

28 May 2008

SENATE STANDING COMMITTEE ON ECONOMICS

**INQUIRY INTO THE CURRENT STATE OF AUSTRALIA'S SPACE
SCIENCE & INDUSTRY SECTOR**

SUBMISSION BY INTELSAT ASIA CARRIER SERVICES INC

Intelsat Asia Carrier Services Inc, an indirect subsidiary of Intelsat Holdings, Ltd (collectively, Intelsat), holds an Australian carrier licence under subsection 56(1) of the Telecommunications Act 1997. Intelsat operates the largest fleet of geostationary satellite in the world, with more than 50 such satellites operating world-wide. Several of Intelsat's satellites provide Australia with domestic and international services.

Intelsat appreciates the opportunity to submit its views to the Committee

Background to this Submission

The terms of reference b. iv. and v. refer to government/industry coordination and strengthening Australia's space capability in the private sector.

Intelsat has been increasingly concerned about the Australian regulatory environment for satellite communications, including the policy of the Australian Communications and Media Authority (ACMA) regarding its responsibilities in international satellite coordination through the International Telecommunication Union (ITU).

Expansion by international and national companies in satellite telecommunications will be limited by this ACMA policy.

**FILING AND COORDINATION OF SATELLITE NETWORKS BY
AUSTRALIA**

This submission is similar to a paper recently submitted to the Chairman of the ACMA, in the context of discussions with Intelsat about the policy position of the ACMA on filing and coordination of satellite networks with the ITU. It addresses the proposition that, while the ACMA may undertake filing and coordination of communication satellite networks with the ITU, it is not obliged to do so.

Background to Filing and Coordination of Satellite Networks by Australia

Prior to the 1980's, Australia was a part owner of international satellite networks operated by Intelsat and Inmarsat. At the time, these two companies operated under international treaties in the land and maritime environments respectively. These networks provided both international and domestic satellite services. Australia had no policy requirement to perform international filing and coordination with the ITU.

In a major policy change in the early 1980's, the Australian Government decided that there would be a government-owned "national" satellite system serving Australia, New Zealand, and possibly Papua New Guinea. To bring this policy into effect, the Australian Government created a new division of the Department of Communications to plan all aspects of the national satellite system. The Department's existing Spectrum Management Division worked with the new division on the necessary ITU filing and coordination.

A government authority, Aussat, was created to own and operate the national satellite system, but the Department of Communications continued to be "the administration" for ITU filing and coordination purposes, in line with its other spectrum management functions. National and international regulatory arrangements in communications evolved but the need for filing and coordination continued, increased by:

- the need for Aussat, having launched its first satellite in 1984, to plan and file for later generations of its satellite networks;
- the gradual move from monopoly telecommunications in 1989 to full competition in 1997, including satellite communications;
- the privatisation of Aussat in 1992, through its sale to Optus;
- the entry of additional satellite operators, such as PanAmSat (now merged with Intelsat), into world markets, including the Australian market;
- the rapid erosion of the quasi-duopoly of the U.S.A. and the U.K. in satellite filing and associated expertise; and
- the evolution of Australian Defence Force communications with satellite usage as a major component.

The spectrum management functions of the old Department of Communications, including satellite filing and coordination, passed successively to the Spectrum Management Agency, the Australian Communications Authority (ACA), and now the ACMA, with powers defined by legislation. The first spectrum management function of the ACMA is to:

"(...) to manage the radiofrequency spectrum in accordance with the Radiocommunications Act 1992" (RA92)
(Australian Communications and Media Authority Act 2005 (ACMAA 05) (Section 9(a)).

In the 1980's and 1990's many governments, including the Australian Government, implemented major telecommunications policy changes. They were driven by the view that new competitive forces, combined with rapid technological change and innovation, would deliver much better and less costly services to users.

Communications satellites were, and are, an integral part of this change, nationally and internationally. Satellites, by their technical nature, require international filing and coordination, which is now a major function of the ITU. No communications satellite can lawfully be launched without this procedure, which by international treaty is a function only of governments.

However the ACMA interprets legislation to the effect that it may carry out this function of filing and coordination but is not obliged to do so. There is therefore no certainty that any organisation can, through the Australian administration, file and coordinate a satellite using the radio frequency spectrum.

This is an inhibitor both to Australian companies and to international companies for which Australia is part of an international market and a base for regional activities. It is a strange policy which would see Australian satellite companies going offshore, for example to Malaysia, to lodge the necessary filing and coordination documents with the ITU. It would also be strange to see international companies such as Intelsat, with regional activities based in Australia, having requests for satellite filings rejected because the ACMA feels that those companies can go elsewhere to another administration.

ACMA Statements on Filing and Coordination

Throughout the period mentioned above, the only written policy statement about the regulator's legal duty regarding filing and coordination appears to be an ACA discussion paper in October 2001 - "Review of Criteria Used to Assess Requests to File Satellite Networks with the ITU". This paper stated that:

"The ACA is established by the Australian Communications Authority Act 1997(ACAA 97). The ACAA 97 specifies the telecommunications and spectrum management functions of the ACA. Section 8 of the ACAA 97 also provides that the ACA may undertake 'additional functions'. Filing and coordinating satellite networks with the ITU is an additional function of the ACA. While the ACA may undertake additional functions, it is not obliged to do so."

There is no reasoning given as to why filing and coordination is an "additional function" under Section 8 of that Act, and not a "spectrum management function" under Section 7. Since 2001 ACA and ACMA staff members have repeated the "additional function" assertion on a number of occasions, including in 2008.

This statement does not acknowledge that wider government policy has long been to encourage the satellite space industry within Australia. The view above is hardly an encouragement to satellite operators to establish operational facilities in Australia.

Legislation

More detail on Intelsat's view of the legal position is covered in [Annex A](#)

Government Policy on the Space Industry

Australian Government space policy appears to be bi-partisan. It is currently defined in the document "Australian Government Space Engagement Policy Framework and Overview" November 2006, re-endorsed in March 2008, which begins with the statement on Page 1:

“Space is important to Australians – we are sophisticated users of space for national security, communications and broadcasting, environmental and natural resource management, weather forecasting, and navigation and timing services”.

The first element in the policy framework on Page 2 is:

“(…) participating in and supporting global cooperative and trading arrangements to achieve strategic, economic and social outcomes”

Satellite filing and coordination via the ITU is surely a global cooperative arrangement.

On Page 3, the Government’s space activities fall under four broad themes. The first of which is:

“Ensuring access to space services”, the first of three primary categories being “communications and broadcasting”

The Minister, in his first major industry speech to ATUG on 12 March 2008, made repeated references to the importance of competition, including the statement:

“(…) competition will remain a cornerstone of telecommunications policy”.

Satellite communications are an integral part of competition in national and international services, both between satellite services themselves and with terrestrial services. The Minister also said in the context of the new broadband network that:

“(…) this includes the use of wireless and satellite technologies”.

The Assessment Criteria

The assertion that filing and coordination with the ITU is merely an additional function of the ACMA affects the Assessment Criteria of the ACMA for accepting satellite networks for filing and coordination. Specifically these criteria are as follows:

Filing the satellite network with the ITU must not impede the capacity of the ACMA to perform its spectrum management or telecommunications functions.

The issue of limited resources and specialist skills is important. However, the ACMA requires specialist skills in many areas, for example microwave coordination. Satellite coordination is no different in the sense that the ACMA is obliged to possess the necessary skills to fulfil its statutory functions or the means to obtain those from external sources when needed.

This does not deny the fact that those requesting filing should be obliged to present requests and data to the ACMA in the most accurate and efficient way possible. To alleviate pressure on resources, the ACMA might agree to accept professional certification of the application for filing in order to minimise effort within the ACMA, just as it does with national microwave assignments.

There must be a benefit to Australia in accordance with the object of the Act and the functions of the ACMA. For example, the filing must:

- increase the overall public benefit derived from using the radiofrequency spectrum;
- support the communications policy objectives of Government;
- provide opportunities for the Australian communications industry in domestic and international markets; or
- otherwise assist the ACMA to meet its legislative obligations.

This criterion, again, proceeds from the premise that satellite filing is an “Additional Function” of the ACMA.

The only mention of ‘public benefit’ in the relevant Acts is in *RA 92* Section 3(a), where one of the objects of the Act is to:

“(...) maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum ”

This is a general and high-level statement expressed in relative terms. It does not require the ACMA, for example, to examine a microwave network to judge whether it is delivering TV programs of merit to a broadcasting transmitter site or to refuse the licence if it feels that an optical fibre would be a better option for the transmission.

We suggest that “public benefit” as stated in the object is a broad test for beneficial outcomes, for example:

- efficient use of the spectrum so that others are not unduly impeded from using it too;
- increased competition in services delivered;
- provision of new services (which, unless inherently unlawful, are by definition beneficial if they provide services for which people are willing to pay); or
- providing public infrastructure and services.

This test of public benefit should not be a detailed examination for worthy causes or an assessment of merit against unspecified criteria.

However, *RA 92* Section 3 is probably broad enough for the ACMA to reject a satellite filing application which relates solely to communications and industry outside Australia. A hypothetical example would be a request by a European company with no business interests in Australia requesting a filing for a satellite network covering only ITU Region 1 countries (Europe and Africa). On the other hand, that company might have a proven record of buying a substantial amount of its satellite hardware or software requirements from Australian radiocommunications industry, bringing it into the “radiocommunications community” covered by *ACMAA 05* Section 9(b).

In short, we are saying that satellite filings broadly associated with Australia or its wider interests, including those carrying services to other countries within the same group of networks as those serving Australia, are covered by *ACMAA 05* Section 9 under ACMA Spectrum Management Functions. Rejection of assistance on the grounds of limited ACMA resources would not be valid, though there would be other valid reasons as already covered above.

Certainly there may be a fine line in a few instances where the ACMA must decide whether it is acting under *ACMAA 05* Section 9 or Section 11, as detailed in Annex A.

Limitation of Resources

The ACMA is almost fully budget-funded and the taxes collected go exclusively to consolidated revenue. This is the primary reason for any ACMA limitation of resources for satellite filing activities. However those companies filing satellites through the ACMA are required to meet all ITU filing fees and the costs to the ACMA of the filing and coordination activities. The satellite industry cannot accept that the ACMA can avoid its statutory duties by claiming lack of resources to carry them out or alternatively claim that its duties are “optional”. Under ITU rules, only governments can submit satellite filings for coordination.

However, it is a fact that for many organisations in Australia, and Canberra in particular, obtaining and keeping qualified staff is a continuing problem. It may be that the ACMA inference that satellite filing and coordination is a second order function within the ACMA could adversely affect the attraction and retention of expert staff. Such staff are also likely to be additionally suitable for wider spectrum management functions, so the policy is counter-productive for the ACMA. Limitation of resources for this area is also counter-productive in a national sense. Satellite filing is one of the few areas where the ACMA can leverage its expertise and bring high-technology business to Australia which might otherwise go elsewhere.

Summary

The assertion that filing and coordination is an “additional function” of the ACMA, which the ACMA is not obliged to carry out, is contrary to legislation. It is also an inappropriate policy, clearly contrary to long standing and current wider policies of the Government, which can only harm the overall interests of Australia in telecommunications and radiocommunications.

Intelsat suggests that the obligations of the ACMA in relation to satellite filing and coordination through the ITU should be clarified, if necessary by amendment to legislation.

Annex A:

Legal Discussion Regarding ACMA Filing and Coordination Responsibilities

LEGAL DISCUSSION REGARDING ACMA FILING AND COORDINATION RESPONSIBILITIES

Through all the above policy and organisational changes (Page 2 above), the legislation affecting international spectrum management obligations has not changed substantially. The *Radiocommunications Act 1983* was replaced by the *Radiocommunications Act 1992 (RA 92)*, and both require powers to be exercised with regard to international agreements (Sections 7 and 288, respectively). Satellite filing and coordination is undertaken in accordance with such agreements.

The two sections mentioned above of the *Australian Communications Authority Act 1997(ACAA 97)*, Sections 7 and 8, now appear in much the same form in the *Australian Communications and Media Authority Act 2005 (ACMAA 05)*, as Sections 9 and 11. It is worth noting that in both Acts, anything required of the ACA or ACMA under the *RA 92* is clearly a “spectrum management function”, not an “additional function”. (See Sections 8(b)(i) and 11(d)(i), respectively).

Section 2 of the ACA 2001 Discussion Paper correctly stated that only administrations can file networks with the ITU. Australia is a signatory to the ITU Convention which creates this requirement in Australia. As the ACMA, on behalf of the Australian Government, is the “Australian Administration”, it follows that no other person in Australia can file a satellite network with the ITU. Persons wishing to file a satellite network must therefore request either the ACMA or a foreign administration to file it on their behalf.

Obtaining a successful result from the three filing stages required by the ITU is a pre-condition to operation of a satellite network under a radiocommunications licence issued under Chapter 3 of *RA 92*. Such a licence is necessary for operation of radiocommunications from a space object to and from Australia to a space object. Under the *RA 92*, only the ACMA can issue a radiocommunications licence. It follows, therefore, that lawful operation of radiocommunications to or from Australia from a space object requires at least:

- successful filing of a satellite network through and by the ACMA or a foreign administration; and
- issue of a radiocommunications licence by the ACMA.

(Licences under the *Telecommunications Act 1997* and/or the *Broadcasting Services Act 1992* might also be needed, but this is not relevant to the main discussion here).

For the ACMA to maintain that it has no obligation to file a satellite network with the ITU is to say that it has significantly different obligations regarding space communications to those it has for terrestrial communications. It is, in effect, stating that a person can be refused a licence for space communications because the ACMA has insufficient resources to do the necessary filing, which only it or a foreign administration can do.

This contrasts significantly with *RA 97* Chapter 3, which requires the ACMA to:

- carry out various procedures to issue a spectrum licence; and
- most significantly, consider specific matters in relation to the issue of an apparatus licence, stating reasons for refusal if it does not issue a licence.

Nowhere in *RA 97* is it stated nor implied that lack of ACMA resources for procedural matters is a valid reason for refusing to issue a licence. Conceivably, the ACMA could do this on the basis that foreign administrations are available and willing to do the required satellite network filing. This is an unlikely argument if the satellite network is wholly or predominantly for communications to, from or within Australia.

Apart from the practical implications regarding licensing under *RA 92* covered above, satellite filing functions are covered by the *ACMAA 05* Section 9 “Spectrum Management Functions”, most clearly under Sections 9(a), (b) and (i).

Section 9(a) requires the ACMA to manage the spectrum in accordance with *RA 92*, which contains numerous provisions for regulating space objects. Section 9(b) requires the ACMA to assist the “radiocommunications community”, which surely includes assistance for operations or planned operations of space radiocommunications. Section 7(j) covers all functions incidental to or conducive to the functions above.

To classify satellite filing as an “Additional Function” under *ACMAA 05* Section 11, subject to the restrictions of Section 11(2) on ACMA resources, seems highly artificial and wrong.

This view does not deny that the ACMA has the power to refuse, for valid reasons, to file a satellite network or ultimately to refuse to issue a licence. Examples of valid reasons might be that:

- the satellite network has nothing to do with Australia or its geographic region, (though a related series of networks such as Endeavour, with one or more component networks serving Australia, would not be excluded); or
- the frequencies requested in the satellite network filing do not conform to ITU or Australian spectrum plans.

In either case, though, these reasons for refusal may not be appropriate if a filing for a satellite network with those characteristics would be of importance to the Australian Government. The question, then, would be why would the ACMA not undertake such a function if government interests justified the filing?

RA 92 Section 100, which covers the issuance of licences, is relevant in this context. The Explanatory Memorandum relating to the passage of *RA 92* in the Parliament, as well as the legislation itself, contains no inference that space radiocommunications have a different level of importance to that of terrestrial communications.