proposal currently on the table is to merge the two organisations into a single regulator, but maintain the distinction between the treatment of BSB spectrum on the one hand, and the remaining spectrum on the other.

Yet despite this shift to a less drastic, policy neutral proposal, suspicion has remained among the broadcasters that the ABA's social and cultural priorities will eventually become subordinate to technical regulation and revenue considerations, and that the barriers between the BSBs and the other areas of spectrum will be gradually chipped away. A joint submission to the 2003 Paper from broadcasting industry peak bodies Commercial Radio Australia and Commercial Television Australia said it was 'crucial that broadcasting continue to be the primary use of spectrum' in the BSBs, indicating the fear that BSB spectrum could be invaded for other uses. Telstra appeared to echo this prediction in its submission on the 'one regulator, two policy regime' model, when it argued that such a model would distort a convergent market by encouraging it to gravitate towards use of whichever licensing regime was associated with the lowest costs. Both Telstra and Optus explicitly maintained their argument that an opening up of the BSB spectrum market should be part of any merger.

On the other hand, there remain more practical, less speculative arguments in favour of the 'minimal change' proposal. Firstly, it would allow the government to be seen to be progressing the issue and, if implemented, would result in the reduced transaction costs associated with having only one regulator. Furthermore, a merged regulator would have a stronger basis from which to respond in a unified way to technological convergence, once it begins to bite in earnest. Lastly, as a matter of parliamentary reality, an attempt to push through both spectrum management and institutional reforms at the same time would most likely result in debate and delay, and little or no progress in any direction.

FUTURE DIRECTION

Overseas experiences may provide some guidance on the future of spectrum planning under a merged Australian regulator. In support of the argument for merging the ABA and the ACA, both the 2002 and 2003 Papers referred to the fact that in the UK, US and Canada, consolidation of the regulation of telecommunications and broadcasting services has already taken place. According to the 2002 Paper, both the US and the UK are now indicating an intent to move away from merit-based broadcasting spectrum allocation and towards the auctioning of spectrum.

Submissions to the 2003 Paper closed on 15 September 2003. The 2003 Paper did not set any timetable for progressing the issue, so for now the ball is in DCITA's court. Meanwhile, it seems certain that technology will continue to close the gap between telecommunications and broadcasting services at a fast pace. While it may not a solution in itself, a merger of the ACA and the ABA seems to be an important first step in formulating an appropriate regulatory response to technological convergence. From there, whether the regulatory environment can keep pace with technology remains to be seen.

Tom Reid is an articled clerk and Niranjan Arasaratnam is a partner in the Melbourne office of Allens Arthur Robinson.

Spam Bill Almost Law

John Corker examines the new proposed model for regulating spam in Australia, and critiques some potential problems.

On 31 October 2003 the Environment, Communications, Information Technology and the Arts Legislation Senate Committee issued the report of their inquiry into the *Spam Bill 2003* and the *Spam (Consequential Amendments) Bill 2003* and recommended that the Bills be agreed to without amendment.

It seems likely that the Bill will shortly become law.

The main features of the Spam Bill are:

- a prohibition against unsolicited commercial electronic messages (***UCEM***) with an Australian link;
- electronic messages include SMS and MMDS messages sent through a telecommunications network including the Internet and by mobile phone;
- a message is commercial simply if one of its purposes is commercial in nature even if it only includes a hyperlink to a commercial website;
- UCEM is prohibited unless it is sent with a recipient's consent. Consent can be explicit or inferred, notably from what is referred to as "conspicuous publication" of an electronic address;
- a single UCEM is prohibited. It is not necessary that it be sent in bulk;
- all commercial electronic messages must contain accurate information about the messages originator;
- all commercial electronic messages must contain a functional 'unsubscribe' facility to allow people to opt-out of receiving further messages from that provider;
- software that harvests electronic addresses from the Internet for the purposes of sending UCEM is prohibited;
- governments, political parties, charities, religious organisations and educational institutions are exempt from the prohibition against sending UCEM and the requirement to include a functional "unsubscribe facility" in each message; and
- the Australian Communications Authority (***ACA***) is responsible for enforcing the scheme. There is no right for a private legal action to be taken to enforce compliance with the provisions of the Bill.

Regulations may be made to give effect to the operation of agreements and MOUs that Australia might enter into with other countries that are directed towards curbing spam.

The associated *Spam (Consequential Amendments) Bill 2003* extends the

existing search and seizure powers of the ACA to permit the ACA, to obtain a warrant to enter premises and take computers to investigate a suspected breach or simply to monitor compliance with the Act.

CHILLING OF COMMERCIAL FREE SPEECH

The Bill makes unlawful the sending of a **single** UCEM rather than the sending of bulk messages which is the spam problem. The justification given for this approach is the difficulty of proving that a person is sending bulk messages and the loopholes that can be found such as changing one or two characters in each message or sending multiple address lists each one of a size just below what might be considered to be bulk.

The unfortunate effect of this approach is the potential chilling of commercial free speech and a restriction on legitimate business practices of sending some unsolicited messages that may be of interest to the recipient.

Whilst the ACA has a discretion to enforce the prohibitions, none of this changes the fact that sending a single UCEM will be unlawful. An alternative way to address this issue may have been to prohibit only bulk messaging and use anti-avoidance provisions to cover the loopholes. Similar to the anti-avoidance provisions in Schedule 6 of the *Broadcasting Services Act 1992*, the ACA could be given authority to form an opinion that a message or messages were sent for the purpose of avoiding the UCEM prohibition or determine that a particular message is UCEM. One thing most people agree on is that 'spam is hard to describe but you know it when you see it'[1] so the ACA would not have difficulty recognising a spam message.

Another approach to this problem is that suggested by the Australian Computer Society and endorsed by Labor in its minority report[2]. They suggest an explicit exception for single messages distributed by a sender with a bona fide held view that the addressees would have an interest in receiving them.

OPPORTUNITY FOR NICHE SMS MARKETING

The recipient's consent is a defence to the offence of sending UCEM. Consent can be express or reasonably inferred from the conduct and the business and other relationships of the recipient individual or organisation.

Consent may not be inferred from the mere fact of publication of an electronic address unless it is a conspicuous publication and the message sent must be relevant to the work-related business, functions or duties of an employee, director, officer, partner, office-holder or self employed individual concerned or in certain cases, the office, position, function or role concerned.

What is conspicuous is not defined but would seem to include mobile phone numbers and email addresses published in the Yellow Pages, in journals, magazines, newspapers and on business or organisation related websites and even in chat rooms.

Accordingly, the conspicuous publication exception permits intermediaries to establish lists of email addresses and mobile phone numbers from the above sources with each electronic address correlated to the work-related business functions or duties of the electronic address concerned. For example, all email addresses and mobile phone numbers of people in the building trades could be compiled into a single list and legitimately used for sending UCEM relating to building products. These lists could be legitimately used for sending unsolicited commercial emails or, more relevantly in the building trade, SMS or MMDS messages to mobile phones as most tradespersons use mobile phones as their main form of communication. Equally law firms who publish the email addresses of their partners on their websites could find themselves on lists whereby law stationers, document copiers, law book publishers, computer firms and court dress makers are regularly sending UCEM to their partners as messages from these businesses are relevant to their functions as a partner in a law firm.

The conspicuous publication exemption has the effect of legitimising niche marketing in the electronic messaging space and we should not be surprised to see some businesses taking advantage of this particularly in the highly sought after SMS marketing area. The Commonwealth Privacy Act continues to apply but with its exemptions for small business (turnover <$3m) and the fact that these lists can be de-identified for personal information, it will not prohibit this type of marketing.

The Bill provides that, if businesses and individuals publish a statement that they do not wish to receive UCEM in the same place as the publication of their electronic address, then their address can not be used in this way. Businesses and organisations would be well advised to consider including the words "No Spam" when re-subscribing to their Yellow Pages entry, reviewing the electronic addresses contained on their website or in other conspicuous publication of their contact details.

All sent messages will have to include details of a functional unsubscribe facility so for those that have the time and trust to use such a facility there will be a way of removing their address from the list.

BETTER OFF WITH A '.AU' EMAIL ADDRESS?

A further defence to the sending of UCEM is that the sender did not know and could not with reasonable diligence have ascertained that the message had an Australian link. If the message originates in Australia then it has an Australian link and there are other connections with Australia that apply. The evidential burden to show reasonable diligence rests with the sender of the message. For a spammer based outside Australia who has bought an email list from a third party, to remove all the addresses with an Australian sub-domain, would seem to be exercising reasonable diligence. This may possibly leave plenty of Australians with .com, .org, .net or hotmail addresses still on the list. It is very difficult and in most cases impossible to look behind an email address to ascertain whether the individual who can access that email account has a connection with Australia. It is hard to see what more diligence could be exercised.

Many Australian businesses in the past few years have done away with the .au Australian sub-domain for their web address and the email addresses of their staff. Australian businesses may now be well advised to go back to using a .au sub-domain for the email addresses of their staff particularly if spammers based in other countries are going to comply with international MOUs and agreements on curbing spam which are a key part of the government's overall strategy.

COMMENCEMENT AND REVIEW

The substantive provisions of the Bill don't commence until 120 days after it receives Royal Assent. The Act also provides for a Ministerial Review of its operation within 2 years of its commencement.

John Corker is a Senior Associate at Clayton Utz in Sydney.

1 Mr Philip Argy, Australian Computer Society, Proof Committee Hansard. p.13.

2 Labor Minority Report paragraph 21.