

SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO

**SENATE ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY
AND THE ARTS REFERENCES COMMITTEE**

**INQUIRY INTO THE AUSTRALIAN COMMUNICATIONS AND MEDIA
AUTHORITY**

JANUARY 2005

The Media Entertainment and Arts Alliance

The Media Entertainment and Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Executive Summary

The Alliance welcomes the opportunity to comment on the amalgamation of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) into one statutory authority to be known as the Australian Communications and Media Authority.

In September 2002, the Alliance made a joint submission to the Department of Communications Information Technology and the Arts (DCITA) in respect of its Review of the ABA and the ACA.¹ The submission supported the merging of the ABA and the ACA providing the social and cultural objectives of broadcasting regulation are maintained. The submission argued that 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.

The submission to DCITA noted that "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."

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.

The Alliance notes the Senate References Committee is seeking comment on whether the powers of Australia's competition and communications regulators meet world best practice. The Alliance considers that there is no reason why Australia's regulators should not be able to meet world practice. However, they will be impeded in so doing until such time as a comprehensive review of the policy framework in which the merged regulators will operate is undertaken and a clear policy framework for media and communications in the 21st century is developed and implemented.

¹ The submission was a joint submission made by the Alliance, Australian Film Commission, Australian Film Finance Corporation Ltd, Film Australia Ltd, Australian Screen Directors' Association, Australian Writers' Guild and AusFILM. The submission is available online at www.afc.gov.au.

In April 2003, the then Minister for Communications, Senator Richard Alston said "A key issue now is the need to develop flexible regulator schemes that can deal with an unpredictable and increasingly convergent technological and business environment, while ensuring spectrum is available to be allocated to the most efficient uses."² The Alliance agrees and regrets the fact that a little over 18 months later this has not occurred.

Rather, in the August 2003 Discussion Paper, *Proposal for new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority*, DCITA stated "any future changes to the broad policy and regulatory frameworks for communications would be determined by the Australian Government through its ongoing review processes and are not proposed to be linked to merger considerations which are the subject of this paper."³

The Second Reading Speech for the Australian Communications and Media Authority Bill 2004 sets the agenda as follows:

"The formation of the ACMA is a response to convergence within the communications industry. Digital technologies are reshaping traditional telecommunications and broadcasting industry sectors by allowing new types of devices and services, which in turn create new market opportunities. Businesses are being forced to respond by restructuring the way they do business, their offerings to their customers, and their relationships with other businesses. Consumers have significantly different expectations about the types of services available, their costs and availability than they did a decade ago.

"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, and the other focused chiefly on content issues, to provide a holistic response to converging technologies and services."⁴

The Alliance agrees. However, 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.

On the eve of the digital era, in 1999, the Federal Government commissioned the most comprehensive inquiry into broadcasting in Australia ever undertaken.

The Productivity Commission delivered its report on Broadcasting in March 2000.

The Commission's Report focussed in large part on the so-called digital revolution and the Government's digital broadcasting policy. The Report warned, "Without change to the framework for digital television, the conversion plan is at serious risk of failure."⁵ It made a number of recommendations aimed at driving consumer take-up of digital television and freeing up access to spectrum.

The Productivity Commission further recommended as follows:

² Minister for Communications, Information Technology and the Arts, Senator Richard Alston, Regulating a Converging Environment, ABN AMRO Communications Conference 2003, cited in Submission to DCITA, *Proposal for new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority*, Australian Film Commission, September 2003, page 2, available online at www.afc.gov.au.

³ *Proposal for new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority: Discussion Paper*, DCITA, August 2003, page 6, available online at www.dcita.gov.au.

⁴ Australian Communications and Media Authority Bill 2004, Second Reading Speech, available online at www.aph.gov.au.

⁵ *Broadcasting Inquiry Report*, Productivity Commission, 3 March 2000, page 17.

“To ensure that the social and cultural objectives of broadcasting continue to be addressed in the future digital media environment, the Government should:

- commission an independent, public inquiry into Australian audiovisual industry and cultural policy, to be completed by 2004; and
- following this review, but prior to the final switch-off of analog services, implement a new framework of audiovisual industry and cultural policy.”⁶

The Alliance considers it regrettable that such a review has not been undertaken. Unfortunately, in the intervening period the Australia – United States Free Trade Agreement (AUSFTA) was negotiated, prior to a series of eleven reviews being conducted, all of which are mandated by legislation, between July 2004 and June 2005 into various aspects of broadcasting policy. Because a comprehensive Annex II reservation covering Australia’s audiovisual and cultural sectors was not negotiated in the AUSFTA (as was the case in the Singapore Australia Free Trade Agreement [SAFTA]), it is likely the outcomes of many of those eleven reviews will be constrained by the policy decisions made in the context of the negotiations for the AUSFTA.

Further, the outcomes of these eleven reviews will be considered in the absence of the development of a framework of audiovisual industry and cultural policy for the digital era and separately to consideration of how the new regulator might best be able to operate.

The Productivity Commission Broadcasting Report concluded that the switch to digital television is the most fundamental change in broadcasting since the introduction of television itself. However, as one of the Report’s authors, Stuart Simson, noted on 8 June 2004, “In fact what we should have said is that it is *potentially* the most fundamental change because, as we sit here today, this magnificent opportunity is passing Australia by. This is a totally unacceptable situation.”⁷

The Alliance also questions whether the undertaking of discrete reviews of aspects of broadcasting policy is an appropriate manner in which to develop good communications and media policy. Broadcasting policy was developed at a time of distinct media – radio, television, print publishing. Consequently, it was possible for some policy formulation to be developed for one medium in isolation of other media. However, even fifty years ago, the influence of the media as a whole required comprehensive consideration to avert any one or more owners exerting undue influence – hence the implementation of ownership and cross media rules.

The Alliance notes DCITA has advised submitters to its current broadcasting reviews that comment on issues other than those the subject of the review in question can be raised, but this will not necessarily occur. In any event, it is unlikely to provide a comprehensive response that addresses broadcasting policy in a holistic manner. It will be unlikely to result in the overview achieved in the Productivity Commission Report on Broadcasting or the ACCC Report on *Emerging Market Structures in the Communications Sector* and unlikely to result in a comprehensive policy framework for the future in the which the regulator must operate.

Whilst the Alliance does not agree with all of the recommendations contained in the Productivity Commission Report on Broadcasting, its overall thrust is as pertinent today as it was five years ago. As the ACCC noted in 2003, “Given the various interrelationships between the media regulations a fundamental reconsideration of media regulation is required. That is, the media regulations cannot be examined in isolation and any reform needs to take place ‘across-the-board’.”⁸ The ACCC went on to say, “The regulations applying to the FTA and pay TV sectors should be considered in a comprehensive manner – that is – a broad review of the regulations applying to pay TV and FTA broadcasting is necessary. It would be undesirable for further amending of the media regulatory

⁶ Recommendation 11.4, *Broadcasting Inquiry Report*, Productivity Commission, 3 March 2000, page 422.

⁷ *Whatever Happened to the Productivity Commission Report?* Stuart Simson, address to Network Insight Seminar, 8 June 2004, available online at www.networkinsight.org/publications/publications_08June2004.asp.

⁸ *Emerging market structure in the communications sector, A report to Senator Alston, Minister for Communications, Information Technology and the Arts*, ACCC, June 2003, page xvii.

framework to occur in a piecemeal fashion – a thorough assessment of the regulations and how they relate to each other is necessary.”⁹

Australia’s media and competition regulators will be best placed to achieve world best practice when they can do so within a comprehensive holistic policy framework.

The need for a comprehensive independent review is not going to go away. In October 2004, the Productivity Commission released its *Discussion Draft: Review of National Competition Policy Reforms*. In respect of communications it suggested “Government policy should focus on facilitating the emergence of new and innovative ways to deliver more content and more choice to consumers. Removing the restrictions on competition ... would be a first step to achieving these aims. It would also help to facilitate the uptake of new technologies and ensure that these technologies are used in ways that maximise their potential.”¹⁰

One of DCITA’s current reviews is looking at matters relating to the end of the moratorium on the issue of new commercial television broadcasting licences. However, the Government, in announcing the review “indicated that it intends to amend the current legislative arrangements which give the Australian Broadcasting Authority (ABA) the power to allocate new commercial television broadcasting licenses so that the power is vested in the Government.” Consequently, the review “will therefore be conducted on the basis that the Government intends to amend legislation to provide that decisions regarding the allocation of new commercial television broadcasting licences will now rest with the government of the day. The review will examine how this decision should be implemented. It will focus on the process and the framework for making decisions, and will not address the question of whether or not a new licence should, in fact, be allocated.”¹¹

In its submission to the DCITA Review, the Australian Consumers’ Association expressed their reaction to the Government’s decision to reclaim the power to grant licences, neatly echoing the Alliance’s views, as follows: “It does not seem that this desire by Government to take the reins is based on empirical data or actual events that indicate the ABA is not competent to oversee the issuance of any new license. We recognise the significant public interest concerns in broadcasting, and hence consider it appropriate that there should be regulatory management of the industry. Government has an appropriate role in setting the parameters and goals of that regulation, however, in our view it is not the place of the government of the day to micro-manage such processes, or to take the final say in what are commercial matters.”¹²

The Government’s ad-hoc approach to digital television policy, through granting concessions to different parties, leads to a framework that focuses on what can’t be done rather than what can, says Professor Varan, inaugural chair in New Media at Perth’s Murdoch University.

This creates a restrictive environment that prevents producers of local content from grappling with important issues, Varan says.

It also puts them at a ‘massive competition disadvantage’ when trying to sell shows internationally, as they fail to incorporate digital and interactive content.

“Digital is very confusing in Australia, it’s been a very chaotic few years, mostly because of ongoing policy dilemmas,” he says.

“There is inherently conflicting policy and there’s no confidence in what the policy will be tomorrow.”

⁹ *Emerging market structure in the communications sector, A report to Senator Alston, Minister for Communications, Information Technology and the Arts, ACCC, June 2003, page 59.*

¹⁰ *Discussion Draft: Review of National Competition Policy Reforms, Productivity Commission, October 2004, page 196, available online at www.pc.gov.au.*

¹¹ *Provision of Commercial Television Broadcasting Services After 31 December 2006, Issues Paper, DCITA, July 2004, available online at www.dcita.gov.au.*

¹² *Submission to DCITA Review of the Provision of Commercial Television Broadcasting Services After 31 December 2006, Australian Consumers’ Association, available online at www.dcita.gov.au.*

Such instability threatens Australia's position as a global leader in the export of traditional television content, Varan says.¹³

The Age, 29 June 2004

The Council of Australian Governments (CoAG) established the National Competition Council (NCC) to oversee the implementation of national competition policy. In its submission to the Productivity Commission's Review of National Competition Policy Arrangements, the NCC reported that the Australian Government has failed to meet its legislation review commitments in respect of communications.¹⁴ The NCC submission continued: "The Australian Government is a party to the NCP and also disburses competition payments. While the Council assesses the Australian Government's progress in implementing the NCP program and reports publicly on its performance, the Australian Government does not receive NCP payments. This creates an inconsistency in how jurisdictions are treated when they fail to comply with their commitments. Apart from the opprobrium of being found not to comply, there are no incentive mechanisms operating on the Australian Government to progress reforms. Indeed, the Australian Government's relatively poor performance has been noted by the States and Territories subject to penalty recommendations. The PC could usefully look at how this might be addressed."¹⁵

In 2003, the NCC, in its *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, stated in relation to the restrictive nature of broadcasting regulations:

"The Commonwealth Government has addressed neither the benefits and costs to the community from these restrictions nor whether its objectives in broadcasting could be achieved without these restrictions. The Council assesses the Commonwealth as having failed to meet its NCP obligations, because it did not consider the major restrictions of competition against the CAP clause 5 principle."¹⁶

In recent years, the ABA has also conducted a number of reviews at the behest of the Government, the reports arising from which have yet to be released, including:

- the 2003 Review of Australian Content on Subscription Television
- the 2000 Investigation into Expenditure Requirement for Pay Television Documentary Channels
- the 2000 Proposal for Pre-Production Expenditure in respect of the Pay Television Drama Expenditure Requirement.

It is difficult to see how the structural merger of the ABA and the ACA will overcome the many issues identified by the Productivity Commission, the ACCC and the NCA as needing urgent policy attention.

As noted above, DCITA has embarked on a series of 11 reviews required by the Broadcasting Services Act 1992. The first, the review into the Provision of Services other than Simulcasting by Free-to-air Broadcasters on Digital Spectrum, had to be conducted by 1 January 2005. The discussion paper was released in May 2004 calling for submissions by 30 July 2004. Consequently, that legislative requirement has been met. The legislation also requires the Minister to table the review report in Parliament. The report is to be developed following Government consideration of the issues raised in the review. Other than the date by which the review is to be conducted, the process is the same for the other ten reviews. With no time line mandated other than causing the reviews to occur, the Alliance is concerned that the reviews will follow the course of the Productivity Review of Broadcasting where a

¹³ *Out of tune with the magic of digital TV*, Adam Turner, *The Age*, 29 June 2004, available online at www.theage.com.au.

¹⁴ Submission to the Productivity Commission's Review of National Competition Policy Arrangements, NCC, June 2004, page 15, *Discussion Draft: Review of National Competition Policy Reforms*, Productivity Commission, October 2004, page 194, both available online at www.pc.gov.au.

¹⁵ Submission to the Productivity Commission's Review of National Competition Policy Arrangements, NCC, June 2004, page 39, available online at www.pc.gov.au.

¹⁶ National Competition Council, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2003 - Volume two: Legislation review and reform*, August 2003, p.11.7 available online at <http://www.ncc.gov.au/pdf/AST5LR-012.pdf>.

report was released but no action undertaken or, as in the case of the ABA reviews mentioned above, the reviews undertaken but the reports not released.

The Senate References Committee asked for comment on the whether Australia's competition and communications regulators meet world best practice with particular reference to the United Kingdom regulator Ofcom and others.

Ofcom is the regulator for the communications industries with responsibilities for television, radio, telecommunications and wireless communications services.

"Ofcom exists to further the interests of citizen-consumers as the communications industries enter the digital age.

"To do this Ofcom shall:

- Balance the promotion of choice and competition with the duty to foster plurality, informed citizenship, protect viewers, listeners and customers and promote cultural diversity.
- Serve the interests of the citizen-consumer as the communications industry enters the digital age.
- Support the need for innovators, creators and investors to flourish within markets driven by full and fair competition between all providers.
- Encourage the evolution of electronic media and communications networks to the greater benefit of all who live in the United Kingdom."¹⁷

The Alliance is wary of comparisons with overseas counterparts as the circumstances are always different.

However, what is clear is that Australia is years behind the United Kingdom in driving digital switchover. In its 2004 report to the Secretary of State, *Driving digital switchover*, Ofcom reported "[t]he growth of digital TV has been one of the UK's most significant commercial and technical achievements of recent times. Since its launch in 1998, digital TV has grown faster than almost any other electronic household good or service, and the UK is recognised as the global leader in digital TV adoption."¹⁸

In June last year, one of the authors of the Productivity Commission Report on Broadcasting, Stuart Simson, explained the state of play in Australia. "Four years on from our report, and six years since the digital conversion legislation passed parliament, the market is telling us that the policy has comprehensively failed. A few hundred thousand digital conversions in the free-to-air space is absolute testimony to this. To be precise 322,000 digital FTA homes out of 7.2 million TV households or 4.4 per cent. After taking account of households with multiple TVs the figure is barely two per cent."¹⁹ And the digital subscription sector had signed 400,000 customers. By contrast, digital free-to-view television in the United Kingdom is in 13.1% of households and subscription digital in a further 37.1% of households.

While Ofcom has played an important role in the planning and implementation of the conversion to digital, it is not, however, therefore appropriate to conclude that the failure of the conversion to digital in Australia is a failure that can be attributed to the regulator.

The digital agenda has been determined by the Government. The various reviews that have questioned the process have been set aside. Were the Government to now take the lead and undertake a comprehensive review of communications policy and develop a policy framework that clearly articulates a robust industry and cultural policy as has been done in the United Kingdom, the newly

¹⁷ www.ofcom.org.uk.

¹⁸ *Driving digital switchover*: a report to the Secretary of State, Ofcom, 5 April 2004, page 3, available online at www.ofcom.org.au.

¹⁹ Address to Network Insight Seminar, 8 June 2004, *Whatever happened to the PC Report?* Stuart Simson, available online at <http://networkinsight.org/docs/StuartSimson.PDF>

merged ABA and ACA would be in a position to start benchmarking themselves against the performance of Ofcom.

The longer it takes the more opportunities will be lost. As Ofcom has noted, "Digital switchover has the potential to transform TV broadcasting, not least to create a more effective and well-functioning broadcasting market, it could open new avenues for the creative talents of the broadcasting industry; and it would provide the scope for new and exciting opportunities in broadcasting and in new communications technologies by freeing up a large amount of potentially valuable radio spectrum. The benefits are widely spread, however with some accruing to consumers, some to Government and some to broadcasting companies."²⁰

So while the UK Government has worked closely with its regulator to drive digital switchover and in so doing become a world leader, Australia will be joining the game very late in the day. Switchover will free up spectrum and drive opportunities for the generation of content. As David Currie, Ofcom Chairman, put it: "What does the new world hold for them, with media content delivered over multiple fixed and wireless networks? It means tremendous opportunity – global distribution at low cost, the ability to monetise back catalogues and archives as constraints on broadcast capacity and channel availability are lifted – and of course, digital technology also cuts the cost of production, increasing the margin available for both in-house and independent producers."

The enhanced capacity for delivery of content and hence creation of content that freeing up spectrum will allow could potentially revitalise the film and television industry in Australia at no cost to Government. In the United Kingdom, they are reaching for the future to ensure they are at the cutting edge internationally and poised to capture every opportunity available worldwide. By the time Australia joins the game, the British television production industry will have secured a central place for itself in the international market and Australian content creators will struggle to be seen.

While the UK is confronting the 21st century head on, planning the future, implementing their strategies and grappling with content regulation and the best ways to ensure that British programming plays a central role in a diversified media landscape, Australia is not.

Two years ago, the Alliance was concerned that, in the amalgamation of the two regulators, the importance of content regulation not be overlooked. While the current content regulations administered by the ABA are to be continued within ACMA, the very real concerns that the regulations ACMA will oversee will be inadequate to deal with what should be a rapidly changing environment remain.

So while the Alliance does not have an objection to the amalgamation of the two regulators, we do consider that the opportunities it offered to address the many challenges of the future have been, if not lost, postponed for another day.

While the current regulatory framework may serve the incumbent free-to-air commercial broadcasters well, the Alliance questions whether the framework developed for the 20th century is serving the Australian public or the Australian audio-visual industry as it should in the 21st century. The ACCC, in a submission to DCITA, noted that "[a]n ABN AMRO report on the media sector released in July 2002 noted that the operating margins of Australia's major FTA television companies (at an average of 28 per cent) were amongst the highest in the world (global average of 18 per cent). The report commented that this was the result of the benefits provided by the current regulatory structure of the Australian FTA industry."²¹

Finally, the Alliance considers that if ACMA is to be a world class regulator it must be resourced to do so. As Stephen Carter, Ofcom Chief Executive put it on 13 January 2004, "The first task – as ever, for an evidence-based regulator – is some fairly intensive research." Research does not happen in a vacuum. Good research is essential to good policy outcomes and it must be well resourced.

²⁰ *Driving digital switchover*: a report to the Secretary of State, Ofcom, 5 April 2004, page 3, available online at www.ofcom.org.au.

²¹ ACCC Submission to DCITA, Provision of services other than simulcasting by Free-to-air broadcasters on digital spectrum, 23 August 2004, page 11, available online at www.dcita.gov.au.