

**Competitive**

**Carriers'**

**Coalition Inc**

---

**Submission to the Senate Environment, IT Communications  
and the Arts Committee**

**Inquiry into the Powers of Communications Regulators**

**January 2005**

## **Introduction**

The CCC welcomes the opportunity to contribute to the Senate ECITA committee's inquiry into the power of communications regulators. The CCC is an association representing a group of non-dominant telecommunications carriers in Australia. The CCC stands apart from other representative groups because it speaks exclusively for carriers and carriage service providers that have invested in building their own competitive infrastructure, rather than simply trying to resell Telstra products.

Its members have invested over \$4 billion in competitive infrastructure and have been at the forefront of driving competition in markets as diverse as 3G mobile services, corporate data and voice services, wholesale transmission and residential Internet and voice products.

## **Executive Summary**

The merger of the ABA and the ACA provides an opportunity for a detailed examination of the regulatory arrangements operating in the telecommunications industry. The CCC believes that there is presently a mismatch of resources across the various regulatory functions, specifically a shortfall of resourcing for the competition functions carried out by the ACCC.

The resources of the ACA for the technical and consumer functions performed by that agency are disproportionately high compared to the funding of competition regulation, which the CCC contends should be the higher priority concern.

However, these misplaced priorities in part reflect the consequences of the failure of sustainable competition to develop in Australian telecommunications market due to continuing structural problems. This has resulted in an increasing reliance on regulation to affect outcomes, particularly for consumers, which a robust and competitive market would deliver without regulatory intervention. This increased regulation has in turn created regulatory fatigue among new, competitive entrants, which is in turn a barrier to entry and stymies competition. In other words, we have reached a point where we see a vicious circle of market failure being chased by more regulation, which in turn facilitates more market failure.

Nevertheless, the merger of the ACA and ABA should be seen as an opportunity to re-examine the roles of agencies and alternative divisions of functions, extending to a consideration of whether all telecommunications functions should be centralized with one, new agency. Present funding priorities could also reflect inappropriate regulatory arrangements leading to duplication.

However, it is unlikely that any changes to telecommunications regulatory arrangements can be fully effective unless they are accompanied by policy and regulatory reforms to address the structural causes of the failure of competition in communications markets.

The CCC believes there are several developments that are likely to occur in the next year that would justify a comprehensive review of the regulatory agencies within 18 months of the creation of ACMA.

### **The Drivers for Change**

The CCC believes that there is an urgent need for the regulatory arrangements for the management of communications to be fundamentally reviewed. Separately to this submission, the CCC has made representations to the Government calling for a large increase in the funding of the ACCC to support its functions in overseeing competition issues in telecommunications. The CCC believes that there is a crisis in the regulation of telecommunications, particularly the enforcement and oversight of safeguards to competition that requires immediate action. (refer below)

The CCC has also consistently called for action to address the structural impediments to competition that have been identified by the ACCC, the Productivity Commission and the National Competition Council, among others. It is this failure that has led to the crisis in competition management. These two are the top priority issues for regulatory reform.

The process of bringing together the ACA and the ABA will necessarily require some consideration of the resourcing of telecommunications-related activities presently conducted by the ACA. Some of these activities have important areas of overlap with competition issues. The CCC believes that it would be opportune in the context of this merger to lock in a statutory review process of the amalgamated ACMA. A set review would be well placed, within 18 months of the merger, to ascertain the progress of the merger and the impact of significant changes to the sectors subject to regulation. Further, this review would offer the opportunity to consider the merits of a rationalization of functions, and even consider the case for further action. The example of the UK, where the regulators have been unified into Ofcom in the past year, would provide valuable insights in a review conducted in such a timeframe. Ofcom would by then have been in operation for long enough to have established a track record.

A focus of such a review should be to identify how the regulatory burden on the industry can be lightened through the removal of duplication and the better prioritizing of regulatory obligations imposed on industry.

CCC members have experienced a steady increase in the regulatory burden imposed by the plurality of agencies and apparent overlapping of their roles in telecommunications regulation. They have also become increasingly dissatisfied with the performance of the ACA in particular, and its apparent unfriendliness to commercial concerns.

The ACA has increasingly been seen as a follower rather than a leader in terms of regulatory guidance and oversight. This has caused significant duplication and regulatory burden on the industry as a whole.

These issues have contributed to the regulatory fatigue that is affecting all of the industry, including consumer and user representative groups. The CCC has long contended that the inexorable increase in micro-regulation of the industry and the dissatisfaction with self-regulatory models are a direct function of competition to develop as fully as was hoped in 1997. This view is supported by recent comments from the ACCC.<sup>1</sup>

The CCC therefore contends that the competition framework requires review and revitalization, similar to that being undertaken in the UK, to ensure that it keeps pace with technological changes and the lessons of the experience of the past eight years. This review must extend to the arrangement and organization of regulatory roles between agencies. But, like the UK, addressing the core causes of competitive failure must be the driver of any changes proposed, including changes to regulatory arrangements.

### **Resourcing the Regulation of Competition**

The CCC believes that the most immediate problem in telecommunications regulation today is with the oversight and enforcement of competition, which has reached a crisis point. The ACCC is seriously under-resourced and under-skilled for the tasks it must perform in relation to telecommunications, and a severe bottleneck has developed with urgent matters not progressing satisfactorily. It is also important to understand that this is having the effect of demanding that individual companies devote ever more resources to regulatory issues.

The CCC submits that the level of resources devoted by the ACCC to the oversight and regulation of the telecommunications industry is significantly below the level where the industry can have confidence that the regulator is able to control behaviour, ensure compliance and intervene effectively to protect competitors from the misuse of market power by incumbents.

The CCC submits that the evidence of a growing crisis in the past two years has had a significant effect on the decision-making of consumers of communications services, especially in corporate markets, and can only create a strongly negative environment for investment in communications.

Evidence of this crisis and the broader need for reform includes;

1 The repeated acknowledgement by the ACCC that it lacks the ability to address the fundamental incentive and ability of Telstra to act in ways detrimental to competition.

---

<sup>1</sup> ACCC Telecommunications Reports 2002-03, report 1, Telecommunications Competitive Safeguards for the 2002-03 financial year.

2 Increased regulatory burden on competitive carriers. Carriers are incurring increased regulatory costs, contrary to the intention in 1997 that the industry would see reduced regulation and regulatory burden as competition spread. Of particular concern is the extent of regulatory reporting required of carriers. There are some 15 or more reports that carriers must provide to the ACCC, ACA and DCITA on a quarterly and/or annual basis. However none of these reports appear to have any positive impact upon the competitive structure of the industry and appear only to provide interesting statistical data.

3 Overlapping functions between the ACA, the ACCC and sometimes other departments and agencies, in areas such as consumer protection. A recent example has been the approach to considering the implications of the introduction of Voice of Internet Protocol services. The CCC believes that the most important issues arising from the introduction of VoIP are competition-related, and the agency taking the lead in directing industry focus should be the ACCC. However, the industry has been asked to provide information and respond to separate inquiries from the ACA, DCITA, the ACCC and ACIF, work which seems poorly co-ordinated. The ACA asked Industry participants to respond to detailed inquiries intended to assess all the regulatory arrangements that might at some point need to be changed to accommodate VoIP. Increasingly, it appears that the changes required to accommodate VoIP are minimal, and that few of those are urgent.

The VoIP experience illustrates the need to rationalize reporting to ensure that such information is constructively fed into improvements in the regulatory regime. The proliferation of these reports is another manifestation of the deficiencies of a regime of multiple regulators. The future model for the regulator must ensure that reporting is coordinated and streamlined.

An example of overlapping and conflicting policy and regulatory activity is demonstrated in the ACA behaviour in its zeal to develop new and inconsistent content regulation for the mobile environment. There appears to have been a lack of coordination with other regulatory and industry bodies in the development of the ACA's draft determination. For example, the ACA's discussion paper states that the 'self-regulatory' arrangements include portal (or walled garden) content, yet do not acknowledge the very significant amount of work on portal content already undertaken by the mobile carriers, the IIA and the Australian Broadcasting Authority in relation to the IIA's revised content code of practice. Similarly, while the ABA has approved a credit card-based age verification procedure for internet regulation, the ACA has explicitly stated that this would be unsatisfactory for mobile content. The ACA's discussion paper provided no evidence to support its view that the ABA-approved age-verification procedures are insufficient. In addition, the ACA seems to have ignored the Government's existing focus on law enforcement and community education for chat services, an approach that has the support of industry and other regulatory bodies such as the Classification Board and the Office of Film and Literature Classification.

At the same time the ACCC has expressed its concern about exclusive content rights and the fears that Telstra (a carrier with significant market power) is choking competition in

the broadband and 3G mobile markets. The ACA appears to have little concern about competition and development implications and it is unclear if the ACCC has the powers to deal with the competition issues.

These broad areas of concern are compounded by the mismatch in resources between the ACCC and Telstra. It is understood that Telstra alone enjoys a legal and regulatory budget 10 times that of the ACCC telecommunications group. It is the CCC's long-held view that the only means of finally resolving the serious points of failure of competition in the telecommunications industry in Australia is for the Government to comprehensively consider structural reform options and implement serious and fundamental changes as a result. Without appropriate structural arrangements to underpin effective competition, any industry regulator will inevitably be swamped by the need to make an ever-expanding number of incremental interventions. This is especially the case for telecommunications where the rapid pace of technological change creates so many opportunities for market power to be exercised anti-competitively.

Recent expressions of concern by the ACCC about the use of exclusive control of content to further frustrate competitive entry shows that these new generation convergence issues are no longer problems of tomorrow but are very much alive today. Members of the CCC have previously described the use of content control by Telstra to gain competitive advantage.<sup>2</sup>

Notwithstanding that the issue of Telstra market power arising from its integrated structure requires a comprehensive policy response, there is also a clear need in the interim for an urgent response to the symptoms of the structural flaws and measures to make regulatory arrangements as efficient as possible.

### **Reconsidering the Roles of Regulators**

Beyond an immediate significant increase in resources to the ACCC to perform its present functions, the CCC believes that there is a need for a review of regulatory arrangements and policy settings that should encompass the roles of the ACCC and other agencies such as the ACA.

As discussed above, however, the timeframe in which this should occur needs to take into account other mooted legislative changes that could profoundly influence the environment in which these agencies operate. For example, it is likely that the legislative arrangements to allow the final sale of the publicly owned portion of Telstra will be put in place over the next year. Minister Coonan as said that this process will include a consideration of regulatory arrangements relating to competition and consumer protection.<sup>3</sup> It is also likely that changes to cross-media ownership laws will be passed.

---

<sup>2</sup> Comindico submission to Senate ECITA Competition in Broadband inquiry October 2003

<sup>3</sup> Telstra Issues in Question. [www.australianit.com.au](http://www.australianit.com.au) February 2 2005

Both of these developments will have important impacts on the roles and responsibilities of regulators. In particular, any reforms targeted at dealing with the structural impediments to competition in telecommunications would have profound implications for regulatory arrangements.

## **Options**

The CCC has identified various options for reform of regulatory arrangements but does not at this time endorse any particular model. Rather, it believes that they require further investigation. Within the timeframe of the proposed passage of the legislation to merge to ACA and the ABA, it is unlikely that a comprehensive review of the roles of relevant regulators could be conducted

The CCC therefore proposes that there be a mandated review of the effectiveness of the ABA/ACA merger should commence within the first 18 months of the merger. The review would likely be able to identify:

- As yet unidentified synergy opportunities.
- The impact of likely sectoral change (cross-media law amendments, privatization of Telstra and associated consumer and competition protections)
- Whether domestic and overseas experience suggests that there is a case for an industry specific regulator, incorporating also the competition functions
- Whether there should be a transfer of consumer protection activities from the ACA to the ACCC, and an associated increase in resources and consistency of focus.

## **Conclusion**

Reform of the telecommunications industry to introduce competition has been one of the boldest policy initiatives of recent Governments. However, there has not been a major review of the policy framework since the introduction of full competition in 1997. The evidence of recent years from a range of sources, not least the ACCC, indicates that such a review is now a matter of necessity as threats to sustainable competition become increasingly apparent.

In the meantime, the CCC calls for an immediate increase in the resources to the highest priority area of competition regulation. Separately, a full consideration of the appropriate roles and responsibilities of the various regulators of the industry, with a view to considering how those roles can be rationalized and made more effective, should follow within 18 months of the creation of ACMA, taking into account other legislative and regulatory changes that are likely to occur in the meantime.

The CCC would be pleased to expand on the issues raised in this document or any other issue considered relevant.

Please Contact

David Forman  
Executive Director  
CCC