

Extract from speech by ACMA Chairman Chris Chapman to the AGS Media and Communications Forum, Sydney, March 2007

# Legal challenges facing ACMA as regulator

**From a distance, ACMA might appear to be a straightforward creature of statute. Four Acts principally frame its responsibilities for regulation of broadcasting, datacasting, online content and telecommunications, and management of Australia's radiofrequency spectrum. But these four Acts are augmented, complicated and often constrained by another 29 statutes and more than 523 legislative instruments, as well as new legislation for communications issues such as spam that were inconceivable when the original Acts were drawn up.**

And ACMA is also subject to the obligations of common law, administrative law, ministerial directions and international treaties.

ACMA has also inherited two quite distinct regulatory genes. The Australian Broadcasting Authority demonstrated a clear preference for making compliance breaches public. The Australian Communications Authority preferred not to. This has given rise to different expectations and assumptions about compliance and enforcement in their sectors—expectations and assumptions that continue to manifest themselves to the converged offspring.

We are striving for consistency in compliance as we strive to manage the expectations of these different industries, as well as those of the public, consumers and government. This means that, in terms of the letter of the law with which we must comply and in terms of the spirit in which we choose to apply it, ACMA has a difficult task—typically complex, often conflicting, even contradictory. There is a need to transform ACMA so its day-to-day *modus operandi* is sustainable and defensible.

## **INHERENT LEGAL CHALLENGES AND COMPLEXITIES**

Some of the inherent 'burdens' ACMA faces include the challenges and complexities in its legislative framework and historical context, and the characterisation of the regulator as a 'toothless tiger'—the question of enforcement and its frequent precursor, the investigation. There are also 'external' legal and regulatory challenges from an increasingly complex communications and media world.

There can be some tension within and between the legislation and its objects. For example, we are not to impose unnecessary financial and administrative burdens on telcos, even as we require them to install underground cabling. Nor are we to impose unnecessary financial and administrative burdens on broadcasters, even as we require them to broadcast matters of local significance. Sometimes there is tension between our responsibilities, which can seem inconsistent or contradictory.

We have an important role as an advisor to government, but we are also an independent regulator responsible for enforcing the law in an impartial and apolitical manner. And as an agency within government, we are charged with implementing government policy.

One of our most important challenges is to meet the public's expectation that we will effectively and efficiently enforce industry's compliance with their legal obligations. By imposing substantial penalties, parliament has given us a strong message that we should be rigorous in enforcing the laws protecting media diversity, stopping spam and ensuring compliance with the Do Not Call Register.

## **ENFORCEMENT**

Last year, ACMA was given enhanced enforcement powers in broadcasting and

radiocommunications—the ability to contemplate the use of mid-range enforcement action. We also released guidelines on how we will use enforceable undertakings to improve compliance with telecommunications obligations. ACMA's powers to accept enforceable undertakings are similar to those used often by the Australian Competition and Consumer Commission. And of course we have legislation dealing with 'nuisance communications'—the Spam Act and the Do Not Call Register Act.

If a regulatory breach has occurred, we will, within the limits of the legislation, take regulatory action commensurate with the seriousness of the breach. Our general approach to compliance will be to negotiate and resolve the matter with the complainant and the contravener, without resorting to formal procedures. However, if informal resolution is unsuccessful or inappropriate, ACMA will take appropriate enforcement action—for example, our action in response to evidence of systemic failure to comply will be stronger than against an isolated breach—and reserves its right in all circumstances to take formal action. I should emphasise that this approach is almost never appropriate when serious criminal offences are involved or there are public security or safety issues in play.

The regulatory regime we inherited offered a co-regulatory approach using industry-developed codes of practice that generally worked well, although I acknowledge the criticism of the timeliness of the handling of co-regulated broadcasting complaints. Today's environment tends toward a more heavy-handed approach—a change that has the potential to give rise to a tension because a heavy-handed approach may lead to less cooperation—but co-regulation requires eternal cooperation. ACMA will have to tread a fine line.

ACMA has racked up an impressive record in successful enforcement action. We have navigated a careful course between keeping a watchful but unobtrusive eye on the market and its supply-side participants, and acting quickly and effectively in the event of an obvious failure to deliver on or rectify breaches of the regulations. We take legal action when required. And our success in reducing spam in Australia is due to well-conceived legislation enabling effective regulatory intervention.

## **EMERGING CHALLENGES**

As we move to the future, we necessarily diverge from what our legacy legislation offers, into converged communications and new technologies that were not envisaged when the legislation was conceived, and commensurate challenges.

We have compliance and enforcement challenges that are essentially manifestations of the same fundamental issue—the increasing disconnect between our pre-convergent legislative framework and the rapid pace of convergence development. We have a big role in making rules for industry, but

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increasingly our challenge is making rules that are practical, realistic and enforceable—a converged regulator must be creative and smart.

#### ACMA'S RESPONSE

My ambition for ACMA is that it be, and be recognised as, the leading converged regulator in the world by 2010. We do not expect to know all the answers—change is too unpredictable. Our *modus operandi* will be to prepare and act quickly. I have five examples of how we will do this.

1. We are examining what we have, what we do and how we can improve. Investigation is a core ACMA function, but the 15 areas with an investigation role all have different processes and procedures, skills and tools. We have ad hoc investigation systems and procedures and want to build on our experience to ensure we have high quality procedures, the most suitable processes for the legislation, better risk management, and appropriately standardised systems and methodologies. In my experience, the capacity to respond and take action is 75 per cent of the solution—the other 25 per cent is to sustain it. We are engaging a consultant to review and report on our investigative needs. We also want to review inconsistencies in processes and their causes, and the integrity of investigation practices, and propose solutions.
2. We recognise the need to work more closely with other regulators, for example, with the ACCC when dealing with media mergers.
3. We will encourage even more industry cooperation and work assiduously on self-regulation. For example, I welcomed the approach by Anne Hurley, Chief Executive of Communications Alliance, when she wrote to me about the current arrangements for standards development, noting the increasing convergence between telecommunications and radiocommunications, and the need to work together to meet the new challenges.
4. We will continue our international cooperation because, for example, its importance in reducing spam originating far from our shores continues to increase.
5. We will be more creative and smarter in dealing with compliance and enforcement. For example, accepting undertakings that, while having no statutory backing, can deliver desired outcomes, such as when Network Ten provided undertakings in 2005 for the 2006 series of the program *Big Brother Uncut*. Whether it be traditional or emerging business structures, traditional or new technologies, ACMA will stand firm by its commitment to educate and encourage compliance in the first instance, and then act strongly and firmly when required.

The full text of Mr Chapman's speech is on the ACMA website at [www.acma.gov.au](http://www.acma.gov.au) (go to Home > About ACMA: News & media centre > Speeches).

