

# CHAPTER 1

## OVERVIEW

1.1 In this Chapter the Committee provides an overview of self-regulation in Australia's information and communications industries. It discusses the nature of the industries and highlights the need for their effective regulation. The self-regulatory models that currently apply are summarised, with particular emphasis on the regulation of privacy and complaints-handling mechanisms. The Committee also briefly discusses convergence technology and the challenges it poses for the future regulation of the information and communications industries.

### Introduction

1.2 Information and communications industries play an indispensable role within the daily life of the Australian community. The information and communications industries in this inquiry refer to the four major industries in Australia that deal with the carriage and supply of information – the print media, television, radio and telecommunications. These industries are experiencing change at a rapid rate. Modern trends suggest that information and communications industries will in the near future be overtaken by a 'new media' – that is, by a convergence of broadcasting, publishing, computing, communications and telephony.

1.3 The emergence of the 'new media' has only served to further highlight the enormous power that the various information and communications industries can wield, and the complex balance between competing private and public interests that has to be continually managed. The Government is currently undertaking a Convergence Review which will further explore the ramifications of the 'new media'. The review will provide a comprehensive analysis:

... of the issues related to the convergence of technologies and markets in the telecommunications, information technology, broadcasting and media industries, and the wider economy, over the next five to ten years.<sup>1</sup>

1.4 The Committee will note the outcome of the Convergence Review and the ramifications that it may have for the future effective regulation of Australia's information and communications industries.

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1 [http://www.dcita.gov.au/graphics\\_welcome.html](http://www.dcita.gov.au/graphics_welcome.html), as at 24 January 2000.

1.5 In examining the regulation of Australia's existing information and communications industries, it is appropriate to bear in mind what a former President of the New South Wales Court of Appeal had to say in this regard:

The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way ... it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it. *The media may, by the exercise of this power, influence what is done by others for a purpose which is good or bad. It may do so to achieve a public good or its private interest. It is, in this sense, the last significant area of arbitrary public power* [emphases added].<sup>2</sup>

## **The nature of Australia's information and communications industries**

### *Overview*

1.6 The information and communications industries can be divided into four major categories:

- **print media** - including newspapers, magazines and books;
- **television** – including commercial, non-commercial and community television stations;
- **radio** – including commercial, non-commercial and community radio stations; and
- **telecommunications** – including the Internet and telephony.

1.7 The discussion below provides an overview of the main corporations that control Australia's information and communications industries. It indicates that a relatively small number of corporations are responsible for providing Australians with news, current affairs, communications and entertainment services.

1.8 Such a concentration, together with a 'bottom line' mindset that continually threatens to displace foundational media visions, such as those of *The Age* newspaper for 'philanthropy, the diffusion of truth and the advancement of humanity',<sup>3</sup> may potentially undermine the ideals of a healthy media within a liberal democracy. That is, for free expression; fair and accurate representation of news; editorial independence and media ethics.

1.9 Professor Mark Pearson, the Head of Communication and Media Studies at Bond University, expressed his concerns in that respect, when he said that:

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2 *Ballina Shire Council v. Ringland* (1994) 33 NSWLR 680 at 720 per Mahoney JA.

3 These sentiments were expressed in the September 1854 prospectus that floated *The Age*, a Melbourne newspaper launched on 17 October 1854.

We have a whole shift in media outlets – a shift in attitude towards the bottom line, circulations and ratings while still flying the flag of public interest and press freedom. You wonder who is the real master sometimes of these organisations – whether it is the MBA that is ruling the newsroom, as one American article suggested, or whether it is a legitimate concern for public interest rather than just what is interesting to the public.<sup>4</sup>

1.10 There is arguably no more notorious example of the increasingly predatory and intrusive tendencies of the media than the events leading to the tragic death of Diana, Princess of Wales, on 31 August 1997. As a result, the British Press Complaints Council sought to curtail the behaviour of ‘news hawks’ and ‘media scrums’ by banning:

- photographs obtained by persistent pursuit;
- motorbike chases; and
- invading the privacy of public figures in places such as restaurants, churches and secluded beaches.

1.11 The small number of major commercial interests in Australia’s media industries, and the potential threat posed to the public interest by the push for higher circulation and ever higher ratings, suggest a need for an effective system for their regulation. Without it, private corporate interests may well be promoted over and above the public interest.

### *Print Media*

1.12 Table 1.1 provides an overview of the ownership that the listed corporations hold over various media outlets.

Table 1.1

#### *Control of print and publishing*

<b>Company</b>	<b>Print and Publishing</b>
News Limited	67.6% of Aust. capital city and national papers; 75.6% of Aust. Sunday papers; 46.2% of Aust. suburban papers; 23.3% of Aust. regional papers; 4 <sup>th</sup> biggest book publisher.
Publishing & Broadcasting Ltd	43% of top 30 magazines by circulation.
Fairfax	21.5% of Aust. capital city and national papers; 23.3% of Aust. Sunday papers; 14.3% of Aust. suburban papers; 14.9% of Aust. regional papers.

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4 *Official Committee Hansard*, Sydney, 22 April 1998, p. 410.

APN	13 regional papers with 30% of total circulation; 3.9% of Aust. suburban papers; 50 non-daily papers; Book publisher Peter Isaac Publishing.
Rural Press	160 regional papers; 35 agricultural papers.
PMP Communications	29.2% of top 30 magazines by circulation (24 in total).
Western Australian Newspapers	9.2% of total circulation of Aust. capital city & national daily newspapers; 8.8% of total circulation of Aust. suburban papers; 1.2% of total circulation of Aust. regional daily papers.

Source: *Communications Update, Issue 151, (1999:13)*

1.13 Table 1.1 shows that in spite of the concerns of successive governments and public-policy makers about encouraging greater diversity of control and competition within the print media,<sup>5</sup> the number of significant ‘players’ in the market is limited to seven major business corporations.

### Television

1.14 Historically, governments have been concerned about the potentially adverse impact of a pervasive media outlet such as television. In its final report, the 1954 Royal Commission on Television stressed the need to ensure that the interests of the community be protected:

... in order to provide not only for the entertainment and enjoyment of viewers, but also for their education ... and enlightenment. The use of this new medium of communication must, in our view, be regarded, by commercial as well as national stations, as in the nature of a public trust for the benefit of all members of society.<sup>6</sup>

1.15 Apart from the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Services Corporation (SBS), which are essentially funded by the taxpayer (the ABC being 72% publicly funded, and the SBS 69%), some 50 commercial television services operate in Australia. Table 1.2 provides an overview of the market share held by the main media corporations in television stations in Australia.

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5 For example, see the Inquiry into the Ownership and Control of Newspapers in Victoria (1981) *Report to the Premier of Victoria*, (Norris, Chair); the Working Party into Print Media Ownership (1990), *Stage 1 - Report to the Attorney-General of Victoria* (Matthews, Chair); and *News & Fair Facts – The Australian Print Media Industry*, Report of the House of Representatives Select Committee on the Print Media, Canberra, March 1992 (Lee, Chair).

6 Royal Commission on Television *Report*, (Canberra: Government Printing Office, 1954) (G Paton, Chair), p. 144.

Table 1.2

*Population reach of television networks*

Group	Stations	Potential audience (% of population)
Seven Network	5 metro, 1 regional	72.1
Ten Group	5 metro	64.9
Nine Network	3 metro, 1 regional	51.5
TWT Holdings	1 metro, 7 regional	25.6
Prime Network (Ramsay)	8 regional	25.1
Southern Cross Broadcasting	1 metro, 4 regional	21.5
Telecasters Australia	5 regional	18.8

Source: *Communications Update*, Issue 151, (1999:13)

*Radio*

1.16 In 1942, the Joint Parliamentary Committee on Wireless Broadcasting also expressed some concerns that the power and influence of radio broadcasting should not be corrosive of the fabric of the nation, and that there ought to be:

... some measure of public control of programs in the general interests of the community, not only to prevent the service from being used for improper purposes, but to ensure that it will exercise a positive influence for good on the individual and national character.<sup>7</sup>

1.17 Table 1.3 below shows that a relatively small number of corporations control the majority of Australia's radio stations.

Table 1.3

*Radio networks population reach*

Group	No. of stations	Potential audience (% of
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7 Joint Parliamentary Committee on Wireless Broadcasting, *Report*, (Canberra: Government Printing Office, (W G Gibson, Chair), 1942), p. 10.

		total population)
Austereo Ltd	11 metro, 3 regional	62.5
Aust. Radio Network	8 metro, 3 regional	52.6
RG Capital Australia	1 metro, 13 regional	30.0
Lamb Family	2 metro	27.2
Southern Cross Broadcasting	5 metro	24.7

Source: *Communications Update, Issue 151, (1999:20)*

### *Telecommunications*

1.18 Table 1.4 shows that virtually all Australian households have telephones and that, increasingly, more households are connecting to the Internet. As with other information and communications industries, telephony services are provided by a relatively small number of corporations compared with the numbers of Internet Service Providers (ISPs). Under the *Telecommunications Act 1997* telephone service providers and ISPs are obliged to join the Telecommunications Industry Ombudsman (TIO) scheme. Membership of the TIO Scheme reflects the difference between numbers of telephone service providers and ISPs with 91 telephone service providers and 766 ISPs at 30 June 1999.<sup>8</sup>

**Table 1.4**

#### ***Telephone and Internet usage (per household)***

Media Type	1996	1998
Telephone	96.4%	96.8%
Internet	286 000 (4.3%)	1 084 000 (15.9%)

Source: Australian Communications Authority, *Telecommunications Performance Report 1998-1999*; ABS *Household Use of Information Technology 8146.0 1998*

### **Regulation of the information and communications industries**

1.19 During the course of its inquiry, the Committee received submissions and heard evidence on the regulatory frameworks within Australia's information and communications industries covering both the self-regulatory as well as the co-regulatory models.

1.20 Significantly, much of this evidence was critical of two important aspects of the media; namely: (i) the complaints-handling process; and (ii) the standards that

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<sup>8</sup> Telecommunications Industry Ombudsman, *Annual Report 1998-99*, [www.tio.com.au](http://www.tio.com.au), as at 18 February 2000, pp. 10-11.

apply with respect to privacy. For that reason, the Committee resolved to focus upon these two major issues.

1.21 However, before turning more directly to the critical issues of complaints and privacy, it is appropriate, at this stage of the report, to clarify what is meant by ‘regulation’, ‘co-regulation’ and ‘self-regulation’.

### *Regulation, co-regulation and self-regulation*

1.22 Regulation is the control of particular sectors of an economy through statutory regimes that have a defined reach and application. These controls can affect their owners’ legal right to operate within their respective sector, and also determine the content of their programs. Co-regulation, by contrast, provides a legislative framework that is supervised by a statutory authority, and within these defined parameters, industry self-regulates.

1.23 Self-regulation is when an industry sets its own standards of conduct as a way of influencing the behaviour of its members. Guidelines as to what is considered to be acceptable or unacceptable behaviour are contained in ‘Statements of Principles’, ‘Codes of Practice’, ‘Codes of Ethics’ or ‘Codes of Conduct’. And usually, there are mechanisms in place for dealing with breaches of these codes and statements.

1.24 Regulatory codes of either a co-regulatory or self-regulatory type can be wide-ranging in their application. For example, the Australian Press Council’s Statement of Principles, which underpins the regulation of the print media, deals with issues such as accuracy, honest and fair presentation of news and comment, offensive material, discrimination and vilification and privacy. Similarly, the Federation of Australian Commercial Television Stations (FACTS) Industry Code of Practice affects such matters as the classification of programs, the portrayal of cultural diversity, program promotions and privacy.

### *Print media*

1.25 It has been suggested that for constitutional and historical reasons to do with ‘civil liberties’, ‘free speech and a free press’, ‘free speech and autonomy, truth and democracy’, the Commonwealth Parliament does not have any direct heads of legislative power over the print media.<sup>9</sup>

1.26 But it can legislate for the print media by way of its indirect powers under the Commonwealth Constitution, such as:

- Section 51(i), which enables the Commonwealth to make laws in relation to trade and commerce with other countries and among the states;
- Section 51(ii), the Commonwealth’s taxation power;

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9 D Butler and S Roderick, *Australian Media Law*, (Sydney: LBC Information Services, 1999), p. 464.

- Section 51(v) which provides the Commonwealth with the power to make laws dealing with postal, telegraphic, telephonic and other like services;
- Section 51(xx), which allows the Commonwealth to legislate in relation to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth;
- Section 51 (xxxvii), which permits the Commonwealth to legislate on subject matter referred to it by the Parliament of a State; and
- Section 122, which gives the Commonwealth a plenary power to legislate in relation to territories.

1.27 Currently, regulation in the print media essentially consists of two broad types. In the first category, the Commonwealth has implemented a statutory regime by way of the *Classification (Publications, Films and Computer Games) Act 1995*. That Act imposes certain requirements, such as warnings about content, on designated categories of submittable publications, which generally involve material of a sexually explicit nature, or with strong violence and language. The second category has to do with what may be termed the ‘unrestricted’ print media, that is to say, with newspapers and magazines that are not restricted by the application of the *Classification (Publications, Films and Computer Games) Act 1995*.

1.28 Self-regulation of unrestricted print media is overseen by the Australian Press Council (APC), which encompasses all print media, including regional, local, suburban as well as ethnic newspapers. Additionally, the Australian Journalists’ Association (AJA) has an important role to play, as it sets standards for the professional conduct of its journalist members. Both the APC and the AJA operate by setting their own respective standards, and by providing their own particular mechanisms for dealing with complaints about breaches of those standards.

1.29 It should be noted that as membership of the AJA is not exclusively confined to journalists who work in the print media, but also in other media, such as radio and television, their conduct could potentially, therefore, be subject to the entire gamut of regulatory regimes that are currently in place.

### *Radio and Television*

1.30 Unlike the essentially self-regulatory regime that operates within Australia’s print media, radio and television broadcasting services are subject to a co-regulatory structure. Consequently, these divisions of the media ‘self-regulate’ within the broad parameters that have been set out in the *Broadcasting Services Act 1992* (the Broadcasting Services Act).

1.31 In brief, section 154 of the Broadcasting Services Act establishes the Australian Broadcasting Authority (ABA), and section 123 requires radio and television industry groups to develop regulatory codes of practice in consultation with the ABA.



1.32 Apart from some mandatory aspects designated in section 123 of the Act, which have to do with the classification and broadcasting of certain types of films, section 123 is largely permissive in its ambit, and sets out a range of matters that industry codes may choose to incorporate in their text. For example, these include:

- preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry [s. 123 (2) (a)];
- promoting accuracy and fairness in news and current affairs programs [s. 123 (2) (c)]; and
- methods of handling complaints from the public about program content or compliance with codes of practice, and reporting to the ABA on complaints so made [s. 123 (2) (h) (i) and (ii)].

1.33 Codes of practice are to be registered with the ABA and included in its register of codes of practice. However, if the ABA is satisfied that there is convincing evidence that a code of practice is not operating so as to provide the appropriate community safeguards for one of the optional matters referred to in sub-section 123(2), and the ABA is also satisfied that it ought to determine a standard in relation to that matter, it must, in writing, determine a standard in relation to that matter [s. 125 (1)]. Likewise, where no code of practice has been formulated by a particular industry player, the ABA may determine a standard with respect to the particular matter at issue [s. 125 (2)].

1.34 Finally, a code (or standard) of practice may also be amended by Parliament [s. 128], and whilst its breach attracts no ‘penalty’, the ABA may nevertheless impose conditions on the issue and/or renewal of licences [Part 4].

### *Telecommunications*

1.35 Two regulatory schemes apply to the telephony and the Internet – one that deals with the content of the Internet and another that is limited to the carriage of data by telephony and the Internet.

1.36 The regulation of the content of the Internet is dealt with by a co-regulatory framework that is underpinned by the Broadcasting Services Act. Under this model, content is regulated by a self-regulatory code that is developed within the parameters laid out in that Act.

1.37 The regulatory scheme for the carriage of data under the *Telecommunications Act 1997* focuses on self-regulation for issues such as billing and connection practices of telephone and Internet service providers. Self-regulatory codes that will set industry standards for these types of services are currently being developed. The Telecommunications Industry Ombudsman (TIO) is the principal body for hearing complaints that relate to these matters.

## **Complaints-handling in the information and communications industries**

1.38 It was generally conceded in evidence that effective complaints-handling mechanisms are essential to the success of the various regulatory schemes. For example, FACTS contended in its submission that:

Complaints handling is at the core of any self-regulatory system. Complaints are an important indication of viewer reaction to a station's service. They are the trigger for the investigation of possible breaches of Code provisions. Complaints handling is an effective bench-mark of a station's professionalism and commitment to self-regulation.<sup>10</sup>

1.39 Where a person is aggrieved about any of the sectors of the Australian information and communications industries referred to previously, the process for lodging his/her complaint will vary according to the relevant sector. A brief outline of the various processes is provided below.

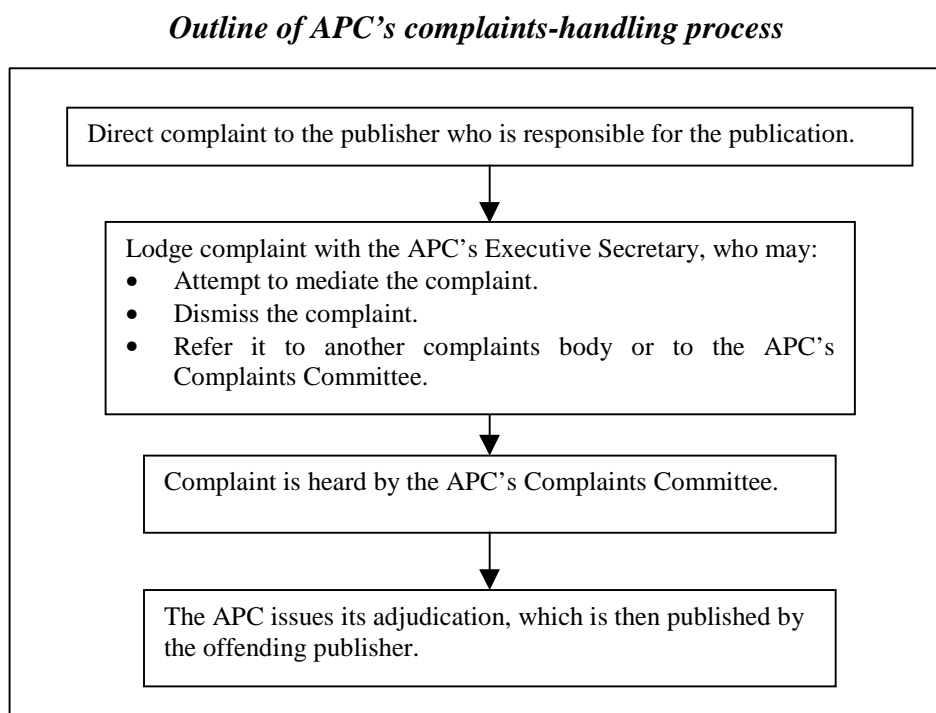
### *Print Media*

1.40 Where a person has a complaint about a given publication - such as a newspaper item, a magazine article or a photograph - he or she should at the first instance try to resolve the matter with the responsible publisher. Failing this, the person should lodge their complaint with the APC. The Executive Secretary of the APC will then normally attempt to resolve the matter between the complainant and the publisher, before the matter proceeds to a formal adjudication by the APC. Figure 1.1 below outlines the major steps involved in the APC ultimately upholding a complaint.

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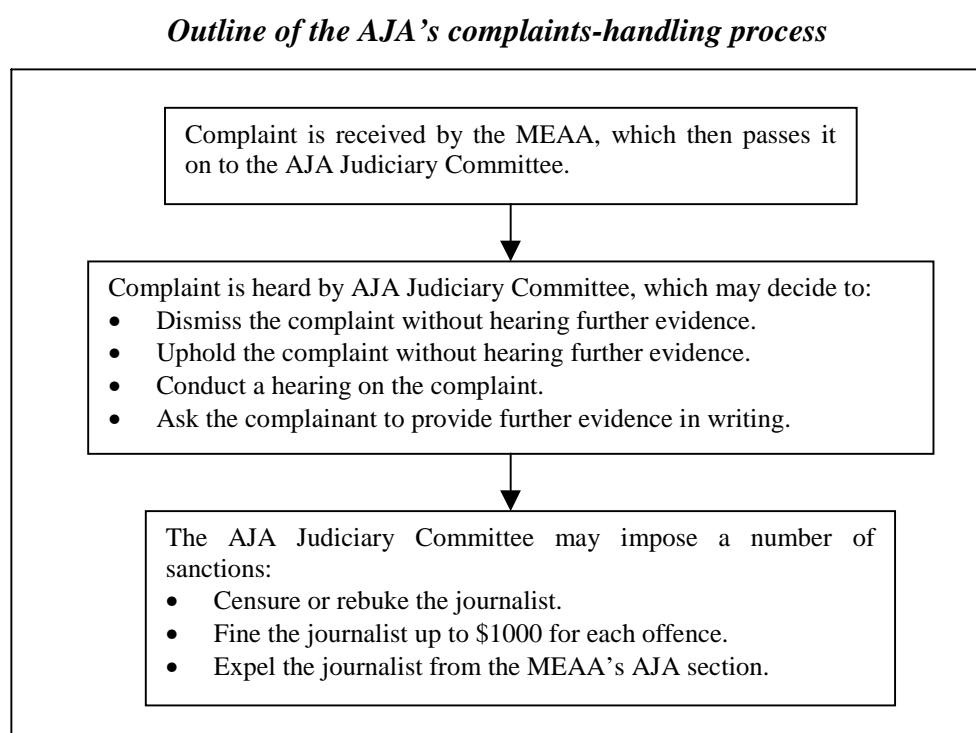
10 Federation of Australian Commercial Television Stations, Submission 29, p. 926.

Figure 1.1



1.41 The AJA's Judiciary Committee also deals with complaints about the conduct of journalists who are members of the Media, Entertainment and Arts Alliance (MEAA). Figure 1.2 provides a brief outline of the complaints-handling procedures adopted by the MEAA and the AJA Judiciary Committee.

Figure 1.2



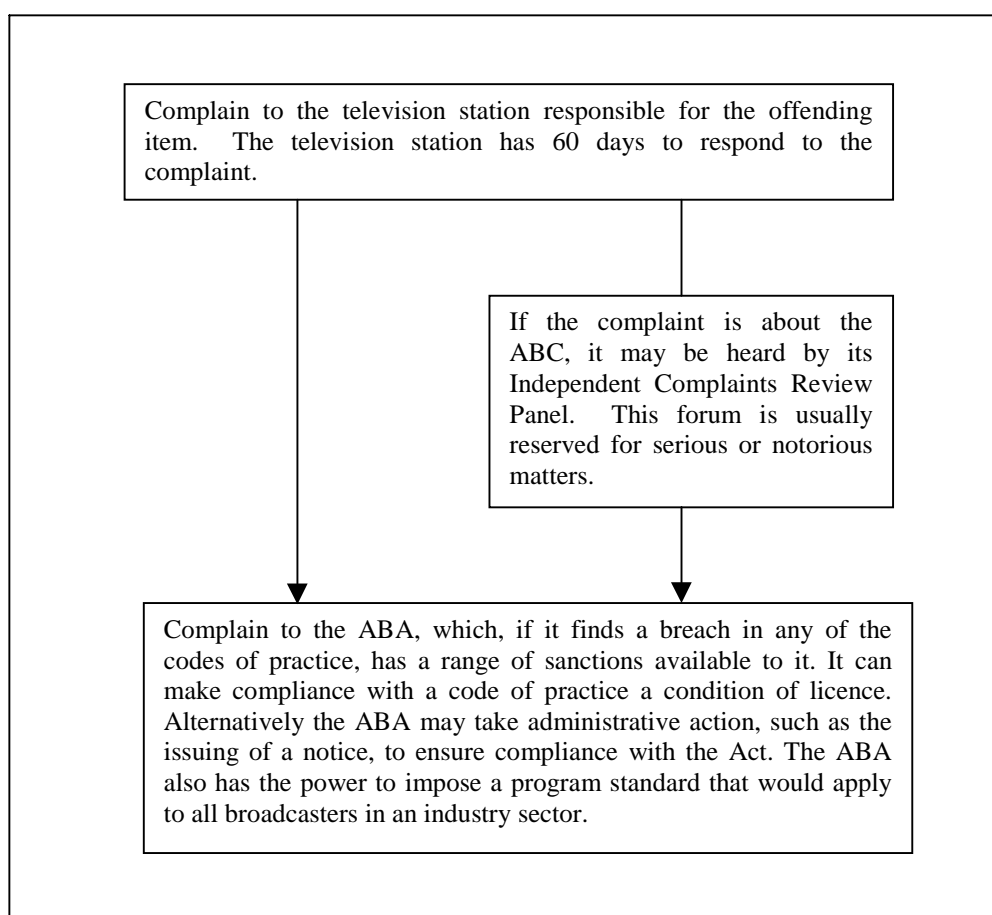
## Television

1.42 A complaint about the content of a television broadcast will, in most cases, involve a two-stage process. First, the complainant will refer his or her complaint to the television station in question. Secondly, if the complaint is not satisfactorily resolved, it may then be lodged with the ABA.

1.43 The main differences between the complaint-handling procedures for commercial television stations, as opposed to those for the ABC and SBS, are that the former operates under a code of practice formulated under the Broadcasting Services Act, whereas the codes of practice for the ABC and SBS are formulated under their enabling legislation, that is, the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991*. In addition, the ABC provides a complaints-hearing forum, its Independent Complaints Review Panel.

Figure 1.3

### *Outline of complaints process for television broadcast*



## Radio

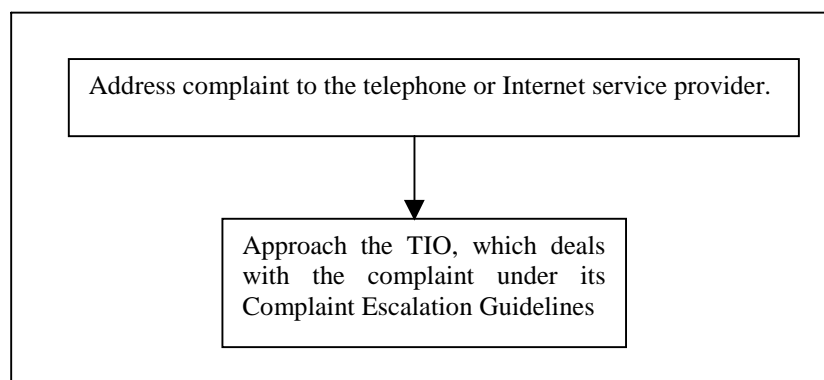
1.44 The complaints-handling mechanisms for commercial radio and ABC and SBS radio, in turn mirror those in place for their television equivalents.

## Telecommunications

1.45 Two complaints-handling models apply to telephony and the Internet. The first model applies in cases where the complaint concerns the carriage of information. For example, a complaint about the time taken for a telephone service to be connected, or the amount charged by an Internet service provider. A complaint about the carriage of information must first be directed to the relevant telephone or Internet service provider. If the matter is not resolved, the complaint may be taken up by the TIO, which has established its own 'Complaint Escalation Guidelines'. Under the Guidelines, the method for resolution will depend on the category of the complaint. That is, on whether it is an inquiry, consultation, complaint or dispute.

Figure 1.4

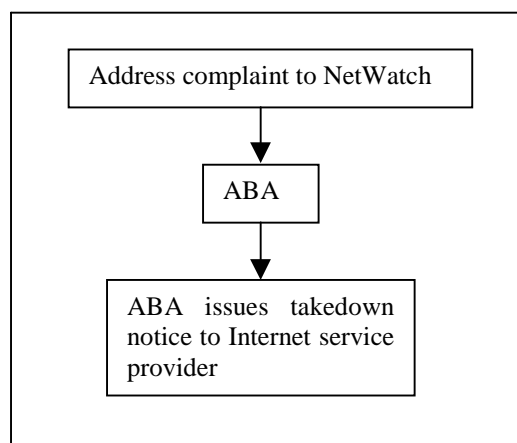
### *Complaints-handling procedures for the carriage of information*



1.46 The second complaints-handling model applies to complaints about Internet content. Under this model, an individual addresses their complaint to a Government funded service called NetWatch, which ultimately passes the complaint on to the ABA. If the ABA finds that the content is prohibited, it will issue a take-down notice to the Internet service provider.

Figure 1.5

### *Complaints-handling procedures for Internet content*



## Privacy and the information and communications industries

1.47 'Privacy' is not simply the 'right to be left alone'. More comprehensively, its scope incorporates:

Material which so closely pertains to a person or to his/her innermost thoughts, actions and relationships, that he/she may legitimately claim the prerogative of deciding whether, with whom, and under what circumstances he/she will share it.<sup>11</sup>

1.48 The scope of privacy is therefore broad enough to encompass: (i) personal or territorial privacy; (ii) privacy of information; (iii) privacy of communications; and (iv) surveillance privacy.

1.49 Aside from a number of statutes dealing with privacy of communications, such as the Commonwealth's *Telecommunications (Interception) Act 1979* as well as the various 'Listening Devices' Acts in the States and Territories, Australia is also a signatory to the *International Covenant on Civil and Political Rights*, which requires signatories to effect, within their national systems, regimes that will afford broad privacy protection to their respective citizenry.

1.50 Accordingly, Commonwealth agencies have been subject to legislation since the introduction of the *Privacy Act 1988*.

1.51 On 20 February 1998, the Federal Privacy Commissioner released the *National Principles for the Fair Handling of Personal Information* (NPPs), which were subsequently revised on 1 January 1999 following extensive consultations with business groups. Prior to this, the Government had announced, on 16 December 1998, that it would legislate to support and strengthen self-regulatory privacy protection within the private sector.

1.52 Whilst the Committee fully recognises and endorses the importance of free speech, it is also cognisant that such a freedom has to be balanced against the right of all members of the community to protect their privacy.

1.53 The Committee therefore welcomes, for example, that part of the APC's Statement of Principles, which provides that:

Readers of publications are entitled to have news and comment presented to them honestly and fairly, and with respect for the privacy and sensibilities of individuals.<sup>12</sup>

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11 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No. 11 (1979), p. 110.

12 Australian Press Council Statement of Principles, number 3, <http://www.presscouncil.org.au/pcsite/complaints/sop.html>, as at 17 January 2000.

1.54 The Committee also approves of section 4.3.5 of the FACTS Code of Practice, which provides that:

In broadcasting news and current affairs programs, licensees ... must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast.

1.55 However, as the Committee will argue, and finally recommend in this report, the decision as to what will or will not constitute 'an identifiable public interest', should not be left to purely sectarian interests. The Committee is of the view that the important balance to be struck between the 'private' and 'public' interest ought to be weighed up within the framework of a fair, independent and objective statutory regime.

### **Convergence - the future of the regulation of Australia's information and communications industries**

1.56 The Convergence Review Issues Paper was released by the Commonwealth Department of Communications, Information Technology and the Arts and states that:

There is no generally accepted definition of convergence. It can refer to technological change, commercial mergers and acquisitions, or the convergence of new service types. ... For the purposes of this Review, convergence is defined as *services sector restructuring enabled by digitalisation*.<sup>13</sup>

1.57 The relevance of convergence to the self-regulation in Australia's information and communications industries can be described by way of an example. Currently, radio stations broadcast their programs by way of radio waves. In the near future, they will 'broadcast' by way of digital technology, meaning that the radio broadcast can be received through the Internet. The regulatory challenges that apply to radio wave broadcasts as opposed to digital broadcasts vary considerably. Radio wave broadcasts utilise a relatively old technology, which is subject to limitations. For example, it does not allow the listener to interactively listen to the broadcast. Rather, the listener is confined to the instantaneous broadcast.

1.58 In contrast, with digital broadcasts, the listener will be able to recall and access past broadcasts. For example, they may listen to a week's worth of late-night talk shows. In the case of young consumers, they may access late-night broadcasts that discuss issues directed at adults, and listen to them during the daytime.

1.59 Therefore, in the future, the regulation of radio broadcasts must not only grapple with the new technology that radio broadcasts will utilise as a result of convergence, but it will also have to contend with a new type of broadcast, that is, one

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13 Convergence Review Issues Paper, [http://www.dcita.gov.au/graphics\\_welcome.html](http://www.dcita.gov.au/graphics_welcome.html), as at 29 January 2000, p. 2.

which provides the listener with an interactive experience. For example, new measures will have to be employed to restrict listeners' access to adult oriented broadcasts. The existing restrictions, which are limited to placing the material on late at night, could not apply to digital technology, which is not bound by real time broadcasts.

1.60 The Committee notes, however, that convergence is a new field, and the various issues that it will raise are not yet certain. The Committee will note the outcome of the Government's Convergence Review before it considers the issue of convergence in more detail.