Chapter 5

An opportunity lost

> The merger of the ABA and the ACA… and the creation of this new regulatory body without an underlying change in government policies is certainly not going to have any worthwhile effect on the overall situation. It may even make matters worse[1]…. To a large extent the current regulatory battles are a lost cause – and therefore, also, the current regulatory environment. So any review of ACMA needs to take this into account.[2]

Introduction

5.1 The establishment of ACMA is generally supported as a necessary first step in addressing the regulatory issues posed by the emergence of convergent technologies (see Chapter 2). A number of witnesses argued for the continuation of a 'light touch' regulatory approach[3], supporting an incremental approach to the reform of communications regulation[4] and the administrative merger proposed in the current raft of bills. However, the Committee also heard from a number of individuals, academics and industry organisations who were dissatisfied with the current approach to communications regulation and who saw the establishment of ACMA as a lost opportunity in a sector where emerging technologies outpace the regulatory regime. The Media Entertainment and Arts Alliance voiced this concern:

> Such a merger would provide the opportunity to be more than simply an administrative change. It offered the opportunity for functional change and for an audit of the existing regulatory framework for communications and broadcasting…. Unfortunately, what is now occurring is simply an administrative change. Whilst a merged regulator will be better placed to have an overarching view of the economic, social, cultural and technical policy issues confronting Government and the industries it regulates and be able to better serve the general public, the broader opportunities that the merging of the two regulators offers are being overlooked.[5]

5.2 In this chapter the Committee identifies major weaknesses within communications policy and regulations and in ACMA as it is currently proposed. The key issue then becomes how measures can be designed to achieve robust and competitive telecommunications and media sectors and what role ACMA can play in improving and streamlining the regulation of these markets.

---

1 Paul Budde Communications Pty Ltd, *Submission* 1, p. 8.

2 Ibid, p. 3.

3 For example, Telstra, *Submission* 15.

4 Mr Paul Fletcher, Optus, *Committee Hansard*, 11 February 2005, p. 4.

5 The Media Entertainment and Arts Alliance, *Submission* 11, p. 2.

5.3 This Chapter discusses:

- review of the regulatory regime and ACMA
- regulatory powers
- funding
- organisational culture
- recognition of consumers.

In each of these sections the Committee outlines the issues identified in the evidence and makes a number of recommendations.

Review of the regulatory regime and ACMA

5.4 Given that many in the communications industries believe that there are significant issues needing to be addressed in the current policy framework, some submissions outlined the need for a policy review.[6] The Committee received evidence that wider convergence issues are unlikely to be adequately addressed without a comprehensive policy review in both the telecommunications and broadcasting sectors:

> It is difficult to see how the "new authority will be better placed to take a strategic view of wider convergence issues" in the absence of the policy review that is so critically needed. Simply merging two organisations is not going to address the key issues that will confront regulators in the 21st century. The Alliance is not alone in believing that a comprehensive independent review of communications and broadcasting policy is needed.[7]

5.5 Others in the broadcasting sector echoed the need for the Government to conduct a review of the entire regulatory system. Both the SPPA and AFC proposed the development of an overarching policy which would produce dynamic communications and media sectors, capable of being world leaders:

> SPAA endorses the view that further work is required to establish the policy framework and direction of the entire regulatory system and that ACMA adopt a similar over arching policy objective to the United Kingdom's, OFCOM approach, being to make the United Kingdom "home to the most dynamic and competitive communications and media market in the world".[8]

5.6 The AFC also argues that more work is needed to flesh out the policy framework to provide clear direction to the newly integrated regulator:

> Integration of the regulators offers an opportunity to assess the entire regulatory system for communications, to ensure it is well suited to the

---

6 For example, Paul Budde Communications Pty Ltd, *Submission* 1, p. 7.

7 The Media Entertainment and Arts Alliance, *Submission* 11, p. 3.

8 Screen Producers Association of Australia, *Submission* 16, p. 2.

> future development of a dynamic sector incorporating broadcasting, telecommunications and audiovisual production.[9]

5.7 As discussed in Chapter 4 the amalgamation of the five key broadcasting and telecommunications regulators in the UK provided the opportunity to establish a new regulatory framework under the *Communications Act 2003.* The Committee heard from witnesses expressing the need for the creation of a regulatory framework in which the ACMA can operate. The Communications Law Centre expressed the view that, whether or not the framework is created through amendments to the existing Broadcasting Services Act and Telecommunications Act or through the passing of a newly written communications act, creating a more holistic model for the regulator and the powers of that regulator would make sense.[10]

5.8 In regard to the establishment of ACMA itself, the Australian Consumers Association argued for a review of the legislative basis of powers and jurisdiction to operations in order to achieve maximum integration and seamless coverage of the ABA and ACA. Such a review was seen as particularly important where convergence had blurred lines between matters such as broadcasting, Internet activity and traditional telephony:

> Combining the governance and administrative structures of the Australian Communications Authority and the Australian Broadcasting Authority is a necessary but hardly sufficient component of responding to the convergence challenge. This will lead to a conjoined rather than a converged regulatory agency…. We consider that a comprehensive review, from the legislative basis of powers and jurisdiction to operations and activities, is a strategic necessity, and should be at least planned if not legislated for.[11]

5.9 Dr Derek Wilding from the Communications Law Centre argued:

> The ACMA Bill will achieve the administrative and organisational merger of the Australian Communications Authority (the ACA) and the Australian Broadcasting Authority (the ABA) without addressing any substantive matters relating to the powers and operations of the two regulators. While in our view it would be preferable to address these matters at the time of the enabling legislation, we acknowledge the government's preference for the timely completion of an initial administrative merger and we hope that there will be an opportunity for a further review of the powers and operations of the new ACMA at a later stage.[12]

---

9 Australian Film Commission, *Submission* 19, p. 2.

10 Dr Derek Wilding, Communications Law Centre, *Committee Hansard*, 11 February 2005, p. 10.

11 Australian Consumers' Association, *Submission* 4, p. 2.

12 Communications Law Centre, *Submission* 7, p. 2.

5.10 The lack of any requirement for an internal or external review of the new body after 12-18 months of operation was a concern raised by others. For example, the Competitive Carriers Coalition (CCC) stated:

> The CCC believes that it would be opportune in the context of this merger to lock in a statutory review process of the amalgamated ACMA. A set review would be well placed, within 18 months of the merger, to ascertain the progress of the merger and the impact of significant changes to the sectors subject to regulation. Further, this review would offer the opportunity to consider the merits of a rationalization of functions, and even consider the case for further action. The example of the UK, where the regulators have been unified into OFCOM in the past year, would provide valuable insights in a review conducted in such a timeframe. OFCOM would by then have been in operation for long enough to have established a track record.[13]

5.11 Optus representative Mr Paul Fletcher supported an internal review, by the new body, of:

> …the way that the organisation is structured and the charter that they have been given. I think that would be the first priority: an internal exercise in saying, 'How do we efficiently deploy the resources we now have to discharge the responsibilities that parliament has given us?' There are a lot of big questions being asked this year. In some senses, it might be better to have ACMA focusing on its task and not rolling into yet another wide-ranging inquiry.[14]

5.12 Dr Wilding from the Communications Law Centre, on the other hand, supported a parliamentary review rather than an internal ACMA review:

> I do not think that the public interest is best served by the regulator investigating its own future in that sense. There are things that, in fact, the regulator can validly pursue, but I think it would be preferable for there to be a parliamentary function for that review, such as that suggested in the second and third terms of reference. The consideration, for example, of competition powers and other aspects of a larger, more converged regulator is something that is better done on an independent basis.[15]

5.13 When asked whether such a review might be useful, a DCITA representative commented:

> It might be. Certainly the regulators obviously always have the ability to come back to the government and provide advice on their powers or particular issues if they wish. Of course, some of those regulatory powers

---

13 Competitive Carriers Coalition, *Submission* 12, p. 3.

14 Mr Paul Fletcher, Optus, *Committee Hansard,* 11 February 2005, p. 2.

15 Dr Derek Wilding, Communications Law Centre, *Committee Hansard,* 11 February 2005, p. 11.

> do get caught up when we are looking at those policy issues as well—the role and powers that the regulator should have in those areas.[16]

5.14 The Committee is disappointed that no mandatory review process has been included in the ACMA legislation. Such a review would establish the progress of the merger and the impact of significant changes to the sectors subject to regulation. Additionally, this review would provide the opportunity to consider the merits of a rationalization of functions, and even consider the case for further action.[17] The Committee concurs with Professor Peter Gerrand that there is a need to insert clauses in legislation foreshadowing periodic government reviews of the current regulatory framework to ensure it delivers national communications outcomes that are adequate in terms of (a) international competitiveness (b) regional equities and (c) community equities.[18]

Recommendation 1

5.15 The Committee recommends that the main bill be amended to require that within 18 months of establishment ACMA commence a review of its operations, and systematically review the entire regulatory policy for communications in light of future challenges. The review report should be tabled in Parliament within two months of its receipt by the Minister. The review should reconsider the recommendations of both the Productivity Commission Report on *Broadcasting* and the ACCC Report on *Emerging Market Structures in the Communications Sector*, as well as any policy reviews currently underway.

Policy input

5.16 The Committee notes that, though a number of submissions refer to the need for a comprehensive review of the regulatory regime, few address the question as to who should input into the process. In contrast to ACMA, OFCOM in the UK has been required to undertake a series of significant policy reviews in public service broadcasting, a strategic review of telecommunications and a spectrum framework review (see discussion in Chapter 4). ACA witness Dr Horton, commented that:

> OFCOM has a fairly strong policy input responsibility. We do not have that; we have a department that advises the minister on policy et cetera. In terms of future content and carriage regulation, we are very much getting involved in mobile content regulation as the ACA. The ABA has a role in internet regulation, whereas OFCOM has no role at all in internet regulation.[19]

5.17 Similarly, the Deputy Secretary of DCITA told the Committee:

---

16 Ms Fay Holthuyzen, DCITA, *Committee Hansard*, 11 February 2005, p. 62.

17 Competitive Carriers Coalition, *Submission* 12, p. 3.

18 Professor Peter Gerrand, *Submission* 21, p. 2.

19 Dr Robert Horton, ACA, *Committee Hansard*, 11 February 2005, p. 40.

> The way OFCOM actually works is it tends to have a slightly higher policy role than the regulatory arrangement in Australia, where the department and the government tend to operate the policy side of it and the regulators tend to implement it.[20]

5.18 The Committee heard concerns that the functions in the main bill, which referred to various reporting and advisory functions of ACMA, appeared to be backward-looking rather than forward-looking. Mrs Rosemary Sinclair from ATUG noted:

> In sections 8, 9 and 10, for each of telecommunications, radio communications and broadcasting et cetera, we have a responsibility to advise the minister around developments in bits of the industry and the operation of the act. My reading of that is that it is all past tense. We are advising the minister of what has happened and there does not seem to be any opportunity raised to advise the minister of what might be needed, given the problems and concerns that may have been identified over the last 12 months.[21]

5.19 However, a DCITA representative noted that there was ongoing work on various emerging issues:

> A whole range of digital reviews are currently under way, which are clearly on issues relevant to broadcasting legislation. There is the work in terms of the cross-media, digital radio issues are being considered, and on the telecommunications side there is the work being done on voice over IP, mobile content and … the issues that the minister indicated that she is looking at—the regulatory environment in the context of the Telstra issues.[22]

5.20 The Committee heard a range of differing views on the desirability of input of policy by ACMA. On the one hand AAPT argued that the new regulator should receive its policy objectives and regulatory policy from the Department, the Productivity Commission or an independent source:

> The Parliament needs to ensure that the process of interpreting the differing requirements of the legislation administered by the ACMA is not left to the ACMA. It has been a somewhat strange process of late to see the ACA issue a statement of "Regulatory Philosophy" in response to the Regional Telecommunications Inquiry (the Estens report) recommendations, when clearly regulatory philosophy is a function of the Parliament as incorporated in legislation.[23]

---

20 Ms Fay Holthuyzen, DCITA, *Committee Hansard*, 11 February 2005, p. 54.

21 Mrs Rosemary Sinclair, Managing Director, Australian Telecommunications Users Group, *Committee Hansard,* 10 February 2005, p. 15.

22 Ms Fay Holthuyzen, DCITA, *Committee Hansard,* 11 February 2005, p. 62.

23 AAPT, *Submission* 8, p. 6.

On the other hand, the Committee heard the argument that the new regulator ought, like OFCOM, to have input into the policy and communications regulation.[24] The Committee sees that there would be benefit in involving ACMA in policy development.

Recommendation 2

5.21 The Committee recommends that the main bill be amended to require the ACMA to provide reports to the Parliament on matters of communications policy from time to time where the ACMA is of the view current policy settings are inadequate to meet current or future challenges.

Regulatory powers

5.22 As discussed above the creation of ACMA should offer the opportunity to revisit telecommunication and media regulation. The goal should be to integrate them in a sensible way to provide communications and media specific regulation that is not inimical to competition, but recognises the fluidity and interrelatedness of markets that creates real problems for broad-brush competition law.[25] The Committee heard evidence which argued that the ACCC should continue to administer competition aspects of the communications regime, advised by ACMA.[26]

Telecommunications

5.23 Telecommunications regulation is structured upon a self-regulatory model. The regulatory policy in section 4 of the *Telecommunications Act 1997* states:

> The Parliament intends that telecommunications be regulated in a manner that:
>
> (a) promotes the greatest practicable use of industry self-regulation; and
>
> (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry; but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.

5.24 As the Law Council noted, Part 6 of the *Telecommunications Act 1997* contains a range of provisions that require the development of industry codes of practice.[27]

5.25 During the 40th Parliament, this Committee undertook a range of comprehensive inquiries into the state of telecommunications infrastructure and

24 Communications Law Centre, *Submission* 7, p. 4.

25 Australian Consumers' Association, *Submission* 4, p. 5.

26 Ibid.

27 Law Council of Australia, *Submission* 19, p. 6.

competition in the broadband sector and found that self-regulation was unable to address the degree of market power that Telstra enjoyed within the telecommunications sector. Evidence to these inquiries suggested that Telstra's market power stifled competition and challenged the regulatory regime which was not adequately equipped to deal with it. The effect was to deter infrastructure investment, to suppress the take-up of broadband service and to produce prices for broadband and other telecommunications services which were higher than in many OECD countries.[28]

5.26 The overall effect of Telstra market dominance has been a regulatory environment almost entirely focussed on eliminating anti-competitive behaviour and the belief that a competitive market alone will meet all of Australia's communications needs.[29] However, as the Committee heard:

> It is worth noting that competition is a tool to pursue these ends rather than an end in itself. It can assist deliver price and service benefits to consumer stakeholders, but at the same time, it can be the excesses of competition that stymie such outcomes (as in access denial or ludicrous content bidding wars). So competition needs to be simultaneously encouraged and restrained – a challenge few regulatory regimes can rise to, one that ACMA as a modern acme of converged regulation can and must aspire to meet.[30]

5.27 The Committee believes that in the current telecommunications self-regulatory landscape the competition model has demonstrated that it cannot alone deliver on the following needs:

- regional equity (accessibility and affordability of advanced services)
- community equity of basic services within a region (including equity of tariffs and directory services across larger metropolitan areas);
- national competitiveness in advanced infrastructure deployment.[31]

5.28 A number of witnesses, while supportive of the new authority, argued that unless the market power of Telstra was addressed the regulatory regime would remain ineffective.[32] The adequacy of the regulatory powers of the ACCC was questioned by Ms Rosemary Sinclair from ATUG who highlighted ACCC's difficulty in achieving effective market competition:

---

28 Senate Environment, Communications, Information Technology and the Arts References Committee, *Competition in broadband services*, August 2004; Senate Environment, Communications, Information Technology and the Arts References Committee, *The Australian telecommunications network*, August 2004.

29 Paul Budde Communications Pty Ltd, *Submission* 1, p. 5.

30 Australian Consumer Association, *Submission* 4, p. 5.

31 Professor Peter Gerrand, *Submission* 21, p. 1.

32 Paul Budde Communications Pty Ltd, *Submission* 1.

> One is market power and how that is dealt with and we have heard often from the ACCC over the last two or three years around this issue…. I would say that in the ACCC's annual reports to parliament there are continued messages around market power in this industry and the difficulty the ACCC is having in dealing with that.[33]

5.29 The Competitive Carriers Coalition argued that structural problems in the telecommunications market rendered regulation largely ineffective:

> This has resulted in an increasing reliance on regulation to affect outcomes, particularly for consumers, which a robust and competitive market would deliver without regulatory intervention. This increased regulation has in turn created regulatory fatigue among new, competitive entrants, which is in turn a barrier to entry and stymies competition. In other words, we have reached a point where we see a vicious circle of market failure being chased by more regulation, which in turn facilitates more market failure… However, it is unlikely that any changes to telecommunications regulatory arrangements can be fully effective unless they are accompanied by policy and regulatory reforms to address the structural causes of the failure of competition in communications markets.[34]

5.30 Several witnesses raised what they saw as the failure of the current regulatory framework. The Australian Consumers Association argued that the ACA itself had questioned the effectiveness of the regulatory approach in the current environment:

> The regulatory approach taken to instil competition into the telecommunications market of Australia seems only to have advanced sufficiently to diagnose what would work better. The view of ACA is that Australia may have reached the end of what can be accomplished by extending and enlarging the regulatory apparatus in telecommunications. It is trying to manage access to the infrastructure of a huge, vertically integrated incumbent supplier that retains near monopoly control over essential and pivotal infrastructure. This incumbent wields superior power to the regulator in political and economic terms.[35]

5.31 The ACA argued that technical complexity in itself impacts on competition law, rendering it inadequate. Rapid change in the area makes it difficult to specify markets with the certainty that competition law requires. This issue highlights the overlap between the work of the ACMA and the ACCC, and the importance of a necessary close working relationship between them. The ACCC needs to be fully appraised of rapid technical changes in its work, while the ACMA needs to clearly understand that technical decision can affect competition outcomes.

5.32 In their submission the ACCC highlighted the complexity of regulatory problems in a natural monopoly market:

---

33 Ms Rosemary Sinclair, ATUG, *Committee Hansard*, 10 February 2005, p. 15.

34 Competitors Carriers Coalition, *Submission* 12, pp. 2-3.

35 Australian Consumers' Association, *Submission* 4, p. 4.

> It is important to note that regulatory powers are dependent on the nature of the regulatory problem that they are seeking to address. This, in turn, depends on a range of issues including the presence of market power, the existence of natural monopoly and the incentives of an incumbent firm to hinder access and restrict competition.[36]

5.33 The Committee is concerned that the ACMA, and the ACCC, do not have the necessary regulatory power to deal with issues of incumbent market power in the current telecommunications landscape. These issues are essentially structural in nature, with several witnesses arguing that the essential solution is the structural separation of Telstra's wholesale operations from Telstra's retail operations.[37]

5.34 The issue of regulatory power is considerably more significant in advance of the Government's determination to proceed with the full privatisation of Telstra without structural separation. The Committee is concerned that if Telstra becomes a fully privatised company current regulatory regimes will prove inadequate to deal with the market power rendered by incumbency. As Paul Budde warns:

> At the time of the introduction of the 1997 Act the almost limitless nature of the power wielded by the incumbent telecoms operator was poorly understood and, as a result, the wrong policy decisions were made, based on light-handed regulations. It is now generally recognised that to introduce change around such a powerful incumbent required stronger regulatory powers.[38]

5.35 Professor Peter Gerrand argued that if Telstra is privatised, there would be a pressing need to strengthen the regulatory environment because Telstra:

- Will become a cross-media giant through acquisitions of a TV network and/or newspaper empire that make perfect business sense: to integrate its advertising streams, and bundle its products.
- Will lobby politically and aggressively – using all its media - to resist any further legislative changes that might disadvantage its business opportunities and profits. If cross-media ownership rules are relaxed, Telstra will exercise more political influence within Australia than Packer or Murdoch.
- Will use its unique cross-media portfolio to bundle (and cross-promote) telecoms products in ways not open to competitors.
- Will be motivated to design its future optical fibre Customer Access Network (CAN) in such a way as to make infrastructure access commercially unattractive to competitors, thereby ensuring an even

---

36 ACCC, *Submission* 13, p. 2.

37 Professor Peter Garrand, *Submission* 21; Moore and Moore Consulting Services, *Submission* 2.

38 Paul Budde Communications, *Submission* 1, p. 1.

> tighter monopoly in the OF CAN than it has achieved in the Copper CAN.[39]

5.36 The need to consider the establishment of a 'super' regulator to address the nexus of market power and regulation was raised in the evidence:

> A powerful regulator – one that is a match for the very powerful media and communications interests – should be put in place to oversee the total regulatory landscape. Within this super regulator there would be divisions for the various segments…. On the other hand, all the national interest elements should be kept together and managed as a whole. These include national infrastructure strategies, media diversity, foreign ownership, competition regulations, consumer issues and so on.[40]

5.37 In light of Telstra's market power and its proposed full privatisation in the near future, the Committee believes that there is a need to enhance the powers of ACMA to allow the authority to develop from a technical regulator to an overarching regulator with responsibility for technical, infrastructure, consumer, media and telecommunications issues.

5.38 The Committee reiterates the recommendations that it made in its earlier inquiry into *Competition in Broadband Services*:

Recommendation 3

5.39 The Committee recommends that the Productivity Commission be tasked to undertake a full examination of all options for structural reform in Australian telecommunications, including but not restricted to, structural separation of Telstra (para. 4.77).

Recommendation 4

5.40 The Committee recommends that Telstra be required to divest its shareholding in Foxtel (para. 4.79).

Recommendation 5

5.41 The Committee recommends that the Government should direct the Australian Competition and Consumers Commission to provide further advice on its recommendations in its report *Emerging Market Structures in the Communications Sector* on the feasibility of introducing a content access regime (para. 4.80).

---

39 Professor Peter Gerrand, *Submission* 21, p. 2.

40 Paul Budde Communications, *Submission* 1, p. 9.

Recommendation 6

5.42 The Committee recommends that the Government should direct the Australian Competition and Consumer Commission to provide further advice on its recommendations in its report *Emerging Market Structures in the Communications Sector* that Telstra be required to divest itself of its HFC network (para. 4.81).

5.43 The Committee would encourage the closest possible co-operation between the ACCC and the ACMA in addressing the technical implications of competition. We note that until recently, the ACA and the ACCC had cross membership of their boards, and the Committee is of the view that this is important in establishing relationships and should be continued. The ACCC stated that cross-membership between the ACCC and the ACA was an appropriate way to deal with the dotted line between the ACA and the ACCC:

> The area of technical regulation and social regulation goes beyond the sorts of things that the ACCC does and should do. Those are areas that are legitimately in the realms of another organisation. That is not to say that there are not smudge marks sometimes in that delineation but the most appropriate way to deal with any greying of that line between the two roles is with the sorts of arrangements that we have had in the past and would expect to have in the future—for example, some cross-fertilisation between the two organisations. Previously the head of the ACA was an associate commissioner of the ACCC and the telco commissioner was an associate member of the ACA. That arrangement … has fallen away because of the ACMA amalgamation process and because of the lack of permanent appointments but we have, in the interim, put in place some less formal arrangements to maintain that cooperation and coordination.[41]

5.44 Commissioner Willett went on to say that it is also important that there be good relations and contact between staff at both bodies.[42] The Committee believes that this relationship might also be improved by pooling resources on projects with relevance to both technical and competition regulation.

Recommendation 7

5.45 The Committee recommends that the ACCC and the ACMA be encouraged to develop the closest of possible working relationships, including:

- **cross-membership between the ACMA and ACCC governing boards; and**
- **pooling of resources on projects with relevance to both technical and competition regulation.**

---

41 Commissioner Edward Willett, ACCC, *Committee Hansard*, 11 February 2005, p.28.

42 Ibid.

Broadcasting

5.46 Broadcasting regulation comes under the BSA and like telecommunications is primarily self-regulatory:

> Section 4 of the BSA states that Parliament's intention is that broadcasting and datacasting services be regulated in a manner that in the opinion of the ABA "enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on the providers" of regulated services; however this statement is less definitive than section 4(a) of the Telecoms Act. Under the BSA, there are also requirements for the development of industry codes of practice (which are registered by the ABA) and for the ABA to exercise more interventionist powers of regulation where the codes are demonstrated to fail (the ACA also has similar powers). The ABA also has powers to determine industry standards. The ABA has described this scheme as "co-regulation" (although this is not a term used in the BSA).[43]

5.47 The Committee heard evidence from several witnesses who were critical of the ABA in its administration of self-regulation, in particular the ABA's reluctance to use enforcement mechanisms for breaches of the code. Dr Derek Wilding argued:

> In the broadcasting sector there has been a question mark over the authority's approach to using the enforcement mechanisms that are available to it, and we have seen that in relation to the commercial radio standards. Part of it is a degree of timidity in approaching regulatory moves that are other than self-regulatory in nature. For example we might see the length of time that it takes to address an issue such as local content on regional television as something indicative of both underresourcing and a certain approach in using those enforcement mechanisms.[44]

5.48 In their submission the Australian Consumers Association argued:

> We would like to see the enforcement activities of the merged entity increased, so that non-compliance will be actively pursued, where necessary with enforcement action. We are not uncomfortable with an approach whereby action is usually based on a graduated use of regulatory measures using the minimum power or intervention necessary to achieve the desired result. However mild regulatory approaches without the certainty of persuasive sanctions should compliance be denied simply breed complacency and calls the regulator into poor repute. The message to ACMA must be that intervention is to be mounted with vigour consistent to the size, risk, and urgency of the non-compliance rather than pursuant to an ideology of minimal intervention or light touch at any cost.[45]

---

43 Law Council of Australia, *Submission* 19, p. 6.

44 Dr Derek Wilding, Communications Law Centre, *Committee Hansard*, 11 February 2005, p. 14.

45 Australian Consumers' Association, *Submission* 4, p. 9.

5.49 The Australian Film Commission supported the UK approach to ensuring a community-focused approach to broadcasting standards through appointment of a Content Board chaired by a non-executive member:[46]

> The AFC believes that there is merit in considering the approach of the UK to the structure of OFCOM, which supplements the main board of the organisation with a Content Board and a Consumer Panel. ACMA will inherit the consumer panel from the ACA and will have the power to appoint advisory groups… The Content Board is set up under the Communications Act and is responsible for overseeing the regulation of content, specifically broadcasting content and including issues such as production quotas. It consists of 14 members drawn from the general public and is appointed by the main board and the OFCOM deputy chairman is its chairman, but is subject to the ultimate decision making authority of the main Board.[47]

5.50 Similarly, Young Media Australia argued:

> YMA sees the creation of the ACMA as an ideal opportunity to address one serious shortcoming of the current regulatory scheme, namely the absence of proper support for community involvement. [48]

5.51 Young Media Australia identified that within the existing regulatory scheme there is no requirement that any ABA member have expertise in child development:

> As one of the stated objectives (and in our view the most important stated objective) of the regulation of media and communications is the protection of children and young people, we consider it imperative that a person with knowledge of those groups' needs be closely involved in the administration of the system. Our experience with the ABA indicates persistent failure to consider issues from a child development perspective, and the inclusion of a child development expert in decision-making could go a long way to remedying this.
>
> YMA therefore submits that a provision should be included, stipulating that at least one member of the ACMA should be a person with expertise in child development. It would also be desirable to stipulate that any Division dealing with matters relating to the protection of children and young people contain at least one such person.[49]

5.52 The Screen Producers Association of Australia cautioned against domination by technical issues in the merged entity:

> Government needs to ensure that the ACMA's internal structures are not overwhelmed or vulnerable to majority dominance by technical and

---

46 *Communications Act 2003* (UK), section 12.

47 Australian Film Commission, *Submission* 20, p.7.

48 Young Media Australia, *Submission* 22, p. 2.

49 Ibid.

> spectrum issues. SPAA sees merit in the recommendation that ACMA adopt a similar approach to Ofcom with the establishment of a Content Board able to feed recommendations to the main board. SPAA submits that there needs to be adequate and fair representation at Board level to ensure the strategic direction of content regulation is represented at the highest level.[50]

5.53 The operation of OFCOM's Content Board is discussed in Chapter 4. The Committee sees some merit in formalising the involvement of the community in the establishment and enforcement of content standards as occurs in the Content Board in the UK. The Committee believes that such a mechanism would ensure that the ACMA board is able to draw on a wider pool of expertise in deciding key issues related to broadcasting standards and community expectations.

5.54 The Committee also believes that ACMA provides an opportunity to develop an organisational culture which will be more active in enforcement of content regulation and compliance. It supports SPAA's call for:

> increased flexibility in ACMA's ability to enforce or encourage adherence to content regulations and to rectify non-compliance issues.[51]

5.55 The Committee notes the recommendations of the Senate Select Committee on Information Technologies in April 2000, which, among other things, called for:

> An independent statutory body, known as the Media Complaints Commission (MCC), to be established to more effectively protect the right to privacy and empower individuals in lodging a complaint against Australia's information and communications industries.[52]

5.56 The Committee also called for:

> A more proactive enforcement of self-regulatory codes. And a stronger statement of regulatory policy under section 4 of the Broadcasting Services Act to ensure that industry properly addresses consumer concerns and upholds high levels of broadcasting standards.[53]

Recommendation 8

5.57 The Committee recommends that the Government consider the creation in legislation of a Content Board modelled on the United Kingdom model to advise the ACMA on content regulation.

---

50 Screen Producers Association of Australia, *Submission* 16, p. 5.

51 Ibid, p. 2.

52 Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media*, 13 April 2000, p.xii.

53 Ibid.

Recommendation 9

5.58 The Committee recommends that section 4 of the *Broadcasting Services Act 1992* be amended to place greater emphasis in the ACMA's regulatory policy on fair and effective resolution of consumer complaints.

Funding

The cost of the new body

5.59 The Explanatory Memorandum of the main Bill[54] states that the establishment of the new body is expected to be revenue neutral, with resource needs for 2005/06 and 2006/07 to be the combined total of forward estimates for the ACA and the ABA. The ACA's submission[55] referred to 'economies of scope' that could be achieved by the merger. Optus also suggested that some cost savings should be achieved.[56]

5.60 The Committee was interested to ascertain whether any administrative savings from combining the two bodies were envisaged (for example, in having only one membership structure and combined administrative functions, as well as potentially reduced overlap in functions). During the public hearings, Dr Horton from the ACA argued:

> Certainly efficiencies are imposed on us by DOFA; we have an efficiency dividend of $1 million in that first year. We have been asked to absorb a budget of $1.5 million on spam; it was an NPP [new policy proposal] in the first instance, but we were asked to absorb it. We have been asked to absorb depreciation in the future, which is $1.8 million. We have to find it from that budget, which is not being increased, because there are no NPPs. So an efficiency discipline has been put on us already.
>
> Clearly, by bringing the two organisations together, there will be some savings but not in the first year. We anticipate that the set-up costs of the organisation will balance out the administrative savings of bringing two organisations together. But in future times—there is no doubt in my mind anyway—we will see that administrative cost. At that time we will have a review of the finances of ACMA; that has been mooted for 2006 in anticipation of 2007-08.[57]

5.61 A representative from DCITA noted that the issue of administrative savings would be a matter for the new body to examine, and acknowledged that it would be:

> … likely that would be some administrative savings that would result from some of the overhead issues but there are clearly costs in bringing a lot of

54 Explanatory Memorandum to the *Australian Communications and Media Authority Bill 2004*, p. 3.

55 Australian Communications Authority, *Submission 5.*

56 Optus, *Submission* 9, p. 2.

57 Dr Robert Horton, ACA, *Committee Hansard*, 11 February 2005, p. 43.

> those systems together in the first instance. So there are additional costs imposed on the ABA and the ACA now in terms of their IT systems and their human resources systems and moving from a CAC agency to an FMA agency arrangement. They are actually additional costs that they are bearing now. But we would expect that down the track there would potentially be some saving over time.[58]

The cost of regulation and litigation

5.62 The Committee heard evidence that the cost of regulating anti-competitive behaviour in a monopoly market was an issue of major concern. The disparity in economic, legal and regulatory resources was raised by several witnesses:

> [When] Telstra is able to bring to bear $50 million-odd of legal and regulatory budget against $5 million in the commission that you get into a situation where the rest of us are always chasing to try and catch up, and conflicts are able to be drawn out and are never resolved.[59]

5.63 Similarly, it was argued that:

> Telstra is too large to be regulated effectively: (a) it has far more resources than the regulator; (b) it can always vary the non-transparent boundaries between its wholesale and retail businesses for competitive advantage.[60]

5.64 Telstra's willingness and extensive resources to challenge the regulator were evident in the Part A Competition Notice, issued on 19 March 2004, against Telstra in relation to the pricing of Telstra's broadband internet services and which Telstra settled on 21 February 2005 for $6.5 million. At a hearing on 11 February 2005, 10 days prior to the settlement, Mr Michael Cosgrove from the ACCC told the Committee that extensive ACCC resources were directed at pursuing this notice:

> I have an enforcement team of eight people and the majority of those people were working on the competition notice, as well as a private law firm retained by the commission.[61]

5.65 Commissioner Ed Willett added:

> There are clear constraints on our current resources. We have statutory roles that we must continue to perform, and they take up a good chunk of the current resources.[62]

---

58 Ms Fay Holthuyzen, DCITA, *Committee Hansard*, 11 February 2005, p. 60.

59 Mr David Forman, Competitive Carriers Coalition, *Committee Hansard,* 10 February 2005, p. 38.

60 Professor Peter Gerrand, *Submission* 21, p. 1.

61 Mr Michael Cosgrove, ACCC, *Committee Hansard*, 11 February 2005, p.37.

62 Commissioner Ed Willett, ACCC, *Committee Hansard*, 11 February 2005, p.38.

5.66 The Committee was told of the defiance shown by Telstra to the regulator in regard to this notice:

> It seems extraordinary that what has been supposedly the atomic deterrent in regulation has been imposed for 10 months—that Telstra have been willing to engage in a debate with the commission for 10 months while fines of potentially $300 million have continued to rack up. That indicates that Telstra are able to see and respond to emerging threats to their market power and understand that the remedies that are available to the commission are inadequate to prevent them from gaining benefit.[63]

5.67 Similarly, the Committee heard evidence from Mr Charles Britton, the Senior Policy Officer for IT and Communications for the Australian Consumers' Association, who also noted Telstra's ability to resource any assault by the ACCC:

> We have had a competition notice sitting on Telstra because of its broadband behaviour for nine months now with $1 million a day fines—or whatever it is—accumulating. That does not seem to have gotten its attention. So, while your point is well made, at the same time it is really important not to underestimate just how resilient Telstra's coffers are.[64]

5.68 Industry bodies, such as the CCC, noted that the drain on the ACCC's resources had a flow on effect to others in the industry:

> The ACCC is seriously under-resourced and under-skilled for the tasks it must perform in relation to telecommunications, and a severe bottleneck has developed with urgent matters not progressing satisfactorily. It is also important to understand that this is having the effect of demanding that individual companies devote ever more resources to regulatory issues.[65]

5.69 Industry frustration at the wasted resources of the ACCC in enforcing undertakings in relation to Telstra's products was raised, as was Telstra's tendency to engage in a series of examinations and undertakings that were then withdrawn and replaced with others.[66] Additionally, the Committee heard evidence which suggests that Telstra's ability to engage in protracted regulatory challenges was placing a financial and staffing burden on many of the smaller industry players who found themselves victim of Telstra's anti-competitive actions.

---

63 Mr David Forman, Competitive Carriers Coalition, *Committee Hansard,* 10 February 2005, p. 38.

64 Mr Charles Britton, Australian Consumers' Association, *Committee Hansard*, 10 February 2005, p. 13.

65 Competitive Carriers Coalition, *Submission* 12, p.4.

66 Mr David Forman, Competitive Carriers Coalition, *Committee Hansard,* 10 February 2005, p. 38.

> This has been a very bruising and disruptive development. Ongoing battles between the regulator and Telstra have been the main feature of the telecoms agenda the last eight years.[67]

5.70 Mr Ian Slattery from Primus told the Committee that the increased regulatory burden for Primus had been significant:

> As a ballpark estimate, Primus has had to realise an increase of about 60 per cent of resourcing to deal with what it considers is an increased regulatory burden, primarily as a result of added reporting and monitoring requirements and record-keeping rules imposed on us.[68]

5.71 The need to meet the requirements of a number of regulatory agencies and the associated burden this places on industry were reiterated by the CCC, which claimed in their submission that:

> CCC members have experienced a steady increase in the regulatory burden imposed by the plurality of agencies and apparent overlapping of their roles in telecommunications regulation.[69]

5.72 Moreover, many of Telstra's competitors felt that the increased reporting requirements being placed upon carriers did not produce any tangible feedback that the competitive landscape was improving.[70]

5.73 The Committee recognised the increased financial burden placed on regulators, industry, and ultimately consumers, and believes that an examination of funding for the ACCC and ACMA is necessary. While the Committee appreciates that the administrative merger of two organisations should provide some efficiencies it has also been suggested that communications regulation is an under-funded sector and is disadvantaged because of this. The Committee heard that the Australian Energy Regulator provides a model for funding the ACCC's and ACMA's regulatory activities. The Australian Energy Regulator currently has a budget of about $20 million a year for managing energy markets and it has about 100 staff. In comparison, telecommunications has less than $6 million and about 34 staff.[71]

5.74 The Committee believes that, regardless of the administrative savings that the merger of the ABA and the ACA will deliver (as discussed earlier in this chapter), there is a need to review funding to the ACCC and ACMA. The Committee concurs with Paul Budde, who has argued:

---

67 Paul Budd Communications Pty Ltd, *Submission* 1, p. 5.

68 Mr Ian Slattery, Competitive Carriers Coalition and Primus Telecom, *Committee Hansard,* 10 February 2005, p. 39.

69 Competitive Carriers Coalition, *Submission* 12, p. 3.

70 Mr Ian Slattery, Competitive Carriers Coalition and Primus Telecom, *Committee Hansard,* 10 February 2005, p. 39.

71 Mr David Forman, Competitive Carriers Coalition, *Committee Hansard,* 10 February 2005, p. 38.

> Size does matter in this respect, as significant funds are needed to take on the very serious issues in this industry – an industry in which the stakes are so high that tens of millions of dollars can easily be spent during a single court case. Only a well-funded and powerful regulator will be able to operate effectively in this market.[72]

Recommendation 10

5.75 The Committee recommends that funding to the ACCC for telecommunications competition issues be substantially increased as a matter of urgent priority.

Organisational culture

5.76 The Committee heard various concerns about the membership of the new regulator and its structure. In particular, its approach to spectrum management was considered to be significant. Other concerns related to the lack of statutory objectives for the new regulator in the main bill, and the transparency of reporting arrangements.

Membership of the ACMA board

5.77 As noted in Chapter 3, the main bill contains no requirement for the members of ACMA to have experience or expertise relevant to any of the functions of the new body. Optus representative Paul Fletcher referred to the challenges in making appropriate appointments:

> On the one hand, it is desirable to have people in those positions who have industry experience. On the other hand, it can be a challenge to find such people who do not have an ongoing association with or an interest in one or other player in the sector and who therefore may give the appearance of being conflicted or unable to deal with issues in an impartial fashion.[73]

5.78 Several submissions, such as the ABC's, expressed concern that there should be experience in broadcasting amongst board members:

> The ACMA Bill makes no stipulation about the qualifications of individuals for appointment as Members of the ACMA. The ABC submits that regulations governing the appointment of ACMA Members might be desirable and should be drafted so as to ensure that the Board includes a significant number of individuals with experience with broadcasting regulation in Australia.[74]

---

72 Paul Budd Communications Pty Ltd, *Submission* 1, p.9.

73 Mr Paul Fletcher, Optus, *Committee Hansard*, 11 February 2005, p. 5.

74 ABC, *Submission* 3, p. 3.

5.79 The ABC considered that, in particular, it would be desirable if the Chair were experienced in broadcasting and broadcasting regulation.[75]

5.80 Some submissions expressed similar concerns that at least some ACMA board members should have experience in telecommunications:

> …we think the scope to have people with some telecoms industry experience in addition to people with broadcasting industry experience will be a positive benefit of the merger, because you will have a merged body which has these part-time member positions and that will offer the capacity to put people with some telco experience into those roles. The other point we were making was that the ABA historically has attracted more political and media scrutiny than the ACA… [T]he profile that the ABA chairman has had over the years, for example, has certainly been considerably higher than that of the ACA chairman.
>
> …we want to make sure there is an appropriate balance, so that people from a telecoms industry background are also appropriately represented, particularly in those part-time member positions.[76]

5.81 The Screen Producers Association of Australia, however, cautioned against domination by 'technical' issues arguing for strong representation at Board level to ensure the strategic direction of content regulation is represented at the highest level:

> Given the recent experiences associated with the leadership controversy at the ABA, SPAA is concerned that incorporating ACMA under the *Financial Management and Accountability Act 1997*, carries a potential risk of politicisation of the Authority. It is recommended that the Authority have the capacity to develop limited enforceable, internal mechanisms to address controversial or ineffective performance at all levels of the organisation.[77]

5.82 Young Media Australia identified that within the existing regulatory scheme there is no requirement that any ABA member have expertise in child development.[78]

5.83 The Law Council of Australia queried the proposed number of ACMA members, whether this was envisaged to allow for 'interest group' or industry representation, and whether that issue should be more closely considered:

> It is not clear why the ACMA Bill provides for nine (9) members, or for those members to be eligible for two (2) terms of five (5) years each (or a total of ten years combined ABA/ACA/ACMA service). No reasons for this decision are set out in the Explanatory Memorandum. It appears that an assumption has been made that every single "interest group" or industry

---

75 Ibid.

76 Mr Paul Fletcher, Optus, *Committee Hansard*, 11 February 2005, p. 5.

77 Screen Producers Association of Australia, *Submission* 16, p. 5.

78 Young Media Australia, *Submission* 21, p. 3.

> needs to be represented on the board of the ACMA, and if this is correct, it is an assumption that could be questioned.[79]

5.84 Another issue concerns the grounds for the removal of board members. Under clause 24 of the main Bill, the appointment of a member or associate member must be terminated if the Minister is of the opinion that the person's performance has been 'unsatisfactory for a significant period of time'. This test is the same as that currently applying to ACA members[80] rather than that applying to the ABA, where an appointment may be terminated for 'misbehaviour or physical or mental incapacity' or for other specified reasons such as bankruptcy.[81] This would mean that a Minister was able to remove a board member without recourse to Parliament as currently required for members of the ABA. This reduces the statutory protection to members of the ACMA dealing with the ABA's quasi-political role of adjudicating complaints about media content.

5.85 These concerns reflect the clear need for the board of the ACMA to reflect a wide range of skill to contribute to the organisation. Given the continuing controversy surrounding the appointment of the previous chair of the ABA, the Committee is of the view that the Government needs to clearly establish the skills set it requires for the ACMA board and adopt a full merit-based appointment process utilising those criteria.

Recommendation 11

5.86 The Committee recommends that the Minister establish clear selection criteria for the appointment of ACMA board members, advertise and conduct a merit-based selection process to ensure recruitment from the widest possible talent pool.

Divisions within ACMA

5.87 Several submissions expressed concern about the structure of the new body. Clause 46 provides for Divisions to be established to deal with certain matters that would otherwise be determined by ACMA as a whole. While no submissions opposed this provision, there were some reservations about whether the new body would truly operate as a merged entity or whether the ACA and ABA might in effect continue to operate independently within the new structure.

5.88 For example, the Media and Communications Committee of the Law Council of Australia noted in its submission that:

> … "generic" division may be more satisfactory than the formation of divisions on "industry" lines (eg broadcasting, radiocommunications,

79 Law Council of Australia, *Submission* 19, p. 5.

80 *Australian Communications Authority Act 1997*, section 37.

81 *Broadcasting Services Act 1992*, Schedule 3, clause 9.

> telecommunications), as this would simply repeat the existing regulatory separations, and potentially defeat the purpose of the "merger".[82]

5.89 A representative from Optus expressed similar sentiments:

> If the new chair and board simply create one division that replicates the existing ACA and another that replicates the existing ABA we think that would be a loss of the potential for improvement that this change represents. On the other hand, you could imagine a structure in which a content regulation division was created which would look at, in an integrated fashion, regulation of content on free-to-air television, pay television, narrowband and broadband internet and mobile online content. There would be real logic and, we would hope, efficiency benefits in doing that, given that the same principles tend to be looked to in each of what are today distinct content regulation regimes. In other words, all of those regimes tend to look to the OFLC classifications and tend to adopt some reasonably similar sets of principles. To bring those areas together and manage them in an integrated way, be that by means of a division or be that in another way, would in our view be desirable.[83]

5.90 However, the Media and Communications Committee of the Law Council also noted that such an approach posed some challenges:

> If Divisions are formed on the basis of "generic" functions (eg investigations, codes, licensing) rather than on the basis of the separate legislative schemes (eg broadcasting, telecommunications), then a challenge for the ACMA will be to ensure that the correct statutory objectives are applied in each case (eg the *Telecommunications Act 1997* places a very high emphasis on self-regulation).[84]

5.91 A DCITA representative emphasised that the matter would be one for ACMA to consider, and compared the division structure with that applying to the ACCC:

> It is a mechanism to enable the organisation to deal, if they wish, with specific issues by smaller numbers of the membership. Again, how they do those issues is a matter for the ACMA membership and board. Certainly the government's intention has been for this to be a converged regulator and not to retain individual silos. That is not to say that individual issues might not be dealt with by some particular members, but it is really a mechanism to give the organisation some flexibility.[85]

5.92 Given these comments from the Department, the Committee is of the view that the role and functions of Divisions should be included in the structural review of ACMA recommended in Recommendation 1.

---

82 Law Council of Australia, *Submission 19*, p. 5.

83 Mr Paul Fletcher, Optus, *Committee Hansard,* 11 February 2005, p. 7.

84 Law Council of Australia, *Submission 19*, p. 5.

85 Ms Fay Holtuyzen, DCITA, *Committee Hansard*, 11 February 2005, p. 61.

Spectrum management

5.93 Currently, responsibility for spectrum management is divided between the ACA and ABA. The ACA has overall responsibility for administering radiofrequency spectrum in accordance with the provisions of the *Radiocommunications Act 1992*. However, under the *Broadcasting Services Act 1992*, the Minister is able to designate portions of that spectrum that will be used by broadcasting services. This spectrum, the broadcasting services bands (BSBs), is planned and administered by the ABA.[86]

5.94 Due to the different emphasis in function and legislation the two regulators take a different approach to spectrum planning and management. The ABA's processes give weight to demographic, social and economic factors in planning spectrum BSB allocations. In particular, the ABA takes an end-to-end approach to interference that is intended to ensure before transmissions begin that such problems will not arise. In contrast, the ACA's spectrum planning methodology is market-based and seeks to maximise returns to the Commonwealth. Its approach to interference seeks to solve such problems after they have arisen and become the subject of a complaint by affected parties. Additionally, under this approach, the costs for addressing interference problems are primarily borne by the spectrum users.[87]

5.95 The Screen Producers Association of Australia is concerned that at present there are no structural safe guards to prevent economic and technical regulation assuming priority over the social and cultural objectives of broadcasting regulation. This concern stems from the different organisational cultures of the two merging organisations, namely the economic development focus of the ACA and the cultural and social objectives of the ABA, as established in their differing legislative bases. The Screen Producers Association of Australia believes there is also a critical need for recognition of the economic conditions required to support the cultural and social objectives of Australian content.[88]

5.96 For broadcasters, such as the ABC, who are supportive of the ABA's approach to spectrum planning, there is concern that the new regulator may over time adopt a market model similar to the ACA:

> The Corporation notes and is satisfied that the approach to the merger taken in the Bills retains intact the broadcasting regime set out in the BSA, including the separation of BSB spectrum from other radiocommunications spectrum…. The ABC is strongly of the opinion that the ABA's BSB planning philosophy and processes should also be transferred to the ACMA…. Accordingly, it seems plausible to expect that the body will shift and adapt its operations over time. Nothing in the legislation ensures that current BSB spectrum planning and management processes will not be

---

86 ABC, *Submission* 3, p. 2.

87 Ibid.

88 Screen Producers Association of Australia, *Submission* 16, p. 3.

> replaced by uniform processes more akin to those of the ACA, including post facto correction of interference problems.[89]

5.97 Similarly, Free TV Australia also sees the need for ACMA to recognise the requirement of broadcasting services in the broadcasting service bands (BSBs) to meet the objectives of the BSA in spectrum planning, as opposed to those under the *Radiocommunications Act 1992* and the *Telecommunications Act 1997*.[90] The Australian Film Commission argued:

> The AFC supports the merging of the ABA and the ACA in the creation of ACMA. An integrated regulator will be in a better position to have an overarching view of the economic, social, cultural and technical policy issues confronting Government and the industries it regulates. However, in changing the structure of regulation, the AFC would be concerned if economic and technical regulation assumed priority over social and cultural objectives of broadcasting regulation.[91]

5.98 Concern was also raised about irregularities in the way in which broadcasting spectrum was paid for. Dr Landrigan from Telstra told the Committee:

> There do seem to be some anomalies in the way broadcasting spectrum is regulated, for example, compared to the way telecommunications spectrum is used and regulated. These are matters which we have pointed out for some time in submissions to the Productivity Commission—that is, in the broadcasting sector spectrum is basically paid for on a revenue basis whereas in the telecommunications industry it is paid for up front with licence fees. That does seem to be somewhat anomalous, given that the same spectrum can in many cases be used for dual purposes—which is a neat example of convergent in and of itself. We expect that that anomaly will actually be carried over to the new entity, but it is being dealt with in the same way, in our view, in the new bill as it is now.[92]

5.99 The Committee believes that the competitive market based philosophy of the ACA does not necessarily deal effectively with the cultural and social objectives of broadcasting as set out in the *Broadcasting Services Act 1992*, especially in relation to community and public broadcasting. The Committee endorsed the call by a number of witnesses that there be recognition of cultural and social content issues at board and supporting board structural levels in ACMA.[93] The Committee notes that the differing objectives of spectrum management under the *Broadcasting Services Act 1992* and the *Telecommunications Act 1997* will continue to apply in the management of spectrum, and would encourage the ACMA to clearly maintain the distinction.

---

89 ABC, *Submission* 3, p. 4.

90 Free TV Australia, *Submission* 6, pp. 1-2.

91 Australian Film Commission, *Submission* 20, p. 2.

92 Dr Mitchell Landrigan, Telstra, *Committee Hansard*, 10 February 2005, p. 27.

93 Screen Producers Association of Australia, *Submission* 16, p. 2.

Recommendation 12

5.100 The Committee recommends that the ACMA clearly establish mechanisms to ensure that the differing legislative public interest objectives for the management of broadcasting and telecommunications spectrum are recognised and fully protected by the merged entity but that anomalies in the calculation of commercial licence fees for access to spectrum be considered as part of the policy review provided for in recommendation 1.

Objects clause

5.101 Some witnesses criticised the absence of an objects clause in the main bill, suggesting that such a clause should state clearly what ACMA's focus should be and what principles should govern its activities:

> What we have in [the main bill] is a lot of information about functions and quite a bit of administrative information about who can become a member, how long they can become a member for and the remuneration tribunal and all the rest of it. It seems to me that the one glaring omission from this legislation is an objectives clause, which ought to go to the issue that this body ought to be focused on pro-competitive outcomes in all its work. In the same way that Part 11B and Part 11C of the ACCC access regime is about promoting competition, any to any connectivity, and the long-term interests of end users. That sort of 'reason why we are doing this' type statement is missing from this legislation.[94]

5.102 Ms Rosemary Sinclair on behalf of ATUG supported in particular the inclusion of references to 'procompetitive outcomes, consumer protection and long-term interest of end-users' in an objects clause.[95] The Screen Producers Association of Australia supported the inclusion of another object:

> …that gives the ACMA the responsibility to facilitate independent film and television production in Australia, including but not limited to the establishment of minimum terms of trade between independent producers and broadcasters.[96]

5.103 The Committee notes that the UK legislation that governs OFCOM sets out not only the body's functions, but its duties in relation to carrying out those functions and the principles which it must consider in doing so. For example, OFCOM's principal duty 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'.[97] In performing those duties, OFCOM must have regard to 'the principles under which regulatory activities should be transparent,

---

94 Ms Rosemary Sinclair, ATUG, *Committee Hansard*, 10 February 2005, p. 17.

95 Ibid, p. 20.

96 Screen Producers Association of Australia, *Submission* 16, p. 2.

97 *Communications Act 2003* (UK), subsection 3(1).

accountable, proportionate, consistent and targeted only at cases in which action is needed'.[98] Other considerations that must be taken into account where relevant include the desirability of promoting competition, effective self-regulation and investment and innovation; the need to ensure an appropriate level of freedom of expression; the needs of children, the elderly, persons with disabilities, those on low incomes and those in ethnic communities and rural or urban areas; and the opinions of consumers and the public generally.[99] Other provisions in the Act relate specifically to fulfilling community obligations,[100] reviewing regulatory burdens,[101] encouraging availability of easily usable apparatus[102] and promoting media literacy.[103]

5.104 The main bill does not contain such detail, apart from setting out ACMA's functions. The Committee notes, however, that the ACMA will continue to be bound by the regulatory objectives set out in existing telecommunications and broadcasting legislation. For example, section 4 of the *Telecommunications Act 1997* sets out that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation; but does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry; nor compromise the effectiveness of regulation in achieving the objects mentioned in section 3.

5.105 Section 3 of the *Telecommunications Act 1997* sets out the main object of promoting the long term interests of end users of carriage services and the efficiency and international competitiveness of the Australian telecommunications industry (subsection 3(1)). Subsection 3(2) sets out a number of other objects of the Act. As the Media and Communications Committee (MCC) of the Law Council of Australia noted in its submission,[104] those other objects include 'promoting the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community' (paragraph 3(2)(d)), and providing 'appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants in sections of the Australian telecommunications industry' (paragraph 3(2)(h)). Section 5 of the Act states that the ABA is to use its functions and powers in a manner that, in the ABA's opinion, will produce 'stable and predictable' regulatory arrangements and deal effectively with breaches of rules established under the Act. All these provisions will apply to the new ACMA.

---

98 Ibid, subsection 3(3).

99 Ibid, subsection 3(4).

100 Ibid, section 4.

101 Ibid, section 6.

102 Ibid, section 10.

103 Ibid, section 11.

104 Law Council of Australia, *Submission 19*, p. 6.

5.106 Similarly, section 4 of the *Broadcasting Services Act 1992* contains a statement of regulatory policy in broadcasting, datacasting and Internet services that will continue to apply to ACMA. Subsection 4(2) refers to Parliament's intention that broadcasting and datacasting services be regulated in a manner that in the ABA's opinion 'enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers' (paragraph (a)). There is a similar statement of intention in relation to Internet content and Internet carriage services (subsection 4(3)). Both the Broadcasting and Telecommunications Acts also require the development of industry codes of practice.[105]

5.107 The Committee considers that a legislative statement of policy objectives for the new body would be beneficial in terms of setting directions for the new body to follow in carrying out its functions, similar to the clear statements which govern OFCOM's operations. While the Committee accepts that existing regulatory policy objectives in other legislation will continue to apply to ACMA, there is no clear overarching statement of the Parliament's intention in the development of the regulatory approach to be followed by the new organisation. This requires a more consistent approach across the Acts administered by ACMA on issues of self-regulation, competition and consumer protection.

Self-regulation

5.108 Self-regulation is expressly approved as the preferred mechanism for regulation under section 4 of the *Telecommunications Act 1997*. The ACA's Statement of Regulatory Philosophy states that:

> The ACA encourages the greatest practicable use of industry self-regulation, while not imposing undue costs on industry, jeopardising consumer safeguards to compromising the effectiveness of regulation.[106]

5.109 However, while self-regulation has an important role in industry codes under the *Broadcasting Services Act 1992*, there is no presumption in favour of self-regulation in the statement of regulatory policy in section 4 of that Act. Such a fundamental inconsistency in drafting should not be left for the organisation to contend with. Indeed, the ACA's reliance on self-regulation has been subject of some criticism in this inquiry. AAPT argued that the creation of a single regulator will highlight the tension between the conflicting views of what self-regulation means:

> Some commentators take a view that self-regulation is a response by Government to industry seeking ' an easy life', while other take a view that self-regulation works in the interest of end users and reduces costs. Similar confusion rests with considerations of the role of industry and regulators in a self-regulatory framework, with some thinking that a regulator making regulations is a punishment to industry for failing to self-regulate, whereas

105 *Telecommunications Act 1997*, Part 6; *Broadcasting Services Act 1992*.

106 ACA, *Submission* 5, Attachment C.

> others see it as a failure of policy and the regulator. A further difference exists between those who see very clear delineation between what can be achieved through self-regulation versus regulation, while other believe that self-regulation ahs few bounds. These distinctions and views need to be related to theories of economic organisation in general, and it can be argued are not distinct from questions of market power or structure.[107]

5.110 AAPT argues that this adds to the need for a review of the policy principles and regulatory policy of the Acts. Paul Budde argues that while self-regulation works for technical issues (which are based on international standards), it does not work for commercial or political issues:

> Commercial interests would, of course, prefer fewer regulations, but the dominance of the companies involved in these markets makes regulations essential to protect the national interest.[108]

5.111 Budde argues that issues such as national infrastructure strategies, media diversity, foreign ownership, competition regulations, consumer issues and so forth have a 'national interest' component and need a super-regulator capable of withstanding substantial political pressure.

5.112 In its report on the *Australian Telecommunications Network* in 2004, this Committee was very critical of the emphasis of the ACA on self-regulation. The Committee concluded then that:

> The current regulatory regime is clearly failing to ensure that Australian consumers have universal access to a full range of affordable and reliable telecommunications services. The introduction of some new initiatives, such as the network reliability framework, have been useful but fall far short of what is required. In addition to the measures set out in the Committee's specific recommendations, the role and powers of the Australian Communications Authority need to be generally reviewed and enhanced.[109]

5.113 By contrast, Telstra argued that Australia over-regulates its telecommunications sector by world standards.[110]

5.114 The Communications Law Centre argued that while self-regulation is effective and appropriate in some circumstances, a stronger emphasis on compliance and enforcement is called for in others. It drew the Committee's attention to the recommendations of the report to the ACA on improving consumer representation,

---

107 AAPT, *Submission* 8, p. 4.

108 Paul Budde Communications Pty Ltd, *Submission* 1, p. 8.

109 Senate Environment, Communications, Information Technology and the Arts Reference Committee, *The Australian Telecommunications Network,* August 2004, p. 145.

110 Telstra, *Submission* 15, p. 3.

which recommended statutory changes to the statement of regulatory policy in section 4 to emphasise the interests of end users rather than self-regulation per se.[111]

5.115 The merger of the ACA into the ACMA without dealing with the adequacy of its powers to deal with future challenges, particularly in 'future-proofing' the rollout of infrastructure, is a major deficiency in the Government's reform process. The issue of how best to promote the rollout of new telecommunications infrastructure should, in the Committee's view, be an important part of the review recommended in Recommendation 1. However, the Committee is of the view that the Parliament should revise its instructions to the ACMA on the regulatory policy to be used in section 4 of the *Telecommunications Act 1997* to place less emphasis on self-regulation where national interest issues are concerned.

Recommendation 13

5.116 The Committee recommends that section 4 of the *Telecommunications Act 1997* be amended to remove the preference for self-regulation and to more closely reflect the regulatory policy statement under the *Broadcasting Services Act 1992*. The revised section should make it clear that Parliament intends that telecommunication be regulated in a manner that:

- **promotes the use of industry self-regulation where this will not impede the long term interests of end users; and**
- **enables the objects mentioned in section 3 to be met in a way that does not impose unnecessary financial and administrative burdens on participants in the Australian telecommunications industry.**

Recognition of consumers

5.117 The Committee is particularly concerned that the interests of consumers are poorly recognised in legislation. The evidence highlights a number of problems in the areas of legislative recognition, industry codes, funding for consumer participation and community awareness, and suggests need to develop a simplified consumer complaints process.

Legislative recognition

5.118 As noted in Chapter 3, the Consumer Consultative Forum currently established under the *Australian Communications Authority Act 1997* is continued under clause 59 of the main bill. However, the Committee heard evidence from a number of witnesses who expressed concern about the lack of consumer recognition in the ACMA legislation. Ms Rosemary Sinclair from ATUG told the Committee:

> Section 17 is the only reference to the ACCC in any of this legislation and for ATUG this is a core issue. We see the merged authority having a big role in competition and consumer protection. That is really at the heart of

---

111 Communications Law Centre, *Submission 7*, p 3.

> our concerns, but in all the legislation the only reference to the ACCC is around section 17 and it is on the particular issue of electronic addressing. Section 59 continues the ACA as Consumer Consultative Forum. The question for us is: how do we expand the brief of that body and resource that kind of forum? [112]

5.119 A number of witnesses argued that historically both the ABA and the ACA had a poor track record in dealing with consumer issues.[113] Dr Bob Horton told the Committee that the ACA had put considerable effort into consumers and consumer organisations over the past 18 months to two years and that these relationships have improved significantly:

> We have made some enormous strides in this whole industry self-regulation environment which was cast in 1997. While I think we have made great strides in achieving the objectives of industry self-regulation, certainly in operational codes and technical matters, we have in a way left consumers some distance behind us and we have sought to make up some of the distance over the last 18 months or two years. I think we have quite considerably achieved the progress that we were hoping for in the time plus we have managed to get consumer organisations working interactively together—for the first time in my memory in this industry anyway.[114]

5.120 To deal with the need to improve its consumer issues performance, the ACA last year commissioned eight representatives of consumer organisations to produce a report to develop strategies for strengthening consumer representation in telecommunications. The Committee commends the ACA on this initiative and notes that the report is currently under active consideration by the ACA Board. While concern was expressed over the lack of consumer protection and consultation in the current communications regime, the establishment of the ACMA was seen as an opportunity to tackle this omission:

> We do not feel consumers have been particularly well served by the light touch self-regulatory approach to consumer protection in telecommunications. In our view the touch has been even lighter and consumer outcomes even more remote in the world of broadcasting. The creation of ACMA perhaps presents an opportunity to review the benefits of instituting a comprehensive yet simple, consistent and appropriately enforceable regime of consumer protection across the media and communications market.[115]

5.121 In terms of obtaining consumer input to the planning and operations of ACMA, the Committee noted Recommendation 27 from the recent *Consumer Driven Communications: Strategies For Better Representation* (CDC) *Report* that:

---

112 Ms Rosemary Sinclair, ATUG, *Committee Hansard*, 10 February 2005, p. 14.

113 Australian Consumer Association, *Submission* 4; Communications Law Centre, *Submission* 7.

114 Dr Bob Horton, ACA, *Committee Hansard* , 11 February 2005, p. 41.

115 Australian Consumers' Association, *Submission* 4, p. 6.

The merged ACA-ABA entity (ACMA) should draw on the following as appropriate when developing consumer consultative mechanisms to build on the existing telecommunications framework:

- consultative committees;
- consultations (individual and group) with consumer representatives (eg as occurred in the development of the Integrated Public Number Database (IPND) Standard) and other industry participants;
- genuine community consultations (i.e. town hall type exercises - suitable for some issues such as payphones or ABA local content investigation);
- smaller focus groups;
- more innovative mechanisms such as citizens juries or the Office of Film and Literature Classification Community Assessment Panels scheme;
- written submissions; and
- consultancy arrangements on specific matters.[116]

5.122 The Committee welcomes the recognition by the ACA of the need to have a stronger consumer focus and recommends that the ACA and the ACMA give urgent favourable consideration to adopting the recommendations for better consumer representation. The Committee believes that the issue of consumer interests needs to have a higher priority across both telecommunications and broadcasting, and recommends that at least one member of the ACMA board have a consumer representation background. The Committee notes that there is no mention of consumer interests nor the enforcement of standards in the functions of the ACMA in either clause 8 or 10. The Committee believes that the bill should be amended to explicitly place consumer issues high up the priorities list for the new authority.[117]

Recommendation 14

5.123 The Committee recommends that the ACA and the ACMA give urgent consideration to the adoption of the recommendations in the ACA research report *Consumer Driven Communications: Strategies for Better Representation,* as part of a concerted effort to ensure that the ACMA is more pro-consumer than the ACA and ABA were able to be and that the Government give urgent consideration to any amendments to communications legislation that the ACMA deems necessary as a result of such consideration.

116 Ibid, p. 8.

117 Communications Law Centre, *Submission* 7, p. 4.

Recommendation 15

5.124 In recognition of the need for the ACMA to improve on the consumer issues performance of the ACA and ABA, the Committee recommends that at least one member of the ACMA board should have a background in consumer advocacy and representation.

Recommendation 16

5.125 The Committee recommends that the main bill be amended to:

- **explicitly refer to the promotion of competition as a legitimate means to advance objectives of consumer protection in clause 8 of the main bill;**
- **explicitly place the development and enforcement of adequate consumer protection requirements into clause 8 of the main bill; and**
- **explicitly refer to the enforcement as well as the monitoring of compliance with codes of practice for broadcasting in clause 10 of the main bill.**

5.126 The Committee notes that the ACA report on Consumer Representation contains a number of recommendations for legislative changes. These are obviously outside the scope of the ACMA. However, in light of the evidence received by this Committee expressing serious concerns about the current treatment of consumer issues by the ACA and the ABA, the Committee believes that the proposed legislative changes should be considered forthwith to ensure that the ACMA has the full legislative armoury it needs from day one to do its job. One of these changes to the objects clause of the *Telecommunications Act 1997* was endorsed in Recommendation 13 above. Because of the importance of these recommendations the Committee reiterates them here:

- Legislation merging the ABA and the ACA should build on the existing aspects of the telecommunications regulatory framework that involve consumer consultation. It should avoid any movement towards adopting the minimalist public consultation model for codes and standards set out in section 123(4)(b)(iii) and section 126 of the *Broadcasting Services Act 1992* for the whole Communications sector.
- The *Telecommunications Act 1997* be amended such that consumer participation in code development be mandatory and must be demonstrated before the ACA can register any co-regulatory code (not confined to those produced by the Australian Communications Industry Forum (ACIF)).

  This be achieved by introducing into the *Telecommunications Act 1997* a requirement that the ACA is satisfied that in the development of codes of practice consumer consultation has been adequate. Therefore amend section 117 (1)(i) as follows:

From:

‘(i) the ACA is satisfied that at least one body or association that represents the interests of consumers has been consulted about the development of the code;

To:

‘(i) the ACA is satisfied that there has been adequate consumer consultation in the development of the code and that at least one body or association that represents the interests of consumers has participated in the development and drafting of the code.

- The objects of the Telecommunications Act and regulatory policy (ss3 and 4) be reworked in relation to the role of self-regulation. Policy should be reshaped to recognise that it can be appropriate to allocate matters to the ACA for action without necessarily satisfying the current tests relating to codes/standards.
- Section 4 of the Act be amended as follows:

  The Parliament intends that telecommunications be regulated in a manner that:

  (a) Promotes the use of industry self-regulation where this will not impede the long term interests of end-users; and

  (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;

  but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.
- Amend the Telecommunications Act (Division 5 Part 6) to include circumstances additional to code failure/unfulfilled request as triggers for development of an industry standard. Retain the distinction that codes are developed by industry and standards by the regulator.
- A new section 125A should be inserted in Part 6 which allows the ACA to make a Standard in circumstances where there is evidence to suggest self-regulatory mechanisms will not adequately respond to an identified need in relation to consumer protection. In deciding whether to exercise this right, the ACA is to have reference to the views of, and consult with, any body or association that represents a section of the industry and to the views of any body or association that represents consumers.
- A new section be inserted into Part 34 Special Provisions relating to the ACA’s telecommunications functions and powers requiring that where a complaint is made about a breach of a standard, a licence condition or a Service Provider Rule, the ACA is required to investigate the matter.

- The new section 582 would adapt section 149 of the Broadcasting Services Act 1992 which requires the ABA to investigate any complaint relating to a breach of a licence condition.
- The new section 582 would require the ACA to investigate any complaint received from an organisation that represents consumers where the complaint relates to a breach of a licence condition, service provider rule, or a standard (except where the complaint is frivolous or vexatious).
- The Department of Communications, Information Technology and the Arts (DCITA) facilitate the establishment of an independent consumer-managed disability equipment program so that end-users can connect to the standard telephone service regardless of their disability and the service provider they use. This should be included in the Telecommunications (Consumer Protection and Service Standards) Act 1999 in a similar way to the National Relay Service.[118]

Industry codes

5.127 Another concern raised with the Committee was the fact that industry codes are currently registered on separate registers at the ABA and the ACA, subject to satisfaction of the relevant legislative 'adequate community safeguards' test. Witnesses questioned how ACMA would apply the test/s and whether these separate registers would be maintained? [119] As Dr Derek Wilding from the Communications Law Centre told the Committee:

> An example of that is the tests that are applied in the object, such as the test for the use of the long-term interest of end-users that is used in competition regulation partly in the Telecommunications Act but with much more of an emphasis on consumer protection. Jumping across to the Broadcasting Services Act, there is not really a coherent articulation of a concept of end-users, consumers or even public interests. I think that is another area that would benefit from a more holistic approach.[120]

5.128 The issue of code registration was also raised by the Australian Consumers Association who noted that the CDC Report suggested in Recommendation 44 that:

> The merger of the ACA and the ABA presents an opportunity to overcome existing jurisdictional limitations that affect code development on matters that cross carriage and content. In this environment, it may be appropriate for the Telephone Information Services Standards Council (TISSC) code to be registered with ACMA and to be enforceable by the new regulator. This would also allow content regulation on mobiles as well as other issues associated with high bills to be dealt with via a registered code. The

118 ACA, *Consumer Driven Communications: Strategies for Better Representation,* December 2004, pp. 5-6.

119 Law Council of Australia, *Submission* 19, p. 6.

120 Dr Derek Wilding, *Committee Hansard,* 11 February 2005, p. 14.

> successful aspects of the TISSC process (for example, the participation of public/consumer members, compared to other self-regulatory processes; the audit compliance program) could also be recognised under these arrangements.[121]

5.129 The Committee heard that the ACIF's new approach to consumer codes was a positive development[122] and had provided the ACA with a more efficient model of applying resources to consumer issues:

> The ACIF have set up a council, adopted an entirely different approach to consumer codes, which are very consistent with equal recognition of industry and consumer inputs, and put a lot of effort and time into it. I think we are on the right track with the legislation and the means that we have to redress some of the concerns that consumers have had. If what we have created or started within the current ACA legislation continues into ACMA then we will have a lot more satisfying experience of customers and consumers. We are applying our resources in a much more efficient way to consumer issues and galvanising consumers in a way they have not been galvanised before.[123]

5.130 The Committee noted the concerns of a number of witnesses that the differing accountability mechanisms and approaches to consumer protection in the ABA and ACA, place a different emphasis on consumer consultation and protection. The ACA has legislative accountability for consumer issues, including the requirement to establish a Consumer Consultative Forum, which will continue under the main Bill. In contrast, the ABA does not have such a prescribed consumer protection function – its focus is on community safeguards, with recognition that the relationship with the consumer/audience rests with the broadcaster. [124] The Committee heard concerns that the ACMA could adopt an ABA style approach to consumer protection:

> Our concern is that consumer protection and participation is not somehow de-emphasised or tugged in the broadcast heritage direction as a consequence of the merger. We would like to see this explicitly dealt with in the details of the formal merger.[125]

5.131 The recommendations contained in this report will ensure that the interests of consumers are placed first and foremost in the eyes of ACMA.

Funding for consumer participation

5.132 The funding of consumer participation was a major issue raised by a number of witnesses. Ms Rosemary Sinclair told the Committee:

---

121 Australian Consumer Association, *Submission* 4, pp. 6-7.

122 Ms Rosemary Sinclair, ATUG, *Committee Hansard,* 10 February 2005, p. 15.

123 Dr Bob Horton, ACA, *Committee Hansard*, 11 February 2005, p. 44.

124 Law Council of Australia, *Submission* 19, p. 6.

125 Australian Consumer Association, *Submission* 4, p. 8.

> The issue of resourcing input from the consumer side is a very significant one. The ACA has also done a lot of work over the last 18 months or so identifying that empowered consumers are a very necessary part of effectively competitive markets.[126]

5.133 Similarly, Professor Peter Gerrand argued:

> I am very sympathetic to the position of the consumer advocates, particularly residential consumer advocates, because they have so little funding for the job they have to do compared with their myriad constituency. The issues which come up in forums like ACIF are very complex. They are not funded to deal with issues across the board; they have to prioritise. They often have difficulties getting representatives to meetings and they have difficulties in calling upon the level of expertise that is available to other players in the industry.[127]

5.134 The issue for funding of consumer involvement in broadcasting monitoring was also raised with the Committee:

> The co-regulatory schemes relating to television, radio and online services place considerable onus on the community to detect breaches and bring them to the notice of the appropriate body/ies. In our view, this asks rather too much of the community unless resources are provided to inform the public about the content of the various codes and regulations, and to help them determine whether it is arguable that material they have seen constitutes a breach.[128]

Community awareness

5.135 The communications regulation landscape is, as discussed in Chapter 2, both complex and fragmented. The Committee heard evidence which indicates that the general community is not well informed about the role of the ACA and TIO and often find it difficult to pursue complaints against telecommunications companies:

> Unbeknown to the general public, the Projects Team of the Standards and Compliance Group in the ACA will apparently deal with breaches of an industry code, the ACIF Code – Deployment of Radiocommunications Infrastructure (ACIF Code). As generally there is no mention of the ACA or this ACIF Code in carriers' notifications to residents, most residents are not even aware of the existence of the ACA, let alone the existence of this code. It is understood that some of those lucky enough to discover the existence of this team in the ACA have been sent on a wild goose chase, e.g. to contact their own council, the Telecommunications Industry Ombudsman or even another contact in the ACA, the latter two of which do

---

126 Ms Rosemary Sinclair, ATUG, *Committee Hansard*, 10 February 2005, p. 14.

127 Professor Peter Gerrand, *Committee Hansard,* 11 February 2005, p. 21.

128 Young Media Australia, *Submission* 22, p. 2.

> not even deal directly with the issue. So it's not surprising that the number of complaints about carriers appears to be low.[129]

Simplifying the process

5.136 The need to simplify the interface between the consumer and the regulatory structure was argued by Young Media Australia:

> For some time, YMA has been an advocate of greater simplification of Australia's regulatory structures on the media; our ideal would be a 'one-stop shop' where members of the community (especially parents) can gain access to information and address their complaints on all media including television, radio, films (including videos and DVDs), online services, computer games and telephony.[130]

5.137 Additionally, YMA argued that there was a need to establish a National Media and Communications Office:

> …legislation should provide that a nominated percentage of the money raised from the sale of spectrum licences should be earmarked for the establishment of a National Media and Communications Information Office, with the function of informing the public about the content of the various codes and regulations, and of counselling members of the public who think they may wish to make a complaint under the same.[131]

5.138 Throughout this inquiry the Committee heard that technological convergence posed significant issues for communications regulations and for consumer in-put and protection. Mr Charles Britton from the Australian Consumers Association argued that convergence had increased the need for a one-stop shop for consumers:

> Part of the problem is that consumers can end up going to the TIO, to TISSC or, potentially, to the ABA if it is a content issue on the internet. They could go to the state fair trading agencies. They could possibly try going to the ACCC. The Communications Authority is there to deal with spam, for instance. There is a wide range of possible avenues that people might have to pick and choose between… but there are always people falling between the cracks. People do not know where to go. Then you have the whole question of the ABA not being geared to consumer complaints, because classically broadcast is not about individual consumers; it is about advertisers. The customer of a broadcaster is the advertiser not the viewer. But that is changing because of the digital change that is coming along. Pay TV is an example. It is a subscriber relationship, which is a much more individualised and personalised relationship. That is one of the consumer impacts of convergence, and why it is important, for instance, that we now get TV coming to the mobile phone handset—and that is billable, it has to be said. Our view looking into the future is that we are going to see ongoing

---

129 Tower Sanity Alliance, *Submission* 23, p. 5.

130 Young Media Australia, *Submission* 22, p. 1.

131 Ibid, p. 2.

> jumbling between these domains. It would be sensible to set it up so that we had an umbrella approach that brought some sort of consistency.[132]

5.139 The Committee believed that the convergence aspect of premium data services and the current complaints handling scheme was problematic:

> An important part of the context is the number of agencies that a consumer may need to deal with to make a complaint: TIO, TISSC, AComA, ABA, ACCC and various State Offices of Fair Trading might all have a role. For example, Pay-TV has an uneasy relationship with the TIO, with some aspects accommodated within the scheme, and others left to the good offices of State agencies. This creates a fragmented and confusing landscape of consumer protection, assistance and redress arrangements. In our view a general imperative is to drive toward a 'one stop shop' for consumer's communications problems, an imperative focussed by micro and macro convergence events.[133]

5.140 The Committee heard a number of witnesses who argued that the Telecommunications Industry Ombudsman scheme, which was set up to offer an industry funded complaints mechanism for consumers of telecommunications services, could be expanded to take in communications more generally and to provide a single point of consumer readdress. It is noted that the TIO has worked reasonably efficiently to achieve that objective:[134]

> I guess that one of the virtues of the TIO is that it is a scalable funding model—that is, the members pay, and they pay by dispute. You could not just say, 'TIO, you do this.' You would need to change the definition of the TIO—in our view, to a communications industry ombudsman—and expand its membership base, which would expand its resources base, and that would become self-funding. We do not argue for just tacking it on, as it were; it needs to be approached in a systematic way.[135]

5.141 The Committee notes the CDC Report Recommendation 43 that one way of achieving this policy outcome would be by amending the *Telecommunications (Consumer Protection and Service Standards) Act 1999* in order to:

- expand the jurisdiction of the TIO to allow the TIO to evolve into a 'Communications Industry Ombudsman';
- bring consumer complaints relating to pay television services within the operations of the TIO; and

---

132 Mr Charles Britton, *Committee Hansard*, 10 February 2005, p. 2.

133 Australian Consumers' Association, *Submission* 4, p. 7.

134 Mr Paul Fletcher, Optus, *Committee Hansard*, 11 February 2005, p. 2.

135 Mr Charles Britton, Australian Consumers' Association, *Committee Hansard*, 10 February 2005, p. 2.

- bring network connection & customer equipment issues under the jurisdiction of the TIO.[136]

Recommendation 17

5.142 The Committee recommends that *Telecommunications (Consumer Protection and Service Standards) Act 1999* be amended in order to establish a single Communications Industry Ombudsman.

Transparency in reporting

5.143 As set out in Chapter 3, the main bill requires ACMA's annual report to the Minister to 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*.

5.144 The Committee notes that clause 57 of the main bill requires the new regulator to maintain the reporting requirements currently imposed under section 50 of the ACA Act in relation to matters that must be included in the annual report. The Explanatory Memorandum to the main Bill notes that this requirement, 'consistent with the approach of the BSA, does not extend the requirements to require the ACMA to report on the complaints received and investigations conducted under the BSA'.[137]

5.145 Dr Derek Wilding from the Communications Law Centre told the Committee that a greater degree of transparency in reporting was desirable:

> It would be my view that a greater degree of transparency is likely to be beneficial in instilling public confidence within this bigger regulator. One of the problems, I think, with the investigations relating to the commercial radio standards in the last two or three years has been the public's exclusion from those processes until it is over. One of the problems we had with the investigations that the ABA conducted into 2GB and 2UE was the extent to which questions were asked of the participants, but we did not have an indication of the kinds of approaches that had been made and of the approach of the investigation until the investigation was over. That, of course, is not the case if you have got a public hearing and not everything can proceed in that way.
>
> A greater degree of openness would be helpful and, at the other end of that, what the regulators learn about the operations of their own act or acts is something that would be of benefit for wider public knowledge. Comments on the operations of the acts and the problems with those acts are quite justifiably a matter that parliament would be interested in, given that

136 Australian Consumers' Association, *Submission* 4, p. 7.

137 Explanatory Memorandum to the *Australian Communications and Media Authority Bill 2004*, p. 30.

> parliament has created the laws. It is not simply that the government has created the laws. The parliament and the public have an interest in knowing what the regulators think about the problems in the system they are administering and how we might go about solving some of those problems.[138]

5.146 Dr Wilding supported an amendment to the main Bill relating to the tabling of reports as:

> …a minimum something that might very easily be achieved with little change to the existing bill. That would make an important difference in terms of transparency and public confidence in the new regulator.[139]

5.147 The ABA itself has not addressed this issue.[140]

5.148 In the Committee's view, it makes some sense to use the opportunity of the merger of the ACA and the ABA to ensure maximum openness and transparency across both organisations. It seems inconsistent that the less restrictive reporting rules of the ABA would continue to operate notwithstanding the replication of the more open reporting rules of the ACA in the ACMA Bill.

Recommendation 18

5.149 The Committee recommends that clause 57 of the main bill be amended to make it clear that reports under the *Broadcasting Services Act* on complaints received and investigations conducted will be publicly released.

Conclusion

5.150 While the Committee endorses the establishment of a single technical regulator in light of developments in convergence, it is apparent from the evidence collected throughout this inquiry that many witnesses, from a broad cross-section of the community, had concerns that ACMA will not be able to meet the regulatory, competition, policy, social, cultural and political issues which will face this country in the very near future.

5.151 As the ACMA proposal currently stands it is a lost opportunity. In comparison, the establishment of OFCOM in the UK was the 'watershed' in which an overarching, holistic communication's policy and legislation was developed. The result has been to develop strong broadcasting and telecommunications sectors while at the same time protecting consumers and national interests on issues such as media ownership and community standards in broadcasting.

---

138 Dr Derek Wilding, Communications Law Centre, *Committee Hansard,* 11 February 2005, pp. 15-16.

139 Ibid, p. 16.

140 Ms Lynnita Maddock, ABA, *Committee Hansard,* 11 February 2005, p. 52.

5.152 The necessity for a strong and powerful regulator is doubly important in Australia because of the market power of Telstra as the dominant telco and because of the high level of concentration of ownership in the media sector. Without a strong and powerful regulator, the commercial interests of the big players will run roughshod over the interests of consumers and competitors. The recommendations in this report will not solve these issues. Rather, they will be a strong statement from the Parliament to the new regulator that it has the support of Parliament to be more robust and assertive in defending the interests of the community in the difficult task of regulating the telecommunications and media giants. Further, the longer-term review recommended in this report recognises that, given the rapidly changing environment in communications, the process of reform of our regulatory authorities has only just begun and will almost certainly never completely end.