The Senate

Environment, Communications, Information Technology and the Arts References Committee

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A lost opportunity?

Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters

March 2005

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Terms of Reference

The Senate referred the following matters to the Committee for inquiry and report by 10 March 2005:

(a) the provisions of the Australian Communications and Media Authority Bill 2004 and the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 and related bills;

(b) whether the powers of the proposed Australian Communications and Media Authority and the Australian Competition and Consumer Commission will be sufficient to deal with emerging market and technical issues in the telecommunications, media and broadcasting sectors; and

(c) whether the powers of Australia's competition and communications regulators meet world best practice, with particular reference to the United Kingdom regulator OFCOM and regulators in the United States of America and Europe.

Table of Contents

Recommendations

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 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 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].**

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].

Recommendation 9

The Committee recommends that section 4 of the *Broadcasting Services Act* 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].

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].

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].

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].**

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].

Recommendation 15

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].

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**
- **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].**

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].

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].

Abbreviations

ABA	Australian Broadcasting Authority
ACA	Australian Communications Authority
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
APEC TEL	Asia-Pacific Economic Cooperation (Telecommunications)
AT&T	American Telephone and Telegraph Company
ATUG	Australian Telecommunications Users Group
BRTF	Better Regulation Task Force (UK)
BSC	Broadcasting Standards Commission (UK)
BT Group	British Telecom Group
CCF	Consumer Consultative Forum
CDC	Consumer Driven Communications
DCITA	Department of Communications, Information Technology and the Arts
DOJ	Department of Justice (USA)
DTI	Department of Trade and Industry (UK)
ERG	European Regulators Group
EU	European Union
FCC	Federal Communications Commission (USA)
FTC	Federal Trade Commission (USA)
ITC	Independent Television Commission (UK)
OFCOM	Office of Communications (UK)
OFT	Office of Fair Trading (UK)

Oftel	Office of telecommunications (UK)
plc	programmable logic controller
TISSC	Telephone Information Service Standards Council
VoIP	Voice-over Internet Protocol

Chapter 1

Background to the inquiry

1.1 The Senate referred this inquiry to the Committee on 8 December 2004 for report by 10 March 2005. The approach of the bills from which this inquiry has arisen is to make only minimal change to the existing regulatory frameworks that apply to telecommunications and broadcasting, in order to provide for the merger of the ACA and the ABA into a new body, the Australian Communications and Media Authority (ACMA). In accordance with the terms of reference, set out on page (v) above, the Committee was asked to examine not only the provisions of the bills but also whether ACMA's powers would be sufficient to deal with emerging market and technical issues, and to consider world best practice in competition and communication regulation.

Conduct of the inquiry

1.2 In accordance with its usual practice, the Committee advertised the inquiry in the *national media* in December 2004. The Committee also wrote directly to a range of organisations and individuals to invite submissions, and received 24 written submissions, as listed at Appendix 1.

1.3 In order to explore the issues in more detail, the Committee held two public hearings in Canberra on 10 and 11 February 2005. A list of individuals and organisations who gave evidence at these hearings is at Appendix 2. While further public hearings in other States and Territories would have been desirable, the urgency with which the Government sought to have the bills debated limited the time available to canvass issues more widely.

Outline of the report

1.4 In Chapter 2 the Committee provides a broad overview of the current regulatory arrangements in Australia's telecommunications and broadcasting sectors. This chapter also gives the history of the proposed ABA and ACA merger and briefly reviews other reports which have canvassed this proposal.

1.5 Chapter 3 discusses the provisions of the *Australian Communications and Media Authority Bill 2004* (the main Bill) which establishes ACMA and gives it certain powers and functions, and the provisions of the *Australian Communications and Media Authority Bill 2004*. The other eight bills that contain consequential amendments are also briefly outlined.

1.6 Chapter 4 addresses term of reference (c) to examine a range of international communications regulatory models. An overview of communications regulation in the United Kingdom (UK), the United States of America and the European Union is provided, with particular attention to OFCOM, the UK regulator.

1.7 In Chapter 5 the Committee considers whether the powers of ACMA and the Australian Competition and Consumer Commission will be sufficient to deal with emerging market and technical issues in the telecommunications, media and broadcasting sectors. The Committee's conclusions and recommendations are in that chapter.

Acknowledgements

1.8 The Committee wishes to express its appreciation for the cooperation of all witnesses to its inquiry, whether by making submissions, by personal attendance at a hearing or, as in many cases, by giving both oral and written evidence. It stresses that all evidence has been taken into account in the preparation of this report, while noting that it was not possible to cite all evidence in the report.

Note on references in this report

1.9 References in this report are to individual submissions as received by the Committee rather than a bound volume of submissions. References to *Committee Hansard* are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

Chapter 2

ACMA and the regulatory framework

> Much work is needed to flesh out the policy framework for communications 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 future development of a dynamic sector incorporating broadcasting, telecommunications and audiovisual production.[1]

Introduction

2.1 The regulation of Australian communications is complex, and has been subject to considerable reform over the last decade. There are eight pieces of legislation that regulate the communications industry:

- *Australian Communications Authority Act 1997;*
- *Telecommunications Act 1997;*
- *Telecommunications (Consumer Protection and Service Standards) Act 1999*;
- *Radiocommunications Act 1992*;
- *Spam Act 2003;*
- *Broadcasting Services Act 1992;*
- *Trade Practices Act 1974* (TPA)*;* and
- *Prices Surveillance Act 1983*.

2.2 The regulatory powers are shared between six different regulatory bodies:

- Australian Broadcasting Authority (ABA);
- Australian Communications Authority (ACA);
- Australian Competition and Consumer Commission (ACCC);
- Australian Communications Industry Forum (ACIF);
- Department of Communications, IT and the Arts;
- Telecommunications Industry Ombudsman (TIO).

2.3 The *Telecommunications Act 1997* (TA) developed a framework with greater emphasis on self-regulation. The ACA has responsibility for technical matters on telecommunications, and the ACCC has responsibility for competition issues. Industry self-regulatory bodies, particularly ACIF, play a key role on the development of codes

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1 The Media Entertainment and Arts Alliance, *Submission* 11, p. 1.

of practice for telecommunications.[2] Industry participants, independent communications experts, and consumer groups have argued to this inquiry that the current communications regulatory environment is inadequate because:

- there remains a lack of competition in communications, especially telecommunications;
- rural and regional areas do not have universal access to telecommunications;
- self regulation has failed to meet the needs of consumers;
- regulators often lack the teeth or resources to enforce behavioural change;
- the regime is too fragmented to deal with issues arising from the convergence of technology. For example, there is regulatory uncertainty that surrounds content services on mobile devices.[3]

2.4 Mr Paul Budde submitted that due to a lack of strong government policy and focus for telecommunications regulation the current regulatory regime is fragmented and problematic. He argued that 'the regulatory structure in our country is a hodgepodge.'[4]

2.5 The Committee heard that since the introduction of the *Telecommunications Act 1997,* the regulation of telecommunications has occurred in a fragmented manner:

> As a consequence of the market realities, telecommunication policies in Australia have consisted largely of a number of reactive, haphazard, stop-gap decisions, in an endeavour to overcome the many problems generated by the self regulatory regime.[5]

2.6 The establishment of a new regulatory authority is seen by the Government and ALP and many in industry and the wider community as a first step in addressing inadequacies in communications regulation. This chapter sets out the current key features of the communications regulatory environment and outlines the developments leading up to the ACMA proposal. It discusses evidence to the Committee about the creation of a new authority and presents the Committee's conclusions in regard to the need for a new regulatory authority.

Current institutional arrangement

2.7 In previous reports[6] this Committee has provided a detailed overview of the history of communications regulation in this country. The Committee, therefore, will

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2 Alasdair Grant (ed.), *Australian Communications Regulation (3ed.)*, UNSW Press, Sydney, 2004, p. 45.

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

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

5 Ibid.

6 Senate Environment, Communications, Information Technology and the Arts References Committee, *Competition in broadband services*, August 2004.

not repeat that discussion; rather, the functions and structure of each of the agencies involved in the current regulatory framework are outlined briefly below.

Australian Communication Authority

2.8 The Australian Communications Authority (ACA) is a government regulator of consumer and technical issues for radiocommunications and telecommunications.

2.9 Established in July 1997 under the *Australian Communications Authority Act 1997*, (by a merger of AUSTEL and SMA), the ACA exercises powers under the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, the *Radiocommunications Act 1992*, the *Spam Act 2003*, and other related legislation.

2.10 The ACA works with the communications industry to achieve active self-regulation, while ensuring industry compliance with licence conditions, codes and standards and monitoring the effect of regulations to ensure they are responsive to the community's needs.[7]

2.11 Under TA, the ACA may require an industry body to develop a code or standard, and registers these once developed, or it imposes its own standards and monitors the effectiveness of these codes and standards. The radiocommunications regulatory role of the ACA involves the allocation of licences, preparation of spectrum plans, marketing of spectrum and management of interference. Its powers allow it to set standards, including health and safety standards for transmission.[8]

2.12 Funded through the federal Budget, the ACA collects substantial revenue on behalf of the Commonwealth. Revenue is collected through telecommunications carrier and radiocommunications licence fees and charges, as well as through charges on telecommunications numbers, which generate $60 million a year. The ACA also collects revenue from price-based allocation of spectrum. More than $3 billion dollars has been raised through auctions of spectrum licences since 1997.

2.13 The main functions of the ACA are to:

- Represent Australia in international regulation of communications
- Manage access to the radiofrequency spectrum through radiocommunications licensing
- Resolve competing demands for spectrum through price-based allocation methods
- Investigate and help in resolving radiocommunications interference

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7 Australian Communication Authority website, 8 February 2005, at: http://internet.aca.gov.au/ACAINTER.2818080:STANDARD:1984425067:pp=DIR1_4,pc=PC_6

8 Alasdair Grant (ed.), Australian Communications Regulation (3ed.), UNSW Press, Sydney, 2004, p. 45.

- License telecommunications carriers and ensure compliance with licence conditions and carriage service provider rules
- Regulate industry compliance with mandatory standards and voluntary codes of practice
- Administer legislative provisions relating to powers and immunities of carriers in constructing telecommunications facilities
- Monitor compliance with consumer safeguards and service guarantees
- Report on telecommunications industry performance
- Administer the Telecommunications Numbering Plan
- Inform industry and consumers about communications regulation
- Regulate transmission of unsolicited electronic email.[9]

2.14 The ACA has a full-time Chair and Deputy Chair, and between one and three full-time or part-time members, appointed for terms of up to five years. The ACA is currently made up of the Acting Chairman, the Acting Deputy Chairman, a full-time Member, a part-time Member and Acting Associate Member. Day-to-day business at the ACA is managed by an executive team - currently the Chairman, the Deputy Chairman, the full-time Acting Member, two Senior Executive Managers and nine Executive Managers.

2.15 The ACA employs around 440 staff in offices across Australia. It has central offices in Canberra and Melbourne, and regional offices and operations centres around Australia. Regional offices provide access to the radiofrequency spectrum through licensing and frequency assignment services, and undertake interference investigations and audits to ensure compliance with regulatory requirements.[10]

2.16 The ACA has powers to conduct public inquiries and investigations into carriage services, content services and any matter relevant to the ACA's functions and powers as contained in sections 486-7 and 508-10 of the TA.[11]

Australian Broadcasting Authority

2.17 The Australian Broadcasting Authority (ABA) is an independent statutory authority constituted under Part 12 of the *Broadcasting Services Act 1992* and responsible, through the Minister for Communications, Information Technology and

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9 Australian Communications Authority, *Submission* 5, Attachment A.

10 Australian Communications Authority website, 8 February 2005, at: http://internet.aca.gov.au/ACAINTER.2818080:STANDARD:1984425067:pp=DIR1_4,pc=PC_6#works

11 Alasdair Grant (ed.), Australian Communications Regulation (3ed.), UNSW Press, Sydney, 2004, p. 46.

the Arts, to Parliament.[12] The *Broadcasting Services Act* defines the role of the regulatory authority, gives the ABA a range of powers and functions, and sets out explicit policy objectives. The objectives include the desirability of program diversity, limits on concentration of ownership and foreign control of the mass media and the need for media to help foster an Australian cultural identity, report news fairly and respect community standards.[13]

2.18 The Broadcasting Services Act provides for the appointment of a Chairperson, a Deputy Chairperson and at least one, but not more than five, other Members who may be full-time or part-time. The Members of the ABA are appointed by the Governor-General for periods of up to five years and are eligible for reappointment on one occasion only. The Minister may appoint persons to be Associate Members of the ABA, either generally or for particular investigations or hearings.[14]

2.19 The ABA's main functions are to:

- plan the availability of segments of the broadcasting services bands for analog and digital broadcasting
- allocate, renew, suspend and cancel commercial and community broadcasting and narrowcasting licences, and collect any fees payable for those licences
- formulate and vary commercial and national television digital conversion schemes and approve the implementation plans for digital conversion for commercial television broadcasters
- oversee compliance with the BSA and other regulations, including program standards about Australian content and children's programs
- investigate complaints that the BSA or a mandatory condition or standard has been breached
- register and keep under review codes of practice relating to content and complaints handling for broadcasting and online content
- undertake reviews, surveys and research on the performance of broadcasters, programming matters, technological advances and service trends in the broadcasting industry, and other broadcasting issues.[15]

12 There are additional administrative provisions in Schedule 3 of that Act.

13 Australian Broadcasting Authority, website, 8 February 2005, at: http://www.aba.gov.au/aba/index.htm

14 Australian Broadcasting Authority, Annual Report 2003-2004.

15 *Proposal for new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority: Discussion paper*, DCITA, Canberra, August 2003, p. 4.

Australian Competition and Consumer Commission

2.20 The Australian Competition and Consumer Commission (ACCC) is an independent statutory authority formed in 1995 to administer the *Trade Practices Act 1974* (TPA) and the *Prices Surveillance Act 1983*. The ACCC has a Chairman, a Deputy Chair, five full-time Commissioners and several associate and ex-officio members and a Chief Executive Officer. Appointments to the ACCC involve participation by Commonwealth, state and territory governments.

2.21 The ACCC administers the economic and competition aspects of telecommunications regulations, having taken these functions over from the former industry-specific regulator, AUSTEL, in 1997. It is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the TPA and the state/territory application legislation. The ACCC outlined its powers in its submission:

> The current regulatory regime was introduced with the deregulation of the telecommunications sector in 1997. Changes to the Trade Practices Act 1974 (TPA) saw the introduction of the telecommunications-specific access regime (Part XIC) and anti-competitive conduct provisisons (Part XIB). These provisions apply in addition to the general access and competition provisions that apply to the economy more broadly, as contained in Parts IIIA and IV of the TPA respectively.[16]

2.22 The ACCC promotes competition and fair trade in the market place and regulates national infrastructure services. Its primary responsibility is to ensure that individuals and businesses comply with the Commonwealth competition, fair trading and consumer protection laws.[17]

2.23 Competition regulation is primarily under the TPA. Part XIB of the TPA provides mechanisms to address breaches of the telecommunications-specific 'competition rule'. Under the rule, a carrier or carriage service provider must not engage in anti-competitive conduct. A carrier or carriage service provider is said to have engaged in anti-competitive conduct if it has a substantial degree of market power in a telecommunications market and takes advantage of that power with the effect, or likely effect, of substantially lessening competition. In comparison, the general anti-competitive provisions in Part IV of the TPA have a higher purpose threshold.[18] However, as the ACCC submitted:

> In introducing the telecommunications-specific regime, the Government considered that total reliance on the general provisions in Parts IIIA and IV of the TPA would not achieve its objectives as, among other things :

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

17 Australian Competition and Consumer Commission, website, 8 February 2005, at: http://www.accc.gov.au/content/index.phtml/itemId/54137/fromItemId/3744

18 ACCC, *Submission* 13, p.3.

- telecommunications is a complex, horizontally and vertically integrated industry;
- anti-competitive cross-subsidies by the incumbent from non-competitive markets to markets in which competition exists or is emerging is a particular threat to the establishment of a competitive environment;
- due to the fast pace of change in the industry and the volatile state of the industry, anti-competitive behaviour can cause particularly rapid damage to competition; and
- there is considerable scope for the incumbent to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbent.

The ACCC is of the view that the significance of these factors has not diminished over the time that the telecommunications-specific regime has been in place.[19]

ACIF

2.24 ACIF is an industry owned, resourced and operated company established to implement and manage communications self-regulation within Australia. Established as the peak self-regulatory body of the communications industry it has primary responsibility for the development of consumer codes, operational codes and technical standards. The ACIF was incorporated as a company of limited guarantee in June 1997.

2.25 ACIF's main functions include:

- the timely delivery of Standards, Codes and other documents to support competition and protect consumers;
- driving widespread compliance; and
- the provision of facilitation, coordination and implementation services to enable the cooperative resolution of strategic and operational issues.

2.26 ACIF comprises a Board, an Advisory Assembly standing Reference Panels, task specific Working Committees, Industry Facilitation Groups, Consumer Advisory Bodies, and a small Executive. It is the communications industry's peak body, leading the delivery of best practice in industry self-regulation. Membership of the ACIF is open to all participants in the communications industry, with fees assessed with regard to industry category and annual revenue. The ACA must be satisfied that ACIF represents all sections of the communications industry and consults all interested parties when developing codes and standards.[20]

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19 ACCC, *Submission* 13, p.3.

20 Alasdair Grant (ed.), Australian Communications Regulation (3ed.), UNSW Press, Sydney, 2004, p. 47.

Telecommunications Industry Ombudsman (TIO)

2.27 The Telecommunications Industry Ombudsman was established in 1993 to provide free and independent alternative dispute resolution scheme for small business and residential consumers in Australia who have a complaint about their telephone or Internet service.

2.28 The role and powers of the TIO are set out in Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. Its Constitution and Memorandum and Articles of Association govern the TIO's operations. It is administer by a Council and Board (appointed by and from industry, with the exception of an independent director) and managed by an independent Ombudsman.[21]

2.29 The Council is comprised of five TIO member representatives and five consumer representatives, with an independent Chairman. While the Ombudsman has responsibility for the day to day operations of the scheme, the Council provides advice to the Ombudsman on policy and procedural matters.

2.30 The TIO is an industry-funded scheme, deriving its income solely from members who are charged fees for complaint resolution services provided by the TIO. Members consist of telecommunications carriers, telephone carriage providers and Internet Service Providers (ISPs). A member is only charged complaint handling fees if the TIO receives a complaint from one of its customers. Therefore, the funding system acts as an incentive for members to keep TIO investigations to a minimum by developing and maintaining effective complaint handling and customer service procedures.[22]

2.31 The TIO has the authority to make Binding Decisions (up to the value of $10,000) that are legally binding upon the telecommunications company, and Recommendations (up to the value of $50,000). The TIO also has the power to exercise its discretion not to investigate a case further if it is of the view that all relevant facts in the matter have been considered.

2.32 The TIO can only investigate a complaint if:

- The consumer has given the service provider a reasonable opportunity to address the complaint;
- The complaint is made within 12 months of the consumer becoming aware of the circumstances surrounding the complaint. The time limit may be extended by a further 12 months in certain cases;
- Legal proceedings have not commenced;

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21 Alasdair Grant (ed.), Australian Communications Regulation (3ed.), UNSW Press, Sydney, 2004, p. 243.

22 TIO website, 17 February 2005, at: http://www.tio.com.au/about_tio.htm

- The complainant was resident in Australia at the time that the circumstances surrounding the event occurred;
- The complaint is made in good faith; and
- The complaint type is within the TIO's jurisdiction (set out below)

2.33 The TIO has jurisdiction to investigate complaints about:

- The standard telephone service;
- Mobile services;
- Internet access;
- Pay-phones;
- Delays in telephone connections;
- Printed and electronic White Pages;
- Fault repair;
- Privacy;
- Land access; and
- Breaches of the Customer Service Guarantee and industry Codes of Practice.[23]

Institutional reform

2.34 In 2000 the Productivity Commission conducted a major review of broadcasting with a view to improving competition, efficiency and consumers' interests in broadcasting services.[24] The review referred to 'a degree of overlap' between the functions of the ABA and the ACA, and noted that 'a single spectrum manager would remove these overlaps' and improve efficiency in spectrum management.[25] However, the Commission concluded that while combining the two bodies might lead to some administrative efficiencies, there would be drawbacks if a single body were required 'to pursue multiple and sometimes conflicting objectives'. The Commission concluded that 'social and cultural objectives are better pursued independently, by an organisation separate from that which allocates spectrum'.[26]

2.35 In August 2002, the Department of Communications, Information Technology and the Arts (DCITA) released a discussion paper on spectrum management.[27] The paper focussed in particular on whether changes in the roles and responsibilities of the

23 TIO website, 17 February 2005, at: http://www.tio.com.au/about_tio.htm

24 Productivity Commission, *Broadcasting*, Report no. 11, AusInfo, Canberra, 2000.

25 ibid, pp. 213-214.

26 ibid, p. 214.

27 *Options for structural reform in spectrum management: discussion paper,* DCITA, Canberra, August 2002.

ACA and the ABA would be likely to lead to efficiencies or other improvements. Submissions from both the ABA and the ACA supported a merger of the two bodies. Specifically, the paper sought industry and public views on three institutional reform options:

> a) creation of a single agency with responsibility for broadcasting, telecommunications, radiocommunications and online regulation
>
> b) transfer of the ABA's spectrum planning, licence allocation and enforcement functions to the ACA
>
> c) transfer of the ABA's broadcasting spectrum planning functions to the ACA.

2.36 Following this process, the Government determined that the only viable alternative to retaining the existing regulators as separate entities was the merging of the ACA and ABA into a single organisation with responsibility for broadcasting, telecommunications, radiocommunications and online regulation (option (a) above).[28]

2.37 In August 2003, DCITA released a further discussion paper,[29] focussing on the key issues that would need to be addressed if the two bodies were merged. The discussion paper specifically ruled out any proposal to assume the ACCC's responsibility for competition regulation.[30]

The Australian Communications and Media Authority

2.38 On 11 May 2004, in association with the 2004–05 Budget, the Government announced its intention to merge the two bodies, to create a new communications and media regulator called the Australian Communications and Media Authority (ACMA).[31] It was argued that the creation of ACMA would have few implications for industry and the community, as there was no changes to the existing regulatory and spectrum planning frameworks for telecommunications and broadcasting. ACMA would retain the existing offices of the ACA and ABA throughout Australia, although it was proposed that some functions may be co-located over time.

2.39 It was proposed that in establishing ACMA the existing responsibilities of the ACA and the ABA regulating broadcasting, online content, radiocommunications and telecommunications be placed within a single regulator, thus enabling a coordinated regulatory response to converging technologies and services in areas as diverse as spectrum management and content regulation. Additionally, the ACA argued that the single regulator would also be better placed to respond to the statutory reviews of

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28 DCITA website, 17 February 2005, at: www.dcita.gov.au

29 *Proposal for new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority: Discussion paper*, DCITA, Canberra, August 2003.

30 ibid, p. 2.

31 Hon D Williams AM QC MP, 'Australian Communications and Media Authority'*, Media release*, Canberra, 11 May 2004.

digital television required in 2004 and 2005 under the Broadcasting Services Act 1992.[32]

2.40 In his second reading speech for the main Bill, The Hon. Peter McGauran outlined the need for establishing ACMA:

> The formation of ACMA is in response to convergence within the communications industry…. New regulatory structures are required to deal with these changes. It is becoming increasingly difficult for two separate regulators, one of which is primarily focused on infrastructure and carriage issues, to provide a holistic response to convergence. The establishment of ACMA will enable a coordinated regulatory response to converging technologies and services. The new authority will be better placed to take a strategic view of wider convergence issues.[33]

2.41 The establishment of the new authority had in principle support from the ALP. Labor's Stephen Smith MP argued:

> Labor supports this legislation as a necessary first step in addressing the increasing regulatory problems posed by the emergence of convergent technologies. It is the first step towards addressing this issue – a much delayed one at that, but in the final analysis it is a step in the right direction.[34]

2.42 An outline of the main provisions of the ten bills which establish the ACMA and make consequential changes to existing legislation is provided in Chapter 3.

2.43 Technological convergence was argued by the government as being a key factor in the establishment of the ACMA. Similarly, Telstra submitted the importance in addressing issues of technological convergence:

> Telstra understands that the policy motivation for the merger is to respond to technological convergence within the communications industry. Telstra agrees with the Explanatory Memorandum to the ACMA Bill that digital technologies are reshaping traditional telecommunications and broadcasting industry sectors by allowing new types of devices and services, necessitating a policy response.
>
> Telstra supports the merger of the ACA and ABA. Greater coordination at the institutional level is a legitimate first step towards addressing technological convergence.[35]

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32 ACA website, 17 February 2005, at: http://internet.aca.gov.au/ACAINTER.5308464:STANDARD::pp=PC_4,pc=PC_1501

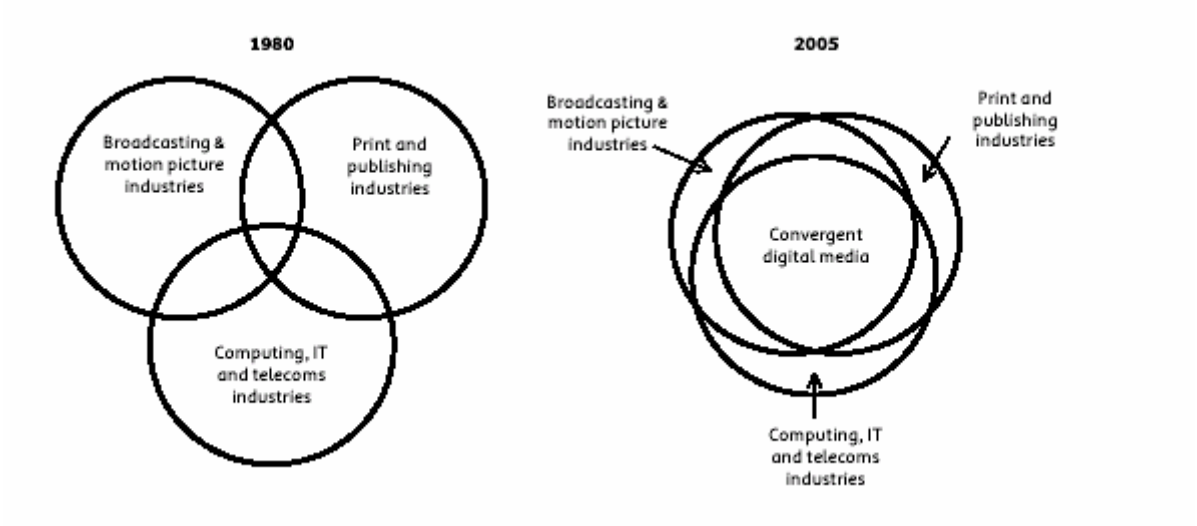
33 The Hon. Peter McGauran, *House of Representatives Hansard*, 2 December 2004, p. 4.

34 Mr Stephen Smith MP, *House of Representatives Hansard,* 9 February 2005, p. 88.

35 Telstra, *Submission* 15, p. 2.

2.44 Telstra noted in their submission that the term 'convergence' is generally taken as referring to the ability of different media to be provided over essentially the same type of digital platform. They illustrated this by the diagram in Figure 1 below.

Figure 1: Conceptual illustration of convergence over the last 25 years[36]



2.45 In evidence the Australian Consumers Association outlined the significance of technological convergence in a digital environment:

> Perhaps the most important change is the end of technological imperatives to vertically integrate the method of delivery and the form of content. In a fully digital world, this association is weakened or breaks down completely. A newspaper masthead could migrate to the Net – no printing press there. Voice could be carried over data channels over pay-TV cables, bypassing traditional exchanges. The Internet could deliver TV over the copper pair cables in homes currently used for voice – no need for radio frequency transmission. On the other hand mobile telephone data spectrum can be used for digital TV or radio.[37]

2.46 The Committee was told that the new generation of mobile phones which offer Internet and SMS was an illustration of convergence and the regulatory challenges this poses, as the ACA had traditionally dealt with SMS issues, whilst the ABA had dealt with Internet and content issues.

2.47 The Committee notes that convergence which is argued by the Government as being a key factor in establishing ACMA is not a new trend. The Australian Consumers Association, Charles Britton told the Committee that problems posed by convergent technologies have been know for 10 to 15 years now. Internationally, Governments of other countries have attempted to address this issue for over half a decade. The Singaporean government established the merger regulator Infocom

36 Telstra, *Submission* 15, p. 4.

37 Australian Consumers Association, *Submission* 4, p. 1.

Development Agency (IDA) in 1999, similarly, the UK government established Ofcom in 1999.

> Around the world, more and more media and communications regulators are moving towards convergent organisational structures, though with differing interpretations of what constitutes "convergent". The FCC in the USA and the CRTC in Canada have been convergent for many years. Italy, Switzerland, Ghana, South Africa have set up convergent regulators in more recent years.[38]

2.48 Australia's late move towards a converged regulator has resulted in reactive and superficial administrative response to converged technologies which are already available. It was submitted that:

> In our view Australia has erred on the side of delay, and the changes proposed in the creation of ACMA are belated and do not sufficiently address the imperatives in the marketplace. The issues related to this dilemma have emerged particularly in the realms of media ownership, access to infrastructure resources at reasonable prices, the reverse problem of access to content by competing carriers, technical standards and consumer protection rules, complaints handling, and dispute resolution.[39]

2.49 The delay in responding to converging technologies has led to both gaps and duplication in regulation and regulatory responsibility. These are discussed in more detail in Chapter 5.

2.50 Evidence to the Committee indicates that there was approval for the establishment of the new authority from the telecommunications industry. Many witnesses were critical of the current regulatory landscape which was argued to be complex and unfocused. Therefore, ACMA was seen as a streamlining of regulatory processes and was in keeping with current international developments:

> The plethora of regulators we now have, is becoming increasingly difficult to maintain. The necessary focus is lacking, as well as, perhaps even more importantly, the necessary power to act decisively on the many contentious political and commercial issues the industry is facing. The trend around the globe is to bring the various regulatory authorities together under one umbrella. If it were vested with the appropriate powers, such a body would be able to regulate the rapidly converging industries.[40]

2.51 AAPT noted that 'the merger of the ACA and ABA is an important step in improving the Australian communications regulatory regime.'[41] Optus argued:

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38 Mr Richard Hooper, *Convergence & Regulation*, Paper given at the TIO Conference, Melbourne, Australia, 25 November 2003. TIO website, 1 March 2005, at: http://www.tio.com.au/publications/other_publications/RichardHooper.PDF

39 Australian Consumers Association, *Submission* 4, p. 2.

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

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

> 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.[42]

2.52 Support for the authority was more fragmented within the broadcasting sector.[43] The Screen Producers Association of Australia[44], the Australian Film Commission[45], and the Media Entertainment and Arts Alliance[46], all supported the proposed merger providing that the social and cultural objectives of broadcasting regulation were maintained. The Committee heard that the merger:

> has the potential to bring cohesion and certainty to the convergence of telecommunications technology with traditional broadcasting functions.[47]

2.53 However, in contrast the ABC raised its concerns about the proposed merger:

> The Corporation has consistently maintained that such a merger is unnecessary. It believes that the current regime operates very effectively, providing audiences across Australia with diverse and high quality broadcasting services, and it is unclear whether there is any advantage to be gained from changing it.
>
> However, the ABC has also argued that if such a merger is to occur, it should be administrative only and not be accompanied by an alteration of the regulatory frameworks governing broadcasting and radiocommunications.[48]

Conclusion

2.54 The Committee supports the establishment of ACMA and acknowledges that it is a necessary first step in reforming current regulatory inadequacies. However, the merging of two regulators with differing cultures and responsibilities without any review of their underlying powers and responsibilities will do little to improve the regulatory environment. The Committee is concerned that serious shortcomings with the current regulatory arrangements have not been addressed in the ACMA bill and examines these in subsequent chapters. It is of the view that the foundation of the ACMA represents an opportunity to update and improve the regulatory arrangements

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

43 Free TV Australia, *Submission* 6.

44 Screen Producers Association of Australia, *Submission* 16.

45 Australian Film Commission, *Submission* 20.

46 The Media Entertainment and Arts Alliance, *Submission* 11.

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

48 ABC, *Submission* 3, p. 1.

for communications and media, meeting the challenges of technological change, infrastructure investment, consumer protection and cultural diversity in a competitive, commercial environment. That the Government has chosen an administrative merger rather than a more wide ranging modernisation of the regulatory arrangements is a lost opportunity for Australia.

Chapter 3

Provisions of the bills

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

Overview

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

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

> It is becoming increasingly difficult for two separate regulators, one of which is primarily focused on infrastructure and carriage issues and the other focused chiefly on content issues, to provide a holistic response to convergence. The establishment of the ACMA will enable a coordinated regulatory response to converging technologies and services. The new authority will be better placed to take a strategic view of wider convergence issues.
>
> Benefits to industry will include a reduction in duplication in the compliance process with improvements in the coordination of regulatory functions. A single authority will be better placed to coordinate telecommunications and broadcasting issues in international fora such as the International Telecommunication Union. In addition, a single authority will have the potential to manage resources to enable a timely response to periods of high demand for spectrum planning, and create enhanced opportunities to attract and retain staff and to broaden staff expertise.[2]

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

3.5 The Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 (the 'Consequential Bill') repeals the *Australian Communications Authority Act 1997* and the provisions of the *Broadcasting Services*

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

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

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

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

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

The main Bill

3.7 Key provisions in the main Bill are outlined below.

Functions and powers

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

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

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

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

4 Section 158.

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

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

Accountability

3.12 Both the ABA and the ACA are bodies corporate[7] to which the *Commonwealth Authorities and Companies Act 1997* applies. Both bodies have a Chair, Deputy Chair and other part-time or full-time members (up to three for the ACA and five for the ABA).

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

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

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

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

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

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

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

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

Constitution, membership and staffing

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

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

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

Decision-making and delegation

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

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

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

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

Ministerial direction and other constraints on functions

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

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

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

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

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

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

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

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

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

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

14 Explanatory Memorandum, p. 2.

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

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

Annual reporting and corporate plans

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

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

Advisory committees

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

Other matters

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

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

Main provisions of the Consequential Bill

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

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

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

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

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

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

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

Chapter 4

International regulatory models

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

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

The US model

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> In the US the dominant view is that broadcasting is basically a commercial activity which the government regulates to ensure efficient management of the spectrum, prevent the excesses of monopoly behaviour and, as far as the First Amendment permits, prevent potentially harmful speech.
>
> The idea that government might finance a centrally controlled public broadcaster, like the BBC or the ABC, has never been supported in the US and goes against the strong commitment to the idea of free speech. In consequence the principle has been to licence as many stations as the spectrum and those desirous of becoming a broadcaster could bear. This idea of economic freedom also engenders a deep seated fear of cartels and the ill effects of monopoly behaviour in the US so that broadcasting regulation has had a major focus on curbing the power and operation of networks.[6]

The EU's European Regulators Group

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

4.15 The EU's "1998 package", the old legislative telecommunications framework, was primarily designed to manage the transition from monopoly to competition and was therefore focused on the creation of a competitive market and the rights of new entrants. Due to rapidly changing technologies, convergence and the new challenges of the liberalised markets, a single coherent framework that covers the whole range of electronic communications, the New Regulatory Framework, was agreed and applied in July 2003.[7] The regulatory framework comprises a series of legal texts and associated measures that apply throughout the 25 EU Member States.

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

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

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

7 Data protection applied at the end of October 2003

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

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

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

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

The APEC TEL Effective Compliance Enforcement Guidelines & Practices

4.20 The Committee's attention was drawn to the effective compliance enforcement guidelines and practices developed by the APEC Telecommunications and Information Working Group (APECTEL) and released in 2004[10]. Those guidelines were described by Mr Paul Budde as 'an overview of the weapons that regulators need in their armouries':

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

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

- reducing the digital divide,

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9 ibid.

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

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

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

4.22 The guidelines aim to:

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

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

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

4.24 The guide states that the regulator must be:

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

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

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

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

The UK communications regulator OFCOM

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

Establishment of OFCOM

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

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

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

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

13 UK *Communications Act 2003*, section 6.

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

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

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

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

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

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

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

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

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

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

OFCOM takes over

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Ibid, para 5.

22 Ibid.

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

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

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

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

Powers and duties

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

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

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

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

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24 *Communications Act 2003*, section 6.

25 *Ibid*, subsection 3(1).

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

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

Competition powers

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

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

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

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26 Ibid.

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

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

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

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

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

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

4.52 As OFCOM's website notes:

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

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

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

Offences, penalties and fines

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

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

4.55 The Act allows OFCOM to impose financial penalties on television broadcasters who contravene the provisions of their licence. Those penalties will not exceed the greater of £250,000 or 5% of qualifying revenue (£100,000 or 3% for a first offence). In relation to radio licensing the Act raises the ceiling for financial penalties for contravention of licence conditions from £50,000 to £250,000.[31]

Funding for OFCOM

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

Board structure

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

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

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

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

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

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

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

Content Board

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

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

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

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

34 Ibid, Para 6.

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

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

Consumer Panel

4.63 The Committee notes that OFCOM:

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

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

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

Media mergers

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

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

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

37 Subsection 16(2).

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

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

OFCOM and the EU

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

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

Current and recent OFCOM reviews

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

Public service television broadcasting review

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

Strategic review of telecommunications

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

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

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

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

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

> Faced with the technology shift to digital, it is becoming clear that the current market and regulatory structure is unsustainable. It is that challenge that our Phase 2 proposals seek to address.
>
> This report seeks to address the five key questions that OFCOM posed for the Review. Firstly, in terms of the characteristics of a well functioning competitive market for both residential and business customers, keen prices, wide availability and reliability of basic voice and data services - guaranteed by a choice of suppliers - remain important. But innovation, range and choice in new services are increasingly prized; and the infrastructure that will support them consequently becomes more important. Purely arbitrage-based services are likely to have a limited life-span. The objective is sustainable competition. The increasing choice of new services and tariffs will also put a premium on effective customer information and the ability to switch easily between providers.
>
> Effective and sustainable competition can be achieved in core and backbone networks, provided careful attention is paid to ensuring a successful migration of today's interconnection regime to the very different topography that IP-based networks imply. In local access and other wholesale access products, efficient and sustainable competition is likely to require some continuing regulation to secure genuine equality of access, right through from product design to customer handover. Such regulation needs to be focused on a more limited range of wholesale products than to date - where there are real bottlenecks that are likely to endure. However, where it is focused, it also needs to be more intensive than hitherto. Such an approach, of much more tightly focused but intensive intervention to guarantee genuine equality of access through key bottlenecks, also creates real scope for a significant withdrawal from sector-specific regulation.
>
> Regulators cannot create investment, nor are they well placed to determine when and how much. That is for the industry and the market. However, the proposals in OFCOM's new regulatory framework will, we believe, encourage investment in scale and reach by BT Group plc's competitors to the deepest possible point of connection with BT Group plc's network. This should ensure that there is an increasing range of services and supply for sustainable competition from last-mile delivery right through to retail services. For BT Group plc's own network investment, OFCOM's framework contains a range of instruments and decisions - such as the review of the Network Charge Control, the valuation of BT Group plc's local loop assets, and the question whether there should be a single weighted cost of capital - to ensure that BT Group plc is able to reap an appropriate rate of return - one which recognises the risks involved in next generation networks.
>
> On the final question posed - whether structural or operational separation of BT Group plc, or full functional equivalence, still remained relevant issues

> - the answer from the Phase 1 consultation was that, yes, they were still relevant; more so perhaps than we had anticipated. However, the large majority of industry respondents expressed caution about the prolonged uncertainty and disruption to the sector that would be involved in the process which would determinatively answer the structural separation question, namely an Enterprise Act market investigation and subsequent referral to the Competition Commission. If genuine equality of access could be made to work, the overwhelming majority of responses suggested that it would be a far preferable outcome. Equally, however, they shared OFCOM's view that the status quo was unsustainable.
>
> We are at a critical point. There is a genuine opportunity for players in this market, BT Group plc in particular, both to make progress and to benefit the consumer. But market structure and technology development make it a time-limited opportunity. The response of the key players in the market in the coming months will determine whether the sector generally can take advantage of this opportunity, for the benefit of consumers and citizens, and the UK as a whole[42].

Spectrum liberalisation and trading

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

Reviews and impact assessments

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

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

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

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

4.74 The Committee notes that OFCOM also has a statutory duty[44] to carry out impact assessments in relation to proposals it considers 'important', unless the urgency of the matter makes such action 'impracticable or inappropriate'. As the Explanatory Notes to the Act state:

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

Public reporting requirements

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

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

Committee conclusion

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

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

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44 *Communications Act 2003*, section 7.

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

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

47 Ibid, Subsection 3(11).

48 Ibid, Subsection 3(12).

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

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

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

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.

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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

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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]

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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

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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:

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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]

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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

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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:

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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:

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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).

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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.**

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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]

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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

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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.

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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

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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]

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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.

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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:

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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]

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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

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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.

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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.

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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,

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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,

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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:

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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:

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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

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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.

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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.

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.[1]

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.[2]

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.[3]

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.

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**

- **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:

> 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[4].

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.[5]

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

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

5 Optus, Submission 9, p. 1.

Appendix 1

Submissions

1	Paul Budde Communication Pty Ltd
2	Moore & Moore Consultancy Services
3	Australian Broadcasting Corporation (ABC)
4	Australian Consumers' Association
5	Australian Communications Authority (ACA)
5A	Australian Communications Authority (Supplementary Submission)
5B	Australian Communications Authority (Supplementary Submission)
6	Free TV Australia
7	Communications Law Centre, University of New South Wales
8	AAPT
9	Optus
10	Department of Communications, Information Technology and the Arts
10A.	Department of Communications, Information Technology and the Arts (Supplementary Submission)
11	Media, Entertainment & Arts Alliance
11A.	Media, Entertainment & Arts Alliance (Supplementary Submission)
12	Competitive Carriers' Coalition Inc
13	Australian Competition and Consumer Commission (ACCC)
14	Australian Telecommunications Users Group Limited (ATUG)
15	Telstra

16 Screen Producers Association of Australia (spaa)

17 Meridian Connections Pty Ltd

18 Ofcom

19 Law Council of Australia

20 Australian Film Commission

21 Professor Peter Gerrand

22 Young Media Australia

23 Tower Sanity Alliance

24 Ms Kerrie Adra

Additional Information

Letter from Ms Anne Hurley, Chief Executive Officer, Australian Communications Industry Forum (ACIF) dated 16 February 2005 attaching a paper ACIF Input to and Comments on the report *Consumer Driven Communications: Strategies for Better Representation*

Appendix 2

Public Hearings

Thursday, 10 February 2005 – Canberra

Australian Consumers' Association

Mr Charles Britton, Senior Policy Officer, IT and Communications

Australian Telecommunications Users Group (ATUG)

Mrs Rosemary Sinclair, Managing Director

Mr Richard Thwaites, Adviser

Telstra

Dr Mitchell Landrigan, Group Manager, Regulatory

Ms Kate McKenzie, Managing Director, Regulatory

Competitive Carriers Coalition Inc

Mr Brian Currie, Regulatory Affairs Manager, Hutchison

Mr David Forman, Executive Director

Mr Ian Slattery, General Manager Regulatory, Primus Telecom

Media Entertainment and Arts Alliance

Ms Lynn Gailey, Federal Policy Officer

Friday, 11 February 2005 – Canberra

Optus

Mr Paul Fletcher, Director Corporate and Regulatory Affairs

Communications Law Centre

Dr Derek Wilding, Director

Professor Peter Gerrand, Private Capacity

Australian Competition and Consumer Commission

Mr Michael Cosgrave, General Manager, Telecommunications Group

Mr Edward Willett, Commissioner

Australian Communications Authority

Mr Allan Horsley, Acting Deputy Chair

Dr Robert Horton, Acting Chairman

Mr Geoffrey Luther, Acting Member

Department of Communications, Information Technology and the Arts

Ms Fay Holthuyzen, Deputy Secretary

Dr Simon Pelling, General Manager, Digital Broadcasting and Spectrum Management Branch, Broadcasting Division

Ms Jodi Ross, Legal Officer