Communications Law Centre

Submission to the Senate Environment, Communications, IT and the Arts References Committee Legislation Committee

Inquiry into the Australian Communications and Media Authority

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COMMUNICATIONS LAW CENTRE

THE UNIVERSITY OF NEW SOUTH WALES

VICTORIA UNIVERSITY OF TECHNOLOGY

The Communications Law Centre

The Communications Law Centre is an independent, non-profit public interest research, teaching and public education centre, specialising in media, communications and online law and policy. The Centre was established in Sydney in 1988 and in Melbourne in 1990. It is a research centre of the University of New South Wales and is affiliated with Victoria University. The CLC aims to be an innovative, professional and influential source of research, ideas and actions in the public interest on media and communications issues. The Chair of the Communications Law Centre Ltd is Hon Deirdre O'Connor. Chair of the Centre's Management Committee at UNSW is Professor Philip Bell.

In the past two years the Centre has made submissions and provided additional comment on broadcasting issues including the operation of the commercial radio standards, the investigation into levels of local content on regional television and the proposals concerning deregulation of the cross-media rules. Recent telecommunications work includes research into fair terms in consumer contracts and work around selling practices and hardship policies. The Centre operates an internet law practice (Oz NetLaw) from its Melbourne office and is about to embark on a project funded by the TPA Trust examining fair trading issues associated with online auctions. Centre staff recently participated in the ACIF industry working group to develop a code of practice relating to telecommunications consumer contracts. Centre staff hold national representative positions of the consumer councils of the Australian Communications Authority, the Australian Competition and Consumer Commission, the Australian Communications Industry Forum, and Telstra.

INTRODUCTION

The Communications Law Centre welcomes the opportunity to contribute to this Inquiry.

Comments on the specific provisions of the Australian Communications and Media Authority Bill 2004 ('the ACMA Bill') are set out below. In addition, make the following introductory comment concerning the scope of the Bill.

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.

In particular, we suggest that such an inquiry could address the issue of regulatory uncertainty that surrounds content services on mobile devices. The outcomes of the investigations of the Department of

Communications, Information Technology and the Arts and the Australian Communications Authority could be addressed at this time. At present, a regulatory gap exists, preventing the registration of a code of practice with either the ACA or the ABA. It is this type of issue which a converged regulator should have the powers to address, yet ACMA will find its powers as limited as those of two existing regulators.

In addition, there is an urgent need to review the powers of the broadcasting regulator and the effectiveness of the penalty regime for breaches of licence conditions. In 2004 it emerged that the regime for licence conditions imposed on commercial broadcasters is virtually unenforceable. This undermines the effectiveness of the Act and the credibility of the regulator. It is unfortunate that ACMA will carry the baggage of its predecessor.

More generally, we are hopeful that the context of communications convergence will prompt a review of the consumer protection aspects of regulatory policy. It is the Centre's view that over 14 years of practicable operation of co-regulation in the broadcasting environment and 8 years in telecommunications have resulted in valuable experience and knowledge about the ways in which industry and consumers can participate most effectively in regulatory processes.

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.

These issues are addressed in the recent report to the ACA, *Consumer Driven Communications: Strategies for Better Representation* (ACA, 2004, https://www.aca.gov.au/consumer_info/CDC_committee/).

Some specific recommendations from that Report proposing amendments to the *Telecommunications Act* are reproduced below. While we would urge the Senate to consider these matters when addressing the ACMA Bill, we hope that a further inquiry into the powers and operations of the communications regulator would enable some of these issues to be explored in more detail.

2 The Telecommunications Act 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 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;'

3 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:

> "(4) Regulatory policy
> The Parliament intends that telecommunications be regulated in a manner that:
>
> (a) promotes the ~~greatest practicable~~ 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."

This is a moderate change to regulatory policy, informed by several years of practical implementation of the current framework. It would recognise both the successes and failures of the current arrangements.

This does not require ACIF to be removed from the framework or even a radical alteration in the emphasis on co-regulation No change would be required to the further statement of regulatory policy in section 112.

4 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.

PROVISIONS OF THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY BILL 2004

Clause 8 ACMA's telecommunications functions

(1)(d) 'to report and advise the Minister in relation to matters affecting consumers, or proposed matters affecting consumers'

It is acknowledged that clause 10 largely reproduces section 6 of the ACA Act. However experience of the application of the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* emphasises the importance of effective consumer protection regulation in a competitive environment. Consumer protection is a core component of telecommunications regulation in Australia, manifested in the objectives of both the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. However, the telecommunications functions of the new regulator do not include a clear statement of regulation directed towards consumer protection, only the requirement to report to the Minister on matters affecting consumers.

The decision to characterise the regulator's functions in this respect only in terms of reporting to the Minister on these matters appears to indicate a lesser regard for consumer protection. It would be preferable to include in the telecommunications functions of ACMA explicit statements regarding these operations, such as:

> *'To regulate telecommunications in order to ensure an adequate level of protection for consumers within a competitive telecommunications market'*
>
> *'To monitor compliance with and to enforce consumer protection requirements'.*

Clause 10 ACMA's broadcasting and datacasting functions

It is acknowledged that clause 10 largely reproduces section 158 of the BSA. As pointed out above, several years' operation of the BSA and experience of the ABA suggest that public confidence in the regulator can be undermined by a perception that the regulatory framework does not adequately promote compliance and enforcement. As a result, it may be appropriate to review the statement of broadcasting functions.

In subclauses 10(j) and 10(l), while the regulator's role in monitoring compliance with codes and standards is acknowledged, there is no mention of enforcement of those codes, standards, and licence conditions. This has been a point of criticism of the current arrangements and it would be desirable to attend to the problems in relation to enforcing broadcasting codes and licence conditions as soon as possible. The role of the regulator in enforcing these instruments in an important part of administering a legal framework that includes both self-regulatory and regulatory arrangements.

Clause 30 Obligation to disclose interests before deciding a particular matter

It is encouraging to note the disclosures system for conflicts of interest built into the ACMA Bill. Our suggestion for improvement to the regime would be an amendment to 30(4) which requires that in circumstances where a conflict is disclosed and members have accepted that the affected member will continue to work on the matter, the disclosure becomes a matter of public record. There may be good reasons for the member to continue with the matter, however such an arrangement is necessarily a compromise arrangement. Recent experience suggests that it is as important to avoid any questions of perceived bias as well as accusations of actual bias. Given the increased size, budget and scope of operations of the new communications regulator, the importance of transparency in decision-making should be acknowledged from the outset.

Clause 57 Annual Report

Clause 57 of the ACMA Bill requires the new regulator to maintain the reporting requirements currently imposed under section 50 of the ACA Act. The Explanatory Memorandum 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'.

In the Centre's view, the ACMA Bill and the associated transitional provisions present the opportunity to bring into line the practices of the two arms of the communications regulator. The ABA publishes reports of its major investigations and makes available a public database of code complaints which have been upheld by the Authority. However, the combined requirements of sections 149, 178 and 179 of the BSA and the function to report on the operations of the Act (section 158(n)) do not result in a reporting regime as transparent and comprehensive as that of the ACA under section 105 of the *Telecommunications Act* (under which the Minister is required to table a report in Parliament) and section 6 of the *ACA Act*. Specifically, the report by the ABA to the Minister on the operation of the Act would be a valuable addition to material that is placed in the public domain.

Clause 59 Consumer Consultative Forum

The Consumer Consultative Forum (CCF) of the ACA is an integral part of consultation on matters relating to consumer protection. In our view, industry participation through the self-regulatory processes that lead to consumer codes can only be successful if there is effective consumer participation. This is not to say that self-regulation will necessarily and automatically be effective if consumers participate – simply that it cannot succeed without it. The recent report to the ACA, *Consumer Driven Communications: Strategies for Better Representation*, explores the issue of consumer participation and notes that with some restructuring the CCF could work effectively as the leading source of consumer advice to the

communications regulator. For this reason, we believe that it would be timely to amend the legislation to take account of these recommendations for an enhanced role for the CCF, pursuant to the findings of the CDC Report: The relevant recommendation is extracted below:

28 The ACA restructure its current Consumer Consultative Forum (CCF) in the following way, to be referred to as the Consumer Consultative Framework.

(1) Create a standing 'Consumer Council', with a fixed number of consumer representatives selected in a transparent way for a fixed term such that the consumer movement has confidence in that representation.

The Consumer Council will have a membership that is committed and resourced to provide ongoing involvement with the ACA about consumer matters. It would provide authoritative policy advice to the ACA, be empowered to take the initiative in raising matters for ACA attention, and form part of the accountability framework for the ACA, contributing to the formation and review of enforcement and audit plans and activities. It should meet on a regular basis, but be available for urgent matters as needed. As a standing Group, members would need to be resourced to meet that commitment. The Consumer Council will be convened as a review panel to directly advise the Authority on the following matters (without limiting the activities of the Council):

1. Consumer codes presented for registration
2. Draft service provider rules, licence conditions relating to consumer protection
3. Other relevant regulatory initiatives, for example, amendments to the Customer Service Guarantee
4. Advice to the Communications Minister.

The Consumer Council will take a significant role in directing the activities of the Consumer Forum (see below). Members will attend the regional meetings and ensure that concerns raised by consumers are addressed by the ACA.

(2) Create a 'Consumer Forum', open to all consumer representatives with an interest in communications. This Forum to operate primarily on a regional basis, meeting on a State-by-State basis. Regional meetings will function to gather consumer input about communications related issues, and to provide relevant ACA material to consumer participants.

On an annual basis, selected forum members will be assisted to attend a national Forum (held in various state capital cities in rotation), to facilitate national consumer consultation and information exchange.

It is envisaged that the members of the Council and the Forums would include representatives from the broad range of consumer interests. This might need to be done on a more or less regular basis.

Committees should be formed as needed to address particular concerns from the diverse needs of the community such as people with a disability, Indigenous people, people in rural and remote areas, young people and older people. However, people with a disability have ongoing concerns with accessibility of technology in order to use the Standard Telephone Service. Therefore, a Disability Liaison Forum should be established by the ACA to comprehensively deal with current and future issues.

Such particular forums would need to be co-ordinated by the Consumer Council and communicate with both the Council and Forum levels of the revised CCF framework.

The ACA to provide a budget and secretariat service for the operation of this Framework.

(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

In the Introduction to this submission it was noted that the ACMA Bill effects a merger of the administrative and organisational aspects of the two communications regulators and remains silent on the powers of the new ACMA. Accordingly, in our view this question is better addressed at a later Inquiry into the powers of ACMA in the context of convergence. As a preface to the Inquiry we would note that market power is likely to be an issue of greater, rather than lesser significance in a converged media environment, especially if there is further deregulation of the media ownership laws.

We understand that the government wishes to proceed with deregulation of cross-media ownership. This would present opportunities for enhanced market power on the part of a handful of leading media and telecommunications companies. The ACCC has already pointed to the dangers of market power in new media markets and the potential of merged companies to impede competition in more traditional telecommunications services (see ACCC, *Emerging Market Structures in the Communications Sector*, June 2003). If the communications regulator loses some of its powers over structural regulation as a result of amendments to cross-media rules, the ACCC will need enhanced powers in the form of media-specific competition rules. A review of these matters should also take account of related issues such as restrictions currently imposed on the allocation of commercial television licences, multi-channelling and sports rights for commercial and pay TV.

(C) WHETHER THE POWERS OF AUSTRALIA'S COMPETITION AND COMMUNICATIONS REGULATORS MEET WORLD'S BEST PRACTICE, WITH PARTICULAR REFERENCE TO THE UNITED KINGDOM REGULATOR OFCOM AND REGULATORS IN THE UNITED STATES OF AMERICA AND EUROPE

It is not possible to assess this matter without a comparative study of the three regulators. Such a study is not possible in the timeframe of the Inquiry,

It appears that the Government's preferred course is to establish the merged entity of ACMA in an administrative sense only, without considering questions relating to the powers of the two current regulators and the opportunities for addressing aspects of convergence by a combined communications regulator. (We note above the example of a code of practice governing mobile content, which will still fall outside the jurisdiction of Australia's communications regulator even after the merger of the ACA and the

ABA). While in our view it would be preferable to address the issues of operations and powers at the same time as the enabling legislation, in the circumstances these matters could be addressed in a later Inquiry, following the establishment of ACMA. Accordingly, it would be desirable to hold over the question of comparative powers/world's best practice until this second review is conducted.

CONTACT

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