THE LEGAL CHALLENGES FACING ACMA AS REGULATOR

CHRIS CHAPMAN*

I INTRODUCTION

The Australian Communications and Media Authority ('ACMA'), established under the *Australian Communications and Media Authority Act 2005* (Cth), has taken over the roles of the Australian Broadcasting Authority ('ABA') and the Australian Communications Authority ('ACA'). ACMA must manage the expectations of the different industry sectors (which are increasingly in competition with each other), the public and consumers. It needs to strive to consistently apply the law.

The legislative regime within which ACMA works is diverse and complex. Four principal Acts govern ACMA's industry responsibilities: the *Broadcasting Services Act 1992* (Cth) ('*BSA*'), the *Radiocommunications Act 1992* (Cth), the *Telecommunications Act 1997* (Cth) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

However, those four Acts are augmented and complemented by another 29 statutes, more than 500 legislative instruments and dozens of industry codes of practice developed with segments of the broadcasting, radiocommunications and telecommunications industries, and with participants in the internet industry. These other instruments include licence area plans, legislative instruments for radiocommunications, and new legislation for communications issues, such as spam – these pieces of legislation dealing with 'one-off' nuisance communications issues – the response by government to strong community concerns. Additionally, ACMA is also subject to common law and administrative law obligations, ministerial directions, other government legislation (such as the *Financial Management and Accountability Act 1997* (Cth) and the *Freedom of Information Act 1982* (Cth)), and certain international treaties.

Accordingly, ACMA operates in a complex legal environment, which has recently undergone significant reform in regards to broadcasting. It must also strike an appropriate balance between sometimes competing objectives under the four principal pieces of legislation. Like any regulator working in a dynamic and developing environment, ACMA faces challenges in enforcing the law, including the exercise of new enforcement powers. Further, for sound policy and process

* BCom (Merit) (UNSW), LLB (UNSW), Advanced Management Program (Harv); Chairman and CEO, Australian Communications and Media Authority.

reasons, developments in the legislative framework occur more slowly than the rapid change in technology. This inevitable lag between the technology and the law can present its own complications and challenges. In my view, this was a key issue sought to be addressed in the Government's 2006 media reforms. In this regard I note that in introducing the Media Reforms Discussion paper, the Minister for Communications, Information Technology and the Arts addressed the gap between the 'analogue' approach to media regulation and the world of digital technology and the difficulty of regulating this new environment.[1]

II INHERENT LEGAL CHALLENGES AND COMPLEXITIES

Looking first at the inherent legal challenges and complexities, the principal question for ACMA is how to reconcile competing objectives under its legislation. For example, the *BSA* provides that:

> The Parliament also intends that broadcasting services and datacasting services in Australia be regulated in a manner that, in the opinion of the ACMA … enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and datacasting services …[2]

Yet under the same Act, the objects were changed as part of the media reforms to include the promotion of 'the availability to audiences throughout Australia of television and radio programs about matters of local significance'.[3] I recognise that there clearly may be trade-offs between the imposition of any minimum standards to support that object, costs associated with meeting those standards, and the reluctance to impose financial burdens on broadcasting services licensees. In terms of ACMA's own role, its duty is to implement the media reforms in whatever way achieves the public interest considerations while minimising 'unnecessary' administrative burdens on the broadcasters. Similar trade-offs exist under the *Telecommunications Act 1997*,[4] and the *Radiocommunications Act 1992*.[5]

The process of resolving the majority of these trade-offs is left to ACMA itself. This is because ACMA is often left by Parliament with a substantial delegated law-making function and associated discretion. Under the suite of telecommunications legislation, ACMA may (and sometimes, must) make:

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1 See Australian Government, *Meeting the Digital Age, Reforming Australia's Media in the Digital Age*, Discussion Paper on Media Reforms (2006) ('Discussion Paper'). On page 3 it was stated:

> In order to ensure the quality and diversity of services delivered to consumers, media policy has traditionally closely controlled who may enter the market and what services they may offer. The current, 'analogue' approach to media regulation, enshrined in the BSA is based on regulatory distinctions between different types of broadcasting. Digital technology enables new services to be offered and opportunities for additional sources of content for audiences from both new and existing players. In a converged environment, it will become increasingly difficult to regulate the emergence of new players and new services. Digital technologies blur the lines between the traditionally distinct telecommunications, broadcasting, print and IT sectors as they deliver an increasingly common range of services.

2 *BSA* s 4(2)(a).

3 *BSA* s 3(1)(ea).

4 *Telecommunications Act 1997* (Cth) s 4.

5 *Radiocommunications Act 1992* (Cth) s 3.

- rules for cabling providers;[6]
- instruments relating to the universal service obligation[7] and setting out the customer service guarantee;[8]
- disability standards; [9]
- a numbering plan;[10]
- determinations for allocating freephone and local rate numbers;[11]
- an integrated public number database scheme;[12] and
- technical standards.[13]

Although under the *BSA,* ACMA's law-making function is, in scope, more limited, ACMA has some significant delegated legislation powers, for example:

- it may make and vary conversion schemes for the conversion of commercial and national television broadcasting services from analogue to digital.[14] These schemes are significant instruments that govern how commercial and national television broadcasters make the transition to digital transmissions
- it may make standards which set out detailed rules for broadcasting licensees, such as:
  - Broadcasting Services (Australian Content) Standard;
  - Children's Television Standard;
  - Broadcasting Services (Commercial Radio Advertising) Standard;
  - Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard; and
  - Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard.

Often, the power to make these legislative instruments has existed for some time, and ACMA, as the successor to the Australian Broadcasting Tribunal, the Australian Broadcasting Authority, the Spectrum Management Authority, Austel and the Australian Communications Authority, has enjoyed the benefit of institutional experience (or corporate memory and skill sets) in exercising these powers. However, recent legislative changes have given rise to new powers, new institutional learning and experience.

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6 *Telecommunications Act 1997* (Cth) s 421.
7 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) pt 2.
8 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) pt 5.
9 *Telecommunications Act 1997* (Cth) s 380.
10 *Telecommunications Act 1997* (Cth) s 455.
11 *Telecommunications Act 1997* (Cth) s 463.
12 *Telecommunications Act 1997* (Cth) s 295A.
13 *Telecommunications Act 1997* (Cth) pt 21.
14 *Broadcasting Services Act 1992* (Cth) sch 4.

In response to a report by Professor Ian Ramsay,[15] Parliament passed the *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth) ('*Enforcement Powers Act'*) which amended the *BSA* to confer upon ACMA the power:

- to accept enforceable undertakings;[16]
- to give remedial directions;[17]
- to impose civil penalties for acts such as breaches of licence conditions;[18] and
- to seek injunctions.[19]

Previously, ACMA and the ABA were actually very constrained in practice in the action they could take in response to most breaches of the *BSA*. Effectively, ACMA could only decide between taking no action, issuing notices, imposing additional licence conditions, cancelling the licence or referring a breach to the Director of Public Prosecutions for criminal proceedings. The *Enforcement Powers Act* introduced what are generally described as 'mid-range' enforcement options to broadcasting and radiocommunications. Similar powers have existed for many years under the *Telecommunications Act 1997* (Cth) and since the commencement of the *Spam Act 2003* (Cth).

ACMA has also needed recently to come to a view on how it would exercise these new options. In February 2007, ACMA released its (Cth).[20] Amongst other principles set down in the guidelines, ACMA has foreshadowed these approaches:

- enforcement action should be proportionate to the impact of the breach or risk of breach;
- enforcement action should seek to address any systemic or ongoing element that may give rise to future breaches; and
- individuals may be personally liable where the person failed to take reasonable steps to prevent the contravention, and was in a position to influence the conduct of a contravening corporation.[21]

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15 Ian Ramsay, *Reform of the Broadcasting Regulator's Enforcement Powers* (2005), Australian Consumer and Media Authority <http://www.acma.gov.au/webwr/_assets/main/lib100845/enforcementpowers.pdf> at 23 June 2007.

16 *BSA* ss 61AS, 205V.

17 *BSA* ss 61AN, 61ANA, 121FH, 121FJB, 137, 141.

18 *BSA* pt 14B.

19 *BSA* pt 14C.

20 See *BSA* s 215 and ACMA, 'Guidelines relating to ACMA's Enforcement Powers under the *Broadcasting Services Act 1992* (Cth)' (2007) <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/F7C20FBC91E24ECECA25727A0013D74D/$file/Final+ACMA.doc> at 30 June 2007.

21 Ibid 3.2.

III ENFORCEMENT

Traditionally, the *BSA* has contained a scheme of 'co-regulation'. Each broadcasting category may develop a code of practice that applies to the broadcasting operations of participants in that category.[22] ACMA may review the codes and, if it considers that the codes are failing, may impose standards.[23] Under these codes, complaints about the broadcasting operations are generally directed to the broadcaster in the first instance.[24]

If the process set down by a code fails to resolve the complaint, it is then referred to ACMA. As a policy, this has the advantage of filtering 'lower level' complaints, and places responsibility for handling these complaints directly on the broadcaster who is the subject of the complaint. It should give rise to an immediate awareness in that broadcaster of the types of matters about which complaints commonly relate. It relies on a code of practice being in place that reflects community standards, and has relevance and clarity, which is perhaps why the *BSA* requires ACMA's participation in the development of the codes.[25]

In other areas, ACMA has a direct compliance and enforcement role; for example, in the media ownership and control laws,[26] and the more recent legislation for dealing with nuisance communications such as spam and unwanted telemarketing calls.[27]

Among the most important challenges ACMA faces is meeting the public expectation that it will effectively and efficiently (and independently) enforce industry compliance with legal obligations. By allowing for significant penalties, Parliament has given ACMA a particularly strong message that it should be rigorous in enforcing the laws protecting media diversity, reducing spam and ensuring compliance with the Do Not Call Register.[28] If there has been a breach of the *BSA*, ACMA will, within the limits of the law, take regulatory action commensurate with the seriousness of the breach.[29]

Although ACMA considers that the co-regulatory approach under the *BSA* has worked well, there has been criticism of the timeliness of the handling of co-regulated broadcasting complaints. For example, the ABC television program *Media Watch* has commented on the timeliness of dealing with particular

22 *BSA* s 123.

23 *BSA* ss 123A, 125.

24 See, eg, Australian Broadcasting Association's Commercial Television Industry Code of Practice 2004 s 7.

25 *BSA* s 123(1).

26 See *BSA* pt 5.

27 *Spam Act 2003* (Cth); *Do Not Call Register Act 2006* (Cth).

28 See, eg, *BSA* ss 61AME, 61AQ; *Spam Act 2003* (Cth) pt 4; *Do not Call Register Act 2006* (Cth) pt 4; 'The bill will also ensure that ACMA can undertake the critical regulatory functions require of it in the new media regulatory framework that will be established by the government's media reform package. In particular, ACMA will have a key role in ensuring that diversity of media ownership and content are protected': Second Reading Speech, *Communications Legislation Amendment (Enforcement Powers) Bill 2006* (Cth), House of Representatives, 14 September 2006 (De-Anne Kelly, Parliamentary Secretary, Trade).

29 See Guidelines above n 20, 3.2; *Broadcasting Services Act 1992* (Cth) s 4(1).

complaints.[30] Whilst ACMA considers that investigations of broadcasting complaints are necessarily time consuming, particularly if procedural fairness is to be given to the subjects of the complaints, ACMA has, nonetheless, over the last nine months, reassessed its own internal procedures for their adequacy and timeliness. Further, ACMA has engaged external consultants who are to recommend practical steps to deal with co-regulated broadcasting complaints more quickly and using what we have learned from our other investigative responsibilities. The time taken may be a focus of attention when the commercial radio and television industry codes are reviewed later this year. ACMA must continue to perform its functions in accordance with the principles of administrative law. It will encourage, and if necessary, require, through its new powers, co-regulated entities to recognise (with good faith) that they must bear the burden of complying with all their obligations to ensure that the broadcasting services bands are used appropriately and, ultimately, consistently with the public interest.

In other contexts, ACMA has successfully taken enforcement action, using powers similar to those conferred by the *Enforcement Powers Act*. For example, under the *Spam Act 2003* (Cth), ACMA successfully sought significant civil penalties against an entity for the transmission of spam emails.[31] In deciding to take this action, ACMA had to rely on its understanding of the *Spam Act 2003* (Cth), which was, at that time, almost unique in its operation. ACMA's understanding was largely confirmed by Nicholson J in the Federal Court.[32] In the decision on penalties, his Honour agreed that the *Spam Act 2003* (Cth) penalty regime is distinct from similar regimes enforced by the Australian Competition and Consumer Commission, and imposed a significant penalty of $4.5 million on the first defendant.[33]

However, judicial processes can also cast uncertainty upon ACMA's processes. For example, in the course of *Wyong-Gosford Progressive Community Radio Inc v Australian Communications and Media Authority*,[34] the applicant first sought a merits review of a decision not to grant it a community broadcasting licence on 24 November 2005 (outside the statutory time limit). Justice Cowdroy ultimately made final orders refusing to extend the time within which the applicant could seek merits review on 20 December 2006. Between November 2005 and December 2006, the entity to which ACMA had granted the relevant community broadcasting licence could not be certain whether there would be a merits review of ACMA's decision, with the potential result that that entity could lose its community broadcasting licence. Resort to the courts by aggrieved persons is a necessary part of administrative law, and ACMA does not criticise the Federal Court or any entity exercising its rights. However, ACMA is aware that these processes and uncertainties can involve significant costs and cause significant distress to participants in the broadcasting industry. This is

30 ABC Television, 'Trouble in Jonestown', *Media Watch*, 30 October 2006.
31 *Australian Communications and Media Authority v Clarity1 Pty Ltd* (2006) 155 FCR 377.
32 *Australian Communications and Media Authority v Clarity1 Pty Ltd* (2006) 150 FCR 494.
33 *Australian Communications and Media Authority v Clarity1 Pty Ltd* (2006) 155 FCR 377.
34 (2006) 93 ALD 784.

particularly the case when there is a significant delay in the resolution of a matter.

ACMA seeks to provide as much certainty as it can. It is notable that ACMA's new powers to accept enforceable undertakings are similar to those used often by the ACCC (with which ACMA is forging a closer relationship in the interests of mutual benefit and the desire of both to minimise the regulatory burden in overlapping areas of interest). ACMA recognises that there is no sharp dichotomy between competition law and media regulation and that businesses seeking to engage in media transactions will often be engaging, simultaneously or immediately consecutively, with the ACCC and ACMA to obtain necessary approvals or clearances for the transaction to proceed. Additionally, ACMA recognises that the ACCC has significant and deep experience in using the enforceable undertaking power.

ACMA has actively been seeking to learn as much as it can as quickly as possible from the experiences of the ACCC in this area. For example, ACMA has developed and published a briefing note for businesses considering a media merger which reflects some of the key considerations which ACMA will bear in mind when dealing with applications for approval in a media merger context.[35] The briefing note was informed by extensive consultation with the ACCC. ACMA has also introduced processes whereby discussions with merging businesses are held with representatives of each regulator (the ACCC and ACMA) present and asks the businesses to agree to share confidential information with each regulator. This reflects the determination of ACMA and the ACCC to reduce regulatory 'gaming' by industry participants.

IV EMERGING CHALLENGES – COMMUNITY EXPECTATIONS AND CONCERNS, NEW TECHNOLOGY AND THE LEGAL FRAMEWORK

The existing legal framework may struggle over time to cope with technological change, especially 'convergence' in telecommunications and broadcasting services (such as the provision of traditional 'broadcasting' services over the internet and on mobile phones). This framework must also allow ACMA to respond to changes in community expectations and concerns. In the absence of legislative change, ACMA will have to deal with new compliance and enforcement challenges, which address the disparity between the existing legislative model of three distinct communications silos (telecommunications, radiocommunications and broadcasting) and emerging technologies, and reflect approaches that bridge them.

In making delegated legislation and enforcing the law, in circumstances of rapid and often unpredictable technological and social change, ACMA will

35 *Media Ownership Reforms – Prior Approval Processes for Certain Media Mergers* (2007) Australian Communications and Media Authority <http://www.acma.gov.au/webwr/_assets/main/lib101061/briefing per cent20paper per cent20- per cent20media per cent20reform per cent20- per cent20prior per cent20approvals.pdf> at 23 June 2007.

require agility. The following four examples demonstrate some of the different challenges that ACMA faces.

A Social and Legislative Change – Media Ownership and Private Equity

Broadcasting services have typically been viewed as powerful means of influencing public debate. Consequently, Parliament has limited the degree of control any one person has over the more influential types of broadcasting services licences. Since 1992, the control and ownership rules have prevented concentration of control over commercial television and radio broadcasting licences.[36] Ultimate ownership of major companies has generally resided in listed public companies – that is, entities with such a spread of ownership (as required by the rules of the Australian Securities Exchange) that relatively few people further up the chain of ownership would be in a position to exercise control over the licences, and that those who were in such a position could be relatively easily identified.

However, the recent growth of private equity in Australia has had significant implications for regulators, including ACMA. While some of the challenges faced by the corporate regulators will also have an impact on ACMA, there are some distinct and unique challenges for the regulation of the control and ownership rules in the media sector.

In the Australian media sector, private equity funds have invested in two of the large media operations, PBL Media and the Seven Media Group. The challenge of private equity arrangements in the media sector is determining who, in the chain of ownership, will be either a controller or in a position to exercise control. Unlike the traditional corporate structure of media groups, private equity is less transparent and firms subject to private equity ownership are not subject to the same reporting and disclosure requirements as listed public companies. For ACMA, this means that being able to identify all controllers can be a complex and challenging task, as can monitoring changes in control.

A second challenge for ACMA lies in identifying any breaches of the media diversity rules in private equity transactions. ACMA is reliant on controllers disclosing interests held in a media group or operation. With the complexity of many private equity fund structures, clear identification of who owns beneficial or legal interests in the media group may require cross-checking against other media operations to ensure there are no breaches of the diversity rules.

Although private equity funds can be structured in a number of ways, there are some commonalities that highlight some of these challenges.

Private equity funds are typically incorporated under the partnership laws of jurisdictions such as the Cayman Islands or Delaware. Most funds have a life span of 10 to 12 years. Investors are usually institutional investors, such as superannuation funds or endowment funds, and occasionally high net-worth individuals. Investors face significant penalties if they leave the fund before the end date, and investments are therefore stable and long-term.

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36 *BSA* pt 5.

The fund is generally formed as a limited partnership, and under the relevant law, members of the fund (that is, the investors) are unable to be involved in day-to-day management, or in the business decisions of companies in which the fund invests. The fund will generally be wholly-owned by a general partnership, which manages, controls and operates the fund through its board. It is the board of the general partnership that will be the ultimate decision-maker for the fund, and therefore, in the media context, likely to be in a position to exercise control. Depending on the investment structure, the general partnership may also hold a direct interest in an investment.

There are often other entities or individuals in the structure, such as an advisory committee that influences the investment decisions of the fund, influential executives or managers or a management company. Depending on the nature of the arrangements with the fund, these entities or individuals may also be in a position to exercise control.

B Social and Legislative Change – Community Concerns about Localism – Trigger Events and the Local Presence Licence Condition

As part of the recent media changes, ACMA has become more directly interested in the operation of some broadcasters than was the case under the previous co-regulatory model. ACMA is required to impose a 'local presence' condition on commercial radio broadcasting licensees in regional areas.[37] The condition deals with the maintenance of staffing levels and production facilities.

The condition requires the licensees to maintain the same local presence that it or its predecessor had upon the occurrence of a 'trigger event'.[38] A trigger event is a change in control of the licence, or the formation of a new registrable media group or a change in control of an existing registrable media group in the licence area.[39] I will not delve any further here into the complexities of 'registrable media groups'.

Earlier this year, ACMA issued the *Broadcasting Services (Additional Regional Commercial Radio Licence Condition – Local Presence) Notice*, [40] which sets out what staffing levels and what use of studios and other production facilities must be maintained after the occurrence of a trigger event.

The development of this licence condition required a careful balancing between the needs of regional communities in radio stations maintaining a local presence and the other requirements,[41] with the needs of licensees to maintain some flexibility in managing their businesses and upgrading their technology. It involved careful consideration of the operations of regional radio broadcasters.

37 *BSA* s 43B.

38 *BSA* s 43B(1).

39 *BSA* s 61CB.

40 *Broadcasting Services (Additional Regional Commercial Radio Licence Condition – Local Presence) Notice 2007* (Cth).

41 See, eg, *Broadcasting Services (Additional Regional Commercial Radio Licence Condition – Local Presence) Notice 2007* (Cth) s 43B.

However, development of the licence condition was merely the beginning. In time, a more significant challenge may lie in enforcing it after a trigger event occurs.

This rapid change in legislation and community concerns about local radio presence has required ACMA to move quickly and implement new workable rules in a relatively short time.

C Social and Technological Change – Globalisation and Dealing with Community Concerns

Parliament has sought to respond to strong community concerns about unsolicited and unwanted electronic communications that originate both within and outside Australia's borders, such as spam and telemarketing.

As a response to the transmission of unsolicited emails, often sent without a bona fide marketing purpose, Parliament passed the *Spam Act 2003* (Cth).[42] ACMA enforces the provisions of this Act and has done so successfully,[43] without, however, relying solely on it. For example, ACMA has developed technological tools, such as SpamMATTERS, the reporting and forensic analysis system which allows the public to monitor and report to ACMA instances of potential spam. ACMA has also entered into arrangements with international bodies for coordinated responses (for example information gathered under the Australian Internet Security Initiative, another of ACMA's technological initiatives, may be shared with international agencies).

However, one aspect of the *Spam Act 2003* (Cth) AMCA has had to grapple with is whether the practice of 'missed call marketing' falls within the prohibitions of that Act. Although the *Spam Act 2003* (Cth) was designed to be technologically neutral, behaviour and technology evolves to evade its requirements. The challenge for ACMA is to maintain a comprehensive understanding of technological changes, so as to ensure compliance against ever-changing landscapes.

As a response to 'cold-calling' or telemarketing (which, unlike spam, overwhelmingly has a genuine marketing purpose), Parliament passed the *Do Not Call Register Act 2006* (Cth). Parliament set the foundations for the scheme, but it was for ACMA to arrange the building of the register, set the policy on how telemarketers could access the register (and for what price), and how the public could enter their numbers. ACMA's challenge was to build a structure that was workable for telemarketers, telephone account-holders and the Commonwealth as well ACMA itself.

The structure needed to be both implemented and enforced by ACMA, in effect making ACMA both a 'legislator' and 'prosecutor'. The challenge was therefore to balance the needs in each case and the legal challenge was to draft

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42 For example, consider the 'Nigerian' emails, which encourage the unsuspecting to provide their banking details in the hope of obtain a percentage of the fictionally embezzled spoils of the Nigerian treasury, and similar scams: see, 'Nigerian Email Scam Broken Up', *Sydney Morning Herald* (Sydney), 3 October 2003, <http://www.smh.com.au/articles/2002/10/03/1033538710688.html> at 20 June 2007.

43 *ACMA v Clarity1 Pty Ltd* (2006) 155 FCR 377; *ACMA v Clarity1 Pty Ltd* (2006) 150 FCR 494.

the instruments in order to reflect the balance accurately between the two mindsets.

The scheme is still nascent, and there will be, no doubt, enforcement issues, but these are still a future challenge.

D Social and Technological Change – Convergence and the Future of Communications Regulation

This is where some significant challenges lie. Historically, telecommunications companies provided telecommunications services over their own networks (or, by agreement, the networks of others), and broadcasting services were provided on a point-to-multipoint basis by entities with clear control over both the content and carriage of the service, and this was true more or less without exception.

However, this is no longer true. Using Voice over Internet Protocol ('VoIP'), any entity can provide a telecommunications service over another entity's network without that entity's knowledge. Similarly, many broadcasting services (particularly subscription services) are provided in circumstances where the content and the means of carriage are separately owned and perhaps separately controlled (for example, a proprietary channel on a cable television network). Others are provided on a point-to-point basis, such as via 3G mobile 'telephony' or over the internet. None of these developments were widely predicted; predictions about the rise in short messaging services, and internet applications such as MySpace and YouTube were also missing in action.

ACMA has to respond to new and convergent services, often with an international dimension, within the existing legal framework.

VoIP is a case in point. It raises issues about how the existing framework under telecommunications legislation fits with the new service. ACMA has already amended the *Telecommunications Numbering Plan 1997*[44] to provide for numbering prefixes for emerging services such as VoIP, but there are other issues, such as compliance with the Customer Service Guarantee and whether changes to the *Telecommunications (Emergency Call Service) Determination 2002*[45] are necessary to ensure VoIP providers enable access to emergency call services.

However, sometimes legislative change drives technological change. Some of the amendments made by the *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth) to the *BSA* and the *Radiocommunications Act 1992* (Cth) introduced new licences, Channel A datacasting transmitter licences, and Channel B datacasting transmitter licences.

ACMA is currently setting up a regime for allocating these licences which will allow the licensees to provide digital broadcasting services using unallocated channels in the broadcasting services bands. The Channel B licences are designed to drive innovative services, such as mobile television.

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44 Pursuant to s 455(1) *Telecommunications Act 1997* (Cth).

45 Pursuant to s 147(1) *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

A challenge for ACMA may prove to be that these channels are a unique legal hybrid of the *BSA* and the *Radiocommunications Act 1992* (Cth). Unlike normal broadcasting service band licences, which automatically carry with them apparatus licences under the *Radiocommunications Act 1992* (Cth), ACMA is required to allocate two particular species of apparatus licence *first*, with broadcasting services licences to follow later. So, unlike normal apparatus licence allocation processes under the *Radiocommunications Act 1992* (Cth), ACMA is focused on content issues, not just spectrum access.

V CONCLUSION

The recent changes to the legislation, especially the *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth), have made ACMA a more powerful entity than its predecessors. Those changes should allow ACMA to act proportionally and to respond more quickly to enforcement situations, particularly those that might arise under the media diversity reforms.

Our broader range of enforcement options will also allow ACMA to react more quickly and effectively to the many challenges that ACMA faces, whether from changes in society, legislation or technology. The new enforcement powers will be useful in this respect, but ACMA itself will need to be prepared to deal with novel and unforeseen situations, and be structured to act effectively on such a disposition. ACMA is also aware that it will be increasingly challenged to take on new roles to address pressing community concerns as they emerge with the technological change that is so fundamentally transforming our economy and society.