

# Introducing Your New Regulator: ACMA

## Clare O'Neil gives an overview of the Australian Communications and Media Authority Act 2005 and related legislation, what will change and what will stay the same

On 2 December 2004, the *Australian Communications & Media Authority Bill 2004 (ACMA Bill)* and related legislation<sup>1</sup> was introduced into the House of Representatives. The introduction of the ACMA Bill was the culmination of a lengthy and considered process commencing with the Department of Communications, Information Technology & the Arts (DCITA) discussion paper *Options for Structural Reform in Spectrum Management* in August 2002. The purpose of the legislative package is to create a new Australian media regulator by merging the Australian Broadcasting Authority (ABA) and Australian Communications Authority (ACA). Both the ABA and ACA have supported the merger, and Authority

hearings, the Committee reported on 10 March 2005. The report made 18 recommendations, some of which are discussed below.

A total of 9 amendments to the primary ACMA Bill (based largely on the ECITA Committee report recommendations) were made in the Senate on 16 March by the Australian Democrats and the Labor Party. These were disagreed to by the House of Representatives on the same day. The Senate did not insist on the amendments, and the ACMA Bill and related legislation were passed in their original form on 17 March 2005. It received assent on 1 April 2005<sup>3</sup>.

ACMA will commence upon proclamation, or by 1 July 2005 at the latest<sup>4</sup>. A

speech to the 2005 Australian Broadcasting Summit, ACMA will be operating in a regulatory environment that is highly dynamic, unpredictable and varied - new digital technologies are allowing previously distinct sectors to compete across increasingly convergent markets, using a range of different delivery platforms<sup>5</sup>. A primary example of these new technologies are the third generation mobiles, which may offer telephony, online and broadcasting-type services carried on the same network to a single piece of equipment. In such an environment, the maintenance of two separated regulators dealing with different sectors of the media is neither practical nor effective<sup>6</sup>.

In its submission to the ECITA Committee, DCITA noted that the formation of ACMA will facilitate a co-ordinated response to converged technologies, and that a combined Authority will be better positioned to understand and respond to emerging market trends in the area<sup>7</sup>. A single regulator for media and communications issues will also be advantageous as it will provide a single point of contact for industry on relevant matters.

The new merged authority will also be in a position to consolidate arrangements in areas such as the planning of the radiofrequency spectrum (currently the ACA plans all spectrum other than the broadcasting services bands, which are the responsibility of the ABA) and the issuing of apparatus licences under the *Radiocommunications Act 1992* (this is currently the responsibility of the ACA, with some powers delegated to the ABA in respect of apparatus licences for broadcasters). It will also be able to work through content issues where currently both the ABA and the ACA have areas of jurisdiction, such as new mobile services.

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members and senior management of both organisations welcomed the decision to create a converged regulator.

This paper will canvass some of the more significant provisions of the ACMA Bill and discuss the process of the Australian Communication & Media Authority's (ACMA's) creation.

### **Where is the Process up to?**

Following its introduction, the legislative package passed the House of Representatives on 10 February. The provisions of the ACMA Bill and related legislation were referred to the Senate Standing Committee on the Environment, Communications, Information Technology & the Arts (ECITA Committee) on 8 December 2004<sup>2</sup>. Following the receipt of submissions and public

July 2005 start date is considered the most likely scenario as there are a number of logistical and other challenges (such as identifying an ACMA Chair) that must be overcome prior to ACMA's commencement.

### **Why Merge?**

Digital convergence issues and the increasing overlap of functions between the ABA and ACA (for example, in areas such as mobile and internet content regulation, licensing, spectrum planning, and the regulation of telephone sex services) provide the primary basis for the merger of the ACA and ABA.

The merger will assist in dealing with present challenges facing the ACA and ABA in regulating new and emerging technologies. As pointed out recently by ABA Acting Chair Lyn Maddock in a

### **What Will Change?**

There are a number of differences between the current ACA and ABA and the proposed ACMA, some of which will be more visible to industry than others. Some of the more notable changes are discussed below.

## Members

The ABA is restricted to a maximum of 7 members<sup>8</sup>, who can only be reappointed once for a total appointment period of 10 years. In the ABA, the members can only be dismissed on very limited grounds, such as misbehaviour. The ACA has capacity for up to 5 members<sup>9</sup>, who may be dismissed on a number of grounds, including unsatisfactory performance for a significant period of time.

ACMA will be able to have up to 9 members, with an unlimited number of associate members<sup>10</sup>. There is no limit on the number of times that ACMA members can be reappointed, although there is still a total appointment time of 10 years (which includes any time as a member of the ABA or ACA)<sup>11</sup>. The members will also be subject to provisions relating to disclosure of interests (both a standing obligation to disclose<sup>12</sup> and an obligation to disclose before deciding a particular matter<sup>13</sup>) and, like the ACA, the termination provisions are broader than those currently in operation in the ABA. ACMA members may be terminated for, among other things, unsatisfactory performance for a significant period of time, physical or mental incapacity, or misbehaviour<sup>14</sup>.

## Divisions

The ACMA Act allows for the creation of Divisions of the Authority<sup>15</sup>. The Authority chooses which members are to comprise the Division, although the Chair of ACMA may nominate to be part of any Division<sup>16</sup>. The Authority determines which of ACMA's powers and functions are to be dealt with by each Division, and must make a determination with regard to the type of matters that a Division may deal with<sup>17</sup>. There is no restriction on the matters which may be delegated to a Division, provided that the matters delegated accord with the kinds of matters the Division can deal with<sup>18</sup>. Although neither the ACA nor ABA have the ability to create Divisions, the work presently undertaken by specialised committees in these agencies (involving their Authority members) represents an informal divisional structure in many instances. It is possible that formal ACMA Divisions will undertake much of the work of these existing Committees of the ABA (such as the

Planning & Licensing Committee) and the ACA (such as the Radiocommunications Steering Committee), although any decision to create and delegate to Divisions will ultimately be a matter for the ACMA members.

## Corporate Structure

Currently the ACA and ABA are government agencies prescribed under the *Commonwealth Authorities & Companies Act 1997 (CAC Act)*. ACMA is to be prescribed under the *Financial Management & Accountability Act 1997 (FMA Act)*. What does this mean in practice? Essentially, ACMA will be subject to a different, slightly more rigorous set of financial controls regarding issues such as procurement, expenditure, and budgeting, and it will also be subject to the Commonwealth *Legal Services Directions* in their entirety. The Chair, who will also be the Chief Executive of ACMA<sup>19</sup>, will have ultimate legal and financial responsibility for the management of the agency. Under the CAC Act, the ABA and ACA members bear collective responsibility for the strategic management of each agency. This will not be the case in ACMA. In ACMA, the role of Authority members will be

The decision as to what charges may be imposed for services or expenses incurred will be a matter for the ACMA members.

## What Will Stay the Same?

The creation of ACMA is intended to be a minimal change model in terms of the impact it will have on the consumers, audiences and industries concerned. Detailed below are some of the key features of ACMA which will continue existing ACA or ABA arrangements.

## Regulatory Regime

There will be no significant change to the existing regulatory regimes<sup>23</sup>, so the current legislation and rules will still apply. One of the major recommendations of the ECITA Committee was that the ACMA Act be amended to require a major review of ACMA's operations and the entire regulatory policy for communications within 18 months of its establishment. This recommendation was reflected in an amendment made to the ACMA Act in the Senate, however it was not accepted by the House of Representatives and did not ultimately become part of the legislation. In its submission

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to perform the statutory functions of ACMA as set out in Division 2 of the ACMA Act. Reflecting this position, the Authority members may not direct the Chair in relation to the performance of his or her functions and powers under the FMA Act or *Public Service Act 1999*<sup>20</sup>.

## Ability to Charge For Expenses

The ACMA Act allows ACMA to make determinations fixing charges for a range of services and matters in relation to which expenses are incurred by ACMA under the legislation it administers<sup>21</sup>. This represents a change only insofar as it relates to matters and services concerning the Broadcasting Services Act 1992. Presently, the ACA has the power to make determinations in the same terms as ACMA will be able to<sup>22</sup> but the ABA has no such power.

to the Committee, DCITA indicated that changes to the regulatory frameworks will be addressed as and when they are needed<sup>24</sup>.

Because there are not going to be any significant changes to the Acts that the ACMA will administer, ABA and ACA staff skills and knowledge will remain relevant, ensuring that the new Agency commences with of the necessary corporate and historical knowledge concerning the operation, interpretation and application of the regulatory regimes.

## Location and Staff Arrangements

In the first instance, ACMA will have three main offices located in Sydney, Canberra and Melbourne, with regional offices in Coffs Harbour, Newcastle, Brisbane, Cairns, Townsville, Darwin, Rockhampton, Adelaide, Hobart, Wodonga,

and Perth<sup>25</sup>. Staff of the ACMA will be engaged pursuant to the *Public Service Act 1999*<sup>26</sup>, as staff in the ACA and ABA presently are.

### Consumer Consultative Forum

The provisions relating to the ACA's Consumer Consultative Forum (CCF) have been reproduced in the ACMA Act<sup>27</sup>, and have not been restricted to telecommunications issues. While this may initially appear to result in a duplication of the existing arrangements, the provision in the ACMA Act potentially broadens the scope of the operations of the CCF to include broadcasting issues affecting consumers. However, any move to widen the scope of issues which may be considered by the CCF would need to be carefully considered, as the one-to-many mode of delivery by broadcasters generally gives rise to a different set of issues than the one-to-one delivery mode of many telecommunications service providers.

A number of the recommendations of the ECITA Committee related to strengthening the position of consumers generally, including ensuring that at least one ACMA member has a background in consumer representation and advocacy. Although these recommendations were reflected in Senate amendments, they were not agreed to by the House of Representatives and are not part of the legislation as passed.

### Budget

The ACMA will be allocated the combined budget of the ACA and ABA for the first two years of its operation, with a review of funding to be undertaken for the 2007-2008 financial year. While it is anticipated that some savings may be made in relation to consolidating the administration of the two agencies, these savings are likely to be required for infrastructure projects relating to the merger, such as the integration of finance and human resources systems<sup>28</sup>.

### Conclusion

The creation of the ACMA will be accompanied by a number of challenges, such as the determination of an appropriate organisational structure to support the rationale behind the merger, developing procedures and infrastructure for

the new organisation, and the development of an appropriate culture and identity for the new regulator.

How these challenges will be faced and addressed depends largely on the identity, character and views of the ACMA Chair, once he or she has been selected<sup>29</sup>. As the Chair of the Authority and the Chief Executive of the Statutory Agency, the person selected for the position will have a pivotal role in shaping both the new organisation and the tenor of media regulation in the current dynamic environment.

The creation of ACMA, the result of almost three years of consideration and discussion, will assist in the effective and responsive regulation of new technologies as they emerge, in addition to providing a continuing stable regulatory environment for existing service providers, audiences and consumers.

**Clare O'Neil is a Senior Lawyer in the Policy, Legal & Licensing Branch of the Australian Broadcasting Authority. She thanks Giles Tanner for the suggestion and Jonquil Ritter for the review of this article.**

(Endnotes)

<sup>1</sup> The related legislation comprises: the *Australian Communications & Media Authority (Consequential & Transitional Provisions) Bill 2004*; the *Television Licence Fees Amendment Bill 2004*; the *Radio Licence Fees Amendment Bill 2004*; the *Datacasting Charge (Imposition) Amendment Bill 2004*; the *Radiocommunications (Receiver Licence Tax) Amendment Bill 2004*; the *Radiocommunications (Spectrum Licence Tax) Amendment Bill 2004*; the *Radiocommunications (Transmitter Licence Tax) Amendment Bill 2004*; the *Telecommunications (Carrier Licence Charges) Amendment Bill 2004*; and the *Telecommunications (Numbering Charges) Amendment Bill 2004*.

<sup>2</sup> The inquiry was entitled *Powers of Australia's Communications Regulators*, although the final report was subtitled as *Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters*.

<sup>3</sup> Hereafter references to the primary legislation will be to the *Australian Media & Communications Authority Act 2005 (ACMA Act)*.

<sup>4</sup> Section 2 of the ACMA Act

<sup>5</sup> Keynote address to the 2005 Australian Broadcasting Summit, 28 February 2005. An edited extract of the speech is available in the March 2005 *ABA Update* at pages 23-25, which may be accessed at: [http://www.aba.gov.au/abanews/aba\\_update/current.htm](http://www.aba.gov.au/abanews/aba_update/current.htm)

<sup>6</sup> *Ibid*

<sup>7</sup> Submission by DCITA to the ECITA Committee: *Inquiry into the Powers of Australia's*

*Communications Regulators*; available on the ECITA Committee website at: [http://www.aph.gov.au/senate/committee/ecita\\_ctte/acma/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/ecita_ctte/acma/submissions/sub10.pdf)

<sup>8</sup> Section 155 of the *Broadcasting Services Act 1992*

<sup>9</sup> Section 37 of the *Australian Communications Authority Act 1997*

<sup>10</sup> Section 24 of the ACMA Act. Like the ABA and ACA, associate members' powers are limited to those stipulated in their instrument of appointment.

<sup>11</sup> Section 21 of the ACMA Act

<sup>12</sup> Section 29 of the ACMA Act

<sup>13</sup> Section 30 of the ACMA Act

<sup>14</sup> Section 34 of the ACMA Act

<sup>15</sup> Subsection 46(1) of the ACMA Act

<sup>16</sup> Subsection 46(3) of the ACMA Act

<sup>17</sup> Subsection 46(1) of the ACMA Act

<sup>18</sup> Subsection 50(1) of the ACMA Act

<sup>19</sup> The Chair is the CE of ACMA pursuant to an amendment to the *Financial Management and Accountability Regulations 1997*. The amendment is found at Section 64 of the *Australian Communications and Media Authority (Transitional and Consequential Provisions) Act 2005*.

<sup>20</sup> Section 63 of the ACMA Act

<sup>21</sup> Section 60 of the ACMA Act

<sup>22</sup> Section 53 of the *Australian Communications Authority Act 1997* (Cth)

<sup>23</sup> Reflecting the views expressed by DCITA in their 2003 Discussion paper on the issue: [http://www.dcita.gov.au/\\_data/assets/word\\_doc/11,002/Discussion\\_Paper.doc](http://www.dcita.gov.au/_data/assets/word_doc/11,002/Discussion_Paper.doc) and the then Minister for Communications, Information Technology & the Arts, Daryl Williams, in his press release dated 11 May 2004 announcing the creation of ACMA: see [http://www.dcita.gov.au/Article/0,,0\\_7-2\\_4011-4\\_118741,00.html](http://www.dcita.gov.au/Article/0,,0_7-2_4011-4_118741,00.html) This is further supported by the Explanatory Memorandum to the ACMA Act.

<sup>24</sup> Submission by DCITA to the ECITA Committee: *Inquiry into the Powers of Australia's Communications Regulators*; available on the ECITA Committee website at: [http://www.aph.gov.au/senate/committee/ecita\\_ctte/acma/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/ecita_ctte/acma/submissions/sub10.pdf)

<sup>25</sup> There is to be no immediate change to the location of ABA and ACA offices, although over time the locations may alter. Former Minister for Communications, Information Technology & the Arts, Daryl Williams, in press release dated 11 May 2004 announcing the creation of ACMA: see [http://www.dcita.gov.au/Article/0,,0\\_7-2\\_4011-4\\_118741,00.html](http://www.dcita.gov.au/Article/0,,0_7-2_4011-4_118741,00.html)

<sup>26</sup> Section 54 of the ACMA Act

<sup>27</sup> Section 59 of the ACMA Act

<sup>28</sup> Ms Faye Holthuyzen, Deputy Secretary for Communications, DCITA, in evidence to the ECITA Committee, on 11 February 2005: see *Committee Hansard: Senate References Committee on the Environment, Communications, Information Technology & the Arts*; Reference: The provisions of the *Australian Communications and Media Authority Bill 2004 and other matters*, 11 February 2004; pp 60: <http://www.aph.gov.au/hansard/senate/committee/S8056.pdf>

<sup>29</sup> At time of press, the identity of the Chair of ACMA is not known.