Australian Government

Department of Communications, Information Technology and the Arts

COMMUNICATIONS LEGISLATION AMENDMENT (INFORMATION SHARING AND DATACASTING) BILL 2007

ECITA COMMITTEE QUESTIONS

PART A - INFORMATION SHARING PROVISIONS

Introduction

Parliament has recently passed the *Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act* 2007 which, among other matters, provided the Australian Competition and Consumer Commission (ACCC) with powers to provide information to a range of other entities, including Australian Communications and Media Authority (ACMA). The ACCC's information gathering powers commenced on 19 July 2007. However, no similar powers exist for ACMA to provide relevant information to the ACCC. Both regulators believe that an ability to exchange information will assist them to fulfil their regulatory roles more effectively and this Bill introduces those complementary powers for ACMA.

The ability for ACMA and the ACCC to exchange information will also reduce the reporting burden for industry. Where the two agencies previously gathered the same information from industry (including broadcasting and telecommunications companies), complementary information-sharing powers will allow information to be gathered through a single operation.

Whilst the Bill is primarily aimed at clarifying the ability of ACMA to share important regulatory information with the ACCC, ACMA also has cooperative relationships with a range of other regulators and entities. For completeness, the provisions of this Bill clarify ACMA's ability to share information with these other entities.

This document has been prepared in consultation with the ACMA in response to a request for information from the Senate Environment, Communications, Information Technology and the Arts Committee.

On 19 July 2007, the Committee Secretariat wrote to the Department and ACMA seeking our views regarding issues raised by the ABC and Free TV Australia in their submissions. Further to this the Committee Secretariat asked the Department to address specific questions in relation to privacy matters are in the submissions provided by the Office of the Privacy Commissioner (OPC) and the Victorian Privacy Commissioner (VPC).

Free TV Australia and Australian Broadcasting Corporation (ABC) Submissions

Submissions provided by Free TV Australia and the ABC have raised concerns regarding the protection of information provided to ACMA by broadcasters on a confidential basis.

Please refer to the Department's response to question 4 below which addresses these concerns.

Specific questions – privacy issues

Section 3 – 'authorised disclosure information'

1. *The Office of the Privacy Commissioner (OPC) and the Victorian Privacy Commissioner (VPC) argued that reference to the definition of 'personal information' that is also 'authorised disclosure information' and compliance with the Privacy Act 1988 should be included in the bill (OPC p. 3, Vic Privacy Commissioner, pp 2–3).*

   What is the department's response?

The Department notes that the vast majority of information that is likely to be shared by ACMA would not be personal information. In practice, it is envisaged that the majority of 'authorised disclosure information' would relate to matters such as the structure of relevant commercial transactions, and commercial relationships between parties to transactions, their suppliers and customers.

The Department notes, however, that any 'personal information' collected by ACMA would fall within the scope of the *Privacy Act 1988* and the Bill is not intended to alter the application of that Act to ACMA in general.

Advice provided to the Department by the Office of the Parliamentary Counsel in drafting the Bill was that a specific provision noting the continued application of the *Privacy Act 1988* would simply be declaratory of existing law and would therefore not be necessary (or indeed preferable from a legislative drafting perspective).

The *Privacy Act 1988* will continue to apply to ACMA and the information it collects regardless of whether or not the Bill specifically notes its continued application or makes reference to the definition of 'personal information' as defined in the *Privacy Act 1988*.

The Department and ACMA note the amendments proposed by OPC and the VPC but consider they would not make substantive changes to the operation of the Bill or the *Privacy Act 1988*.

The Department is mindful of the need to make clear that the *Privacy Act 1988* will continue to apply and considers this is most appropriately done through the inclusion in the Explanatory Memorandum to the Bill of a statement explaining this intention.

The Department notes that page 14 of the Explanatory Memorandum to the Bill states:

> *"It is important to note that, to the extent that information to be disclosed under proposed new Part 7A includes "personal information" as defined in section 6 of the Privacy Act 1988, the provisions of that Act will apply. In particular, it is not intended that the disclosure provisions included in proposed new Part 7A should override the Information Privacy Principles contained in section 14 of the Privacy Act 1988."*

2. *Can the department explain how, in general, the Privacy Act and the Privacy Principles will apply to ACMA and the Minister?*

ACMA and the Minister are bound by the Commonwealth *Privacy Act 1988*, which provides a framework for the collection, maintenance and disclosure of personal information collected by all government agencies.

That Act lays down strict safeguards which "agencies" must observe in their dealings with personal information. "Agency" is defined in section 6 to include, inter alia, Ministers, Departments (ie each "agency" within the meaning of the *Public Service Act 1999*) and certain bodies established for a public purpose by or under a Commonwealth enactment. The Act applies to ACMA and the Minister in the same way as it applies to other agencies.

Section 14 of the Act sets out 11 Information Privacy Principles (IPPs) which govern how personal information is collected, stored, used and disclosed. The IPPs also allow people, subject to certain exceptions, to access information that agencies keep about them and to request changes to such information.

IPPs 1 – 3 regulate collection and solicitation of personal information. They apply when an agency collects personal information and intends to include the information in its records or publish the information in a generally available publication. IPPs 4 – 7 deal with security of personal information, availability of information about the kinds of records held by agencies and access to, and correction of, personal information. IPPs 8 – 11 deal with the use and disclosure of personal information.

The provisions of this Bill will not override the protections provided by the *Privacy Act 1988* as it applies to personal information (including the Information Privacy Principles contained in that Act).

IPP 11 ("Limits on Disclosure of Personal Information") is particularly relevant to this Bill. IPP 11 includes a general prohibition on the disclosure of personal information, which is subject to specified exceptions. One such exception is where the disclosure of a record containing personal information is required or authorised by or under law (see IPP 11(1)(d)). The effect of the provisions in the Bill will be to clarify the circumstances in which disclosure by ACMA will be authorised by law and so will fall within this exception to the presumption against disclosure. The provisions of the Bill are framed so as to authorise disclosure of information, which in unusual circumstances

may include personal information, in prescribed circumstances linked closely to the enforcement of existing regulatory frameworks.

ACMA abides by the objective of the *Privacy Act 1988* to protect an individual's privacy by requiring personal information collected and held by Commonwealth Departments and Agencies to be managed in accordance with the *Information Privacy Principles* defined in the *Privacy Act 1988*. ACMA ensures, like other Commonwealth Departments and Agencies that it only collect personal information for a lawful purpose which is necessary or directly related to the its. As required under the *Privacy Act 1988*, ACMA ensures that:

- individuals are made aware of the purpose for which the personal information is collected and
- the information collected is relevant and accurate and stored securely against loss or damage.

Additionally, ACMA staff receive training and advice on the operation of the *Privacy Act 1988* in relation to the performance of their duties.

Other than creating an authorised exemption in prescribed circumstances, it is not intended that the disclosure provisions included in the Bill should otherwise affect the application of Information Privacy Principles contained in the *Privacy Act 1988*.

3. The OPC argued that, for 'authorised disclosure information':

- *consideration be given to expressly excluding personal information from being authorised disclosure information (as the majority of 'authorised disclosure information' will be commercial in nature); or*
- *the bill be amended to provide that, where personal information is disclosed, those disclosures are made to jurisdictions that are assessed in ACMA's view, to be subject to a law, binding scheme or contract which upholds principles for fair handling of the information that are substantially similar to the Information Privacy Principles (pp 3–4). (See also Vic Privacy Commissioner, p. 2)*

What is the department's response to these suggestions?

As noted by the OPC and VPC, the majority of information which ACMA is likely to share with other entities is likely to be commercial in nature (information such as business holdings, business structures, commercial activities and service offerings) and is unlikely to contain personal information.

However, some of ACMA’s regulatory functions are likely to result in the collection of personal information, where that information is relevant to the performance of ACMA’s functions. There are likely to be instances in which this information is of potential benefit to other regulatory entities in performing their duties and functions and it would

therefore be counterproductive to exclude ‘personal information’ from the definition of ‘authorise disclosure information’.

As a specific example, pursuant to Schedule 5 of the *Broadcasting Services Act 1992*, ACMA works closely with overseas regulatory agencies in relation to offensive and prohibited Internet content. Any information ACMA receives in relation to criminal activity on the Internet, such as information relating to child-pornography, will be of direct interest to overseas regulatory bodies, given the global nature of the Internet. This information is likely to include material which may identify persons involved in criminal activity on the Internet.

However, information such as this, which enables a person to be identified, is likely to constitute ‘personal information’. We note that the OPC and VPC have suggested the exclusion of such information from the definition of ‘authorised disclosure information’. However, the Department and ACMA consider this would not be consistent with the Bill’s objective to facilitate the transfer of relevant and useful information.

We also note the suggestion that disclosure of personal information to regulatory entities in other jurisdictions only be permitted where appropriate privacy protections are in place in that other jurisdiction.

The Department acknowledges the importance of ensuring the ongoing protection of personal information. However, as noted above, it is envisaged that the majority of ‘authorised disclosure information’ will be commercial in nature.

In the limited circumstances in which ‘authorised disclosure information’ includes ‘personal information’, it should be noted that sharing of that information will only be permitted in circumstances where the ACMA Chairman is satisfied that the information will assist or enable the other party to perform any of its functions or exercise any of its powers.

In recognition of the potential sensitivity of the information ACMA collects, the list of agencies ACMA will be authorised to share information with has also been limited to those with which ACMA has an ongoing cooperative role.

Importantly, the Bill also makes provision for the Chairman of ACMA to impose conditions to be complied with in relation to the disclosure of information and it is envisaged that this will include conditions addressing the treatment and protection of any personal information.

The Department believes that these measures, particularly when it is considered that the majority of ‘authorised disclosure information’ will be commercial in nature, provide an effective balance between the objectives of the Bill and the need to ensure appropriate controls are in place on potentially sensitive information.

Any further restriction on the ability of ACMA to share information that might contain personal information may impact on its ability to fulfil its enforcement duties, particularly in areas in which cross-jurisdictional cooperation is key.

As an example, ACMA has a range of statutory functions relating to the regulation of the Internet. The global nature of the Internet means a uniform regulatory approach to such issues as offensive Internet content and child-safety online is not possible. As an alternative approach, Australian and international jurisdictions work cooperatively through their respective regulators and enforcement agencies to address Internet content issues and to share relevant information.

A requirement that ACMA limit its collaborative efforts to only those jurisdictions with particular privacy protections in place would have a serious impact on the ability of ACMA to effectively and meaningfully fulfil its existing statutory functions in relation to international enforcement and co-operation issues, such as information on internet content or spam.

4. The ABC argued that the bill should specify that, in circumstances where ACMA discloses authorised disclosure information that has been provided to it on a confidential basis to another entity, ACMA must impose a condition on the recipient entity that it not further disclose the information (pp 1–2).

What is the department's response to this suggestion?

The Department recognises that the information ACMA receives from regulated entities has the potential to be commercially sensitive. Accordingly, the Bill includes a number of measures which seek to balance the public interest in good governance with industry's interest in controlling access to sensitive information it has provided to ACMA.

To this end, we note that the purpose of this Bill is to facilitate the transfer of information only where the receiving party has a legitimate regulatory interest in receiving it. Hence, under proposed new section 59D, disclosure will only be permitted in circumstances where the ACMA Chairman is satisfied that the information will assist or enable the other party to perform any of its functions or exercise any of its powers.

The list of agencies ACMA will be authorised to share information with has also been limited to those with which ACMA has an ongoing cooperative role.

Importantly, the Bill also makes provision for the Chairman of ACMA to impose conditions to be complied with in relation to the disclosure of information. This provision was included to enable the Chairman to impose conditions regarding the treatment of information by recipient entities and in particular, regarding the treatment of information provided to ACMA on a confidential basis.

The Department and ACMA note the suggestion made by the ABC. However, we are the view that the Bill already includes adequate protection through the inclusion of a provision for the ACMA Chairman to place conditions on recipient entities.

Also, the ACCC and ACMA have already publicly signalled their intention to work together to develop guidelines for the handling of shared information.

Section 59F – disclosure of publicly available information

5. *The Victorian Privacy Commissioner noted that 'publicly available information' is not defined in the bill and in its current form is 'extremely broad'. The Commissioner argued that the wording be amended to refer to a 'generally available publication' and that 'generally available publication' be defined in the bill (p. 2).*

   What is the department's response?

The Department notes the VPC's views. The Department also notes the views expressed by Free TV Australia regarding the disclosure of publicly available information.

The Department considers the intention of this section is clearly expressed. This section clarifies that information that is already in the public domain may be disclosed by an ACMA official and has been included for the avoidance of doubt.

We consider that the term 'publicly available' can be sufficiently understood through its ordinary meaning and that no express definition is required. In addition, the nature of the information that ACMA gathers and may provide to relevant agencies will be factual information and data about which definitional issues are unlikely to arise.

6. *The OPC argued that consideration should be given to excluding personal information from the operation of clause 59F (p. 5).*

In its submission the OPC outlines its concerns with reference to the collection of publicly available personal information from a public register or newspaper and notes that the Information Privacy Principles apply to that information regardless of whether the information is also publicly available. ACMA noted that it does not routinely collect personal information in this way. The Department and ACMA note the views of the OPC.

However, we do not consider exclusion of personal information from the operation of clause 59F is warranted. As noted above, it is envisaged that the majority of information ACMA is likely to share with other entities will be commercial in nature. Accordingly, it is envisaged that proposed new section 59F will primarily apply to information that is commercial in nature that is already publicly available. This will provide certainty for ACMA in its dealings with information, such as business structures and commercial offerings, which are already in the public domain.

Section 59H – disclosure authorised by regulations

7. *The OPC argued that regulation making powers under this clause should expressly provide for the privacy of individuals to be a matter of consideration*

for the Chair of ACMA and that the process include consultation with the Privacy Commissioner (p. 5).

The Department notes the OPC's suggested amendment and the suggested inclusion of a requirement for consultation with the Privacy Commissioner. However, proposed new section 59H enables regulations to be made which would enable sharing of 'authorised disclosure information' in specified circumstances. The current drafting proposed new section 59H would allow privacy considerations to be addressed in the making of those regulations. The Department considers that the Bill as currently drafted provides sufficient scope for the consideration of privacy matters. In addition, the Department notes the highly limited circumstances in which 'authorised disclosure information' is expected to include personal information.

8. *The Victorian Privacy Commissioner argued that the 'specified circumstances' envisaged by this clause should be clearly expressed in the bill and that the disclosure of authorised disclosure information that is also personal information should be excluded from this provision (p. 3).*

What is the department's response to these issues?

The Department notes the VPC's views. The reference to 'specified circumstances' in proposed new section 59H is deliberately broad. The regulation-making power has been drafted in this way, to address future circumstances in which there may be a legitimate interest in ACMA sharing information, but which are not covered by the existing provisions. As an example, proposed new section 59F would allow regulations to be made extending ACMA's information sharing powers under the existing provisions to a newly created regulatory agency (ie, where that agency is not listed in the list of entities set out at proposed new section 59D).

For the reasons outlined above in relation to question 3, the Department considers that the exclusion of personal information from the operation of this provision would not be consistent with the objectives of the Bill.

PART B - DATACASTING PROVISIONS

ISSUES RAISED IN AUSTRALIAN BROADCASTING CORPORATION (ABC) SUBMISSION

Note: References to the BSA mean *Broadcasting Services Act 1992*. References to the Radcomms Act mean the *Radiocommunications Act 1992*.

<u>Issue</u>:

Protection against interference to existing services from changes to frequencies for datacasting transmitter licences.

"…the ABC does not believe that the proposed amendments to paragraph 111(1)(d) are an adequate means of protecting terrestrial television transmissions from interference from Channel B mobile television services. Instead, what is required is thorough planning of the channels allocated to Channel B licences of the kind applied to the television services in adjacent channels."

"The [ABC] supports the arguments for a fully-developed planning regime advanced in greater detail by Free TV Australia."

<u>DCITA comment:</u>

Items 6 and 7 would amend paragraph 111(1)(d) of the Radcomms Act to enable the ACMA to vary spectrum frequencies specified in a datacasting transmitter licence (DTL).

The explanatory memorandum explains:

> "The power to vary frequencies on which licences operate is already available to the ACMA in relation to other transmitter licences. It is intended that the proposed amendments would create a consistent approach and enable ACMA to more effectively address technical considerations. For example, it is intended to assist ACMA to avoid possible interference with other services and to facilitate the potential provision of mobile television services."(p19)

The proposed provisions are a technical amendment which would allow ACMA to have greater flexibility in future planning and use of spectrum used for DTLs. Whilst interference issues may be one issue which would require a change in frequency for a DTL, they are not the only issue and the primary purpose of the amendments is not interference mitigation per se.

There are already provisions relating to management of interference. The Technical Planning Guidelines (TPGs) made under section 33 of the BSA are specifically designed to guard against interference with existing television services, by minimising the likelihood of interference occurring and providing a means of appropriately managing any interference that does occur. The TPGs set out rules relevant to the planning and commencement of broadcasting services and services operating under a DTL.

The TPGs contain mandatory technical requirements to be met by commercial, community (including temporary community) and datacasting transmitter licensees

using the broadcasting services bands, when planning and operating new transmission facilities or proposing changes to existing facilities.

Paragraph 109A(1)(f) of the Radiocomms Act requires a licensee of a DTL to comply with the TPGs. At the time of writing, the current version of the TPGs was published in December 2003 and is available on the ACMA website[1]. If interference with television reception does occur, the DTL licensee transmitting the interfering service must take immediate action to prevent the interference.

ACMA has recently conducted a public consultation on proposed amendments to the TPGs prior to the allocation of the Licence A and B datacasting transmitter licences. The changes were intended to provide greater clarity about the guidelines concerning establishment and location of new transmitters, to clarify the application of guidelines relating to overspill and particularly to provide clearer guidance to prospective licensees on the technical arrangements that should be made to avoid 'image channel interference' when installing a network deployment of transmitters under a datacasting transmitter licence. ACMA's consultation paper indicated that the proposed changes will help to ensure that there is no interference to the reception of analogue or digital television.

With regard to a fully-developed planning regime, see comments in response to Free TV Australia.

ISSUES RAISED IN FREE TV AUSTRALIA'S SUBMISSION

ABILITY TO CHANGE FREQUENCIES AFTER DATACASTING TRANSMITTER LICENCES ARE ISSUED

Issue:

Protection against interference to existing services from changes to frequencies for datacasting transmitter licences.

"If Channel B is used for mobile television …..interference to existing digital television services will result." (FreeTV submission Executive summary).

DCITA comment:

Same comment as in response to ABC

Issue:

Planning processes for the allocation or variation of frequencies.

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[1] See http://www.acma.gov.au/ACMAINTER.1638528:STANDARD::pc=PC_90249

"It is imperative that the introduction of mobile television services in Channel B is carefully and cooperatively planned to ensure the new mobile services do not compromise the availability and quality of free-to-air digital terrestrial television services and disrupt the smooth transition to digital television services for all Australian viewers."

"……proposed amendments to the *Radiocommunications Act 1992* should be revised to require ACMA to undertake a planning process for the allocation or variation of frequencies for datacasting services, consistent with the existing approach for broadcasting services."

(FreeTV submission Executive summary).

DCITA comment:

As noted above, there are safeguards to prevent interference from new digital services such as mobile television, and additional safeguards to rectify any interference that does in fact occur.

The amendments contained in the Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007 do not reduce the need for consultation in relation to changes to frequencies in relation to DTLs.

The legislation simply empowers ACMA to make these changes after the licence is issued.

A power enabling ACMA to change frequency allocations after the issue of a licence already exist in relation to transmitter licences for broadcasting services. These include transmitter licences to which section 108 of the Radiocommunications Act applies, transmitter licences for temporary community broadcasting services (section 101A) and permanent community broadcasting services (section 102), transmitter licences for commercial television broadcasting licences and commercial radio broadcasting licences (section 102), and transmitter licences issued under digital conversion schemes (section 102A). The amendments make the situation in relation to DTLs consistent with the situation for transmitter licences for these broadcasting services.

ACMA already plans channels for digitral television in Digital Channel Plans (DCPs) which are subject to consultation requirements. ACMA would, in the case of significant changes to frequencies, conduct a public consultation process as a matter of course as a consequence of these frequency allocations being part of the DCPs[2].

Although digital channels not relating to the conversion of analog television services do not need to be planned in a DCP (though they *may* be), ACMA would only undertake such planning without consultation with relevant stakeholders if it were satisfied that there was a low risk of interference. ACMA's usual practice is to conduct public consultation. In any event, ACMA is required to comply with the objects of the Acts it

[2] Commercial Television Conversion Scheme 1999 and the National Television Conversion Scheme 1999.

administers. ACMA recognises the importance of existing free-to-air television services and will continue to ensure that there are appropriate safeguards in place.

The Department notes that the ACMA consultation paper released in December 2006, "Allocation of spectrum for new digital television services" indicated the following in relation to how potential replanning would be undertaken in relation to Channel B licences:

> **"Possible Replanning to improve channel B**
> ACMA has performed an initial review of the unassigned channel allotments in each of the high/moderate power/wide coverage areas. That review identified that in most, though not all areas, some limited replanning may improve the suitability of channel B for mobile television use from the high/moderate power transmission site. It is envisaged that any replanning would be performed so that the effect on existing services is minimised.
>
> ACMA proposes to produce an engineering report detailing the replanning that could be performed to improve channel B for mobile television use. That report would be released together with other allocation documentation.
>
> The implementation of the changes in the engineering report into a revision to relevant DCPs would be conditional on:
>
> - ACMA receiving advice that licensee B will use 'channel B' to implement a mobile television service;
> - ACMA receiving, within 2 years[3] of the allocation date, formal advice from licensee B that it wishes to implement the variations discussed in the engineering report; and
> - the proposed changes being agreed by ACMA following the normal formal consultation processes required for a DCP (and if necessary Licence Area Plan) variation.
>
> ACMA may consider applying cost recovery charges to associated post allocation work (for example, preparation of DCP documentation)." (p32)

ACMA has undertaken a significant amount of analysis and planning in relation to mobile television use of Channel B. This work has included engineering studies to examine replanning options for mobile television services, which as discussed above may be released together with other allocations documents.

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[3] ACMA requires a defined time-frame to avoid an open-ended commitment to the resources needed to support the potentially required DCP revisions and for the potential 'reservation' of channels for the possible channel changes.

Note: ACMA may also wish to negotiate with licensee B on the priority order and overall time frame for implementing any proposed changes. Variations to DCPs are subject to consultation requirements as per Part A section 13(2) of the *Commercial Television Conversion Scheme.* To provide time for public consultation and internal ACMA processing a minimum allowance of 6 months from receipt of advice should be assumed.

ACMA has also conducted public consultation on the frequencies that could be used for the licences for Channel B, the technical arrangements, the approach to planning and interference management. This consultation has included the release of discussion papers in March and December 2006 as well as specific consultation on the changes to the Technical Planning Guidelines. Free TV and ABC provided submissions in responses to these papers and ACMA has taken their views and comments into account.