



**Submission to the
Department of Communications, Information Technology and the Arts**

**AUSTRALIAN FILM COMMISSION
Australian Film Finance Corporation Ltd
Film Australia Limited
Australian Screen Directors Association
Australian Writers' Guild
Media, Entertainment & Arts Alliance
AusFILM**

**Review of the Roles of the Australian Broadcasting Authority and the
Australian Communications Authority**

September 2002

EXECUTIVE SUMMARY

This submission is made on behalf of the Australian Film Commission, Australian Film Finance Corporation Limited, Australian Screen Directors Association, Australian Writers' Guild, Film Australia Limited, Media, Entertainment & Arts Alliance and AusFILM. Throughout this submission, the AFC's views should be taken to represent the views of the other signatories.

The submission puts forward the following main arguments:

1. We support Option A, to merge the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA), provided that the social and cultural objectives of broadcasting regulation are maintained in the newly integrated regulator.
2. In changing the structure of regulation, we would be concerned if economic and technical regulation were assumed to have priority over social and cultural objectives of broadcasting regulation. We see no reason to change the mix of co-regulation with industry, which characterises the regulatory style of the ABA and the ACA.
3. An integrated regulator would be in a better position to have an overarching view of the economic, social, cultural and technical policy issues confronting Government and the industries it regulates.
4. More 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.
5. There are critical issues of functional structure and governance that need to be addressed, perhaps drawing on proposals for the Office of Communications (OFCOM) in the UK and the current structure of the Federal Communications Commission (FCC) in the US. While undoubtedly there are lessons to be learned from international approaches to regulation, these must be seen in the context of our own communications history.
6. We strongly oppose options B and C, to integrate only the planning and licensing functions of the ABA with the ACA, as this would lead to a dilution of the social and cultural objectives of broadcasting regulation.

1. INTRODUCTION

This submission is made on behalf of the Australian Film Commission (AFC), Australian Film Finance Corporation Limited (FFC), the Australian Screen Directors Association (ASDA), the Australian Writers' Guild (AWG), Film Australia Limited, the Media, Entertainment & Arts Alliance (the Alliance) and AusFILM to the Department of Communications, Information Technology and the Arts in response to the call for public comment on the discussion paper entitled "Options for Structural Reform in Spectrum Management".

The AFC operates as part of the Australian Government's Commonwealth Film Program as the agency responsible for supporting the development of film, television and digital interactive media projects and their creators. The AFC focuses its efforts on the independent production sector – companies and individuals who are not affiliated with broadcasters or major distribution and exhibition companies.

The FFC is the Commonwealth Government's primary vehicle for investing in Australian film and television production. The FFC invests in a diverse range of feature films, television drama and documentaries.

ASDA is an industry association that represents the interests of over 750 directors and producers of feature films, television, documentaries and animation nationally.

The AWG is the professional association and peak body for all performance writers.

Film Australia is a Federal Government owned company, which supports production and distribution of documentaries in the national interest.

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

AusFILM is Australia's international film marketing agency and is a collaboration between over 60 corporate members, and State and Federal Governments.

Although nominally dealing with future options for spectrum management and licensing, this review has important implications for the future structure of regulation. We argue that changes in one area will have impacts on the whole of the current regulatory framework for broadcasting and telecommunications in Australia.

The primary interest of the AFC is in the implications of a new regulatory framework for the development of Australia as an innovative creator of

content in a converged communications environment. Regulation has played an important role in the development of Australia's broadcasting and telecommunications industries, as well as in the development of a creative infrastructure of content creators and resources.

Broadcasting is a highly significant social and cultural institution in Australia, which has been regulated not only to achieve economic and technical outcomes (eg. efficient spectrum usage), but also to ensure that the optimal social and cultural benefits can be realised. The AFC is keen to see that any regulatory change builds on the strengths of the existing system.

The AFC supports the option of merging the ABA and the ACA, as long as the social and cultural objectives of broadcasting regulation are maintained. In our view there are compelling arguments in support of a converged regulator in the current and future communications environment. A converged regulator would be in a better position to have an overarching view of the economic, social, cultural and technical policy issues confronting government and the industries it regulates.

The option of merging the two regulators is not simply an administrative change, rather one that could lead to functional change, particularly in considering the future development of communications. The prospect of a merger provides the opportunity to conduct an audit of the existing regulatory framework for communications and broadcasting. If done this would require a longer public process, a deeper analysis of the policy options and consideration of the economic implications for the industries being regulated. We do not believe that the state of regulation in this country is such that there is a lack of time for this work to be undertaken. The process of regulatory reform in the UK is an indicator of the amount of preparatory work and debate that is needed.

In making this submission the AFC chooses not to comment on the technical aspects of spectrum management nor in any detail on telecommunications regulation as that is not its area of expertise.

2. THE ROLE OF REGULATION

The AFC begins from the principle that regulation is designed to serve the public interest and that serving the public interest encompasses economic, social and cultural objectives. As the Productivity Commission has said:

“Broadcasting is a powerful medium for informing, persuading, entertaining and influencing people's behaviour and attitudes. Governments pursue social and cultural policies through broadcasting regulation.” (Broadcasting, 2000)

The Productivity Commission recognised that the implementation of regulatory policy seeks to achieve a balance between social, cultural and economic dimensions of the public interest.

While we recognise that these objectives are interlinked, the process of balancing them does not mean that they always receive equal weight. Considering communications as a whole – broadcasting and telecommunications – and the manner in which each sector is regulated means that there is a difference in the balance between these objectives.

Looking at the objectives of the *Telecommunications Act 1991* (Telecoms Act) and the *Radiocommunications Act 1997* (Radcoms Act) there is a distinct emphasis on regulation to achieve mainly economic objectives. These include the promotion of competition, efficient allocation and use of the spectrum and promoting the development of the Australian telecommunications industry. That is not to say that these objectives lack a social dimension, particularly when read together with the *Trade Practices Act 1974*. Regulating to ensure access to communications networks and services and promotion of universal service obligations are explicit trade-offs in favour of social objectives.

2.1 The Broadcasting Services Act (BSA)

When one looks at the objects of the Broadcasting Services Act 1992 (BSA) the emphasis falls upon regulation to achieve social and cultural objectives. This is largely because broadcasting services are recognised as being capable of exerting strong social and cultural influence over the community (as stated above by the Productivity Commission).

The social objectives include respect for community standards of taste and decency, protection of children from harmful material, accuracy and fairness in the presentation of news and refraining from speech that creates or fuels hatred within the community.

The cultural objective is to ensure that broadcasting contributes to the development of a sense of national identity, reflects the diversity of cultural expression in the community and fosters a level of creativity that is focussed on quality and innovation.

The social and cultural objectives arise not from the technological means of communications, but from the content of what is carried by communications services. This does not mean that the BSA does not also deal with issues of carriage and the economic regulation of broadcasting. The planning of the broadcasting spectrum, the allocation of licences and the management of rules governing ownership and control are both economic and social in their objectives.

2.2 Focus on Content, Culture and Public Interest

The AFC's focus is on content. Our mission is to provide screen cultural and industry support for the creation of new and innovative audio-visual production by Australians. This is an integral part of fulfilling the Government's cultural policy objectives for film and television – the development of an important creative industry that speaks to the Australian community and the world. For the AFC, industry development and the promotion of cultural outcomes are

inextricably linked. What the AFC does has both a cultural and an economic dimension.

The AFC argues that the ABA fulfils an equally important role in furtherance of the Government's cultural policy. There is no doubt that without regulation of Australian content and children's programming the level and the quality of these programs, currently enjoyed by Australian audiences, would be much lower. This is a crucial cultural outcome of regulation. Equally, Australian content regulation has had a profound effect on the development and continuing health of the Australian production industry, with important economic outcomes in terms of employment and exports.

In contemplating a change to the structure of regulation we would be concerned if economic and technical regulation were assumed to have a priority over social and cultural. The AFC recognises there is a worldwide trend towards a more deregulatory framework for telecommunications. Witness the requirement under the US *Telecommunications Act 1996* for the Federal Communications Commission (FCC) to 'forbear' from applying that Act where market analysis leads it to conclude there is effective competition and there are no other compelling public interest reasons to regulate.

Similarly, the recent European Union Directive on a common regulatory framework for electronic communications networks and services (March 2002) enjoins national regulatory authorities to remove regulation from an entity where there is no issue of significant market power being exercised.

The AFC does not take issue with the idea that competition policy principles applied to telecommunications will produce market-based outcomes that best serve the public interest.

However, the AFC would argue that competitive market based solutions do not necessarily deal effectively with the cultural and social objectives of broadcasting. The BSA introduced a large measure of deregulation into the broadcasting sector and introduced co-regulation with service providers in many areas. The assumption being that the ABA would use its powers only to the extent required by the public interest. On some occasions the ABA has had to intervene because the operation of the market was producing socially undesirable outcomes. This was the case in the 'cash for comment' investigation and the effort to remedy an identified decline in the provision of local news in some areas of regional Australia.

There continues to be a tension between the idea of an industry specific regulator and the application of general competition regulation to broadcasting. This tension arises from the fact that while many of the competition policy issues are not unique to broadcasting, the social and cultural aspects of communications are unique. We believe that it is necessary to have a regulator with the role and responsibility to deal adequately with the social and cultural issues relating to communications. Currently that regulator is the ABA.

We are somewhat concerned by the ACA's submission in commenting on the small number of ABA staff in non-technical, non-license related areas. There appears to be a suggestion that this aspect of ABA work could be handled by the ACA's consumer focused telecommunications activities.

The AFC is not arguing for re-regulation of any areas. Our concern is to ensure the different roles of regulation are recognised. The BSA strikes an appropriate balance between regulation to achieve social and cultural outcomes and regulation for economic and technical outcomes. The AFC would wish to see that balance preserved.

3. INTERNATIONAL EXPERIENCE IN REGULATION

The Discussion Paper points to international experiences in structural reform, citing the US, Canada and the UK. This is presumably because the US and Canada have merged broadcasting and telecommunications regulators and the UK is proposing to follow the same path. However, the reality is that the situation in those countries is more complex both in terms of the structure of regulatory agencies and the style of rulemaking in which they engage. (See Appendices 1 and 2 for more detail.)

Many countries are grappling with the issues of convergence and their implications for the regulatory future. The responses of countries to these issues have as much to do with their economic and social circumstances, the historical approach to regulation, and the nature of the telecommunications and broadcasting systems they have constructed, as they do with any common response to these issues. As a consequence there is no international template for regulatory reform.

While undoubtedly there are lessons to be learned from approaches to regulatory change in other nations, these must be seen in the context of Australia's own regulatory and communications history.

3.1. Regulatory structures

The management consultancy firm McKinsey, in a study commissioned by the UK's Independent Television Commission (ITC), identified four alternative approaches to regulatory structure. These are:

1. Creation of an integrated communications regulator;
The US and Japan being examples of this approach, as is the proposed establishment of the Office of Communications in the UK.
2. Some functions remain outside the merged regulator;
Canada, Italy and Finland are cited as examples of this approach. In Canada there is industry self-regulation that is not supervised by the Canadian Radio and Telecommunications Commission (CRTC). Also, despite strong regulation of Canadian content by the CRTC, the Canadian Audiovisual Certification Office plays a significant role in determining what is Canadian content.

3. Some consolidation by function, but no stated intentions for further consolidation;
Australia falls into this category in that during the nineties it merged all broadcasting regulatory functions in the ABA and spectrum management and telecommunications functions in the ACA. New Zealand, France and Sweden are also countries where regulation of broadcasting and telecommunications remain in separate bodies.
4. Highly fragmented, but moving towards consolidation;
The UK currently has a highly fragmented regulatory structure with three broadcast regulators, a non-broadcast spectrum regulator and a telecommunications regulator. The BBC is only partially subject to external regulation and is predominantly regulated by its board of governors. Germany also has a highly fragmented regulatory structure, a function of its federal constitution, which means that regulation is conducted at the level of the constituent states of the federal republic.

Like Australia, many countries have a general competition regulator that stands beside the communications regulator and has some responsibilities for regulating the competition aspects of communications. Canada, Japan and the US are examples of this. In determining the role of a new regulator in Australia, we urge that consideration be given to the media related operations of the Australian Consumer and Competition Commission (ACCC).

While the McKinsey report cites the US as a model for an integrated communications regulator, this does not present the full picture of regulation in the US. The FCC is the sole regulator of communications at the federal level, but the state and municipal governments also have responsibility for the regulation of telecommunications and broadcasting. This means that while the *Communications Act 1934 (US)* provides an overarching regulatory framework, there is a fragmentary approach between the three levels of government.

An example of how this works in practice is the US cable industry. The providers of cable television services, the system operators, are licensed not by the FCC, but by the municipal government in the city in which they build the cable system. The rationale being that in order to build a cable system, permission is needed from the owner of the public land on which it is built. The *Communications Act 1934 (US)* sets the general terms of licences, which are for 15 years, but the municipal government is responsible for licensing, renewal and some other aspects of regulation, for which it receives licence fees from the operators.

Similar arrangements apply to telecommunications so that, for example, the New York State Public Service Commission amongst its other functions is a telecommunications regulator.

The point being that the regulatory structure in the US is more complex than at first sight and this reflects the unique nature of its telecommunications and broadcasting systems and the history of regulation in that country.

3.2. Regulatory style

Aside from differences in structure, there are also differences internationally in the regulatory style. The McKinsey report characterises the approach to rulemaking by regulators as regulatory style and has found there are three broad approaches, although this is harder to characterise than regulatory structure. The approaches are:

1. Traditional emphasis on rulemaking;
Countries like France, Germany and Italy have regulators with a high degree of autonomy and directive power over the sectors they regulate. Regulators like this have the freedom to make regulation within a relatively general legislative framework with few formal processes for industry and public consultation. This is particularly the case with countries that have a strong tradition of close supervision of broadcasters, as is the case in Europe. For example, in France the regulator is not only responsible for the regulation of the state owned broadcasters but appoints the chairs of the governing boards. The consequence is that this regulatory style can often lack transparency and openness.
2. Open approach with a relatively high degree of reliance on industry co-regulation;
Australia currently has this style, where both the ABA and the ACA co-regulate in a number of areas with industry representative bodies. The subject of regulation and the manner of rulemaking are determined by the Parliament with relatively little freedom to determine new rules outside those areas.
3. A reasonably open process, but with an emphasis on rulemaking;
The US and Canada have this regulatory style. In the US, the FCC has a formal process of rulemaking, which involves formal submissions and public hearings to determine rules.

One can see from the above schema that Australia probably sits at the mid point of international practice in terms of its regulatory structure and the style of regulation it imposes. This reflects the history of our broadcasting and telecommunications sectors and previous approaches to regulation, including the regulatory reform process that occurred in the nineties.

As result it could be argued that Australia is better prepared to deal with new regulatory challenges than many other countries. The urgency to make changes to our regulatory structures is not as immediate as it is for the UK.

4. COMMENT ON THE OPTIONS

The AFC agrees with the ABA submission that the benefits of restructuring will depend on a full consideration of all the relevant issues. If there is to be change, it should not be seen as simply an exercise in transferring functions and resources from one organisation to another. It presents the opportunity to assess the strengths and weaknesses of the entire regulatory system for communications and to ensure that it is best suited to dealing with the future development of the sector. It will also be necessary to assess the likely impact of these changes for industry and the public.

The AFC also agrees with the ABA that there would be benefit in considering changes in the context of the entire framework of policy developments affecting the communications sector. We point to the extensive policy development process that is occurring in the UK in the lead up to regulatory restructuring. These have all been public processes and have included the Green Paper 1998, the White Paper 2000, the Draft Communications Bill 2002, the inquiry into the Bill by the Joint Committee of the House of Lords and the House of Commons and the recently announced investigation into the television program supply market by the ITC. In addition, the existing regulators have commissioned detailed reports from management consultants on the resourcing and governance of the new regulator OFCOM.

We recognise valuable work has been done here by the Productivity Commission in its inquiries into Broadcasting and Telecommunications Competition Regulation, but we are concerned that the Commission took predominantly a competition policy perspective. As important as this is, there would be benefit in looking at the proposed changes from a wider perspective.

4.1. Option A: Combine the ABA and ACA into a single organisation

Combining the ABA and the ACA into a single organisation is our preferred option.

We are attracted to this option chiefly because of the opportunities it presents for an integrated regulatory structure to deal more effectively with the issues that arise from convergence.

As a result of the relatively narrow focus in the Discussion Paper on spectrum management, it does not deal effectively with the wider rationale for an integrated regulator and the implications for the sector it will regulate. The AFC believes that a strong rationale for the integration of the regulators is the opportunity to exploit the potential for development of a dynamic new communications sector incorporating telecommunications, broadcasting and audiovisual production. Information, communications and entertainment industries are converging with important economic, social and cultural implications, as new media technologies enter all sectors of business and private life. It will be crucial to have a regulatory body with a comprehensive brief to manage emerging issues in communications. This would allow

Australia to capitalise on the reforms it has already made and better position it in adapting to the new environment.

The regulatory body should have an economic and social brief to ensure wide distribution of and access to communications and to ensure a high level of consumer protection as new markets develop. We would also argue that there are important developments in intellectual property and in the economic structure of content creation that the new regulator needs to take account of in approaching its task of regulation that are not easily dealt with in the present structure. For example, should there be any public service obligations on the providers of broadband and internet services as they become more pervasive, and if so what should these be?

The AFC sees no compelling reason to change the current regulatory style of the ABA and the ACA, that is the mix of co-regulation with industry and proportionate targeted regulation. However, the AFC believes that consideration needs to be given to some structural change to ensure that the social and cultural objectives of broadcasting regulation are not diminished.

4.1.1. Regulatory policy

The legislation that the ABA and the ACA currently administers contains an extensive list of objectives, some of which may be taken to be contradictory, but none of which is given priority. The BSA sets out a regulatory policy for the ABA to follow in performing its functions, whereas no similar direction is given to the ACA. This is an issue that will need to be resolved. We note for example that in the UK, the Joint Committee examining the Communications Bill has recommended the following as the principal duty of OFCOM:

(a) to further the long-term interests of all citizens by

(i) ensuring the availability of a diversity and plurality of high quality content in television and radio and

(ii) encouraging the optimal use for wireless telegraphy of the electro-magnetic spectrum; and

(b) to further the long-term interests of consumers by promoting the efficiency of electronic communications networks and services, and broadcasting

and to do so wherever possible by promoting effective competition in national, regional and local communications markets throughout the United Kingdom.

The AFC submits that consideration needs to be given to a clear statement of regulatory policy as a guide to the new regulator in undertaking its functions.

4.1.2. Structure

We think that there is merit in the approach of the UK to the structure of OFCOM, where the proposal is to supplement the main board of the organisation with a Content Board and a Consumer Panel. The proposal for the Content Board arose from concerns about the need to maintain high-level supervision of content regulation, while not increasing the main board to an unmanageable size. There was also concern that the regulation of content might get subsumed into a focus on competition and economic regulation in the new agency. The operation of the Content Board is discussed in more detail in Appendix 1. The Consumer Panel essentially replaces the consumer advisory boards of the UK telecommunications regulator Ofcom.

Similar issues arise for the structure of a new Australian regulator. The main board will need to be relatively small and yet also have a spread of expertise necessary to ensure there is appropriate attention to all aspects of its regulatory tasks.

An alternative to the UK model is to look more closely at the structure of the FCC where the six operating bureaux have a much larger role in the making of regulatory policy and the formal decision-making processes of the FCC, as well as in advising the Commission members. The FCC Commissioners operate at a more strategic and political level, which in part stems from the party political nature of their appointment.

Within the FCC there is also a functional distinction according to the industry being regulated. Thus, the Media Bureau regulates broadcasting services (including cable television), the Wireless Telecommunications Bureau regulates wireless telephony and other forms of non-government use of wireless communications and the Wireline Competition Bureau regulates predominantly interstate fixed line telecommunications.

To the extent that the FCC regulates content, that is undertaken by the Media Bureau, which administers the rules relating to indecent and obscene broadcasts, children's television and political broadcasts, in combination with its role in the licensing of broadcasters.

4.2. Option B: Transfer of planning, licence allocation and enforcement functions from the ABA to the ACA

This option would essentially leave the ABA as a regulator of broadcasting and online content, moving it closer to being a body like the New Zealand Broadcasting Standards Authority. While it has the attraction of locating all spectrum management and licensing functions in the one agency, it disintegrates the necessary link between licensing and programming.

The AFC are also concerned about how an independent content regulator would be able to enforce the regulation it manages. Under the BSA, compliance with program standards is a licence condition and a major

incentive for participation in the co-regulatory scheme is the ability of the ABA to impose standards if codes are not developed or they fail.

Under this option the Discussion Paper proposes that the ABA would cede to the ACA the power to make and enforce licence conditions, making it essentially an advisory body to the ACA. Not only would this lead to a more cumbersome administrative process, we see this as a major downgrading of the social and cultural objectives of broadcasting regulation - for which we can see no rationale. Parliament and the community have put a high value on the regulation of Australian content and children's television. These principles must be supported by a regulator with effective powers.

Further, as the Discussion Paper suggests, Option B raises issues about the viability of the organisation as a stand-alone regulator.

The AFC and signatories to this submission strongly oppose Option B.

4.3. Option C: Transfer broadcasting planning functions from the ABA to the ACA

Essentially this is a return to a situation similar to that existing prior to the formation of the ABA, when broadcast spectrum planning resided in the Department of Communications and licensing in the Australian Broadcasting Tribunal. It was a key part of the reform introduced by the BSA, that planning and allocation be linked in the one organisation.

The contribution of technical planning skills and expertise to the ABA has better equipped it to provide advice to government and manage technological change in the broadcasting sector, such as the transition to digital. In our view the loss of these skills would also affect its ability to undertake the remaining tasks.

Essentially the AFC feels that this option represents tinkering at the edges of structural integration and is not attractive when the prospect of full integration is far more compelling.

The AFC and signatories to this submission strongly oppose Option C.

APPENDIX 1

REGULATORY REFORM IN THE UNITED KINGDOM

1. Current Regulatory Framework for Broadcasting

The UK broadcasting sector has traditionally been subject to high levels of government supervision to ensure that the UK citizen receives a high quality and diverse range of broadcasting services. The level of regulatory intervention is highest for the terrestrial services and in some circumstances can be quite detailed and directive as to the program output. At the same time there is a much stronger emphasis on 'public service' as the primary ethos of UK broadcasting.

There are three organisations responsible for regulating broadcasting in the UK – the British Broadcasting Corporation (BBC), the Independent Television Commission (ITC) and the Radio Authority. The Broadcasting Standards Commission straddles all broadcasters and deals with issues of taste and decency.

BBC

A Royal Charter and an Agreement with the Government govern the BBC. The Charter sets out the objectives of the BBC and establishes a board of governors with the responsibility to see that the BBC conforms to its charter. The board of governors is independent of the management of the BBC and sit for fixed 5-year terms.

It is funded by a licence fee paid by households and business for the right to operate a radio or television receiver and from the operation of its own stand-alone businesses.

The BBC operates two national television services and a range of radio services.

ITC

The ITC licences and regulates the regional private television services on Channel 3 (ITV), the publicly owned national service Channel 4, the national private television service Channel 5 and the private satellite and cable delivered subscription services such as BskyB. The publicly owned Welsh language service S4C is not regulated by the ITC.

There are 15 regional ITV licensees and GMTV, the national breakfast television service. The ITV licensees are permitted to network and have formed the ITV Network Centre to commission nationally networked programs and co-ordinate the national schedule. Network Centre commissions programs from regional licensees and independent producers. In addition, the ITV licensees are required to jointly contract an approved news service

provider to independently provide news services on the network, currently this is Independent Television News (ITN).

Prior to the Broadcasting Act 1990 the ITV service was provided by the Independent Broadcasting Authority (IBA) by means of 'franchises' given to privately owned companies. The IBA closely supervised the franchise companies to ensure they delivered high quality public service television. In return the franchise companies were allowed to advertise.

The 1990 Act created the ITC and turned the franchises into licences issued by the ITC. It created the Channel 4 Corporation, previously a partnership between the IBA and the ITV franchises, and made provision for Channel 5 to be licensed by the ITC. The ITC was constrained from issuing further terrestrial television licences, except for low power local services, until the Broadcasting Act 1996 made provision for the introduction of digital terrestrial television.

The terrestrial television services are all regarded as 'public service' television and are subject to close supervision by the ITC, which sets program standards and technical quality standards. Compliance with these standards is a condition of licence and the ITC actively monitors output to ensure compliance. There are positive program requirements, usually expressed as a promise of performance at the grant of the licence, which covers such things as quality and diversity of output, news and current affairs, regional production and programming for the deaf and hearing impaired. The levels of UK content are set by licence conditions, while the level of independent production commissioned is set by the Act of 1990 in compliance with the EC Television Without Frontiers Directive.

The ITC undertakes annual reviews of performance and issues report cards on that performance.

The Radio Authority

The Radio Authority was created by the 1990 Act, which also introduced independent (i.e. non-BBC radio) to the UK. The Radio Authority has a similar brief to the ITC – planning the spectrum, licensing services, imposing technical and content standards.

There are three national radio services, the number and nature of which is specified by the 1990 Act: a classical service (Classic FM), a talk service (Talk radio) and a popular music service (Virgin Radio). These were awarded by means of a competitive bid.

The Authority plans and licences local services by means of a 'beauty contest', which looks at whether the proposed service meets the needs of the local area, the applicants financial viability and the implications for ownership.

The Communications Bill

As noted in the discussion paper the UK Government is proposing substantial changes to the regulatory framework of telecommunications and broadcasting in the UK. Although there are distinct differences between the broadcasting and communications systems and their regulation in Australia and the UK, there may well be some lessons in the UK experience.

The first thing to note is that the UK is undertaking the most substantial overhaul of its regulatory framework in decades. In telecommunications it is being driven by the need to comply with the new European Union (EU) regulatory framework by the middle of 2003. This framework, arrived at by a long process negotiation amongst member states was formalised by five Directives issued by the EU in March 2002 (the Framework Directive, the Authorisation Directive, the Access Directive, Universal Service Directive and the Data Protection Directive). The effect of these measures is to apply competition policy principles to the uniform regulation of newly opening telecommunications markets across Europe. Regulation will be based on the extent to which there is the exercise of significant market power by entities within the market.

Another important driver for change is the strong belief on the part of the UK Government that the creative industries are at the heart of the future growth of the UK economy. This has been an essential part of the Blair administration's approach to cultural and broadcasting policy development since it came to power. It can be seen in one of the objectives the Government set itself in its December 2000 White Paper which is to make the United Kingdom "home to the most dynamic and competitive communications and media market in the world".

At the same time, the regulatory framework of UK broadcasting puts a very high value on ensuring the UK consumer has access to a diverse range of high quality programming. Broadcasters need to continually demonstrate a high level of commitment to public service in return for access to the spectrum. The level of regulatory intervention, therefore, has been much higher than it has ever been in Australia. In the past the UK has been willing to restrict competition and access to ensure the public service remit is met and there is no sign in the current UK debate that this basic commitment to public service has diminished.

The process of arriving at the Communications Bill has been lengthy, starting in 1998 with a Green Paper. It is not over yet as the Government considers the report of a Joint Committee of the House of Commons and the House of Lords on the Bill. The initial response of the UK Government to the Joint Committee's report has been to request that the ITC enquire into the television programme supply market in the UK. The Committee has recommended that OFCOM periodically review the program supply market to determine "whether the market is operating in a fair, transparent and non-discriminatory manner".

The White Paper foreshadowed the plan of the Government to establish a new regulator, OFCOM, which would encompass the Independent Television Commission, the Broadcasting Standards Commission, the Radio Authority, the Radiocommunications Agency and the Office of Telecommunications. OFCOM already exists, created by a separate piece of legislation, although its form and function is the subject of the Communications Bill. The regulators above still continue until all the issues to do with transition to the new regulators have been resolved and enacted.

It is clear from the Communications Bill that although OFCOM has a strong role as an economic regulator and spectrum manager, the primary focus of regulation is ensuring beneficial social, cultural and economic outcomes for consumers. The report of the Joint Committee clearly states the overarching responsibility of OFCOM will be to achieve the widest public interest, which includes more effective competition and market access.

The structure of OFCOM consists of a board appointed by the Government. Beneath this main board the Bill proposes two other entities, the Content Board and the Consumer Panel.

The Content Board will be responsible for overseeing the regulation of content, specifically broadcasting content, will consist of members drawn from the general public and will be appointed by the main board. A member of the main board who is not the OFCOM chairman will be its chairman.

The Joint Committee has recommended the Bill clearly states the Content Board have executive and deliberative responsibility for the public service remit of broadcasters and program standards, subject to the ultimate decision making authority of the main Board. The Content Board is to be appropriately resourced and the Joint Committee recommended it should have the power to publish its own views. The intention of all these measures is that OFCOM remain focussed on content regulation, with appropriate input from the public, while the main board concentrates on strategic issues and economic regulation.

The Consumer Panel is a public advisory panel that would replace the existing advisory panels maintained by Oftel and meet the requirements of the EU Universal Service Directive, ensuring measures are in place to consult with consumers, particularly those who are least advantaged in the market place. The Consumer Panel's role is advisory and its members are to be appointed by OFCOM. The Joint Committee has recommended that the Minister appoint its members and that where OFCOM intends to depart from any advice given it by the Panel, it has to publish the reasons for this.

In relation to the regulation of broadcasting the Bill proposes more regulation for the BBC and less regulation for the other free to air broadcasters. In essence the BBC will no longer be as self-regulatory as it presently is and will be subject to supervision by OFCOM. This will be achieved by changes to the BBC Charter and Agreement with the Government. For the other free to air

broadcasters the highly supervisory role of the ITC and Radio Authority will be replaced by a more proportionate regulatory approach.

The intention of the Government is to rationalise regulation across the entire public broadcasting sector and to make it more deregulatory. The Bill introduces the model of three tiers of regulation in what is called the public service broadcasting remits. These chiefly apply to television, not radio, and are greatest on the BBC and least on Channel 5. The explanatory material to the Bill sets out the detail of these remits, which are based on the existing requirements of the broadcasters and is attached at Appendix 2.

APPENDIX 2

Communications Bill 2002 (UK)

Public service broadcasting remits

The General Public Service Broadcasting Remit

The General Public Service Broadcasting Remit is defined as the provision of a properly balanced service with a view to the maintenance of high general standards in all respects (and in particular in respect of their content, quality and editorial integrity) and offering a wide range of subject matter (having regard both to the programmes as a whole and also to the days of the week on which, and the times of the day at which, the programmes are shown) meeting the needs and interests of different audiences, and having regard to the specific provisions set out below:

The provisions referred to above are:

- a) provided as a public service for disseminating information, education and entertainment
- b) stimulate, support and reflect, in drama, comedy, music and the visual and performing arts, the diversity of cultural activity in the United Kingdom
- c) contain comprehensive and authoritative coverage of news and current affairs in the United Kingdom and throughout the world to support fair and informed debate at local, regional and national levels
- d) provide wide-ranging coverage of sporting and other leisure interests
- e) contain programmes of an educational nature (including specialist factual, religious and social issues programmes)
- f) include a high standard of original programmes for children and young people
- g) contain programmes which reflect the lives and concerns of both United Kingdom audiences and more local communities
- h) contain a reasonable proportion and range of programmes for United Kingdom audiences made outside London and the South East.

Specific Public Service Broadcasting Remits

In addition to the General public service broadcasting remit, each public service broadcaster ie Channels 3, 4, & 5, together with the BBC and S4C will have a detailed remit listing the specific second and third tier commitments. Taken together the remits will establish a hierarchy of public

service broadcaster obligations ranging from the BBC at the top to Channel 5 at the bottom. The obligations will apply as follows:

All Public Service Broadcasters

- Free to air and universally available services
- 25% independent production quota
- Original production quota
- Party political broadcasts
- News and current affairs in peak time

In addition, specific requirements as follows:

The BBC

- Regional programming quota
- Regional production quota
- Programmes for schools
- High quality of programmes meeting meet the full public service broadcasting remit as set out in the Agreement

Channel 3

- Regional programming quota
- Regional production quota
- A range of high quality and diverse programming

Channel 4

- Regional production quota
- Programmes for schools
- High quality of programmes providing a broad range of high quality diverse programming which in particular demonstrates innovation and reflects cultural diversity

S4C

- A broad range of high quality diverse programming, with a substantial proportion of programmes in Welsh

Channel 5

- A range of high quality and diverse programming.

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