SUBMISSION TO THE SENATE ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS COMMITTEE INQUIRY INTO THE POWERS OF AUSTRALIA'S COMMUNICATIONS REGULATORS

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1. Introduction

The Australian Film Commission (AFC) is a statutory authority which aims to enrich Australia's cultural identity by fostering an internationally competitive audiovisual industry, developing and preserving a national collection of sound and moving images, and making Australia's audiovisual heritage available to all Australians. The AFC is Australia's premier research and policy body for the film and television production industry.

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 primary interest of the AFC in the establishment of the Australian Communications and Media Authority (ACMA) 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. The AFC is concerned to see that the regulatory environment in Australia continues to promote that creative development and expression and ensures Australian audiences have access to significant levels of Australian content.

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 merging of the ABA and the ACA in the creation of ACMA. An integrated regulator will 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. However, in changing the structure of regulation, the AFC would be concerned if economic and technical regulation assumed priority over social and cultural objectives of broadcasting regulation.

The AFC also argues that 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.

In making this submission the AFC first makes some general comments about the role of broadcasting regulation and its relation to cultural policy before making some specific comments in relation to the terms of reference of the inquiry.

2. The role of regulation

The AFC takes as its 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 commented in its 2000 review of broadcasting regulation:

> *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.*

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)

The emphasis of the objects of the Broadcasting Services Act 1992 (BSA) falls more towards 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 Content, Culture and the Public Interest

The AFC's focus is on content. Its programmes to provide screen cultural and industry support for the creation of new and innovative audiovisual production by Australians for Australians and the preservation of content for future generations. 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 currently 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 the AFC would be concerned if economic and technical regulation were assumed to have a priority over social and cultural regulation. The AFC recognises there is a worldwide trend towards a more deregulatory framework for telecommunications. Nor does the AFC 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.

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 to communications are. The AFC believes that it remains

necessary to have a regulator with the role and responsibility to deal adequately with the social and cultural issues relating to communications.

The AFC's concern is to ensure the different roles of regulation continue to be recognised. The BSA strikes an appropriate balance between regulation to achieve social and cultural outcomes and regulation for economic and technical outcomes. The AFC recommends that this balance is preserved.

2.3 The structure of the Australian television broadcasting system

The current structure of the Australian broadcasting system is the result of historical decisions made about regulation of the sector. A brief outline of the elements of this system is set out below in order to understand the parameters of future regulation.

- Broadcasting is the sole responsibility of the Commonwealth with no involvement by the States or local governments. The Broadcasting Services Act 1992 sets out the regulatory policy and the Parliament has delegated the principle regulatory role to the Australian Broadcasting Authority.

- The Minister for Communications has a limited power to direct the regulator in the administration of its functions and had no formal power in licensing, standards making etc.

- There are two national public broadcasters – ABC and ABS – which are created by the Parliament and largely funded by direct appropriation. Limited advertising is permitted on the SBS and both organisations run related business enterprises. The transmission facilities of the national broadcasters are leased from a privately owned enterprise.

- The ABA does not regulate the national broadcasters except in the area of complaints made about compliance with codes of practice.

- Private commercial broadcasters are individually licensed under the Act. Licences are granted for periods of five years, but there is a presumption of renewal unless the ABA has reason to believe the licensee might be unsuitable. The transmission facilities, which are licensed separately under the Radiocommunications Act are owned by the private broadcasters.

- There is a moratorium on the issue of new commercial television licences until the end of 2006.

- There are limits on the number of licences that may be owned by any one person, however the licensees have largely organised themselves into three national programming networks. These networks have no formal status under broadcasting legislation.

- Newspaper interests cannot own a television station in the same market and foreign persons are limited to 15% company interests in any commercial television broadcaster.

- Subscription television licences are granted in perpetuity. There is no limit on the number of licences that may be issued, but also the possession of a licence does not give the holder access to carriage. That is the subject of negotiation between the licensee and the carriage provider (eg Foxtel, Optus or Austar).

- Australian content and children's television programming on commercial television are regulated by standards determined by the ABA. Australian content on subscription television is regulated under the BSA. All other content regulation is undertaken by way of codes of practice developed by the broadcasters and registered with the ABA. The ABA has a role to investigate unresolved complaints about matters covered by the codes.

3. Comment on the terms of reference

(***a) the provisions of the Australian Communications and Media Authority Bill 2004 and the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 and related bills;***

The main function of the Bill is to achieve the structural integration of the ABA and the ACA through the establishment of the ACMA. As a result the ACMA takes on the combined functions of the two regulators, which are now organized in three groupings of telecommunications, spectrum management and broadcasting. No substantive change has been made in the functions relating to broadcasting that is presently carried out by the ABA.

The legislation makes no changes to the regulatory policy set out in the broadcasting and telecommunications legislation, nor to the procedures for licensing, content regulation or the conduct of investigations in relation to broadcasting.

The AFC recommends this remain the case.

(b) whether the powers of the proposed Australian Communications and Media Authority and the Australian Competition and Consumer Commission will be sufficient to deal with emerging market and technical issues in the telecommunications, media and broadcasting sectors; and

It is generally expected that the formation of the ACMA will provide the basis for a more thorough going assessment of the present and future development of the Australian communications sector and a co-ordinated response to convergence issues. However, there is nothing in the functions of the ACMA,

beyond a general requirement to report to the Minister on the operation of the relevant legislation that would require this to happen.

In the UK, prior to the formation of the Office of Communications (OFCOM) there was an extensive 'white paper' review of future communications options for the UK followed by a detailed examination of the proposed Communications Act by the British Parliament. The AFC believes that it might be useful if the ACMA was given a clearer mandate to undertake a review of the regulatory options facing Australia, including the role that the communications sector should be playing in the stimulation of Australian creativity and to report to the Minister and the Parliament on those options within a reasonable timeframe.

An important driver for the regulatory change that occurred in the UK was 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. One of the objectives the Government set itself was to make the United Kingdom "home to the most dynamic and competitive communications and media market in the world". The AFC believes believe that should also be the objective of the Australian government.

The legislation does not set out the manner in which the new regulator is to be structured internally, other than to set out the powers of the members of the board. While it might not be appropriate to set out in detail the structure of the organisation in legislation there is no doubt that this will be an important factor in how well the ACMA is able to achieve its mandate.

The ACMA will have a greatly extended range of responsibilities. It is clear the ACMA has a strong role as an economic regulator and spectrum manager, but the primary focus of regulation is ensuring beneficial social, cultural and economic outcomes for consumers. The AFC believes this should be the strategic goal to be achieved by the organisation and the main focus for the board.

The AFC believes that there is merit in considering the approach of the UK to the structure of OFCOM, which supplements the main board of the organisation with a Content Board and a Consumer Panel. ACMA will inherit the consumer panel from the ACA and will have the power to appoint advisory groups. The need for the OFCOM 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 Content Board is set up under the Communications Act and is responsible for overseeing the regulation of content, specifically broadcasting content and including issues such as production quotas. It consists of 14 members drawn from the general public and is appointed by the main board and the OFCOM deputy chairman is its chairman, but is subject to the ultimate decision making authority of the main Board. 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.

An alternative to the UK model is to look more closely at the structure of the US Federal Communications Commission (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.

(c) ***whether the powers of Australia's competition and communications regulators meet world best practice, with particular reference to the United Kingdom regulator OFCOM and regulators in the United States of America and Europe.***

It is important to understand that both currently and historically the approach to regulation of broadcasting in Australia has been different from that in either the UK or the US, just as there are distinct differences between the USA and the UK. All three countries have faced common issues, such as who should own and control broadcasting, how should it be financed and how should both the positive and negative impacts of broadcasting be managed, but have responded in different ways to these issues. In part these responses have been influenced by factors such as differences in legal traditions, different social and cultural attitudes and different political dynamics, all of which have produced different broadcasting structures and priorities for the implementation of regulatory policy.

Between the US and the UK there has been since broadcasting commenced a fundamental division on the role of broadcasting in society. In the US the dominant view is that broadcasting is basically a commercial activity which the government regulates to ensure efficient management of the spectrum, prevent the excesses of monopoly behaviour and, as far as the First Amendment permits, prevent potentially harmful speech.

The idea that government might finance a centrally controlled public broadcaster, like the BBC or the ABC, has never been supported in the US and goes against the strong commitment to the idea of free speech. In consequence the principle has been to licence as many stations as the spectrum and those desirous of becoming a broadcaster could bear. This idea of economic freedom also engenders a deep seated fear of cartels and the ill

effects of monopoly behaviour in the US so that broadcasting regulation has had a major focus on curbing the power and operation of networks.

In the UK broadcasting was for a long time not seen as a commercial activity at all and until the mid fifties was run as a government monopoly. As Anthony Smith has described it “Broadcasting was born in Britain as an instrument of Parliament, as a kind of embassy of the national culture and the national polity within the nation.’ The idea that broadcasting is a national cultural institution the primary purpose of which is to serve the nation with a high quality information, education and entertainment service and which is independent of any political interference is fundamental to the UK broadcasting system.

There is also a broadly held consensus as to what that public service consists of and that where broadcasters are supported by advertising that activity is secondary to the achievement of the public service obligations. The recently enacted Communications Act 2003 has only served to reinforce that consensus and to make even clearer the obligation of OFCOM to ensure the public service remit for all broadcasters is clearly articulated and that it will be met.

In contrast, the Australian system has aspects of both the US and UK systems in that there are both publicly and privately owned broadcasters. The idea that the government should be a broadcaster was supported early on. Service provision was seen to be something that governments should do if the private sector could not support it, as was the case in transport and communications infrastructure. However, unlike the BBC the ABC has historically been more closely supervised and dependent on government, as well as being from time to time subject to political direction.

But government has not wanted to run the entire system. Thus commercial broadcasting, particularly commercial television was designed as a system that would make no call on the public purse, either for transmission facilities or other costs. While it was to have some public service obligations, these were to be met from the profits of broadcasting. Unlike the UK, the consensus as to what those obligations might be (children’s television, Australian content, and limits on advertising time) has been weaker and contested, at times strongly, by the broadcasters.

Unlike the US concern about competition and the effect of oligopoly is only a relatively recent phenomena in Australia – the Trade Practices Act dates from 1974. As a consequence successive governments and the general public for a long time tolerated a very high degree of oligopoly and concentration of ownership. Thus, the Australian commercial broadcasting system grew by first radio licences and then television, being granted to established newspaper interests. This heavy media concentration was only broken down by the ownership and control changes in 1986.

It is also worth noting that in terms of regulatory style Australia has experimented with more regulatory bodies than either the UK or the US, but most of these bodies have been subject to high levels of political direction.

The formation of ACMA will represent the fifth body to regulate broadcasting in Australia; its predecessors being the Post Master General's Department (1922-48), the Australian Broadcasting Control Board (1948-1975), the Australian Broadcasting Tribunal (1975-1992) and the Australian Broadcasting Authority (1992-present). Only since 1992 has the regulator not been subject to direction by the Minister in the performance of its functions.

These differences between Australia, the UK and the US make it difficult to determine the nature of what might be regarded as world's best practice. It is perhaps more appropriate to consider whether the powers proposed for the competition and communication regulators are appropriate to the objectives and values of the broadcasting and communications sector which Australia has developed and wishes to preserve.

For further information regarding the AFC's views on the structure of Australia's broadcasting system, AFC submissions to the outstanding subscription television reviews and the current Digital Television Reviews are available on the AFC website:

- AFC Submission to the 2000 ABA Investigation into Expenditure Requirement for Pay TV Channels at http://www.afc.gov.au/resources/online/pdfs/paytvdoco.pdf

- AFC submission to the 2003 ABA Review of Australian Content on Subscription Television, February 2003 http://www.afc.gov.au/downloads/policies/afcpaytvsub03.pdf http://www.afc.gov.au/downloads/policies/append_paytvsub03.pdf

- AFC supplementary submission to the 2003 ABA Review of Australian Content on Subscription Television, May 2003 http://www.afc.gov.au/downloads/policies/pay tv response_final.doc.pdf

- AFC submission to the 2004 DCITA Review into the provision of services other than simulcasting by free to air broadcasters on digital spectrum and the provision of commercial television broadcasting services after 31 December 2006, November 2004 http://www.afc.gov.au/downloads/policies/041020_mc_4th_sub_final.pdf

- AFC submission to the 2004 DCITA Review into the viability of creating an Indigenous broadcasting Service and the regulatory arrangements that should apply to the digital transmission of such a service using spectrum in the broadcasting bands, November 2004 at http://www.afc.gov.au/downloads/policies/041020_indig_sub_final.pdf