

Department of Communications

Review of the Australian Communications and Media Authority

An Individual/Private Capacity Due Diligence for Consideration

From: Selva (Kidnapillai Selvarajah)

Remarks: My views expressed in this submission do not necessarily reflect the views of my past employers or present employer or any other community or voluntary organisations that I am currently involved.

Note: This submission can be made to the public after removing my residential address

Summary of Due Diligence

- The review is necessary due to emerging technological trend with particular reference to the merging of the telecom-wireless-internet-broadcasting sectors
- The understanding the regulatory implications of the merged sectors is very difficult
- The approach of reducing regulatory burden, purely based on the primitive of cost reduction focus to entity like the ACMA is questionable and could culminate a chaotic merged sectors in the market
- The prevailing market deficiencies need to be considered carefully in this review and they are directly related to the regulatory performance of the ACMA
- Market driven or self-regulatory approach will not be conducive for a rapidly changing technological sector whilst the consumer expectation in the market has increased exponentially.
- Is this review surfacing out from the Vertigan recommendations made to the Minister for Communications?
- The ACMA's regulatory performance audit carried out by the ANAO could be another source of inspiration to the review process for consideration.
- Ministerial control over telecom sector shall be vested with the Minister for Communications and the current strange perception of the Attorney-General's controlling the telecom sector needs to be changed. The confidence of the market participants should not be eroded. It is not good for \$45 billion telecom sector.
- Any regulation either inhibit or stimulate technological changes with particular reference to the merged sectors.
- The review should recognise the basic difference between the regulation of technology, and the technology of regulation.
- We should ensure that there is no maturity for regulation relating to the merged sectors and the regulation should reflect the contemporary needs of the sector.

Background: The Minister for Communications has announced a review of the Australian Communications and Media Authority (ACMA). The purpose of the review is to examine the objectives, functions, structure, governance and resource base of the ACMA to ensure it remains fit-for-purpose for both the contemporary and future communications regulatory environment. The ACMA review will also incorporate the broad requirements of the Government's Contestability Programme and Regulator Performance Framework to assess the efficiency of the ACMA and its administration of communications laws and regulations.

Due Diligence: The scope of this review seems to be broad. Therefore the review needs to be carried out diligently by considering the implications of the rapidly changing technological environment relating to telecom, wireless, internet, and broadcasting and media sectors. The review is also necessary as the government is keen to reduce the regulatory burden for business and the community by simplifying the rules and regulations. The aim of this government's deregulation exercise is to deliver real reform (Note: the real reform is debatable one and we should not be carried away on this) through better regulation, which lowers the cost burden on business, while maintaining necessary consumer and other safeguards. However, whether the approach of reducing the regulatory burden applicable to entities like the ACMA, is questionable. Therefore, the review should not focus only on reducing regulatory burden. The review should have a well-balanced and pragmatic approach of business and consumer focus.

The ACMA is a converged regulator overseeing telecommunications, radio communications, broadcasting and the internet sectors. It is also to be considered as a unique regulatory organisation in its existence. We should recognise that it is very difficult to understand the regulatory implications of the emerging technological nature.

In summary, the review is necessary due to emerging technological trends with particular reference to the merging of telecom-wireless-internet-broadcasting sectors.

Review Process: The Review is being undertaken by the Department of Communications. It is being supported by a Reference Group of Australian and international communications and regulatory experts. The Reference Group's role is to support the Department to provide advice on international regulatory and industry best practice. The Reference Group is expected to consider best practice in communications regulation and also providing individual perspectives on emerging issues and future challenges arising from new technologies and industry trends in addition to providing advice and insights to the Department on identified issues as requested.

Due Diligence: We hope that the Department of Communications have the capacity to undertake this review process with the help of the reference panel to reframe the regulatory mechanism required to ensure the Australians are getting the benefits of the merged telecom-wireless-internet-broadcasting sectors in terms of availability, affordability and reliability. They should consider some of the prevailing market deficiencies that we have already observed including:

- The dominant nature of Telstra that has been continued diluting the competitive character of the Australian Telecom-wireless-internet sectors

- The current monopoly position of the National Broadband Network, owned by the government but operated by NBNCo.
- The continued widening gap in the provision of services in the regional, rural and remote areas(RRR areas)
- The redundant nature of the current legislated Universal Service Obligation with particular reference to the delivery of mobile and broadband services in RRR areas
- The governance mechanism (if any) between the ACMA and ACCC relating to the economic regulation of the communications sector, including telecommunications and the National Broadband Network (NBN), broadcasting and content sectors.
- The relevance of the major legislations currently administered by the ACMA viz:
 - The Telecommunications Act 1997
 - The Radiocommunications Act 1992
 - The Broadcasting Services Act 1992
 - The Telecommunications (Consumer Protection & Service Standards) Act 1999
- The considerable concerns raised by various stakeholders relating to the violation of individual Privacy due to the unprecedented technological developments and how far the ACMA has been successful in addressing such concerns
- The challenging nature of the technology revolution and its impact in the national security agencies carrying out its legitimate responsibilities
- The unpredictable nature of innovation in the market such as the introduction of Mobile Payments and Direct Carrier Billing by operators
- The ACMA ability to tackle the dark internet side and the violation of copyright laws relating to the content sector
- The current status of the ACMA regulating Net Neutrality and NBN network
- The effectiveness of technology neutral legislations and the self-regulatory framework
- The willingness of the government to keep the Internet as a neutral platform without introducing unnecessary hindrances for the market participants

Therefore, it is essential that the prevailing market deficiencies need to be considered carefully in this review and they are directly related to the performance of the ACMA that remains fit-for-purpose for both the contemporary and future communications regulatory environment

Reference Panel: I have been told that the Reference Group has no role in assessing submissions and will not be responsible for making any recommendations to the Minister. Essentially, the Reference Group provides a 'sounding board' function for the Department. One member of the Reference Group will be remunerated for specific research tasks they will be asked to undertake. No other members are being remunerated or are being asked to undertake specific research work. This person is not an employee of any industry or regulatory bodies.

Due Diligence: Hopefully the Minister for Communications would be able to seek some fine-tuning advice from the reference group to acquaint himself with the development of innovative regulatory practices that are being implemented around the world by framing an appropriate regulatory framework to address the challenge posed by the digital revolution.

Vertigan Panel Review: The Minister for Communications has said that a landmark report on the telecommunications industry has been laid out in October, 2014, a path to a less regulated more competitive market, consistent with the regime that applied to the telecom sector prior to the NBN. The Vertigan panel included 19 recommendations for market-based reforms, encompassing industry structure, infrastructure-level competition, service provision and market regulation. Interestingly, the panel is critical of many regulations introduced between 2007 and 2013 and argues the NBN is a risky undertaking that should face increased competition.

Due Diligence: We wonder how the current ACMA review is connected with the recommendations of the Vertigan Panel review. Is this ACMA Review really surfacing out from these 19 commendations made by the Vertigan panel for less regulated telecommunications Industry? I hope Vertigan panel has carefully considered the technological revolution that has created unpredictable regulatory implications in the merged telecom-wireless-internet-broadcasting-media sectors.

ANAO Performance Audit: The Australian National Audit Office (ANAO) recently has carried out a performance audit relating to the unsolicited communications. The objective of the audit was to assess the effectiveness of the ACMA's regulation of unsolicited communications. The ACMA has been subject to ANAO audit coverage over recent years, including an audit in 2009–10 that assessed the ACMA's effectiveness in operating, managing and monitoring the Do Not Call Register. It is a vital source of information to assess the ACMA's current capability in addressing the privacy related concerns.

Due Diligence: It very hard for ANAO to conduct performance audit to assess the overall performance of the ACMA in administering the relevant legislations and the success of safeguarding the consumer interests. However, it has made recommendations that need to be followed up and therefore I strongly believe these ACMA performance audits conducted by ANAO are good source of information. I am confident it could provide many fascinating facets relating to the ACMA regulatory role in the merged sectors.

The regulatory performance audit of the ACMA by the ANAO could be another source of inspiration to the review process for consideration to assess the past performance of the ACMA.

Attorney General vs. Communications Minister: We all know that the Attorney-General's (AG) Department delivers programmes and policies to maintain and improve Australia's law and justice framework and strengthen the national security. The main role of Minister for Communications is to promote an innovative and competitive communications sector to make digital technologies and communications services better for everyone. However, during the last 18months, I get a strange perception that the AG's Department seems to exercise more effective Ministerial level control over the telecommunications sector than the Minister for Communications. I could cite some examples for my strange observation:

- Policy decision banning the Chinese vendor, Huawei in bidding NBN related tenders in the name of national security and thereby forcing the NBN to seek products and services from other vendors. However, Australia has signed the Free Trade Agreement with China.

- The enactment of the Telecommunications (Interception and Access) Amendment (Data Retention) act 2014 violating UN convention relating to individual privacy whilst burdening the Telecom Operators with unwanted regulation.
- The current ongoing discussion on Telecom Sector Security Reform to interfere in the operational decisions of the Telecom Operators just for the sake of satisfying the request of a few security agencies. It is to be noted that these Security agencies have enough powers to deal with any cyber related security threats emanating from both inside and outside of the world.

Due Diligence: I hope the review could be an opportunity looking at my assessment attentively. It is a sine quo non that the ministerial control over the Telecommunications sector are vested with the Minister for Communications as per Westminster style of governance mechanism. The confidence of the market participants should not erode and it is not good for \$45 billion sector.

Smaller Government Initiative: The ACMA was established ten years ago and there has been no root-and-branch review of it in that time, despite substantial changes in the communications sector. The Government believes it is now appropriate to undertake such a review within the context of its Smaller Government initiative and other deregulation programs.

Due Diligence: The understanding technological implications and capturing the required regulatory framework for the Communications Sector is very difficult and I would say rather impossible. How far the government objective of the smaller government initiative and other deregulation programs could end up a conducive market environment for both operators and consumers. Therefore the review should not be distracted on the smaller government initiative

Digital Economy: During the last 20 years in particular, the digital revolution is probing the existing regulatory framework of the merged telecom-wireless-internet-broadcasting-media sectors and this revolution is compelling regulators to respond this unpredictable changes happening in the merged sectors on a daily basis. The Regulators have to grapple with the disruptive technologies in a manner that will foster both innovation and fairness in the market. The key areas for regulators to look at, and that require a focus on digitization, are market efficiency, scarcity management, and safeguarding customer welfare and at the same time this merged sectors should attract further investment to enhance the competitive nature of the market to flourish the Digital Economy.

Due Diligence: The Department of Communications should ensure that the ACMA review culminates in developing recommendations required to focus on digitization, market efficiency, scarcity management and safeguarding the consumer welfare(in terms of price, choice, access, security and privacy concerns) whilst providing the market participants to continue to invest and innovate with a view to enhancing the digital economy. The world society is now a networked society and the impact of technology on our everyday lives and economic interactions is undeniable.

Regulation: The primary objective of regulatory mechanism is to achieve the required balancing act among the regulatory parameters, viz availability, affordability and reliability for products and services that are sold in a competitive market. It is very difficult to achieve such balancing act without a comprehensive regulatory framework. Therefore the merged technological sectors need a relevant and appropriate regulatory framework to ensure an inclusive society enjoying the benefits of the technological revolution to embrace the digital economy.

Due Diligence: Any regulation either inhibit or stimulate technological changes and with particular reference to the merged sectors, it is more appropriate. It mainly depends on the technology of regulation. In other words, the choice of regulating government policy such as market driven or self-regulatory framework. The Department Communications should recognise **the exact difference between the regulation of technology, and the technology of regulation**. Further, economic regulation and technology regulation need to be differentiated but handled by the same regulatory entity as much as possible. If that is not possible, there should be a legally binding governance mechanism needs to established to ensure both Economic Regulation and Technology Regulation go hand in hand relating to the merged telecom-wireless-internet-broadcasting sectors. We should look back and see whether how far the ACMA has performed in this regard.

The effects of regulation whether it is economic regulation, at present carried out by ACCC or the technology regulation including social regulation carried out by the ACMA are likely depend on a variety of factors: the motivation for regulation, the nature of regulatory instruments and structure of the regulatory process, the telecom industry's economic characteristics, and the legal and political environment which the regulation takes place.

It is a well-known secret that telecom-wireless-internet-broadcasting technologies will not have any maturity and therefore we should ensure that there is no maturity for regulation relating to the merged sectors. As I have already described the world has become a networked society and therefore the expectation of the world society has changed dramatically. It is the duty of the government to fulfil such hugely changed expectation of the society.

There are models that I have personally developed relating to the regulation telecom industry and I have provided summary of such a simple model that could effectively used during the ACMA review process by the Department of Communications to visualise the telecom market and how ACMA should behave accordingly.

Market Behavioural Model: Any regulation needs to ensure that the telecom market behaves appropriately. The behaviour (in terms of supply and demand for products and services) of the Market (M) mainly depends on the Regulation(R), Consumer behaviours (C), Policy/Legislation (P), and the number of Operators (O) in the market. All these could be simply correlated as a mathematical equation as depicted below:

[M]-> [P, O R, C] and it needs no explanation as it is simple logic self-explanatory model how the market behaves in terms of P, O, R and C.

Conclusion: During the last 10 years, the ACMA is responsible for the regulation of the broadcasting, telecommunications radio communications and internet industries in Australia. As I have described, the ACMA currently has significant regulatory responsibilities under four principle acts. Having said that, the Australian communications environment has changed dramatically since the ACMA was established in 2005. The Telecom-wireless-internet-broadcasting –media sectors have now merged. The Australian government has made a twist in the communications sector rolling out the NBN as a monopoly. The expansion of digital economy with innovation such as mobile payments need an umpire to monitor the playing field of the market participants. The ACMA review is an opportunity to address some of the concerns that the communications sector has witnessed. The Review is necessary as the government is keen to reduce the regulatory burden for business and the community by simplifying the rules and regulations. However, whether the approach of reducing the regulatory burden can be applied to regulatory entity like the ACMA, it is questionable.

The ACMA is a converged regulator overseeing telecommunications, radio communications, broadcasting and the internet sectors. It is considered as a unique regulator in its existence. We should recognise that it is very difficult to understand the regulatory implications of the emerging technological nature.

Review Puzzle: Here is the puzzle to the ACMA review and it is very simple, and the puzzle has captured all what I have tried to convey to the Department of Communications:

- Emerging technologies may not always be immediately understood
- The telecom market needs to be competitive and there will be no hindrances to innovate by the market participants
- Consumer safeguards is vital and the expectation of the consumers in the market has increased exponentially
- The basic difference between the regulation of technology, and the technology of regulation needs to be recognised.

I hope the Department of Communications could be able to work out the review puzzle with the help of the Reference Group to make pragmatic recommendations to the Minister for Communications

Thank you.