



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

**Reference: Auditor-General's reports Nos. 27 (2007-08) to 2 (2008-09)**

WEDNESDAY, 24 SEPTEMBER 2008

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**JOINT STATUTORY  
COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT**

**Wednesday, 24 September 2008**

**Members:** Ms Grierson (*Chair*), Mr Georgiou (*Deputy Chair*), Senators Mark Bishop, Boyce, Bushby, Feeney and Lundy and Mr Baldwin, Mr Bevis, Mr Bradbury, Mr Butler, Ms King, Mr Morrison, Mr Neumann and Mr Robert

**Members in attendance:** Senators Bushby, Feeney and Lundy and Mr Bradbury and Ms Grierson

**Terms of reference for the inquiry:**

To inquire into and report on:

Auditor-General's reports Nos 27 (2007-08) to 2 (2008-09)

**WITNESSES**

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**Committee met at 12.02 pm**

**CHAIR (Ms Grierson)**—Thank you very much to representatives of the ACMA for being here today. We are sorry we are running a little bit late because of divisions at the beginning of our proceedings. I open today's public hearings, which examine the Auditor-General's report No. 46 (2007-08), *Regulation of commercial broadcasting*, and I welcome the representatives from the Australian Communications and Media Authority. I ask participants to remember that only members of the committee can put questions to witnesses if this hearing is to constitute formal proceedings of the parliament and thereby attract parliamentary privilege. If other participants wish to raise issues for discussion, I ask them to direct comments to the committee. It will not be possible for participants to directly respond to each other. Given the short time available today, statements and comments by witnesses should be relevant and succinct.

I remind witnesses that the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings in the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. The evidence given today will attract parliamentary privilege.

[12.04 pm]

**CARLOS, Ms Dianne, General Manager, Corporate Services Division, Australian Communications and Media Authority**

**CHEAH, Mr Chris, Acting Deputy Chair, Australian Communications and Media Authority**

**O'LOUGHLIN, Ms Nerida, General Manager, Industry Outputs Division, Australian Communications and Media Authority**

**CAHILL, Mr Matt, Group Executive Director, Performance Audit Services Group, Australian National Audit Office**

**CAINE, Mr Grant, Senior Director, Performance Audit Services Group, Australian National Audit Office**

**CASS, Mrs Barbara, Executive Director, Performance Audit Services Group, Australian National Audit Office**

**CHAPMAN, Mr Steve, Deputy Auditor-General, Australian National Audit Office**

**CHAIR**—Audit Office, you have a brief statement which you have tabled already. Would someone second that as a submission?

**Senator FEENEY**—I second that.

**CHAIR**—It is so ordered. Mr Cheah, you may present your opening statement.

**Mr Cheah**—As we said in our response to the ANAO, the ACMA welcomes the audit of our commercial broadcasting activities. As a relatively new organisation, ACMA is very conscious of the benefits of independently reviewing processes and procedures so that they continue to meet the expectations of government, industry and the community. In that context, ACMA welcomed the ANAO finding that we have been adequately addressing the majority of the broadcasting complaints we have received.

The ACMA also acknowledges that there are areas where our management of commercial broadcasting investigations can be improved. As such, the ACMA has formally accepted each of the five ANAO recommendations and our recently formed SES band 2 compliance and enforcement committee has been charged with overseeing their implementation. I would like to inform the committee that implementation progress is being reported directly to the ACMA chair on a monthly basis and my colleagues stand ready to provide more details on the specific responses to each recommendation.

In many areas this work constitutes a continuation of activities that started prior to the ANAO audit. ACMA first started to develop new approaches to our broader investigation functions

following an independent review that we commissioned ourselves in the middle of 2007. Our compliance and enforcement committee, for example, was established in direct response to this 2007 review. Our current work on an investigation procedures manual also originated with this 2007 report. Recent improvements to our broadcasting investigations processes have also included the implementation of an expedited investigation approach to facilitate the faster resolution of routine or straightforward investigations. ACMA has also implemented a statement of issues approach to better focus the parties on the matters of significance, thereby improving both our efficiency and our timeliness.

Against this background, it is very useful to take the opportunity to comment on the context of the ACMA's broadcasting investigations. Fundamentally, the co-regulatory framework set out in the Broadcasting Services Act, the BSA, significantly shapes ACMA's approach to regulation of the broadcasting industry, and ACMA's role in handling complaints is considerably prescribed. ACMA is required to investigate all unresolved complaints about content once the complainant has first referred the matter to the licensee and either is not satisfied with the licensee's response or has not received a response within 60 days. Unlike, for example, the Ombudsman, ACMA has no ability to decide not to investigate a complaint.

In conducting an investigation relating to an industry code of practice, ACMA are required to comply with the general administrative law requirements such as procedural fairness as well as specific provisions under the BSA that require us to consult the people affected by the content of a report before publication. Notably, we have a requirement under section 180 of the BSA to provide specific comment. As a result, the time taken to complete an investigation includes time taken by ACMA as well as time taken to respond to issues under investigation.

More broadly, ACMA's overarching interest in relation to commercial broadcasting investigations is in promoting and developing a compliance culture. In doing that, we are increasingly using the formal powers available to us, but this also involves meeting with broadcasters, signalling our actions, carefully framing our findings and publicising decisions for broader industry consideration.

Finally, I would like to note that ACMA's broadcasting investigation activities are only one small part of our broader responsibilities. In addition to the wider range of broadcasting issues, ACMA also has a significant role in relation to telecommunications, radio communications and the internet. Given finite resources, it is inevitable that ACMA will be required to apply its resources through rigorous priority setting and assessment of risk. In that regard, ACMA notes that the time frame of the ANAO review covered a period of unprecedented work for the agency through significant and time sensitive activities, including the introduction of new media laws and the Do Not Call Register. The assessment of risk in overall priority setting will continue to be a key aspect of ACMA's regulatory responses moving forward.

**CHAIR**—Thank you. I know we all have many questions to ask regarding this report, but I would like to hear directly from ACMA and from ANAO: how do you perceive the risks to the public and to the government if ACMA is not an effective body? What is the biggest risk to the public interest and to the government if you do not perform your function well?

**Mr Cheah**—Is this specifically in relation to the broadcasting content related function?

**CHAIR**—And the complaints, yes.

**Mr Cheah**—The way I would describe the role we play is that we are in a sense overseeing, as I said in my comments, a co-regulatory approach. So the idea is that we are trying to make sure that our television and radio programs are in fact responding to community standards. That is what we are charged to do under our legislation. The legislative framework under which we are operating sets up a number of mechanisms, I suppose, which kind of work together. The legislative framework very much regards the key responsibilities for that as lying with the industry in the first instance. There is a kind of embedded assumption that it is in the interests in some ways for the broadcasters to respond to community interests themselves because it is their viewers and listeners. That is an important part of it. Then what I think the legislative framework does is say that sitting at the top of that there should be a certain level of regulatory oversight. The industry is encouraged to develop their own codes in terms of what they think reflects community standards and then we have got a role in accepting those codes or not as the case may be and forming a sort of independent view of that.

If we do not perform our functions well, the risk would be that over time you would see a decline in community standards—potentially start to see a mismatch between what the broadcasters are doing and what the community standards are. Viewers and listeners might start to lose confidence in their broadcasters. I think what would then probably happen, realistically, is that you would start to see more political pressure come to bear to do something about the system. But, as I said, it is very important to realise that our role is in this co-regulatory environment.

**CHAIR**—We will give the Audit Office the opportunity to comment on that and on the key risks if that body is not acting effectively.

**Mr Cahill**—From the broader sense, obviously if anybody is not working as intended then the desires of the parliament are not met. As ACMA has pointed out, underpinning the approach is the co-regulatory approach, and obviously with the co-regulatory approach there is that balance of fulfilling those specific roles as well as that oversight role that ACMA has pointed out and getting that right. Obviously if that is not the case then how the media and industry act may not be consistent with what we want to set for the community standards.

**CHAIR**—Thank you. ACMA, obviously we all understand the power of the media, and it is a power that is particularly profound. A co-regulatory approach is one that has been praised for its appropriateness for this area, but I ask you whether you have got the balance right between representing the interests of the public and representing the interests of the broadcasting industry.

**Mr Cheah**—As I said, we do not set the legislative framework, so in terms of the balance, that gets done by the parliament and by the government. In terms of the way we exercise our own functions within that, needless to say we would say that we think that, broadly speaking, we do have that right. We certainly conduct a very evidence based approach to the way we think about the issues of community standards. We conduct research into what those community standards might be in terms of then considering codes. Once the codes are in place we then, as I said in my opening statement, investigate all matters that come to us, as we are required to do under the legislation. I can assure you that at authority level we invest a fair bit of time thinking about the issues where there might be boundary issues and things are a bit unclear and there are

potential precedents to be set. We also think quite a lot about what is the best way, given the legislative tools that we have, to actually get a compliance culture going amongst the media sector. Ms O'Loughlin might have some extra observations.

**Ms O'Loughlin**—I might also mention that, as well as the codes, we also oversight a series of industry standards. If ACMA determines that there are some systemic breaches in the industry of the codes, there are a number of options available to it. It can move forward in terms of looking at licence conditions on individual broadcasters or, if it considers that there is a systemic issue across the industry that needs to be addressed, it does have the power to develop an industry standard in those circumstances. We have developed a number of those. It takes things a little out of the co-regulatory framework and it means that complaints can come directly to ACMA, and it means that we have a much stronger oversight role on those particular issues. A couple of those standards are already set in the legislation, such as the Australian content standard and the children's television standard, but we have also introduced standards around things like disclosure on commercial radio.

**CHAIR**—And we are here today because the audit report we have chosen to look at does not give us comfort that those roles are being performed in a way that we can track and that we can have some confidence in the timeliness of the responses to the public in this area, which are not as timely as we would like them to be. We also cannot see evidence of impacting on the regulation through trend data in any way. I know my colleagues would like to pursue those areas a bit further.

**Senator FEENEY**—Firstly, I would like to deal with the proposition that you are adequately dealing with complaints. Can you tell me, given that you say you do not have a discretion to not investigate a complaint, what percentage of complaints made to you are actually investigated? I understand you have the capacity to not investigate a complaint if you believe it to be frivolous, vexatious or not made in good faith, pursuant to section 149. Can you give me some idea of what percentage—

**Ms O'Loughlin**—I would say that we very rarely consider a complaint to be vexatious or frivolous. I would have to take on notice the question of numbers, but I cannot remember one in the last two years. So we do not use that particular clause in the act lightly, because we do believe that we have a very high hurdle in terms of taking seriously complaints that come to us. We do not investigate some complaints that come to us that we do not think are in our jurisdiction. For example, we get complaints about advertisements, which are best dealt with by the Advertising Standards Board rather than by ACMA. So it is more that, when complaints come to us that are not within our jurisdiction, we may refer the complainant on to the most appropriate body to deal with their complaint.

**Senator FEENEY**—Can the ANAO assist with my question relating to the percentage of complaints?

**Ms O'Loughlin**—I think there was something in the report itself.

**Senator FEENEY**—I am not convinced that I understand the figure in the report. It says '20 per cent'. That strikes me as such a remarkably low figure that I am assuming that I misunderstood it.

**Mr Caine**—Where does it refer to 20 per cent?

**Senator FEENEY**—I may be looking at a summary. I am looking at page 16.

**CHAIR**—I think the complaints are on pages 46 and 47 of the report. I think they start on page 44.

**Mrs Cass**—On page 38 we give the number of code complaints that were received for radio and broadcasting and how they then went down into investigations. Is that the one you are referring to?

**Senator FEENEY**—Yes. I guess I am interested in exploring that triaging, if you will, of when a complaint is made. How do you triage it so that you ascertain whether you believe it is frivolous or not made in good faith, or perhaps whether it is outside your jurisdiction. Obviously, that process is of critical importance in terms of both your role and our scrutiny of your role. What can you tell me about that?

**Ms O'Loughlin**—In referring to the figure of 1.2 on page 38, obviously at the very high level broadcasters get enormous amounts of feedback from their viewers. That could be that it has been reported to us when they get feedback, which may vary from 'I don't like the newsreader's tie' to 'Why isn't my favourite program on at the right time?'—those types of complaints. So they get an enormous amount of feedback from their viewers. I think one of the strengths of the co-regulatory framework is that it encourages that.

**Senator FEENEY**—Forgive me for interjecting, but how do you know that that is the nature of the complaints they receive? Do they provide you with reports?

**Ms O'Loughlin**—Summary reports come to us on a monthly basis, so we have a sense of those types of complaints. The complaints that come to us must actually relate to something that can be covered by the commercial code of practice for radio or television or any of the other codes.

When we receive complaints, what we do in terms of triage is that often we get very general complaints and we work very hard to make sure that, in determining whether it is a complaint we want to investigate, we can gather enough information to make sure that the complaint is a valid complaint. By that I mean that it is a complaint that relates to a specific clause in the code of practice. We often get complaints which do not relate to codes at all, and that is where we try and refer the complainant to the most appropriate body to deal with those complaints. It is very rarely that we get down to dismissing a complaint as frivolous and vexatious. It is more about considering whether we have jurisdiction to look at that complaint under the code.

Often we also send the complainant back to the broadcaster, because they may not have gone to the broadcaster in the first instance. But we try and help complainants through that process to make sure it is a satisfactory one for them as well.

**Senator FEENEY**—But there are issues about ACMA's follow-up of those complainants—that is to say, your capacity to ascertain whether they have indeed got satisfaction or whether their complaint has been dealt with by the broadcaster. When you refer someone to a

broadcaster, is it a bit like a fire and forget process where you send them off into the ether and do not ascertain how that inquiry is handled?

**Ms O'Loughlin**—We certainly would not want to send them off and never hear from them again. We do want them to go through that process with the broadcaster because we do believe that the broadcaster is in the best position to satisfactorily resolve a complaint. But we do, of course, encourage them to come back to us if they do not get satisfaction. My team often do quite a lot of toing-and-froing with complainants to make sure that they do get some satisfaction for their complaints.

**CHAIR**—Senator Feeney, I do not like to interrupt your chain of questions, but Senator Lundy has indicated she has to leave very soon. Do you mind if she asks some questions?

**Senator FEENEY**—Of course not.

**Senator LUNDY**—Thank you. I have got another committee to chair. One of the specific recommendations was on the Australian music code of practice and compliance with that. Can you describe to the committee what the process is of monitoring compliance with that?

**Ms O'Loughlin**—There has not been a lot of monitoring of compliance with that. Normally what happens is that the AMPCOM code is provided to CRA and they monitor it themselves and report to us. We have taken on board the recommendation from the ANAO to provide greater scrutiny to that, and that is something we are talking to the Commercial Radio Association about at the moment because their code is under review and we want to tighten that up.

**Senator LUNDY**—In response to this recommendation, will that be a case of cross-referencing what you see in the CRA report with an independent evaluation of the Australian music code of practice? Or will you undertake your own reporting perhaps for periods of time to ensure compliance?

**Ms O'Loughlin**—At this stage we are in discussions with CRA in terms of how any new clauses in their code would work. How we would monitor and assess that we have not developed at this point in time, but that would fall very much out of what the new clauses in the code would be. The challenge for us in monitoring things like Australian content on radio, or indeed on television, is the enormous amount of material one needs to look at when you are doing that type of assessment. We have done some auditing before for local content on regional television and that was a quite substantial investment of time and money by the organisation because you literally have to listen to or watch 24 hours a day for seven, 14 or 21 days to assess that. I think we try and balance out the most appropriate way of us independently checking what people are doing mixed with complaints handling and the reportage we get from other sources and the potential to use things like auditing to satisfy ourselves over time, bearing in mind that that is quite a significant investment for us.

**Senator LUNDY**—From the way you describe that, there is no accessible data that you can access from, say, commercial broadcasters about the status of their content as Australian or otherwise.

**Ms O'Loughlin**—They will report that to us.

**Senator LUNDY**—But that means you should not have to watch everything; you should just cross-reference that data with perhaps a limited amount of content to make sure they are reporting it correctly.

**Ms O’Loughlin**—Senator, I am sorry, I probably misunderstood your question a little. I was referring to the fact that we can look at what they have reported as being Australian content, and at our understanding of whether that is Australian content through reference to ARIA and things like that, but it is where there might be cause on us to get an independent assessment—

**Senator LUNDY**—Yes, you are right. They are two separate things.

**Ms O’Loughlin**—Yes. But we do look at what is reported to us and whether, on what has been provided to us, that makes sense.

**Senator LUNDY**—On the point of what has been reported to you and what you have been able to go back and verify, have there been any discrepancies? Have you found reason to need to check up on what is being reported to you for accuracy?

**Ms O’Loughlin**—I might need to take that on notice. I do not believe that we have had any significant discrepancies, but I would like to take that on notice.

**Senator LUNDY**—I think knowledge about that would be helpful in terms of confidence in the compliance of the co-regulatory regime. Thank you.

**Senator BOYCE**—One of the comments from the Auditor-General was in relation to the fact that you did not have a consolidated manual for complaints handling. It says here that you were intending to develop one during 2008. Can you tell us about where you are at with that, please?

**Ms O’Loughlin**—We have implemented a process whereby the development of a manual is being done as a whole-of-agency project. We of course are looking at a manual that is specific to broadcasting, but we also want to develop a procedures manual that covers broadcasting, telecommunications, radio communications, internet—the broadest sweep of our regulatory arrangements. That is mainly because it has significant value for us in testing where there are differences, where there are similarities and where there is potential for efficiencies. We have started that process. We are probably three or so months from having a first draft of a consolidated one, but we have moved forward on specific chapters. For example, we have recently completed one on a very important power that we have under each of our acts surrounding infringement notices. We have also developed quite separately a full procedures manual for our obligations—

**Senator BOYCE**—Sorry, could you repeat that?

**Ms O’Loughlin**—We have done a full chapter of infringement notices across the organisation. Separately, we have also developed manuals for our regulatory responsibilities with regard to the spam act. What we are hoping over the next three to four months to complete the full development of a compliance and enforcement manual for the entire organisation, which will also include broadcasting.

**Senator BOYCE**—Am I right in assuming that the vast majority of your complaints would be related to broadcasting, not to the other areas?

**Ms O’Loughlin**—The largest number of complaints we receive are with respect to other areas.

**Senator BOYCE**—Such as?

**Ms O’Loughlin**—Such as the Do Not Call Register, for which we are responsible, and also spam.

**Mr Cheah**—And some areas of telecommunications.

**Ms O’Loughlin**—And in some areas of telecommunications we get quite a lot, although a lot of those initial complaints go to the TIO.

**Senator BOYCE**—Is that because they are not specifically related to you? They would be complaints about service provision and the like, would they?

**Ms O’Loughlin**—The model under the Telecommunications Act works a little differently. The Telecommunications Industry Ombudsman is the first line of complaint. So, once they have gone to their provider, if they do not get satisfaction they go to the TIO and then ACMA is only responsible for things that are escalated to it from there—whereas in broadcasting you go to the broadcaster and then you come to us. So it is slightly different.

**Senator BOYCE**—When are you anticipating having the manual completed and operational?

**Ms O’Loughlin**—It is an iterative process—between three and six months.

**Senator BOYCE**—This is not strictly within the scope of this, but you mentioned sending the complainants back to the broadcaster if they had not been there. What processes do you have in place to follow that up, to know what happened then?

**Ms O’Loughlin**—We usually ask the complainant to give us a ring and tell us how they went.

**Senator BOYCE**—And how do you know if that happens?

**Ms O’Loughlin**—We often follow up directly with the complainant just to make sure that they have gone through that process. The complainants will usually come back to us.

**Senator FEENEY**—How often is often?

**Ms O’Loughlin**—I would have to give you some more formal advice on that, but the team is pretty much focused on trying to make sure that the complainant gets a satisfactory response.

**Senator BOYCE**—I am trying to imagine what this is like. Someone who has taken a phone call puts a little flag on that name to check with them in a week—is that what we are talking about?

**Ms O'Loughlin**—I think you will find that that is probably how they manage it within their team, but I can certainly give you some additional information on that.

**Senator BOYCE**—I would appreciate getting that.

**CHAIR**—Audit Office, did you find any evidence of that sort of process in place to manage complaints?

**Mr Caine**—The databases that we saw have a log. One of them has a call log where they record complaints coming in, say, by phone and other means, and there is usually a comment field saying what action ACMA has taken in regard to that in terms of the degree to which follow-up occurs. The database did not help us there.

**Ms O'Loughlin**—One of the things that the ANAO recommended and one of the things that we are working on at the moment is to try and automate some of the systems for flagging and reminders, because a lot of the systems that we have just do not have that capacity. That is certainly a project that we are working with our corporate area to improve—the AIMS database is what we call it—so that there is much more automatic generation of prompts and reminders and better reporting.

**CHAIR**—Can I just follow that up too. The audit found considerable problems with the recording of data in AIMS. It appears that that system could become a useful tool and could provide a lot of very useful data about complaint handling and compliance if it were being used effectively, but the audit found it was not being used effectively. Could you tell us what steps have been taken to improve staff use of AIMS to record all relevant investigation data?

**Ms O'Loughlin**—I think probably the process of having the Audit Office in our organisation over the period of time that they were doing this review assisted greatly in flagging to the team itself additional information that they should record in AIMS, so I think there has already been—

**CHAIR**—Was there any training done with them? Were there any directives issued? Were there any refresher courses or anything else like that done?

**Ms O'Loughlin**—The way we have approached this is to talk as a division about how the various findings and observations of the Auditor could be better integrated into our systems. We have also had a business analyst go through our systems as well, both to identify where we can improve them in line with the ANAO findings and to conduct that discussion with staff about how they need to improve things in adding stuff into the AIMS database.

**CHAIR**—And how will you know if that has worked?

**Ms O'Loughlin**—I think it is a matter of us assessing the improvements in our investigation processes over time.

**CHAIR**—I would say to you that continuous improvement is a very exciting motivator for people working in any field, but they need data, they need feedback, they need measurements and they need to know what the progress that they are achieving is and what the benefit of that is.

**Senator BOYCE**—I want to go back, Mr Cheah, if I could. You mentioned earlier a report that ACMA had commissioned itself that had brought up a number of the issues that you said the Auditor-General had also raised. Could you tell us a bit more about that report, please.

**Mr Cheah**—I will make my comment in general terms and then I might pass on to my colleague. The report, in general terms, was about our approach to investigations. When ACMA was formed, as you would be aware, it was formed by the merger of the old Australian Broadcasting Authority and the Australian Communications Authority. It has been very interesting, because for the first time you have had very disparate approaches to investigations and a whole lot of regulatory activities across areas which have been quite siloed, where the legislative requirements have been quite different and where there have probably been different cultures. So what we decided we needed to do—and it is probably part of a number of activities, actually—is to go through and have a look across the organisation at the different kinds of approaches that were being taken towards various activities. Interestingly, the first cab off the rank was in fact investigations, and it turned out to be quite prescient because the ANAO—

**Senator BOYCE**—Investigations into complaints or investigations into noncompliance?

**Mr Cheah**—Mainly investigations into complaints or areas of alleged regulatory noncompliance—for example, interference management might be one of those. We have quite different approaches, systems and legislation, as I said, and our roles differ too. In an area like spam and Do Not Call, we are the direct regulator and that is our role. In an area like broadcasting, as I said before, we oversee a co-regulatory approach. In telecommunications, we are one layer further back. Our role there is to investigate areas of systemic noncompliance, because individuals are dealt with by the Ombudsman. So that was the investigations consultancy, I suppose, which we engaged. Ms O'Loughlin might have some further comments.

**Ms O'Loughlin**—I would only add that the outcome of that was that the review itself also pointed to the need to develop what are best practices across the organisation, and what can we pick from those to change in other areas? It also identified the need for a comprehensive compliance, enforcement and investigation manual, which we have developed. It also recommended that there be a focus by senior management on looking at these issues, and we have established a compliance and enforcement committee internally, which is made up of SES band 2 officers—the general managers, basically—to drive the continuous improvement process across the organisation.

**Senator BOYCE**—So there is a compliance and enforcement committee, but is it also looking at complaints compliance, so to speak?

**Ms O'Loughlin**—Yes. We put the complaint thing under that general heading of 'encouraging compliance in the industry'. That committee is charged with leading the development of the whole-of-agency procedures manual. It is also charged with looking at specific high-priority investigations to make sure that they are being given the appropriate resourcing and priority

across the organisation. It also looks at where there are potentially differences in the way we do things across the organisation and whether they are differences that arise from the legislation or whether they are just differences in operational practice that have emerged over time.

**Senator BOYCE**—The chair mentioned continuous improvement earlier. How are you benchmarking yourself against where you were in relation to what the report said and where you go, of course bringing in the ANAO suggestions? How do you measure progress?

**Ms O'Loughlin**—We have a series of reports which have visibility by the CEO and chair on a monthly basis. We have set KPIs for our broadcasting investigations and our other investigations, which are a measure of our performance, and that is where we will benchmark it—through that KPI process and through regular high-level reporting. In the development of the compliance and enforcement manual, we will be looking at what we think are best practice regulatory approaches for various bits of the compliance and enforcement chain, taking on board not only the ANAO's report and review of us but also the ANAO's general guides to better practice in regulation, which are very helpful in developing those manuals.

**Senator BOYCE**—And you will be reporting publicly against those KPIs?

**Ms O'Loughlin**—Yes, we report against those in our annual report.

**CHAIR**—Could I just say that the audit report said that you were monitoring performance against divisional business plans rather than the performance indicators outlined in the portfolio budget statements. Could you update us on the steps you are taking to ensure that you report against the portfolio budget statements in future?

**Ms Carlos**—There is a little bit of history there, which we had discussions with the ANAO on, in terms of the two organisations coming together and putting outcomes and outputs together. Over the last 12 months we have gone down a path of doing a lot more in terms of strategic planning and building up that framework. We have certainly acknowledged and accepted the audit finding that we needed to realign our reporting in terms of our PBS and our annual report.

As for the progress that we have made towards that, certainly this year's portfolio budget statements are far more aligned with that strategic framework. That will not really come to the fore until our annual report next year. However, what we have done this year is that, in our annual report which has not yet been tabled, we have tried to draw together those synergies between the PBS reporting and the performance information that is in there. It has been a little bit of a slow process but we are getting there. There is a further stage of reviewing our outcomes and our performance information, which is underway at the moment for the 2009-10 budget process in line with the department of finance and Operation Sunlight requirements. I think we are getting there but we are always happy to have a review and to make things more streamlined and more accountable.

**Senator FEENEY**—I was questioning you earlier about your investigation of matters. For the 21 per cent of complaints that you do investigate, as they fall within your jurisdiction, and resolve, the report said you take an average of 18 weeks to deal with those complaints. It said that 18 weeks included delays as mundane as delays in your mailroom right through to delays that are presumably as significant as obtaining agreement from broadcasters. I was wondering if

you could do two things for me. Perhaps you could explain to me, in as much detail as you are able to, the reasons for that 18 weeks other than the delays in the mailroom. In particular could you explain to me what reaching an agreement with a broadcaster entails.

**Ms O'Loughlin**—In the report there is a quite useful diagram, which I will now find and then I can walk you through it. Here it is. It is on page 114 under appendix 2.

**Senator FEENEY**—Yes, thank you. I have that.

In **Ms O'Loughlin**—As it states there, we receive a complaint, we check whether or not it has been to the complainant first and whether or not it is a valid code complaint. If we believe it is, we then ask the broadcaster to actually provide us with the tapes or some recording. Often at that point in time the broadcaster will take the opportunity to provide some material to us in terms of information and evidence that they would like us to consider. There is a period of time in waiting for that to be produced by the broadcaster and for that to come to us. We do find that sometimes we need to go back to the complainant as well, to clarify that we understand their complaint well. So there is a period of time which is probably—and this is when we get into appendix 3—around making sure that we have got all the information that we need to investigate the matter before us including the broadcast itself.

**Senator FEENEY**—I refer to that process whereby the broadcaster provides you with the tape and perhaps with relevant facts about the broadcast. To what extent do you have a system in place to measure how long that takes? Perhaps you do not need to—I do not know. To what extent do you take measures to try to impose swifter response times on the broadcaster?

**Ms O'Loughlin**—It is one that always challenges us. It depends on the complexity of the complaint. Sometimes we get things which are very straightforward but often with some broadcasts it can be a very complex investigation to undertake. There is no real hard and fast rule. We try to make sure that we give broadcasters a reasonable time in which to come back to us. But we will often find that it is only once we get into an investigation and understand the complexity that broadcasters may actually ask for additional time. We try to push them as hard as we can.

**Senator FEENEY**—It seems to me that a complainant needs to leap over several hurdles here. On the initial contact they need to leap over the hurdle of falling within your jurisdiction. Presumably, they need to leap over the hurdle of not being found to have been frivolous or to have made a complaint in bad faith. Then later on they need to leap over the hurdle of your re-establishing the bona fides of their complaint after you have spoken to the broadcaster. I wonder why that has to happen at so many different junctures in the process. Why can't it happen either at the outset or at least in a more consolidated way?

**Ms O'Loughlin**—Part of that is also about the requirements that we have under administrative law to provide natural justice to broadcasters. I have had a look at some of the recent investigations we have done. The processes that ACMA had to undertake in one of the circumstances took seven weeks. The amount of time given to broadcasters to respond and to provide us with evidence was six weeks. So in that circumstance there was a fairly even amount of time. There are various parts of the process, set out in our legislation but also in terms of providing procedural fairness, whereby we are actually required to give broadcasters a

reasonable amount of time at the outset, in terms of giving them the initial complaint, but also when we come up with a preliminary draft report of the investigation. We need to give them the opportunity to comment on that preliminary draft. When we finalise it we also need to give them the opportunity to comment before we publish the report. That is a specific provision in the act as well. So there is a lot of time spent—

**Senator FEENEY**—in waiting for others.

**Ms O’Loughlin**—Yes, in waiting for others.

**Mr Cheah**—In terms of your original comment as to the complainant’s point of view: when they are making an initial inquiry of us, often they will come to our front desk or will be put through to one of our officers. At that stage they are establishing for themselves whether or not they would like to make a complaint and they are getting advice. So they get some advice then as to how to go about complaining and what they need to do. By the time it actually becomes a proper complaint, a formal complaint—and I think the officers actually do try to be pretty helpful in terms of resolving that—then it is pretty much in the system and the only time we will go back to them will be if there are genuine points of clarification or issues that have been raised by the broadcaster which might be relevant to their complaint. So I think the actual processes in terms of dealing with a complainant are in fact relatively streamlined.

**Senator FEENEY**—Goodness me! When I look at appendix 2, many words spring to mind, Mr Cheah, but ‘streamlined’ is not among them. It says 18 weeks.

**Mr Cheah**—I think your original question was: won’t the complainant have many, many things that they have to go through and many interactions with us? I think my comment—

**Senator FEENEY**—Not so much ‘many interactions’ as hurdles they have to surmount.

**Ms O’Loughlin**—We are constantly trying to find new approaches to doing our broadcasting investigations which try to speed things up. We balance that with procedural fairness and all the other things that we need to balance up. Some of the things that we have looked at, which Mr Cheah mentioned earlier, include, with quite complex investigations, trying to establish upfront the core issues that the complainant wants resolved and that are going to be addressed by the broadcaster. As I said, often we can get a complaint that is immensely broad ranging about a program. So it is about trying to help the complainant, I think, to come up with what is fundamentally the core issue that they want resolved by the broadcaster. We are finding that has benefits for the complainant and for the broadcaster.

**Senator FEENEY**—I can see that, and I commend you for it. I just wonder why it cannot happen at the outset. Why must it happen in the middle of the process?

**Ms O’Loughlin**—We are trying to use that statement of issues process from the outset when the complaint comes to us so that we are really trying to hone down what the complainant is after and what the key concerns are so that we do not go off onto tangents which might take us a great deal of time to get through.

**Senator FEENEY**—Can you also explain to me how, after this process which I would characterise as Byzantine and we then reach the moment when you seek to reach agreement with the broadcaster, how you do so? Can you explain that to me?

**Ms O’Loughlin**—Yes, certainly.

**Senator FEENEY**—Please explain it to me both in terms of the process and what it gives rise to.

**Ms O’Loughlin**—As part of the co-regulatory framework, as Mr Cheah mentioned earlier, what we are trying to do with broadcasters is to get them to develop a compliance culture so that they are complying as a matter of course with the codes of practice and standards and everything else. What we do find when we get to a breach is that there is a period when we may choose to use our formal powers but more often than not we will use negotiation and liaison with the broadcasters to try to get them to change behaviour so that they comply with the code in the future. That can take a period of time in terms of making sure what the broadcasters are proposing to us we and the authority think is going to ensure that they comply with that particular code clause going forward.

**Senator FEENEY**—How is that informal liaison process—which is aimed to generate a ‘compliance culture’ to use your words—transparent?

**Ms O’Loughlin**—It is usually transparent through the media releases that we put out around what action the broadcasters are going to take to resolve a breach. We specifically put that into our media releases to inform the public, but also other broadcasters, about what we expect people to do in achieving compliance into the future. That is how we make them public.

**Senator FEENEY**—I will perhaps come back to this point, but I recall the report recommended or spoke about the need for the reporting of significant breaches. Is that a process that would enable—sorry, have I not made myself clear?

**Mr Cheah**—We do actually—

**Ms O’Loughlin**—The authority is very aware of the power of making breaches public. We always make breaches public. We also have recently started to make non-breaches public.

**Senator FEENEY**—So that is the significant non-breach reports.

**Ms O’Loughlin**—Yes, we have started that recently.

**Mr Cheah**—If I could just chip in at this point. This is the authority rather than the organisation. We spend quite a lot of time thinking about these strategic issues such as how we create a compliance culture and what is the best way of responding, particularly if you start to see a pattern of behaviour amongst a broadcaster. We do think about adjusting our responses depending on the kind of response we are getting from a broadcaster.

**Senator FEENEY**—If you see a pattern of behaviour amongst a broadcaster, what do you do about it? Have you ever launched an own motion investigation into a broadcaster?

**Ms O’Loughlin**—Yes, we have. The most recent one was an own motion investigation we launched on *Big Brother* in 2005.

**Senator FEENEY**—Weren’t you directed by the minister to do that?

**Ms O’Loughlin**—No, there was an earlier one. It predates me. There was general concern about behaviour that was occurring on *Big Brother*.

**Senator FEENEY**—Forgive my ignorance. When are we talking about chronologically?

**Ms O’Loughlin**—We are talking about 2005. The authority at that time launched an own motion investigation into the *Big Brother Uncut* series.

**Senator FEENEY**—Was that the last one—2005?

**Ms O’Loughlin**—There have been a couple of very small own motion ones that we have done quite recently, but that was probably the major one.

**Senator FEENEY**—Could you take it on notice to advise me of your own motion inquiries since, say, 2005?

**Ms O’Loughlin**—Yes.

**Senator FEENEY**—That would be good. The term ‘community standards’ has been obviously referred to on several occasions. Mr Cheah, in your opening remarks I think you touched upon the fact that the organisation does research to ascertain community standards. If I got that wrong, please explain it to me. How do you ascertain community standards?

**Mr Cheah**—I made that comment a bit later on, but I will let Ms O’Loughlin go into some of the detail about how we go about doing that.

**Ms O’Loughlin**—As part of our input into the development of new codes and revised codes with industry, we will often identify whether there are any issues of concern that have been raised through the complaints process, through reporting—the media does a lot of reporting on itself—and also identify where we might need to do some research to test whether community standards are still being maintained by the current codes.

Probably the most recent one we undertook, which was actually directed by the former minister and was a very useful body of work, was around reality television. The review itself went a bit broader than reality television to test things like classification symbols and how people understood classification symbols on television—whether they were comfortable with those symbols and whether they knew what those symbols meant. That was one of the concerns that we were seeing generally in the commercial broadcasting space, and it is a piece of research that we did that responded to that and gave us some good information about what can be—

**Senator FEENEY**—Was that published?

**Mr Cheah**—Yes it was. It was a major report. In fact, the good thing about that research was that it also asked quite a few open-ended questions such as: ‘Have you seen anything on television over the last 12 months which has been of concern to you?’ It was quite interesting to see firstly the number of people and how they responded to that but also what the categories were and how the issues lined up. A major piece of research of that kind does have these flow-on consequences to a lot of our other activities as well.

**Ms O’Loughlin**—Some of that was surprising in terms of what we learned was of community concern that we had not recognised before. How contestants were treated was something that was of strong community concern, whereas we probably went into it thinking some of the behaviour or language might have been of more concern. So we do, as part of working with industry when they are going through development of a new code of practice, often undertake research to fully inform us so that we can have that discussion with broadcasters about whether or not we think their codes are still meeting those community standards. Broadcasters are also required, under the legislation, to consult publicly on their draft codes of practice. Once they have done that consultation they provide the consultation, their code and their response to the consultation to the authority.

**Senator FEENEY**—Do you supervise the consultation process that broadcasters undertake?

**Ms O’Loughlin**—We do not supervise it but we certainly provide them with our expectations on that consultation in terms of it being public and allowing community time to respond to issues.

**Senator FEENEY**—Have there ever been occasions when you have advised a broadcaster that you thought such consultation was inadequate?

**CHAIR**—Senator Feeney, I have to go to the chamber for a division, so I will have to bring this hearing to a close. ACMA, we have some further questions we would like to put on notice to you, if you are happy to do that. Would you like to table your opening statement as part of your evidence?

**Mr Cheah**—Yes.

**CHAIR**—I thank everyone for attending the inquiry today.

Resolved (on motion by **Senator Feeney**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

**Committee adjourned at 12.58 pm**