of broadcasters or networks where it identifies, through complaints and regular analysis of investigations data, a systemic pattern of non-compliance with complaints handling provisions.

ACMA response

3.47 ACMA agrees with the recommendation. A recent example of where ACMA has adopted this approach is that, following the identification of a pattern of complaints handling breaches by the Nine Network, ACMA is monitoring the broadcasters' implementation of new procedures for complaints handling, including a regular reporting requirement.

Compliance and enforcement action

3.48 When regulatory non-compliance is found, ACMA should take action to address the risks posed by the non-compliance that is commensurate with the seriousness of the breach. The ANAO examined ACMA's compliance and enforcement activities in respect of commercial broadcasting regulation.

3.49 Enforcement action can be taken against a particular broadcaster, or against a section of the broadcasting industry by way of an industry standard for urgent and serious matters⁵⁰, or through a Code review for less urgent and serious matters. When ACMA's enforcement options were expanded by amendments to the BSA in 2006⁵¹, it issued guidelines in early 2007 to inform its staff, broadcasters and the public on how it would apply the new provisions.⁵²

3.50 For most breaches of the TV and Radio Codes, ACMA considers that the use of its enforcement powers may not be appropriate to the breach. Rather, it uses negotiated agreements with broadcasters to address non-compliance and generally accepts the actions broadcasters have taken or proposed to prevent recurrences. These commonly include training for staff on the Code requirements and improvements to broadcasting procedures.

Compliance and enforcement activities

3.51 For most compliance and enforcement actions (including those proposed by broadcasters and agreed by ACMA), ACMA does not require licensees to confirm that the actions have been implemented nor does ACMA follow-up to ensure this has occurred. Compliance and enforcement actions are not recorded centrally. This inhibits ACMA's ability to follow them up and bring past compliance and enforcement actions to bear on current enforcement considerations. Some form of broadcaster advice and checking by ACMA would provide greater assurance that compliance and enforcement actions have been implemented as ACMA intended.

3.52 Recent enforceable undertakings have required broadcasters to report regularly to ACMA on their progress towards compliance. Under the new media ownership and control laws introduced in April 2007, broadcasters can seek approval from ACMA to temporarily breach them. An enforceable undertaking agreed between ACMA and a broadcaster includes a provision for regular reporting to ACMA on their progress towards remedying the breaches. The ANAO suggests that, where relevant, ACMA apply this approach more

⁵⁰ Compliance with industry standards is a condition of all commercial broadcasting licences.

⁵¹ Enforcement options now include: (i) taking informal action, such as accepting an unenforceable (voluntary) undertaking; (ii) accepting an enforceable undertaking; (iii) issuing a remedial direction; (iv) imposing an additional condition on the licence; (v) issuing a civil penalty notice; (vi) suspending or cancelling the licence; and (vii) referring the matter for prosecution as an offence.

⁵² ACMA 2007, *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992*. There are generally more enforcement options available to ACMA for breaches of legislation, standards or licence conditions than for breaches of Codes of Practice.

broadly to its broadcasting compliance and enforcement actions to reduce the risk of non-compliance recurring. In addition, recording all compliance and enforcement actions centrally (such as in AIMS) would give ACMA a more informed view of regulatory compliance across broadcasters, and would aid the consistency of future application.

Stakeholder consultation

3.53 ACMA has mechanisms in place to obtain feedback on a regular basis from the commercial broadcasters about its processes and performance in investigating broadcasting complaints. In addition to its normal day-to-day interactions with the broadcasters, bi-annual meetings are also held with the industry peak associations.

3.54 Conducting regular surveys of users of services provided by Government is a good practice that can assist agencies to identify areas to continuously improve their service delivery. ACMA (and its predecessor) have not conducted any surveys covering the major stakeholders involved in the broadcasting investigations process. To remedy this, ACMA's proposed client satisfaction survey (discussed in Chapter 2) should be expanded to include complainants' experiences in dealing with ACMA during investigations.

Reporting on broadcasting investigations

Internal reporting

3.55 As previous noted, ACMA has only provided monthly consolidated performance reports to its Executive Management Group since July 2007. These reports include information on the number of current investigations, categorised by age, and some explanatory commentary and historical trend information. These reports enable management to monitor broadcasting investigations more closely and to initiate appropriate and more timely corrective action, where required.

External reporting

Annual Reports

3.56 ACMA's annual reports regularly include:

- the number and percentage of broadcasting investigations completed within four months of receipt of the complaint or further information; and

- a summary of each investigation finalised during the year in an appendix.

3.57 ACMA reported that 86 and 85 per cent of investigations were completed within four months in 2005–06 and 2006–07, respectively. However, the ANAO's analysis of AIMS data suggests that the reported results may be somewhat overstated. The AIMS database indicates that during 2005–06 about 81 per cent of investigations were completed within four months, with ACMA's performance falling to less than 53 per cent in 2006–07. ACMA advised that it is not able to divert resources to recalculate historical data, but commits to adequately documenting future reconciliations. Future annual reports will also include reporting against the new timeliness indicators approved by the Authority in December 2006.

3.58 ACMA's performance reporting on investigations is substantially less informative than that of its predecessor, the ABA. In addition to providing comparative figures for earlier years, ABA annual reports routinely included the following details:

- the number of investigations: carried over from the previous year; started during the year; and on hand at year end;
- an age analysis of investigations: carried over from previous year; and on hand at year end;
- the average time taken to complete investigations; and
- the percentage of investigations decided by the Authority and delegates within the target periods of six months and three months, respectively.

3.59 In addition to this information, ACMA could also consider disaggregating performance by the major types of investigations (such as commercial, community, radio and television) and provide some commentary identifying the reasons why performance fell short of targets, where applicable.

3.60 The summaries of each investigation reported in the Annual Report appendix would be more informative if they included the:

- investigation number, as this will help interested readers locate the relevant report and will also assist ACMA to identify any duplicate or missing entries;

- broadcast date, as reporting only when investigations are completed can mask, or incorrectly attribute, clustering of compliance issues; and
- duration of investigations, together with an explanation of the key factors contributing to the overall duration, where this exceeds the target timeframe.

Investigation reports and summaries

3.61 Constructive use of publicity can be an important element within an overarching strategy designed to foster a culture of voluntary compliance across the industry. As well, publicising ACMA's work and the reasons for its decisions can promote transparency and accountability. Where an investigation results in a breach being found against a broadcaster, ACMA publishes the investigation report on its website and issues a media release alerting interested persons about the availability of the report. Where an investigation does not result in breaches being found, ACMA publishes some limited information under its 'non-breach summaries' section of the website. In December 2006, the Authority agreed to the:

... publication of particular non-breach reports taking into account the likely public interest and the relative value and resourcing of necessarily providing natural justice to both the complainant and the licensee.

3.62 Publishing 'significant' non-breach reports in full would make ACMA's interpretation of current community attitudes, and the boundaries for breach and non-breach decisions, more transparent. ACMA advised in June 2008, that the release of such reports is being progressed.

4. Broadcasting Content Claims and Disclosures

This chapter examines the aspects of ACMA's regulation of commercial broadcasting relating to the content of broadcasts. The areas covered include: Australian, children's and local content; anti-siphoning provisions; and current affairs disclosures.

Introduction

4.1 ACMA requires commercial broadcasters to provide programming information to assess their compliance with the *Broadcasting Services Act 1992* (BSA), standards and Codes of Practice covering: Australian, children's and local content quotas; and anti-siphoning provisions.⁵³ Commercial radio broadcasters are also required to make on-air disclosures during current affairs programs of any commercial agreement between sponsors and presenters, and payment of production costs by advertisers and sponsors. The ANAO examined ACMA's processes for monitoring compliance with these requirements.

Australian, children's and local content

4.2 Commercial television and radio broadcasters are required to meet common minimum conditions and quotas for the Australian and children's programming they broadcast. For example, commercial television broadcasters are to broadcast each year a minimum of 55 per cent Australian programming between 6:00 a.m. and midnight. Commercial television broadcasters in regional areas are also subject to additional local broadcasting requirements.

Australian content on commercial television

4.3 Commercial television broadcasters are required to broadcast each year minimum quotas of: Australian programming; first release Australian drama, documentaries, children's programs, and children's drama; Australian preschool programs; repeat Australian children's drama; and all Australian

⁵³ The anti-siphoning provisions prevent subscription broadcasters acquiring the exclusive broadcasting rights to particular sporting events determined by the Minister. Commercial broadcasters are required to report to ACMA on their broadcasting of these sporting events.

children's programming.⁵⁴ In addition to an annual quota, first release Australian drama also has a three-year quota.

4.4 ACMA found that, in the 2005 and 2006 calendar years, broadcasters have met all requirements except for one broadcaster who failed to meet one of the program quotas by 30 minutes in 2005. ACMA accepted an undertaking that it would make up the 30 minutes of program time during 2006.

4.5 Each year, ACMA requires the 13 metropolitan commercial television broadcasters to submit reports that detail each broadcasted program they are claiming under the Australian content and children's television standards. ACMA's verifies broadcaster claims by:

- pre-classifying all Australian children's and preschool programs before they go to air;
- using an automated validation tool to check the spreadsheets, with any anomalies queried with the broadcasters concerned; and
- examining the bona-fides of new programming against Australian content standards.

The ANAO found that the automated validation tool helped ACMA to obtain quality information from broadcasters and that it appropriately determined the bone-fides of new programs.

4.6 The published compliance reports for metropolitan broadcasters detail the programs that comprise each network's programming quotas (except for the 55 per cent Australian programming quota). ACMA advised that industry stakeholders (including government media bodies, peak industry associations and broadcasters) carefully scrutinise these reports.

4.7 The 40 regional commercial television broadcasters also submit annual claims against the Australian content and children's television standards. Unlike metropolitan broadcasters who provide details of each program, regional broadcasters submit a summarised figure against each requirement. The information requested recognises that most regional broadcasters are affiliated with one or more metropolitan broadcaster. This means that little programming is sourced from the regional broadcasters themselves.

⁵⁴ Under the *Broadcasting Services (Australian Content) Standard 2005* and *Children's Television Standards 2005*. Australian programming is categorised as either first release (meaning its first broadcast on commercial television) or repeat. The quotas relating to Australian children's programming are not mutually exclusive.

Local content on regional commercial television

4.8 Commercial television broadcasters in the licence areas of Regional Queensland, Northern and Southern New South Wales and Regional Victoria have been required to broadcast common minimum quotas of material of local significance since February 2004.⁵⁵ Thirteen regional broadcasters must achieve the minimum quotas of 90 points weekly and 720 points over six weeks within the 20 local areas. Points are earned for material of local significance broadcast between 6:30 a.m. to midnight on weekdays and 8:00 a.m. to midnight on weekends during two designated 24 week periods each year.⁵⁶ Each half-year, regional broadcasters submit reports to ACMA that summarise the points they accrued each week. From this information, ACMA has determined that all regional broadcasters fully complied with local content quotas between February 2004 and July 2007.

4.9 To verify the accuracy of the point summaries provided to ACMA, a consultant was engaged in 2005 to conduct a preliminary evaluation of compliance with the licence condition. In response to some identified shortcomings, ACMA then consulted and workshopped with all broadcasters to clarify its record-keeping requirements and to address areas of ambiguity. In mid-2007, ACMA engaged consultants to audit compliance by three regional broadcasters in three local areas for periods of either one week (one audit) or six weeks (two audits). These audits found that, despite the complexity of their calculation, the points summaries provided by broadcasters to ACMA were accurate. Regular audits of broadcasters (on a sample basis) are an effective means of obtaining assurance that broadcasters continue to comply with the local content licence condition.

Australian content in television advertising

4.10 Eighty per cent of advertisements broadcast between 6:00 a.m. and midnight on commercial television are required to be produced in Australia.⁵⁷ ACMA relies on Commercials Advice Pty Ltd (CAD), a wholly-owned

⁵⁵ The *Broadcasting Services (Additional Television Licence Condition) Notice 7 April 2003*. Parliament decided to extend the local content regime to Tasmania from 1 January 2008. This will affect three more commercial television broadcasters in the one licence area.

⁵⁶ Points accrue on the basis of two points per minute of local area news and one point per minute for most other types of local content, excluding advertising and sponsorship material. Limits are placed on the reuse of material to accrue points.

⁵⁷ *Television Program Standard 23—Australian Content in Advertising*.

subsidiary of Free TV Australia, to classify advertisements as Australian, foreign or 'exempt'.⁵⁸ ACMA advised that advertising agencies:

- submit their advertisements to CAD for classification;
- answer questions relating to their compliance with the standard; and
- certify that the information they provide is correct.

4.11 ACMA also advised that third-parties, such as the Screen Producers Association of Australia, regularly scrutinise the classification of advertisements by CAD. Reviews of advertisement classification in 1999 and 2004 undertaken by ACMA's predecessor, the ABA, identified no significant problems with foreign advertisements being incorrectly classified as Australian.

4.12 Metropolitan television broadcasters are required to submit reports to ACMA each year summarising the percentage of their broadcasted advertisements that meet the Television Program Standard. From this information, ACMA has determined that metropolitan broadcasters met the Australian advertising quotas in 2005 and 2006. The percentage of Australian advertising reported by the broadcasters has ranged between 85 and 95 per cent for the last 10 years.

4.13 ACMA does not monitor the extent to which regional television broadcasters comply with the Australian advertising quotas. It considers that it is unlikely that a greater proportion of foreign advertising will be broadcast in regional areas than metropolitan areas—particularly as advertising specifically targeting local audiences is likely to be Australian. The ANAO considers this to be a reasonable approach.

High-definition digital television quotas

4.14 Commercial television broadcasters in metropolitan areas and some regional areas are required under the BSA to broadcast at least 1 040 hours of high definition television (HDTV) programming each year.⁵⁹ Broadcasters submit half-yearly returns to ACMA outlining monthly totals for the:

- hours of HDTV programs transmitted by the broadcaster overall, and in the prime viewing hours of 6:00 p.m. to 10:30 p.m.;

⁵⁸ Advertisements for imported cinema films, videos and recordings; advertisements for live appearances by overseas entertainers; and paid community service announcements are exempt from the standard.

⁵⁹ A pro rata HDTV quota is calculated for broadcasters in the first year where the quotas apply.

- duration of HDTV programs containing archival material;
- duration of the archival material; and
- maximum proportion of archival material contained in any of the programs.⁶⁰

4.15 From the information provided, ACMA has determined that, with the exception of one broadcaster in 2005, all affected broadcasters met the HDTV quotas in 2005 and 2006. The broadcaster failed to meet its pro rata quota of 780 hours by some seven hours, due to technical difficulties. ACMA determined that publicising the broadcaster's failure was sufficient action to take for this breach.

Australian music content on commercial radio

4.16 Commercial radio broadcasters are required to meet minimum quotas of Australian music in their broadcasts between 6:00 a.m. and midnight.⁶¹ Minimum quotas range from five per cent to 25 per cent, depending on the service format of the radio stations (as outlined in Appendix 5). Some broadcasters are also required to meet minimum quotas for new Australian music (as a proportion of all Australian music) of between 15 per cent and 25 per cent.

4.17 Under the Australian Music Code, the Australian Music Performance Committee (AMPCOM)⁶² is responsible for categorising each radio service into one of the five music categories and monitoring broadcasters' compliance with the Code. Commercial Radio Australia, the peak industry association, coordinates the compliance returns from all broadcasters and publishes AMPCOM's annual reports on its website. The Code has not set a timeframe within which annual reports are to be produced and published.

4.18 Recent AMPCOM annual reports have noted radio broadcasters' high compliance with the Australian Music Code component of the Commercial Radio Codes of Practice. As of May 2008, the 2006–07 AMPCOM Annual Report was not publicly available (although AMPCOM provided the ANAO

⁶⁰ *Broadcasting Services (Digital Television Standards) Regulations 2000.*

⁶¹ *Commercial Radio Code of Practice 4: Australian Music (the Australian Music Code).*

⁶² AMPCOM is a voluntary association comprising an independent chair and representatives from Commercial Radio Association (CRA), the Australian Recording Industry Association (ARIA), the Australian Music Publishers Association, the Musicians' union and the Media Entertainment and Arts Alliance.

with the data that will be reported). In reviewing these reports, the ANAO made the following observations:

- nine licensees (three per cent) did not meet all quota requirements for Australian content and/or new Australian content for the periods July to December 2006 and/or January to June 2007. This was an improvement on 2004–05 and 2005–06 where 11 per cent did not meet quota requirements;
- the service formats of 27 licensees reported in 2006–07 did not correctly align to the music categories. Ten of these licensees would not have met their quota requirements had they been classified correctly⁶³; and
- seven current licensees have been omitted from the AMPCOM annual reports because they are not affiliated with Commercial Radio Australia, the body that collects the compliance data.

4.19 ACMA has a broad oversight role to ensure that registered Codes of Practice are 'operating to provide appropriate community safeguards'.⁶⁴ Currently, it does not monitor or oversee the Australian Music Code. ACMA indicated that its role in respect of broadcasters' compliance with the Code is the investigation of valid complaints. As ACMA has not received any complaints about this matter, it does not believe it is an issue of concern to the community. However, Code complaints are initially made to the licensee concerned and not ACMA.

4.20 To provide assurance that the industry is complying with the Code (within the meaning of the BSA), ACMA should identify and address any impediments to the timely production and publication of the annual reports on Australian music, and monitor broadcasters' reported compliance with the Code.

⁶³ In 2004-05, four of the 17 licensees incorrectly categorised would not have met their quotas. In 2005-06, four of the 27 licensees incorrectly categorised would not have met their quotas.

⁶⁴ Under s.125 of the BSA, ACMA can determine a program standard where it is satisfied that a registered Code of Practice is not providing appropriate community safeguards.

Recommendation No.3

4.21 To more effectively monitor compliance with the *Commercial Radio Code of Practice 4: Australian Music* by commercial radio broadcasters, the ANAO recommends that ACMA:

- (a) identifies and addresses any impediments to producing the annual reports so that they can be published within six months of the end of the financial year;
- (b) examines the reports for completeness and significant Code non-compliance and investigates as appropriate; and
- (c) includes a summarised report on compliance with the Code in its annual reports.

ACMA response

4.22 ACMA agrees with the recommendation. ACMA will discuss the recommendation with Commercial Radio Australia and take the recommendation into account in its registration of the revised Codes of Practice, which are currently under review. ACMA notes that the current code does not require annual reports to be published within six months of the end of the financial year and that the code will be subject to public consultation. ACMA further notes that it has not received any complaints on these matters since the current Code commenced in 2004.

Anti-siphoning provisions

4.23 The BSA allows the Minister to list, in a formal notice, events that should be available to free-to-air (FTA) television for viewing by the general public.⁶⁵ This list is known as the 'anti-siphoning list'. Anti-siphoning provisions are designed to prevent subscription broadcasters from acquiring exclusive broadcasting rights to listed events.

4.24 In May 2004, the former Minister for Communications, Information Technology and the Arts determined a new anti-siphoning list with effect from 1 January 2006 to 31 December 2010. The list covers 12 sports and 30 events. ACMA is to monitor the operation of the anti-siphoning list over this period and provide interim reports to the Minister at least every six months. Between

⁶⁵ s.115 of the *Broadcasting Services Act 1992*. FTA broadcasters include commercial broadcasters and the national broadcasters (that is, the Australian Broadcasting Corporation and Special Broadcasting Service).

January 2006 and March 2007, ACMA had reported on over 11 000 'games' covered by the anti-siphoning list and broadcast by the commercial broadcasters.⁶⁶

4.25 In December 2006, the former Minister announced 'use it or lose it' guidelines that, from 1 January 2007, were to inform future ministerial consideration of whether particular events on the anti-siphoning list had received adequate 'use' (that is, broadcast coverage). Listed events that do not receive adequate broadcast coverage are at risk of being de-listed by the Minister, which would allow subscription broadcasters to acquire their exclusive broadcasting rights. To December 2007, ACMA had submitted six anti-siphoning reports to the former Minister, including one under the 'use it or lose it' guidelines. ACMA indicated that the use of listed events by commercial broadcasters, and ACMA's anti-siphoning reports (when published), are scrutinised by subscription broadcasters and their peak industry association. It also advised that it has not received complaints about the accuracy of its anti-siphoning reports.

Content of the anti-siphoning reports

4.26 Broadcasters supply the data that ACMA analyses and reports to the Minister and the ANAO found relatively few errors or anomalies in the data.⁶⁷ Information typically reported in the July 2007 report for each event includes summaries of the:

- broadcast rights held by the networks;
- extent to which games were broadcast live (by category);
- proportion of the games' duration that was broadcast (by category);
- proportion of Australia's population covered by the broadcast event (that is, population reach).⁶⁸

⁶⁶ Listed events can have one or more games. 'Games' are the most detailed level of reporting by broadcasters. It can refer to, for example, an individual tennis match, a rugby league or Australian Football League (AFL) match, or a day's play at the cricket or golf.

⁶⁷ ACMA uses an automated validation tool to check broadcasters' data for errors before reports are produced.

⁶⁸ Population reach is the number of people in each licence area (after eliminating population overlap to avoid double counting) covered by broadcasters. Population reach does not refer to the viewers actually watching the broadcast, but refers instead to the number of viewers who would be able to watch the broadcast, should they choose to do so. The maximum population reach of the three networks ranges from 98.3 to 99.97 per cent of Australia's population.

4.27 However, notwithstanding the differences between listed events, there is great variability in the type of information reported and their methods of presentation—within and between reports. ACMA agrees that there is a need for greater consistency of reporting on the anti-siphoning scheme. The consistency of ACMA's reporting of the anti-siphoning scheme would be enhanced were it to apply a consistent reporting process or method. For example, a method that describes for each event: the rights available to and retained by broadcasters; how the rights were used (that is, broadcast); and the proportion(s) of population reached, will assist stakeholders to compare more easily the extent to which events covered by the anti-siphoning provisions have been broadcast.

4.28 When producing the July 2007 anti-siphoning report, ACMA gave the broadcasters an opportunity to comment on the draft of the event descriptions and the broadcasting rights they acquired. However, broadcasters were not given an opportunity to comment on ACMA's analyses of the extent to which the rights were made available to another broadcaster (for multi-part simultaneous events only), live types, broadcast durations, and population reached. The accuracy of the report's analyses is important as they are a major input into the Minister's consideration of the future coverage of the anti-siphoning scheme. Making the analyses available to broadcasters for comment before their submission to the Minister would provide ACMA with greater assurance of their accuracy. Anti-siphoning reports are made public at the Minister's discretion.

Verification of broadcasters' claims

4.29 For the most part, ACMA does not independently verify the accuracy of the Australian and children's content, and anti-siphoning information provided by broadcasters. Local content is the only area where ACMA independently verifies the broadcasters' claims of compliance. For the Australian Music Code and Australian advertising standard, ACMA relies on intermediaries to monitor Australian music broadcast on commercial radio (AMPCOM) and to determine the Australian content of advertising broadcast on commercial television (CAD).⁶⁹

4.30 ACMA advised that it does not independently verify the Australian, Children's, HDTV and anti-siphoning information claims of broadcasters

⁶⁹ The intermediaries are associated with the peak commercial broadcasting bodies and broader industry associations.

because of the scrutiny provided by third parties and the lack of other intelligence (such as upheld viewer complaints) that would indicate the accuracy of broadcasters' claims to be an area of concern. ACMA also considers that the potential costs of independent verification outweigh the assurance benefits. While appreciating that there is a balance to be struck, a risk based approach to monitoring would normally be applied in such circumstances to provide some assurance that broadcasters adhere to their regulatory requirements. This may involve gaining an appreciation of broadcasters' compliance processes and evaluating other industry intelligence. If necessary, ACMA could address any residual risk by independently verifying broadcasters' compliance claims (on a sample basis).

Commercial radio current affairs disclosure

4.31 Commercial radio broadcasters are required to provide ACMA with summaries of commercial agreements between sponsors and presenters of current affairs programs.⁷⁰ Notifications are placed on ACMA's Register of Notifiable Commercial Agreements, which is available on its website. The ANAO examined the Register and found:

- ACMA received late notification of 15 commercial agreements (involving five broadcasters), with delays in some cases exceeding six months; and
- numerous instances of the date of the agreement being recorded as 'ongoing' (including all agreements of one broadcaster), which makes it difficult to determine whether the notifications were received within the specified timeframe.

4.32 ACMA advised that it relies on complaints to trigger investigations into any potential breaches of this standard and has taken no action in respect of late notification of, or undated, commercial agreements. However, without an up-to-date and complete Register, listeners are inhibited from lodging complaints should they consider radio presenters are not making all relevant on-air disclosures of commercial agreements. Further:

⁷⁰ *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*. Presenters are required to notify licensees of new commercial agreements within seven days and licensees to notify ACMA within a further 14 days.

- licensees may be at risk of under-reporting their gross earnings for the purposes of calculating their broadcast licence fees⁷¹; and
- repeated late notifications may indicate weaknesses in the offending broadcasters' compliance programs.⁷²

4.33 ACMA should communicate with the broadcasters to encourage them to disclose commercial agreements in a timely manner. This could also involve an increased focus on broadcasters' legislated compliance programs.

⁷¹ ACMA has received legal advice that fees received by radio presenters for direct endorsements, favourable commentary or advertising could be treated as part of the gross earnings of the licensee.

⁷² As required under the *Broadcasting Services (Commercial Radio Compliance Program) Standard 2000*.

5. Other Regulatory Activities

This chapter examines ACMA's regulatory activities associated with media ownership and control and broadcast licence fees.

Media ownership and control

5.1 ACMA has responsibility for monitoring the media industry's adherence to the ownership and control rules established by the BSA. The media laws in place up to 31 January 2007 contained prohibitions on foreign ownership and control, and controlling more than one licence in a licence area.⁷³ New media laws, under the *Broadcasting Services Amendment (Media Ownership) Act 2006*, came into effect on 1 February 2007. The new arrangements introduced prohibitions on unacceptable media diversity situations and unacceptable three-way control situations.⁷⁴ The public is kept informed of changes in ownership and control through ACMA's Notifications Register.⁷⁵ The ANAO examined ACMA's management of licensees' and publishers' compliance with the reporting requirements of the BSA.

Compliance with the previous media ownership and control rules

5.2 The media ownership and control rules that applied up to 31 January 2007 required commercial radio and television licensees to provide annual returns outlining the people in control of the licences, and to notify ACMA when controlling interests changed. Returns for 2005–06 covering all licences, with the exception of two, had been submitted by November 2006. The owner of two radio licences in regional WA did not submit annual returns and ACMA was of the view they had ceased broadcasting.

5.3 During the period from July 2005 to 3 February 2007 (the day before the new media control laws came into force), ACMA received 66 notifications of changes in control involving 189 commercial radio licences and 13 commercial

⁷³ Licence areas are the specified geographic boundaries of television and radio licences. Licensees must, within the context of broadcasting practicalities, broadcast only in their licence areas.

⁷⁴ An **unacceptable media diversity situation** arises if there are fewer than five points in any metropolitan licence area or fewer than four points in any regional licence area. In general, each registrable media group constitutes one point, as does each separate media operation that is not part of a registrable media group. An **unacceptable three-way control situation** arises if a person is in a position to exercise control of a commercial television licence, a commercial radio licence and an associated newspaper in the one radio licence area.

⁷⁵ Reports based on the register are on ACMA's website at www.acma.gov.au.

television licences.⁷⁶ The ANAO noted major prima facie non-compliance by licensees in lodging notifications within the required seven days.⁷⁷ Over half of the notifications were lodged more than a month after the relevant transaction, including 19 notifications (29 per cent) that were lodged over a year after the transaction.

5.4 ACMA advised that no formal enforcement action has been taken or is proposed in respect of the breaches under the old media ownership and control laws. ACMA decided that, as the laws had changed and the only remedies available under the old laws involved prosecution by the Director of Public Prosecutions, it was more appropriate to take an educative approach in the first few months, following the introduction of the new media ownership and control laws. The new laws also give ACMA a greater range of enforcement options, including the ability to issue infringement notices. ACMA advised in April 2008 that it was sending letters informing licensees of the new notification provisions.

Compliance with the new media ownership and control rules

5.5 The Register of Controlled Media Groups (RCMG) is a core component of the new media ownership rules. It lists the media groups in each licence area, the media operations that form part of a group and the controllers of those operations. The RCMG was created from notifications received from media owners and controllers and published by ACMA in March 2007.⁷⁸ The RCMG provides new information to the industry and the community on the existence of registrable media groups in licence areas across Australia. ACMA received all required notifications in respect of licensees and publishers, albeit a few after the due date, with the exception of two radio licences.⁷⁹ In March 2007, ownership of these licences was transferred and ACMA indicated it was monitoring compliance by the new owner.

5.6 In early April 2007, ACMA wrote to 25 licensees/publishers indicating that it had not received the required notifications from 50 *controllers*.⁸⁰ Formal

⁷⁶ Some notifications separately recorded by ACMA are related to the same media transaction. Some licences are included in more than one notification.

⁷⁷ In some cases, licensees may not be aware of relevant transactions at the time they occur and only become aware at a future time (for example, changes in ownership of a 'distant' holding company that indirectly controls a licence).

⁷⁸ This was a one-off requirement. Note that annual notifications are also required under s.62 of the BSA.

⁷⁹ The same two licences that failed to lodge their 2005–06 annual returns (see para. 5.2).

⁸⁰ A controller of a media group means a person who is in a position to exercise control of each media operation in the media group.

warning letters were then sent to the 17 persons/companies that had still not provided notifications by mid-April 2007. By August 2007, ACMA indicated that all persons had complied with their obligations.

Notifying ACMA of changes to media control and ownership

5.7 The new media ownership and control rules also require commercial radio and television licensees to notify ACMA when controlling interests change and to provide annual returns outlining the people in control of licences.⁸¹ ACMA must enter changes into the RCMG, where required, as ‘unconfirmed’ within two days of receiving notifications⁸² and review and confirm or cancel the entries within 28 days. Similar requirements apply to the removal and alteration of entries.

5.8 In August 2007, ACMA conducted a ‘stocktake’ of the timeliness of these notifications under the new arrangements which were implemented from 4 February 2007. A draft internal report found that many licensees/publishers/controllers had lodged notifications late, or had failed to notify ACMA of change of control events. During the period 4 February 2007 to 18 July 2007, ACMA received 33 change of control notifications involving 145 commercial radio licences, 13 commercial television licences, and 12 associated newspapers. Of these, ACMA identified 18 cases of late notifications or failures to notify ACMA, including three that were more than 10 years late. The draft report recommended sending formal warning letters to licensees, publishers and controllers in 15 cases—as a precursor to issuing infringement notices. The draft report also recommended ACMA adopt a standard procedure for dealing with late or incomplete notifications of change of control events.

5.9 ACMA advised that a review of the internal report was completed in February 2008 and enforcement action has commenced—twelve formal warnings have been sent and one infringement notice is being prepared. ACMA is still to develop a standard procedure to maximise compliance by licensees, publishers and controllers with the new media laws. The ANAO considers that it is in ACMA’s interests to develop and implement a standard procedure as soon as possible. Further, the timeliness of compliance and enforcement action would improve were ACMA to develop standard timeframes for imposing compliance and enforcement action, based on the

⁸¹ This requirement is now extended to publishers of associated newspapers.

⁸² So long as the change event does not result in an unacceptable media diversity situation or an unacceptable three-way control situation or breach any statutory control rules.

seriousness of the identified non-compliance. Monitoring against the standard timeframes could then be reported in ACMA's monthly management reports.

5.10 The ANAO examined 11 notifications of media control changes and found that ACMA verified their internal consistency and followed up any missing or inaccurate information in a timely manner. The changes were also correctly recorded on the RCMG. However, there were seven cases where the statutory declaration had not been completed or witnessed, or where the certification had not been signed. ACMA advised that it is amending its procedures to require a specific check that forms have been properly signed and witnessed.

Annual returns under the new rules

5.11 In relation to the 2006–07 annual returns from licensees and publishers, 11 returns (relating to six radio networks) were received late and two returns (relating to the owner of two radio licences, and one publisher) were not received. ACMA advised that comparisons between the RCMG and 2006–07 annual returns also identified eight cases where ACMA had not been informed of a change of control event at the time it occurred. ACMA further advised that it sent formal warning letters to 11 commercial radio licensees in January 2008 and the publisher in March 2008 who lodged late notifications. Other formal warnings were pending as at April 2008.

Conclusion

5.12 ACMA has not taken (and does not propose to take) enforcement action to address identified non-compliance with the change notifications under the old media ownership and control rules. In relation to the new rules introduced in February 2007, ACMA initially took an educative approach and, more recently, has issued formal warning notices for breaches under the new rules. An absence of timely action creates a risk that non-compliance will not be properly addressed. Early enforcement action sends a message to broadcasters that non-compliance is not acceptable. ACMA committing to implementing a standard operating procedure will help to address broadcasters' non-compliance in a more timely manner. Developing standard timeframes to impose compliance and enforcement action will also assist in this regard.

Recommendation No.4

5.13 To improve compliance with the requirement to notify ACMA of change of control events under Part 5 of the *Broadcasting Service Act 1992*, the ANAO recommends that ACMA:

- (a) finalise and implement a standard operating procedure for handling late or incomplete notifications; and
- (b) develop standard timeframes to impose compliance and enforcement action, based on the seriousness of the breaches, and monitor performance against the timeframes.

ACMA response

5.14 ACMA agrees with the recommendation. This work has been underway for some time and formalised standard operating procedures and timeframes for compliance and enforcement in relation to change of control events will be established by mid-2008.

Compliance with approvals and directions under Part 5 of the BSA

5.15 The BSA gives ACMA the authority to grant prior approval for parties to temporarily breach media ownership and control laws; and direct parties to take action to comply with media ownership and control laws.⁸³ The ANAO examined the prior approvals granted and directions given during 2005–06 and 2006–07. All were supported by documentation and an appropriate consideration of the relevant matters—at times with the assistance of ACMA’s legal area. Media ownership/control change notifications lodged subsequently with ACMA indicated that those subject to the approvals and directions had complied with them before their expiry.

Broadcast licence fees

5.16 Collecting the fees payable in respect of commercial television and radio licences is a primary function for ACMA. Licence fee policy, and ultimate financial accountability in terms of Australian Government revenue rests with the Minister and the Department of Broadband, Communications and the Digital Economy.⁸⁴ Fees are calculated as a percentage of the gross earnings the

⁸³ Appendix 6 summarises the 11 provisions of the BSA where ACMA can grant temporary approval or direct parties to comply.

⁸⁴ Formerly, the Department of Communications, Information Technology and the Arts.

licensee received for advertising and other matter broadcast over the licence service during the previous financial year.⁸⁵

Collection of fees

5.17 Broadcast licence fees are self-assessed and commercial broadcasters are to provide the following financial information to ACMA and pay the appropriate licence fees by 31 December each year:

- a statutory declaration made by the chief executive officer or secretary of the licensee stating the amount of gross earnings;
- an auditor's statement stating the amount of gross earnings;
- an audited profit and loss statement and balance sheet; and
- information, in an approved form, on how the licensee calculated the amount of licence fees paid.

5.18 ACMA commenced a review of its broadcast licence fees collection processes in late 2006 with the aim of streamlining procedures for the benefit of both broadcasters and ACMA. It introduced the electronic submission of documentation and electronic funds transfers of licence fee payments for the 2006–07 returns. ACMA also revised and further improved the guidance notes provided for fee collections due on 31 December 2007.

Fees calculated and collected by ACMA

5.19 ACMA collected a total of \$275.9 million in broadcast licence fees in 2006–07. Television broadcasters paid \$254.6 million (92 per cent) and radio broadcasters paid \$21.3 million (eight per cent). A recalculation by the ANAO of the broadcast licence fees payable found only very minor errors and that the number of licensees paying their fees after the statutory deadline fell from 13 in 2005–06 to three in 2006–07. In 2005–06, 19 of the 21 radio stations that changed hands in 2005–06 submitted returns covering only part of the year, not the full year, indicating a lack of understanding by new licensees of their obligations under the BSA and the *Radio Licence Fees Act 1964*. ACMA advised that it has reminded licensees of their legislative obligations and refunds any licence fee overpayments and seeks to recover any underpayments.

⁸⁵ The percentage of licence fees increases up to a maximum of nine per cent for television licensees and 3.25 per cent for radio licensees.

Risks to accurately calculating licence fees

5.20 To facilitate accurate self-assessments, ACMA and broadcasters require a common understanding of the nature of broadcasters' revenue sources and their applicability to licence fee calculations. ACMA provides forms and guidance notes for licensees on its website, which were developed by the ABA in the early 1990s. Although the guidance notes were updated by ACMA in 2006, they still reflect the underlying assumptions used in the early 1990s, which were based on industry practice at that time. However, the industry has undergone significant changes since the guidelines were first developed 16 years ago. These changes include larger payments for sporting events and the rise in new programming that allows broadcasters to reduce costs and access new forms of revenue. This includes:

- reality television programs⁸⁶;
- advertiser-funded programming;
- paid product placements;
- branded content;
- third party arrangements (such as cash for comments); and
- financial arrangements between advertisers, networks and stations.

5.21 Increasingly, the extent to which these new formats affect broadcasters' licence fee obligations depends on the exact nature of contractual arrangements in place. Without adequate knowledge of these arrangements, ACMA can neither provide guidance to broadcasters on their legislative obligations nor assure itself and key stakeholders that all broadcast licensing fees are being calculated correctly.

5.22 Even for traditional broadcasting revenue streams, the ACMA guidance notes provide only limited information about how the various revenue items should be treated. This lack of detailed instructions allows licensees to adopt their own interpretation of the legislation, with an attendant risk of significant variations and inconsistencies between returns. A revision to the guidelines would aid both ACMA and the broadcasters.

⁸⁶ Many reality television programs generate revenue through audience interactions such as calling 1900 telephone lines to vote for/against particular contestants. Relationships may also exist between producers and broadcasters concerning the various types of revenue associated with such programs.

ACMA's auditing of broadcast licence fee returns

5.23 ACMA has the power to conduct audits of broadcast licence fees returns under the BSA. The former ABA conducted an audit program during 2001 to 2004. Although the audits found a generally high level of compliance, they raised questions about the treatment of various items of revenue—mainly commissions and contra revenue.⁸⁷ In October 2007, the Authority decided to recommence a targeted audit program for broadcast licence fees returns to:

- provide assurance that ACMA is collecting the amount of broadcasting fees prescribed by legislation;
- provide ACMA with a much more detailed understanding of current and emerging practices in the broadcasting industry;
- assist ACMA to provide clear guidance to broadcasters on their legislative obligations; and
- improve consistency and integrity of returns submitted by broadcasters.

5.24 The ANAO supports ACMA implementing a targeted audit program of broadcast licence fees returns as part of an integrated risk-based strategy to maximise compliance.

Requirements of broadcasters' internal operations

5.25 Commercial broadcasters' compliance (or non-compliance) with most provisions of the BSA, standards and Codes of Practice is demonstrable to the public and/or ACMA through their broadcasts and the information they provide to ACMA.⁸⁸ However, there are provisions within the industry Codes and standards that are not visible to ACMA or the public, but relate to the internal operations of broadcasters. These provisions are summarised in Table 5.1.

⁸⁷ Contra revenue occurs where two parties who owe each other money offset the payments such that only the net amount is paid. Anti-avoidance provisions in the *Television Licence Fees Act 1964* and *Radio Licence Fees Act 1964* allow the Authority to treat the revenue of a related party as revenue of the licensee for broadcast licence fee calculation purposes.

⁸⁸ The information includes compliance returns for Australian, children's and local content quotas, anti-siphoning information and annual returns and change notifications under the media ownership and control rules.

5.26 Requiring broadcasters to publish their emergency broadcast procedures and compliance programs (radio only) on their websites, as well as the results of their annual review/audit, would demonstrate broadcasters' compliance with these provisions.

Table 5.1

Provisions insufficiently monitored by ACMA

Provision	Description
Broadcast of Emergency Information— <i>Radio Code 8 & TV Code paragraphs 1.26–1.30</i>	Commercial radio and television broadcasters are required to: <ul style="list-style-type: none"> • implement internal procedures to broadcast emergency warning and information; • designate a 24-hour a day contact officer; and • conduct an annual review and update procedures.
Broadcasting Services (Commercial Radio Compliance Program) Standard 2000	Commercial radio broadcasters are required to formulate, implement and maintain a compliance program to ensure compliance with BSA, standards and Codes. Compliance programs must: <ul style="list-style-type: none"> • be in writing; • designate a senior officer of the broadcaster as responsible for operational compliance; • be provided to all operational staff in operational areas; • establish a formal training program for all operational staff, to be conducted at induction and at least once a year; and • have a monitoring strategy and an annual audit of compliance.

Source: *Commercial Television Industry Code of Practice; Commercial Radio Codes of Practice and Guidelines, and Broadcasting Services (Commercial Radio Compliance Program) Standard 2000.*

6. Governance Arrangements

This chapter addresses ACMA's governance arrangements, particularly in relation to its regulation of commercial broadcasting. ACMA's governance framework, management of risks, and performance management and reporting, are examined.

Introduction

6.1 Sound governance arrangements enable a regulator to meet its responsibilities and be accountable for its decisions and actions. They also assist a regulator to meet community expectations and to build stakeholder and public confidence.⁸⁹

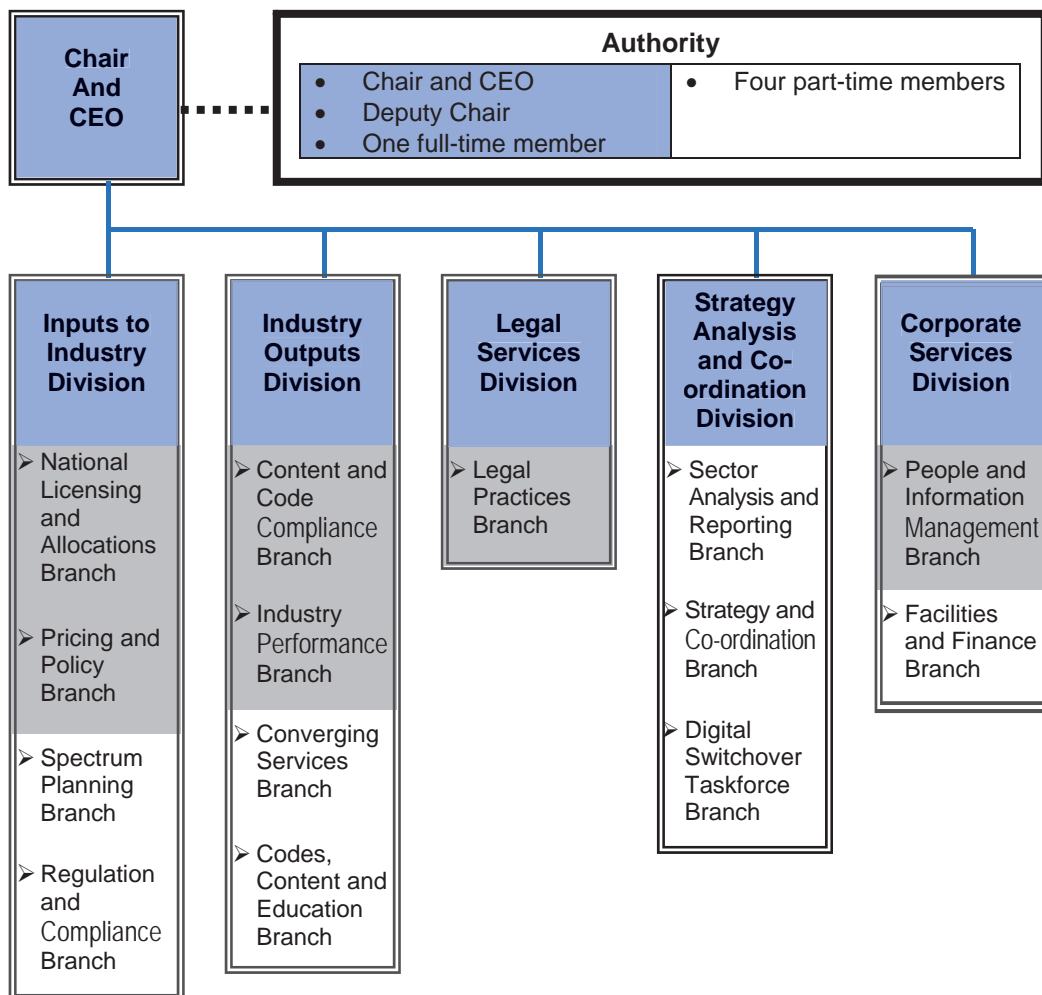
ACMA's corporate governance framework

6.2 The amalgamation of the Australian Broadcasting Authority (ABA) and Australian Communications Authority (ACA) brought together two very different organisations with different cultures and ways of operating. Most of the members appointed to the Authority were not on the Boards of its predecessors. Within ACMA's first year of operation, some experienced members from the senior management teams of the ABA and ACA left. The organisation also underwent a major restructure, to better reflect the converging nature of the communications environment. Figure 6.1 illustrates ACMA's current structure and highlights commercial broadcasting regulation responsibilities.

⁸⁹ ANAO 2007, *Administering Regulation: Better Practice Guide*, p. 7.

Figure 6.1

ACMA’s organisational structure



Members of the Executive Management Group includes General Managers of all Divisions

Branches regularly involved in commercial broadcasting regulation

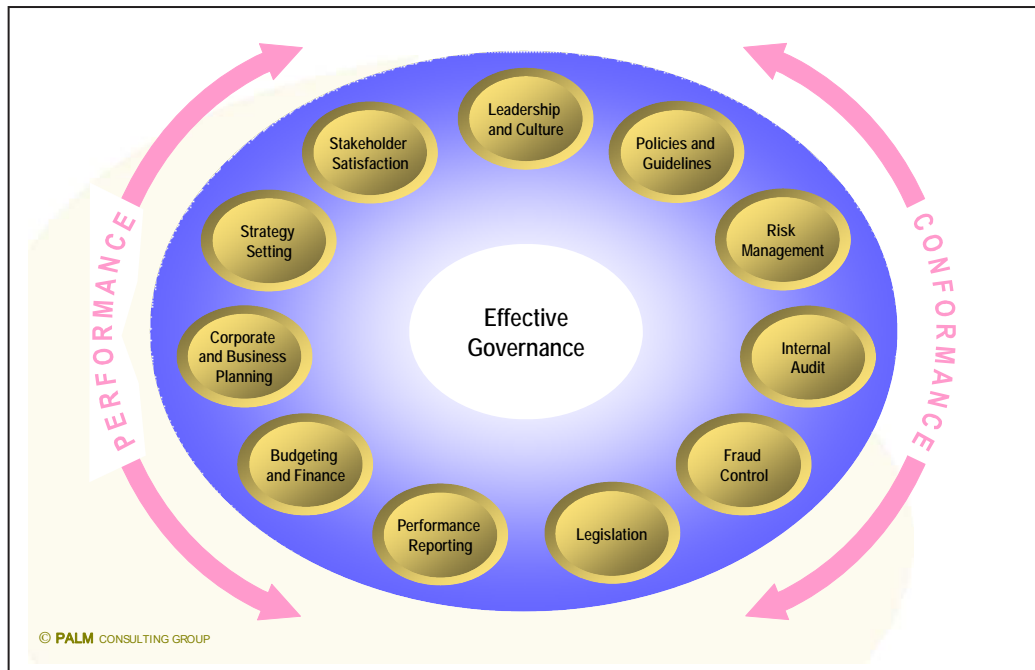
Source: ACMA

6.3 ACMA’s governance arrangements in the 18 months following its establishment lacked cohesion. Elements of corporate governance, such as fraud control, internal audit, risk management, performance reporting and business planning, were generally considered in isolation, rather than within a coordinated framework. To address these shortcomings, in June 2007 ACMA’s

Executive Management Group⁹⁰ endorsed a new corporate governance framework (illustrated in Figure 6.2) and process for implementation.

Figure 6.2

ACMA's corporate governance framework



Source: ACMA

6.4 A preliminary assessment by ACMA identified the following gaps between its existing arrangements and desired governance practices:

- performance measurement and reporting was focused on activities and their results, with very limited measurement and reporting of performance against standards or targets;
- linkages between higher and lower level planning processes were unclear;
- documentation of regulatory procedures and policy interpretations was limited; and
- risk management was at an early stage of development.

⁹⁰ Comprising the Chairman, other full-time Authority members and the General Managers heading ACMA's five Divisions (refer Figure 6.1).

6.5 In respect of commercial broadcasting, the ANAO agrees with this preliminary assessment. In particular, this audit identified areas of ACMA's internal and external performance reporting processes that could be improved⁹¹, and noted the absence of policies and procedures manuals to guide ACMA's staff.⁹²

6.6 ACMA advised that it expects to complete a more comprehensive assessment in May 2008 and to develop a workplan soon after to address the gaps in its governance arrangements. The ANAO supports ACMA's approach to implementing its revised corporate governance framework.

Review of ACMA's funding requirements

6.7 An external review of ACMA's funding requirements was completed in January 2007.⁹³ This review determined that ACMA required an eight per cent increase in funding over the period 2007–08 to 2010–11 to deliver its regulatory functions (in an environment of increasing activity volumes) and the new measures and activities requested by Government. ACMA identified activities and tasks that could be adversely affected by competing priorities should funding continue at current levels. These activities included:

- the development of the corporate governance framework and cross-organisational improvement in investigation processes could be delayed or deferred; and
- compliance investigations and compliance and enforcement activities could experience reductions in responsiveness and/or activity.

6.8 ACMA indicated that a reduction in these activities would increase the risk of industry non-compliance, its ability to deliver services and process inefficiencies continuing. In April 2008, ACMA advised that it continues to manage its regulatory functions within tight financial and resourcing constraints, given that it did not receive all the additional funding sought.

⁹¹ Refer paras. 2.34 - 2.35 and 3.55 - 3.62.

⁹² Refer paras. 2.22 and 3.12.

⁹³ The review was undertaken under the direction of a steering committee with representatives from ACMA and the former Departments of Finance and Administration, and Communications, Information Technology and the Arts.

Risk management

6.9 Risk management is crucial to regulatory administration as it guides the development and implementation of compliance strategies and activities. Prior to reviewing its corporate governance framework ACMA had limited organisation-wide risk management strategies, tools and techniques. In parallel with its governance review, ACMA is developing a risk management framework that will incorporate:

- improving the quality and consistency of risk analysis;
- better linkages between business plans and risk management;
- applying a consistent methodology across ACMA to defining risk, its consequences and mitigation priorities;
- reporting regularly on risk management; and
- obtaining organisation-wide information on risk management that allows for sharing of better practice across divisions and subject matter areas.

Risks to commercial broadcasting

6.10 Effective risk management frameworks are able to provide intelligence and discern trends and patterns from various data sources. Such analysis will assist ACMA to appropriately manage the risks posed by its co-regulatory approach to broadcasting services, an important part of which is the:

- handling of Code complaints by commercial broadcasters before investigation by ACMA; and
- processes that ACMA has in place to gain assurance that broadcasters are meeting legislative requirements and industry Codes of Practice.

6.11 ACMA has identified the risks facing commercial broadcasting as the timeliness of investigations and the quality of programming data received from broadcasters to assess regulatory compliance. These risks have been rated low. However, the ANAO considers that there are also potential risks to the overall integrity of the co-regulatory approach, given the following:

- ACMA does not monitor the requirement for broadcasters to publicise the Codes of Practice and their complaints handling procedures;

- broadcasters potentially restrict the number of complaints they receive by not accepting emailed complaints, although this is the most popular method used for making complaints to ACMA;
- the considerable level of stakeholder dissatisfaction with the broadcasting complaints process reported in ACMA's *Reality Television Review*;
- ACMA does not verify the accuracy of the complaints and compliance data reported by broadcasters; and
- the high number of complaints handling breaches by broadcasters identified by ACMA, coupled with prima facie breaches not fully investigated.

6.12 In re-assessing the risks facing commercial broadcasting, ACMA should also consider the timeliness of addressing complaints and the quality and completeness of complaints and investigations data. A further consideration is the risk of non-compliance not being properly addressed because of the lack of timely enforcement action and follow-up by ACMA.

6.13 An important element of ACMA's risk management framework has to be the ongoing monitoring of regulatory and operational risks. It is only through the assessment of these risks that ACMA will be able to judge the appropriateness of its compliance strategies, priorities and activities. This analysis will also help to inform ACMA's strategic risk assessment.

Performance management and reporting

6.14 ACMA's Corporate Plan 2006–09 and Portfolio Budget Statement (PBS) 2006–07 outline ACMA's outcomes and outputs. Outcome 1 and Output 1.1 (outlined in Table 6.1) are particularly relevant to the regulation of commercial broadcasting but also apply to ACMA's other areas of regulatory responsibility.

Table 6.1**ACMA's outcomes and outputs**

Outcomes	Outputs
1. ACMA will provide a regulatory environment that supports an efficient communications sector	1.1 Effective regulation of the communications industry
	1.2 Planning and licensing of communications services
2. ACMA will contribute to meeting the communications products and service needs of the Australian community by enabling an effective information, standards and safeguards regime	2.1 Ensuring the provision of community standards and safeguards which reflect broad community expectations
	2.2 Facilitating sufficient community information to enable informed decisions about communications products and services

Source: ACMA Corporate Plan 2006–09

6.15 The challenge for ACMA is to plan, monitor and report its performance, against four distinct areas of regulatory responsibility (that is, broadcasting, online content, radiocommunications and telecommunications) using mainly, generic performance indicators (as outlined in column 1 of Table 6.2). The context and relevance of each generic outcome and output differs for each area of regulation. For example, regulating telecommunications providers is very different to regulating broadcasters. Consequently, some performance indicators are more relevant and important to some areas of regulation and less so to others.

Performance indicators, targets and external reporting

6.16 Under the outcomes and outputs framework, agencies are expected to report annually against the performance indicators outlined in their Portfolio Budget Statements (PBS). ACMA plans its activities and monitors its performance against the performance indicators in its divisional business plans. The ANAO found that the relationship between the performance indicators in the PBS and the Industry Outputs Division business plan was unclear.⁹⁴ These indicators are outlined in Table 6.2. Without a reasonable degree of alignment between the two sets of performance indicators, and an explanation of the relationship between the two, it is difficult for ACMA to demonstrate that it has measured and reported against its regulatory outcomes and outputs. ACMA advised in June 2008, that it had made progress to improve the alignment of the performance indicators in Divisional Business Plans to those in the PBS.

⁹⁴ The Industry Outputs Division is mostly responsible for the regulation of commercial broadcasters.

Table 6.2

Performance indicators related to the regulation of commercial broadcasting

Portfolio Budget Statement 2006–07 ⁽¹⁾	Industry Outputs Division Business Plan 2006–07
<p>Quality</p> <ul style="list-style-type: none"> • The regulatory framework supports an efficient communications sector while ensuring that public interest objectives are met • Industry complies with the regulatory framework, with ACMA taking timely and appropriate enforcement action where required • Industry feedback indicates industry acceptance of, and compliance with, the regulatory framework <p>Quantity</p> <ul style="list-style-type: none"> • For each of the following activities, the number of applications received and proportion dealt with within applicable timeframes: <ul style="list-style-type: none"> – codes investigations – applications for temporary approval of a breach of the <i>Broadcasting Services Act 1997</i> (sic) • The minimisation of recurrent regulatory breaches by individual industry participants 	<ul style="list-style-type: none"> • Regulatory processes (including investigations) completed within internal and/or statutory timeframes • Industry and consumer feedback indicates a high level of confidence, acceptance, compliance and satisfaction with arrangements and ACMA’s effectiveness • Government satisfied with quality and accuracy of ACMA advice and performance in delivering its regulatory functions • Outcomes of internal review of investigations processes (undertaken by Legal Services Division) implemented • Self-reporting ‘spot audits’ or similar testing processed (sic) undertaken on: <ul style="list-style-type: none"> – Regional local content licence condition – Australian Content Standard (format factor) • Industry feedback indicates satisfaction with engagement

Note 1: Output 1.1.

Source: ACMA’s Portfolio Budget Statement 2006–07 and Industry Outputs Division Business Plan 2006–07.

6.17 The fundamental difficulty faced by those wishing to review ACMA’s performance is that there is no consolidated report on each area of regulatory responsibility. For example, ACMA’s 2006–07 Annual Report provides aspects of ACMA’s broadcasting regulatory performance:

- in a number of places across 60 pages; and
- using a combination of activity descriptions, and quantitative and qualitative performance indicators that, for the most part, are difficult to align with the PBS performance indicators.

6.18 Without a consolidated picture of the performance for each of ACMA’s areas of regulation, it is difficult to:

- put into context the PBS performance indicators common to all of them; and

- determine whether ACMA has reported fully against all relevant performance areas.

6.19 ACMA's current annual reporting would be more effective if it included reporting separately on its performance for each key area of regulatory responsibility.

Recommendation No.5

6.20 To further improve its performance management and reporting, the ANAO recommends that ACMA's future annual reports include performance reports for each area of regulatory responsibility, using the key performance indicators in its Portfolio Budget Statements and business plans.

ACMA response

6.21 ACMA agrees with the recommendation. ACMA has implemented the necessary processes and framework to address the recommendation within the context of ACMA's 2008–09 budget and annual report.



Ian McPhee
Auditor-General

Canberra ACT
27 June 2008

Appendices

Appendix 1: ACMA Response

CHAIR



Australian Government

**Australian Communications
and Media Authority**

Level 15 Tower 1 Darling Park
201 Sussex Street Sydney NSW

Tel: (02) 9334 7700, 1800 226 667
Fax: (02) 9334 7799

PO Box Q500
Queen Victoria Building NSW 1230

www.acma.gov.au

28 May 2008

Ms Barbara Cass
Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Ms Cass

REGULATION OF COMMERCIAL BROADCASTING PERFORMANCE AUDIT

In response to your letter of 30 April 2008 advising the Australian Communications and Media Authority (ACMA) of the outcome of the Regulation Commercial Broadcasting Performance audit, I attach the following information as requested:

- ACMA's comments for inclusion as an appendix to the final report;
- a response to each of the recommendations; and
- a summary of ACMA's comments to be used in the Australian National Audit Office (ANAO) report brochure.

ACMA acknowledges the ANAO's endeavour and assistance throughout the process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Chapman'.

Chris Chapman
Chairman

ACMA comments in response to ANAO Performance Audit: Regulation of Commercial Broadcasting.

The Australian Communications and Media Authority (ACMA) welcomes the review undertaken by the Australian National Audit Office (ANAO) of its broadcasting investigations function.

As a relatively new organisation, ACMA is seeking to review its processes and approaches to ensure that they continue to meet the expectations of government, industry and the community.

In that regard, ACMA welcomes the ANAO's findings that it has adequately addressed the majority of broadcasting complaints received over the period reviewed. The ACMA also acknowledges the ANAO assessment that there are areas where the management of investigations can be improved.

Co-regulatory framework

The co-regulatory framework established under the *Broadcasting Services Act 1992* (BSA) framework requires that industry participants assume responsibility for regulatory detail within their own sectors within limits and subject to clear legislative obligations. ACMA in effect partners with industry to deliver prompt and flexible approaches to convergence and other regulatory challenges.

ACMA's experience has been that a co-regulatory approach—with registered codes as the industry's key contribution—makes it easier for the regulator and industry to adapt to the ongoing challenge of changes in technology and shifts in business models.

It places industry closer to consumers and consumer views, places obligations on industry to deal with consumers concerns effectively and positions the regulator to deal with elevated disputes, systemic issues and contraventions of the law.

There are also powerful incentives built into the framework for industry to monitor itself and its competitors, leading to self-correcting behaviour and creating a compliance culture across the sector.

Radio and television broadcasting, by their very nature, have a significant impact across the Australian community. Parties interested in the quality of Australia's broadcasting include the general public, competitor broadcasters and their sectoral associations, the print and electronic media and a range of government and non-government organisations.

Many of these parties undertake regular, and often extensive, monitoring of their areas of interest, the outcomes of which may come to ACMA as a formal complaint or may play out in public. Media programs and reports also play an important role in highlighting potential systemic issues for consideration. Such high levels of public scrutiny provide strong incentive for broadcasters to comply with

legislation, codes and standards—and to report accurately within the co-regulatory framework.

Through these actions, parties also provide valuable intelligence to ACMA in undertaking its regulatory responsibilities. This provides a cost-effective source of information and supplements tax-payer funded activities undertaken by the regulator.

This is quite different to other more legislatively prescriptive environments and requires a different style of regulator in many areas.

That said, ACMA agrees wholeheartedly with the ANAO that complaints-handling processes need to be sufficiently robust for confidence to be maintained in the co-regulatory framework and is working with industry to continually improve these processes.

ACMA improvement activities

ACMA itself has already been mindful of a number of the matters raised in the report. To that end, ACMA engaged an independent consultant in mid 2007 to review its investigations practices. ACMA is currently developing a project plan to implement findings from that review, with implementation to commence in 2008–09. Major improvement activities will include:

- identification of common ACMA ‘best practice’ investigation processes;
- production of an investigation manual that documents best practice processes, ensuring greater consistency across the breadth of ACMA’s investigations; and
- creation of a cross-agency forum to promote more efficient use of resources through information sharing across investigation teams.

In order to oversee this project, ACMA has created a compliance and enforcement committee, comprising senior managers at the SES2 level. ACMA anticipates that the ANAO findings regarding its broadcasting investigations systems, processes and procedures will form a valuable input to this ongoing project.

ACMA also notes that there have been a number of improvements to the management of its investigations processes in the period following its establishment as an organisation less than three years ago. These include:

- the introduction of Key Performance Indicators for broadcasting investigations;
- the establishment of a senior management oversight committee to review broadcasting complaints and trends on a weekly basis;
- the introduction of monthly management performance reports that include broadcasting investigations performance and trend data; and

- the recent establishment of a new branch to provide, among other things, broader scope for senior management oversight of broadcasting investigations.

ACMA acknowledges that some benefits of these improvements have been realised relatively recently.

Risk management and resource allocation

As with all of its functions, ACMA applies its resources through rigorous priority-setting and assessment of risk. In that regard, ACMA notes that the timeframe of the ANAO review covered a period of unprecedented work for the agency through significant and time-sensitive activities including the introduction of the then government's media reform laws and introduction of the Do Not Call Register.

There are a number of instances in the report where it is evident that the ANAO and ACMA have differing views as to the level of risk, and therefore, resources which should be applied to broadcasting industry monitoring and compliance matters.

For example, ACMA would consider that verification of programming data reported by broadcasters may not be an efficient use of resources in light of other priorities where there are already strong incentives for industry participants to identify and highlight inaccuracies. In these circumstances, subscription television interests have strong incentives to independently test data presented in published anti-siphoning reports. This, in turn, creates further incentives for broadcasters to report accurately. In this context, there may be little or no additional benefit in the further testing of programming data by the regulator.

That said, the ANAO report will be useful to ACMA in re-assessing whether its current approaches to risk apportionment and resource allocation in these areas remain appropriate.

In addition ACMA's Business Planning and Risk Management activities have advanced significantly with the development of business plans aligned to the budget and risk registers for the 2008/09 financial year and will be linked in the annual report for 2007/08. Both activities have periodic reporting to the ACMA Executive and Audit Committee.

ANAO Proposed Report
Under s.19 of the Auditor General Act 1997
Regulation of Commercial Broadcasting
ACMA's responses to recommendations (at p. 25)

Recommendation 1

ACMA agrees with the recommendation. ACMA considers that it is critical that consumers understand that they can escalate their concerns to the regulator if not appropriately handled by the broadcaster. ACMA will also undertake a body of work in 2008–09 to improve the data capture, validation and reporting capabilities of AIMS.

ACMA regularly reviews investigations outcomes in order to identify patterns or trends which are included in new investigations reports and considered by ACMA's senior management team on a regular basis. ACMA anticipates that improvements to AIMS will further enhance its capacity to capture trend and performance information relating to breach and non-breach data in a more timely and comprehensive manner.

Recommendation 2

ACMA agrees with the recommendation.

A recent example of where ACMA has adopted this approach is that, following the identification of a pattern of complaints handling breaches by the Nine Network, ACMA is monitoring the broadcasters' implementation of new procedures for complaints handling, including a regular reporting requirement.

Recommendation 3

ACMA agrees with the recommendation. ACMA will discuss the recommendation with Commercial Radio Australia and take the recommendation into account in its registration of the revised Codes of Practice, which are currently under review. ACMA notes that the current code does not require annual reports to be published within six months of the end of the financial year and that the code will be subject to public consultation. ACMA further notes that it has not received any complaints on these matters since the current Code commenced in 2004.

Recommendation 4

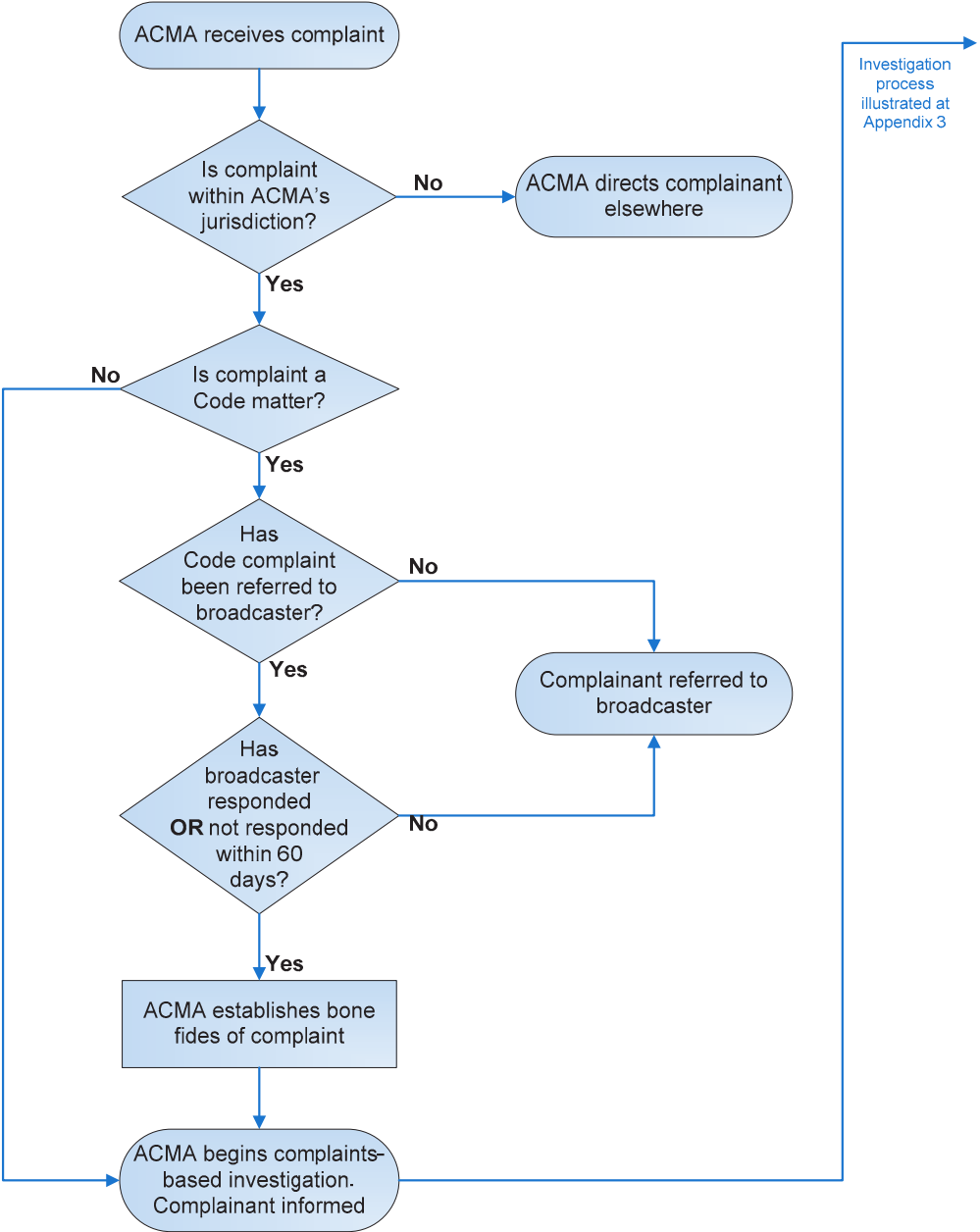
ACMA agrees with the recommendation. This work has been underway for some time and formalised standard operating procedures and timeframes for compliance and enforcement in relation to change of control events will be established by mid-2008.

Recommendation 5

ACMA agrees with the recommendation.

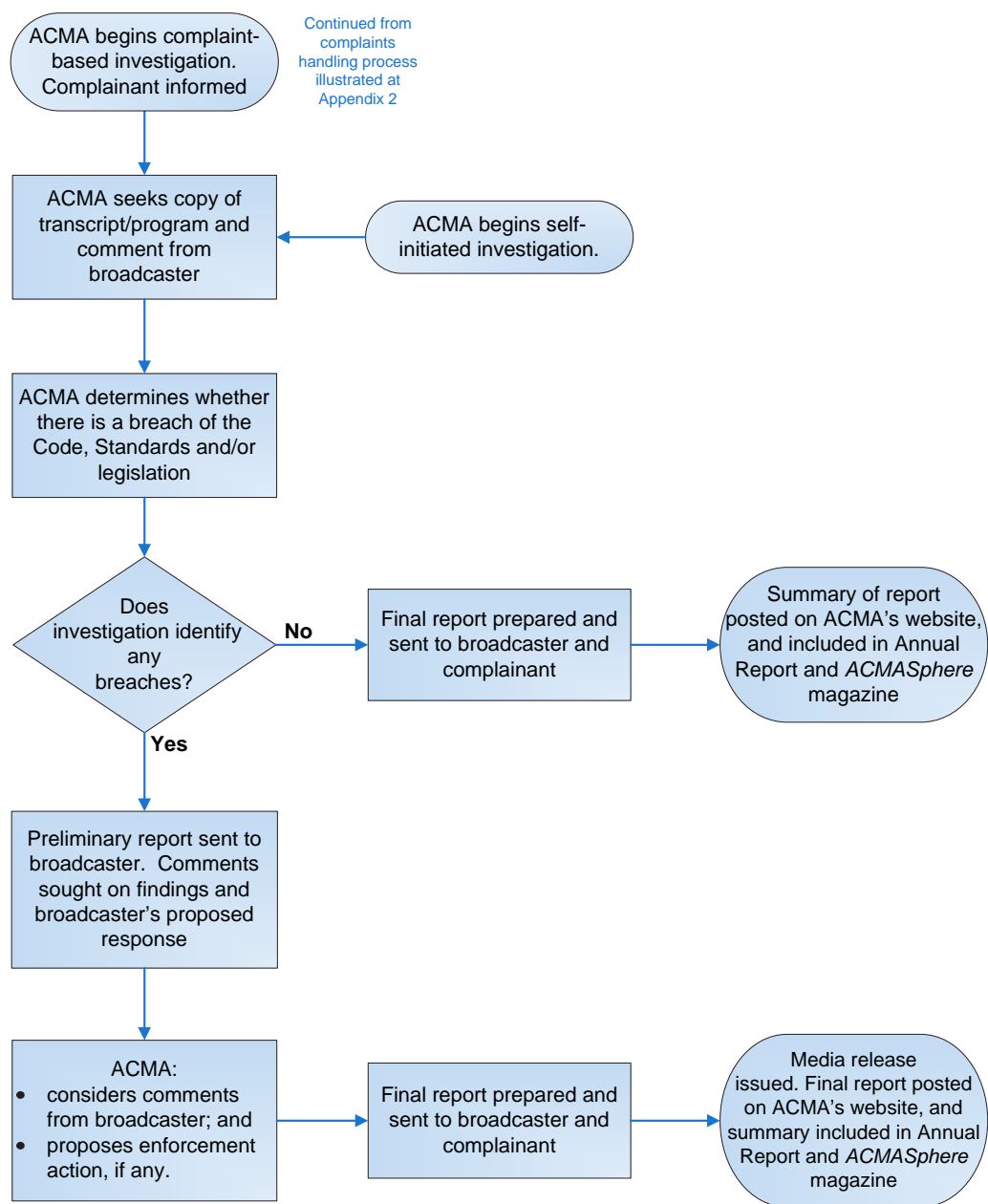
ACMA has implemented the necessary processes and framework to address the recommendation within the context of ACMA's 2008–09 budget and annual report.

Appendix 2: ACMA's Process for Handling Broadcasting Complaints



Source: ANAO analysis of ACMA data

Appendix 3: ACMA's Process for Undertaking Broadcasting Investigations



Source: ANAO analysis of ACMA data

Appendix 4: Subject Matter of Commercial Broadcasting Investigating for the Period 2005–06 and 2006–07⁽¹⁾

BSA and subordinate legislation	Television			Radio		
	No. of investigations	No. Breach	Breach	No. of investigations	No. Breach	Breach
Licence Conditions						
Tobacco Advertising	7	7	-	1	-	1
Captioning of programs	3	2	1	na	na	na
Codes of Practice						
Programs unsuitable for broadcast (incite violence/brutality, hatred/vilification/ discrimination, indecency, gratuitous language, offend cultural sensitivities, simulate news)	18	18	-	28	36	5
News & Current Affairs (inaccuracy, non-correction of errors, misrepresent viewpoints, failure to present significant viewpoints, gratuitous emphasis, fact and comment indistinguishable, create public panic, breach privacy)	39	55	7	7	10	3
Complaints handling (no substantive response, no response within 30 days, failure to advise matters can be referred to ACMA)	20	17	10	7	2	6
Interviews & Talkback (no permission to broadcast)	-	-	-	1	2	-
Classification: Program promotions and advertisements (Inappropriate for G viewing periods; inappropriate intimate advertising; inappropriate advertising during sporting events)	20	65	5	na	na	na
Classification: TV Programs (Inappropriate for G; PG; M; or MA time zones; unsuitable for TV)	38	107	7	na	na	na

BSA and subordinate legislation	Television			Radio		
	No. of investigations	No. Breach	Breach	No. of investigations	No. Breach	Breach
Classification: Consumer advice and warnings, display of symbols	5	8	-	na	na	na
Non-program matter: TV advertisements, program promotions (length of breaks, hourly limits, noise levels, certification)	4	9	-	-	-	-
Other (non-compliance with Code, interviews subject to laws, paid material distinguishable)	2	1	1	-	-	-
Total for 162 completed investigations	128⁽²⁾	294	31	34⁽²⁾	50	15

Note 1: Investigations may involve more than one subject matter or the same subject matter more than once. Does not include most investigations conducted under s.170 of BSA.

Note 2: Does not represent a summation of all figures in the column as investigations may involve more than one subject matter.
na not applicable

Source: ACMA's AIMS database

Appendix 5: Australian Music Requirements Under the Australian Music Code

Music Category	Format of Service	Minimum percentage of Australian Music	Minimum percentage of Australian Music to be 'new' ⁽¹⁾
A	<ul style="list-style-type: none"> • Mainstream Rock • Album Oriented Rock • Contemporary Hits • Top 40 • Alternative 	25	25
B	<ul style="list-style-type: none"> • Hot/Mainstream Adult Contemporary • Country • Classic Rock 	20	20
C	<ul style="list-style-type: none"> • Soft Adult Contemporary • Hits & Memories • Gold—encompassing Classic Hits • News Talk/Sports Talk 	15	15
D	<ul style="list-style-type: none"> • Oldies • Easy Listening • Easy Gold • Country Gold 	10	Not applicable
E	<ul style="list-style-type: none"> • Nostalgia • Jazz • NAC (smooth jazz) 	5	Not applicable

Note 1: As a proportion of all Australian Music.

Source: *Commercial Radio Code of Practice 4: Australian Music*

Appendix 6: ACMA’s Powers to Grant Temporary Approval to Breach, or Direct Parties to Comply with, Media Ownership and Control Rules

BSA Provision	Allows ACMA to ...
<i>Old and new media rules</i>	
s.67	grant prior approval for a person to breach the limitations on control or directorships for a period of up to two years
s.68	grant a one-off extension of up to one year to the period granted under s.67
s.70	direct a person to take action within a period of up to two years so that the person is no longer in breach of the limitations on control or directorships
s.71	grant a one-off extension of up to one year to the period granted under s.70
<i>New media rules only</i>	
s.61AJ	grant prior approval to a person to enter into a transaction that would result in an unacceptable media diversity situation for a period of up to two years
s.61AK	grant a one-off extension of up to one year to the period granted under s.61AJ
s.61AMC	grant prior approval to a person to enter into a transaction that would result in an unacceptable three-way control situation for a period of up to one year
s.61AMD	grant a one-off extension of up to six months to the period granted under s.61AMC
s.61AN	direct a person to take action within a period of up to two years to remedy an unacceptable media diversity situation
s.61ANA	direct a person to take action within a period of up to one year to remedy an unacceptable three-way control situation
s.61AP	grant a one-off extension of up to three months to the periods granted under s.61AN or s.61ANA

Source: *Broadcasting Services Act 1992* (as amended)

Index

A

ACMA's Information Management System (AIMS), 8, 19, 29, 40, 45, 49, 51–53, 57–59, 63, 65–66, 68, 71, 74–75, 117

Advertising Standards Board, 18

Australian Broadcasting Authority (ABA), 8, 13, 19, 22, 25, 35, 44, 46, 50, 52, 56–57, 62, 75, 80, 94–95, 97

Australian Communication and Media Authority (ACMA)

ACMASphere magazine, 18, 43–44

Authority, 8–9, 13, 22, 25, 35, 60–61, 63, 66, 75–76, 95, 97, 99

Executive Management Group, 9, 53, 74, 99

organisational structure, 98

Portfolio Budget Statements, 8, 27, 31, 102–105

website (www.acma.gov.au), 22, 24, 45, 49, 50, 52, 76, 81, 86, 88, 94

Australian Communications and Media Authority Act 2005 (ACMA Act), 8–9, 13, 35

Australian Communications Authority (ACA), 8, 13, 35, 97

Australian Music Performance Committee (AMPCOM), 8, 22–23, 81–82, 85

B

Broadcasting Services Act 1992 (BSA), 8–9, 13–14, 18, 20–24, 26, 35–40, 42, 44, 54, 56, 60, 62, 66, 70, 73, 77, 80, 82–83, 88–89, 92–93, 95–96, 116–117, 119

non-compliance with, 16, 24–25, 89, 91, 116

C

Codes of Practice

breaches of, 15, 16, 20–22, 27, 29, 51, 58–59, 66–72, 76, 81, 102, 116

Commercial Radio Australia Codes of Practice and Guidelines (2004), 8, 18, 21, 30, 38–39, 42–43, 52, 59, 73, 81, 83, 96, 118

Commercial Television Industry Code of Practice (2004), 8, 38, 42–43, 54–55, 96

Commercial Radio Australia, 8, 18, 38, 40, 43, 81

Commercials Advice Pty Ltd (CAD), 8, 79–80, 85

complaints

Code, 7–8, 13–14, 18, 20, 26, 37–38, 42–45, 48, 50–51, 55–56, 58, 82, 101

methods of lodging, 44

non-Code, 8, 14, 37, 42, 48, 58

D

Department of Broadband, Communications and the Digital Economy, 8, 13, 20, 35, 36, 92

Department of Communications, Information Technology and the Arts, former, 9, 14, 23, 54, 83, 92, 100

Department of Finance and Administration, former, 100

F

Free TV Australia, 8, 18, 40, 43–44, 55, 80

I

Investigations Review, 60

M

Minister for Broadband, Communications and the Digital Economy (or the Minister for Communication, Information Technology and the Arts), 8–9, 14, 20, 22–23, 36, 39, 54–56, 70, 77, 83–85, 92

R

Reality Television Review, 15, 43, 54–55, 72

Series Titles

Audit Report No.1 2007–08
Acquisition of the ABRAMS Main Battle Tank
Department of Defence
Defence Materiel Organisation

Audit Report No.2 2007–08
Electronic Travel Authority Follow-up Audit
Department of Immigration and Citizenship

Audit Report No.3 2007–08
Australian Technical Colleges Programme
Department of Education, Science and Training

Audit Report No.4 2007–08
Container Examination Facilities Follow-up
Australian Customs Service

Audit Report No.5 2007–08
National Cervical Screening Program Follow-up
Department of Health and Ageing

Audit Report No.6 2007–08
Australia's Preparedness for a Human Influenza Pandemic
Department of Health and Ageing
Department of Agriculture, Fisheries and Forestry

Audit Report No.7 2007–08
The Senate Order for Departmental and Agency Contracts (Calendar Year 2006 Compliance)

Audit Report No.8 2007–08
Proof of Identity for Accessing Centrelink Payments
Centrelink
Department of Human Services

Audit Report No.9 2007–08
Australian Apprenticeships
Department of Education, Science Training

Audit Report No.10 2007–08
Whole of Government Indigenous Service Delivery Arrangements

Audit Report No.11 2007–08
Management of the FFG Capability Upgrade
Department of Defence
Defence Materiel Organisation

Audit Report No.12 2007–08
Administration of High Risk Income Tax Refunds in the Individuals and Micro Enterprises Market Segments
Australian Taxation Office

Audit Report No.13 2007–08
The Australian Taxation Office's Approach to Managing Self Managed Superannuation Fund Compliance Risks
Australian Taxation Office

Audit Report No.14 2007–08
*Performance Audit of the Regional Partnerships Programme:
Volume 1–Summary and Recommendations
Volume 2–Main Report
Volume 3–Project Case Studies*
Department of Transport and Regional Services

Audit Report No.15 2007–08
Administration of Australian Business Number Registrations: Follow-up Audit
Australian Taxation Office

Audit Report No.16 2007–08
Data Integrity in the Child Support Agency
Child Support Agency
Department of Human Services

Audit Report No.17 2007–08
Management of the IT Refresh Programme
Centrelink

Audit Report No.18 2007-08
Audits of the Financial Statements of Australian Government Entities for the Period Ended 30 June 2007

Audit Report No.19 2007–08
Administration of the Automotive Competitiveness and Investment Scheme
Department of Innovation, Industry, Science and Research
Australian Customs Service

Audit Report No.20 2007–08
Accuracy of Medicare Claims Processing
Medicare Australia

Audit Report No.21 2007–08
Regional Delivery Model for the Natural Heritage Trust and the National Action Plan for Salinity and Water Quality
Department of the Environment, Water, Heritage and the Arts
Department of Agriculture, Fisheries and Forestry

Audit Report No.22 2007–08
Administration of Grants to the Australian Rail Track Corporation
Department of Infrastructure, Transport, Regional Development and Local Government

Audit Report No.23 2007–08
The Management of Cost Recovery by Selected Regulators

Audit Report No.24 2007–08
DIAC's Management of the Introduction of Biometric Technologies
Department of Immigration and Citizenship

Audit Report No.25 2007–08
Administering Round the Clock Medicare Grants
Department of Health and Ageing

Audit Report No.26 2007–08
Tasmanian Forest Industry Development and Assistance Programs
Department of Agriculture Fisheries and Forestry

Audit Report No.27 2007–08
Emergency Management Australia
Attorney-General's Department

Audit Report No.28 2007–08
Defence's Compliance with the Public Works Committee Approval Processes
Department of Defence

Audit Report No.29 2007–08
Parent School Partnerships Initiative
Department of Education, Employment and Workplace Relations

Audit Report No.30 2007–08
The Australian Taxation Office's Use of Data Matching and Analytics in Tax Administration
Australian Taxation Office

Audit Report No.31 2007–08
Management of Recruitment in the Australian Public Service

Audit Report No.32 2007–08
Preparation of the Tax Expenditures Statement
Department of the Treasury

Audit Report No.33 2007–08
The National Capital Authority's Management of National Assets
National Capital Authority

Audit Report No.34 2007–08
Administration of the Pathology Quality and Outlays Memorandum of Understanding
Department of Health and Ageing

Audit Report No.35 2007–08
Building Certification of Residential Aged Care Homes
Department of Health and Ageing

Audit Report No.36 2007–08
The Australian Taxation Office's Strategies to Address Tax Haven Compliance Risks
Australian Taxation Office

Audit Report No.37 2007–08
Management of Credit Cards

Audit Report No.38 2007–08
Administration of Job Network Service Fees
Department of Education, Employment and Workplace Relations

Audit Report No.39 2007–08
Managing e-Business Applications—Follow-up Audit
Department of Education, Employment and Workplace Relations

Audit Report No.40 2007–08
Taxpayers' Charter—Follow-up Audit
Australian Taxation Office

Audit Report No.41 2007–08
Management of Personnel Security—Follow-up Audit

Audit Report No.42 2007–08
Management of Customer Debt—Follow-up Audit
Centrelink
Department of Education, Employment and Workplace Relations
Department of Families, Housing, Community Services and Indigenous Affairs

Audit Report No.43 2007–08
Third Tranche Sale of Telstra Shares
Department of Finance and Deregulation

Audit Report No.44 2007–08
Interim Phase of the Audit of Financial Statements of General Government Sector Agencies for the Year ending 30 June 2008

Audit Report No.45 2007–08
Specific Purpose Payments: General Recurrent Grants for Government Schools
Department of Education, Employment and Workplace Relations

Current Better Practice Guides

The following Better Practice Guides are available on the Australian National Audit Office Website.

Agency Management of Parliamentary Workflow	May 2008
Public Sector Internal Audit	
An Investment in Assurance and Business Improvement	Sep 2007
Fairness and Transparency in Purchasing Decisions	
Probity in Australian Government Procurement	Aug 2007
Administering Regulation	Mar 2007
Developing and Managing Contracts	
Getting the Right Outcome, Paying the Right Price	Feb 2007
Implementation of Programme and Policy Initiatives:	
Making implementation matter	Oct 2006
Legal Services Arrangements in Australian Government Agencies	Aug 2006
Preparation of Financial Statements by Public Sector Entities	Apr 2006
Administration of Fringe Benefits Tax	Feb 2006
User-Friendly Forms	
Key Principles and Practices to Effectively Design and Communicate Australian Government Forms	Jan 2006
Public Sector Audit Committees	Feb 2005
Fraud Control in Australian Government Agencies	Aug 2004
Security and Control Update for SAP R/3	June 2004
Better Practice in Annual Performance Reporting	Apr 2004
Management of Scientific Research and Development Projects in Commonwealth Agencies	Dec 2003
Public Sector Governance	July 2003
Goods and Services Tax (GST) Administration	May 2003
Building Capability—A framework for managing learning and development in the APS	Apr 2003
Internal Budgeting	Feb 2003
Administration of Grants	May 2002
Performance Information in Portfolio Budget Statements	May 2002

Some Better Practice Principles for Developing Policy Advice	Nov 2001
Rehabilitation: Managing Return to Work	June 2001
Business Continuity Management	Jan 2000
Building a Better Financial Management Framework	Nov 1999
Building Better Financial Management Support	Nov 1999
Commonwealth Agency Energy Management	June 1999
Security and Control for SAP R/3	Oct 1998
Controlling Performance and Outcomes	Dec 1997
Protective Security Principles (in Audit Report No.21 1997–98)	Dec 1997