

**Senate Environment, Communications,
Information Technology and the Arts Committee**

Inquiry into the Powers of Australia's Communications Regulators

Submission from the Australian Broadcasting Corporation
January 2005



Australian Broadcasting Corporation Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Powers of Australia's Communications Regulators

Introduction

The Australian Broadcasting Corporation (ABC) welcomes this opportunity to comment on the introduction of Bills to create a new combined communications regulator, the Australian Communications and Media Authority (ACMA), by merging the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA).

The ABC wishes to confine its remarks to the approach that the Government has taken to this merger, which is embodied in the provisions of the Australian Communications and Media Authority Bill 2004 ("ACMA Bill"), the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 and other related legislation.

The Bills

In recent years, the ABC has made submissions to two reviews conducted by the Department of Communications, Information Technology and the Arts (DCITA) in relation to merging the ABA and ACA.

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.

The ABC has examined the present Bills and believes that as tabled they reflect the Government's stated intention of combining the two bodies but not changing the regulatory regimes that they administer. In the Corporation's view, this is the best course, given the decision to merge the bodies.

The ABC notes press reports suggesting that the Bills have been viewed in some quarters as an opportunity to modify aspects of existing regulatory regimes.¹ The Corporation believes that such modification 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

¹ Toni O'Loughlin. "Pressure on regulator to be tougher", *Australian Financial Review*, 3 December 2004, p.11.

frameworks. If changes to regulatory structures are to be seriously contemplated, the ABC believes they should be the subject of appropriate public consultation processes.

The ABC notes that the ABA’s complaints investigation role in relation to the ABC’s Code of Practice, which is set out in ss.150–153 of the *Broadcasting Services Act 1992* (“BSA”), will be transferred to the ACMA. The Corporation regards the ABA as providing a valuable external review role in addition to its own review processes. The ABC would not like to see this role diminished or altered under any legislative process.

Spectrum Management Issues

The ABC has concerns about the ways in which the new regulator will perform its spectrum planning and management functions in the longer term.

Currently, responsibility for spectrum management is divided. The ACA has overall responsibility for administering radiofrequency spectrum in accordance with the provisions of the *Radiocommunications Act 1992*. However, under the BSA, 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 instead planned and administered by the ABA.

The discussion paper for the first DCITA review of issues surrounding the merger, “Options for Structural Reform in Spectrum Management”, argued that efficiencies might be achieved by bringing spectrum management under the control of a single body. It was on this basis that it canvassed the option of merging the two regulators, as well as the option of transferring some or all of the ABA’s spectrum management functions to the ACA.

The ABC’s strong preference, as it spelled out in its submission to that review, is that the ABA retain its existing responsibility for planning and licensing BSB spectrum, or that a combined regulator continue to employ an approach to spectrum management similar to the ABA’s.

This preference reflects a marked difference in the spectrum planning and management methodologies adopted by the two regulators. The ABA’s processes pay careful attention to the specific nature of broadcasting and 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. The ABC is strongly in favour of this approach and believes that it is a fundamental underpinning of the success of the Australian broadcasting industry.

By comparison, 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. In the ABC’s experience, it is the broadcasters, rather than the parties causing the interference, that bear the brunt of complaints from the public about disrupted reception. Further, under this approach, the costs for addressing interference problems are primarily borne by the spectrum users.

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. Similarly, the ACMA Bill absorbs the functions of the ABA set out in s.158 the BSA, which become, with minor alterations, the “broadcasting, content and datacasting” functions of the new regulator set out in s.10 of the ACMA Bill.

The ABC is strongly of the opinion that the ABA’s BSB planning philosophy and processes should also be transferred to the ACMA. While there is nothing in the Bill to explicitly effect this transfer, the Corporation expects that the ACMA will be initially little different from its two predecessors and believes it is likely that when the new regulator commences operations it will continue to undertake spectrum management in the same ways that the ABA and ACA do.

However, as the Explanatory Memorandum to the ACMA Bill indicates, the formation of the ACMA is a response to convergence and the impact of emergent technologies on traditional communications industry sectors.² 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 replaced by uniform processes more akin to those of the ACA, including *post facto* correction of interference problems.

While the ABC acknowledges that one means of settling this issue might be through additional provisions in the ACMA Bill guaranteeing the continuation of ABA processes, doing so would be contrary to the spirit of the Bill and the purely administrative merger being achieved.

Instead, the ABC believes the best approach would be to ensure that the Members of the new body be appointed in such a way as to ensure that it contains significant representation of individuals experienced with broadcasting in Australia. In particular, it would be desirable if the Chair of the ACMA had experience with broadcasting and broadcasting regulation.

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.

Finally, the ABC notes the importance of ensuring functional lines of appeal for those whose activities are regulated by any combined agency of this kind. While it is to be hoped that overlaps between the ACMA’s divergent planning regimes will be few, there must be identifiable avenues of appeal if, for example, the radiofrequency arm makes a determination that is at odds with the determinations of the broadcasting arm.

² Australian Communications and Media Authority Bill 2004 Explanatory Memorandum, p.1.