

Chapter 4

International regulatory models

For years we have been warning that the models structured around regulation will not deliver the outcomes that the governments of these countries envisaged. It is interesting to note that not one of the models has worked – no regulations in New Zealand; self-regulation in Australia; prescriptive regulation in the USA; and a range of intermediate formats in other parts of the world – none of them have been successful.¹

4.1 The terms of reference for this inquiry required the Committee to consider, amongst other matters, whether the powers of Australia's competition and communications regulators meet world best practice, with particular reference to the United Kingdom (UK), the United States of America (US) and Europe. This chapter outlines those models as well as a recent report of the Asia Pacific Economic Cooperation Telecommunications and Information Working Group (APECTEL), and draws specific comparisons with some aspects of the UK model.

The US model

4.2 Unlike Australia, telecommunications regulation is not a federal power under the US Constitution. Consequently, regulatory responsibilities that affect telecommunications are split between federal and state governments and across multiple agencies. US telecommunication regulation is also a mix of general competition laws (such as anti-trust laws) and industry-specific regulation. For these reasons, the US regulatory framework is complex, with some inter-jurisdictional overlap and conflict.

4.3 Key agencies responsible for regulation of national competition policy or communications regulation include:

- the Federal Trade Commission, an independent body which is concerned with business conduct and monopolisation;
- the Antitrust Division of the Department of Justice, which is responsible for merger and acquisition activity issues;
- the Federal Communications Commission (FCC), which is involved in licensing, policy making and rule making in the telecommunications sector;
- the National Telecommunications and Information Administration, which advises the President on communications policy and regulates government use of the radio spectrum; and
- State Public Utility Commissions, which control some state aspects of regulatory policy.

1 Paul Budde Communications Pty Ltd, *Submission 1*, p. 3.

4.4 Implementation of US competition policy has depended significantly on effective, long standing, staff level communications and consultation between the competition agencies; for example, one writer has observed that:

telecommunications reform has involved many years of interaction between the Antitrust Division and FCC staffs, and many of the competition agencies' statements about FCC regulatory proposals have been developed cooperatively, to support the direction of FCC efforts. This co-operative direction was crucial to the design of the antitrust divestiture which built on the FCC's separation rules between competitive and monopoly parts of AT&T's network, but was less effective in implementation. To date, cooperation in regard to provisions in the new Telecommunications Act relevant to the issue have been effective.²

4.5 US competition law is concentrated in three basic longstanding antitrust statutes, the *Sherman Act*, the *Clayton Act* and the *Federal Trade Commission Act*; these have remained basically unchanged for over 50 years, with the Sherman Act dating back over a century. However, in policy terms, interpretation of these statutes has evolved over time, in part through court decisions but also in the light of the priorities and guidelines of the enforcement agencies, ie. the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).

4.6 The US anti-trust laws are concerned with market conduct of individual firms who through exclusionary tactics which might be endeavouring to obtain or protect monopoly powers, or who might be charging unreasonably high prices as a result of their dominance of the market. The focus of the Sherman Act is on preventing any unfair conduct which would allow a firm to achieve a monopoly by excluding other more efficient competitors. There are substantial sanction powers available including:

- Mandated divestiture
- Restructuring
- Undoing monopoly structure and the creation of competing firms in its place.

4.7 However, monopolisations whilst complex are comparatively uncommon. The Sherman Act was used in the telecommunications industry and led to the AT&T divestiture and associated restructuring of the national telephone industry in the 1970s. The basis for the action followed an attempt by the incumbent monopoly carrier to exclude competitors in the markets for long distance services and equipment. It is noted that Australia does not have equivalent anti-trust and divestiture laws.

4.8 In relation to telecommunications regulation more specifically, the FCC was established by the *Communications Act* of 1934. It is an independent federal government agency that is directly responsible to Congress and is charged with regulating interstate and international communications by radio, television, wire,

2 Michael Wise, *The role of competition policy in regulatory reform*, OECD Journal of Competition Law and Policy, Vol 1, No. 1, 1999.

satellite and cable. However, as the AAPT's submission to this inquiry noted, the seemingly organised state of a single telecommunications regulator masks the reality of 50 state public utility commissions.³

4.9 As former ABA Chairman David Flint commented, there are also significant differences in the relationship between the regulator and the executive federal government:

- Whether or not you admire the FCC, a converged Australian regulator will not be a carbon copy of that regulator.
- The American system results in an often adversarial relationship between Congress and President, and that means the Congress is delighted to grant executive power to bodies other than the administration. Under the Westminster system of responsible government, there is no incentive to transfer the same range of functions to the unelected agencies.⁴

4.10 The FCC is directed by five Commissioners appointed by the President and confirmed by the Senate for five year terms (except when filling an unexpired term). The President designates one of the Commissioners to serve as Chairperson. Only three Commissioners may be members of the same political party and none can have a financial interest in any Commission-related business. As the chief executive officer of the Commission, the Chairman delegates management and administrative responsibility to the Managing Director. The Commissioners supervise all FCC activities, delegating responsibilities to staff units and bureaus.

4.11 The Commission staff is organised by function. There are six operating Bureaus and ten Staff Offices. The Bureaus' responsibilities include: processing applications for licenses and other filings; analysing complaints; conducting investigations; developing and implementing regulatory programs; and taking part in hearings. The Bureaus are Consumer & Governmental Affairs; Enforcement; International Bureau Media; Wireless Telecommunications and Wireline Competition. The Offices provide support services.

4.12 While the Bureaus and Offices have individual functions, they regularly join forces and share expertise in addressing Commission-wide issues. The FCC rules and regulations are codified in Title 47 of the Code of Federal Regulation.⁵

4.13 In relation to broadcasting regulation, the US approach is quite different from that of the UK and Australia, as the Australian Film Commission noted:

3 AAPT, *Submission 8*, p. 3.

4 Professor David Flint, former ABA Chairman, at the Australian Telecommunications Users Group (ATUG) 2004 conference, Thursday 4 March 2004.

5 The rules are initially published in the Federal Register. The Government Printing Office compiles all the changes, additions, and deletions to the FCC rules and publishes an updated Code annually.

In the US the dominant view is that broadcasting is basically a commercial activity which the government regulates to ensure efficient management of the spectrum, prevent the excesses of monopoly behaviour and, as far as the First Amendment permits, prevent potentially harmful speech.

The idea that government might finance a centrally controlled public broadcaster, like the BBC or the ABC, has never been supported in the US and goes against the strong commitment to the idea of free speech. In consequence the principle has been to licence as many stations as the spectrum and those desirous of becoming a broadcaster could bear. This idea of economic freedom also engenders a deep seated fear of cartels and the ill effects of monopoly behaviour in the US so that broadcasting regulation has had a major focus on curbing the power and operation of networks.⁶

The EU's European Regulators Group

4.14 The European Commission, in its role as the initiator of legislation and general policy in the European Union (EU), consists of a number of secretariats, one of which is the Information Society Commission, whose responsibilities include telecommunications.

4.15 The EU's "1998 package", the old legislative telecommunications framework, was primarily designed to manage the transition from monopoly to competition and was therefore focused on the creation of a competitive market and the rights of new entrants. Due to rapidly changing technologies, convergence and the new challenges of the liberalised markets, a single coherent framework that covers the whole range of electronic communications, the New Regulatory Framework, was agreed and applied in July 2003.⁷ The regulatory framework comprises a series of legal texts and associated measures that apply throughout the 25 EU Member States.

4.16 The Information Society Commission runs various committees which contribute to the management, implementation and further development of the new adopted regulatory framework in electronic communications. The goals of the new framework are to:

- encourage competition in the electronic communications markets,
- improve the functioning of the internal market and
- guarantee basic user interests that would not be guaranteed by market forces.⁸

6 Australian Film Commission, *Submission 20*, pp. 8-9.

7 Data protection applied at the end of October 2003

8 European Commission Information Society website, 23 February 2005, at: http://europa.eu.int/information_society/topics/ecommm/all_about/todays_framework/index_en.

4.17 The regulatory framework provides a set of rules that are simple, aimed at deregulation, are technology neutral and sufficiently flexible to deal with fast changing markets in the electronic communications sector.⁹

4.18 A body called the European Regulators Group (ERG), comprising representatives from the 25 EU member countries, together with the Information Society Commission, discusses the practical consequences of the framework, and works to achieve a harmonised approach to regulations established under the regulatory framework.

4.19 The Committee notes that the establishment of a coordinated framework is the cornerstone of achieving workable and sustainable communications regulation, whether across Europe or Australia. The establishment of the new European regulatory framework is timely and sensible in the context of the fast-changing markets in the electronic communications world. The Committee considers that the function of the framework, which guarantees basic user interests, should be kept in mind when considering the Australian regulatory model.

The APEC TEL Effective Compliance Enforcement Guidelines & Practices

4.20 The Committee's attention was drawn to the effective compliance enforcement guidelines and practices developed by the APEC Telecommunications and Information Working Group (APECTEL) and released in 2004¹⁰. Those guidelines were described by Mr Paul Budde as 'an overview of the weapons that regulators need in their armouries':

Drafted by senior officials from Australia, Canada, the Philippines, Singapore, Thailand and the United States, [the Guidelines] gives a sober, balanced overview focused on the concept of the 'Empowered Regulator'. As well as voluntary compliance mechanisms it concludes that a regulator needs to be able to impose a wide range of penalties when moral persuasion fails – including warnings, violation notices, orders to cease non-compliance, fines, seizure of assets, licence revocation and criminal proceedings.¹¹

4.21 The work of the APECTEL contributes to the overall APEC goals of trade facilitation, investment liberalization and economic/technical cooperation. Its priorities are set by both Telecommunications and Information Ministers and Leaders and currently focus on:

- reducing the digital divide,

9 *ibid.*

10 Asia-Pacific Economic Cooperation, website, 23 February 2005, at: www.apecsec.org.sg/apec/apec_groups/working_groups/telecommunications_and_information.html

11 Paul Budde, *Submission 1*, p. 7.

- next generation networks and technologies,
- e-government,
- mutual recognition arrangements,
- regulatory reform,
- capacity building,
- protecting information and
- communications infrastructure and cybersecurity.

4.22 The guidelines aim to:

- provide practical examples of compliance programmes, enforcement principles, procedures and tools;
- highlight key success factors that lead to fair, balanced and reasonable arrangements resulting in an effectively competitive marketplace; and
- present case studies to show effective implementation of compliance and enforcement regimes.

4.23 The guide states that compliance with such guidelines can assist economies to achieve the following:

- Promote and maintain fair and efficient market conduct and effective competition, which will lead to improved efficiency and international competitiveness of information and communications industries;
- Ensure that telecommunication services are reasonably accessible to all, and are supplied as efficiently and economically as practicable;
- Encourage, facilitate and promote investment in and the development of IT and telecommunications industries.
- Guarantee that consumers rights are protected by enabling them pursue complaints against companies, and by ensuring that companies follow established rules.

4.24 The guide states that the regulator must be:

- independent and not accountable to any telecom supplier;
- empowered with clear authority, jurisdiction and enforcement tools;
- fair and transparent in its processes, deliberations and actions.

4.25 In relation to compliance, the guide describes situations, markets and services where a compliance program could be successfully introduced (and where it would likely not succeed). It explains what a compliance programme should contain, how it should be developed while including the industry, consumers and the regulator in partnership, and the regulator's role in developing and introducing clear rules on compliance conduct and monitoring processes.

4.26 A section on enforcement principles explains the basic principles (fast, firm, fair and flexible) in the development and application of enforcement procedures. The section on enforcement procedures provides a best practice 'step-by-step' guide to initiating an investigation; investigation procedures which include essential tools to gather information and issue punishments; treatment of consumer and carrier-to-carrier complaints; opportunities and procedures for appeal; and alternative dispute resolution methods.

4.27 The Committee sees merit in considering these concepts for developing areas related to compliance in future communications framework legislation.

The UK communications regulator OFCOM

4.28 The Committee heard numerous references in submissions and during the hearings to the functions and activities of the UK regulator, the Office of Communications (OFCOM). OFCOM was described as arguably the most successful regulator, on the basis that more sustainable changes have been made by it than by the regulators in any other country.¹² Its establishment has particular significance for Australia because it resulted from a merger of a number of existing regulators. Unlike Australia, however, it encompassed a substantial policy review and set in place a framework for further reform.¹³

Establishment of OFCOM

4.29 OFCOM came into existence with the passage of the *Office of Communications Act 2002* after a review of the communications industry, including by way of a 2000 Government White Paper, *A New Future for Communications*.¹⁴ The White Paper proposed various reforms of communications regulation and stated the government's aim as follows:

- We will make the UK home to the most dynamic and competitive communications and media market in the world.
- We will ensure universal access to a choice of diverse services of the highest quality.
- We will ensure that citizens and consumers are safeguarded.¹⁵

4.30 The White Paper set out in broad terms how the sector should be regulated. At its centre were proposals for the creation of a unified regulator, OFCOM. The White

12 Paul Budde Communications Pty Ltd, *Submission 1*, p. 3.

13 UK *Communications Act 2003*, section 6.

14 UK Government Communications White Paper, *A New Future for Communications*, 12 December 2000.

15 UK Department of Trade and Industry website 23 February 2005 at: www.communicationswhitepaper.gov.uk/by_chapter/ex_summ/index.htm.

Paper saw the need for the new regulator to be able to undertake its regulatory duties effectively:

It is important that OFCOM has sufficient powers to carry out its duties. It has to be able to take tough action when necessary and to ensure that regulated companies take the action which is required of them. We therefore intend that OFCOM will have enforcement powers analogous to those of Ofcom and the ITC. We will re-base broadcasting regulation upon modern Competition Act principles and give the regulator concurrent powers with the OFT [Office of Fair Trading] which the ITC currently lacks. In addition, we will give OFCOM *Competition Act* type powers to levy financial penalties for breaches of the sector-specific regulatory requirements. This will bring the range of enforcement powers into line with the powers of other regulatory bodies, for example the Financial Services Authority and the Office of Gas and Electricity Markets.¹⁶

4.31 The Blair Government's vision for OFCOM was that the new regulator was to be significant in creating a dynamic market. The necessary powers were outlined in the White Paper:

- OFCOM will have concurrent powers with the OFT to exercise *Competition Act* powers for the communications sector. As competition becomes more pervasive, we will expect it to rely more on these general powers than on specific sectoral ones.
- OFCOM will also have additional sector-specific powers to promote effective competition in the communications services sector for the benefit of consumers.
- For most providers of services, the sector-specific rules will cover only the essential issues such as consumer protection, access and interconnection. Stronger sectoral competition rules will, however, be applicable to companies having significant market power.
- OFCOM's powers to promote competition and protect consumers will apply to electronic programme guides and similar new systems.
- We need to ensure that the spectrum management framework is kept up to date and are commissioning an independent review of spectrum management. We will value the spectrum used by broadcasters and introduce new mechanisms to enable communications companies to trade spectrum.
- We will continue to ensure that health issues are properly reflected in the regulatory framework.
- We will also ensure that environmental issues are properly reflected in the regulatory framework, whilst at the same time ensuring that

16 Department of Trade and Industry and Department of Culture, Media and Sport, *A new future for Communications, Communications White Paper*, website, 28 February 2005, at: http://www.communicationswhitepaper.gov.uk/by_chapter/ch8/8_9.htm

there are no unnecessary barriers to the construction of the communications infrastructure the UK needs.¹⁷

4.32 It was intended that OFCOM set an example of regulatory good practice and was required to ensure that regulation was kept to the minimum necessary. This means that OFCOM was expected to secure public policy objectives with regard to the protection of consumers and citizens, with the minimum of regulation. This 'light touch' approach appears in some of the specific provisions; for example, in media ownership, in the preference for an industry-led initiative on handling consumer complaints about networks and services, and in the introduction of a more consistent and self-regulatory approach to public service broadcasting.

4.33 To secure light-touch regulation, OFCOM is required to carry out regular reviews of its functions and to identify any areas where regulation is no longer necessary or appropriate, and to publish an annual statement setting out how it plans to meet this requirement. This is in line with the recommendation of the *Better Regulation Task Force's* (BRTF) that economic regulators should withdraw from competitive markets when regulation was no longer necessary. OFCOM also has a duty to have regard to the BRTF's principles of transparency, accountability, proportionality, consistency and targeting.

OFCOM takes over

4.34 Legislation which established the new regulator and gave it its powers and functions came into force in two stages. The *Office of Communications Act 2002* established OFCOM, gave it a preparatory function and placed the five existing regulators under a duty to assist OFCOM to prepare itself for receiving full powers. The Act allowed the Secretary of State to create the body before the main legislation came into force so as to allow regulatory functions to be transferred to it more quickly.¹⁸ In 2003 the *Communications Act 2003*, which sets out OFCOM's duties, functions, powers and structure, was passed.

4.35 The Explanatory Notes to the *Office of Communications Act 2002* (which was prepared on 30 May 2002) states that the aim of the *Communications Bill* will be:

... to create a less complex system of codes and rules which is flexible enough to cope with the pressures of technological change over the long term in this fast-moving sector.¹⁹

4.36 The Explanatory Notes to the *Communications Act 2003* flagged OFCOM's future role in relation to developing new regulatory rules:

17 Department of Trade and Industry and Department of Culture, Media and Sport, *A new future for Communications, Communications White Paper*, website 28 February 2005 at: http://www.communicationswhitepaper.gov.uk/by_chapter/ex_summ/index.htm

18 *Explanatory Notes to the Office of Communications Act 2002*, para 5.

19 *Explanatory Notes to the Office of Communications Act 2002*, para 5. [Ibid.]

One of the central objectives of the Act is the transfer to OFCOM of the functions, property, rights and liabilities of the bodies and office holders that currently regulate the communications sector. OFCOM will then develop and maintain new regulatory rules for the communications sector within the context of a single set of regulatory objectives, and in the light of the changing market environment.²⁰

4.37 The main provisions of the *Communications Act 2003* includes:

- the replacement of the current system of licensing for telecommunications systems with a new framework for the regulation of electronic communications networks and services;
- the power to develop new mechanisms to enable spectrum to be traded in accordance with regulations made by OFCOM, and a scheme of recognised spectrum access;
- the development of the current system for regulating broadcasting to reflect technological change, to accommodate the switchover from analogue to digital broadcasting and to rationalise the regulation of public service broadcasters;²¹

4.38 Other key provisions include those relating to consumer interests and content regulation:

- the establishment of a Consumer Panel to advise and assist OFCOM and to represent and protect consumer interests;
- the establishment of a Content Board to advise OFCOM, and undertake functions on their behalf, in relation to the content of anything broadcast or otherwise transmitted by means of an electronic communications network and in relation to media literacy.²²

4.39 The UK government sought to allow for extensive consultation across the industry and the community on the second bill, noting that comments were welcomed 'from all standpoints - the telecoms industry, broadcasters, spectrum users, industry consumers, private consumers, viewers, listeners and citizens'.²³

4.40 The Committee acknowledges that, in Australia, there has been a significant number of inquiries into telecommunications and broadcasting over the last decade, and that various stakeholders and community groups have had an opportunity to provide input on the future directions of regulation of those sectors. However, the UK's approach differed from that currently being followed in Australia, in that the

20 *Explanatory Notes to Communications Act 2003*, para 7.

21 *Ibid*, para 5.

22 *Ibid*.

23 Official Documents website, 23 February 2005, at:
www.official-documents.co.uk/document/cm55/5508-iii/550802.html.

legislation, which gave the new regulator its duties and functions, also incorporated a section that ensured that the regulatory framework must be reviewed by the new regulator, and that the review must be published.²⁴

4.41 The five sectoral regulators that OFCOM replaced on 29 December 2003 when the functions, property, rights and liabilities of these bodies were transferred to it were:

- the Broadcasting Standards Commission;
- the Independent Television Commission (responsible for commercial television);
- Ofcom (the Office of Telecommunications);
- the Radio Authority (independent and commercial radio); and
- the Radiocommunications Agency (spectrum).

Powers and duties

4.42 OFCOM is an independent statutory corporation accountable to Parliament. Its principal duty in carrying out its functions is:

- to further the interests of citizens in relation to communications matters; and
- to further the interests of consumers in relevant markets, where appropriate by promoting competition.²⁵

4.43 The *Communications Act 2003* created a new system of codes and rules that were less complex than the old broadcasting and telecommunications regulations and were considered to be flexible enough to cope with the pressures of technological change over the long term. OFCOM's specific statutory duties fall into six areas:

- ensuring the optimal use of the electro-magnetic spectrum;
- ensuring that a wide range of electronic communications services – including high-speed data services – are available throughout the UK;
- ensuring a wide range of TV and radio services of high quality and wide appeal;
- maintaining plurality in the provision of broadcasting;
- applying adequate protection for audiences against offensive or harmful material; and
- applying adequate protection for audiences against unfairness or the infringement of privacy.²⁶

24 *Communications Act 2003*, section 6.

25 *Ibid*, subsection 3(1).

4.44 Material on OFCOM's website emphasises its role in protecting the interests of consumers:

OFCOM exists to further the interests of citizen-consumers as the communications industries enter the digital age. To do this OFCOM:

- Balances the promotion of choice and competition with the duty to foster plurality, informed citizenship, protect viewers, listeners and customers and promote cultural diversity.
- Serves the interests of the citizen-consumer as the communications industry enters the digital age.
- Supports the need for innovators, creators and investors to flourish within markets driven by full and fair competition between all providers.
- Encourages the evolution of electronic media and communications networks to the greater benefit of all who live in the United Kingdom.²⁷

Competition powers

4.45 OFCOM was given powers under primary legislation to deal with anti-competitive behaviour. Most significantly, the *Communications Act 2003* gives OFCOM concurrent powers with the Office of Fair Trading (OFT) to apply in relation to communications matters the provisions in the *Competition Act 1998* prohibiting undertakings which have the effect of restricting competition and trade within the UK. Since 1 May 2004, OFCOM's powers were extended to any such agreement or abusive conduct if there is any anti-competitive effect on trade between Member States of the EU.

4.46 Under the *Communications Act 2003*, communications matters include the provision of electronic communications networks and services and broadcasting and related matters. OFCOM's jurisdiction also encompasses competition issues relating to the allocation, use or trading of spectrum, in so far as these activities are connected with communications matters.²⁸

4.47 OFCOM was given concurrent powers with the Office of Fair Trading (OFT) to exercise the powers of the *Competition Act 1998*, so far as the communications sector is concerned, and concurrent powers to address monopolies using the powers of the *Fair Trading Act 1974*.

26 Ibid.

27 OFCOM website, 23 February 2005, at: www.Ofcom.org.uk/about_ofcom.

28 Office of Fair Trading, *Liaison on competition matters*, 18 December 2003; OFT website, 28 February 2005, at: <http://www.oft.gov.uk/NR/rdonlyres/5A75F852-4C48-4D12-8604-A7A85D504968/0/ofcom.pdf>

4.48 Concurrent jurisdiction, in this sector, ensures that both OFCOM and the OFT (strictly speaking the Director General of Fair Trading) are able to exercise the powers provided by the *Competition Act*. However, both are required to consult together in respect of any new case arising, and agree which should act. Formal arrangements for consultation are set out in regulations made under the *Competition Act* and these were applied to OFCOM. In practice, the exercise of *Competition Act* powers in relation to communications, including investigations of abuse of a dominant position, will normally fall to OFCOM. This means that competition issues in broadcasting, which previously were dealt with by the OFT, now fall to OFCOM.

4.49 OFCOM has access to powers that are specific to the sector - and to the more general powers of the *Competition Act* and *Fair Trading Act*. It is expected that as competition becomes more pervasive in the supply of communications services, OFCOM will be able to rely increasingly on these general powers, rather than powers specific to the sector, in addressing concerns about competition. However, many aspects of the sector-specific framework, such as universal service provision, will remain necessary and will not disappear or become redundant in the foreseeable future.²⁹

4.50 In addition, the *Communications Act* gives OFCOM powers to impose specific ex ante regulation in relation to electronic communications networks and services.

4.51 The Office of Fair Trading has powers under the merger provisions of the *Enterprise Act 2002*, in relation to relevant mergers which have or may result in a substantial lessening of competition in markets in the UK for goods or services, though it is not clear to what extent these powers would be applicable to spectrum trades.

4.52 As OFCOM's website notes:

- Having considered the various options, OFCOM believes that the existing legislative framework is appropriate and sufficient to prevent distortions of competition and fulfils our obligation under the EU Framework Directive. The *Competition Act* would be the primary mechanism for preventing anti-competitive behaviour following the introduction of spectrum trading, supplemented by existing powers under the *Communications Act* and *Enterprise Act* where these are applicable.³⁰

29 Department of Trade and Industry, *Communications Act 2003*, website 28 February 2005, at http://www.communicationsbill.gov.uk/policy_narrative/550806.html

30 OFCOM, *Ensuring effective competition following the introduction of spectrum trading*, website 28 February 2005, at: http://www.ofcom.org.uk/consult/condocs/sec/effective_competition/section2/?a=87101

Offences, penalties and fines

4.53 The main provisions of the *Communications Act 2003* includes the replacement of the system of licensing for telecommunications systems with a new framework for the regulation of electronic communications networks and services. The *Communications Act* removes the criminal offence of running a telecommunications system without a licence.

4.54 The regime for networks and services establishes a civil penalty mechanism for enforcement purposes. The amount of the penalty imposed can be anything up to 10 per cent of the turnover of the person's relevant business. The intention behind this civil penalty mechanism was to ensure compliance with the proposed regime for networks and services by creating an appropriate deterrent, in respect of initial, continued and recurring infringements. The civil penalty mechanism for enforcement, in addition to being intended to deter, also has the purpose of being punitive. Where a person is in serious and repeated contravention of a general or specific obligation and the giving of enforcement notices or imposition of financial penalties has failed to secure compliance, the Communications Act provides that a person's entitlement to provide a network or service or make available an associated facility may be suspended or restricted. A person is guilty of a criminal offence if he provides a network or service or makes available an associated facility while his entitlement to do so is suspended or in contravention of any restriction.

4.55 The Act allows OFCOM to impose financial penalties on television broadcasters who contravene the provisions of their licence. Those penalties will not exceed the greater of £250,000 or 5% of qualifying revenue (£100,000 or 3% for a first offence). In relation to radio licensing the Act raises the ceiling for financial penalties for contravention of licence conditions from £50,000 to £250,000.³¹

Funding for OFCOM

4.56 OFCOM raises its funds from a number of sources including television and radio broadcast licence fees; administrative charges for electronic networks and services and associated facilities; and a grant-in-aid from the Department of Trade and Industry to cover OFCOM's operating costs in spectrum management. OFCOM sets its licence fees and administrative charges at a level which is sufficient to cover its cash funding requirements each financial year.

Board structure

4.57 The OFCOM Board comprises both Executive and Non-Executive Members. There are six Non-Executive Members including the Chairman, who is responsible for running the Board, and three Executive Members, including the Chief Executive. The Chairman and Non-Executive Members are appointed jointly by the Secretary of State

31 Department of Trade and Industry, *Communications Act 2003*, DTI website, 28 February 2005, at: http://www.communicationsbill.gov.uk/policy_narrative/550806.html

for Trade and Industry and the Secretary of Culture, Media and Sport for a period of between three and five years. The Chief Executive is appointed by the Chairman and the independent Non-Executive Members, while the other Executive Members are appointed by the Board of OFCOM on the recommendation of the Chief Executive.

4.58 The Committee notes that there was some concern amongst witnesses, as discussed in Chapter 5,³² that the main Bill does not specify what expertise new ACMA members ought to bring to the Board. The legislation that governs OFCOM does not indicate the selection criteria for board membership, but does detail the relationship between OFCOM and persons involved in the pre-commencement regulatory arrangements, in the period between the creation of OFCOM and the passing of the Communications Act that absorbed the five regulators into OFCOM.³³

4.59 The Explanatory Notes for the *Office of Communications Act 2002* referred to an 'initial scoping study' by independent consultants :

This study assesses the kind of organisation OFCOM might be and how the complex task of transition might be managed. It notes that the appointment of a Chair and Chief Executive of OFCOM would be a significant step in enabling the more detailed design of policies, and would allow the making of key strategic decisions on such matters as structure, appointments, vision and organisational culture. The proposals represent a basis for planning, although final decisions will be for OFCOM once appointed.³⁴

4.60 Thus the emphasis was not so much on board composition as board duties, which includes design of policies, the making of key strategic decisions on structure, appointments, vision and culture.

Content Board

4.61 Under subsection 12(1) of the *Communications Act 2003*, OFCOM has a duty to establish a Content Board whose functions are governed by section 13 of the Act. As a committee of the Board of OFCOM, it has two key functions – broadcast content regulation and media literacy. The Content Board's primary task within OFCOM is to champion the interests of viewers, listeners and citizens across the United Kingdom relating to:

- the provision of broadcast services of high quality and appealing to a variety of tastes and interests;
- adequate protection from the inclusion of offensive and harmful material in broadcast services; and

32 For example, Mrs Rosemary Sinclair, ATUG, *Committee Hansard* 10 February 2005, p 21; Mr Paul Fletcher, Optus, *Committee Hansard* 10 February 2005, p 1.

33 Explanatory Notes to *Office of Communications Act 2002*, para 11.

34 *Ibid*, Para 6.

- adequate protection from unfair treatment at the hands of broadcasters and from unwarranted infringements of privacy.³⁵

4.62 The OFCOM Board seeks advice and recommendations from the Content Board on any content-related aspects of decisions it has reserved for itself. All other content-related decisions are delegated to the Content Board.

Consumer Panel

4.63 The Committee notes that OFCOM:

... consults the community on issues related to markets for services and facilities, for apparatus used in connection with them and for directories capable of being used in connection with communications network.³⁶

4.64 In particular, the *Communications Act 2003* establishes a Consumer Panel to advise OFCOM on consumer interests in communications. The Panel is independent of OFCOM and operates at full arm's length from it, setting its own agenda and making its views known publicly.³⁷

4.65 The Panel has a responsibility to understand consumer issues and concerns related to the communications sector (other than those related to content of advertising and programming)³⁸ and helps inform OFCOM's decision-making process by raising specific issues of interest to domestic and small business users. These include issues affecting rural consumers, older people, people with disabilities and those who are on low incomes or otherwise disadvantaged. To ensure that its recommendations to OFCOM are based on sound evidence, the Panel has a budget for commissioning its own research.

Media mergers

4.66 The UK *Enterprise Act 2002* requires OFCOM to investigate matters of public interest arising from the merger of newspapers or broadcast media companies, should such an investigation be requested by the Secretary of State. In 2004 OFCOM published a consultation document outlining draft guidance on how it planned to undertake such public interest tests.³⁹

35 Tony Stoller, OFCOM, *Submission 18*, section 2.3.2

36 Explanatory Notes to *Communications Act 2003*, para 53.

37 Subsection 16(2).

38 The Advertising Standards Authority (ASA) enforces the Advertising Standards Codes which OFCOM applies to television and radio broadcasting. The Committee of Advertising Practice (CAP) Broadcast Committee is contracted by OFCOM to write and enforce the codes of practice that govern TV and radio advertising.

39 OFCOM website, 23 February 2005, at: www.ofcom.org.uk/consult/condocs/pi_test/pi_test_consultation/ as at 23 February 2005.

OFCOM and the EU

4.67 The UK must fulfil various obligations in communications regulation arising from its membership of the EU. Section 4 of the *Communications Act 2003* sets out OFCOM's duties for that purpose. As the Explanatory Notes state:

The duty is a duty to act in accordance with six Community requirements:

- (i) to promote competition;
- (ii) to ensure that OFCOM's activities contribute to the development of the European internal market;
- (iii) to promote the interests of all persons who are citizens of the European Union;
- (iv) to take account of the desirability of carrying out their functions in a manner which, so far as practicable, does not favour one form of network, service or associated facility, or one means of providing or making available such a network, service or facility over another;
- (v) to encourage the provision of network access and service interoperability; and
- (vi) to encourage compliance with international standards to the extent necessary to facilitate service interoperability, and to secure a freedom of choice for customers.⁴⁰

Current and recent OFCOM reviews

4.68 OFCOM has conducted some recent wide-ranging reviews and is currently engaged in a number of others.⁴¹

Public service television broadcasting review

4.69 OFCOM conducted a statutory review of public service broadcasting aimed at maintaining and strengthening public service broadcasting in the digital age. The year-long review, *Competition for Equality*, which concluded in February 2005, provided detailed analysis of all the UK public service broadcasters: BBC, ITV1, Channel 4, Five, S4C and all related television services taken together.

Strategic review of telecommunications

4.70 This review is the first wide-ranging analysis of the sector for 13 years and aims to establish OFCOM's principles and approach for the future regulation of the UK telecommunications industry. The review is assessing the options for enhancing value and choice in the UK telecommunications sector. It will have a particular focus on assessing the prospects for maintaining and developing effective competition in

40 Explanatory Notes to *Communications Act 2003*, paras 32 & 33.

41 OFCOM website, 23 February 2005, at: http://www.ofcom.org.uk/consult/strategic_reviews/ as at 23 February 2005.

UK telecommunications markets, while having regard for investment and innovation. The report is scheduled to be published in the first half of 2005.

4.71 OFCOM Chairman David Currie and Chief Executive Stephen Carter summarised the aim of the review as follows:

Faced with the technology shift to digital, it is becoming clear that the current market and regulatory structure is unsustainable. It is that challenge that our Phase 2 proposals seek to address.

This report seeks to address the five key questions that OFCOM posed for the Review. Firstly, in terms of the characteristics of a well functioning competitive market for both residential and business customers, keen prices, wide availability and reliability of basic voice and data services - guaranteed by a choice of suppliers - remain important. But innovation, range and choice in new services are increasingly prized; and the infrastructure that will support them consequently becomes more important. Purely arbitrage-based services are likely to have a limited life-span. The objective is sustainable competition. The increasing choice of new services and tariffs will also put a premium on effective customer information and the ability to switch easily between providers.

Effective and sustainable competition can be achieved in core and backbone networks, provided careful attention is paid to ensuring a successful migration of today's interconnection regime to the very different topography that IP-based networks imply. In local access and other wholesale access products, efficient and sustainable competition is likely to require some continuing regulation to secure genuine equality of access, right through from product design to customer handover. Such regulation needs to be focused on a more limited range of wholesale products than to date - where there are real bottlenecks that are likely to endure. However, where it is focused, it also needs to be more intensive than hitherto. Such an approach, of much more tightly focused but intensive intervention to guarantee genuine equality of access through key bottlenecks, also creates real scope for a significant withdrawal from sector-specific regulation.

Regulators cannot create investment, nor are they well placed to determine when and how much. That is for the industry and the market. However, the proposals in OFCOM's new regulatory framework will, we believe, encourage investment in scale and reach by BT Group plc's competitors to the deepest possible point of connection with BT Group plc's network. This should ensure that there is an increasing range of services and supply for sustainable competition from last-mile delivery right through to retail services. For BT Group plc's own network investment, OFCOM's framework contains a range of instruments and decisions - such as the review of the Network Charge Control, the valuation of BT Group plc's local loop assets, and the question whether there should be a single weighted cost of capital - to ensure that BT Group plc is able to reap an appropriate rate of return - one which recognises the risks involved in next generation networks.

On the final question posed - whether structural or operational separation of BT Group plc, or full functional equivalence, still remained relevant issues

- the answer from the Phase 1 consultation was that, yes, they were still relevant; more so perhaps than we had anticipated. However, the large majority of industry respondents expressed caution about the prolonged uncertainty and disruption to the sector that would be involved in the process which would determinatively answer the structural separation question, namely an Enterprise Act market investigation and subsequent referral to the Competition Commission. If genuine equality of access could be made to work, the overwhelming majority of responses suggested that it would be a far preferable outcome. Equally, however, they shared OFCOM's view that the status quo was unsustainable.

We are at a critical point. There is a genuine opportunity for players in this market, BT Group plc in particular, both to make progress and to benefit the consumer. But market structure and technology development make it a time-limited opportunity. The response of the key players in the market in the coming months will determine whether the sector generally can take advantage of this opportunity, for the benefit of consumers and citizens, and the UK as a whole⁴².

Spectrum liberalisation and trading

4.72 OFCOM published its Spectrum Framework Review in November 2004. This extends and consolidates earlier publications relating to spectrum management, especially those making it possible for licensees to buy and sell spectrum in the market ('spectrum trading') and reducing or removing unnecessary restrictions and constraints on spectrum use ('spectrum liberalisation'). Phase 2 consultations close on 24 March 2005.

Reviews and impact assessments

4.73 OFCOM is required by statute to conduct reviews relating to its operations. For example, section 6 of the *Communications Act 2003* requires OFCOM keep the carrying out of its functions under review with a view to ensuring that its regulation 'does not involve (a) the imposition of burdens which are unnecessary; or (b) the maintenance of burdens which have become unnecessary'. As the Explanatory Notes to the Act note:

OFCEM must from time to time publish a statement setting out how they propose to comply with this duty and must have regard to that statement when carrying out their functions. When reviewing their duties under this section, OFCEM must consider whether or not their general duties set out in section 3 may be furthered or secured, or are likely to be furthered or secured, by effective self-regulation and, in the light of that, whether it would be appropriate to remove or reduce regulatory burdens.⁴³

42 OFCOM *Strategic Review Phase 2 consultation document* foreword 18/11/2004
http://www.ofcom.org.uk/consult/condocs/telecoms_p2/tsrphase2/?a=87101

43 Explanatory Notes to *Communications Act 2003*, para 38.

4.74 The Committee notes that OFCOM also has a statutory duty⁴⁴ to carry out impact assessments in relation to proposals it considers 'important', unless the urgency of the matter makes such action 'impracticable or inappropriate'. As the Explanatory Notes to the Act state:

OFCOM must either carry out and publish their assessment of the likely impact of the proposals or publish a statement setting out their reasons for thinking that it is unnecessary for them to carry out such an assessment.⁴⁵

Public reporting requirements

4.75 As well as annual reporting requirements, the Committee notes that OFCOM is under various obligations to publish other statements connected with the manner in which it carries out its duties. For example, OFCOM is required to publish a statement where it has resolved an 'important' conflict in its duties.⁴⁶ Every annual report must contain a summary of the manner in which OFCOM resolved such conflicts.⁴⁷ Important matters are defined to include:

- (a) a major change in the activities carried on by OFCOM;
- (b) matters likely to have a significant impact on persons carrying on businesses in any of the relevant markets; or
- (c) matters likely to have a significant impact on the general public in the United Kingdom or in a part of the United Kingdom.⁴⁸

Committee conclusion

4.76 As some submissions noted,⁴⁹ there is no single overseas model which is wholly applicable to the Australian situation. Communications regulation in different countries has evolved in different circumstances over time and with different systems of government. However, the Committee agrees with the views of many witnesses that there are many valuable lessons to be learned from the UK experience. In particular, the Committee notes that the UK framework legislation for OFCOM's operations contains various statutory requirements that are missing from the bills under consideration in this inquiry, including:

- a review of policy objectives and regulatory policy;
- inclusion in the annual report of reporting on certain matters, including the resolution of conflicts of interest in achieving statutory objectives; and

44 *Communications Act 2003*, section 7.

45 Explanatory Notes to *Communications Act 2003*, para 39.

46 *Communications Act 2003*, subsection 3(8).

47 *Ibid*, Subsection 3(11).

48 *Ibid*, Subsection 3(12).

49 For example, Australian Film Commission *Submission 20*, p. 8.

- significant acknowledgement of consumer interests, including the OFCOM Content Panel and Consumer Board.

4.77 Moreover, the systematic way in which the UK set about creating a single communications regulator as well as conducting a review of regulatory policy is in contrast to the Australian approach. The establishment of the ACMA will not assist Australia to address rapidly advancing technologies unless serious and immediate changes are made to existing legislative and policy frameworks. These issues are explored in more detail in the next chapter.

