SENATE ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS COMMITTEE: INQUIRY INTO THE POWERS OF AUSTRALIA'S COMMUNICATIONS REGULATORS

SUBMISSION FROM THE MEDIA AND COMMUNICATIONS COMMITTEE, BUSINESS LAW SECTION, LAW COUNCIL OF AUSTRALIA

1. Introduction

The Media and Communications Committee of the Business Law Section of the Law Council of Australia (**M&C Committee**) welcomes the opportunity to provide a submission to the Senate Environment, Communications, Information Technology and the Arts Committee (**Senate Committee**). The Senate Committee is presently conducting an inquiry into the powers of Australia's communications regulators, and among other things, is considering the *Australian Communications and Media Authority Bill* 2004 (**ACMA Bill**).

By way of background, the M&C Committee includes lawyers who practice in the area of media and communications law, including in private law firms, in media and communications organisations, and in public sector organisations. The M&C Committee forms part of the Business Law Section of the Law Council of Australia (**Law Council**). Amongst other things, the Law Council seeks to promote the "general improvement of the law",[1] and the Business Law Section promotes "the interchange of information and views" about "laws, practices and procedures affecting business, finance and commercial activities throughout Australia".

At this time, the M&C Committee is limiting its main comments to paragraph (a) of the Terms of Reference, which refers to the provisions of the ACMA Bill (and other related legislation). These comments are contained at sections 2 to 4 below. Also, at section 5 of this submission, the M&C Committee makes an additional comment relevant to paragraph (b) of the Terms of Reference, which relates to the issue of whether the powers of the relevant regulators will be "sufficient to deal with emerging market and technical issues".

2. Limited scope of the ACMA Bill

The ACMA Bill provides for the merger of the Australian Broadcasting Authority (**ABA**) and the Australian Communications Authority (**ACA**). As indicated in the Explanatory Memorandum to theACMA Bill (**the Explanatory Memorandum**), the intention is to make "only minimal changes to the existing regulatory frameworks that apply to the telecommunications and broadcasting sectors".

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1 http://www.lawcouncil.asn.au/history.html#role

The ACMA Bill is not, and does not purport to be, a "Convergent Communications Act" like the *Communications Act* 2003 in the United Kingdom or the *Communications and Multimedia Act* 1998 in Malaysia. It is understood that the Government's intention is simply to introduce legislation that addresses the "mechanics" of bringing the ACA and the ABA into a single organisation.

At this time, the M&C Committee understands that there has been no indication from the Government about if and when more comprehensive changes to the current separate schemes for regulating broadcasting, radiocommunications and telecommunications may be made. However, as a general comment, the M&C Committee notes that pressure for such changes to be made is likely emerge in the short to medium term, as developments in technology make some of the current regulatory distinctions between broadcasting and "non-broadcasting" communications services artificial, if not obsolete.

For instance, it would appear to make little sense to regulate identical content (that is accessed at the same time but on different platforms) in different ways, according to the device upon which it is received. This is anticipated to be a major legal and policy issue facing the ACMA, as the scope of "mobile content" offerings develop over time.

To explain this point in some more detail, the M&C Committee notes that while the *Broadcasting Services Act* 1992 (**BSA**) was originally intended to be "technology-neutral", piecemeal amendments to the legislation have led to the BSA becoming a mix of "technological neutrality and technological specificity" (this was also observed by the Productivity Commission in its *Broadcasting Inquiry Report*[2]). This means that content that looks the same from a consumer perspective may be regulated in different ways, according to how it is delivered or received (or both). The M&C Committee also considers that the ACA has also been adopting a technology-specific approach to the regulation of "premium services" supplied from "walled gardens" and by use of specific telephone numbers in recent times. Such technological distinctions are likely to be highlighted further as new content and communications services are developed, which will in turn raise the question of whether the current regulatory frameworks broadcasting, radiocommunications and telecommunications should be revisited.

As a separate but related point, it may also be questioned whether a single body should be responsible for dealing with classification issues, recognising that under the present regulatory regime, content may be classified quite differently according to where and how it is received (ie whether in a theatre, on television, online or in print).

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2 Productivity Commission, Broadcasting Inquiry Report, 3 March 2000, at page 54.

However, as noted, such issues are beyond the scope of the ACMA Bill as drafted. Accordingly, the M&C Committee expects that its comments about future regulation of broadcasting and communications will be a topic for future submissions.

The M&C's specific comments on the ACMA Bill follow below.

3. FMA Act issues

Given that the ACMA Bill is intended to do little more than bring the ACA and the ABA together, the M&C Committee questions why the ACMA is to be a prescribed agency for the purposes of the *Financial Management and Accountability Act* 1997 (**FMA Act**). As discussed below, the telecommunications, broadcasting and Internet sectors will need to wait for many important reforms about how these industries are regulated, as such matters are not addressed in the ACMA Bill. However, the executive government does not appear to have shown the same degree of patience, as illustrated by the introduction of the FMA Act regime to the regulator of these sectors.

It is understood that the *Commonwealth Companies and Authorities Act* 1997 (**CAC Act**) presently applies to the ACA and the ABA. The M&C Committee understand that some practical consequences of this change may make the ACMA appear to be less independent of the executive branch of government than has been the case in relation to the ABA and the ACA[3], to vest greater powers in the Chair, and to reduce the role of the appointed members in a material way.

For instance, it is understood that the governing body of each of the ACA and the ABA, consisting of the members, has previously been ultimately responsible for the administration of those authorities, including budgetary issues (eg decisions about the allocation of funds from each authority's budget for specific projects). However, under sections 44 and 52 of the FMA Act (when read with the *Financial Management and Accountability Regulations*), it is understood that the Chief Executive has responsibility for such issues, not the ACMA as a whole. In this context, it is noted that clause 63 of the ACMA Bill specifically provides that the ACMA will not be able to direct the Chair in relation to the Chair's performance of functions or exercise of powers as Chief Executive under the FMA Act. This is broadly comparable to removing ultimate authority of the board of any corporation in relation to some quite significant matters, in favour of the chief executive.

In this context, it is not clear from the ACMA bill what the precise role of the ACMA appointed members is intended to be. It appears that the intention is that the members may in practice form an "advisory board" in relation to the powers that will be exercised by the Chair under the FMA

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[3] For example, the ACMA will be subject to greater supervision of its activities, through instruments such as Legal Services Directions.

Act, and will otherwise be limited to making decisions on matters arising under the relevant regulatory schemes. As a more general comment in this context, the M&C Committee questions why the decision to adopt the FMA Act has been made, given the otherwise prevailing "minimal change" approach that characterises the ACMA Bill.

As a separate point, the M&C Committee notes that there could be a perception that public authorities that are regulated by the CAC Act are more independent from the executive branch of government than agencies regulated by the FMA Act. In this context, the M&C Committee notes that traditionally, it has been recognised that the body responsible for the regulation of broadcasting (in particular) needs to be independent, given the role and influence of the media in Australian society generally, and upon elected representatives in particular. It has also been recognised that "Australian news and entertainment media have a robust tradition of free expression and rigorous analysis of public policy" (as noted by the Government on the DFAT website, for example[4]). If the proposed reforms of the media ownership provisions in the BSA are enacted this year (as anticipated), then the need for the authority that monitors the relevant statutory objectives (including that of media diversity) to be and to be seen to be independent is likely to become more pronounced.

In that context, and more importantly, in light of the "minimal change" approach adopted elsewhere in the ACMA Bill, the M&C Committee question why the FMA Act is to apply to the new merged regulator, rather than the CAC Act (which currently applies to the ACA and the ABA). The Explanatory Memorandum simply notes that this change is "in the interests of sound financial accountability and in recognition that the ACMA will be a publicly funded body which collects taxes on behalf of the Commonwealth". However, as this is the case at present (for example, the ACA already collects spectrum licence taxes, and transmitter licence taxes), this does not explain why a move away from the CAC Act scheme is appropriate.

The M&C Committee suggests that the debate about a change to an FMA Act scheme would be better left for consideration in the context of the broader policy review which is expected when the issue of "convergent communications legislation" is eventually considered, rather than incorporated into a Bill which is stated to involve "only minimal changes".

4. Additional matters for clarification

4.1 Members

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

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[4] See Department of Foreign Affairs and Trade website at http://www.dfat.gov.au/facts/media.html

Memorandum. It appears that an assumption has been made that every single "interest group" or industry needs to be represented on the board of the ACMA, and if this is correct, it is an assumption that could be questioned.

The M&C Committee suggests that these are matters which would benefit from further consideration by the Senate Committee.

4.2 Provision of commercial services

The M&C Committee considers it curious that the ACMA will be able to provide commercial services (clause 11). The ACMA Bill and the Explanatory Memorandum provide no guidance about when the provision of commercial services would be considered to "impede the ACMA's capacity to perform its other functions" (per clause 11(2)). For instance, if the completion of commercial services caused a delay in the completion of statutory functions, it can be queried whether this would be considered to be an "impediment"?

The M&C Committee suggest that this is a matter which the Senate Committee should consider.

4.3 Divisions

Section 46 of the ACMA Bill indicates that "Divisions" of members may be established to deal with certain matters that would otherwise be determined by the ACMA as a whole.

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, as noted at section 5 below).

However, it is noted by the M&C Committee that "generic" division may be more satisfactory than the formation of divisions on "industry" lines (eg broadcasting, radiocommunications, telecommunications), as this would simply repeat the existing regulatory separations, and potentially defeat the purpose of the "merger".

5. Regulatory powers

The Terms of Reference for the Senate Committee include a question about whether the powers of the ACMA and the ACCC will be sufficient to deal with emerging market and technical issues in the telecommunications, media and broadcasting sectors.

In this context, the M&C Committee wish to emphasise that the telecommunications schemes that the ACMA will administer are schemes that emphasise self-regulation, and that this should be noted by the Senate Committee in the course of its inquiry.

For example, the regulatory policy in section 4 of the *Telecommunications Act* 1997 (**Telecoms Act**) 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].

Part 6 of the Telecoms Act contains a range of provisions that require the development of industry codes of practice.

In practice, the M&C Committee considers that this means that self-regulation is central to the regulatory scheme in the Telecoms Act, and that it is to be preferred to more interventionist forms of regulation when this is practicable. In other words, if matters can (practicably) be addressed under industry codes of practice, regulatory intervention should only occur where self regulation has been demonstrated to be deficient.

A similar approach is adopted under the BSA. Its corresponding statement is in section 4 of the BSA, which 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).

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5 Apart from the main object of promoting the long term interests of end users and the efficiency and international competitiveness of the Australian telecommunications industry (per subsection 3(1)), other objects of particular relevance in section 3 of the *Telecommunications Act* include the object of "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 the object of 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)).

The M&C Committee suggests that the statutory emphasis on self regulation is an important matter to take into account in any consideration of whether regulatory powers are "adequate". Of particular relevance to note for the purposes of this submission:

- The regulatory framework which ACMA will administer includes a significant framework for industry self-regulation. The differences in the well-developed individual models for the telecommunications and broadcasting industries will need to be understood and accommodated by the new body. For example, ACIF (the peak body for telecommunications self-regulation) has developed and continues to develop multiple codes and standards covering inter-operator operational and technical issues, as well as service provider/consumer issues (je consumer protection); the broadcasting self-regulatory framework does not cover inter-operator arrangements and has a single Code of Practice for community safeguards;

- The ACA and the ABA have differing accountabilities and approaches to consumer protection which drive the operation of the individual self-regulatory frameworks. The ACA has legislative accountability for consumer issues (including the requirement to establish a Consumer Consultative Forum). It takes a pro-active and inclusive role in furthering consumer interests which flows through to the development of the industry Codes and standards. 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.

- 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: this raises the question of how ACMA will apply the test/s and will there be separate registers maintained?

As a separate practical issue, the statutory emphasis on self-regulation in telecommunications is also a matter to be taken into account by the ACMA when it administers the regulatory schemes in the BSA and in the Telecoms Act (as discussed above).

In conclusion, the M&C Committee appreciates having the opportunity to provide the Senate Committee with this submission.

Law Council of Australia – Business Law Section - Media & Communications Committee (Sydney)
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