Submission by

Australian Consumers' Association[1]

to

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

Inquiry into the Australian Communications and Media Authority (ACMA)[2]

Preface

The Australian Consumers' Association (ACA) is a not-for-profit, non-party-political organisation established in 1959 to provide consumers with information and advice on goods, services, health and personal finances, and to help maintain and enhance the quality of life for consumers. The ACA is funded primarily through subscriptions to its web site, magazines, fee-for-service testing and related other expert services. Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests.

Introduction

In general terms, the ACA supports the creation of an Australian Communications and Media Authority. It has been apparent for best part of a decade that technological change driven by digitalisation has been shaping a communications landscape devoid of the traditional features that business (and governments and consumers) have used to navigate, regulate and make choices. All content is being reduced to a string of zeroes and ones, 'on' or 'off'. Digital bits are essentially indifferent to what they represent (content) and how they are conveyed (carriage). The move from analogue methods of information handling to digital ones is rippling not just throughout the economy, but also into the cultural infrastructure of our society.

Some observers have said that such a flat landscape means the end of regulation – we have the fabled level playing field. However important social, economic, architectural and consumer realities will continue to apply even though the fundamental technologies may be changing. 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. In the analogue world, a radio broadcaster is distinguished by its use of a radio transmitter. A TV broadcaster uses a different transmitter. A newspaper needs to have printing presses; a voice telephone company needs copper wires, phone towers and fibre links and an ISP needs routers and modems.

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[2] http://www.aph.gov.au/senate/committee/ecita_ctte/acma/tor.htm

More astute observers will have noted that it is these unavoidable analogue features (for example cable plant investment, spectrum scarcity) that have been used to extract additional value in the marketplace They will also have noted that where these have been removed, industry tries to create features from which to derive value (for example control of interconnect to networks, domination of standards, exclusive content arrangement, restricted access to facilities and product bundling for consumers). As the tectonic plates of the industry segments shift, governments and their regulators have to adapt. The moves made by these guardians of the public interest then have a material impact on the options, opportunities and threats that are emerging from digital change to confront consumers.

Enter ACMA

This consideration of digital convergence sets the context to consider the creation of ACMA. Timing is an important challenge with regards to any move on regulatory systems in response. Move too early, and convergence can become the tail that wags the dog. Incumbent interests can achieve long treasured and wholly analogue goals in digital disguise. On the other hand, new choke points derived from delay in the adaptation of the regulatory apparatus could generate their own class of robber barons. 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.

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 accept that the operating divisions should not be jammed together in some short-term jumble. However, 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. This Review should have the goal of achieving maximum integration, and seamless coverage, particularly of matters where the convergence phenomenon has and is blurring lines between traditional boundaries between matters such as broadcasting, Internet activity and traditional telephony. In our view a converged regulator with overall and integrated responsibility in this area should be better placed to act with the relevant flexibility to assist innovation and market development than a fractured and uncertain system.

Communication, Media and Competition

The consideration of regulation in this converged environment cannot be separated from the question specific legislative and regulatory instruments and powers as opposed to employing general competition law and regulation. As outlined above, technology can and will change the communications landscape – the essential questions relate to what happens meanwhile and what factors other than true market forces and innovation diffusion are at play. In our view the need for specific rules is in the nature of network industries such as the converged communications market. As

a consequence the need for competition rules to be tailored to their characteristics is a permanent feature of the modern economy rather than a temporary transitional requirement of traditional government monopoly busting.

In our view, general competition law as it stands cannot adequately deal with market places that:

- Are based on networks.
- Are technically complex.
- Do not have well developed and/or easily defined markets.
- Have significant (residual) incumbent market power.

Network based

Digitally converged marketplaces are all about connections. Connectedness is critical to networks. In the analogue world each device is effectively in isolation, except for a service provider or partner joined on the same circuit. A user of a power point doesn't care who is plugged in to some other power point. They could be the only power user in the world, and it would make no difference. An analogue telephone user can only connect to a limited number of parties. But the same does not apply in the digital networks, where the possibility exists communicating with anyone on the network simultaneously. The more people there are on the networks, the greater the potential utility of the network to all.

Technical complexity

Standards take on a particularly pivotal position in the digitally convergent world. Interconnection is essential. How things interconnect and continue to provide a seamless consumer experience (interoperate) is defined at a technical level by agreed standards. In the digital world, control of technical standards is one of the key choke points, the place at which to levy the road tolls of the digital data highway, as Microsoft has comprehensively demonstrated. For the consumer however, the options available can be diminished or made more expensive. Standards processes are typically voluntary, consensus oriented and co-operative. However, the effectiveness of self-regulation (as epitomised in the creation of voluntary standards) seems to fail in the areas that are contested. As standards increasingly come to represent the competitive high ground, regulators such as ACMA will need to take an increased role in the international development of digital, network and communication standards to preserve the interests of consumers.

Do not have well developed and/or easily defined markets

While some of the markets in the media and communication space are traditionally well defined, it is precisely one of the most significant impacts of the convergence phenomenon that the distinctions (which very often were dictated by characteristics of analogue technology) between them are blurring. In addition the dizzying pace of technological development that is driving digital convergence and conversion is also rendering what consumer buy increasingly 'soft'. The world of physical objects is becoming less and less important in advanced economies – you don't fix most appliances; you junk them and buy a new one. Electronic devices are generally a few grains of silicon sand, a bit of plastic and a splash of copper arranged in a clever fashion; the value is not in the materials, but in the software and services associated with the object. Indeed modern market concepts of 'product as contract' suggest that

the core of what you buy is the contract, not the actual goods. Communications and media products, services, and content are becoming entirely digital in nature and defined by software. The history of IT technology generally is that once something reaches this condition, the rate of change and innovation accelerates enormously. Thus searching for stable market descriptions will become an increasingly difficult and eventually perhaps even a futile task. Therefore in our view, regulation that addresses the issues of these mercurial markets in specific media and communications terms will be necessary to address nuances that standard competition law cannot.

Incumbent market power

ACA has a low opinion of the extent to which the market power of the previous monopoly incumbent, Telstra, has been diminished. It is a characteristic of network industries that either standards, or connectedness, or a combination of both can rapidly lead to market domination from percentage of market share which is lower than traditionally felt to be indicative of market power. This effect can further reinforce the power of the incumbent and make it even harder for new entrants. 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. We have argued consistently that the essential solution is structural separation of Telstra Wholesale from Telstra Retail operations.

This initiative is sometime portrayed as a backward looking debate, harking to the era of the landline and analogue telephones. However, it constantly surfaces in thoroughly contemporary and digital areas. For example assertions that broadband will be a conduit for a large array of digital services begs the questions of in what time frame and at what cost? For a long time pricing decisions from Telstra have kept broadband as a 'dial-up plus' rather than the brave new world of broadband for all. Telstra has been subject to a 'Part A' Competition Notice issued in relation to its wholesale ADSL broadband pricing plans since 19 March 2004 to discernable effect for consumers. It is important to bear in mind that Australia is not at the beginning of Australia's first broadband challenge, but rather the **second**. The first brave experiment with high speed digital access was ISDN, and we failed as a nation to make the best of this perfectly adequate method of computer connection for reasons that had far more to do with supporting existing market segments and profit centres than true economics, technical capacity or consumer benefits.

Notwithstanding the difficulties of bringing competition to the telecommunications part of the proposed remit for ACMA, it is important to note that on the broadcasting side of the house, policy has not been anywhere near as focussed on inciting competition and cutting incumbents down to size. This has particularly been the case with respect to Digital terrestrial television (DTV). DTV has the potential to shift large amounts of data down to consumers over wide geographic areas. It has potential reach into virtually every home. However, Australia is pursuing a model of DTV that favours orthodox broadcasting and incumbent broadcasters and effectively ignores the

data implications of the medium. We are throwing away spectrum on compulsory high definition (HDTV) and the Government has drafted regulations to dramatically limit service offerings by datacast.

We have also noted the travails of the Pay-TV sector as it as lurched from facilities-based competition to content capture to quasi-monopoly. We have witnessed the inability of competition law and the ACCC to do anything sensible to address this slide into market entropy. We are deeply concerned that incumbent voice providers are significantly blunting the competitive possibilities of Voice Over IP (VOIP) because of the ownership of cable infrastructure. In the US the cable providers are challenging the established voice providers in this space in a way that will just not happen in Australia. We also note the hand wringing recently from the ACCC about the possibility of communications providers using third generation (3G) mobile phone spectrum aggregating all the valuable sporting content as part of the bundling to excluded other competitors[3]. In our view these difficult situations for the competition regulator illustrate the need for regulation specific to the communications market. They also demonstrate to us that far from reducing the extent of media ownership rules, the Government should be defining the 'media' far more broadly, and empowering the converged regulator to operate effectively across all facets of the market it must supervise.

Addressing the state of competition

In our view, failure to regulate effectively to control anti-competitive and market domination in communications and media poses threats not just to markets but also to cultural and democratic outcomes in Australia. The creation of ACMA should offer the opportunity to visit telecommunication and media regulation and to integrate them in a sensible way to provide communications and media specific regulation that is not inimical to competition, but recognises the fine granularity, fluidity and interrelatedness of markets that creates real problems for broad-brush competition law. The ACCC should continue to administer competition aspects of the communications regime, advised by ACMA. However ACMA has an important role to play. We suggest that effective communications regulation must *encourage access and increase diversity* rather than just 'reduce denial of access'. It should do this across the whole landscape of digital convergence (telecommunications, IT and broadcast).

This is the opportunity of ACMA; not to employ general competition law but to craft communications and media regulation that recognises the changes that are afoot, and to deal with the myriad situations in appropriate ways, sometimes easing regulation to encourage and nurture innovation, at others intervening strongly to break chokeholds by dominant players and ease the passing of obsolete technologies. 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.

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[3] http://www.zdnet.com.au/news/security/0,2000061744,39178513,00.htm

Consumer protection and converged regulation

Consumer protection cannot be taken for granted in the convergent digital marketplace any more than in other marketplaces. Digitalisation offers many potential benefits to consumers; innovative services, greater convenience, better prices, more options and greater choice among them. However, as with other aspects of the convergence phenomenon, there are countervailing trends which demand attention if the consumer experience is to be positive. 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.

A recent example of a fumbled response to a convergence issue has been the introduction of SMS premium services. ACA has not been aware of acute consumer demand driving this 'innovation'. It seems industry pressure for the release of numbers drove a process characterised by haste, interim arrangements and lack of clarity about regulatory boundaries and responsibilities. There is no doubt that the premium SMS/MMS data services illustrate the way convergent services blur the line between content and carriage that has conveniently marked the way for regulators in the past. The Preamble to the Australian Communications Authority (AComA) *Interim Consumer Protection Principles and Procedures for Premium Rate Services* correctly noted such services as "an early example of a convergent service". There has been ample warning over the last decade for Government (in the broadest sense encompassing the regulators, departments and politicians) to prepare for the challenges of convergence.

However the nettle had not been grasped and the future rushed upon regulators, apparently unprepared, in 2004. Our view was that rule setting for these primitive mobile data services would create a set of initial conditions that will inform the way convergence unfolds in Australia and should have been done with great care. Instead it was done in haste. Our preference was to see the matter dealt with as a Service Provider Rule. What we saw initially was a proposal for industry self-governance using a novel form of industry deed-of-agreement. Ultimately AComA was moved to the creation of a Service Provider Rule, which has entailed a more lengthy process and some delay. However we consider consumer detriment less likely to be found in delay than in the peril of setting the management of this emerging and difficult area off in the wrong direction. The lesson of this does not seem to be particularly well taken in the creation of ACMA, which seems more concerned with the merging of the administrations rather than the resolution of how on the ground convergent issues will be resolved now and in future.

In the specifics of this issue, the recent Consumer Driven Communications: Strategies For Better Representation[4] (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

[4] http://internet.aca.gov.au/ACAINTER.3997752:STANDARD:969748898:pp=DIR2_2,pc=PC_1661

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 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.

Another particular area of convergence concern is bundling of services. In their search for competitive replacements for the structures previously imposed by the analogue environment, business will often seek to manufacture new structures that suit their purposes and channel consumer decisions and options into predictable avenues. One way of achieving this is via bundling; that is forcing or enticing consumers to buy a suite of services rather than just the one they might want. So pay TV may be cheaper if you take the local call services from the same company. At best these deals mean consumers have to assess the total bundle value, at worst it means they have to buy extra services they don't want or need, or are locked out because they can't afford the bundle. Of particular concern is the leverage achieved when an essential service (such as voice) is bundled with a more discretionary product like entertainment. Threats to disconnect the essential service can be very persuasive to enforce payment of the entertainment debt, and in our view this conjunction should not be allowed. ACMA could theoretically be well placed to respond better and more consistently to these kind of challenges – but only if the way in which it is joined encourages it to do so.

Dispute resolution

The AComA Preamble to their Interim Paper also noted "premium rate services do not fit neatly into existing complaint handling arrangements". The convergence aspect of premium data services serves to reinforce our view that the current complaints handling scheme in communications is far from neat. 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. The CDC Report suggested in 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:
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> - 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
> - bring network connection & customer equipment issues under the jurisdiction of the TIO.

The need for this consolidation of dispute resolution mirrors in the consumers' world the necessity for a converged regulatory response to a converging industry. One of our concerns is that while directed converged services into the current regulatory scheme may not be the best solution, if not correctly handled, there will be pressure to allow novel, fragmented and possibly more self-regulatory scheme to emerge, or possibly no assistance to consumers at all. In our view this would do consumers, and ultimately industry, a disservice. Ultimately it would be a good and useful outcome if a single industry regulator was matched with a single equally encompassing industry dispute resolution scheme.

Interaction with consumers

In the specifics of the merged ACMA entity, we are concerned that the AComA and the ABA have different cultures, operations and protocols for interaction with consumers. The CDC Report notes:

> The consolidation of the Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA) into the Australian Communications and Media Authority (ACMA) represents a significant opportunity for a change to the regulator's approach to consumer issues and to introduce new approaches.

However, it is also apparent to ACA that the AComA currently has a greater burden of relating to the concerns of individual consumer concerns, and hence has a more apparently open and responsive approach. This is in contrast to the broadcasting heritage where the consumer is the 'deliverable' that the broadcaster brings to the advertiser rather being than the actual customer of the broadcaster. It is one of the consequences of the digital changes in train that the capacity exists for greater and greater personalisation of the consumer relationship with what may have previously been mass-market products and services. This is particularly so in media services. 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.

In terms of obtaining consumer input to the planning and operations of ACMA, it is important to consider Recommendation 27 from the CDC Report that:

> 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:
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> - 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.

ACA would urge the legislative and ministerial instructions to the merged entity take account of these considered views from the consumer movement.

We also urge that ACMA is empowered and enjoined to undertake activities to test the actual market experience of consumers in the communications and media markets, utilising techniques such as shadow shopping style investigations, information gathering in real-time inside industry processes and customer experience audits that follow sample consumer paths through systems.

Enforcement

ACA has been critical of the AComA from time to time because of a perceived failure to take prompt enforcement action in circumstances where we believe it is justified. We have also been critical of the ABA in its administration of self-regulation, a high profile example of which was the infamous 'Cash for Comment' affair. In our view this aspect of the work of the ABA has continued to be unsatisfactory. 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 are 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.

Conclusion

The Productivity Commission in its 2001 review of Telecommunications Specific Competition Regulation remarked on the need for a communications competition regulatory environment that is transparent, independent, timely and efficient. We endorse such a yardstick - one of our abiding concerns is that we achieve that benchmark in all areas affected by digital convergence, including broadcasting. In our view the long-term interests of end-users (LTIE) test is at the heart of meeting this goal in communications regulation. This is not because it represents some kind of consumer nirvana. However, it sets a criterion for a sector specific regulatory regime that aims at delivering consumers a market place where they are not passive users of a network, but active customers of media and communications service providers. It is imperative in our view that the legislation reflects the special characteristics of these networked and convergent industries.

An essential and taken for granted (but not guaranteed) element of communications is the notion of any-to-any connectivity. This may or may not be arguable from the standpoint of overall economic efficiency – ideal competition theory (with the emphasis on *theory*) may well decide that competing networks should be able distinguish themselves to the point of non-interoperation, or at least raise barriers to navigation. The test of the interests of end-users means that the excesses of such economic purism can be contained by an imperative to meet the needs of consumers. Therefore the creation of ACMA is an opportunity to extend the LTIE test to encompass all sections of the digital convergence marketplace.