company had breached the *Trade Practices Act*.

His Honour was of the view that, although the ultimate charges invoiced to Ateco were well in excess of original estimates, a significant part of the cost was due to Ateco's failure to provide adequate instructions and resources, particularly in light of numerous changes to Ateco's system requirements.

Business Bytes' Claim

The claim by Business Bytes was successful and the court held the company was entitled to recover amounts totalling $222,552 in respect of unpaid bills plus legal costs.

Justice McClellan accepted the version of facts put forward by Business Bytes that the work performed was reasonable given the significant new demands placed on the system. His Honour noted that the rates charged by Business Bytes for the work performed were consistent with rates previously charged by Business Bytes.

In addition, His Honour felt that if there was any unnecessary or additional work performed by Business Bytes, they were due in large part to Ateco's failure to provide Business Bytes with adequate instructions and a timely requirements analysis, particularly in the early stages of implementation.

CONCLUSION

While *Ateco Automotive Pty Ltd v Business Bytes Pty Ltd* is a useful example of a technology dispute, it is difficult to draw any overarching principle of law from the court's judgment. It is very clear from Justice McClellan's discussion that the decision turned very much on His Honour's willingness to accept Business Bytes' version of the facts.

Nonetheless, the case is an important illustration of the importance for technology customers to co-operate and communicate with their suppliers. Ateco's failure to keep Business Bytes informed of its system requirements led to increased expense and delay, the cost of which it was ultimately required to pay.

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The Spectre of Change in Spectrum Management

Tom Reid and Niranjan Arasaratnam discuss the Federal Government's proposal to merge the ACA and the ABA in light of some responses from industry and interest groups.

The next time you're watching the English Premier League highlights on your mobile phone, you might like to consider what effect they're having on your cultural identity as an Australian. Are the video clips just a fun diversion, incidental to your 3G mobile phone service, or are they more important than that? Do they warrant applying the sorts of rules that govern what you watch on television, for example?

Submissions have recently closed on the August 2003 discussion paper *Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority* (***2003 Paper***). The 2003 Paper was issued by the Department of Communications, Information Technology and the Arts (***DCITA***), and concerns the proposed merger of the Australian Communications Authority (***ACA***) and the Australian Broadcasting Authority (***ABA***). It follows on from the August 2002 discussion paper *Options for Structural Reform in Spectrum Management* (***2002 Paper***).

The proposal to merge the two regulators has been prompted largely by technological development. The 2002 Paper cites issues such as the growth in internet take-up, and (in the long term) the possible freeing-up of spectrum with the advent of digital television, as examples. To this, the 2003 Paper adds the recent launch by Hutchison 3G Australia of 3G mobile phone services, which offer the potential for broadcasting-type services direct to a user's handset. As a result, spectrum management is said to be becoming increasingly complex, resulting in a greater need for consultation and cooperation between the ACA and the ABA. This in turn results in increased transaction costs, which are passed on to industry and ultimately to consumers.

DIFFERENCES IN APPROACH

However, the proposal to merge the two authorities involves more than merely deciding where the new headquarters will be. The ABA and the ACA work from fundamentally different bases when managing spectrum, differences that principally arise out of the different objectives of the statutes under which each authority obtains its powers. Broadly speaking, while both authorities are required to manage spectrum in the public interest, the ACA does this by maximising revenue from spectrum licensing, while the ABA is more concerned with maintaining the availability, quality and diversity of broadcast content. This difference in approach may have considerable consequences for how broadcasters and telecommunications companies operate.

The ABA took over from the former Australian Broadcasting Tribunal and exercises powers under the *Broadcasting Services Act 1992* (***BSA***). It is responsible for managing spectrum in the Broadcasting Services Bands (***BSBs***), parts of the spectrum which are set aside for broadcasting under section 31 of the *Radiocommunications Act 1992* (***RA***) and referred by the Minister to the ABA for planning. The BSBs are used by both free-to-air television and AM and FM radio services. In administering BSB licences, the ABA is guided by the objects of the BSA, which emphasise the importance of considerations such as:

- diversity in content, including the coverage of matters of both public and local interest;
- quality and innovation in content, including adherence to community standards and the protection of children from exposure to harmful content;

- the development of a sense of Australian identity, character and cultural diversity; and
- the development of a responsive and efficient broadcasting industry.

The ABA uses a variety of methods to achieve these objectives, including overseeing compliance with program standards and industry codes of practice, and administering a statutory complaints scheme. It also enforces the cross-media ownership laws under the BSA.

The ACA was established under the *Australian Communications Authority Act 1997*, merging the functions of telecommunications industry regulator AUSTEL and the Spectrum Management Agency. It exercises powers under the RA and the *Telecommunications Act 1997* and is responsible for planning for all spectrum except the BSBs. Section 3 of the RA contains that Act's objects, which generally require the ACA to ensure that spectrum is used in the most efficient and equitable way possible.

The principal tool used by the ACA to ensure efficiency and equity, at least in areas of high demand (such as the capital cities), has been price. Licensees of spectrum administered by the ACA can choose what services they will offer in that spectrum, and can trade their licences on the open market. By contrast, the ABA is required to have reference to the relative demand for different types of services when allocating spectrum in the BSBs. The ABA is also required to expand the availability of services, including by subsidising broadcasters to provide services in otherwise unprofitable areas. The ACA, apart from some proposed legislative requirements relating to defence and emergency services, is not.

MAKING THE MARRIAGE WORK

The 2002 Paper outlined these differences and asked for public submissions as to whether they constitute a real obstacle to a merger. It proposed three options for reform:

1. creation of a single agency with responsibility for broadcasting, telecommunications, radiocommunications and online regulation;

2. transfer of the ABA's spectrum planning, licence allocation and enforcement functions to the ACA; or
3. transfer of only the ABA's broadcasting spectrum planning functions to the ACA.

Responses (27 in all) were mixed. The free-to-air television and radio networks categorically opposed the move, arguing that 'the question of how to "maximise … the overall public benefit derived from using the radiofrequency spectrum" is not a question about "maximising revenue"'. The implicit fear is that in a merged regulator, the ACA's agenda of auctioning spectrum to the highest bidder would win out, and broadcasters would be forced to compete for spectrum on the open market against the big telecommunications companies such as Telstra and Optus. The broadcasters made the point that telecommunications is about one-to-one information flow, whereas broadcasting is about one-to-many information flow – hence the fundamental need to take cultural and community concerns into consideration.

Conversely, the submissions of Telstra and Optus, along with those of Vodafone, Ericsson and Motorola, indicated an interest in the proposed merger and in particular the concept of opening up the BSBs to free competition. Telstra argued that the use of 'unified, technology-neutral licences' would result in further 'administrative efficiencies', which in turn would translate into cost savings to spectrum operators and consumers (although Telstra did expressly recognise the importance of the social objectives in the BSA). Vodafone submitted that the unequal treatment of different users of spectrum results in potentially harmful 'artificially competitive distortions'.

With the 2003 Paper, however, the government has retreated from the idea of transferring any of the ABA's broadcasting spectrum planning functions to the ACA. The stated reason is that to do this would endanger the administrative viability of the ABA, by leaving it with a much reduced role. Consequently, the 2003 Paper has restricted itself to discussing a 'minimal change' version of option 1. above. The

proposal currently on the table is to merge the two organisations into a single regulator, but maintain the distinction between the treatment of BSB spectrum on the one hand, and the remaining spectrum on the other.

Yet despite this shift to a less drastic, policy neutral proposal, suspicion has remained among the broadcasters that the ABA's social and cultural priorities will eventually become subordinate to technical regulation and revenue considerations, and that the barriers between the BSBs and the other areas of spectrum will be gradually chipped away. A joint submission to the 2003 Paper from broadcasting industry peak bodies Commercial Radio Australia and Commercial Television Australia said it was 'crucial that broadcasting continue to be the primary use of spectrum' in the BSBs, indicating the fear that BSB spectrum could be invaded for other uses. Telstra appeared to echo this prediction in its submission on the 'one regulator, two policy regime' model, when it argued that such a model would distort a convergent market by encouraging it to gravitate towards use of whichever licensing regime was associated with the lowest costs. Both Telstra and Optus explicitly maintained their argument that an opening up of the BSB spectrum market should be part of any merger.

On the other hand, there remain more practical, less speculative arguments in favour of the 'minimal change' proposal. Firstly, it would allow the government to be seen to be progressing the issue and, if implemented, would result in the reduced transaction costs associated with having only one regulator. Furthermore, a merged regulator would have a stronger basis from which to respond in a unified way to technological convergence, once it begins to bite in earnest. Lastly, as a matter of parliamentary reality, an attempt to push through both spectrum management and institutional reforms at the same time would most likely result in debate and delay, and little or no progress in any direction.

FUTURE DIRECTION

Overseas experiences may provide some guidance on the future of spectrum planning under a merged Australian regulator. In support of the argument for merging the ABA and the ACA, both the 2002 and 2003 Papers referred to the fact that in the UK, US and Canada, consolidation of the regulation of telecommunications and broadcasting services has already taken place. According to the 2002 Paper, both the US and the UK are now indicating an intent to move away from merit-based broadcasting spectrum allocation and towards the auctioning of spectrum.

Submissions to the 2003 Paper closed on 15 September 2003. The 2003 Paper did not set any timetable for progressing the issue, so for now the ball is in DCITA's court. Meanwhile, it seems certain that technology will continue to close the gap between telecommunications and broadcasting services at a fast pace. While it may not a solution in itself, a merger of the ACA and the ABA seems to be an important first step in formulating an appropriate regulatory response to technological convergence. From there, whether the regulatory environment can keep pace with technology remains to be seen.

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Spam Bill Almost Law

John Corker examines the new proposed model for regulating spam in Australia, and critiques some potential problems.

On 31 October 2003 the Environment, Communications, Information Technology and the Arts Legislation Senate Committee issued the report of their inquiry into the *Spam Bill 2003* and the *Spam (Consequential Amendments) Bill 2003* and recommended that the Bills be agreed to without amendment.

It seems likely that the Bill will shortly become law.

The main features of the Spam Bill are:

- a prohibition against unsolicited commercial electronic messages (***UCEM***) with an Australian link;
- electronic messages include SMS and MMDS messages sent through a telecommunications network including the Internet and by mobile phone;
- a message is commercial simply if one of its purposes is commercial in nature even if it only includes a hyperlink to a commercial website;
- UCEM is prohibited unless it is sent with a recipient's consent. Consent can be explicit or inferred, notably from what is referred to as "conspicuous publication" of an electronic address;
- a single UCEM is prohibited. It is not necessary that it be sent in bulk;
- all commercial electronic messages must contain accurate information about the messages originator;
- all commercial electronic messages must contain a functional 'unsubscribe' facility to allow people to opt-out of receiving further messages from that provider;
- software that harvests electronic addresses from the Internet for the purposes of sending UCEM is prohibited;
- governments, political parties, charities, religious organisations and educational institutions are exempt from the prohibition against sending UCEM and the requirement to include a functional "unsubscribe facility" in each message; and
- the Australian Communications Authority (***ACA***) is responsible for enforcing the scheme. There is no right for a private legal action to be taken to enforce compliance with the provisions of the Bill.

Regulations may be made to give effect to the operation of agreements and MOUs that Australia might enter into with other countries that are directed towards curbing spam.

The associated *Spam (Consequential Amendments) Bill 2003* extends the