

Chapter 3

Provisions of the bills

3.1 This chapter outlines the main provisions of the ten bills that are the subject of this inquiry.

Overview

3.2 The approach of the bills is to make 'only minimal change to the existing regulatory frameworks that apply to the telecommunications and broadcasting sectors in order to provide for the merger of the ACA and the ABA'.¹

3.3 The Hon Peter McGauran MP explained in the Second Reading Speech that new regulatory structures were needed to deal with changes within the communications industry:

It is becoming increasingly difficult for two separate regulators, one of which is primarily focused on infrastructure and carriage issues and the other focused chiefly on content issues, to provide a holistic response to convergence. The establishment of the ACMA will enable a coordinated regulatory response to converging technologies and services. The new authority will be better placed to take a strategic view of wider convergence issues.

Benefits to industry will include a reduction in duplication in the compliance process with improvements in the coordination of regulatory functions. A single authority will be better placed to coordinate telecommunications and broadcasting issues in international fora such as the International Telecommunication Union. In addition, a single authority will have the potential to manage resources to enable a timely response to periods of high demand for spectrum planning, and create enhanced opportunities to attract and retain staff and to broaden staff expertise.²

3.4 The Australian Communications and Media Authority Bill 2004 (the 'main Bill') establishes the new body, the Australian Communications and Media Authority (ACMA) and sets out its functions, powers and accountability requirements.

3.5 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*

1 Explanatory Memorandum to the *Australian Communications and Media Authority Bill 2004*, p. 1.

2 Hon Peter McGauran MP, Minister for Citizenship and Multicultural Affairs 'Australian Communications and Media Authority Bill 2004: Second Reading Speech', *House of Representatives Hansard*, 2 December 2004.

Act 1992 that relate to the ABA. It also replaces references to the ABA and the ACA in other Commonwealth legislation with references to the ACMA.

3.6 Eight other bills amend existing Acts that impose taxes or fees by replacing references to the ABA or the ACA with references to the ACMA. Under section 55 of the Constitution, laws that impose taxation must deal only with the imposition of taxation. Consequently separate bills are necessary, and they are:

- the *Datacasting Charge (Imposition) Amendment Bill 2004*;
- the *Radiocommunications (Receiver Licence Tax) Amendment Bill 2004*;
- the *Radiocommunications (Spectrum Licence Tax) Amendment Bill 2004*;
- the *Radiocommunications (Transmitter Licence Tax) Amendment Bill 2004*;
- the *Radio Licence Fees Amendment Bill 2004*;
- the *Telecommunications (Carrier Licence Charges) Amendment Bill 2004*;
- the *Telecommunications (Numbering Charges) Amendment Bill 2004*; and
- the *Television Licence Fees Amendment Bill 2004*.

The main Bill

3.7 Key provisions in the main Bill are outlined below.

Functions and powers

3.8 Part 2 of the Bill deals with the ACMA's establishment, functions, powers and liabilities.

3.9 The ACMA is established under clause 6 and its functions are set out in clauses 7-11. Functions are grouped under telecommunications (clause 8), spectrum management (clause 9) and broadcasting, content and datacasting (clause 10). These functions are essentially the same as those currently set out in the *Australian Communications Authority Act 1997*³ and the *Broadcasting Services Act 1992*.⁴ Some additional functions are included, such as monitoring and reporting to the Minister on the operation of certain Acts listed in clauses 8 and 9, and reporting and advising the Minister on the Internet industry (paragraphs 10(n) and 10(q)).

3.10 The ACMA is also given a range of other functions, including providing services or facilities on behalf of the Commonwealth relating to radiocommunications

3 Sections 6 (telecommunications functions) and 7 (spectrum management).

4 Section 158.

or telecommunications; providing for electronic addressing;⁵ and any functions conferred by any other law (clause 11). Such additional functions are equivalent to the ACA's current additional functions.⁶

3.11 The ACMA will have the power to do 'all things necessary and convenient' for the performance of its functions, other than the power to acquire, hold or dispose of property, enter into contracts or lease land or buildings (clause 12). The clause specifically provides that the ACMA may sue. ACMA's financial liabilities are liabilities of the Commonwealth (clause 13).

Accountability

3.12 Both the ABA and the ACA are bodies corporate⁷ to which the *Commonwealth Authorities and Companies Act 1997* applies. Both bodies have a Chair, Deputy Chair and other part-time or full-time members (up to three for the ACA and five for the ABA).

3.13 DCITA proposed in its 2003 discussion paper that the ACMA should also be a government authority under the CAC Act. However, the model that has been adopted for ACMA is that of a prescribed agency under the *Financial Management and Accountability Act 1997*. Such agencies do not have a separate legal identity but act as agents of 'the Commonwealth'.⁸ Thus they may not hold money or property in their own name (clause 12). The Consequential Bill provides for the transfer of the assets and liabilities of the ABA and ACA to the Commonwealth.

3.14 In the public hearing, departmental officers explained how this decision came about:

That arose out of what was called the Uhrig report, which was a look at governance done through the Finance and Administration portfolio where all government agencies across the Commonwealth were looked at in terms of their governance arrangements. I guess ACMA is probably the first one off the list where it was decided that the FMA approach was really more suited to an agency which is funded by the government, raises money in relation to the government, and has that regulatory role. It was decided that the governance arrangement under the FMA Act was more suited to that

5 Clause 17 requires the AMCA to consult the ACCC in relation to managing electronic addressing. This is equivalent to section 12A of the *Australian Communications Authority Act 1997*.

6 *Australian Communications Authority Act 1997*, section 8.

7 *Broadcasting Services Act 1992*, section 154; *Australian Communications Authority Act 1997*, Section 15.

8 For an explanation of the difference between the two types of entities, see Joint Committee of Public Accounts and Audit, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, 2000, Chapter 1, p. 1.

than the CAC arrangements. The ACCC is a FMA agency, so it brings it into line with the ACCC.⁹

Constitution, membership and staffing

3.15 Part 3 of the Bill deals with ACMA's constitution and membership. Clauses 19–20 provide that the ACMA shall consist of a Chair and Deputy Chair (both full-time appointments), and 1 to 7 other members, all of whom are appointed by the Governor-General. Appointments may be made for up to five years and may be renewed, but must not extend beyond ten years (clause 21). Clauses 22–23 address acting appointments.

3.16 Clauses 24–25 allow the Minister to appoint any number of associate members for specific purposes, such as inquiries or investigations. The terms and conditions of appointment of members and associate members, including termination of appointment, are dealt with in clauses 28–35.

3.17 ACMA staff will be people appointed or employed under the *Public Service Act 1999* (clause 54) or staff on loan from other Commonwealth Departments, authorities, Commonwealth controlled companies or bodies established under a law of the Commonwealth for a public purpose (as outlined in clause 55). The Chair will be the head of the statutory agency for the purposes of the *Public Service Act 1999* (subclause 54(2)). Clause 63 specifies that the Chair is not subject to the ACMA's direction in performance of certain functions or powers as Chief Executive under the FMA Act or agency head under the *Public Service Act 1999*.

Decision-making and delegation

3.18 Clauses 36–45 address meeting procedures such as quorums, and decisions taken outside meetings.

3.19 Clauses 46–49 allow ACMA to establish one or more Divisions, composed of at least three members, to undertake specific functions that ACMA delegates.

3.20 Clauses 50–53 deal with delegations. ACMA may delegate any or all of its functions to a Division (clause 50) or to a member, associate member, staff member or member of a Commonwealth authority whose services are made available to ACMA (clause 51). A Division may delegate such functions and powers to others (clause 52), except in relation to specified powers under the *Broadcasting Services Act 1992*. Those non-delegable powers, set out in clause 53, include the power to cancel or suspend licences, impose or vary licence conditions, initiate hearings and refer matters for prosecution.

9 Ms Fay Holthuyzen, DCITA, *Committee Hansard*, 11 February 2005, p. 64.

Ministerial direction and other constraints on functions

3.21 Under the current legislative framework, there are differences in the extent to which the Minister can direct the functions of the ABA and the ACA.

3.22 Ministerial direction of the ABA is limited to directions of a general nature, except for specific powers itemised in legislation.¹⁰ This restriction has been described as 'aimed at limiting the ability of Ministers to influence the allocation of individual broadcasting licences and other decisions made by the ABA'.¹¹

3.23 By contrast, the Minister has significant capacity to direct the ACA in its regulatory functions, as he or she has a general power to give written directions in relation to the performance of the ACA's functions and the exercise of its powers.¹² Since the ACA was established, Ministerial directions 'have played a significant part in the ACA's regulation of telecommunications and radiocommunications'.¹³

3.24 Rather than adopting a single approach, the main Bill preserves the existing different approaches to different types of functions. The Minister will have the power to give the ACMA written directions in relation to the performance of its functions and the exercise of its powers (clause 14). However, such directions may only be 'of a general nature' if they relate to the ACMA's broadcasting, content or datacasting functions or powers relating to those functions, except where the *Broadcasting Services Act 1992* gives the Minister other specific powers to direct. Those specific powers to direct will not be affected by the main Bill. Accordingly:

The power of the Minister to direct the ACMA will be equivalent to the current powers of the Minister to give directions in relation to the telecommunications, spectrum management and additional functions performed by the ACA ... and in relation to the functions of the ABA ...¹⁴

3.25 Clause 15 provides that the ACMA will not be subject to the Commonwealth's direction otherwise than under the main Bill or another Act (a provision which is equivalent to current provisions¹⁵).

10 *Broadcasting Services Act 1992*, section 162. Specific powers of direction relate to such matters as making determinations and clarifications of broadcasting services criteria (section 19); reserving spectrum for national and community broadcasting (section 31); conducting investigations (section 171) and holding hearings on such matters (section 183).

11 DCITA *Discussion Paper*, DCITA 2003, p. 8.

12 *Australian Communications Authority Act 1997*, subsection 12(1).

13 DCITA *Discussion Paper*, DCITA 2003, p. 9.

14 Explanatory Memorandum, p. 2.

15 *Australian Communications Authority Act 1997*, section 13; *Broadcasting Services Act 1992*, section 163.

3.26 Clause 16 also requires the ACMA to perform its broadcasting, content and datacasting functions in a manner consistent with the CER Trade in Services Protocol,¹⁶ a requirement also contained in current legislation.¹⁷

Annual reporting and corporate plans

3.27 Clause 56 requires the ACMA each year to prepare and give to the Minister a corporate plan, covering at least a three year period.

3.28 Clause 57 requires the AMCA to make an annual report to the Minister, who shall table it in the Parliament within 15 sitting days. The report must include specified matters, including copies of Ministerial directions, instruments given by ACMA to carriers and carriage service providers, and reports on complaints and other matters under the *Telecommunications Act 1997*.

Advisory committees

3.29 The ACMA may establish advisory committees to assist it in performing its functions (clause 58). The Consumer Consultative Forum currently established under the *Australian Communications Authority Act 1997* is continued under clause 59.

Other matters

3.30 Part 8 of the Bill provides for a variety of matters, including ACMA's power to make determinations that fix charges (clause 60) and to define expressions used in specified instruments (clause 64); providing an offence of using ACMA's name, acronym or symbol (clause 66); requiring ACMA to maintain a register of policy notifications and ministerial directions (clause 67); and a regulation-making power (clause 68). Many of these ancillary provisions are similar to existing provisions of the ACA Act.

3.31 The Bill provides for the ACMA to be established on proclamation or on 1 July 2005 if not proclaimed before that date (clause 2).

Main provisions of the Consequential Bill

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

3.33 In particular, Schedule 1 item 5 repeals the *Australian Communications Authority Act 1997*. Items 6–58 repeal sections of the *Broadcasting Services Act 1992*

16 Protocol on Trade in Services to the Australian New Zealand Closer Economic Relations Trade Agreement.

17 *Broadcasting Services Act 1992*, para 160(d).

that refer to the ABA and its interaction with the ACA, and insert references to the ACMA where necessary.

3.34 Schedule 2 changes abbreviated references. Schedule 3 makes minor amendments to bills that are anticipated to be before Parliament in relation to the Criminal Code and the *Ombudsman Act 1976*, as well as amendments to provisions of the Criminal Code that are not yet in force.

3.35 Schedule 4 contains transitional provisions, including by providing for the transfer of the assets and liabilities of the ABA and ACA to the Commonwealth (Part 2).

