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Australian Communications and Media Authority Bill 2004

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Contents

Australian Communications and Media Authority Bill 2004

Date Introduced: 2 December 2004

House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: The substantive provisions commence on Proclamation or 1 July 2005, whichever occurs first.

Purpose

To merge the functions of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) into a new Australian Communications and Media Authority (ACMA).

Background

Overview of this package of bills

The package of bills implementing the merger takes an approach of minimal change to the existing regulatory arrangements:

- the Australian Communications and Media Authority Bill 2004 (the 'Main Bill') establishes the new body, the ACMA;
- the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 (the 'Consequential Bill')
  - repeals the *Australian Communications Authority Act 1997* and the provisions of the *Broadcasting Services Act 1992* that relate to the ABA
  - replaces references to the ABA and the ACA in other Commonwealth legislation with references to the ACMA
- a number of existing acts that impose taxes or fees are also amended to replace references to the ABA or the ACA with references to the ACMA. This caters for the requirement in section 55 of the Constitution that laws imposing taxation shall deal only with the imposition of taxation. These amending acts are as follows:
  - Datacasting Charge (Imposition) Amendment Bill 2004
  - Radiocommunications (Receiver Licence Tax) Amendment Bill 2004
  - Radiocommunications (Spectrum Licence Tax) Amendment Bill 2004
  - Radiocommunications (Transmitter Licence Tax) Amendment Bill 2004
  - Radio Licence Fees Amendment Bill 2004

- Telecommunications (Carrier Licence Charges) Amendment Bill 2004
- Telecommunications (Numbering Charges) Amendment Bill 2004
- Television Licence Fees Amendment Bill 2004

History

The idea of merging the ABA and the ACA has been under active consideration since 2002, although the idea was contemplated by the Productivity Commission in its report on Broadcasting in April 2000.[1] In May 2000, however, the Government tabled in Parliament a *Convergence Review*, which largely favoured the continuation of existing arrangements:

> The ideal regulatory institutional structure would exploit organisational synergies and facilitate the transparent management of different types of policy objectives. This suggests that the current division of labour between the ACCC (economic objectives), the ACA (technical objectives) and the ABA (primarily cultural and social objectives) is broadly correct.
>
> Carving communications competition responsibilities out of the ACCC and putting them into a new regulator would reverse the trend towards generic economic regulation. This would be difficult to sustain because electronic and physical infrastructures become more substitutable means of service delivery. Shifts in market boundaries suggest that a whole-of-economy approach to economic regulation remains the best approach to economic regulation, and that competition responsibilities should remain with the ACCC.
>
> The principal area of ambiguity is the split of spectrum management responsibility between the ABA and the ACA. This arrangement has been based on a clear division between broadcasting and non-broadcasting spectrum. The appropriate future division of responsibility will depend on a number of factors, including the pace and direction of broadcasting industry change and the growing use for broadcasting of spectrum outside the broadcasting services bands. If these factors become important or are recognised as likely developments, then a rethink of the division of responsibility for spectrum management may be needed.[2]

In August 2002, the Department of Communications, Information Technology and the Arts released a discussion paper on spectrum management, and, in particular, on whether changes in the respective roles and responsibilities of the Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA) would be likely to lead to efficiencies or other improvements in spectrum management.[3] Both the ABA and the ACA supported a merger between the two bodies in their submissions on this discussion paper.

In August 2003, a further discussion paper was released, focussing on the key issues that would need to be addressed if the two bodies were merged.[4] On 11 May 2004, in association with the 2004–05 Budget, the Government announced its intention to merge

the two bodies, while maintaining the existing offices of the ABA and the ACA throughout Australia, at least for the time being.[5]

The Liberal Party's 2004 election policy made the following undertaking:

> A re-elected Coalition Government will legislate to give the ACMA power to consider complaints alleging serious and specific cases of bias, lack of balance, inaccuracy or unfair treatment in respect of ABC and SBS broadcasts or publications. At present, the ABA is only able to consider complaints which relate to the ABC and SBS Codes of Practice. This amendment will provide a more complete, streamlined and responsive complaints-handling process in respect of both national broadcasters.[6]

Some administrative measures have already been taken to merge the two bodies, by the appointment of the Chairpersons of each authority as Associate Members of the other authority.[7]

Current arrangements

The current institutional arrangements governing the regulation of broadcasting and communications are outlined in the August 2003 discussion paper:

> The ABA and ACA have prime responsibility for the regulation of broadcasting, telecommunications and, to a more limited degree, the Internet industry sectors in Australia. Broadly, the ACA has responsibility for regulating telecommunications and radiocommunications, including managing the radiocommunications spectrum. The ABA is broadly responsible for planning and regulating the broadcasting services bands within the radiofrequency spectrum, broadcast licensing, and online and Australian content functions.
>
> …
>
> The case for merging the two communications regulators arises from developments that have been occurring in the communications environment over the past decade. Digital technologies are reshaping communications industries. Previously distinct sectors now compete across increasingly convergent markets using a range of different delivery platforms. For example, the development of third-generation mobile technologies has created new businesses that are offering telephony, online and potentially broadcasting-type services on the one network and one piece of consumer equipment. Digital technologies are also transforming broadcasting services. Over time the distinction between traditional television and radio broadcasting, and new types of broadband interactive content services, will become less clear.
>
> The convergence of communications technologies and markets is placing growing pressure on the current regulatory institutional arrangements. In Australia, different components of the same industry are currently subject to regulation by two different agencies. For example, Internet content regulation is undertaken by the ABA while the ACA regulates Internet carriage service providers; broadcasting licences are obtained from the ABA while apparatus licences for broadcasting transmitters and

> ancillary broadcasting uses are obtained from the ACA. For businesses in the sector to engage with both regulators results in increased compliance and transaction costs. The regulators themselves are required to cooperate on a range of issues that span their separate responsibilities resulting in additional administration costs which are passed on to industry and, in turn, their customers.
>
> While the impact of convergence is currently manageable within the existing dual-institutional structure, the capacity of each regulator to administer its responsibilities effectively where they intersect with those of the other regulator is expected to diminish over time. Further, given their distinct responsibilities, it could become increasingly difficult for separate regulators to take a more strategic view of wider convergence issues.[8]

The paper goes on to point out that the United Kingdom established a single regulator for the sector in 2003, and that the United States and Canada have long had a single regulator covering broadcasting and telecommunications.

Accountability

The Government suggested in the August 2003 discussion paper that the ACMA should be a government authority under the Commonwealth Authorities and Companies (CAC) Act. However the new body as proposed in the Main Bill will be a prescribed agency under the Financial Management and Accountability (FMA)Act. In a 1999 review of the FMA and CAC Acts, the Joint Committee of Public Accounts and Audit explained the difference between the two pieces of legislation:

> The FMA Act sets out the requirements for agencies which collectively comprise the legal entity, 'the Commonwealth'. Such agencies function as financial and custodial agents for the Commonwealth without acquiring separate legal ownership of the money and assets they deal with on behalf of the Commonwealth. The CAC Act, on the other hand, covers public sector bodies which have their own separate legal identity by virtue of their incorporating legislation. This allows them to acquire ownership of money and other assets coming into their possession.[9]

Since the ACMA will not be able to hold money or property in its own name, the Consequential Bill provides for the transfer of the assets and liabilities of the ABA and ACA to the Commonwealth.

The Joint Committee of Public Accounts and Audit also noted the difference in the reporting and accountability arrangements between the two Acts:

> There are two avenues by which the CEOs of Commonwealth entities are held accountable:
>
> –to the Prime Minister (FMA Act agencies) and to the Board of Directors or shareholder Ministers (CAC Act bodies); and
>
> –via the entity's annual report tabled in Parliament.[10]

ALP and Australian Democrats position

The Australian Labor Party advocated the merger of the ABA and the ACA in its 2004 election policy, stating:

> In this era of convergence between technologies and the digitisation of our broadcasting platforms, the differences between the broadcasting and telecommunications sectors are becoming increasingly blurred. For instance, 3G and broadband technology will increasingly deliver content traditionally delivered by television and radio.
>
> In recognition of this increasing convergence, Labor will merge the Australian Broadcasting Authority with the Australian Communications Authority to create one communications regulator.
>
> Labor will also ensure that the merged regulator continues to recognise the social policy objectives relating to the broadcasting services band. Labor recognises that the broadcasting services band should not regulated by commercial imperatives alone. Commercial broadcasters play a significant social role in their use of public spectrum. Labor will therefore ensure that the integrity of the broadcasting services band regulatory scheme, which recognises the social role of broadcasting, remains in place. Broadcasting spectrum will continue to be subject to separate regulations from other communications spectrum under a Federal Labor Government.[11]

The ALP had previously said that the merger would produce savings of $75m over a four-year period.[12] The Government responded that no savings are to be expected from the merger:

> Unlike the proposal floated by the Opposition, the Government's planned merger involves no reduction in resources currently allocated to the ABA and the ACA to conduct their statutory functions.[13]

The Australian Democrats have expressed reservations about the proposed merger:

> The Democrats have grave concerns about the merits of merging the media standards functions of the ABA and the technical regulations functions of the ACA.[14]

Submissions on the 2002 discussion paper

The Australian Subscription Television and Radio Association (ASTRA), the Service Providers Industry Association (SPAN) and the Australian Film Commission supported the idea of a merger.

The Federation of Australian Radio Broadcasters and the Federation of Australian Commercial Television Stations both opposed the idea of a merger in their submissions on the 2002 discussion paper, on several grounds:

- that the need for change had not been demonstrated
- that the concept of convergence had been overstated
- that broadcasting use of the spectrum is qualitatively different from other uses, and "cannot be divorced from the social and cultural objectives which broadcasting services are expected to fulfil", and
- that broadcasters do use spectrum efficiently, and pay significant licence fees.

They stated that maximising public benefit should not be equated with maximising public revenue, and that social and cultural benefits should be taken into account.[15] This view was supported by the Association of Independent Regional Radio Broadcasters.

A number of bodies supported the option of making the ACA responsible for the management of broadcasting spectrum access, while leaving the oversight of broadcasting program *content* with the ABA. These bodies included the Australian Electrical and Electronics Manufacturers' Association, the Australian Information Industry Association (AIIA), Telstra and Motorola.

The Australian Telecommunications Users Group (ATUG) recommended that an advisory group be established to prepare a Discussion Paper on a merged regulatory structure encompassing the roles of the ABA, the ACA and the telecommunications-specific functions of the ACCC. Optus also believed this to be the best option.

SBS found that substantial change was neither justified nor in the public interest. Nor was the ABC convinced of the need for change, being concerned that in any merger the provisions of the Broadcasting Services Act guaranteeing ABC access to spectrum would not be accurately and completely transferred to the new legislative regime. The Australian Children's Television Foundation also opposed any change, emphasizing the need for an independent and empowered broadcasting authority in Australia.

These submissions were largely repeated in the submissions on the 2003 discussion paper. However, Commercial Radio Australia Limited (CRA) and Commercial Television Australia (CTVA) joined the group opposing the idea of a merger, while Ian Robertson, media lawyer and then ABA board member, supported merger.

Other comment

There has not been much media comment on the merger, but these two extracts from editorials give an idea of the issues. Firstly from the *Age*:

> On the face of it, creating a single regulator for the broadcasting and telecommunications industries makes sense, because changing technology has meant that broadcasters and telecommunications companies are increasingly in direct competition. To cite the usual example: third-generation mobile phones can deliver telephony, data and broadcast services over a single network to a single customer device. But it takes more than technological innovation to create an integrated,

> competitive and well-regulated market. The telecommunications companies have mostly welcomed the approaching change but broadcasters have not, because they fear they will be compelled to bid for the spectrum they use to transmit their services, as telcos do, instead of paying licence fees. Communications Minister Daryl Williams has said that the Government has no intention of overhauling industry regulations, and that the merger of regulators will be purely "administrative" in its effects. This is hardly enlightening. If the new authority is being created because formerly distinct markets are rapidly becoming a single market, as Mr Williams concedes, how can he dismiss the prospect of regulatory change? The Government needs to explain clearly what it expects from the new regulator. And, above all, it must ensure that the authority is led by someone who will act, and be perceived to act, without the conflicts of interest that too often ensnared Professor Flint.[16]

and secondly from the *Australian Financial Review*:

> Broadcasting regulation, thanks to the efforts of communications ministers from both sides of politics to curry favour with powerful network owners, is as big a mess as it's ever been. And there is not the slightest sign that either the Howard government or the opposition will do anything to change that. The government plans to merge the ABA with the technical regulator—the Australian Communications Authority—but in a "policy-neutral" way, which sounds like a lost opportunity. What it should be at least considering is whether detailed content regulation—of the kind that got Professor Flint into bother in the cash for comment inquiries—is of much value in the modern media world. Most people know Alan Jones isn't Walter Cronkite, and other media are not subject to intrusive regulation of their output, beyond the minimum taste and decency standards the community demands. In broadcasting, this has been traditionally justified by scarcity of spectrum. Now modern technology has created abundant spectrum—if only our political masters would trust us to enjoy it—the case for such regulation is weaker.[17]

Main Provisions: Australian Communications and Media Authority Bill 2004

Clauses 8 to 11 set out the ACMA's functions, grouping them under headings for telecommunications, spectrum management, and broadcasting, content and datacasting. These functions are essentially the same as those currently in the *Australian Communications Authority Act 1997* and the *Broadcasting Services Act 1992*.

Clauses 19–21 provide that the ACMA shall consist of a Chair, Deputy Chair, and 1 to 7 other members. The Chair and Deputy Chair must be full-time appointments. Appointments may be made for up to five years, but may not extend beyond ten years.

Clauses 24–25 provide for any number of associate members to be appointed by the Minister for specific purposes, such as inquiries or investigations.

Clauses 46-49 allow for the establishment of Divisions within the ACMA, composed of at least three members, to undertake specific functions delegated under **clause 50**.

Clause 54 provides that the staff of the ACMA shall be employed under the *Public Service Act 1999*.

Clauses 56–57 require the ACMA to prepare a corporate plan every year, covering at least three years, and to make an annual report to the Minister, which shall be tabled in the Parliament.

Clause 59 continues in existence the Consumer Consultative Forum established under the *Australian Communications Authority Act 1997*.

Main Provisions: Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004

Schedules 1–3 of the Consequential Bill amend various Acts in line with changes made by the Main Bill.

Schedule 1 item 5 repeals the *Australian Communications Authority Act 1997*. **Items 6–58** repeal sections of the *Broadcasting Services Act 1992* that refer to the ABA and its interaction with the ACA, and insert references to the ACMA where necessary.

Schedule 4 Part 2 provides for the transfer of the assets and liabilities of the ABA and ACA to the Commonwealth.

Endnotes

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[1] Productivity Commission, *Broadcasting*, Report no. 11, AusInfo, Canberra, 2000, accessed on 7 December 2004; see, for example, pp. 213–5.

[2] *Convergence Review*, Department of Communications, Information Technology and the Arts, Canberra, 2000, p. 115.

[3] *Options for structural reform in spectrum management: discussion paper*, Department of Communications, Information Technology and the Arts, Canberra, August 2002.

[4] *Proposal for new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority: Discussion paper*, Department of Communications, Information Technology and the Arts, Canberra, August 2003. The paper includes, at pp. 23–4, a useful table outlining the differences in the roles of the ABA and the ACA.

[5] Hon D. Williams AM QC MP, *Australian Communications and Media Authority*, media release, Canberra, 11 May 2004.

[6] The Howard Government Election 2004 Policy: 21st Century Broadcasting, 7 October 2004, p. 18.

[7] Sen. the Hon. H. Coonan, *A step closer to a merged regulator*, media release, 24 November 2004.

[8] *Proposal for new institutional arrangements*, op. cit., pp. 3–5.

[9] Joint Committee of Public Accounts and Audit, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Chapter 1, p. 1.

[10] Ibid, Chapter 3, p.35.

[11] L. Tanner MP (Shadow Minister for Communications), *Labor's Plan for Broadcasting*, election policy, 21 September 2004.

[12] Australian Labor Party, *Balancing Work and Family: Labor's Baby Care Payment*, policy document, 31 March 2004, p. 8.

[13] Hon. D. Williams AM QC MP, *Australian Broadcasting Authority Conference Opening Address*, Canberra, 24 June 2004.

[14] Sen. J. Cherry, *Flint exit ends 'embarrassing' era in ABA regulation*, media release, 7 June 2004.

[15] The submissions are available online with the discussion paper: see note 3 above.

[16] Editorial, 'Flint makes his best decision yet', *The Age*, 9 June 2004, p. 18.

[17] Editorial, 'Broadcasting policy a mess', *Australian Financial Review*, 9 June 2004, p. 62.

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