



**SUBMISSION TO DEPARTMENT OF COMMUNICATIONS
INFORMATION TECHNOLOGY AND THE ARTS**

IN RESPONSE TO THE DISCUSSION PAPER

**“PROPOSAL FOR NEW INSTITUTIONAL ARRANGEMENTS
FOR THE AUSTRALIAN COMMUNICATIONS AUTHORITY
AND THE AUSTRALIAN BROADCASTING AUTHORITY”**

22 SEPTEMBER 2003

CONTENTS

1. EXECUTIVE SUMMARY	1
2. INTRODUCTION	3
2.1 Overview of the Government's preferred option	3
2.2 No reason for change	4
3. SPECTRUM PLANNING AND MANAGEMENT ISSUES	5
3.1 Application of statutory objectives	5
3.2 Planning assumptions and spectrum sharing	7
3.3 Planning approaches for broadcasting	9
3.4 Dual use of BSB: section 34 process	10
3.5 Dual use: Non-BSB spectrum issues	11
4. MINISTERIAL POWERS	12
5. GOVERNANCE ISSUES	12
5.1 Board structure and qualifications	13
5.2 Delegations and bureau structures	14
5.3 Location	14
5.4 International spectrum planning considerations	15
6. INTERNATIONAL COMPARISONS	16
6.1 Canada - Canadian Radio-Television and Telecommunications Commission	16
6.2 USA - Federal Communications Commission	18

**RESPONSE TO DOCITA DISCUSSION PAPER: “PROPOSAL FOR NEW INSTITUTIONAL
ARRANGEMENTS FOR THE AUSTRALIAN COMMUNICATIONS AUTHORITY AND THE AUSTRALIAN
BROADCASTING AUTHORITY”**

**JOINT SUBMISSION FROM COMMERCIAL RADIO AUSTRALIA (CRA) AND
COMMERCIAL TELEVISION AUSTRALIA (CTVA)**

1. Executive Summary

Commercial Radio Australia Limited (**CRA**) and Commercial Television Australia (**CTVA**) do not agree with the proposal to merge the Australian Broadcasting Authority (**ABA**) and the Australian Communications Authority (**ACA**).

CTVA and CRA have previously outlined reasons why the commercial broadcasting industry does not consider a merger of the ABA and the ACA to be necessary or desirable. These reasons were outlined in a submission dated 16 September 2002 in response to an earlier paper titled “*Options for Structural Reform in Spectrum Management*” (**the 2002 Paper**). To summarise, these reasons included that the options presented in the 2002 Paper:

- (a) did not seek to remedy any demonstrated failure in the current institutional arrangements;
- (b) were based on incorrect assumptions about “convergence”, which appeared to rely more on overseas predictions and assumptions rather than on the economic and practical realities of the Australian broadcasting and communications sector;
- (c) appeared to assume that all uses of the spectrum were of equal public benefit, and that an “application neutral” approach to spectrum planning was both practical and desirable; and
- (d) appeared to be seeking to adopt changes based on overseas models for the sake of change.

While it is acknowledged that there are differences between the options that were contained in the 2002 Paper and the option which is now presented in the Discussion Paper titled “*Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority*” (**Discussion Paper**), there remain significant unresolved policy issues. Accordingly, CRA and CTVA continue to be of the view that the ABA and the ACA should not be merged.

CTVA and CRA are particularly concerned by the implications of a merger of the ABA and ACA in relation to spectrum management issues. It is crucial that broadcasting continue to be the primary use of spectrum in the bands allocated in Australia for broadcasting services, consistent

with the current policy approach implemented by the ABA. The Discussion Paper leaves many questions about this issue unanswered.

However, if the Government proposes to proceed with a merger of the ABA and ACA, it is important that these spectrum planning and management issues be addressed. If the merger proceeds, CRA and CTVA's submission is that the new institutional arrangements should reflect the following principles:

- (a) the retention of the existing and separate regulatory regimes for broadcasting, radiocommunications and telecommunications, with the only changes to these regimes being for transitional purposes;
- (b) the continued recognition of the primacy of broadcasting in that part of the spectrum known as the "broadcasting services bands" or "BSB" when that part of the radiofrequency spectrum is planned¹;
- (c) the continued application of the planning objectives contained in the BSA and the ABA's planning assumptions to the planning of spectrum in the BSB;
- (d) the board of the merged entity be comprised of people who have a practical and commercial understanding of the industries that are the subject to regulation, with equal numbers of board members with broadcasting industry experience and with telecommunications (including radiocommunications) industry experience;
- (e) the implementation of the separate regulatory regimes applying to broadcasting, radiocommunications and telecommunications through a "bureau" management structure, so that the separate functions and policy considerations relevant to the merged entity are not confused. This would mean that one bureau of the merged entity would regulate broadcasting services by reference to the *Broadcasting Services Act 1992* (**BSA**), and the other bureau of the merged entity would regulate telecommunications services and radiocommunications services by reference to the *Radiocommunications Act 1992* (**Radcom Act**) and the *Telecommunications Act 1997* (**Telco Act**);
- (f) consistent with the bureau structure, the broadcasting engineers of the merged entity should take a leading representative role in international spectrum planning meetings, alongside the engineers from the other (non-broadcasting) bureau.

¹ As referred to the ABA under section 31 of the Radiocommunications Act 1992. This is discussed in more detail at section 3.2 below.

2. Introduction

This joint submission is made by CRA and CTVA in response to the Discussion Paper titled “*Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority*” (**Discussion Paper**) which was released in August 2003.

CTVA is the representative body for all 48 commercial television broadcasting licensees. CRA is the representative body for 245 commercial radio broadcasters.

The 2002 Paper outlined three options for the future institutional arrangements for the regulation of broadcasting and communications in Australia. As noted, CTVA and CRA did not agree that any of the options presented in the 2002 Paper were appropriate or required, and both organisations continue to hold that view.

The Discussion Paper presents a further option for consideration, which the Government has determined is “the only viable alternative to retaining the existing regulators as separate entities”. For the purposes of this submission, this further option is referred to as “the Government’s preferred option”.

2.1 Overview of the Government’s preferred option

The Government’s preferred option would involve “the merging of the ACA and ABA into a single organisation with responsibility for broadcasting, telecommunications, radiocommunications and online regulation”. From the Discussion Paper, CTVA and CRA understand that the Government’s preferred option is based on the following principles:

- (a) That the separate regulatory regimes applying to telecommunications, broadcasting and radiocommunications will be preserved;
- (b) That the Government’s preferred option can be implemented with “minimal change” to those existing and separate regulatory regimes;
- (c) That the Government’s preferred option will not incorporate changes to “spectrum pricing processes in the BSB”; and
- (d) That a “spectrum wide” approach to the management of spectrum planning will not result in all spectrum planning being undertaken in the same way.

The Discussion Paper explains that “any future changes to the broad policy and regulatory frameworks for communications would be determined by the Australian Government through its ongoing review processes and are not proposed to be linked to merger considerations”. It

emphasises that the intention is to focus on institutional arrangements, and not alteration of existing regulatory frameworks.

It is noted that the Government's preferred option is different from option (a) in the 2002 Paper, as that option (a) was described as requiring "substantial legislative change" and appeared to foreshadow potentially significant changes to the way in which broadcasting spectrum was planned and priced.

While the Government's preferred option is an improvement on the options presented in the 2002 Paper, CRA and CTVA do not believe it fully addresses the concerns previously outlined by CRA and CTVA in relation to a merger of the ABA and the ACA. Each of CTVA and CRA continue to hold the view that that a merger is neither necessary nor desirable.

2.2 No reason for change

As with the 2002 Paper, the Discussion Paper does not present any compelling reasons for changing the existing institutional arrangements.

The Discussion Paper identifies the "issues arising out of current institutional arrangements" which it suggests justify the need for change as being "digital convergence" and "overseas regulatory approaches". However, the Discussion Paper does not suggest that change is needed to remedy any demonstrated failure in the current institutional arrangements.

For example, the Discussion Paper acknowledges that the impact of convergence on applications in telecommunications, radiocommunications and broadcasting is currently manageable within the existing dual institutional structure. This observation is consistent with submissions previously made by CRA and CTVA in relation to the issue of convergence.

Also, the fact that overseas jurisdictions have institutional arrangements for the regulation of broadcasting and communications that are different to the existing Australian arrangements is not of itself a reason to change the existing institutional arrangements.

In the absence of any strong grounds for change, and in light of the uncertainties about how the Government may propose to approach spectrum planning issues, CTVA and CRA do not agree with the proposed merger. However, if the Government proposes to proceed with the merger, CRA and CTVA request that a range of issues about spectrum planning, and in particular, about what the Government envisages as a "spectrum wide approach to the management of spectrum planning", be clarified. These issues are outlined below.

3. Spectrum planning and management issues

The Discussion Paper notes that “consideration needs to be given to the differences in the statutory mandates and objectives of the ABA and the ACA in relation to spectrum management” and states that “a merged regulator would need to take account of these differences in its operations”. Accordingly, the Discussion Paper seeks comments on the role of a combined regulator in spectrum planning consistent with a ‘minimal change’ regulator model and on the balance of objectives that should be applied by the merged entity, particularly in relation to decisions about BSB spectrum.

It appears that the issue of application of objectives should be directed at decisions about spectrum relating to the “boundaries between BSB and non-BSB spectrum” (given the illustrations in the Discussion Paper), rather than going to the issue of whether BSA objectives should apply to the planning of BSB spectrum in its entirety. However, as there is some ambiguity about what the Discussion Paper is proposing in this regard, the application of the BSA objectives to the BSB spectrum (as a whole) is addressed below.

To summarise the discussion below, there should be no question about the BSA objectives continuing to apply to the planning of BSB spectrum. The statement contained in the Discussion Paper that “In general, the differing objectives should not present particular difficulties for a combined organisation” does not provide any certainty about this issue. As outlined in the Executive Summary, any new institutional arrangements should reflect the principle that broadcasting uses will continue to have primacy in the BSB (consistent with current ABA policy and the application of international agreements).

3.1 Application of statutory objectives

From the Discussion Paper, CRA and CTVA understand that if the Government’s preferred option is implemented, the merged entity would continue to carry out the functions and to exercise the powers that are presently conducted and exercised by the ABA and the ACA.

To illustrate, it is understood that this means that one bureau of the merged entity would regulate broadcasting services by reference to the regulatory framework contained in the BSA, including the objectives and regulatory policy in that Act. The other bureau of the merged entity would regulate telecommunications by reference to the regulatory framework in the Telco Act and where relevant, also by reference to the relevant provisions of the Radcom Act, applying the objectives and regulatory framework in those pieces of legislation. That bureau would also regulate remaining radiocommunications services by reference to the regulatory framework contained in the Radcom Act.

The Discussion Paper identifies spectrum planning and management as an area where the work of these separate parts or bureaus of the merged entity could theoretically overlap, and that it may need to consider the “different statutory emphases arising out of the different Acts in undertaking BSB and non-BSB spectrum planning functions”.

It is noted in the Discussion Paper that the objectives contained in the BSA and in the Radcom Act which are applicable to spectrum planning differ². However, under the Government’s preferred option, CRA and CTVA understands that this would simply mean that the BSA objectives are applied for the purposes of spectrum planning in the BSB, and the Radcom Act objectives (and any objectives of the Telco Act that are considered relevant) are applied for the purposes of the planning of the rest of the spectrum.

The BSA requires balancing of a range of sometimes conflicting economic, social and cultural objectives, and the Discussion Paper notes that this reflects the “public service” character of broadcasting. As explained in *The ABA’s General Approach to Analog Planning*, this requires the ABA to balance objects including the economic and efficient use of the spectrum, the promotion of the availability to audiences of a diverse range of radio and television services, the promotion of high quality and innovative programming, the encouragement of appropriate coverage of matters of local significance, and the facilitation of the development of a broadcasting industry that is efficient, competitive and responsive to audience needs. By contrast, the relevant objectives in the Radcom Act are principally economic, and are solely concerned with the efficient use and allocation of the spectrum.

CTVA and CRA’s submission is that the merged entity must continue to apply the objects in the BSA when it plans the BSB. As outlined in detail in response to the 2002 Paper, broadcasting planning is a fundamental element of the scheme for broadcasting regulation, as planning effectively determines the style of content provided to audiences (depending on whether a national, commercial, community or narrowcasting service is planned), and where and how audiences can receive that content. On this basis, there are a range of statutory objectives which are relevant, going beyond narrow economic objectives.

It is of central importance that this principle is an assumption upon which any merger of the ABA and ACA is based. The Discussion Paper is unclear about this issue. Accordingly, CRA and CTVA request that if the Government’s preferred option is implemented, it is clarified that the merged entity will continue to apply the BSA objectives when it plans the BSB spectrum. This

² The statutory objectives applying to the ACA are extracted in Attachment C of the Discussion Paper, and the statutory objectives applying to the ABA are extracted in Attachment D of the Discussion Paper, and so these are not reproduced in this submission. However, it is noted that the reference to the object of the “economic and efficient use of the spectrum” that is referred to in section 23 of the BSA is not extracted in Attachment D of the Discussion Paper, despite the fact that this is an important objective of the ABA’s planning functions.

could be ensured either through the legislative process, or through directions by the Minister to the merged entity (assuming that the Minister will have power to direct the merged entity in respect of such matters). As discussed at section 5 below, the implementation of this principle would be assisted by the broadcasting engineers in the merged entity sitting in a different bureau to the non-broadcasting engineers.

With regard to the application of different planning principles in different parts of the spectrum, it is noted that the ACA's submission in response to the 2002 Paper stated that there is "no necessary reason why the distinct activity of broadcasting planning should not follow a separate set of planning principles". The ACA also noted that the benefits flowing from a merger would be positive "even in the face of management of two very different spectrum planning and licence allocation systems". CRA and CTVA agree with these statements.

3.2 Planning assumptions and spectrum sharing

In identifying the "potential benefits" of a merged regulator, the Discussion Paper notes that it would result in a:

"better ability to respond to evolving spectrum management issues, such as the increasing demand for mobile communications spectrum, the need to harmonise spectrum for defence and emergency services, the introduction of digital radio services and the hand-back of analog television spectrum (after full conversion to digital television broadcasting takes place) – there would also be an improved ability to pursue opportunities for sharing spectrum between different services."

As outlined above, CTVA and CRA's firm submission is that the objectives in the BSA must continue to be applied to the planning of the BSB, and that any "opportunities for sharing spectrum between different services" must only be considered in that context. CRA and CTVA would be particularly concerned by any suggestion that the planning assumptions which have been applied by the ABA to date when it has conducted its planning functions would no longer be applied in relation to the BSB spectrum.

To outline the approach to the management of BSB spectrum under the existing regulatory arrangements, under section 30 of the Radcom Act the ACA must prepare a spectrum plan that divides the entire radiofrequency spectrum into frequency bands, and specifies the purpose or purposes for which each band may be used. The spectrum plan must reflect the designation of the BSB which is made by the Minister under section 31 of the Radcom Act. Under section 31, the Minister designates a part of the spectrum as being primarily for broadcasting services, and refers that spectrum to the ABA for planning under Part 3 of the BSA.

Accordingly, while the Spectrum Plan may specify more than one primary use in particular parts of the BSB, as the BSB has been referred to the ABA to manage, the ABA may apply its own planning assumptions in relation to the use of that spectrum. In carrying out its functions under Part 3 of the BSA, the ABA has relied on a range of planning assumptions which have included the following:

“The ABA assumes that the remaining parts of the broadcasting services bands spectrum assigned to it are potentially useful for a range of non-broadcasting services in the category of fixed and land mobile communications. However, the ABA assumes that the objects of the Broadcasting Services Act, including the economic and efficient use of the radiofrequency spectrum, are best served by giving first priority to broadcasting uses of this spectrum.”³

This planning assumption recognises the primacy of broadcasting in the BSB, and CRA and CTVA consider this recognition to be appropriate.

On this basis, any “opportunities” for spectrum sharing with non-broadcasting services (within the BSB) should only be considered in the context of this planning and regulatory framework, and by reference to the BSA objectives (this is discussed further at 3.4 below).

It is noted that the Discussion Paper presents the process in section 31 of the Radcom Act as an example about of when the different statutory emphases of each of the Radcom Act and the BSA may raise issues for a merged entity. Under section 31 of the Radcom Act, the Minister is required to consult with each of the ABA and the ACA prior to the designation of the BSB. If a merger occurs, this will mean that the Minister needs to consult with the merged entity. Provided that adequate direction has been provided to the merged entity about the primary function of the BSB (whether through transitional legislation or through a Ministerial direction), the fact that the Minister needs to consult with the merged entity should not in itself present a problem. In this context, it would be expected that the merged entity would also have regard to international agreements (eg ITU) about the designation of particular parts of the spectrum⁴.

In this context, the advice provided to the Minister by the merged entity will need to take account of the present and future spectrum needs for broadcasting, as informed by present (and continuing) broadcasting planning principles. As the merged entity will need to be accustomed to applying different planning principles to the BSB and the rest of the spectrum (through the bureau structure discussed at section 5 below), it will be equipped to apply broadcasting planning principles in this context.

³ Australian Broadcasting Authority, *The ABA's General Approach to Analog Planning* (August 2003), at page 56.

⁴ Note that discussion about the participation of the merged entity in international fora is discussed at 5.4 below.

3.3 Planning approaches for broadcasting

At the heart of CRA and CTVA's submissions about the need for broadcasting uses to continue to have primacy in the BSB is the fact that broadcasting is planned using different criteria and technical specifications from other communications services. The Discussion Paper does not expressly recognise this issue, and the absence of such recognition is a key concern.

CTVA and CRA's submission in response to the 2002 Paper explained how the technical basis for planning broadcasting services is fundamentally different from that which applies to other radiocommunications and telecommunications services, and why CRA and CTVA reject any suggestion that the use of spectrum by broadcasters can be assessed and planned on the same basis as the use of the spectrum by non-broadcasters. Those submissions should be taken to be reiterated for the purposes of this present submission. To summarise some key points:

- The planning of broadcasting services needs to ensure a minimum level of signal throughout a licence area to domestic receiving equipment.
- In practice, this means that the radiation pattern and radiated power of each broadcasting service within a licence area must be planned to both maximise spectrum efficiency, to ensure adequate coverage, and to minimise interference.
- ABA assumptions for broadcasting spectrum planning rely upon the most efficient spacing of services (within a licence area and in adjacent areas) that will ensure appropriate coverage and to result in interference-free reception of services (within the relevant licence area). This approach is reflected in the ABA's *Broadcast Planning Manual*, and outlined in the *Broadcast Planning Instructions*, the *Technical Planning Guidelines* and the *Broadcast Planning Procedures* (formerly the "Technical Planning Parameters and Planning Methods for Terrestrial Broadcasting" contained in the ABA's *Interim Australian Broadcasting Planning Handbook*, August 1995). Planning the location and characteristics of a broadcasting service assists to achieve these outcomes (eg as noted below, directional radiating antennas reflecting directional technical specifications are often relied upon to achieve the desired coverage).
- By contrast, telecommunications services are usually point-to-point services with vastly different coverage requirements, being delivered to specialised receivers and having very different frequency re-use criteria.
- As a result, planning for telecommunications services applies more simplistic planning rules - using set "re-use distances" between sites before re-using a frequency, and often taking little account of topography. Unlike broadcasting systems, telecommunications

systems planning assumes a fixed Effective Isotropic Radiated Power (EIRP) for all transmitters in a particular class of service.

- Fixed and mobile services (telecommunications and radiocommunications) require highly directional transmission antennas designed to optimise point to point communications (in the case of telecommunications) or fixed design omni-directional antenna (for mobile radiocommunications services) whereas broadcasting applications use individual tailored directional antenna array systems for each service, designed to provide coverage of an often irregular shaped coverage area for the service.

These examples illustrate the difficulties which could emerge if the ABA's existing planning assumptions (including the approach adopted in the *Technical Planning Guidelines*) are not applied to the planning of broadcasting services by a merged entity. It also illustrates that the broadcasting engineers from the ABA and the communications engineers from the ACA are accustomed to working very differently. CRA and CTVA understand that the ACA's engineers are required to comply with a rigid set of *Radiocommunications and Licensing Instructions (RALIs)*, which do not contain the flexibility to tailor radiocommunications system designs to specific circumstances. By contrast, the tools used by the ABA's engineers (as indicated above) facilitate a flexible approach in order to meet the outcomes required by broadcasting services in particular geographic or demographic contexts (eg applying directional radiation patterns depending on geography, quality requirements, population centres and required coverage areas).

The challenge for a merged entity will be to ensure that the separate planning and licensing regimes can operate in a complimentary way that meets the needs of users of the relevant services (eg broadcasting audiences require a high quality and interference free service, whereas some telecommunications and radiocommunications services can operate with less protection).

As discussed in more detail at section 5 below, if the broadcasting engineers sit in the broadcasting bureau, and the non-broadcasting engineers sit in the other (non-broadcasting) bureau, this will assist to ensure that each bureau applies the correct statutory objectives to the relevant spectrum management functions. However, such a structural separation should not restrict the free flow of information between the two bureaus. To illustrate, the fact that the different bureaus will be located within the same merged entity will mean that interactions between the different groups of engineers will be able to be less formal than is the case at present, and this may facilitate the balancing of the needs of different spectrum users in the context of the different regulatory frameworks.

3.4 Dual use of BSB: section 34 process

CTVA and CRA's submission is that non-broadcasting uses of the BSB should only be permitted where this has no adverse effects on the delivery of broadcasting services, and does not impede

future use of the spectrum for the purposes of digital conversion. In other words, such future non-broadcasting uses must be planned in the same way that they are at present. Certainly, there must be no suggestion that broadcasting services must compete with non-broadcasting services to access the BSB spectrum. Otherwise, this may lead to increased levels of interference to services and a loss of quality and viability of existing broadcasting services.

As a separate point, it is noted that if there is a question about whether or not a new type of service is a broadcasting service or not, this is a matter that the merged entity could resolve by reference to the regulatory framework in the BSA.

As noted in the Discussion Paper, section 34 of the BSA already facilitates secondary uses of temporarily unused areas of the BSB. The objects in the BSA should continue to apply to the use of this power in the future. In performing its planning functions under Part 3 of the BSA (which includes section 34), the ABA is required to have regard to the demand for radiofrequency spectrum for services other than broadcasting services. Also, under section 34, the ABA is to have regard to “such other matters” as it considers relevant. On this basis, the merged entity would be able to have regard to a broad range of matters when it exercised its powers under section 34 of the BSA, but it would do so within the BSA regulatory framework, and not within the regulatory framework in the Radcom Act.

It is acknowledged that in at least the short-medium term, the issue of dual use may be largely theoretical, given that there are not large amounts of vacant spectrum in the BSB (as noted in the ABA’s submission to the 2002 Paper). However, these are important issues of principle which should be clarified before the Government implements a merger of the ACA and ABA.

3.5 Dual use: Non-BSB spectrum issues

A related “dual use” issue arises from the fact that broadcasting services also use spectrum outside the BSB for ancillary purposes (for example, television broadcasters use non-BSB spectrum for the purposes of news gathering and outside broadcasts). Unless broadcasters have access to spectrum for these purposes, they will be severely restricted in their ability to provide particular types of content which are important to Australian audiences, particularly news and sporting events.

It is noted that when the ACA plans the non-BSB parts of the spectrum, it must “maximise the overall public benefit derived from using the spectrum”. Another of the objects of the Radcom Act is to “support the communications policy objectives of the Commonwealth Government”.

If a merged entity is created, CRA and CTVA suggest that a Ministerial direction could be given to the merged entity which would require the non-broadcasting bureau to have regard to public interest considerations when it plans spectrum outside the BSB that is used for ancillary

broadcasting services. Specifically, in that context it would be helpful if the non-broadcasting part of the merged be required to have regard to the objective that Australians are able to receive high quality broadcasting services, when it plans such spectrum.

4. Ministerial powers

The Discussion Paper explains that the Minister has different powers of direction in respect of each of the ABA and the ACA. With some specific exceptions, Ministerial directions given to the ABA as to the performance of its functions must be only of a general nature (section 162 of the BSA). By contrast, under the *Australian Communications Authority Act 1997 (ACA Act)*, the Minister is able to give specific directions to the ACA in respect of the performance of its functions and the exercise of its powers.

CRA and CTVA consider that it is appropriate that the Minister be able to direct the merged entity in certain circumstances. CTVA and CRA agree with the observation in the Discussion Paper that it would be possible to retain respective BSA and ACA Act directions in the merged entity by specifying the particular circumstances under which each would apply (eg a more general power of direction could be limited to apply to broadcasting functions). This would be consistent with the principle that different regulatory schemes will be administered by the merged entity.

The Discussion Paper notes that if an alternative, consolidated approach was pursued (eg by making the scope of Ministerial directions uniform), more consideration would be required of the circumstances in which specific and general powers of direction could be exercised. CTVA and CRA would be able to provide comments in relation to such a proposal if this approach is ultimately preferred by the Government.

5. Governance Issues

The Discussion Paper seeks comment on a range of governance issues including the board structure of a merged entity, the qualifications of board members, the use of board divisions, the role of a CEO, whether advisory committees are needed and the delegation of functions. The Discussion Paper also seeks comment on the location of the merged entity. These are all important issues.

At this time, and prior to the development of any detailed proposals about these matters, CRA and CTVA propose only to address in general terms the issues of board structure, board divisions, qualifications of members, delegations and bureau structures, and location.

For the purposes of this submission, it has been assumed that the *Commonwealth Authorities and Companies Act 1997* will apply to the merged entity (consistent with the current application of

this legislation to each of the ABA and the ACA), and that the governance of the merged entity will be the responsibility of an appointed board.

5.1 Board structure and qualifications

The Discussion Paper states that a board requires a sufficient number of members to ensure that it can deal effectively with its range of responsibilities, but not have so many members that it becomes unwieldy. It suggests that the merged entity will comprise a Chair, a Deputy Chair and around 5 additional members. This appears to be a pragmatic approach, but for the reasons outlined below, it is suggested that the board comprise an even number of members (this assumes that the Chair could have a casting vote, if necessary).

CRA and CTVA consider it particularly important that the board comprise people who have a practical and commercial understanding of the industries that are the subject to regulation. Further, CTVA and CRA are of the view that the composition of the board of the merged entity should be balanced, so that there are equal numbers of people on the board with broadcasting industry experience and with telecommunications (including radiocommunications) industry experience (eg a board of four members would include two people with broadcasting expertise and two with telecommunications/radiocommunications expertise). Ideally, this objective of balance should be incorporated into the statutory governance framework for the merged entity.

Recognising that there may be persons appointed to the board who have expertise across the broadcasting and communications industries, CRA and CTVA do not consider it is necessary to legislate for specific numbers of board members with particular industry-specific expertise, so long as the objective of balance is attained through the appointments that are made. CTVA and CRA would not agree with a proposal which resulted in a minority of board members having broadcasting expertise. Nor would CRA and CTVA agree with the quorum of the board not containing equal representation of broadcasting members.

As a general approach, CTVA and CRA suggest that the persons appointed to the board must have demonstrated expertise in at least one of the industries of broadcasting or telecommunications (including radiocommunications), as well as qualifications or expertise in at least one of the areas of commerce, consumer affairs, law, economics, engineering, public policy or public administration. This approach would adapt and modify the requirements of section 20 of the ACA Act.

In this context, it is noted that in its submission to the 2002 Paper the ACA suggested that “the most appropriate membership structure for a new authority is likely to be one that mirrors the skills and experience of the current ABA and ACA membership arrangements to ensure the effective collective administration of the BSA, the Telco Act, the Radcom Act” and related

legislation. This would appear to be a prudent approach, so long as the objective of balance (described above) is maintained.

The Discussion Paper suggests that from time to time, particular powers could be exercised by divisions of the board. This approach would mean that the Chair and at least two other members could have responsibility for specified content or carriage matters. If this approach involved members with broadcasting experience making decisions in relation to specified broadcasting regulatory matters (eg ownership and control investigations), and members with telecommunications experience making decisions in relation to specified telecommunications regulatory matters (eg telephone numbering issues), this could be a reasonable approach. However, the composition of the divisions of the board would need to be divided along “industry lines”, so that the only members sitting in the broadcasting division of the board would be those who were appointed on the basis of their broadcasting industry expertise.

5.2 Delegations and bureau structures

On the basis of the Government’s preferred option (with its retention of separate regulatory regimes for broadcasting, radiocommunications and telecommunications), it is understood that a “bureau” structure will apply to the conduct of statutory functions by the merged entity. To elaborate, this envisages that staff of the merged entity would be “carried across” from the existing regulators, and placed in different “bureaus”, depending on whether they are to carry out functions under the BSA, the Radcom Act or the Telco Act. As outlined above, the board will be the decision making body, and will have general oversight over how the merged entity carries out its functions and exercises its powers.

On this basis, the board could delegate particular functions to the Director (or equivalent) of each relevant branch or “bureau”, in the same way as this presently occurs under the existing ABA structure (for example, the ABA board has delegated the decision making function in relation to complaints relating to Codes of Practice to the Director of the Industry Performance and Review Branch of the ABA). However, such delegations would only be appropriate if the bureau approach is incorporated into the proposed structure. CRA and CTVA consider the bureau structure to be an essential element of the structure of the merged entity, as this will assist in maintaining the separation of the administration of the different regulatory regimes in the BSA, the Radcom Act and the Telco Act.

5.3 Location

The Discussion Paper notes that the issue of whether the merged entity would retain its current locations in three capital cities (Sydney, Melbourne and Canberra) would need to be considered.

As summarised in the Discussion Paper, the location of the ABA's content functions in Sydney reflects the location of the head offices of the major commercial television networks, broadcasting representative bodies (ie CRA and CTVA) and film agencies. Of course, all of the major radio networks also have a strong Sydney presence. Similarly, the location of the ACA's Melbourne office reflects the traditional base of Telstra, and other telecommunications operators also have a strong Melbourne presence.

CRA and CTVA consider that it is important that the merged entity be geographically close to those industries that it regulates, and would not agree with a move of the broadcasting regulatory functions of the merged entity away from Sydney. In this context, it would also appear appropriate for the telecommunications regulatory functions of the merged entity to remain in Melbourne.

Canberra raises separate issues. It is understood that the location of the ABA's engineers in Canberra reflects the fact that many of those staff were based in Canberra when the ABA was created in 1992 (as they previously were located in the Department of Transport and Communications), and that this is the key reason that the ABA has maintained a Canberra office. The Discussion Paper indicates that closer ties between the ABA and ACA's spectrum planning and engineering teams are a likely efficiency which will flow from a merger of the two regulators. However, it needs to be recognised that these teams will continue to work in separate "bureaus" which reflect the functions they are carrying out (ie broadcasting, telecommunications or radiocommunications). The effective implementation of these bureaus needs to be made a priority. CRA and CTVA would like further clarification about how this could be achieved. Some further observations about this issue are noted at 5.4 below.

If it is likely to be difficult to maintain separation between the engineering teams on a bureau basis, then CRA and CTVA are of the view that the relocation of the broadcasting engineers to Sydney, and the radiocommunications and telecommunications engineers to Melbourne, needs to be considered.

5.4 International spectrum planning considerations

As noted above, the planning of Australia's radiofrequency spectrum reflects international agreements about how particular parts of that spectrum are to be used. While the ACA's functions include the representation of Australia in international regulation of communications, the ABA engineers participate alongside the ACA's engineers in regional and international meetings (eg ITU, IRAC, WRC) which address spectrum allocation issues (**international meetings**). This is noted in the table in Attachment B of the Discussion Paper. It has been important for the ABA engineers to participate in this way, given that the primary functions of the ABA include the provision of advice to the ACA in relation to the spectrum plan and frequency

band plans under the Radcom Act, and the designation of the BSB under section 31 of the Radcom Act.

In the context of a merged entity, CRA and CTVA consider it important that the merged entity's broadcasting engineers not only participate in international meetings, but consistent with the "bureau approach" noted above, take a leading representative role in such meetings. CRA and CTVA are concerned that in the absence of such an approach, the integrity of the BSB may be threatened (eg if non-broadcasting engineers from the merged entity propose to agree to international proposals to introduce more non-broadcasting uses into parts of the spectrum which in Australia, is contained in the BSB). This is a key area in which CRA and CTVA seek clarification.

6. International comparisons

As outlined in response to the 2002 Paper, CTVA and CRA consider it to be critical that international comparisons are viewed in context. Regulatory arrangements should recognise the unique circumstances of the relevant country, including that country's relevant social, political and economic priorities and characteristics.

Given that the Government's preferred option appears to reflect some of the elements of the structure of overseas regulatory arrangements (eg in Canada and in the United States), some observations about these arrangements are noted below.

However, CRA and CTVA consider that because of the very different policy contexts of each of Canada and the United States, it is appropriate to limit these observations to governance arrangements – that is, how the boards of these bodies are constituted, and how regulatory functions are divided across the agencies. These illustrations are useful to the extent that they demonstrate that in a merged regulator, different divisions or branches of the regulator can have responsibility for functions under separate regulatory regimes. In other words, a "bureau" model similar to that suggested at section 5 above has been applied in other jurisdictions.

CRA and CTVA's submission is that beyond governance issues, overseas comparisons are of limited use, given that other jurisdictions share few characteristics with the Australian broadcasting and communications environment.

6.1 Canada - Canadian Radio-Television and Telecommunications Commission

The website of the Canadian Radio-Television and Telecommunications Commission (**CRTC**) explains that it is an independent public authority vested with "the authority to regulate and supervise all aspects of the Canadian broadcasting system, as well as to regulate

telecommunications common carriers and service providers that fall under federal jurisdiction”⁵

It should be noted that the CRTC does not exercise spectrum planning functions. The Canadian Minister of Industry has power to plan the allocation and use of the spectrum (under the Radiocommunications Act, RSC, 1985 c.R-2) and there is no equivalent of section 31 of the Radcom Act or Part 3 of the BSA in either the Canadian Radiocommunications Act or the Canadian Broadcasting Act. In practice, this has meant that there is a physical separation of broadcast technical planning functions (which are conducted by Industry Canada on behalf of the Minister) from content regulation and service planning and licensing (conducted by the CRTC). This is similar to the arrangements which applied prior to the establishment of the ABA, and as such, this aspect of the Canadian regime does not reflect the Government’s preferred option.

However, it is also noted that the balance of broadcasting regulatory functions are carried out by the CRTC, and aspects of the governance of the CRTC provide a more useful comparison.

The CRTC’s regulatory authority over broadcasting is derived from the Canadian broadcasting legislation (Broadcasting Act S.C. 1991, c. 11, as amended), and its telecommunications regulatory powers are derived from Canadian telecommunications legislation (the Telecommunications Act S.C. 1993, c. 38, as amended and the Bell Canada Act S.C. 1987, c.19 as amended).

The board of the CRTC comprises a Chairperson, a Vice-Chairperson (Broadcasting), a Vice-Chairperson (Telecommunications), full time members and part time members (some with regional responsibilities). Only full time members participate in the decision making process for telecommunications, while all members participate in broadcasting decisions⁶.

CRA and CTVA consider that a governance model which includes a Vice-Chair for each of broadcasting and telecommunications could be usefully applied in the Australian context. In relation to decision making processes, CTVA and CRA do not consider that it will always be necessary for all board members to compete in all decision making processes, as divisions of the board may be appropriate in some matters (as discussed at 5.1 above). However, this is subject to the qualification that when the board deals with broadcasting matters, there must be at least an equal representation of members with broadcasting qualifications.

The structure beneath the board of the CRTC comprises 4 Directorates, being Broadcasting, Telecommunications, Legal and Secretary-General (the latter contains finance, corporate

⁵ <http://www.crtc.gc.ca/eng/BACKGRND/Brochures/B29903.htm>

⁶ <http://www.crtc.gc.ca/eng/BACKGRND/Brochures/B29903.htm>

services, human resources). This is illustrated in the organisational chart at <http://www.crtc.gc.ca/eng/about/org.htm>. The CRTC website⁷ explains that:

The Broadcasting Directorate is responsible for providing the Commission with information and recommendations needed to supervise and regulate the broadcasting industry in Canada and for developing general broadcasting regulatory policy for adoption by the Commission. The responsibilities of the Directorate are carried out by four groups (broadcasting operations, broadcasting policy, economic analysis and research/competitive disputes) reporting to the Executive Director, Broadcasting.

The Telecommunications Directorate develops advice and recommendations to the Commission to ensure the implementation of Canadian telecommunications objectives set out in the *Telecommunications Act* and to ensure that Canadian carriers provide telecommunications services and charge rates on terms that are just and reasonable, and do not unjustly discriminate or provide an unreasonable preference toward any person. The responsibilities of the Telecommunications Directorate are carried out by seven branches (industry analysis and regulation, consumer affairs, telcom policy decisions, competition implementation & technology, competitor services & costing, tariffs, decisions, planning & operations) reporting to two Director Generals and to the Executive Director.

This may provide a useful comparison for how some regulatory responsibilities could be divided within a merged Australian regulator.

6.2 USA - Federal Communications Commission

The FCC is the single regulator for all forms of non-Federal Government communications in the USA, and is an independent government agency. Its responsibilities include the regulation of interstate and international communications by radio, television, wire, satellite and cable.

The FCC's website explains that the functions of the FCC are directed by five Commissioners appointed by the President and confirmed by the Senate for 5-year terms, except when filling an unexpired term. However, appointments to the FCC are political appointments (eg only three Commissioners may be members of the same political party), which is not a model which CRA and CTVA consider would be appropriate for Australia.

FCC responsibilities are delegated to six operating bureaus, and ten Staff Offices. The Operating Bureaus are the Consumer & Governmental Affairs Bureau, the Enforcement Bureau, the

⁷ <http://www.crtc.gc.ca/eng/about/whoweare.htm#td>

International Bureau, the Media Bureau, the Wireless Telecommunications Bureau and the Wireline Competition Bureau.

Of these, the Media Bureau's role resembles some of the functions of the ABA, as it regulates AM, FM radio and television broadcast stations, as well as cable and satellite services. Similarly, the Wireless Telecommunications Bureau conducts many of the functions conducted by the ACA, as it "handles all FCC domestic wireless telecommunications programs and policies, except those involving satellite communications or broadcasting, including licensing, enforcement, and regulatory functions"⁸. The functions carried out by the Wireline Competition Bureau more closely resemble the telecommunications functions of the ACCC than those of the ACA.

Again, this is an overseas example of a "bureau" structure, with different divisions of a regulator applying different legislative and policy functions to different uses of the spectrum. As noted above, to this extent it provides a useful comparison.

If the Department considers further discussion of any of the issues raised in this submission would be of assistance, representatives from CTVA and CRA would be available to meet to discuss such issues.

22 September 2003

⁸ <http://www.fcc.gov>