

THE CREATION OF THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY AND THE NEXT NECESSARY STEP FORWARD

ABSTRACT

As a result of recent technological developments, identical services can now be transmitted using telecommunication infrastructure *and* broadcast using the radio frequency spectrum. Traditional broadcasting and telecommunications services have evolved beyond that which was envisaged by the legislators of the *Telecommunications Act 1997* (Cth) and the *Broadcasting Services Act 1992* (Cth). Further, new hybrid services have emerged which do not comfortably fit within the existing regulatory framework.

The July 2005 merger of the former Australian Broadcasting Authority (the “ABA”) and Australian Communications Authority (the “ACA”) to form the new Australian Communications and Media Authority (the “ACMA”) is a powerful acknowledgment of the convergence of the broadcasting and telecommunications sectors. The ABA, formerly limited to the governance of the broadcasting sector, and the ACA, formerly limited to the governance of the telecommunications sector, have now been replaced by the ACMA which has been entrusted with the responsibility of regulating both these industries.

In light of this merger of institutional governance, the purpose of this article is to consider whether the next necessary step is the replacement of the present sector-specific broadcasting and telecommunications laws with a common regulatory framework applicable to both industries.

In this regard, the new scheme for the regulation of ‘electronic communications’ introduced in the European Union in 2003 provides some useful insights. The framework largely replaces sector-specific legislation with a system of general authorisations which applies both to the telecommunications and broadcasting. The purpose of the article is to:

- Outline the present sector-specific regulatory framework applying to the Australian broadcasting and telecommunications industries;
- Consider the regulatory problems associated with convergence;
- Analyse the operation of the new European Union regulatory framework;
- Analyse the Australian law reform discourse to date with respect to the effects of the convergence of the broadcasting and telecommunications industries; and
- Consider the extent to which the European Union model offers insights on addressing the remaining identified problems flowing from the convergence of the broadcasting and telecommunications sectors.

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I INTRODUCTION

Media networks and services have traditionally been subject to two distinct statutory regimes. In Australia, telecommunications activities are essentially regulated by the *Telecommunications Act 1997* (Cth), whilst broadcasting services are subject to the *Broadcasting Services Act 1992* (Cth).

The increasing convergence of telecommunications and broadcasting networks and services is however compromising the efficacy of this ‘dual’ regulatory system.¹ Advances in digital technology mean that the same service can be delivered using telecommunications infrastructure *and* also broadcast using the radio frequency spectrum.²

The July 2005 merger of the formerly distinct Australian Broadcasting Authority (‘ABA’) and the Australian Communications Authority (‘ACA’) is a powerful acknowledgment of the convergence of the broadcasting and telecommunications sectors.

The ABA, formerly limited to the governance of the broadcasting sector, and the ACA, formerly limited to the governance of the telecommunications sector, have been replaced by the Australian Communications and Media Authority (‘ACMA’) which now regulates both industries. In the Media Release introducing the new ACMA,³ Senator Coonan, the Minister for Communications, Information Technology and the Arts, stated that:

The merger of the two regulators recognises the changing nature of the telecommunications, broadcasting and media industries. *Convergence of*

¹ See further Jonathon Weinberg, ‘The Internet and Telecommunications Services, Universal Service Mechanisms, Access Charges and Other Flotsam of the Regulatory System’ (1996) 16 *Yale Journal on Regulation* 211, 212–3; OFTEL (UK), *Submission to Parliamentary Select Committee*, ‘Beyond the Telephone, Television and the PC’ (1998); I Walden and J Angel, *Telecommunications Law* (2001) 413; and LJHF Garzaniti, *Telecommunications, Broadcasting and the Internet: E.U. Competition Law and Regulation* (2001) 102–10.

² See further N Selvadurai, ‘Regulating for the Future – Accommodating the Effects of Convergence’ (2005) 13 *Trade Practices Law Journal* 20–39; C Marsden C and S Verhulst, ‘Convergence: A Framework for Discussion’ in C Marsden and S Verhulst (eds), *Convergence in European Digital TV Regulation* (1999) 1; and A Noll, *Highway of Dreams* (1997).

³ Department of Communications, Information Technology and the Arts, ‘Appointments to the new Communications Regulator – ACMA’ (*Press Release*, 24 June 2005) 2.

technology and new technology developments are challenging the old regulatory structures and ACMA will be well placed to deal with these new challenges in the future. [Emphasis added].

In light of this merger of the *institutional governance* of broadcasting and telecommunications, the purpose of this article is to consider whether the next necessary step is the merger of the *substantive laws* applying to broadcasting and telecommunications.

In this regard, the new scheme for the regulation of ‘electronic communications’ which commenced operation in the European Union in 2003 provides some useful insights. The 2003 framework largely replaces sector-specific legislation applying to telecommunications and broadcasting with a system of general authorisations that simultaneously regulates *both* telecommunications and broadcasting activities.⁴

In order to make the assessment as to the need for a merger of substantive laws applying to broadcasting and telecommunications, this article commences by outlining the present sector-specific regulatory framework applying to the Australian broadcasting and telecommunications industries. This is then followed by an analysis of the regulatory problems associated with convergence, and the extent to which a system of general authorisations relating to electronic communications, such as was implemented in the European Union in 2003, overcomes these problems. The process of spectrum management, access and interconnection under the European Union system will be examined in some detail.

Finally, the article analyses the Australian law reform discourse to date on the need to address the effects of the convergence, and considers the extent to which the European Union model offers insights on addressing the remaining identified problems.

II THE SECTOR-SPECIFIC REGULATORY FRAMEWORK

A *Applicable Legislation*

The Australian media industry is subject to both the *Broadcasting Services Act* and the *Telecommunications Act*. The *Broadcasting Services Act* articulates the policies governing the regulation of the broadcasting industry, outlines categories of broadcasting services, and governs the grant and renewal of commercial television broadcasting licences, commercial radio broadcasting licences and data transmitter licences. Certain aspects of the internet industry are also regulated by the Act.

⁴ See N Selvadurai, ‘The Regulation of the Information Society in the European Union’ (2004) 6 *Computer and Telecommunications Law Review* 130–6.

In addition to the *Broadcasting Services Act*, a variety of other legislative enactments serve to regulate the broadcasting sector. The *Australian Broadcasting Act 1983* (Cth) establishes and governs the operation of the Australian Broadcasting Corporation. The *Special Broadcasting Services Act 1991* (Cth) establishes and governs the Special Broadcasting Service. The payment of licence fees by commercial radio broadcasters is regulated by the *Radio Licence Fees Act 1964* (Cth), whilst the payment of licence fees by commercial television broadcasters is governed by the *Television Licence Fees Act 1964* (Cth).

Further, the allocation of radiofrequency spectrum is regulated by the *Radiocommunications Act 1992* (Cth). Broadcasting is one of the ‘uses’ governed by the Act. Section 31 of the *Radiocommunications Act* authorises the Minister to designate a portion of the radiofrequency spectrum as being primarily for broadcasting purposes. This portion of the radiofrequency spectrum is termed the ‘broadcasting service bands’. The Minister is then authorised to refer the designated spectrum to the Australian Broadcasting Authority for planning pursuant to the *Broadcasting Services Act*.

In comparison, the telecommunications industry is subject to the *Telecommunications Act*. The stated objective of the *Telecommunications Act*, when read in conjunction with Parts XIB and XIC of the *Trade Practices Act 1974* (Cth), is to provide a regulatory framework that promotes:

- (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
- (b) the efficiency and international competitiveness of the Australian telecommunications industry.⁵

B *Distinction between “Broadcasting Services” and “Telecommunications Industry”*

Section 6 of the *Broadcasting Services Act* defines a ‘broadcasting service’ to be a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service. The definition of ‘broadcasting services’ in s 6 seeks to be technology neutral by expressly providing that a broadcasting service may be delivered using the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means. However, as will be discussed, the application of the legislation to the new generation of services compromises this objective of technological neutrality.

Interestingly, the definition of ‘broadcasting service’ expressly excludes certain categories of services.

⁵ *Telecommunications Act 1997* (Cth) s 3(1).

Firstly, a service that provides no more than data or no more than text (with or without associated still images) is not a 'broadcasting service'.⁶ Accordingly, services such as teletext services, computer bulletin boards, online information services, email, electronic publishing services and online newspapers are not 'broadcasting services'.⁷ Even where such services include images or graphics in the form of tables, diagrams or maps, such services are not likely to be within the definition.

Secondly, a service that makes programs available on demand on a point-to-point basis, including a dial-up service, is not a 'broadcasting service'.⁸ The Explanatory Memorandum to the *Broadcasting Service Bill 1996* (Cth) cl 6, provides that a service is a 'point-to-point service' if it is delivered by the service provider in response to a request by a user at a time determined by the user of the service.⁹ In contrast, a service is not a 'point-to-point' service if it is delivered by the service provider at a time chosen by the service provider such that multiple users receive the service at the same time.

Accordingly, dial-up telecommunications services are not 'broadcasting services' for the purpose of the Act. Moreover, online video and audio services that enable users to access particular movies, audio tracks or programs at the user's time and discretion are unlikely to be 'broadcasting services'.¹⁰

Thirdly, a service or a class of services that the Minister determines, by notice in the *Gazette*, is not a 'broadcasting service'.¹¹

The *Broadcasting Services Act* establishes a licensing regime for the services within its ambit and oversees the grant of various species of commercial and community television and radio broadcasting licences.¹²

⁶ *Broadcasting Services Act 1992* (Cth) s 6(1).

⁷ M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (2002) 181.

⁸ *Broadcasting Services Act 1992* (Cth), s 6(1).

⁹ Explanatory Memorandum, *Broadcasting Services Bill 1992* (Cth) cl 6.

¹⁰ M Armstrong et al, above n 7, 181.

¹¹ *Broadcasting Services Act 1992* (Cth), s 6(1).

¹² The use of licensing as a means of allocating spectrum has been criticised on a variety of grounds. See C Weare, 'Media Convergence and the Chilling Effect of Broadcasting Licensing' (2001) 6(3) *Harvard International Journal of Press/Politics* 47, for an empirical analysis of a long history political interference with the content decisions of broadcasters. Weare argues that a licensing process creates a potential for elected officials to influence broadcasting content. See also Y Benkler, 'Overcoming Agrophobia: Building the Commons of the Digitally Networked Environment' (1998) 11 *Harvard Journal of Law and Technology* 287 for an economic critique of the licensing process. One alternative is that of the public auctions process which forms part of the 2003 European Union scheme.

In comparison the ‘telecommunications industry’ is defined in s 7 of the *Telecommunications Act* to include an industry that involves:

- (a) carrying on business as a carrier; or
- (b) carrying on business as a carriage service provider; or
- (c) supplying goods or services for use in connection with the supply of a listed carriage service; or
- (d) supplying a content service using a listed carriage service; or
- (e) manufacturing or importing customer equipment or customer cabling; or
- (f) installing, maintaining, operating or providing access to:
 - (i) a telecommunications network; or
 - (ii) a facility used to supply a listed carriage service.

However, whilst the definition of the ‘telecommunications industry’ is broad and potentially all-encompassing, the Act regulates only the *delivery* of content and not the content itself. The ‘delivery’ of a telecommunications service is typically distinguished by the following features:¹³

- the service consists of a network of origination and termination points;
- any component of the network is able to communicate with any other component;
- the communication flow is capable of being two way.

In contrast, broadcasting typically has a ‘one-way’ flow of information. However, as will be examined, broadcasting transmission is increasingly becoming a ‘two-way’ flow allowing for interactivity. Broadcasting services are being increasingly provided on platforms that simultaneously provide telecommunications services. Hence, technological developments have outpaced legislative developments, artificially limiting the operation of the *Telecommunications Act*.

C The New ACMA

The *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005* (Cth) took effect on 1 July 2005 and created the ACMA. The ACMA replaces both the ABA which was formerly subject to the *Broadcasting Services Act* and the ACA which was formerly subject to the *Telecommunications Act*.

The *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005* amends the *Broadcasting Services Act* (ss 6–62)

¹³ Productivity Commission, Parliament of Australia, *Telecommunications and Competition Regulation – Inquiry Report* (2001) 9.

and *Telecommunications Act* (ss 127–60), together with a number of interrelated Acts including the *Radiocommunications Act* (ss 71–118), the *Special Broadcasting Service Act* (ss 124–6), the *Film Licensed Investment Company Act 1998* (Cth) (s 63), the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) (ss 161–5), the *Telstra Corporation Act 1991* (Cth) (ss 160–7) and the *Trade Practices Act 1974* (Cth) (ss 168–71). The amendments are directed at replacing the roles and responsibilities of the former ABA and ACA in the respective broadcasting and telecommunications industries with those of the ACMA. The ACMA is entrusted with the overseeing of the regulation of broadcasting, radiocommunications, telecommunications and online content.

The central reason provided for the merger is ‘convergence’ and the effects of technological change. ‘Convergence’ is commonly used to describe the dissolving of the boundaries between the formerly discrete broadcasting, telecommunications and information technology sectors.¹⁴ In the Media Release accompanying the launch of the ACMA, Senator Coonan states that a merged entity will be well placed to face the challenges of the future.¹⁵

III THE EMERGING REGULATORY GAP

The emergence of new services which form ‘hybrids’ of traditional telecommunications and broadcasting services is increasingly undermining the efficacy of the present sector-specific regulatory framework. A consideration of some of the more significant of these ‘hybrid’ services that do not comfortably sit only within one of the regulatory schemes will help the nature and extent of the emerging regulatory gap.

A *Internet Streaming*

On the face of the *Broadcasting Services Act* it is unclear whether television and radio programs ‘streamed’ through the internet are a ‘broadcasting service’ under s 6. Internet streaming is a more recent development where a multicasting web server is used to transmit video signals transformed into compressed digital signals to multiple users at the same time.

Traditionally, the definition of ‘broadcasting service’ has not been thought to include audio-visual material delivered over the internet. However, this form of internet transmission is no longer a point-to-point communication but a point-to-

¹⁴ See N Selvadurai, above n 2, 21–37.

¹⁵ Department of Communications, Information Technology and the Arts, above n 3, 2.

multipoint communication.¹⁶ As will be recalled, point-to-point communications typify telecommunications transmission whilst ‘point-to-multipoint’ typify broadcasting transmission. On the basis of this traditional description, internet streaming would appear to be a ‘broadcasting service’.

In September 2000, the then Minister for Communications, Information Technology and the Arts issued a determination pursuant to the *Broadcasting Services Act* stipulating that the definition of ‘broadcasting service’ did not extend to services that deliver radio and television programs using the internet. Such services which are delivered using the broadcasting services bands would of course constitute broadcasting services. The determination was made pursuant to a non-public inquiry.

This exclusion is particularly noteworthy in the light of the application of the *Broadcasting Services Act* to datacasting services utilising the broadcasting services bands. The Ministerial Determination makes a distinction between television and radio programs streamed over the internet, and television and radio programs delivered over broadcasting service bands. The former service attracts the regulation of the *Broadcasting Services Act*, whilst the latter service does not attract any such regulation.

Thus, now video and audio material streamed over *wire and cable* is not subject to the requirements of the broadcasting regime, whilst *identical material* transmitted over the *airwaves* are subject to the regime.

This distinction is unsatisfactory because it is based purely on the respective means of carriage and is hence *not* technology neutral. As discussed, the *Broadcasting Services Act* was delivered with the promise of a technology neutral application. It seems that the pace of technological change has required law makers to resort to this old distinction. This is not the fault of lawmakers, a static and specific regulatory regime will always suffer from the syndrome of technology catch-up. What is required is a regulatory regime that has an in-built flexibility and dynamism to enable it to embrace and evolve with technology

B Internet Telephony

A further inconsistency appears in the definition of ‘carriage service provider’ and ‘carrier’ in the *Telecommunications Act*. Providers of traditional telephone services are of course characterised as ‘carriers’ under the Act. In comparison, where an internet service provider offers internet telephony services, they will not be

¹⁶ R Costelloe, ‘Internet Television and Radio Services – The Streaming Controversy’ (2000) 4 *TeleMedia* 58, 58–9.

characterised as a 'carrier'. Rather, they will be characterised as a 'carriage service provider' within s 87 of the Act.

The present non-regulation of internet telephony is perhaps empirically justifiable on the basis of the low level of take-up. However, internet telephony offers a variety of benefits which are likely to facilitate its future success. When its success reaches a critical mass, it is envisaged that greater regulation will be necessary. The issue then will be how such regulation can be accommodated within the present static regulatory framework which has classified such operators as 'carriage service providers'.

C *Video on Demand and Near Video on Demand*

Video on demand services utilise digital subscriber line technology to deliver services over the local telephony loop.¹⁷ Such services enable an end user to demand a service and determine the start and end of the service. The user is able to rewind and forward the video at will. Such services are point-to-point services and not subject to the *Broadcasting Services Act*.

Video on demand operators do however fall within the definition of 'content service providers' in s 97(1) of the *Telecommunications Act*. It is however unclear whether video on demand providers are also 'carriage service providers'.¹⁸

Near video on demand services are typically programs transmitted to users at regular intervals which do not enable the user to control the timing or progress (i.e. rewind/forward) of the video. It is a point-to-multipoint service and a 'broadcasting service' for the purposes of s 6 of the *Broadcasting Services Act*. An example is pay television channels which transmit from point-to-multipoint and which are regulated by the Act.

It seems somewhat inconsistent that video and near video services should attract such dramatically different intensities of regulation.

IV THE REGULATION OF 'ELECTRONIC COMMUNICATIONS' IN THE EUROPEAN UNION

The new regulatory framework for the communications sector was agreed upon by the Council of Ministers on 14 February 2002. The European Union formally adopted the regime on 7 March 2002 and it entered into force on 24 April 2002, the

¹⁷ Ibid 61.

¹⁸ Ibid. The issue was also referred to in *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* [2000] FCA 1159.

day it was published in the *Official Journal*. The new regime commenced operation 15 months after its publication in the *Official Journal* on 24 July 2003.¹⁹

A A Single Integrated Regime

The aim is to provide a single regime to regulate all communications infrastructure and services.²⁰ The regulation consists of sector-specific legislation, recommendations and various non-binding guidelines, and existing competition rules of the European Commission Treaty. The sector-specific legislation consists of:

- the *Framework Directive*²¹ – A general directive which outlines policy objectives applying to a common regulatory framework for electronic communications networks and services;²²
- the *Authorisation Directive*²³ – A specific directive on the authorisation of electronic communications networks and services;²⁴

¹⁹ See I Goodwin and S Spittle, 'The European Union and the Information Society: Discourse, Power and Policy' (2002) 4 *New Media and Society* 225, for a discussion of the policy debate surrounding the creation of an information society within the European Union. The authors examine the language of the debates in the context of language as a tool of social action. The authors identify four discourses surrounding the concepts of "opportunity", "technological determinism", "market dominance" and "consumer". The authors conclude that the language structures the information society debate in such a way as to privilege economics at the expense of social and cultural matters.

²⁰ See J Van Cuilenburg and D McQuail, 'Media Policy Paradigm Shifts' (2003) 18 *European Journal of Communication* 181, for a discussion of three paradigmatic shifts in communications and media policy. Van Cuilenburg identifies three phases: the paradigm of emerging communications industry policy (up to World War II), the paradigm of public service policy (post-war to 1980/1990) and the present paradigm of the new communications policy. Van Cuilenburg notes that this present phase is still evolving.

²¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive') [2002] OJ L 108/33.

²² See B Clements, 'The Impact of Convergence on Regulatory Policy in Europe' (1998) 22 *Telecommunications Policy* 197, for an overview of the consultation process leading up to its release.

²³ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ('Authorisation Directive') [2002] OJ L 108/21.

²⁴ See M Michalis, 'European Union Broadcasting and Telecoms: Towards a Convergent Regulatory Regime?' (1999) 14 *European Journal of Communication* 147, for a placement of the reforms in the context of the history of EU broadcasting and telecommunications regulation. Michalis argues that the EU has primarily relied

- the *Access Directive*²⁵ – A specific directive on access to, and interconnection of, electronic communications networks and services and associated facilities; and
- the *Universal Service Directive*²⁶ – A specific directive on universal service and user rights relating to electronic communications networks and services.

The *Framework Directive* states that the objective of the new regime is to provide a harmonized framework for the regulation of electronic communications networks and services.

B *The Nature of ‘Electronic Communications’*

‘Electronic communications networks’ is widely defined to mean transmission systems which permit the conveyance of signals by ‘wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed and mobile terrestrial networks, networks used for radio and television broadcasting and cable television networks’.²⁷

‘Electronic communications service’ is defined to mean a service normally provided for remuneration which consists in the conveyance of signals on electronic communications networks.²⁸

Hence the regime covers both fixed and mobile telephone networks, cable and satellite television networks and electricity networks, where they are used for electronic communications services. The issue of network access is of strategic significance in that it provides the means of linking three industry sub-groups — network operators, service providers and consumers of services. Access is hence a key determinant of the competition in the industry.²⁹

on telecommunications regulation and that the present reforms involve recognition of the convergence of broadcasting and telecommunications. Michalis applauds the reforms made but contends that further reforms are necessary to fully address the issues raised by convergent technologies.

²⁵ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of electronic communications networks and associated facilities (‘Access Directive’) [2002] OJ L 108/7.

²⁶ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks services (‘Universal Service Directive’) [2002] OJ L 108/51.

²⁷ Framework Directive, [2002] OJ L 108/33, above n 21, art 5.

²⁸ Ibid.

²⁹ Rollet, E, ‘Connecting to the Information Age: A Challenge for the European Union’ (2001) 63 *International Communication Gazette* 371.

In addition, the regime encompasses ‘associated facilities’ such as conditional access systems.³⁰ The Directive encourages providers to use an open application program interface.³¹

C *The Use of General Authorisations*

The *Authorisation Directive*³² provides that the

convergence between different electronic communications networks and services and their technologies require the establishment of an Authorisation system covering all comparable services in a similar way regardless of the technologies used.³³

These aims are believed to be best achieved by the grant of a ‘General Authorisation’ which is applicable to ‘all electronic communications networks and services without requiring any explicit decision or administrative act by the national regulatory authority’.³⁴

A ‘General Authorisation’ is defined to mean a legal framework ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services in accordance with the *Authorisation Directive*.

The General Authorisation will contain an explicit outline of the rights and obligations of the undertaking.³⁵

It is striking that the very definition of ‘General Authorisation’ incorporates ‘sector specific’ or non-general regulation. Whilst flawed in principle, this incorporation of sector specific regulation can perhaps be seen as a forgivable in light of the technical realities of spectrum allocation and access.

Interestingly, the General Authorisation does not preclude the grant of specific rights with respect to the use of radio frequency.³⁶ It is recognised that the granting

³⁰ Framework Directive, [2002] OJ L 108/33, above n 21, art 19.

³¹ ‘API’ means the software interfaces between applications and the resources in the enhanced digital television equipment for digital television and radio services.

³² Authorisation Directive, [2002] OJ L 108/21, above n 23.

³³ Ibid recital 2. See E Halpin, ‘Between Self-Regulation and Intervention in the Networked Economy’ (2002) 28 *Journal of Information Science* 285.

³⁴ Authorisation Directive, [2002] OJ L 108/21, above n 23, recital 8.

³⁵ Ibid recital 10.

³⁶ Ibid recital 10.

of specific rights ‘may continue to be necessary’.³⁷ This seems to compromise the new regimes central object of technological neutrality.

The rights derived from a General Authorisation include the right to:

- (a) provide electronic communications networks and services; and/or
- (b) make an application for the necessary rights to install facilities in accordance with the *Framework Directive*.³⁸

Additional rights accompanying a General Authorisation relate to networks or services provided to the public. These additional rights include the right to negotiate interconnection with, and where applicable, obtain access to or interconnection from other providers of publicly available communications networks and services in accordance with the *Access Directive*.³⁹

D *Relevance to Australia*

The use of an expansive definition of ‘electronic communications’, such as that adopted by the European Union, that encompasses transmission systems which convey signals by wire, by radio, by optical or by other electromagnetic means (including satellite networks, fixed and mobile terrestrial networks, networks used for radio and television broadcasting and cable television networks) would overcome many of the regulatory problems experienced in Australia as a result of the convergence of networks, systems and services.⁴⁰

The benefits of the European Union system flow from the fact that it is truly technologically neutral, and does not regulate on the basis of the *technology used* by the service but rather on the *nature of the service* provided. The artificiality of having to force new and hybrid services into the definition of a ‘broadcasting service’ in order for it to be within the regulatory ambit of the *Broadcasting Services Act* or into the definition of ‘telecommunications industry’ in order for it to be within the regulatory reach of the *Telecommunications Act* are overcome by the technology neutral basis of the European Union. In such a system, it would not be necessary to rely on Ministerial Determinations under s 6(c) of the definition of ‘broadcasting service’ in the *Broadcasting Services Act* to address inconsistencies and ambiguity in the operation of the Act.

³⁷ Ibid recital 11.

³⁸ Ibid art 4.

³⁹ Access Directive, [2002] OJ L 108/7, above n 25.

⁴⁰ See discussion at II above.

The problems experienced in Australia with the regulation of new generation services such as internet telephony, internet streaming, video on demand or near video on demand can be effectively addressed with a non-sector specific regime such as adopted in the European Union. Moreover, future services not envisaged by law makers can also be effectively accommodated as the regulatory regime has an inherent dynamism which enables it to grow and keep pace with technological change.

V SPECTRUM MANAGEMENT

A *The Regulation of Radio Frequencies*

The *Authorisation Directive*⁴¹ states that, ‘where possible’, the rights of use for radio frequencies are to form part of the General Authorisation. Such rights are not to be subject to the grant of individual rights of use.⁴² This approach is of special relevance where the risk of harmful interference is legible.⁴³

However, where it is necessary to grant *individual* rights of use for radio frequencies such rights may be granted to undertakings subject to the General Authorization and arts 6, 7 and 11(1)(c) of the *Authorisation Directive*.

The European Union regulatory system for electronic communications is built and promoted on the premise of the equal treatment of differing technologies and the use of market mechanisms to regulate offer and uptake. Hence it is interesting to note that the new system makes a significant concession in providing for the separate regulation of radio frequencies.

Based on the assumption that spectrum is scarce, art 7 outlines a procedure for limiting the number of rights of use to be granted with respect to radio frequencies. Article 7(1) outlines the matters to be considered in deciding whether to limit the rights of use to be granted for radio frequencies. They include the need to give all users and consumers the opportunity to express views on any limitation⁴⁴ and the need to review the limitation at reasonable intervals or at the reasonable request of

⁴¹ Authorisation Directive, [2002] O JL 108/21, above n 23, art 5.

⁴² Ibid.

⁴³ ‘Harmful interference’ is defined in art 2.2(b) to mean ‘interference which endangers the functioning of a radio navigation service or of other safety services or which otherwise seriously degraded obstructs or repeatedly interrupts a radio-communications service operating in accordance with applicable regulations’.

⁴⁴ Authorisation Directive, [2002] OJ L 108/21, above n 23, art 7(1)(b).

an affected undertaking.⁴⁵ The procedure for the invitation of rights of use and selection process is to be public and transparent.

The grant of an individual right of use will specify whether the right can be transferred at the initiative of the rights holder and under what conditions.⁴⁶

After providing for the separate regulation of radio frequencies, the new regulatory system seeks to redress some of the inefficiencies that may be created by this by expressly prohibiting the duplication of conditions attached to use.

Firstly, art 6 provides that the only conditions that may be attached to General Authorisations and the rights of use for radio frequencies are those set out in the Annex to the Directive. Secondly, the General Authorisation is to only contain conditions which are specified for that sector. Thirdly, such conditions are not allowed to duplicate any conditions which are applicable to conditions which are applicable by virtue of other national regulation.

Finally, additional specific obligations may be imposed on providers of electronic communications networks and services under arts 5(1), 5(2), 6 and 8 of the *Access Directive* and arts 16, 17, 18 and 19 of the *Universal Service Directive*.⁴⁷ In most cases such additional obligations are those which may be imposed on operators with significant market power.⁴⁸

Despite the concession as to the separate regulation of radio frequencies, the *Authorisation Directive* remains reasonably technology neutral on its face. However, an examination of the Annexure containing the potential conditions of use reveals a significant erosion of the premise of technological neutrality in the area of radio frequency management.

In managing the allocation and assignment of radio frequency spectrum, Member States are required to act in accordance with the policy objectives outlined in art 8.⁴⁹ One of the enduring objectives in art 8 is that 'national regulatory authority's take the utmost account of the desirability of making regulation technologically neutral'.

Further, Member States are required to ensure that the allocation and assignment of radio frequencies by national regulatory authorities are based on objective, transparent, non-discriminate and proportionate criteria.⁵⁰ Finally, all allocation

⁴⁵ Ibid art 7(1)(e).

⁴⁶ Ibid art 5(2).

⁴⁷ Universal Service Directive, [2002] OJ L 108/51, above n 26.

⁴⁸ S Farr and V Oakley, *EU Communications Law* (2003) 96.

⁴⁹ Access Directive, [2002] OJ L 108/7, above n 25, art 9(1).

⁵⁰ Ibid art 9(2).

and assignment are to be in accordance with the principles outline in the *Radio Spectrum Decision*.⁵¹

B *Conditions of Use*

Part B of the Annex specifically relates to rights of use for radio frequencies. Conditions that may be attached to rights of use for radio frequencies include:

- (a) Designation of service or type of network or technology for which the rights of use for the frequency has been granted, including, where relevant, the exclusive use for a frequency for the transmission of specific content or special audiovisual services; and
- (b) Technical and operations conditions necessary for the avoidance of harmful interference and for the limitation of exposure of the general public to electromagnetic fields, where such conditions are different to those included in the General Authorisation.

Article 9 of the *Framework Directive*⁵² outlines the procedure for the management of radio frequencies for electronic communications services.

C *Relevance to Australia*

As the General Authorisation preserves the grant of specific rights with respect to the use of radio frequency, it does not represent a substantive change from the allocation of spectrum in Australia pursuant to the *Broadcasting Services Act* and the *Radiocommunications Act*.

However, the European Union's separation of the regulation of the right to broadcast content and the behaviour of the broadcaster from the right to grant access to spectrum is markedly different from that of Australia. In Australia, a broadcasting licence entitles a broadcaster to *both* broadcast content and access spectrum.

In the *Broadcasting Inquiry Report*, the Productivity Commission suggested that the separation of the regulation of the broadcasting of content from the allocation of spectrum would have a number of benefits including 'creating the preconditions for a more efficient use of spectrum' and 'allowing for technological convergence' and 'creating consistency with other spectrum management'.⁵³ Thus the new regime in

⁵¹ Decision No 676/2002/EC.

⁵² Framework Directive, [2002] OJ L 108/33, above n 21.

⁵³ Productivity Commission, *Broadcasting Inquiry Report*, April 2000, 188–91.

the European Union provides a useful insight in regulating spectrum to address the effects of convergence.

VI ACCESS MANAGEMENT

The General Authorisation also entitles undertakings providing electronic communications networks and services to the public to negotiate interconnection and access under the conditions of the *Access Directive*.⁵⁴ Hence under the European Union regulatory regime, *both* spectrum management and access and interconnection are encompassed within a single General Authorisation.

A The Access Directive

The central aim of the *Access Directive*⁵⁵ is ‘to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.’⁵⁶

The recital to the *Access Directive* favours negotiation of access and interconnection arrangements (subject to competition rules) as achieving a more efficient market with effective competition, more choice and competitive services to consumers. It is suggested that undertakings which receive requests for access and interconnections should in principle conclude such agreements on a commercial basis and negotiate in good faith.

Where such negotiations are unsuccessful, the national regulatory authority is entitled to intervene and resolve disputes.⁵⁷

Operators are to offer access and interconnection to other undertakings on terms and conditions consistent with the obligations imposed by national regulatory authorities under arts 5, 6, 7 and 8.

Article 4(1) provides that:

[O]perators of public communication networks have a right and, when requested by other undertakings so authorised, an *obligation, to negotiate*

⁵⁴ [2002] OJ L 108/21. Undertakings offering electronic communications networks and services other than to the public are required to negotiate interconnection on commercial terms.

⁵⁵ Access Directive, [2002] OJ L 108/7, above n 25.

⁵⁶ Ibid art 1(1).

⁵⁷ Ibid art 5.

interconnection with each other for the purpose of providing publicly available electronic communications services....⁵⁸

B *The Obligation of Negotiation*

Despite its generous and expansive title, ‘Rights and obligations for undertakings’, the general obligation imposed by art 4 is subject to some significant limitations.

Firstly, the notion of ‘access’ is somewhat problematic. ‘Access’ is defined in some length:

‘[A]ccess’ means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers *inter alia*: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operations support systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services.⁵⁹

The definition is not exhaustive. It expressed as *including* (i.e. ‘it covers *inter alia*’) the various matters referred to in the definition rather than being limited to the specified matters referred to in the definition. The definition is hence potentially imprecise and open to debate.

On the face of the definition ‘interconnection’ is essentially defined as a specific type of access implemented between public network operators.⁶⁰

It has however been observed that the *Access Directive* uses both the terms ‘access’ and ‘interconnection’.⁶¹ Hence it is arguable that the mere reference to ‘access’ is not intended to exclude ‘interconnection’. For example, In relation to certain issues such as obligations of access to, and use of, specific network facilities,⁶² only the term ‘access’ is used. It seems that in this instance ‘access’ includes ‘interconnection’ and that there is no intention to exclude ‘interconnection’ from the obligations outlined.

⁵⁸ Ibid art 4 (1) (emphasis added).

⁵⁹ Ibid art 2(a).

⁶⁰ Ibid art 2(b).

⁶¹ S Farr and V Oakley, above n 48, 109–10.

⁶² Authorisation Directive, [2002] OJ L 108/21, above n 23.

The title of art 4 suggests that it is to apply to ‘undertakings’ generally. This would seem to be supported by the definition of ‘operators’. ‘Operators’ is defined to include *both* those providing a public communications *or* associated facility.

However, art 4 in fact only applies to a restricted category of ‘undertakings’. Article 4 only applies to those undertakings involving operators of *public* communications networks who have been requested by another *authorised* undertaking. Accordingly, the rights and obligations outlined in art 4 do not extend to providers of associated facilities.⁶³ This is despite the fact that they are included in the definition of ‘operators’.

A second interesting matter is that the definition of ‘operator’ covers both those providing a public communications or associated facility *and* those who are authorised to do so. Accordingly, an undertaking that has received authorisation to provide a public communications network or associated facilities do not in fact actually provide any such networks or facilities have rights and obligations under the *Access Directive*.⁶⁴

The definition of ‘local loop’ is essentially the same as the definition in *Regulation on Unbundled Access to the Local Loop*.⁶⁵ The term is defined to mean the physical circuit connecting the network termination point at the subscriber’s premises to the main distribution frame or equivalent facility in the fixed public telephone network. Another limitation in the operation of art 4 is that it does not apply to access. The general rights and obligation of negotiation provided in art 4 only apply to interconnection.

However, specific obligations can be imposed pursuant to arts 5, 6, 7 and 8 in relation to both access *and* interconnection.

C Rights and Obligations of Undertakings

Article 5 of the *Access Directive* provides for obligations that may be imposed on individual undertakings. Article 5(1)(a) allows national regulatory authorities to impose obligations on undertakings that control access to end-users. The aim of such obligations is to ensure end-to-end connectivity. Such an obligation can include the obligation to interconnect their networks.

⁶³ S Farr and V Oakley, above n 48, 110–12.

⁶⁴ Ibid 110–11.

⁶⁵ Directive 2887/2000, [2000] O.J L 336/4.

Article 5(1)(b) allows national regulatory authorities to impose obligations on operators to provide access to electronic programmed guides and application programme interfaces on fair and reasonable terms.

Article 5 prefaces the obligations in (a) and (b) above with the words ‘in particular’ suggesting that these two obligations are not exhaustive and that additional obligations may be imposed if necessary to achieve the stated objectives of adequate access and interconnection and interoperability of services to promote efficiency, sustainable competition and maximum benefit to end-users.⁶⁶

The important concept of undertakings that ‘control access to end-users’ is not defined. The notion of ‘control’ was however defined in the former *Interconnection Directive*. It is likely that term is intended to have a similar operation in the *Access Directive*.⁶⁷

In the former *Interconnection Directive*, the term ‘control of a means of access to a network termination point’ was defined to mean the ability to control the telecommunications services available to the end user at that network termination point and/or the ability to deny other service providers access to the end-user at the network termination point.

D *Relevance to Australia*

Despite the limitations in the new European Union access regime flowing from restrictive definitions of ‘operators’ and ‘undertakings’, ‘local loop’ and ‘control’, the model offers certain useful insights for Australian law reformers.

As the General Authorisation covers *both* the application to provide a service and the right to negotiate interconnection in accordance with the *Access Directive*, it enables the regulatory and access regimes to move forward together as new and hybrid services develop.

That is, as new services are encompassed within the definition of ‘electronic communications’ they are automatically also taken into account in the access regime. This is in contrast to Australia where this function is divided between the *Broadcasting Services Act* applying to those services considered to be ‘broadcasting services’, the *Telecommunications Act* for those services considered to be within the ‘telecommunications industry’, and the telecommunications and access regime established by Part XIC of the *Trade Practices Act*.

⁶⁶ Authorisation Directive, [2002] OJ L 108/21, above n 23, art (1).

⁶⁷ S Farr and V Oakley, above n 48, 115–6.

VII THE AUSTRALIAN REFORM DISCOURSE

The Australian media law reform discourse has repeatedly noted the regulatory problems flowing from the convergence of the broadcasting and telecommunications industries. However, only limited steps have been taken to address the identified problems. It is useful to consider in some detail the discourse to date, what has been achieved, what may still need to be undertaken, and to what extent the European Union model is a useful road map for future reform.

A *The 2002 Review of Spectrum Management*

The first substantive reform discourse that identified the nature and operation of convergence was the Government report titled *Options for Structural Reform in Spectrum Management*.⁶⁸ The title is perhaps more ambitious than the content, as the main focus of the review was the reform of the institutional arrangements relating to the broadcasting industry. The report does however contain very useful analysis of convergence as a rationale for a single regulatory authority to replace the dual institutions of the ACA and ABA.

The report commences by acknowledging that the present spectrum arrangements have been in existence for nearly a decade during which time there have been 'significant developments in the communications environment'.⁶⁹ First amongst the developments listed is the fact that: 'digital technologies have facilitated convergence of communications services'.⁷⁰

Other developments noted include substantial growth in internet service take-up, the increased popularity of digital television and efficiencies in spectrum capacity usage.

Listed last, and of most significance to the present discussion, is the growing incidence of convergence. In formulating a solution it is significantly noted that: 'A key issue is the need to develop flexible regulatory schemes that can deal with an unpredictable and increasingly convergent technological and business environment'.⁷¹

The review goes on to analyse the functions and roles of the ACA and ABA and considers the benefits of combining the ACA and ABA into a single operation. It is

⁶⁸ Department of Communications, Information Technology and the Arts, *Options for Structural Reform in Spectrum Management*, Discussion Paper, 2002.

⁶⁹ Ibid 2.

⁷⁰ Ibid.

⁷¹ Ibid.

proposed that a single organisation be created with responsibility for telecommunications, broadcasting and on-line regulation.⁷²

It is significantly noted that irrespective of whether ‘broader changes’⁷³ are considered necessary ‘in relation to the planning and allocation of spectrum, there may be benefits in having a single regulator for the communications sector’.

The benefits of having a non-sector specific regulator include:⁷⁴

- Improved ability to undertake detailed work on convergence, emerging competition and regulatory issues. A single agency could better address multi-use planning of spectrum and its future uses (e.g. following analog television hand-back), and the role of satellite services, and analysis of competing technologies (e.g. digital radio);
- Improved co-ordination of telecommunications and broadcasting issues in international forums;
- Greater ability to target enforcement powers where they are needed;
- A more effective spectrum wide approach to the management of spectrum and pricing; and
- Capacity for improved consumer information services.

It is submitted that all of these ‘benefits’ would also flow from the creation of a unified body of broadcasting and telecommunication law, as has been implemented in the new electronic communications regulatory regime in the European Union. The report is however confined to the issue of governance and does not consider this wider issue.

B The 2003 Review of Governance

The Discussion Paper titled ‘*Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority*’ of 15 August 2003⁷⁵ marked a watershed in the reform discourse. Of interest to the present discussion is again the rationale for the merger of the telecommunications regulator and the broadcasting regulator. In considering the reason for having a single regulator for the telecommunications and broadcasting sectors, the following insightful argument is put forward:

⁷² Ibid.

⁷³ Ibid 12.

⁷⁴ Ibid.

⁷⁵ Department of Communications, Information Technology and the Arts, *Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority*, 15 August 2003.

The current (separate) regulation of the telecommunications and broadcasting sectors is increasingly subject to market and technological pressures. The *challenges facing the regulatory agencies in responding to the convergence of telecommunications, broadcasting and Internet applications and content are becoming more pronounced.*

The case for merging the two communications regulators arises from developments that have been occurring in the telecommunications environment over the past decade. Digital technologies are reshaping communications industries. Previously distinct sectors now compete across increasingly convergent markets using a range of different delivery platforms. For example, the development of third-generation mobile technologies has created new businesses that are offering telephony, online and potentially broadcasting-type service on the one network and one piece of consumer equipment. Digital technologies are also transforming broadcasting services. Over time the distinction between traditional television and radio broadcasting, and new types of broadband interactive content services, will become less clear.

The convergence of communications technologies and markets is placing growing pressure on the current regulatory institutional arrangement. In Australia, different components of the same industry are currently subject to regulation by two different agencies. For example, Internet content regulation is undertaken by the ABA while the ACA regulates Internet content service providers; broadcasting licences are obtained from the ABA while apparatus licences for broadcasting transmitters and ancillary broadcasting users are obtained from the ACA. For businesses in the sector to engage with both regulators results in increased compliance and transaction costs. The regulators themselves are required to cooperate on a range of issues that span their separate responsibilities resulting in additional administration costs which are passed on to industry and, in turn, their customers.

While the impact of convergence is currently manageable within the existing dual-institutional structure, the capacity of each regulator to administer its responsibilities effectively where they intersect with those of the other regulator is expected to diminish over time. Further, given their distinct responsibilities, it could become increasingly difficult for separate regulators to take a more strategic view of the wider convergence issues.⁷⁶ [Emphasis added.]

Significantly, convergence is expressly given as the central rationale for the merger of the ACA and the ABA.⁷⁷

It is submitted that the same rationale so eloquently outlined above, also supports the merger of the regulatory framework applying to telecommunications and

⁷⁶ Ibid 4–5.

⁷⁷ Ibid.

broadcasting. The parameters of the present reform debate are too narrow and do not allow for a comprehensive consideration of the reforms needed to address the effects of convergence.

C *The 2004 Review of Planning and Licensing*

Planning and licensing has also been the subject of intense debate. The Issues Paper released in July 2004 and titled ‘*Provision of Commercial and Television Broadcasting Services after 31 December 2006*’⁷⁸ contained a detailed analysis of a broad range of spectrum allocation issues. A central issue was the most effective model for allocating spectrum.

Whilst a large part of the matter canvassed in the report are outside the ambit of the present convergence debate, one of the matters considered is of relevance. Specifically, the Issues Paper sought views on the most appropriate model for the allocation of broadcasting and multiplex licences.⁷⁹ One option would be to allocate content licences with an accompanying right to access spectrum or carriage. The other alternative would be to allocate content licences separately from the carriage arrangements. The findings flowing from the Issues Paper have not as yet become the subject of a Government release.

D *Productivity Commission Inquiry Reports*

In Australia, the Productivity Commission reports into telecommunications and broadcasting, the *Telecommunications Competition Regulation Inquiry Report*⁸⁰ and the *Broadcasting Report Inquiry Report*⁸¹, both referred to the increasing convergence of the telecommunications and broadcasting sectors.

The *Broadcasting Inquiry Report* devoted a chapter to the examination of the incidence of convergence in the Australian media industry and outlined the nature of convergence in media products and markets, media platforms and corporate structures.⁸² Whilst the Report did not contain any recommendations as to the need

⁷⁸ Department of Communications, Information Technology and the Arts, *Provision of Commercial and Television Broadcasting Services After 31 December 2006*, Issues Paper, July 2004.

⁷⁹ Multiplex refers to an arrangement whereby a transmission operator combines or ‘multiplexes’ several program streams from a variety of different broadcasters into a single spectrum channel allocated for digital television. This system allows for the ownership and regulation of the multiplex to be separated from the ownership and regulation of the channels or services transmitted on the multiplex.

⁸⁰ Productivity Commission, above n 13.

⁸¹ Productivity Commission, above n 53.

⁸² Ibid 105–25.

to amend the present regulatory framework, the Report advocated the need to develop a 'convergence broadcasting policy'⁸³ that considered broadcasting in a wider context.

The *Telecommunications Competition Regulation Inquiry Report*, even whilst seeking to delineate a 'telecommunications-specific' competition policy, interestingly noted that the distinction between telecommunications and broadcasting was dissolving. This is becoming increasingly common: a sort of quick glance at reality even whilst struggling to operate within an outdated regulatory framework:

The convergence of broadcasting and telecommunications accentuates the paradoxically pro-competitive orientation of policy towards traditional telecommunications and the protective pall of regulation that shrouds broadcasting. This report is mainly concerned with adjustments to telecommunications-specific regulations, but ... a dysfunctional regulatory environment for broadcasting can have ... damaging effects.⁸⁴

The above also highlights the fact that a 'dysfunctional' regulatory environment can also impede the implementation of an effective competition policy. The reports alerted of the need for legislators to address this problem of convergence in the future.

E *The 2005 Telecommunications Competition Regulation Issues Paper*

The most recent government paper on the subject is the April 2005 *Telecommunications Competition Regulation Issues Paper*.⁸⁵ In contrast to the above *Telecommunications Competition Regulation Inquiry Report*, the *Telecommunications Competition Regulation Issues Paper* does not contain any express discussion of convergence. However, in stating the objectives of the inquiry it is noted that:

[I]t is also appropriate at this time to examine current telecommunications competition regulatory settings, particularly in light of recent technological and market developments, so that the regulatory framework remains effective into the future.⁸⁶

⁸³ Ibid 263.

⁸⁴ Productivity Commission above n 13, 5.

⁸⁵ Department of Communications, Information Technology and the Arts, *Telecommunications Competition Regulation*, Issues Paper, April 2005.

⁸⁶ Ibid 2.

F *The 2005 Merger of the ABA and the ACA*

Without doubt the most significant legislative acknowledgment of the convergence of the broadcasting and telecommunications industries is the merger of the formerly distinct ACA with the ABA to form the the new ACMA.

In 1998, Rod Shogren the then Director of Telecommunications at the ACCC, published a fascinating article outlining, amongst other things, the rationale for the absorption of telecommunications into the duties of the ACCC.⁸⁷ He argues that this significant change in regulatory framework was perhaps motivated by recognition that ‘the traditional boundaries separating telecommunications, computing and broadcasting industries are becoming less distinct’. Shogren powerfully concludes that sector-specific regulation is increasingly vulnerable to the technological and entrepreneurial evolution of markets. He warns that the pace of technological change and hence the pace of regulatory obsolescence will only accelerate in the future and that this is not a problem that will go away.⁸⁸

Accordingly it is important to ensure that desirable technological change facilitating economic growth and consumer welfare is not stifled by the burden of a regulatory system that is directed at outdated technology and services that have evolved beyond that envisaged by the legislation.⁸⁹

VIII CONCLUSION – THE JOURNEY AHEAD

The merger of the ACA and ABA is a brilliant and brave step in the *institutional* regulation of the communications sector. There is no reason in either principle or theory why the rationale provided for the creation of the ACMA would not equally justify the merger of telecommunications and broadcasting *laws*.

Perhaps the reason for the present limitation of merger to institution and not law is merely a matter of time, effort and logistics. The Discussion Paper on *Options for Structural Reform in Spectrum Management* cites as one of the benefits of having a single regulator for the communications sector the ‘improved opportunity to undertake detailed work on convergence’.⁹⁰ This suggests that it may merely be a lack of opportunity that has impeded the reform of this area of law. If so, it may just be a matter of time before the convergence of laws is formally on the reform table.

⁸⁷ R Shogren, ‘Convergence of General Competition Law with Telecommunications Specific Regulation – The Australian Experience’ (1998) 9 *TeleMedia* 153, 154.

⁸⁸ Ibid 157.

⁸⁹ Ibid 158.

⁹⁰ Department of Communications, Information Technology & the Arts, above n 68, 12.

The statutory scheme implemented in the European Union represents an innovative and largely technology neutral framework for the regulation of 'electronic communications' that overcomes the intrinsic regulatory problems flowing from convergence. The artificiality of classifying new and evolving hybrid services such as internet telephony, internet streaming and video and near video on demand as either a 'broadcasting service' or a 'telecommunications service' is overcome by the grant of a general authorisation.

The existence of individual rights with respect to the allocation of radio frequency spectrum does somewhat compromise the technological neutrality of the European Union regime. Similarly, the access and interconnection obligations also serve to dilute the objective of avoiding specific telecommunications law based objectives.

However, despite these limitations, the European Union model remains a dynamic and flexible mechanism that is leading the world in the move towards the seamless regulation of electronic communications.⁹¹

The Australian law reform discourse has repeatedly acknowledged the need to address the effects of convergence on the continuing efficacy of broadcasting and telecommunications regulation. The first bold step has now been taken in the form of the merger of the ABA and the ACA to form the ACMA. It is submitted that the next step is the merger of the substantive laws applying to broadcasting and telecommunications into a legal framework for the regulation of 'electronic communications' — a dynamic, inherently flexible regulatory framework that can accommodate technological evolution and emerging new generation networks and services.⁹²

⁹¹ See S Simpson, 'Intra-Institutional Rivalry and Policy Entrepreneurship in the European Union: The Politics of Information and Communication Technology', (2000) 2 *New Media and Society* 445, for a consideration of the political issues surrounding the launch of the Green Paper and the lengthy consultation process. The author comments on the European Commission's 'pro-active' approach to telecommunications and broadcasting regulation and its overcoming of institutional opposition to deliver a significant breakthrough in information and communication technology regulation.

⁹² See Y Benkler, 'Overcoming Agrophobia: Building the Commons of the Digitally Networked Environment' (1998) 11 *Harvard Journal of Law and Technology* 287, for a history of broadcasting regulation policy. See J Van Cuilenburg, 'Media Policy Paradigm Shifts' (2003) 18 *European Journal of Communication* 181, for a discussion of three paradigmatic shifts in communications and media policy. Van Cuilenburg identifies three phases: the paradigm of emerging communications industry policy (up to World War II), the paradigm of public service policy (post-war to 1980/1990) and the present paradigm of the new communications policy. Van Cuilenburg notes that this present phase is still evolving.