



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

**Proposal for new institutional arrangements for the Australian
Communications Authority and the Australian Broadcasting
Authority**

September 2003

A key issue now is the need to develop flexible regulatory schemes that can deal with an unpredictable and increasingly convergent technological and business environment, while ensuring spectrum is available to be allocated to the most efficient uses.

Senator Richard Alston, 3 April 2003¹

Introduction

The Australian Film Commission (AFC) welcomes the opportunity to comment on the proposed structural integration of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA).

In commenting on this issue last year, the AFC wished to ensure that in any form of structural change or integration, the social and cultural objectives of broadcasting regulation received appropriate attention. The AFC opposed the partial integration of the planning and licensing functions of the ABA with the ACA and strongly supported the complete merger of the two organisations – provided that the social and cultural objectives of broadcasting regulation are maintained in the newly integrated regulator.

To a large extent the Government appears to have accepted this recommendation as the one favoured by the majority of submitters to the earlier consultation process.

The need for a communications review

The AFC argued in its previous submission that 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. The AFC continues to hold this view and notes that the issues paper sees as an advantage of the new regulator that it will have an *'improved ability to undertake detailed work on convergence, emerging competition and regulatory issues.'*

The AFC also argued that more work is needed to flesh out the policy framework for communications to provide clear direction to the newly integrated regulator. An opportunity is provided by the merger 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.

However, the AFC notes that the issues paper makes little mention of this last point stating only that:

Any future changes to the broad policy and regulatory frameworks for communications would be determined by the Australian Government

¹ Minister for Communications, Information Technology and the Arts, Senator Richard Alston, *Regulating a Converging Environment*, ABN AMRO Communications Conference 2003, http://www.dcita.gov.au/Article/0,,0_1-1_1-2_15-4_114143,00.html

through its ongoing review processes and are not proposed to be linked to merger considerations which are the subject of this paper.²

What is not clear from the discussion paper is exactly what the Government's 'ongoing review processes' will be in this area. Will it be a series of small or discrete reviews or something more comprehensive?

The AFC remains strongly of the view expressed in our earlier submission that:

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.³

The AFC is not alone in seeing the need for a comprehensive review. The Productivity Commission in its 2000 Report on Broadcasting also recommended a similar comprehensive review, saying:

To ensure that the social and cultural objectives of broadcasting continue to be addressed in the future digital media environment, the Government should commission an independent, public inquiry into Australian audiovisual industry and cultural policy, to be completed by 2004...⁴

More recently the Australian Competition and Consumer Commission (ACCC) recommended to the Minister that there is a strong case for bringing forward the review of the moratorium on the number of commercial free to air television licences and that as part of this there should be an 'across-the-board' review of the regulations applying to the media sector, in particular those that have a direct impact upon competition. The AFC strongly supports the ACCC when it says:

It is particularly important that the Commission's recommendations about the current regulations applying to the FTA and pay TV sectors not be seen as discrete or as 'either/or' options. The regulations applying to the FTA and pay TV sectors should be considered in a comprehensive manner—that is—a broad review of the regulations applying to pay TV and FTA broadcasting is necessary. It would be undesirable for further amending of the media regulatory framework to

² DCITA, *Proposal for new institutional arrangements for the Australian Communications and Australian Broadcasting Authority: Discussion Paper*, August 2003, p6, http://www.dcita.gov.au/download/0.6183.4_116552.00.doc

³ AFC Submission to the Review of the Roles of the Australian Broadcasting Authority and the Australian Communications Authority, September 2002, p4, http://www.afc.gov.au/downloads/policies/aba_and_aca.pdf

⁴ Productivity Commission, *Broadcasting Inquiry Report*, April 2000, p422, <http://www.pc.gov.au/inquiry/broadcst/finalreport/broadcst.pdf>

*occur in a piecemeal fashion – a thorough assessment of the regulations and how they relate to each other is necessary.*⁵

The review of media sector regulation suggested by the ACCC must take this whole-of industry approach to policy and at the very least consider not only competition, but also cultural policy objectives.

The AFC notes the House of Representatives Standing Committee on Communications, Information Technology and the Arts current inquiry into “the Future Opportunities for Australia’s Film, Animation, Special Effects and Electronic Games Industries”. The deliberations of this Committee could be a useful preparatory stage for this more comprehensive examination and evaluation of a converging content creation industry.

Australia is already being forced to consider regulatory futures in the context of current trade negotiations with the United States. In these negotiations, discussion around the issues of a cultural reservation and the e-commerce chapter has focussed on the presence or absence of regulatory futures in the digital domain. It has raised the prospect of the Australian Government ceding some of its current freedom to regulate as part of the settlement of the trade agreement. In the context of these negotiations the AFC’s principle argument is that decisions about future regulatory options need to be part of a broad communications review by the Australian Government rather than settled pre-emptively in the haste of trade negotiations.

The AFC considers the need for a review is becoming more pressing and that while structural integration of the ABA and the ACA is desirable, it should be accompanied by a thorough reconsideration of the role of the regulator in a convergent communications future.

⁵ ACCC, Emerging Market Structures in the Communications Industry, June 2003, p.59

Issues

Comments are sought on the role of a combined regulator in spectrum planning consistent with a ‘minimal change’ regulatory model and on the balance of objectives that should be applied particularly in relation to decisions about BSB spectrum.

The discussion paper advances what it terms a ‘minimal change’ approach. That is, although there are differences in the statutory mandates of the ABA and the ACA, the newly combined regulator should be able to manage these differences in large part because the statutory frameworks will not be changing.

The paper discusses this within the context of spectrum planning, but does not consider the wider issues associated with integration. In our previous submission, the AFC made the following comment about the proposed merger:

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.⁶

The spectrum planning functions of the ABA and the ACA are probably the most compatible to functional integration. What is missing from consideration in the paper is how the other functions of the disparate regulators will come together.

The AFC is concerned that institutional amalgamation is a relatively straightforward process and the hoped for synergies and capability to deal with regulatory futures will evolve in a natural fashion.

The ‘minimal change’ approach fails to address the likelihood that the new organisation will not be able to keep the statutory responsibilities separate; or that in trying to do so will develop into a disjunctive organisation. As Henten, Samarjiva and Melody argue:

There is, consequently, an increasing necessity of a closer relationship in the regulation of the different communication and media areas. It is not sufficient simply to have the different areas under the same roof. The synergies between the different regulatory areas must be developed more proactively, encompassing the regulatory ‘contributions’ of the different areas. Telecom contributes with infrastructure regulation and access issues; broadcasting with access and content issues...⁷

⁶ AFC Submission, p4

⁷ Henten, A, Samarjiva, R & Melody WH, “Designing Next Generation Telecom Regulation: ICT Convergence of Multisector Utility,” *World Dialogue for Regulating Network Economies*, p.33 <http://www.regulateonline.org/pdf/wdr0206.pdf>, accessed 15/9/03

Therefore the AFC believes more work is required to reap the potential benefits of integration, which go beyond the specific issue of the boundary between BSB and non-BSB spectrum planning functions.

Comments are sought on the Ministerial directions powers that should apply to a combined regulator.

The difference in the Ministerial powers of direction again highlights that the process of institutional integration will throw up issues that require more detailed consideration and would be better considered in a more comprehensive review that encompassed the regulatory tools needed by a combined regulator.

If the desire is to see a more unified approach to the powers of direction then this is really moving beyond the 'minimal change' approach, since it has the potential to raise some fundamental issues to do with the role of the new regulator.

Just as the powers and functions of the regulator have been determined by the Parliament, so too have those of the Minister. Over the last two decades the Parliament has sought to remove the Minister from the decision making processes such as standards making and licence allocation. The Minister needs to be able to direct the regulator as to the policies of the Government, as well as to get the regulator to undertake specific inquiries to assist the process of policy development (eg Australian content on subscription television). However, it is appropriate that the Minister should remain at arms length from decisions made independently by the regulator.

Comments are sought on the board structure of the combined agency, the need for and role of a CEO, whether specialist skills and advisory structures are needed, the delegation of functions, and any other relevant organisational/institutional issues.

The board structure of the new agency is significantly influenced by the regulatory style being applied, which is in turn determined by the legislative framework. In our previous submission we noted that in Australia both the ABA and the ACA follow a style that is characterised as being open and having a relatively high degree of reliance upon industry co-regulation.

While both regulators have a significant amount of work to undertake in managing the regulation of the industries for which they are responsible, the legal framework is quite specific about the areas in which they may make 'legislative' as opposed to 'administrative' decisions.

For example, the ABA manages the ownership and control provisions of the Act, but it does not set the rules on station ownership and audience reach, as is the case with the United States Federal Communications Commission under the US Communications Act. In other words the regulatory policy in such areas is determined by the Parliament, rather than by the regulator.

Nor are their processes of a quasi-judicial nature as was the case with the ABA's predecessor the Australian Broadcasting Tribunal. Although the ABA has extensive powers to investigate matters relating to broadcasting and to conduct public processes, including hearings, it has considerable discretion as to how it does this.

In effect, the regulatory style suggests that the board of the merged regulator does not need to be large and the current ability to delegate powers to the staff should be used in the new organisation.

In our previous submission the AFC argued that there was merit in aspects of the structure being adopted for the Office of Communications (Ofcom) in the UK. In particular the AFC was attracted to the notion of a Consumer Panel and a Content Board having both an advisory and instrumental role in Ofcom. The latter arose from concerns about the need to maintain high-level supervision of content regulation, while not increasing the main board to an unmanageable size. While not wanting to photocopy the Ofcom structure the AFC continues to hold the view that this option has merit.

Comments are sought on the corporate structure and location of a combined organisation, including on the most effective structures and locations of offices to maintain effective functioning and linkages with stakeholders.

The AFC has no detailed comments in relation to the corporate structure, but would submit the success of the new organisation will depend on it being properly resourced with the ability to hold and attract competent staff.

As David Currie, Chair of Ofcom observed in his Guardian Media Lecture on 7 July 2003:

...good regulation is not synonymous with cheap regulation. ...You can have a cheap regulator who will be a jobsworth and, from the point of view of the regulated, completely useless, even if they deliver perfect process. Or you can have intelligent people who will understand and respond on terms of intellectual and professional equality with the brightest and best in the industry.⁸

One area where more resources are required to ensure more effective regulation is in the collection and publication of statistical and other relevant data about the sectors being regulated. At present the only regular data sets published by the ABA are aggregated financial results for commercial television and radio and data on compliance with the Australian content standards. There is almost no information published about the subscription television sector.

⁸ http://www.ofcom.org.uk/newsroom/speeches/currie_radio_festival.htm

Regular publication of more comprehensive information assists the industry being regulated, the industries that intersect with it and the general public, as well as providing some measure of how well the industry is performing against the regulatory objectives.

The AFC notes that, as part of the Communications Act in the UK, OFCOM is required to publish a comprehensive statistical and factual report on the broadcasting sector in the UK. The report is to examine not only regulatory issues but also the financial and economic state of the industry and the production sector that it supports, including examining intellectual property issues and training needs.