

# Government Members' Dissenting Report

This experience tells us that self-regulation is effective and appropriate in some circumstances, while in others a stronger emphasis on compliance and enforcement is called for. Some refinements to regulatory policy and the framework for consumer protection regulation will maximise the outcomes of self-regulation and improve the consumer protection regime overall. Widespread change is not required.<sup>1</sup>

Government members of the Senate Environment, Communications, Information Technology and the Arts References Committee believe that the Committee's inquiry into the establishment of the Australian Communications and Media Authority (ACMA) was a rushed exercise which sought to argue that the establishment of the ACMA was a lost opportunity to review the regulatory regime. However, the establishment of ACMA is the beginning of the process of review and change in which the Government sees the creation of the ACMA as an important building block.

The administrative merger of the ABA and the ACA is part of the ongoing attention to emerging convergence issues in communications and broadcasting. Convergence is having a profound impact on the communications sector (including broadcasting) and the way consumers, both residential and business, use communications services. Changing business strategies, market structures and consumer expectations mean that the existing regulators are faced with new issues which often cross the traditional regulatory boundaries of their respective roles. It will become increasingly difficult for two separate regulators to respond to this changing environment. The formation of the ACMA will facilitate a coordinated regulatory response to converged technologies. A combined authority will be better positioned to understand and respond to emerging market trends.

The responsibility of the ACMA for all spectrum management functions will enable the long-term regulation of spectrum management to be better coordinated, and to take into account both telecommunications and broadcasting interests. However, convergence will not remove the necessity to continue the often distinctive policy objectives for broadcasting and telecommunications. For this reason, the establishment of the ACMA will not mean the removal of the current, separate broadcasting and telecommunications regulatory environments. Changes to these frameworks will be addressed as and when needed.<sup>2</sup>

As a departmental representative told the Committee:

We only want to reiterate what is well known, that this is obviously only an institutional administrative merger. It is obviously not dealing with a range of policy and regulatory reform. That is obviously the intention of the

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

2 Department of Communications, Information Technology and the Arts, *Submission 10*, p. 1.

government, and I guess the government sees this as part of the ongoing attention that it is giving to emerging convergence issue.<sup>3</sup>

The Government does not support any amendment to the ACMA package of Bills as proposed by a number of recommendations, but it does agree in principle with other recommendations made within the majority report.

### **Recommendations agreed to:**

#### **Recommendation 7**

**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 [para. 5.44].**

Government Senators agree with the sentiment set out in recommendation 7 that the ACCC and ACMA be encouraged to develop a closer working relationship.

#### **Recommendation 11**

**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 [para. 5.85].**

The Government Senators support appointments to the board of ACMA being merit based.

#### **Recommendation 12**

**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 [para. 5.99].**

The Government Senators anticipate that ACMA will recognise and fully protect the public interest in its management of broadcasting and telecommunications spectrum.

#### **Recommendation 15**

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3 Ms Holthuyzen, DCITA, Committee Hansard 11 February 2005, p. 54.

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**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 [para. 5.123].**

The Government Senators fully support consumer advocacy within the new Authority and endorse recommendation 15.

### **Recommendations supported in-principle without amending the Bill:**

As discussed, Government Senators see the establishment of ACMA as a first step in a process to address emerging issues within the converging communications sector. Therefore, the ACMA package of bills provides simply for the administrative merger of the ABA and ACA. In light of the need to press ahead with this legislation to establish ACMA by 1 July 2005 the main bill does not require amendment to achieve this administrative merger. The following recommendations are agreed to in-principle by the Government Senators as the Government is of the view that once the ACMA is established there will be opportunity for it to analyse its own structure and future direction.

#### **Recommendation 1**

**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 [para.5.15].**

#### **Recommendation 9**

**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 [para 5.57].**

#### **Recommendation 10**

**The Committee recommends that funding to the ACCC for telecommunications competition issues be substantially increased as a matter of urgent priority [para. 5.74].**

Government Senators support the ACCC being appropriately funded.

### **Recommendation 13**

**The Committee recommends that section 4 of the *Telecommunications Act* be amended to remove the preference for self-regulation and to more closely reflect the regulatory policy statement under the *Broadcasting Services Act*. 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 [para. 5.115].**

Government Senators agree that the telecommunications industry should be regulated to ensure that consumer interests are met, but not at the expense of the participants in the industry. We therefore believe that each aspect of regulation - the light touch policy of the ABA and the more regulative approach of the ACA - should be made according to need; a "horses for courses" approach.

### **Recommendation 14**

**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 [para. 5.122].**

Government Members agree that ACMA should give consideration to research and reports regarding consumer representation within the communication sector. However we do not support the call for such reports to be adopted in totality. Rather the ACMA should be mindful of these reports and advise which aspects of their findings are appropriate.

### **Recommendation 16**

**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**

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- **explicitly refer to the enforcement as well as the monitoring of compliance with codes of practice for broadcasting into clause 10 of the main bill [para. 5.124].**

Again, Government Senators see no need to amend the main bill, but support in principle the need to ensure the enforcement of adequate consumer protection and the monitoring of compliance of codes for broadcasting. Therefore recommendation 16 is supported in-principle.

### **Recommendation 17**

**The Committee recommends that *Telecommunications (Consumer Protection and Service Standards) Act 1999* be amended in order to establish a single Communications Industry Ombudsman [para. 5.141].**

Government Senators do not disagree with the possibility that the TIO could be used to develop a simpler and more streamlined process of consumer compliant handling. However, we do not consider that the *Telecommunications (Consumer Protection and Service Standards) Act 1999* be amended at this stage. This may be a decision in which ACMA could advise in the future. Therefore, we support in-principle recommendation 17.

### **Recommendations which are rejected:**

Government Senators were disappointed that the non-government Senators used this inquiry to raise a number of issues which were not pertinent to the establishment of the ACMA. A number of the majority report's recommendations dealt with broader issues within telecommunications which were not only outside the remit of this inquiry but which had been dealt with in previously inquiries of this Committee. We reject the following recommendations as we rejected them in previous reports:

### **Recommendation 2**

**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 [para. 5.21].**

### **Recommendation 3**

**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. 5.38].**

### **Recommendation 4**

**The Committee recommends that Telstra be required to divest its shareholding in Foxtel [para. 5.39].**

### **Recommendation 5**

**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. 5.40].**

### **Recommendation 6**

**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. 5.41].**

### **Recommendation 8**

**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 [para. 5.56].**

Government Senators believe that the inclusion of the establishment of a Content Board within the ACMA is not appropriate at this time, given that the ACMA will be expected to regulate broadcasting content under the same principles as the current ABA, and that the ACMA would alter regulations as required in the future. We therefore reject recommendation 8.

### **Recommendation 18**

**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 [para. 5.148].**

While the Government believes that it is necessary to have a responsible complaints mechanism it is not necessarily appropriate that all complaints be made public. Therefore Government Senators reject recommendation 18.

### **Conclusion**

This inquiry has produced some useful insights into a number of issues, and Government Senators support a number of recommendations in-principle. However, we also note that the establishment of the ACMA is a first step in a process of regulatory review and change. Therefore there is no need to amend the package of bills associated with the establishment of the new Authority.

As stated in one submission to the inquiry:

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As tabled [the Bills] reflect the Government's stated intention of combining the two bodies but not changing the regulatory regimes that they administer. This...is the best course, given the decision to merge the bodies....To modify aspects of existing regulatory regimes would be inappropriate, as consultation with the industries affected by the merger has been conducted on the basis that it will involve no alteration to regulatory frameworks. If changes to regulatory structures are to be seriously contemplated....they should be the subject of appropriate public consultation processes<sup>4</sup>.

Government Senators note that within the communications industry and wider community there is wide spread support for the establishment of the ACMA.

Optus supports the merger of the Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA) as put into effect via the ACMA Bill 2004. We consider that an integrated structure will allow emerging issues (including in respect of internet regulations and mobile content) to be optimally addressed in a manner which avoids jurisdictional overlap and associated inefficiencies and regulatory uncertainty.<sup>5</sup>

The ACMA will be better placed to address the jurisdictional overlap and associated inefficiencies and regulatory uncertainty which currently exist.

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4 ABC, *Submission 3*, pp 1-2.

5 Optus, *Submission 9*, p. 1.

