



**Submission
of
PCCW Limited
on
Consultation
on the
Establishment of the
Communications Authority**

16 June 2006

“It was much better to have it right than quick...having what some would regard as a stately process enabled the right kind of atmosphere and arrangements to be put in place.”

Chris Smith, Secretary of State for the Department of Culture, Media and Sport on merging of communication authorities and the passage of the attendant Ofcom Act 1993 through the United Kingdom Parliament¹.

Introduction

PCCW agrees with the Government’s recognition that the current structure of the BA and TA are ill-equipped to deal with modern day communications issues and therefore PCCW supports a comprehensive unification of the Broadcasting and Telecommunications portfolios, to be known as the CA, to better meet the challenges of technological convergence. The unification of communications regulation is in line with international best practice and is an inevitable evolution flowing from the meshing of convergent technologies.

As CITB recognises in the Consultation, with which PCCW agrees, it is critical that Hong Kong’s new communications regulator be adequately resourced with the expertise, staff and laws to provide the CA, and the communications industry generally, with the certainty, incentive and opportunity to continue to innovate and grow.

PCCW, however, finds CITB’s two-step approach to unification to be unsatisfying. Simply merging the two regulators, without first considering the structure of CA, the laws that it will administer and how the CA will work in practice, is flawed and represents a “second best” outcome.

PCCW considers that much more comprehensive thought and consideration needs to be given to the structure, purpose and focus of the CA before Government rushes to a unification that will bring no demonstrable benefits yet will easily yield to bad regulation and poor staff moral. International best practice suggests that the structure, goals and staffing of the CA should be resolved, first, and only then should consideration be given to setting up a unified regulator as, to do otherwise, risks cementing the problems of the past whilst providing no solutions for the future. PCCW considers that these changes should not unnecessarily delay the process, particularly as the majority of the legislative amendments are uncontroversial.

¹ Paper written by Ofcom’s External Relations Director on establishment of Ofcom, 2005.

PCCW considers that to be successful, the Government's unification proposal must also analyse the mechanics of the merger including consistency in licensing, regulation and administration. This philosophy is accepted throughout the Consultation however PCCW is concerned that there is little recognition, in practice, of how a plethora of administrative and regulatory hurdles are to be overcome.

Good public policy also involves attention to process. This includes giving the end users ample opportunity to participate in a variety of ways. It also involves ensuring, for example, that the 'silo' effect of departments operating independently of each other is minimised. The opposite of good policy making is an ad hoc or short-term policy response to an immediate problem. Poor policy making often results from unintended consequences that a piecemeal approach has not taken into account².

The Government also appears to abrogate responsibility for important policy, administrative and legal issues by largely leaving these decisions to be made by the new regulator in stage 2 of the unification, instead of by Government. The Government recognises the difficulties in merging an authority structure, with that of a public officer, but there is no discussion about how these difficulties are, in actuality, to be resolved or overcome. For example, there appears to be insufficient consideration given by CITB to how the two bureaucracies are to perform and develop in their new expanded roles, particularly where the TA has traditionally had a competition based focus whereas the BA has had more of a public interest focus.

To be fit for purpose, the structure needs to be designed without any sense of obligation to the structures of the previous bodies. It must have in mind what the new body is to achieve, and it will to an extent be designed around the key personnel appointments. The key to introducing new structures is to change the power relationships, and that is likely to be a repeating requirement.³

The government's answer to these issues, to proceed with a two-stage approach, underestimates the importance of getting the structure and staff of the CA right at the outset including in particular its administrative support and decision-making responsibilities.

² Richard Curtain, Journal of Policy Analysis and Reform, Volume 8, Number 1, 2000, pages 33-46.

³ Paper written by Ofcom's External Relations Director on establishment of Ofcom, 2005, page 40.

Question 1

We seek comments on the proposed staged approach of setting up the CA in the first place, without making changes to the existing licensing and regulatory frameworks for telecommunications and broadcasting and on the proposed priority items for review in the next stage.

PCCW agrees with CITB that a unified regulator has the potential to greatly benefit industry and the broader community. However any practical benefits will be lost if the regulatory parameters, laws and administration do not adequately gel together. The examples of *potential* practical benefits cited by CITB in the Consultation, including operational synergies, will only be realised if the regulatory framework is fully operational, functional and set-up to include the ever-changing challenges of convergence in communications.

PCCW considers CITB's current approach to achieving the synergies, discussed in the Consultation, are non-optimal and lacking in any practical consideration or guidance in the Consultation (or anywhere else) as to how these synergies are to be effected. PCCW certainly agrees that the TA and BA have considerable experience and expertise. However, this functionality will be lost to a new CA if sufficient thought and planning is not given to creating a dynamic, forward looking, competition focused regulator, as envisaged by the Government⁴. Organisations have expertise and, in the future, these may be harnessed to enable a more efficient regulator. However this can only be achieved if there are first clear signals as to the roles of staff and the laws they are to administer.

*Good policy also needs to be outcome-focused by identifying carefully how the policy will deliver desired changes in the real world. Policy makers also need to ensure that they are inclusive by putting in place policies that take full account of the needs and experience of all those likely to be affected by them, whether they be individuals or groups, families, businesses or community organisations.*⁵

The only effective way to achieve efficiencies in merging regulation of telecommunications and broadcasting industries is to identify clearly what the synergies are, and how they may be exploited. At the very least there needs to be independent expert advice on how these synergies may be maximised. For example the TA recently, when dealing with the issue of fixed to mobile convergence (a subset of the broader convergence issues being considered in this Consultation,) commissioned international

⁴ See generally speech by John C Tsang, JP Secretary for Commerce, Industry and Technology at the CASBAA Convention 2004 "Tune in to Tomorrow" at the Hong Kong Academy for Performing Arts, 27 October 2004.

⁵ Richard Curtain, op cit.

consultants Ovum to prepare a 200 page report on the implications of fixed to mobile convergence on Hong Kong's telecommunications markets⁶. In stark contrast, CITB is rushing through what some have called a simplistic proposal for substantive change of the regulatory regime without first considering in any detail how such an organisation will function now and into the future.

The use of buzz words and phrases including 'synergy', 'enhance work efficiency' and 'assurance of consistency' are used throughout the Consultation as if they are an end unto themselves. The reality, however, is that there needs to be clear identification of precisely how such favorable outcomes are to be brought about, in a real and practical sense. It might be better to establish a set of benchmarks against which the success or otherwise of a merged entity may be measured.

In response to the declaration that 'this Government expects more of policy makers', the UK White Paper Modernising Government proposed a set of key principles for the development of a new and more creative approach to policy making (UK Cabinet Office, 1999). An important starting point is to ensure that the policy has a strategic focus in terms of becoming more forward-and outward looking. According to the White Paper, such a focus requires policy makers to look beyond current activities and programs; to improve and extend the capacity for contingency planning, and to learn lessons from other countries by integrating an international dimension into policy making process (UK Cabinet Office, 1999:9).⁷

PCCW strongly supports the more comprehensive "ideal" approach (discussed in the Consultation), particularly as the current ad hoc approach will more likely than not result in worse regulatory outcomes than the present situation. In particular, as currently proposed, the new CA is likely to create uncertainty in the industry and act as a considerable disincentive to investment in the communications industry, contrary to the Government's stated goals for industry in this important area.

The Government should not expect a warm reception for any unification of regulatory functions until there is a solid frame of reference for the CA (however this framework should not unduly delay the formation of the CA). Indeed in paragraph 28 and 29 of the Consultation, CITB expressly recognises that the "ideal approach" for unification is a comprehensive Communications Bill that provides for effective and efficient regulation of the sector. Curiously this comprehensive approach is discarded in favour of an ad hoc process because of unconvincing urgency requirement. Merging the TA and BA is indeed necessary, if done right; but there is no critical timeline in which to make the appropriate amendments to the legislation.

⁶ This is not to suggest that every consultancy is value for money.

⁷ Richard Curtain, op cit.

The implicit justification for “urgency” is mentioned in the executive summary that discusses an urgent need to tackle regulatory and competition concerns arising from convergence (although it remains unclear what these ‘urgent issues’ demanding change are). This is especially the case where regulatory best practices are rooted in non-intervention and light-handed regulation.

CITB’s ‘urgent’ approach to the issue fails to appreciate that a ‘one finger in the dam’ approach will not solve anything, particularly where the same staff will be performing the same functions under the same laws (albeit under a different name). PCCW considers that this ad hoc approach will not be successful, as the new CA entity will be no better placed to deal with these issues yet will need to still perform all their respective functions in an uncertain climate. Further, without a change in the laws, any urgent issues will be dealt with, using the same laws.

There is no international precedent for setting up a regulator, then asking for it to decide for itself the rules and laws it is going to administer. The Hong Kong Government is responsible for making policy. The CA will be an extremely important regulator and be responsible for setting the parameters for the successful growth of the communications industry in Hong Kong. It is imperative that the regulatory levers are of international standard so that industry can have the confidence to invest and grow. The current two-stage approach is ad hoc and leaves all the important policy settings for the regulator to make itself and, at the same time, deal with all the practical considerations that the merger will require. No matter how well intentioned a regulator is in making policy, the rule-maker will be subject to suggestions of bias or over-stepping its authority if the CA is also tasked with making the rules in the first place. Transparency, good corporate governance and best practice require separation of rule making from enforcement of those rules.

The Consultation, and Government, correctly promulgates a new light-handed regulatory approach that recognises the paradigm shift to competition-based regulation. This principle has full industry support and is consistent with global best practices. However the current proposal may mean more regulation, not less. CITB suggests that a two-stage approach will enable the CA to function immediately and more efficiently. This argument for simple unification is counter-intuitive as it pre-supposes that two legacy regulators will function better as one, even without a change in regulatory and administrative frameworks. (In fact, the opposite may well be true when two disparate, culturally different decision-makers are forced to join at the hip, without comprehensive reference as to how the merger is to be effected.)

PCCW supports making all of the statutory changes in stage 1, including the legislative changes of consolidating the competition provisions, extending 7M to the broadcasting industry and any other consequential changes. To a very large degree these proposed changes are logical and non-contentious. PCCW also supports the broadening of the appeal mechanism; removing the Chief Executive in Council from the appeal process and having the one appellate body deal with competition matters. PCCW considers these changes can be easily made at the same time as bringing the CA into being. Only the most difficult issues should be deferred to a stage 2, and only then if such issues will not adversely affect the establishment and operation of an efficient CA.

Question 2

We seek comments on the public mission, core values and regulatory approach of the CA.

PCCW strongly agrees with the core values and proposed regulatory approach of the CA. However, PCCW considers that these goals may be undermined by the proposed ad hoc two-stage approach to unification of the TA and BA.

In several places in the Consultation, CITB recognises that an ideal approach to completing the unification process is a comprehensive review of regulatory laws and practices. However the Government plans to ignore this best practice approach and instead favors putting the cart before the horse in establishing the CA, before it sets out appropriate laws, and leaving the governing body (the new CA) to determine what should be the appropriate framework that the CA itself should follow in implementing those same laws. This runs the risk of creating a body unsuited to promoting those same goals and values that the CITB wishes to promote.

Question 3

We seek comments on the proposed structure that the CA should be a committee supported by a government department.

It is important to raise the issues which concern the Legacy Regulators, reach a conclusion about those, and make clear decisions about them with regard to the new regulator, early and firmly. This reduces the potential for misinformation, and maximises the opportunity for the Legacy Regulators to make a constructive and practical contribution to planning the new body and the transition process. Similarly, an early decision about the governance structure for the new body is

*essential. Many interviewees saw the Ofcom Board structure as a relevant and contemporary model. Changes in governance arrangements during the legislative process risk producing an inefficient outcome.*⁸

To achieve structural autonomy for the new CA Board, and encourage independent merit driven decision-making, it is necessary that the CA and government officials be organisationally and functionally separated. The current regulatory structures of the TA and BA can be seen to be bureaucratic, process driven and hierarchical, and PCCW is concerned that the proposed merger of the two organisations will not lessen this legacy. The new CA should facilitate collegiate decision-making by including a three or five member full time expert Board, assisted by part-time members with administrative support from a non-civil service administrative structure.

At paragraph 52 of the Consultation the Government indicates its preference for an Australian model, based upon the ACMA experience. Unfortunately CITB's choice of model is based upon an misunderstanding of the Australian regulatory framework. ACMA only incorporates the broadcasting and media arms of regulation and has no jurisdiction over anti-trust or competition issues. ACMA is not the appropriate model for Hong Kong, for understanding or utilising a mechanism to deliver a successful CA, as ACMA has no responsibility for competition or merger decisions, as the TA and BA do.

In Australia, there is a general anti-trust law that prohibits anti-competitive conduct, administered by the Australian Competition and Consumer Commission, which is an entirely separate statutory body to ACMA. In Australia, there is also the National Competition Council, which administers competition structural issues, distinct from the ACCC, as well as a number of other sector specific regulatory agencies. The ACCC is a statutory body made up of full time and part time Commissioners that share a significant workload in making regulatory and trade practice decisions.

The ACCC chairman is an experienced businessman, supported by other senior full time experts from a broad and various background including business, commerce and public service. PCCW considers a similar approach would work in Hong Kong although, conceivably, it may be difficult to find the same background or expertise in anti-trust matters. The lack of specific expertise though should not act as an absolute bar to serving on the CA as generally, qualified people should be able to apply their experience equally to competition and other matters. Australia also has the benefit of statutory employees with a long history and experience in competition and broadcasting matters.

⁸ Executive Summary of paper written by Ofcom's External Relations Director on establishment of Ofcom, 2005.

Australia, and other jurisdictions, recognise the need for disengagement of policy from the body enforcing the regulation. This is more so in Hong Kong where there is sector-specific competition regulation, without the over-arching protection of general competition law, for the broadcasting and telecommunications industries. Adoption of an appropriate independent governing regulatory authority, transparently and objectively separate from Government, would also enable the newly formed CA to make world best practice competition decisions (including merger decisions) without any suggestion of vested interests or political interference. The ACCC is one of many examples in Australia, and elsewhere, where the Authority (or Commission) is functionally separate from policy making bodies and, also, separate from Government directions. There may also be utility in having the regulatory body better aligned with the industry it is regulating by using a structure resembling that of industry:

The decision to adopt a structure which consciously resembled a professional services firm–management consultancy, legal or accountancy, for example – was deliberate, and was a factor in determining the nature of Ofcom in its set-up phase and its first two years of operation. This was unlike the traditional structure for a public sector Ofcom’s initial structure sought to avoid the segmentation by sector – the so-called ‘silo effect’ – of the Legacy Regulators. The outcome was horizontal rather than vertical groupings.

This also made clear from the outset that this was a new organisation, not merely a combination of its predecessors, although the knowledge which staff brought with them from the Legacy Regulators ensured that the collective memory was not lost. One interviewee described this as a fundamental change; the message was that this was an economic regulator. The private sector model was also welcomed by the industry: “...because you are trying to regulate a private sector group – the more we understand how you work and the closer it is to our model, then the easier it is to understand”. The Board approach was seen as “extraordinarily positive... [demonstrating] the guts to have and innovative structure”. This was fundamental to the organisation’s new sense of purpose and in seeking to tackle problems that had proved intractable previously.⁹

As CITB recognises in paragraphs 50-51, OFTA and the BA will remain predominantly staffed by civil servants and this will not change in the medium or longer term, even should a non-civil service structure be adopted. Although in reality many staff will of necessity be recruited from the former authorities, at least staffing on non-civil service terms will ensure employees will be free of traditional civil service restraints and be open to the development of a new modern corporate culture¹⁰. Moreover, the precedent of the Securities and Future Commission is much closer to an appropriate CA model as many of

⁹ Page 32 of Chapter 5 of paper written by Ofcom’s External Relations Director on establishment of Ofcom, 2005.

¹⁰ PCCW does not agree that such a process will be unwieldy, (indeed the Government’s own example of the SFC flies in the face of such an assertion).

the decisions are economic ones (particularly those relating to competition), that impact upon financial markets. In particular, competition and merger decisions must be removed from political process and be seen to be removed from the ambit of Government control.

It is important to balance these positive factors, in favor of non-civil service staff and full time CA members, with the factors that CITB consider to weigh against such a change. CITB considers that non-civil service executive support will be unwieldy, lack focus and that the system already provides for some flexibility and enables the TA/BA to effectively discharge their duties. Previous submissions to Government have highlighted the problems with the bureaucratic approach to decision making that characterises current regulation.

PCCW considers that it is imperative to move away from this hierarchical approach and focus on best practice. It seems curious that CITB considers that it is unable to achieve structural change, in tandem with regulatory amendments, as it would be “unwieldy”. Of equal concern is CITB’s apparent view that allowing the staff of the new CA decide upon their own future, is a better outcome than having the Government decide because to do so “could also concern confusion and further distraction”¹¹. In PCCW view, the Government’s approach will not be fully successful in achieving the necessary positive regulatory outcomes that should be the focus of the new CA.

To cement an effective and unbiased structure, the operational/executive support arm should also be a non-civil servant and have *no* voting rights on Authority decisions. Further PCCW supports a model where full time members (or commissioners) are responsible for day to day decision-making including the establishment of sub-committees supported by non civil-service staff (as is the case in Australian and the UK). In this way the CA would function similar to Australia’s competition regulator where staff under guidance of Commissioners bring forward policy papers that discuss issues and canvas options but leave the substantive decision making to the Commissioners.

As previously mentioned Board members should be recruited purely on the basis of merit and experience that they would bring to the decision making task. Members could also be informally tasked by the Chairman to be responsible for particular areas of responsibility, much like the ACCC and the UK’s Ofcom, to maximise the benefit members bring to the organisation. Independent full-time members also bring a sensible level of checks and balances to the advice provided by support staff. Multi-member decision making is also be subject to the innate checks and balances as the members with their different backgrounds and expertise bring their considered views to the joint decision.

¹¹ Paragraph 53, page 20 of the Consultation.

Conclusion

The CITB proposal to merge the TA and BA has substantial merit. However, this unification needs to be more comprehensive and the details substantially more developed.

PCCW, as the leading Hong Kong telecommunications and broadcasting provider, and investor in Next Generation Networks and other technology, stands most to benefit from better and more certain decision making that a properly constructed and resourced regulator will ultimately bring to the HKSAR. Accordingly, we look forward to working with the Government on this important project and bringing it to fruition in the shortest possible timeframe.