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Dear Sir,

**Institutional Arrangements for the Proposed Merger of the Australian Communications
Authority and the Australian Broadcasting Authority**

Telstra is pleased to offer its comments to you in response to the discussion paper issued by the Department inviting submissions from the public in regard to the institutional arrangements underpinning the proposed merger of the ACA and ABA.

We trust that our comments attached hereto are of assistance to your deliberations, and further highlight our genuine support and keen interest in consulting more closely with the Department in developing an appropriate framework to facilitate and bring the proposed merger to a successful conclusion.

Please feel free to directly contact either myself, or Stewart Wallace of my group (tel: (03) 8627 8053 & email: Stewart.J.Wallace@team.telstra.com), in regard to clarification of any aspects of our submission or indeed comments or suggestions in regard to any other aspect of the proposed merger concept.

Yours sincerely,



Paul Paterson
Director Regulatory

Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority

Response by Telstra Corporation to a public discussion paper issued by the Department of Communications Information Technology and the Arts

1 INTRODUCTION

Telstra welcomes the opportunity to provide further comment on the merger of the ACA and the ABA and, in particular, to the institutional arrangements that might underpin the proposed new regulatory body.

This submission supplements an earlier submission from Telstra¹ addressing the more general spectrum management implications of the proposed merger.

In principle, Telstra is not opposed to the merger, and considers that there may be considerable benefits providing certain aspects of the proposal are appropriately addressed.

Telstra notes the Minister's press release of 30 June 2003, announcing the Government's consideration of the future arrangements for the communications regulators, wherein he explicitly acknowledges the convergence occurring within the broadcasting and telecommunications markets as a result of new digital technologies. He specifically observes that convergence is placing increasing pressure on existing institutional arrangements. In that light, Telstra suggests that a simple 'minimalist' combining of the two regulators under 'one roof', without any change of substance to respective regulatory frameworks and procedures, will clearly not adequately respond to this pressure. Moreover, the Minister also explicitly acknowledges that the associated changes to industry structures and development of new technologies mean that it is appropriate to examine the relevant institutional regulatory arrangements. Thus, these two key themes – convergence and evolving industry structures – are rightly identified as central to consideration of the matter.

In that context, Telstra's response firstly presents what it believes are the key underlying principles of a successful merger of the two regulatory institutions into a single entity, before going on to discuss a number of particular issues considered crucial to an efficient and equitable regulatory framework in a new era of convergent digital communications and information services. To conclude, Telstra presents a brief response to the specific questions specifically raised within the public discussion paper.

¹ Review of Options for Structural Reform in Spectrum management, Telstra Corporation, September 2002.

2 KEY PRINCIPLES

To set the context for any consideration of new institutional arrangements, it is important to recall that both the ACA and the ABA are intended to be responsible for the *implementation* of strategic government policy decisions – as opposed to the *development* and *definition* of policy directions and statements. Therefore, any new institutional arrangement must continue to explicitly reflect the policy implementation role, and to maximise efficiencies in policy implementation through a set of key principles. Telstra submits that the entity resulting from a merger of the ACA and ABA must reflect best practice standards in regulation by adhering to the following principles:

Reducing the costs imposed on industry and the broader community

This principle refers to administrative efficiency and the implications of the 'user-pays' principle of cost recovery that is currently borne by industry licensees.

Implementation of government regulatory policy necessarily imposes costs on:

- a) the industry - arising from the need for compliance review and management structures and processes;
- b) the government – to support the administrative structure and the necessary enforcement mechanisms; and
- c) the broader community – since industry costs will logically be passed on to consumers while otherwise non-recoverable administrative costs of the regulatory body will be drawn from the government's general revenue resources.

If the proposed merger results in higher costs imposed on industry then there would be a logical expectation of a commensurate increase in the level of services being offered by the new regulatory body. Otherwise, the merger proposal may be seen as economically inefficient and unsustainable, since increased industry costs must ultimately be recovered from customers and the broader community.

Increased Regulatory Transparency

The importance of transparency of regulatory philosophy was notably highlighted by Recommendation 7.3 of the Estens Report, which recommended that

"the ACA should examine how it could best communicate to the public and consumer representatives its regulatory philosophy and approach, and examine whether and how it should provide greater clarity and certainty about its regulatory enforcement activities".

Telstra believes that any proposed merger must seek to create a transparent and consistent approach to whether and how a merged ACA/ABA would exercise its compliance and enforcement powers. A structured approach should be adopted that would clearly outline to all stakeholders how the new body would:

- identify a potential contravention/breach;
- investigate a potential contravention/breach (including a classification system in relation to the severity of the contravention/breach);
- confirm a contravention/breach has occurred (i.e. look at the mitigating factors considered in determining the extent of any enforcement action); and
- outline the enforcement options available.

In this regard, Telstra has already shared with the ACA its recent consultancy research assessing the application of investigation and enforcement guidelines by domestic and international regulators. This work aims to build on the ACA's ongoing efforts to improve transparency, and would promote a proactive approach to managing the expectations of all constituencies.

Moreover, the principle of regulatory transparency attains even more significance with the inevitable convergence of telecommunications and broadcasting, carriage and content, and fixed and mobile segments. Such convergence is already clearly evident in the delivery of a wide range of content (including sound and image) via the Internet, cable services and advanced wireless access devices. In such an environment, it would be inequitable if the single regulator appeared to treat one stakeholder group in a manner significantly different to any other group. Thus, the rationale underpinning various regulatory decisions applicable to one sector or another must be clearly and widely understood by all constituencies so as to demonstrate procedural fairness.

Finally, Telstra especially highlights the crucial distinction between *content* and *applications* – the latter referring to ‘methods’ of executing transactions that are currently freely permitted in Australia by means other than use of telecommunications services (eg. in person, by mail, or via other avenues). While the ABA may currently be responsible for regulating various content services (eg. broadcasting, Internet), such oversight ought not be arbitrarily extended via the new merged entity to emerging “applications” without careful consideration and broad industry consultation – so as to avoid discouraging service innovation and ongoing investment.

Reduced Process Complexity

Consistent with the goal of increased administrative efficiency via a merged organisation, there would seem to be a clear imperative to minimise complexity within the new regulatory framework and associated processes. This means that, if possible, existing processes should be simplified as a result of the merger and that any new processes must be carefully designed to avoid introducing added complexity. While Telstra has no particular regulatory complexities in mind that could be simplified, it simply notes the significance of this principle, which should remain in focus throughout the merger process.

Improved Regulatory Co-ordination

In Telstra's view, there is a continuing need for co-ordinated regulatory responses to meet more rapidly evolving market scenarios – along with the general environment of convergence. The emergence of M-commerce service applications (as opposed to simple ‘content’ services) involving industry sectors such as banking and finance, and the broader retail merchants sector is a case in point. There is obviously a growing need for new levels of co-ordination between traditionally distinct (even, historically unconnected) industry sector regulatory bodies. In Telstra's view, there remain several specific examples of insufficient regulatory co-ordination that would benefit from explicit review – including, for example, the discouraging effect of Capital Gains Tax and state Stamp Duty on the trading and rationalisation of radio spectrum holdings that might otherwise facilitate increased usage efficiency.

Moreover, Telstra notes that the telecommunications industry has developed a successful and substantial self-regulatory regime, based on co-operative consultation and co-ordination of all key stakeholders, imposing minimum cost on the community, and aimed at tailoring regulatory provisions to encourage service/application innovation, and broader commercial and economic development. Such an efficient industry/government co-ordination regime must be further encouraged and enhanced by any new institutional structure.

Increased Flexibility for Industry

With the emergence of new digital services and applications, involving concepts of which we may yet have little perception, there needs to be sufficient regulatory flexibility inherent in any new regime to stimulate investment and new business activity. Whilst there is clearly an ongoing requirement for appropriate protection of the community in certain areas (such as prevention of fraud, access by children to content of a violent or sexual nature, protection of privacy, responsible credit management, and others), such protective constraints must be carefully structured and implemented so as to avoid unintended discouragement of innovation or imposition of costly obstacles to legitimate new services.

Clear Accountability Structure

In meeting the expectations of the wider community and the specific industry sectors, accountabilities must always be clearly defined within any new institutional structure. By avoiding role ambiguities, a clear accountability structure would facilitate efficient (earliest and lowest-cost) resolution of concerns, misunderstandings, and disagreements associated with specific application of regulatory provisions. Clear designation of responsibilities also directly leads to more efficient general consultation between industry and the regulator in developing effective and efficient future regulatory frameworks – thus, further contributing to reduced costs imposed on the community.

Competitive Neutrality

A new institutional structure must ensure competitive neutrality in the rapidly converging digital services environment. The current regimes relating to such matters as spectrum access, spectrum allocation, delivery of services to underserved (rural/remote) areas and recovery of associated costs, statutory performance and commercial data reporting, and regulatory compliance mechanisms, are quite distinct between the telecommunications and broadcasting sectors. These differing regimes result in significant differences in obligations and costs imposed on the respective licensees that directly translate to unfair competitive advantages or disadvantages. While it may not be clear whether the telecommunications or broadcasting sector is better off under the present regime, this aspect clearly needs to be properly evaluated prior to merging the two regulatory.

3 ISSUES FOR CONSIDERATION

If visible, and indeed measurable, benefits are truly anticipated to come out of the proposed merger of the ACA and the ABA, then Government cannot ignore the inherent policy implications arising from the combining of these two bodies. There are a number of distinct differences existing between the policy objectives and settings of these two regulators and Telstra contends that these differences require

careful review. A simplistic 'minimalist' approach based on assuming that the current frameworks can continue operating unchanged under "one roof" is considered by Telstra to be untenable. In the following sub-sections Telstra offers a number of specific examples in this regard.

3.1 Ministerial Powers

As acknowledged within the discussion paper, Ministerial powers under the respective legislation differ in regard to the telecommunications and broadcasting industry sectors. If these differences were to remain then a convergent market – that many commentators contend is inevitable – will inexorably gravitate toward the least-intrusive and/or least uncertain regulatory environment. Normal business efforts to manage and minimise risks, and to deliberately structure operations for maximum forward-looking commercial stability, will logically result in enterprises either recasting their business activities to attract minimum intervention or relentlessly "chipping away" at relevant regulation to otherwise counterbalance the perception of unequal exposure. In either case, a levelling effect seems highly likely, with the key issue being whether to allow it to be a tedious and more costly evolution, or instead to openly acknowledge the concern and to systematically address it from the outset.

3.2 Licensing Fees and Spectrum Access Tax

The current licensing and spectrum access tax regimes differ between telecommunications and broadcasting licensing. For example, the broadcasting sector obtains inherent financial relief in times of economic downturn through broadcasting licence fees that are directly linked to commercial revenues, while paying only nominal cost-recovery and modest 'estimated' market values for radio apparatus licences. In contrast, the public telecommunications industry has been required to pay fixed annual carrier licence fees and 'up-front' competitive market-derived 'prices' for spectrum licences, in advance of any investment in network infrastructure and before the 'proving' of particular market expectations is achieved.

Furthermore, with the recent release of additional explicit allocations to Radio LAN (RLAN) applications supporting broadband IP applications (eg. voice, sound and video), along with the Minister's 2002 Determination allowing licence-free operation of public 'hot spots' that could see the emergence of 'franchised' wide-area or national operations, the differing cost bases between various players become even more apparent.

If such financial differences were to remain, then the future convergent market will inevitably gravitate toward the lowest-cost regime, either through shifting investment focus, strategic business alliances, or the same relentless "chipping away" at relevant regulation, as suggested above, to counterbalance perceptions of unequal treatment.

3.3 Spectrum Planning and Allocation

As has been acknowledged by the discussion paper, the radio spectrum planning and allocation considerations differ between the telecommunications and broadcasting legislative frameworks. In particular, while the planning of broadcasting services

bands maintains a pre-occupation with social/cultural considerations, and is simplified by the current embargo on the allocation of further commercial TV broadcasting licences, the spectrum available for telecommunications services is essentially subject only to 'efficient usage' criteria and is wide open to aggressive price bidding by almost any entity. The highly protected environment of broadcasting stands in stark contrast to the increasingly competitive market environment of telecommunications – while, in Telstra's view, serious questions remain in respect to the relative essential value and perceived 'importance' of TV services versus 'lifeline' telephony services (and their social/family cohesion role) – see further discussion below.

In a merged environment, and especially as digital convergence spreads inexorably, Telstra contends that continuing such differing treatment will inevitably lead to insoluble conflict between the 'efficient use' objectives of the Radiocommunications Act 1992 and the 'social/cultural' objectives of the Broadcasting Services Act 1992, and will only exacerbate unnecessary and unproductive tensions amongst the various industry stakeholders.

3.4 Quarantine of Broadcasting Services Bands

In Telstra's view, the current quarantining of the broadcasting services bands from other usage serves no justifiable purpose – especially given the embargo on licensing of new commercial TV broadcasters, and the broader transition to digital broadcasting technologies. Moreover, while the particular characteristics and impact of sharing services needs to be carefully considered, a number of quite feasible technical sharing possibilities exist even today and such opportunities will increase significantly with the imminent shift to digital broadcasting technology. Thus, Telstra suggests the earliest removal of the artificial distinction between the broadcasting services bands and other radio spectrum allocations, to increase the efficiency of usage of the scarce community spectrum resource by allowing appropriately compatible non-broadcasting services greater access to this historically-quarantined spectrum area.

3.5 Social/Cultural Priorities

In regard to the special 'social/cultural' considerations associated with ensuring sufficient spectrum allocations to broadcasting services, Telstra continues to doubt the rationale for assigning special allocation and protective priority to broadcasting services in comparison to the essential "life-line" nature, and the widely recognised family/social-cohesion role, of fixed and mobile telephony services in regional and rural areas. Further, the relative 'public benefit' policy distinction between broadcasting and telecommunications services is decreasingly relevant in a converged environment. The protection of the community's access to emergency services, support services, and family/social groupings would seem to be at least equal in importance to access to news and current socio-political content – while weather, market and other information can be readily (and cheaply) provided by other means.

Thus, if such favoured treatment of broadcasting is to remain, Telstra suggests the extension of 'social/cultural' considerations in regard to spectrum assignment to certain other radio-based infrastructure services currently serving the community – for example, rural/remote telephony, data and audio-visual services. Such a designation should logically apply to spectrum assignment priority/protection,

provision of suitable guard-space, and licence fees reflecting the overall level of rural/remote service profitability. In summary, as a part of the efforts toward the proposed merger Telstra encourages the Government to reconsider the present policy distinctions.

4 INSTITUTIONAL STRUCTURE OF A MERGED REGULATOR

In the context of increasingly competitive and technology-defined environment of telecommunications and broadcasting, in the context of convergence, Telstra contends that significant benefit derives from the current structural model of the ACA. In particular, however, Telstra highlights the following issues:

- Given the fast-evolving information and communications technology environment, a newly merged board needs to be able to grapple quickly with highly complex issues associated with technology-based services and applications. This need suggests members with highly developed understanding of state-of-the-art digital communications technology and the applications to which it can be put. At the same time, the board needs sufficient awareness of day-to-day operational matters occupying the minds of industry players to properly appreciate the often-subtle impact of regulatory decisions on current telecommunications and broadcasting industry players. As such, the board members require special expertise and continuous immersion in the day-to-day dialogue of the broader industry. Thus, in Telstra's view, board members must be directly engaged with the executive, and with specific operational leadership responsibilities, to be able to make fully informed decisions to the broader benefit of the community.
- In contrast, Telstra contends that an arms-length board, deliberately distanced from the executive structure and drawn from candidates without significant prior career experience in the industry, will inevitably pose difficulties in the context of concerns as: sufficient understanding of the fast-paced technology opportunities and implications; clear appreciation of rapidly evolving regulatory issues and associated impacts; appropriate understanding of the critical business needs of a highly dynamic technology-based industry; and efficient reporting between the executive and board levels.

Telstra believes that the current ACA structural model, involving a Chairman and board that are directly engaged with day-to-day industry matters, and the functional operations of a regulatory body working 'hand-in-glove' with an efficient and strong self-regulation framework, will stimulate greater confidence and co-operation within the industry and amongst the broader constituency. As a result, Telstra believes that greater innovation and investment by industry will emerge from such an arrangement, to the broader benefit of the nation.

5 RESPONSES TO SPECIFIC QUESTIONS RAISED BY THE DISCUSSION PAPER

Role of a combined regulator in spectrum planning consistent with a 'minimal change' regulatory model – and the balance of objectives that should be applied particularly in relation to decisions about BSB spectrum.

As highlighted above, Telstra contends that a 'minimal change' model is untenable, and that continuing to 'quarantine' BSB spectrum is no longer a sustainable circumstance – especially with the shift to digital technologies, and the inexorable

convergence of communications, information and entertainment services. Moreover, there already exist certain technical sharing scenarios that would see greater use being made of broadcasting spectrum by other types of services, leading to economic efficiency gains and longer-term public benefit. As such, Telstra believes that the current 'objectives' applicable to the planning of the BSBs ought to be the subject of a thorough review.

Comments are sought on the Ministerial directions powers that should apply to a combined regulator.

Telstra has already offered comment in regard to this issue in preceding sections.

Comments are sought on the board structure of the combined agency, the need for and role of a CEO, whether specialist skills and advisory structures are needed, the delegation of functions, and any other relevant organisational/institutional issues.

Telstra has already offered comments of a general nature in relation to these issues, in preceding sections. To reiterate, Telstra contends that the current ACA model is highly effective, involving board members that have inherent and quite strategic specialist knowledge and skills, that are directly engaged in day-to-day regulatory matters; and that undertake certain executive level duties and responsibilities such that they remain constantly in touch with implementation practicalities.

Comments are sought on the corporate structure and location of a combined organisation, including on the most effective structures and locations of offices to maintain effective functioning and linkages with stakeholders.

Telstra contends that there is a critical need to maintain active offices in each of the major capital cities, for a number of sound reasons: the majority of major stakeholders are centred on one or another of these commercial hubs; the increasing need to attract and retain highly skilled and experienced regulatory staff, with minimal family relocation/disruption, to meet the challenges of an ever more complex environment; the ready availability of low-cost, high performance teleconference and teleworking technologies and facilities; and these centres appear to host the majority of entrepreneurial investment in relation to large-scale communications, information and entertainment services. However, akin to Telstra's own direct efforts to engage more closely with its customers, there may also be potential justification for selected regional offices in certain other key locations.

6 CONCLUDING OBSERVATIONS

While Telstra is neither opposed to nor significantly concerned by the proposed merger of the ACA and the ABA – subject to appropriate consideration of the issues raised above – it is not clear that the merger concept will be supported by all stakeholders. There may be some industry sectors that feel their interests will not be advanced (or even protected) by the merger proposal, and certain stakeholders will have developed business models that, in part, implicitly rely upon existing regulatory structures and provisions. However, from Telstra's perspective, as indicated throughout this submission, the merger proposal highlights:

- a) the Government rightly recognises that regulatory governance arrangements and bodies necessarily need to evolve so as to keep pace with evolving [got two "evolve"s in one line now – choose another word] technology and markets;
- b) potential opportunities to further improve the efficiency and effectiveness of regulatory frameworks, with resulting benefits for the industry, the community and Government;
- c) a need for framing and adopting a clear set of principles underpinning the merger planning and process, to ensure an optimum outcome; and
- d) a number of specific issues that need to be explicitly addressed as a part of the merger process, that reflect the inherent policy implications of merging two traditionally separate, but now converging, industry sectors.

Finally, Telstra expresses a genuine and keen desire to further work closely with the relevant bodies and the Government throughout their consideration and planning of this important matter.

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11 September 2003