Communications Law BULLETIN
Convergence Review Special Edition
CAMLA
Communications & Media Law Association Incorporated
Print Post Approved PP: 234093/00011

Making Converged Regulation Possible

Peter Leonard reflects on industry reaction to the Convergence Review Committee's Report and provides some observations about what it says (and does not say) about a shift in the locus of communications policy making and what this means for the industry.

1. Why such a bad press?

The Convergence Review Committee's final report (the ***Report***) was almost immediately the subject of widespread and largely negative media commentary. This might initially appear odd. Any sensible reading of the Report should conclude that the overall scope of regulation as recommended by the Committee would be significantly wound back and focussed. Additionally, the Report's recommendations are not partisan: many, if not all, of the recommendations could be endorsed by any or all of the political parties in Australia. This is not a 'get the media' report.

There are some reasons why the Report has been the subject of such extensive and critical media comment:

- The media likes to talk or write about itself. No-one likes to be regulated. The media can be expected to write about why regulation of itself is inappropriate, wrong or dangerous.
- The Report hit the streets at the same time as some of the more controversial conclusions relating to the phone hacking by the London print media. The interplay of media ownership and political influence, and regulation of print media, is of significant current interest: today, the making of the news is itself hot news.
- The Review process was unusually consultative, with the Committee publishing some ten discussion and issues papers[1] prior to the Report. The media had plenty of opportunity to engage as to the Committee's developing thinking, and did so.
- Freedom of the media is fundamental to democracy. That freedom is already significantly constrained in some areas: notably, by defamation and contempt laws and by the use of suppression orders. The constitutional implied freedom of political communication is narrow and unsupported by a broader constitutional guarantee of freedom of expression.[2] National security laws continue a creeping expansion and can affect reportage. However, when a prospective new challenge to the media arises the fact that freedom of the press is already significantly constrained is overlooked or ignored in media commentaries about the new challenge – and the Committee's Recommendations do create some new challenges for print media. For print media commentators, the Review's most challenging recommendation is that the new regulator would have oversight and potentially exercise reserve powers in respect of media content that currently, in respect of print media, is subject only to limited review by the Australian Press Council and 'light touch' sanctions.
- The Recommendations include greater powers of sanction administered by the new Australian Media Council, without any option for major media proprietors to opt out by leaving the industry self-regulatory scheme. In addition, the new government appointed communications regulator could overturn any industry self-regulatory scheme and sub-

1 Available at http://www.dbcde.gov.au/digital_economy/convergence_review#previous.

2 For a useful reviews see Dan Meagher, *What is 'Political Communication? The Rational and Scope of the Implied Freedom of Political Communication*, 2004, available at mulr.law.unimelb.edu.au/go/28_2_6. See also *Wotton v Queensland* [2012] HCA 2 (29 February 2012).

Volume 31 Nº 2
June 2012

Inside This Special Convergence Review Issue:

Making Converged Regulation Possible
The Convergence Review - Did ISPs and Carriers Get Off Lightly?
Proposed Changes to Australia's Broadcasting Spectrum Licensing Framework
Content Regulation in Australia - Plus ça Change?
Competition and Convergence Regulation: Too Much of a Good Thing?
Australian Media Ownership Controls: Where To Now?
Screen Producers Association of Australia Welcomes Convergence Review Recommendations

Communications Law Bulletin
Editors
Valeska Bloch & Victoria Wark
Editorial Board
Niranjan Arasaratnam
Page Henty
David Rolph
Shane Barber
Lesley Hitchens
Matt Vitins
Deborah Healey
Printing & Distribution: BEE Printmail
Website: www.camla.org.au

Contents

Making Converged Regulation Possible
Peter Leonard reflects on industry reaction to the Convergence Review Committee's Report and provides some observations about what it says (and does not say) about a shift in the locus of communications policy making and what this means for the industry.

The Convergence Review — Did ISPs and Carriers Get Off Lightly?
Thomas Jones and Jennifer Dean consider the potential implications of the Convergence Review Report for ISPs and telecommunications carriers.

Proposed Changes to Australia's Broadcasting Spectrum Licensing Framework
Joshua Gray examines the recommendations made by the Convergence Review panel in relation to the broadcasting licensing regime.

Content Regulation in Australia — Plus ça Change?
Richard Pascoe takes a look at the recommendations in the Convergence Review final report which affect the regulation of content in a converged media environment.

Competition and Convergence Regulation: Too Much of a Good Thing?
Kon Stellios and Catherine Bembrick consider whether the new regulatory schemes proposed by the Convergence Review in relation to media ownership and control rules and content related competition issues, are necessary and appropriate having regard to the ACCC's existing powers.

Australian Media Ownership Controls: Where To Now?
Dr Martyn Taylor examines the recommendations made by the Australian Convergence Review Committee in relation to the ownership and control of media entities.

Screen Producers Association of Australia Welcomes Convergence Review Recommendations
Owen Johnston, writing in his capacity as a Production Executive at Screen Producers Association of Australia (SPAA), considers the recommendations made in the Convergence Review Final Report from the perspective of content producers, shedding light on some of the potential impacts for that industry.

stitute its own, if the communications regulator considered that the new Australian Media Council was not effective.

- This perceived challenge to the print media also followed soon after the almost universal adverse media reaction to the much more far-reaching recommendations of the February 2012 report of the *Independent Inquiry into the Media and Media Regulation* (the Finkelstein Inquiry).[3] The challenge also arises at a time of continuing, largely adverse, media commentary as to the Government's consideration of a new cause of action for serious invasion of personal privacy.

2. Radicalism through scope: unified field theory

Beyond such explanations as to why the Report has attracted so much media attention, it should be acknowledged that the Report is justly the subject of considerable controversy. The Review is radical in its vision and in the scope of the recommended changes. If fully implemented, the Report would fundamentally rewrite all aspects of regulation of broadcast media (including free to air and subscription television and radio), online media and internet content (including internet TV and IPTV and including censorship classification of all forms of media), print media and its online adjuncts, and other news and commentary services provided in or into Australia. As the Committee succinctly put it, '[a] starting point for the Convergence Review is to promote consistency between platforms while being deregulatory where possible.'[4] This broad cross-platform agenda makes the Report unusual, if not unique, in global terms. Public inquiries and reviews in other comparable democracies have not been across all sectors of media, broadcasting and provision of content and therefore not attempted a unified field theory of media, broadcasting and content policy, regulation and regulatory agencies. The recommendations also call for abolition of a myriad of quite specific rules affecting ownership, control and programming of radio and television broadcasting and substitution of broad policy setting powers and discretions vested in a newly constituted regulator. Accordingly, the Report would change the regulatory institutions and the processes for development of ownership, control, programming and broader content policy and rules.

3. Radicalism through regulatory design

The Report has another radical conclusion: that the Australian Communications and Media Authority (***ACMA***) should be disbanded and its relevant functions folded into the new regulator.

The current Government and any future Government will pause in considering whether to effect the substantial shift in both policy setting and regulatory implementation from the Government of the day and the responsible Department and to a new independent regulator. Media and communications policy setting in Australia has traditionally been 'hard wired' by the Parliament into broadcasting statutes and regulations that set many prescriptive rules but also left significant discretions to the relevant Minister and the Department administering communications policy. The hard wired rules, on matters as diverse as cross-media ownership, program standards and anti-siphoning, have usually been justified as creating certainty for future investment in or by broadcasters. In practice, the rules also entrenched the outcomes from usually protracted hard bargaining between government and media stakeholders. That hard bargaining was not always in the public arena or the subject of formal consultative processes. Where significant policy discretions remain, they generally remain as Ministe-

3 Available at http://www.dbcde.gov.au/digital_economy/independent_media_inquiry.

4 Commonwealth of Australia, *Convergence Review Final Report,* (March 2012), 50.

rial preserves, often exercisable without structured decision-making requirements and usually subject only to the (almost theoretical) control of disallowance by parliament. By contrast, where regulatory discretions are devolved to the ACMA, the devolution has usually been highly conditioned, sometimes to the point where the ACMA's decision-making is so convoluted by process requirements that the ACMA is perceived as inflexible or uncommercial. Further, although the Minister's powers of direction toward the ACMA in respect of its broadcasting functions are much more limited than the Minister's same powers in respect of the ACMA's telecommunications functions, in practice the limit has been of little consequence given the narrow policy making (as distinct from enforcement) discretions conferred upon the ACMA in the exercise of broadcasting functions.

Most commentators agree that hard wired regulation leads to broken concepts and archaic artefacts like those Pay TV rules that were designed when Pay TV was only to happen by satellite licences. The point where commentators disagree is whether we are ready for an empowered independent media regulator with real policy discretions. The Committee glosses over this question. The Committee clearly recognises accountability in decision making as an issue. The Committee lists a number of accountability measures including parliamentary scrutiny and potential disallowance, merits review by the Administrative Appeals Tribunal of administrative decisions, the legal requirement to observe procedural fairness, rights to judicial review, and scrutiny and oversight by Parliamentary committees including Senate Estimates, the Commonwealth Ombudsman and the Auditor General.[5] These tools are generally associated with good institutional design and checks and appropriate balances on administrative decision-making[6]. However, good institutional design and appropriate administrative review procedures do not address the fundamental political question of why influential stakeholders such as the Minister, the Department and the broadcasters would elect to trade their current ability to strike and lock bargained outcomes for a right to participate in a public and structured policy making process run by an independent regulator exercising broad policy discretions outside of the political process.

The Committee also does not explicitly address another delicate and largely opaque balance. That balance is between on the one hand, the political influence that print and electronic media may exert through setting the news and commentary agenda and on the other hand, the ability of the Government to discipline perceived excesses in the exercise of that influence through possible expansion (or the omnipresent threat thereof), of regulation of the print and electronic media or changes in policy settings. Even though print media is not heavily regulated today, expansion of independent review of print media content now appears close to inevitable, as demonstrated by the recent moves within the Australian Press Council to revise its processes, funding and available sanctions. The shift of policy setting discretions from the Minister and the Department to an independent regulator would potentially affect both sides of the balance between media and executive government. Indeed, such a move may be perceived to be a greater threat to executive government than to the media. For example, upon devolution of policy making powers to an independent regulator the ability of the Government to discipline perceived excesses in the exercise of media influence through the threat of stepped up regulation of the print and electronic media would be lost – at least, until the legislation is written again.

Accordingly, there must be real doubt as to whether an independent policy-making regulator is politically achievable. To be politically possible, considerable design work would need to be done on the accountability of the proposed communications regulator and as to which policy settings are hard-wired into the new framework. There may, however, be a clearer and quicker transitional path for the Australian Press Council, which today operates entirely outside formal regulation. The Committee has envisaged morphing the constitution, processes and powers (including those of sanction) of the Press Council into the Media Council (also governing electronic media). The announcements since the Committee's Report indicate that the print proprietors have heard the challenge from the Committee to reform the Press Council.

4. Radical selectivity – a heresy uttered in the church of Australian regulation

The Report is also groundbreaking (both within Australia and globally) in its vision for a complete rewrite and simplification of content regulation and in the Committee's creative attempt to craft parity of regulation across delivery platforms. The attempt at parity led naturally to recommendations for a significant ratcheting down of the historical legacy of extensive regulation of broadcast television that had been effected largely through licensing of the broadcasting services bands of radiocommunications spectrum. The Committee rejects the argument that broadcast television is rightly more heavily regulated because of its licensed oligopolistic access to a scarce resource, radiocommunications spectrum. The Report therefore concludes that any move from over-the-air to broadband delivery of audio-visual services makes no difference to the rationale for regulation.[7]

The Recommendations include greater powers of sanction administered by the new Australian Media Council, without any option for major media proprietors to opt out by leaving the industry self-regulatory scheme.

Once the Review concluded that audio-visual services, and professional news and commentary services, however delivered, should be subject to 'parity of regulation', the Report's most heretical policy conclusion readily followed. That conclusion was that the focus of regulation should be narrowed to focus principally onto 'significant' 'content service enterprises' and away from smaller players, even where small CSEs provide substantially similar and substitutable services to those of the large CSEs.

The Review considered that the essential characteristics of the significant media enterprises that influence Australians' access to professional content are:

- control over the content supplied;
- a large number of Australian users of that content; and
- derivation of a high level of revenue from supplying that content to Australians.[8]

Enterprises which host user-generated content could become significant and regulated CSEs through establishing and managing channels of content, where the platform operator acts like a channel aggregator, in a similar way to Foxtel's subscription television service.[9] The platform operator has a financial interest in offering the content covered by that arrangement. Even though it may not exercise direct editorial control over programs, the enterprise's financial agreement with the channel provider would give it significant control over the content.[10] In practice,

5 Ibid, 150-151.

6 Ibid, 117-119.

7 Ibid, 6.

8 Ibid, 10.

9 Ibid, 11.

10 Ibid, 11.

this is not as clear a measure of 'influence' as might first appear. Many media outlets have no control over content other than through deciding whether to run a content provider's content or not, and bundling of content into channels reduces 'control' (other than in the negative sense of a distribution platform provider electing to not carry a particular channel, however popular) still further. The channel provider in this sense may be far more influential than the distribution platform provider, notwithstanding the theoretical choice available to the distribution platform provider as to whether it allows a particular channel 'voice'. That said, it is clear that the Committee sees the derivation of financial benefit by electing to carry such channels as a justification for regulation regardless of whether the distribution platform determines the content itself. Possibly, proximity for regulation – the fact that the distribution platform provider is more likely to be in Australia than the channel provider – also influenced the Committee's thinking.

The current Government and any future Government will pause in considering whether to effect the substantial shift in both policy setting and regulatory implementation from the Government of the day and the responsible Department and to a new independent regulator.

In any event, the Committee concluded that smaller and emerging services should not be burdened by unnecessary regulatory requirements and to achieve this 'the thresholds for revenue and users should be set at a sufficiently high level so that only the most substantial and influential media groups are categorised as content service enterprises.' [11] This is a radical departure from category based regulation, where the same rules are applied to all providers of a particular type or category of service such as free to air television broadcasting or pay TV. Although Australian telecommunications regulation has also used provider specific rules, these have been grounded in economic theory as to potential or actual market power associated with bottleneck facilities or services. That is, differential treatment in competition law is based upon the provision of remedies for misuse of 'substantial market power', which is a recognised concept in economic analysis, however controversial in its application in the courts. Further, 'before the event' (*ex ante*) regulation is the exception. It is typically narrowly applied to regulated access providers controlling bottleneck facilities or services and not to prevent other possible misuses of market power before they occur. Notwithstanding the policy justifications advanced by the Committee for departing from category based regulation, the perception of discriminatory treatment of particular large CSEs that is not grounded in economic theory will offend some sensibilities. The Review uses the type of content, the size of audience and revenue derived in Australia as markers or proxies for whether CSEs have 'significant' influence. Consistent with the view that influence is about the ability of an enterprise to significantly influence the public agenda or public debate, the Committee recommended that content available through social media that is not curated content of the social media service provider, including blogger and user-generated content, be free from new regulation. The social media service provider does not set the agenda of the authors of user-generated content that use the provider's platform as the author's means of distribution and therefore does not have 'control' over that content.[12]

Of course, 'influence' is a subjective concept. Inevitably this leads to criticisms as to arbitrariness of any cut-off point for determining when a party is sufficiently 'influential' as to warrant regulation. The Finkelstein Inquiry Report set a very low level at which a news outlet would be treated as sufficiently 'influential' to be regulated, recommending that regulatory news media standards should be applied to a publisher that distributes more than 3000 copies of print per issue or a news internet site with a minimum of 15,000 hits per year. This recommendation was widely criticised as an over-reach, potentially capturing start-ups and non-professional news or commentary sites. The Convergence Review Committee's Report's reasoning is much more developed and persuasive than the Finkelstein Inquiry Report, but the Committee's recommendation is still susceptible to criticism as to discrimination and arbitrariness. There is no theoretical touchstone of 'influence' to give credibility to regulation in a comparable way to the holy writ of economic theory (however disputed) that underpins definitions of 'markets' and 'market power' that are at the heart of the legitimacy of competition regulation and the jurisdiction of the Australian Competition and Consumer Commission. The criticism that any regulation based on influence is subjective and arbitrary is inherently unanswerable. That criticism does not, however, make the proposal for regulation based upon a concept of 'influence' any less soundly based in policy principle: it just means that the dividing line between which organisations are to be regulated and which are not will always be controversial and disputed, regardless of the legitimacy of the decision maker determining the line at which 'influence' will be inferred.

5. Radicalism by encroachment: content-related competition issues

Another contentious set of recommendations flowed from the Committee's conclusion that 'in a converged world there is a risk that content will be a new competition bottleneck for which regulatory intervention will be required. Establishing a new communications regulator with flexible powers to address content-related competition issues offers the most effective means of ensuring a competitive content market.'[13] Many competition lawyers and competition regulators would question whether content-related competition issues are sufficiently different in nature or skills required to address them to warrant a specialist regulatory institution. This is particularly so, given the trend since the Hilmer Inquiry has been away from industry or sector specific regulation and towards building capabilities of the Australian Competition and Consumer Commission (the ***ACCC***) as a general economic regulator.

It is clear that the Committee envisages the regulator being invested with authority to make new *ex ante* (before the event) rules rather than limited (as the ACCC generally is) to *ex post* (after the event) intervention to remedy market abuses. The Committee stated that:

'The new communications regulator should have flexible rule-making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the Australian Competition and Consumer Commission to deal with anti-competitive market behaviour. These powers should only be exercised following a public inquiry. … The range of powers available to the ACCC is not comprehensive enough to effectively deal with particular aspects of the content market, such as content rights…. A regulator with proactive powers to make rules and issue directions as required in the content market will be better placed to administer regulation that is targeted, more responsive and effective. The regulator will also be better able to deal with emerging issues in a more flexible manner, including not intervening in the market where this is the best course of action.' [14]

The Report does not suggest the criteria that might distinguish 'content-related competition issues' from other competition issues. The potential content-related competition issues cited by the Committee include:

11 Ibid, 12.

12 Ibid, 11.

13 Ibid, 28.

- **exclusive content rights:** where premium content is 'locked' to an incumbent for an extended period, entry into the market could be difficult for new players. Access to premium content such as first-release movies and live sport can be vital to ensure the success of media platforms, including new and emerging platforms.
- **bundling:** bundling may generate competition concerns in, for example, cases where access to premium content is dependent on the acquisition of other products, or where it reduces competition by leveraging market power from another market.
- **network neutrality:** 'net neutrality' is the principle that networks should not unfairly discriminate against or prioritise specific services, applications or content delivered over the internet. Although the subject of debate and controversy in North America and Europe, the non-discrimination requirements imposed upon the NBN may obviate such concerns arising over NBN provisioned broadband. However, there are concerns sometimes expressed that internet traffic can be subject to management practices by internet service providers that are designed to limit competition and reduce innovation, as distinct from reasonable network management practices such as slowing down some users' traffic to avoid or reduce network congestion.
- **metering:** the provision of unmetered content may create competition concerns 'where this practice is employed by dominant players in a market to keep out new entrants, or where customers of one ISP are allowed to access unmetered content from one particular content supplier.'[15]

These examples are not compelling as to a need for a specialist regulator to determine whether to exercise such powers. The regulatory orthodoxy in Australia had become that competition related regulatory powers should be centred within the ACCC. If that regulatory orthodoxy is to be applied, and if *ex ante* powers are in fact required to identify and address content related competition issues, such powers should be vested in the ACCC. The Review recognises the possible overlap and states that 'the regulator's powers should complement the existing powers of the ACCC and should be exercised in coordination with the ACCC.'[16] However well considered, calls for industry-specific competition regulation and regulatory powers run directly contrary to the ruling orthodoxy.

6. Summary

The Report would change the regulatory institutions and the processes for ownership and control transaction review, development of programming rules and broader content policy and rules. The Report develops a groundbreaking and controversial vision for a complete rewrite and simplification of content regulation and crafted broad parity of regulation of similar content delivered across various delivery platforms. The attempt at parity by ratcheting down the historical legacy of extensive regulation of broadcast television is accompanied by a controversial proposal to ratchet up the regulation of print media.

Perhaps most controversially, the Report concentrates the focus of regulation upon particular enterprises that exceed certain Australia sourced revenue and audience reach thresholds. These enterprises would then become subject to broad policy discretions exercised by a newly empowered communications regulator.

That regulator would enjoy discretions today enjoyed by the Minister and their Department, marking a significant shift in the locus of communications policy making. Also controversially, that new regulator would be conferred significant new discretions to address, through the making of *ex ante* rules, what the regulator perceived to be content related competition issues. The new regulator would be exercising discretions that the ACCC would presumably like to enjoy and with significant overlap with existing ACCC functions and jurisdiction.

Notwithstanding the policy justifications advanced by the Committee for departing from category based regulation, the perception of discriminatory treatment of particular large CSEs that is not grounded in economic theory will offend some sensibilities.

In the last decade in Australia the focus of industry specific regulation has generally narrowed and focussed upon entities enjoying significant market power, even in the more heavily regulated telecommunications and utilities sectors. The focus of regulation has progressively shifted from industry-specific regulation to competition regulation administered by the ACCC. The Committee's vision of journeying to a brave new world of simplified, more uniform media and content regulation focussed upon the relatively few larger 'influential' players that the Committee perceives as so 'influential' as to warrant regulation can only be achieved through some difficult sailing through stormy political waters.

Peter Leonard is a Partner at Gilbert + Tobin Lawyers. The views expressed in this Update are the personal views of the author and do not reflect the views of Gilbert + Tobin or the firm's clients.

14 Ibid 28-29.

15 Ibid, 30.

16 Ibid, 33.

Link in with CAMLA

Keep in touch with all things CAMLA via the new Communications and Media Law Association LinkedIn group.

You will find information here on upcoming seminars, relevant industry information and the chance to connect with other CAMLA members.

LinkedIn is the world's largest professional network on the internet with 3 million Australian members.

To join, visit www.linkedin.com and search for "Communications and Media Law Association" or send an email to Cath Hill - camla@tpg.com.au

The Convergence Review - Did ISPs and Carriers Get Off Lightly?

Thomas Jones and Jennifer Dean consider the potential implications of the Convergence Review Report for ISPs and telecommunications carriers.

Despite broad terms of reference – which included examining the operation of media and communications regulation in Australia and assessing its effectiveness in achieving appropriate policy objectives for the convergent era – the Convergence Review committee (the ***Committee***) focussed less on the role of internet service providers (***ISPs***) and carriers in the converged media environment than might have been expected.

Indeed, the ISPs and carriers have largely escaped additional regulation proposed in the Committee's final report (the ***Report***). However, even if they are adopted, there is no guarantee that the initial regulatory framework proposed by the Report (including in particular the thresholds for assessing influence) will remain unchanged. Moreover, given the growing recognition by ISPs and carriers of the critical role that content will play in differentiating their services, it seems likely that the number of users of content provided by ISPs and carriers, and the revenue that ISPs and carriers generate from that content, will continue to increase. For these reasons they may well face increasing levels of regulation over time.

Depending on the levels at which the revenue and audience thresholds are set, this approach could lead to a significant shake-up of media regulation and, in particular, to major changes in the way content delivered over the Internet is regulated.

In this context, it is disappointing that the Committee did not squarely address some of the most difficult questions associated with convergence, for example, how are ISPs that operate in Australia and overseas to be regulated? and what degree of control over content will be sufficient to attract regulation?. Until these (and other) issues are resolved, the 'holy grail' of a workable regulatory framework that recognises the fundamental differences between delivery platforms, but nevertheless produces consistent outcomes across those platforms, is likely to remain elusive.

1. The new concept of the 'content service enterprise'

The large majority Committee's recommendations are directed at those entities that the Committee sees as the most influential in the Australian media landscape. A key, and perhaps surprising, finding by Committee is that the entities that continue to exert significant media influence are the providers of traditional media (free-to-air television, subscription television, radio and newspapers), notwithstanding that in many instances they are now providing content via alternative platforms.[1]

One of the Report's principal recommendations is that regulation, in terms of media ownership and content, should no longer be tied to specific ***kinds*** of businesses (for example, free-to-air television, radio and newspapers), but rather should target all enterprises that:

- have ***control*** over the ***professional*** content they supply;
- have a large number of users/audience members in Australia; and
- receive high levels of revenue from supplying that content, regardless of the platform over which their services are delivered.[2] These enterprises are to be designated 'content service enterprises' (***CSEs***).[3]

Depending on the levels at which the revenue and audience thresholds are set, this approach could lead to a significant shake-up of media regulation and, in particular, to major changes in the way content delivered over the Internet is regulated. When the Convergence Review Interim Report (the ***Interim Report***) was released last year, there were suggestions that the Committee was seeking to 'regulate the internet'.[4]

However, if the proposed thresholds ($50 million per annum in Australian-sourced professional content revenue and more than 500,000 viewers/users per month) are adopted, it is likely that the only enterprises to qualify as CSEs will be those that are already regulated under the *Broadcasting Services Act 1992* (Cth) (***BSA***).[5] Preliminary analysis by PricewaterhouseCoopers suggests that, while the merged Foxtel/Austar business may be subject to media ownership restrictions for the first time, the other entities that would qualify as CSEs are free-to-air television providers and the larger radio and newsprint operators.[6]

On one view, the ISPs and carriers operating in the content space appear to have escaped the proposed regulation. However, there are a number of questions in relation to ISPs and carriers that the Review does not address, creating a level of uncertainty for these sectors.

First, while it will be a relatively simple matter for a free-to-air television station or newspaper to determine the amount of revenue it generates from professional content, the same cannot necessarily be said for new media. For example, where an ISP, carrier or other internet content provider makes a combination of professional and user generated/amateur content available via the same Internet portal, what is the appropriate mechanism for determining the proportion of revenue that is attributable to the professional content?

---

1 Commonwealth of Australia, *Convergence Review Final Report,* 7-10 (the '***Report***')

2 Ibid, 10.

3 See, eg, Ibid, 2.

4 See, eg, Ibid, 13; Bernard Keane, *Convergence Review: Time to Regulate the Internet* (15 December 2011) Crikey <http://www.crikey.com.au/2011/12/15/convergence-review-time-to-regulate-the-internet/>.

5 See above n 1, 12.

6 Ibid, 12.

As the Committee points out, 'access to premium content, such as first-release movies and live sport, can be vital to ensure the success of media platforms including new and emerging platforms.'[12]

Secondly, there is a question about how 'control' of content is to be assessed. A critical issue for carriers and ISPs will be whether they only control content that they explicitly offer to their customers or whether they control other content that is delivered via their services as well.[7]

Thirdly, according to the PricewaterhouseCoopers research, a relatively small increase in revenue or customers may lead to Telstra qualifying as a CSE under the thresholds currently being proposed.[8] Moreover, as carriers and ISPs increasingly move into the content space, it seems likely that more carriers and ISPs are likely to qualify as CSEs. This will raise difficult questions for carriers and ISPs about how to manage their regulatory obligations and the possibility that they may move in and out of the sphere of regulation due to fluctuations in revenue and users.

2. Impact of media ownership changes

The key recommendations of the Report in relation to the media ownership rules include reformulating the 'minimum number of voices' test as a 'minimum number of owners' rule to better reflect the national reach of many content sources in the internet age, and the introduction of a national public interest test for changes of control that are nationally significant.[9] The Report also recommended the elimination of broadcasting licences along with the 'one to a market', 'two to a market', 'two out of three' and the '75 per cent audience reach' rules.[10] The changes are likely to enable a certain amount of consolidation in metropolitan areas where there are a larger number of 'voices' and markets are less concentrated.

Perhaps the most significant issue for carriers and ISPs, given that they may not qualify as CSEs immediately, is how entities that sit at the margins of the proposed revenue and audience thresholds, will be affected. This is an issue that Telstra in particular may face in coming years.

In the Report the Committee stated:

> [t]he Review is not recommending forced divestments of media interests to ensure that a media group complies with the [proposed minimum number of owners] rule. As in the current scheme, the proposed scheme would simply prevent changes in control that would lead to a reduction in the number of owners in a media market.[11]

This may avoid some of the more severe effects for an enterprise. However, it may become extremely difficult for enterprises on the cusp of the CSE thresholds, or that may move in and out of the sphere of regulation for a period, to effect changes in ownership, mergers or acquisitions.

3. Competition-related content issues

The importance of access to content for traditional and new media players should not be underestimated. As the Committee points out, 'access to premium content, such as first-release movies and live sport, can be vital to ensure the success of media platforms including new and emerging platforms.'[12] Although dealing with alleged copyright infringement (and not competition law issues), the recent Optus TV Now decision also underlines the increasing significance of content, and exclusivity of content, for carriers.[13]

One of the more controversial proposals in the Report is that the new communications regulator be given ex-ante rule-making powers and the power to issue directions regarding competition-related content issues such as exclusive content rights, bundling, net neutrality, and metering.[14]

This recommendation may have significant implications for the business models of many ISPs and carriers. Providing un-metered content from preferred sources, throttling data from other sources and bundling content and services are all common features of many internet and telecommunications services plans.

For carriers, the proposed arrangements seem to leave open the real possibility that different sets of rules may overlap or that their interaction may produce unintended consequences.

The proposed new rule-making powers are intended to 'complement' the existing powers of the Australian Competition and Consumer Commission (the '***ACCC***') under the *Competition and Consumer Act 2010* (Cth) (***CCA***).[15]

The Report notes that arrangements in which separate regulators have concurrent responsibility can be found in other jurisdictions, specifically in the UK, the US and Canada.[16] While this may well be the case, the arrangements proposed by the Committee in the Report appear to be particularly complex. The Report proposes that the new communications regulator would be empowered to exercise rule-making powers in relation to content issues, while the ACCC would retain responsibility for regulating content issues via the general anti-competitive conduct provisions under Part IV of the CCA.[17] In addition, the ACCC would remain responsible for telecommunications-specific regulation under Part XIB and Part XIC of the CCA

7 The decision in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 arguably supports a more confined view of what content an ISP controls. However, that decision related to copyright and in the context of CSEs, much will turn on how any amending legislation is ultimately drafted.

8 Above n 1, 12.

9 bid, 18–27.

10 Ibid, 1–2, 18.

11 Ibid, 22.

12 Ibid, 30.

13 See *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012).

14 Above n 1, 28–30.

15 Ibid, 28.

16 Ibid, 123–7.

17 Ibid, 29–31.

18 Ibid, 29–31.

However, the question of what can be reasonably required of ISPs in this context is an issue that has been subject to considerable debate within the industry and is one that the Report does not engage with or elaborate on.

as well as regulation of telecommunications facilities access under *Telecommunications Act 1997* (Cth) (***TA***), with these powers to be reviewed after the National Broadband Network is implemented.[18]

For carriers, the proposed arrangements seem to leave open the real possibility that different sets of rules may overlap or that their interaction may produce unintended consequences. This is particularly so in circumstances where a carrier is using a listed carriage service and/or elements of its own network to provide a content service and may thereby be simultaneously subject to both content-related rules and the CCA and the TA access regime in relation to the same activity.

The proposal put forward in the Report would also require the new communications regulator to have a high level of competition expertise available to it, which may largely duplicate expertise within the ACCC, particularly with respect to competition issues in the telecommunications sector.

4. Content standards

The proposed changes to the content standards regime would see the complaints-based Schedule 5 and Schedule 7 of the BSA, which currently regulate restricted and prohibited content on the Internet, replaced with a national classification scheme.[19] The national classification scheme (recommended by the ALRC in its final report to the Federal Government dated 28 February)[20] and adopted by the Report would apply to all media, regardless of the delivery platform, and would require content providers to 'take reasonable steps' to restrict access to adult content (18+ or X18+) distributed to the Australian public.[21]

The Report quite sensibly suggested that what is 'reasonable' would depend on the delivery platform.[22] However, the question of what can be reasonably required of ISPs in this context is an issue that has been subject to considerable debate within the industry and is one that the Report does not engage with or elaborate on. Given the sheer volume of adult content online (as acknowledged by the ALRC),[23] even requiring low-level monitoring of content by carriers, ISPs or other providers of content may represent an onerous obligation and/or substantial increase in costs. Ultimately, the extent to which any proposal is workable will depend in part on which enterprises are treated as content providers under the scheme.

The additional changes proposed may also see media standards, children's content obligations (where applicable to non-linear programming), technical standards associated with restricting access to content, and Australian content obligations apply to larger ISPs, carriers and other internet content providers for the first time. This may not be a bad thing. However, as with media ownership rules, entities that are sitting just below the CSE thresholds, or moving in and out of the sphere of regulation due to fluctuations in user numbers or revenue, may struggle to manage compliance.

5. Spectrum allocation and management

The Review recommends an overhaul and simplification of the current licensing regime. Instead of broadcasting licences which entitle broadcasters to apparatus licences, the Review recommends moving to spectrum licences (under the *Radiocommunications Act 1992* (Cth), rather than the BSA) with market-based pricing to apply. The Review also recommends amending spectrum planning mechanisms to explicitly take public interest considerations into account.[24] In part, these suggested changes are driven by a desire to promote freedom of communication by removing licensing requirements for a subset of content delivery platforms.[25] They also reflect a recognition that the current spectrum regime fails to ensure that a scarce resource moves to its highest value use, thereby promoting consumer welfare.

Given the valuable nature of this spectrum and the explosion in the volume of mobile traffic, participants in the telecommunications industry may question whether this recommendation represents the highest value use of that spectrum.

In relation to the sixth multiplex, the Report said that capacity should continue to be used for distribution of community television services as well as being made available to new and innovative services that will increase diversity.[26] Given the valuable nature of this spectrum and the explosion in the volume of mobile traffic, participants in the telecommunications industry may question whether this recommendation represents the highest value use of that spectrum.

6. Conclusion

The Federal Government and the Opposition are both yet to respond to the recommendations put forward in the Report. Accordingly it is difficult to judge how many of the proposed changes will be adopted. Moreover, much of the detail associated with the implementation of the proposals has been left to be resolved by the new communications regulator. This approach has meant the Report could sidestep some of the more intractable problems associated with a truly converged regulatory framework.

Nevertheless, political imperatives together with the solid commonsense of many of the Report's recommendations (particularly those which lead to a simplification of the existing regulatory regime) suggest to us that some action by the Government is likely.

Thomas Jones is a partner and Jennifer Dean is a Senior Associate at Corrs Chambers Westgarth. The authors wish to acknowledge the assistance of Daniel Thompson in preparing this article.

---

19 Ibid 44–47.

20 Australian Law Reform Commission, *Classification — Content Regulation and Convergent Media: Final Report,* Report 118 (2012). The Final Report can be viewed on the ALRC website under Publications.

21 Above n 1, 44–47.

22 Ibid, 46.

23 Above n 20, 26.

24 Above n 1, 88.

25 Ibid, 4.

26 Ibid, 88.

Proposed Changes to Australia's Broadcasting Spectrum Licensing Framework

Joshua Gray examines the recommendations made by the Convergence Review panel in relation to the broadcasting licensing regime.

1. Introduction

A unified and flexible broadcasting licensing regime has long been on the policy agenda in many jurisdictions. The Convergence Review's Final Report (***Final Report***) proposes significant changes for the Australian broadcasting industry, including breaking the special case nexus between the activity of broadcasting and the use of the broadcasting services band, thereby potentially bringing broadcasting use of the radiocommunications spectrum back into the mainstream of radiocommunications licensing.

The broadcasting industry will find the recommendations mixed. On one hand, the licence fees they currently pay (based on a 48 year old legislative framework)[1] are likely to be significantly reduced. Broadcasters would also enjoy a new freedom to trade spectrum and thereby derive economic benefit from any spectrum efficiencies they are able to achieve. On the other, a more liberalised approach to the trading and management of spectrum capacity may increase competitive threats from new entrants making available creative new applications using the sixth multiplex – noting, however, the effects of such competition are likely be muted, given the Review's recommendation that such spectrum capacity be reserved for public interest broadcasting.

Spectrum licensing is a boon for governments. Speaking at the Australian Media and Communications Authority's annual Radiocommunications conference on 6 June 2012, the Secretary of the Department of Broadband, Communications and the Digital Economy (***Department***), Peter Harris, noted that spectrum renewals in the next four years are expected to raise approximately $3 billion for the government.[2] With budget discipline in mind, the government may find an increasing tension between achieving policy ideals reflected in the Final Report, such as the reservation of spectrum for particular uses, versus price maximisation through more pure market-based auctions. Spectrum policy will continue to be an area of great interest given the dynamic mix of politics, technological innovation and social values that feed into the debate of how to regulate an increasingly valuable and scarce resource.

2. Recommendations at a glance

The Final Report made the following three recommendations in relation to spectrum:

27. There should be a common approach to the planning, allocation and management of both broadcasting and non-broadcasting spectrum that includes:

    (a) a market-based pricing approach for the use of spectrum, and one that provides greater transparency when spectrum may be used for public policy reasons;

    (b) spectrum planning mechanisms that explicitly take into account public interest factors, and social and cultural objectives currently reflected in the *Broadcasting Services Act* 1992;

    (c) ministerial powers to reserve and allocate spectrum to achieve policy objectives considered important by the government and the Australian community, including public and community broadcasting, which have contributed to the diversity of the Australian broadcasting system; and

    (d) certainty for spectrum licence holders about licence renewal processes.

28. Existing holders of commercial broadcasting licences should have their apparatus licences replaced by spectrum licences to enable them to continue existing services. In addition:

    (a) as broadcasting licence fees will be abolished with the removal of broadcasting licences, the regulator should set an annual spectrum access fee based on the value of the spectrum as planned for broadcasting use; and

    (b) commercial broadcasting licensees should have the flexibility to trade channel capacity within their spectrum.

The Final Report proposes significant changes for the Australian broadcasting industry, including breaking the special case nexus between the activity of broadcasting and the use of the broadcasting services band

29. The new communications regulator should allocate channel capacity on the sixth planned television multiplex (known as the 'sixth channel') to new and innovative services that will increase diversity. The use of capacity on the sixth multiplex for the distribution of community television services should continue. Existing commercial free-to-air television broadcasters and the ABC and the SBS should be precluded from obtaining capacity on the sixth multiplex.

The Final Report notes that the current regulatory distinction between broadcasting spectrum and other forms of spectrum is no longer useful, and recommends that a unified and single framework for planning, management and regulatory oversight is adopted.

The new regulatory framework would mandate that spectrum planning take into account the public interest such as the social and cultural factors as currently exist in the *Broadcasting Services Act 1992* (Cth). The Review also recommends that the Minister be given powers to reserve categories of spectrum for public and community broadcasting. Some commentators have argued that this will allow broadcasters to retain significant political influence;[3] although, regulation of the media is always never far from politics.

---

1 *Television Licence Fees Act 1964* (Cth); *Radio Licence Fees Act 1964* (Cth).

2 Geoff Long, 'Shakeup proposed for spectrum renewal fees' *CommsDay* (7 June 2012).

The Final Report recommends separating spectrum licences for broadcasters from other regulatory obligations such as content obligations. This approach is said to allow broadcasters greater flexibility to deliver content across different platforms and encourage more efficient spectrum use.

Broadcast planning in Australia reserved space for a 'sixth channel' (in addition to the current three commercial operators and two public broadcasters). The available capacity, 7Mhz, is capable of delivering a number of different channels and services. The Review recommends that this spectrum be not be allocated to existing operators (whether commercial or public broadcasters). Instead, this spectrum is to be allocated to a range of new content providers, with the objective of increasing diversity of Australian television services. The pricing of spectrum is discussed in more detail below. The Review also notes that the regulator should estimate and publish the value of this spectrum regularly.

The Final Report notes that the current regulatory distinction between broadcasting spectrum and other forms of spectrum is no longer useful, and recommends that a unified and single framework for planning, management and regulatory oversight is adopted.

3. Implementation

The Final Report recommends a three-stage implementation of the proposed reforms:

1. replacement of existing apparatus licences with spectrum licences;
2. introduction of market-based pricing; and
3. spectrum licence reissue.

3.1 Licence transition

The Review recommends that existing commercial broadcasting apparatus licences are converted to spectrum licences, with tenure of 15 years (the standard spectrum licence period). Spectrum licences would be technologically neutral. To ensure that broadcasters continue to provide broadcasting services, the Review recommends that an initial licence condition be imposed on such converted licences so that the licence must be used to continue providing digital television services. No other licence conditions would be imposed.

Trading of spectrum rights, including agreements about leasing or sale of channel capacity, would be permitted under the proposed regime. Accordingly, so long as the licensee continued to provide digital television services using the spectrum, other parts of that spectrum could be traded and used for other uses. If voluntary and market based arrangements did not result in efficient use of spectrum by broadcasters then the Review suggests that the regulator should have the power to introduce a statutory access regime to allow new content providers access to unused capacity on reasonable terms and conditions.

3.2 Market pricing

Spectrum fees are proposed to be set based on the value of spectrum 'as planned for broadcasting use'. This is an important qualification on the licence fees that might otherwise be payable: note that this is not a pure form of market-based pricing, but rather one which seeks to achieve the particular policy objective of promoting diversity in television services, which may be lead to a lower price outcome than contending potentially higher 'value' uses.

The Final Report also notes that estimating spectrum value is problematic. The Review endorses the proposition that spectrum policy should err on the side of setting spectrum values lower rather than higher to ensure that spectrum is fully deployed and not wasted.

On 1 June 2012, the Department of Broadband, Communications and Digital Economy publically released a report commissioned by the Review on indicative pricing for broadcast spectrum (***Spectrum Pricing Report***).[4] The Spectrum Pricing Report adopts a net present value approach to estimating the 'unencumbered' value of a 7Mhz band of television broadcasting spectrum (i.e. without the attachment of any regulatory obligations). The Spectrum Pricing Report estimates that the annual value of this spectrum is $151.1-51.0 million – the range of which varies depending on whether the number of existing players in the market (3 versus 4). These fees are significantly less than the fees currently paid by television broadcasters in Australia.[5] The Spectrum Pricing Report also applies a similar analysis to radio broadcasting spectrum.

On 6 June 2012, the Secretary of the Department, Peter Harris announced that the Department wished to stimulate a discussion with stakeholders as to better ways to value spectrum licence grants and renewals, noting that all stakeholders had found the negotiation process around renewal of the mobile telecommunications spectrum licences as difficult and unsatisfactory. The Department has launched a new website, 'Spectrum Square' (http://s2.dbcde.gov.au/), as a forum for a continuing dialogue as to spectrum issues. It will be interesting to see whether this initiative creates broader and better engagement and new thinking as to spectrum pricing.

3.3 Spectrum licence reissue

Broadcasters will be given an opportunity to renew spectrum licences at market-based rates at the end of the proposed 15-year term. The Review adopted this approach to address concerns about regulatory certainty required for broadcasters to operate sustainable businesses. Only in limited circumstances, such as breach of a licence condition or overriding spectrum planning policy, would existing licensees not be given the opportunity to renew a spectrum licence.

4. Conclusion

The reforms proposed in the Review would achieve a 'converged' or unified licensing regime. However, these reforms would not truly de-couple spectrum from a particular use given the proposed requirement for licensees to continue to provide broadcast-like services. As technological innovation continues to develop and spectrum becomes increasingly valuable such policy objectives may come under increasing pressure.

The reforms to the spectrum licensing regime must also be read in conjunction with other proposed changes to regulatory obligations, such as Australian content requirements, of broadcasters as these obligations will impact the value of spectrum licenses.

Joshua Gray is a lawyer in the Corporate, Communications and Technology Group at Gilbert + Tobin Lawyers. The views expressed in this paper are those of the author.

3 Bernard Keane, 'Idiot's Guide to Convergence: spectrum in a post-broadcasting era' *Crikey* (10 May 2012).

4 Kip Meek and Robert Kenny (Communications Chambers), 'Indicative pricing for broadcast spectrum' (29 February 2012).

5 See, eg, FreeTV Australia, 'Submission by Free TV Australia Limited Convergence Review – Interim Report' (16 February 2012) 4.

Content Regulation in Australia - Plus ça Change?

Richard Pascoe takes a look at the recommendations in the Convergence Review final report which affect the regulation of content in a converged media environment.

Issues regarding content take up five of the 10 chapters of the Convergence Review: Final Report publicly released on 30 April 2012 (the ***Review***). Fair enough, perhaps, after all content is a (the?) key element in any debate about convergence. Still, regulation of content seems at times to verge on being an obsession in Australia.

In some respects it always has been — one need only look at the detailed, formulaic, and endlessly bickered-over local content and children's content requirements for television, and similarly prescriptive requirements for radio.

Add to this the reality that the technological basis for the current rules is fast disappearing, that generational change is happening in the way in which people consume and use content, and that content itself is now readily and sometimes preferably available from just about anywhere in the world instantaneously (or near enough). It is enough to give even the most even-tempered of policy makers, a migraine.

So perhaps it is no wonder that the analysis of, and recommendations regarding, content in the Final Report look like they do — an attempt to find a middle path through all of the above.

Content Standards

The Review was asked to look at content standards broadly, and to consider within that, the findings of the Australian Law Reform Commission (***ALRC***) review of the National Classification Scheme, and also the Independent Inquiry into Media and Media Regulation (***Finkelstein Inquiry***).

Out of this, the Review recommended that a new communications regulator be responsible for 'all compliance matters related to media content standards, except for news and commentary.'[1] In doing so, the Review has shied away from including news and commentary within the remit of the new regulator, preferring instead to focus on matters arising from news and commentary to be dealt with by an industry 'self-regulatory news standards body operating across all media ... to enforce a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary.'[2] Interestingly, the Review did not endorse the Finkelstein Inquiry's recommendation to establish a statutory authority to regulate news and commentary, and regards such an approach as 'an option of last resort available to government.'[3] The Review instead 'is recommending an industry-led approach that is more likely to produce immediate results and a better long-term solution.'[4]

Content Service Providers

The Review then ties content regulation back to its concept of content services enterprises (***CSEs***). In particular, the Review recommended that:

> a regulatory framework built around the scale and type of service provided by an enterprise rather than the platform of delivery is best suited to this environment. The Review has developed the concept of a 'content service enterprise' to identify significant enterprises that have the most influence on Australians.[5]

The criteria that the Review sets out for determining whether a content provider is a CSE are:

- they have *control* over the content supplied
- there are a large number of Australian *users* of that content
- they receive a high level of *revenue* from supplying that content to Australians.[6]

the Review did not endorse the Finkelstein Inquiry's recommendation to establish a statutory authority to regulate news and commentary, and regards such an approach as 'an option of last resort available to government.'[3]

In relation to control over content the Review recommended:

> that where regulation is necessary, it should focus on enterprises that control professional content and should explicitly exclude user-generated content. User-generated content is typically short-form amateur video published on social media sites where the only control open to the platform provider is the ability to take down the content.[7]

A note of warning from the Review, however, was included: user generated content providers and aggregators may, depending on their development, become CSEs, particularly as they enter into arrangements with professional content providers.[8]

The Review then recommended in relation to the thresholds that should apply to the other two criteria: the relevant revenue threshold should be around $50 million a year of Australian-sourced content service revenue and the audience reach threshold should be set at audience/users of 500 000 per month.[9]

All of which leads to the table that has already been the subject of much comment and sets out those enterprises that the Review considers should, initially, be considered as CSEs:[10]

1 Commonwealth of Australia, *Convergence Review Final Report,* (March 2012) xvii.

2 Ibid 38.

3 Ibid 37.

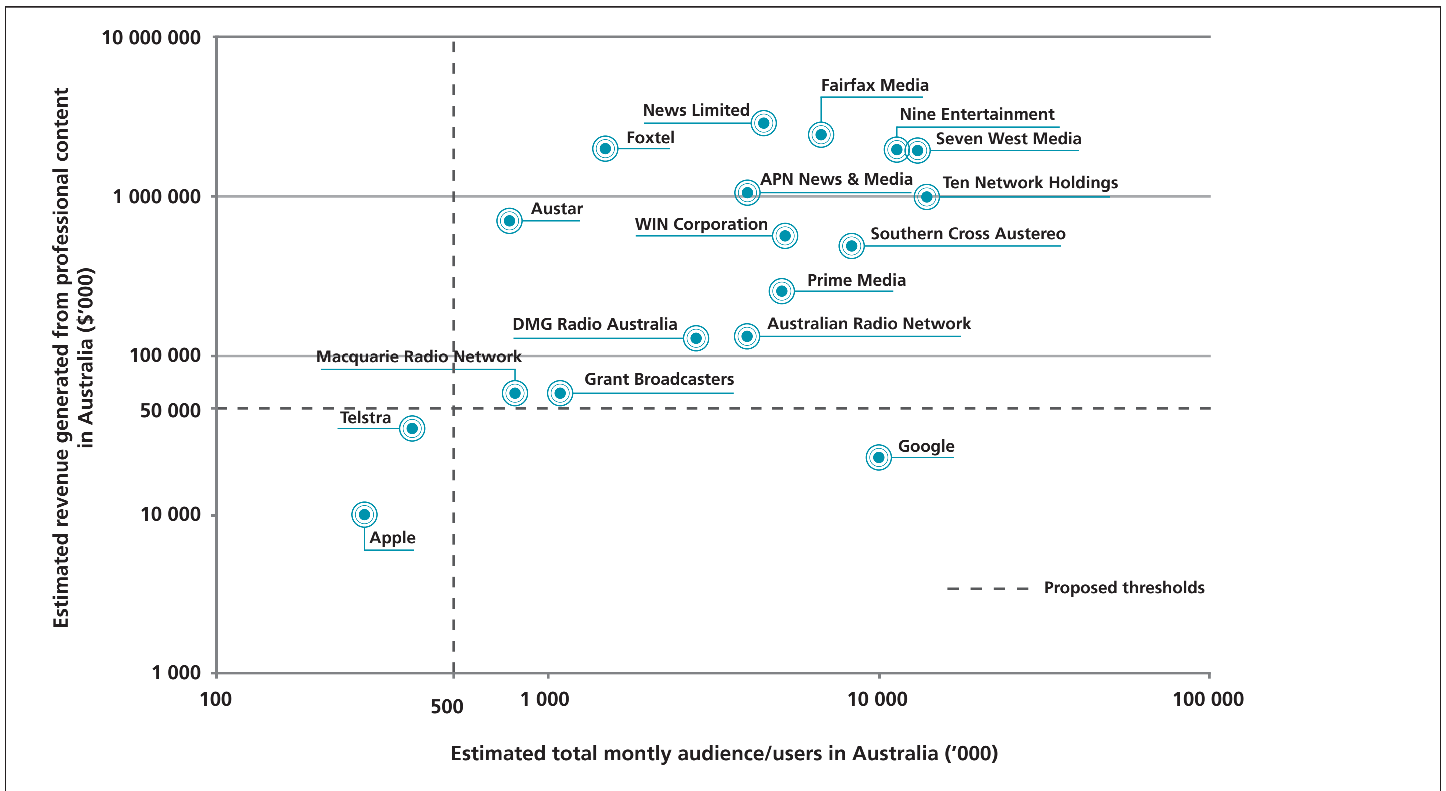
4 Ibid.

5 Ibid 7.

6 Ibid 10 (emphasis in original).

7 Ibid 11.

8 Ibid.



Source: Commonwealth of Australia, *Convergence Review Final Report,* 12; Derived from PricewaterhouseCoopers, *Exploring the Concept of a Content Service Enterprise* (March 2012).

And so, the new enterprises that will be CSEs, and thus will require content regulation will be — the same group of enterprises that are currently the subject of content regulation.

This recommendation reflects the difficulties the Review faced, and that ongoing regulation faces. In effect, the Review has said well, yes, things are changing, but the proposed CSEs still have the most influence and we do not see that changing in the near term, so you guys are still it when it comes to content regulation. The Review has declined to spar with the likes of Google, Facebook, Apple, etc. It is apparently not necessary at the moment. It is the regulatory version of kicking the can down the road.

A National Classification Scheme

The Review recommends that the new regulator have 'responsibility for administering the new national classification scheme proposed by the recent Australian Law Reform Commission review.'[11] The Review additionally recommends that within the new regulator, an independent classification board be established '*to undertake specific classification functions*.'[12]

In addition to this, the Review recommends that CSEs be subject to:

- children's television content standards, where appropriate [and]
- other content standards made by the communications regulator where there is a case for regulatory intervention, with the starting point being the matters covered by the existing co-regulatory codes made under the *Broadcasting Services Act 1992*.[13]

But in a sign that other content providers remain on the radar, the Review also recommends that:

> Content providers that are not of sufficient scale and scope to be classified as a content service enterprise should be encouraged to opt in to content standards applying to content service enterprises, or to develop their own codes.[14]

How the likes of Google, Apple and Facebook will respond to such an invitation will be interesting to see.

Specifically in relation to content standards, the Review makes the very sensible observation that for current content standards regulation 'content-specific, platform-specific and provider-specific rules are inconsistent, confusing and inflexible.'[15]

The Review also acknowledges that '[c]onvergence is putting increasing pressure on the current platform-specific approaches to content standards.'[16]

In the end, the Review recommends:

> The proposed new national classification scheme, administered by the new communications regulator, should regulate the classification of content across all media platforms.
>
> Two additional obligations should apply to content service enterprises:
>
> - Content service enterprises that provide news and commentary should be required to participate in a self-regula-

9 Ibid 12.
10 Ibid.
11 Ibid 38.
12 Ibid (emphasis added).
13 Ibid 38.
14 Ibid.
15 Ibid 40.
16 Ibid.

tory media industry scheme intended to ensure standards of fairness, accuracy and transparency of that content.

- Content service enterprises should also be subject to other content standards set by the regulator, where there is a clear case for legislative intervention (for example, in relation to children's television content).[17]

In particular, the Review adopts the recommendations of the ALRC review in relation to the National Classification Scheme:

> A new classification board responsible for making classification decisions and approving industry classifiers should be located within the new communications regulator. However, the new classification board should be independent of the regulator in performing its statutory functions.
>
> This would ensure that there is a single convergent regulator, while maintaining the independence of the classification board for specific functions.
>
> The Review also endorses other key features of the national classification scheme proposed by the ALRC. These include:
>
> - obligations to classify and restrict content that are technology neutral and apply to content providers that distribute content to the Australian public
> - an obligation to classify feature films, television programs and computer games before content providers sell, screen, provide online or otherwise distribute them to the Australian public
> - new classification legislation that incorporates all [Commonwealth and state] classification obligations currently applying to media content …
> - powers for the regulator to approve industry codes setting out how providers will comply with the scheme …
> - a requirement for content providers to 'take reasonable steps' to restrict access to adult content (that is or is likely to be 18+ or X18+), where that content is sold, screened, provided online or otherwise distributed to the Australian public
> - broad discretion for the regulator whether to investigate complaints
> - measures to restrict access that are complementary to other measures such as cybersafety education and use of parental controls on devices.[18]

It is important to note that the above scheme would apply to all content across all platforms (including both standalone and online games). This part of the proposed content regulatory package is not restricted to CSEs.

In particular, the Review adopts the approach of the ALRC report in relation to adult content. There will be a shift in emphasis from trying to classify this material in each instance, to restricting access to the material, regardless of its actual classification. The Review quotes from the ALRC Report:

> Formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to a minimum needed to achieve a clear public purpose.[19]

The Review then notes that such an approach would replace schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth), but that this new approach would be technology neutral in relation to regulating prohibited or restricted content.[20]

In addition, it would mean that MA15+ material no longer requires a restricted access system and that X18+ material would no longer be prohibited, and could be provided, if there is a restricted access system in place.[21]

The main practical changes from the current arrangements would be that there could be an R18+ category of games (as long as there is a restricted access system in place) and that online content providers would no longer be required to block access to X18+ content (again, as long as there is a restricted access system in place).

And so, the new enterprises that will be CSEs, and thus will require content regulation will be — the same group of enterprises that are currently the subject of content regulation.

The Review's adoption of the ALRC's recommendations make sense — a lot of work went into the ALRC's review and they represent a genuine attempt to balance (or at least find a path through) the competing and noisy interests regarding content standards. Those recommendations are platform technology neutral and, accepting that some regulation of content is necessary, at least attempt to minimise that regulation and allow end users the ability to choose what content they want to view, while putting in place mechanisms to prevent access to harmful or inappropriate content by children.

Australian Content requirements

The Review then deals with Australian content. It divides this into screen and radio content. Australian content has been a perennial issue. The Review acknowledges this and sets the scene for its recommendations:

> The ongoing production and distribution of Australian content is a key issue for the Review. Since the inception of television broadcasting, governments of all persuasions have sought to ensure that Australian professional content is shown on our screens. Support for Australian content is based on the social and cultural benefits that come from programs that recognise Australian identity, character and cultural diversity. The Review received many submissions supporting the value of Australian content and the continuing need to promote its production in a converged media environment.[22]

The Review also warns that 'the emergence of new online services, digital multichannels and on-demand programming makes the current support measures unsustainable in the longer term.'[23]

---

17 Ibid 41 (emphasis added).

18 Ibid 44–5 (citations omitted).

19 Ibid 46, quoting Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media,* Report No 118 (2012) 26.

20 Ibid.

21 Ibid 47.

22 Ibid 59.

23 Ibid.

Despite the fact that we all want it, we all like it and there is and is going to be an ongoing need for Australian-made content, the key issue is, who is going to pay for it? The Review's answer is apparently simple:

> content service enterprises that earn significant revenues from providing professional 'television-like' content to large audiences will be required to invest in the production of Australian content.[24]

But how is this actually going to be implemented? The Review recommends that:

> The quotas and minimum expenditure obligations applying to the free-to-air and subscription television sectors should be repealed and replaced with the uniform content scheme set out in recommendations 14 and 15.[25]

All of this demonstrates the problems that arise once you take the decision to regulate the production of content. This is not to say that regulation of content production in Australia is not necessary or desirable, but it becomes difficult and costly to implement.

Recommendations 14 and 15 propose that:

- Content service enterprises that meet defined service and scale thresholds should be required to invest a percentage of their total revenue from professional television-like content in the production of Australian drama, documentary or children's content or, where this is not practicable, contribute to a new converged content production fund.
- The government should create and partly fund a new converged content production fund to support the production of Australian content.[26]

The Review also recommends that:

- Premium television content exceeding a qualifying threshold should attract the 40 per cent offset available under the Producer Offset scheme. This will bring premium television content in line with the current rate of offset available for feature film production.
- Interactive entertainment, such as games and other applications, should be supported by an offset scheme and the converged content production fund.[27]

In effect, this is a play-or-pay scheme for CSEs. Either make and pay for it yourself, or contribute to a fund which will be set up by and subsidised by the Government.

So who are the CSEs that earn significant revenues from providing 'professional "television-like" content to large audiences?'[28] Well, interestingly, they turn out to be a subset of the CSEs already identified by the Review. After much analysis and discussion, the Review determined that entities above the thresholds in the chart below would be the subject of this regulation:[29]

Again, the larger online content providers find themselves happily below the recommended thresholds. But this may change, says the Review:

> Given that the broadcasters that exceed the revenue and audience thresholds in [the chart above] (see dashed lines) have demonstrated their capacity to contribute to Australian content outcomes over a significant period of time, a revenue threshold of $200 million and an audience threshold of 500 000 is consistent with sustainable investment in Australian content at this time. In the future it is realistic to expect that this group of services will be joined by non-broadcast services as those services continue to expand in line with shifts in consumer preferences.[30]

The message here is again, things are changing, and we will keep an eye on this, but no material changes yet. More interesting discussions await.

A converged content production fund

In the meantime, the Review notes that the new regulator would need to set the amount of contribution to the new fund. It noted that the actual level of contribution will depend on the actual number of CSEs and their latest revenue figures at the relevant time. The Review did observe that for Australian content to be maintained at its current level, the 'traditional broadcasters would need to invest 3 to 4 per cent of their revenue on Australian drama, documentary and children's programs if the scheme were implemented now.'[31]

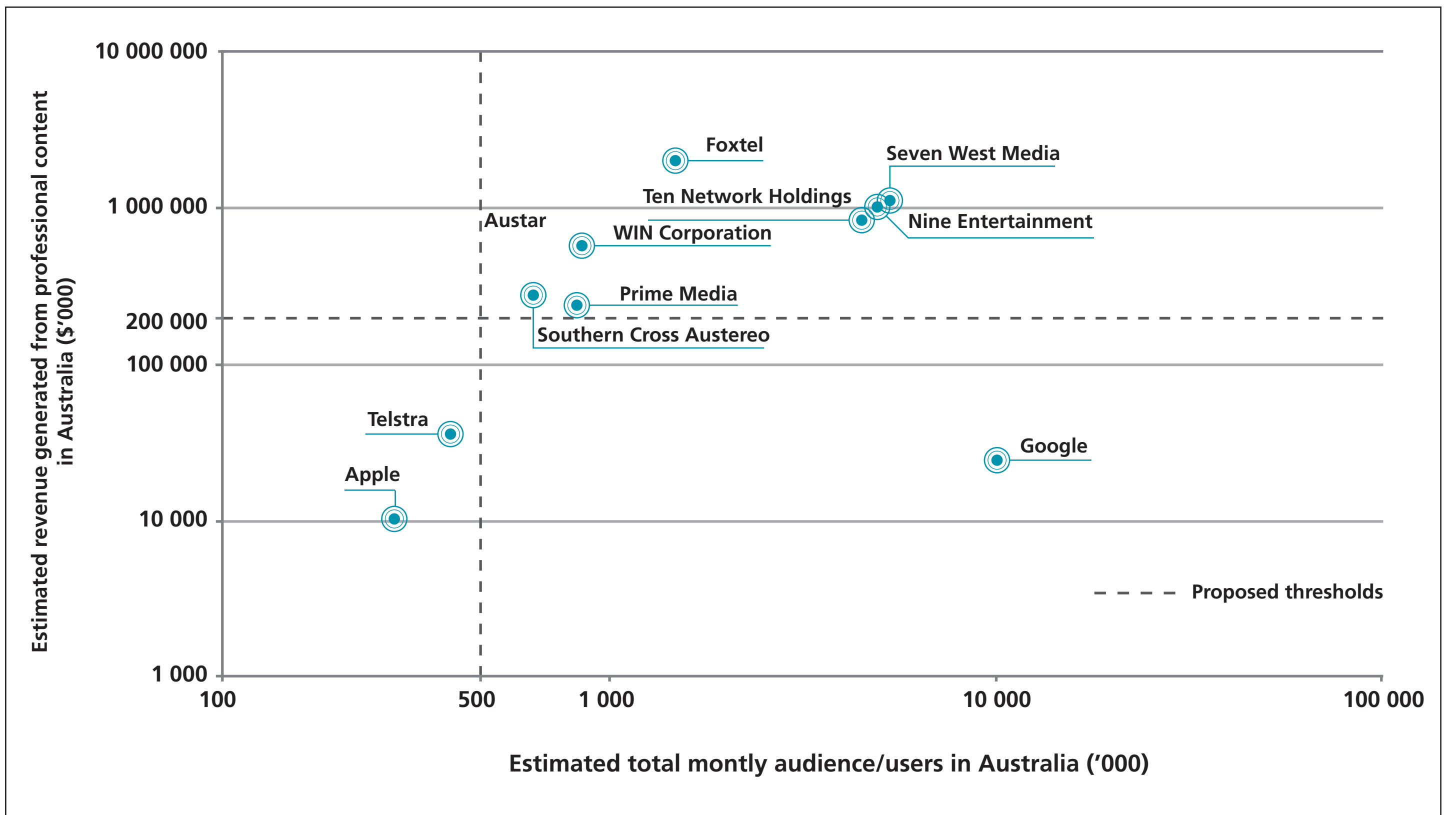
The actual converged content production fund's mission

> would be to develop new and innovative content suitable for all platforms. In addition, the coverage of the fund would be broader than existing arrangements because it would support both audio and audiovisual content. The fund would also focus on innovation in service delivery in both of these sectors, with a special emphasis on regional and community content service providers. The fund's primary roles would be to support:
>
> - the production of programs in key genres, including drama, documentary and children's content, by the independent production sector
> - the production of programming for local and regional services
> - new forms of content delivery and platform innovation, including the production of new media content such as interactive apps and webisodes
> - contemporary music.[32]

This is a broad remit and the Review does not go into any further detail regarding the operation of the fund, other than to note that it:

- 'would invest in content productions on a competitive basis';[33]
- would be funded by contributions from the uniform content scheme, Government appropriations, and 'spectrum fees paid by radio and television broadcasters';[34] and

24 Ibid.
25 Ibid (emphasis added).
26 Ibid (emphasis added).
27 Ibid (emphasis added).
28 Ibid.
29 Ibid 67.
30 Ibid (emphasis added).
31 Ibid 68.
32 Ibid 72.
33 Ibid.
34 Ibid 72–3.



Source: Commonwealth of Australia, *Convergence Review Final Report,* 67; Derived from PricewaterhouseCoopers, *Exploring the Concept of a Content Service Enterprise* (March 2012).

- 'should be able to be established as soon as possible, and in advance of the uniform content scheme if necessary.'[35]

All of this demonstrates the problems that arise once you take the decision to regulate the production of content. This is not to say that regulation of content production in Australia is not necessary or desirable, but it becomes difficult and costly to implement. As a nation, we all seem to say that we want and like well-made Australian content, but we have trouble trusting that this will translate into the appropriate natural market forces that would dictate that the content be produced and shown if there were no regulatory intervention. This has always been at the centre of the debate over Australian content.

In addition, the Review has noted, but has not really addressed, the structural changes that are upon us. Despite ongoing territorial copyright issues, the reality is we have a global market and appetite for content. We also have increasingly varied means and opportunities to consume the content we want to see and hear. Even accepting the Review's statements that it is the traditional players that still have the most influence, this will change. The difference between 2012 and previous reviews of content and media is that Australians now know what they are missing out on if attempts are made to stop or restrict access to content they want. That is the real challenge for the sector.

Whether this new fund will ease that debate remains to be seen. There is a sense, however, that this new approach is arranging things nicely in the little safe pond, and just hoping that the inundation that is upon us will somehow spare us any local damage.

In addition, the Review rides an uneasy line regarding innovation in the sector. The message seems to be — while you are small, we will leave you alone, but get too successful and you may need to be regulated regarding Australian content.

Well, maybe, but equally the message to existing big players could be adapt or die. No-one really bemoans the decline of fixed line telephones, or the innovation of electric public lighting, or any other of the myriad developments in technology over the last 100 years. And despite some views, there is nothing inherently different about the media sector that insulates it from further technological change.

Radio content

Meanwhile, in relation to radio, the Review has adopted a similar approach, recommending that:

- Australian music quotas should continue to apply to analog commercial radio services <u>offered by content service enterprises and be extended to digital-only radio services offered by content service enterprises</u>.
- Music quotas should not be applied to occasional or temporary digital radio services.
- Given the evolving state of internet-based music services, <u>quotas should not be applied at this time</u>.[36]

Having said this, the Review notes the difficulty, if not futility, of attempting to impose quotas on Internet based services:

> The principle of regulatory parity suggests that radio-like services on the internet and terrestrial radio services should be treated in a similar manner. However, the diversity of audio formats and music delivery mechanisms on the internet would make it difficult—if not impossible—to consistently regulate non-simulcast internet-based services through a quota system. There are also different transactions on internet-based services (for example, purchasing music as opposed to listening to advertising-supported or subscription services, the user-directed nature of some services, and subscriber and purchase models). In light of these issues, there is no compelling reason to institute music quotas on internet-based services.[37]

35 Ibid 73.
36 Ibid 76 (emphasis added).

The Review's use of the phrase '*no compelling reason*' is interesting. There is a temptation to mentally add the words *'nor any real ability*' to the sentence. That said, the Review acknowledges that these services are already well used, much loved and happily providing services people want and are prepared to pay for without any particular concern for the country of origin of that content. In addition, we can already stream many thousands of radio stations from around the world. Those stations will be singularly unconcerned about whether they may become theoretically subject to Australian music quotas. And if they were, it is easier to deny access to Australian IP addresses, in which case the business model for proxy IP address providers improves significantly.

Local content rules

In a similar vein, the Review leaves the local content rules for radio and television largely untouched. The Review recommends that:

- Commercial free-to-air television and radio broadcasters using spectrum should continue to devote a specified amount of programming to material of local significance.
- A more flexible compliance and reporting regime for television and radio should be implemented [in connection with the obligations to devote a specified amount of programming to material of local significance].
- The current radio 'trigger event' rules should be removed.[38]

The only significant change is the removal of the trigger event rules, which currently apply when there is

> a transfer of a regional commercial radio licence; the formation of a new registrable media group that includes a regional commercial radio broadcasting licence; or a change of controller of a registrable media group that includes a regional commercial radio broadcasting licence.[39]

The rules that would be removed currently require broadcasting a minimum number of:

- eligible local news bulletins (five per week of at least 12.5 minutes per day)
- eligible local weather bulletins (five per week)
- local community service announcements (one per week)
- emergency warnings (as required).[40]

The rules regarding local content have long been the subject of intense and even passionate views regarding the need for local communities (especially regional and rural communities) to have proper access to relevant local news and information. In a country such as Australia, with its vast distances and small and physically remote communities, this has been a big issue. It will be interesting to see if things change with the rollout of the National Broadband Network and (assuming for the moment that it continues regardless of any change of Government) the deployment of services to regional and rural communities by means of the NBN. The issues about cost of production and distribution of local content may reduce somewhat and new and innovative service providers may find business models for servicing local content needs.

In the meantime, however, carry on.

Conclusion

In essence, a new regulator, incorporating the functions of the office of classifications, the characterisation of Australia's larger professional content providers as CSEs, the adoption of the ALRC's recommendations on content standards, and the establishment of a converged content production fund to ensure the ongoing production and distribution of Australian content are the key features of the Review's recommendations regarding content regulation.

The Review has been public since 30 April 2012. The Government has said it will respond in due course. Undoubtedly, more fun awaits.

Richard Pascoe is a consultant to Communications, Technology & Media Group at Truman Hoyle Lawyers, Sydney. The views in this chapter are his own and do not represent the views of the Firm or its clients.

---

37 Ibid 78.

38 Ibid 79.

39 Ibid 80.

40 Ibid.

SAVE THE DATE:

CAMLA Cup

Thursday 16th August

Round up your brains trust now for CAMLA's annual trivia night!

Thursday 16th August at 6:00pm

NSW Leagues' Club, Level 2, 165 Phillip Street SYDNEY

Invitations will be sent to all CAMLA members shortly.

To reserve your table of 8 or request to join a table contact:

Cath Hill, camla@tpg.com.au or 02 9399 5595

Competition and Convergence Regulation: Too Much of a Good Thing?

Kon Stellios and Catherine Bembrick consider whether the new regulatory schemes proposed by the Convergence Review in relation to media ownership and control rules and content related competition issues, are necessary and appropriate having regard to the ACCC's existing powers.

Introduction

In early 2011 the Federal Government established the Convergence Review Committee (the ***Review***) to assess the effectiveness of current media and telecommunications regulation in Australia in achieving appropriate policy objectives for the convergence era. The Review's scope was determined by terms of reference set by the Government which covered a range of issues including media ownership laws and media content standards. On 30 March 2012 the Review published its final report, presenting its findings and providing recommendations to the Government.[1] The Government subsequently released the final report for public comment on 30 April 2012.

The final report makes 31 recommendations to Government. It is currently unclear what the Government's response will be to the Review's recommendations.

This article:

- examines two of the issues covered in the Review, namely, (a) media ownership and control rules and (b) content related competition issues; and
- considers whether the new regulatory schemes proposed by the Review in relation to these issues are necessary and appropriate, having regard to, among other things, the Australian Competition and Consumer Commission's (***ACCC's***) existing powers in the *Competition and Consumer Act 2010* (Cth) (***CCA***).

Guiding principles: the minimum regulation necessary

The terms of reference specifically required the Committee to advise the Government on the appropriate policy framework in a converged environment. As part of its initial deliberations, the Review established a set of 10 principles to guide its work in addressing that issue.[2] The first principle stated:

> Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose.

As noted in the final report, the Review's starting point was that unnecessary regulation should be removed.[3] Although the Review concludes that a range of existing regulations no longer serve their objective, in relation to media ownership and control rules and content related competition issues, *additional* regulation is required. Specifically, the Review recommends:

- a new regulator be established with power to oversee the media industry. This regulator would replace the existing Australian Communications and Media Authority;
- a number of rules affecting media ownership, control and programming be removed and replaced with broad policy setting powers vested in the new regulator. The policy framework will regulate significant media enterprises, known as 'content service enterprises' (***CSEs***). Whether an entity is a CSE will be based on its size and scope, rather than the manner in which it delivers content. The Review considers that only the most substantial and influential media groups should be categorised as CSEs. Based on threshold levels suggested in the Review, around 15 enterprises would be categorised as 'content service enterprises', for example, News Limited, Fairfax Media, Seven West Media and WIN Corporation;[4]

the Review's starting point was that unnecessary regulation should be removed

- a 'minimum number of owners' rule should be implemented regarding ownership of media in local markets. The stated objective of the regime is to ensure that no single operator or small group of operators has a dominant influence in a local market for news and commentary. CSEs can apply to the regulator for an exemption from the applicable rule if the transaction would result in a net public benefit in the local market;
- a public interest test should apply to changes in control of CSEs of national significance. The focus of the public interest test would be on 'maintaining diversity at a national level'. It will be the job of the new regulator to administer the public interest test; and
- the new regulator should have flexible powers to make rules on content related competition issues, in order to promote fair and effective competition in content markets.

Each of these recommendations is dealt with in greater detail below.

Overall, the Review suggests that 'black letter law regulation' can quickly become obsolete in a fast-changing converged environment and is also open to unforeseen interpretations. Regulation based on overarching policy objectives and flexible powers should therefore be preferred.[5]

---

1 Convergence Review, *Final Report*, March 2012.

2 Convergence Review, *Emerging Issues*, July 2011 pp 8-10.

3 Convergence Review, *Final Report,* March 2012, p viii.

4 The new regulator will define the thresholds for CSEs. The Review considers that essential characteristics of significant media enterprises are those organisations that (i) have control over the professional content they deliver, (ii) have a large number of Australian users of that content and (iii) have a high level of revenue derived from supplying that professional content to Australians. The Review considers that the threshold levels for CSEs should be initially around $50 million a year of Australian sourced content service revenue and audience/users numbering 500,000 per month: Convergence Review, *Final Report*, March 2012, pp ix, 10 and 12.

5 Convergence Review, *Final Report*, March 2012, p xii.

Finally, the Review recommends that the new rules and prohibitions would 'complement, not duplicate' the ACCC's existing powers, including the general prohibition in the CCA against mergers and acquisitions which substantially lessen competition.[6]

Media ownership and control

The Review concludes that rules preventing the 'undue concentration of ownership' remain an important factor in maintaining diversity of news and commentary. Recommendation 6 of the final report provides that:[7]

(a) ownership of local media should continue to be regulated through a 'minimum number of owners' rule but the existing '4/5' rule should be updated to take into account all entities that provide a news and commentary service and have a significant influence in a **local market;** and

(b) the new regulator should have the ability to examine changes in control of CSEs of **national significance.** It should have the power to block a proposed transaction if it is satisfied, having regard to diversity considerations, that the proposal is not in the public interest.

Related to Recommendation 6(a), Recommendation 7 suggests that existing rules on ownership and control should be removed and replaced with a 'minimum number of owners' rule and a public interest test.

The Review submits that a public interest test focused on media ownership would examine broader issues than the 'economic market analysis'

Recommendations 6(a) and 7: local media

The minimum number of owners rule is intended to reflect the objective of ensuring that no single operator or small group of operators has a dominant influence in a local market for news and commentary.[8] The new rule would apply to all CSEs that provide news and commentary services in a local market.

In recognition of the fact that in some markets there are influential news and commentary services provided by media operators that are not CSEs, the Review recommends that the new regulator should have the power to declare that the rule applies to those media operators in a particular local market if:

- the operator has editorial control over its news and commentary; and
- the number of users for the service reaches a minimum percentage of the population or reaches a minimum number of users in that market on an annual basis. This threshold will be set deliberately high by the regulator to 'ensure that only influential media is captured'.[9]

The Review notes that in some situations there may be a net public benefit in a change of control in local markets and therefore suggests that where a proposed merger would otherwise breach the rule, the proponent should be able to apply to the regulator for exemption on the basis that the transaction would result in a public benefit in the local market. Relevant criteria for establishing the existence of a public benefit could include whether the transaction would lead to a substantial increase in the volume of local news, advertising etc and whether local news would be available across more platforms.

Recommendation 6(b): national CSEs

Recommendation 6(b) addresses a change of control of a CSE at a national level and also contains a test based on the 'public interest'. The Review submits that a public interest test focused on media ownership would examine broader issues than the 'economic market analysis' under merger provisions in the CCA and would complement rather than duplicate the ACCC's existing powers.[10] The Review suggests that under this test:[11]

- the new regulator would develop, maintain and publish a register of CSEs of national significance. At a minimum, the definition of a CSE of 'national significance' should include CSEs that provide a content service in multiple markets and in more than one state or territory. Other factors that the regulator could take account of in determining national significance include whether the CSE has a controlling interest in one or more prominent media operations on different platforms; and
- the onus should be on the regulator to demonstrate that the outcome of the proposed transaction is not in the public interest. The Review suggests that factors the regulator could be required to take into account in making its decision include (a) whether the outcome of the transaction would diminish the diversity of unique owners providing general commentary services, as well as news and commentary at a national level, or the range of content services and (b) whether the person taking control of the CSE would represent a significant risk that the CSE would not comply with its operations.[12]

The national public interest test would operate as follows:

- all nationally significant CSEs must notify the regulator of a potential change in control and seek a preliminary view as to whether the public interest test will apply;
- the regulator should undertake an initial assessment and consult with the ACCC before making a final decision whether to conduct a public interest assessment; and
- if the regulator decides that the transaction requires a public interest assessment, it would conduct a public consultation process to seek industry and community views. Following the conclusion of that process the regulator's board would make a decision as to whether the acquisition contravenes the test.

The Review recognises that the introduction of the public interest test may 'increase the regulatory burden on some companies' but suggests that this burden could be reduced by the regulator adhering to strict time limits for administering the test.[13]

The problems with the recommendations

Three criticisms can be made of recommendations 6 and 7:

1. First, the Review does not address whether the proposed reforms are 'necessary' in a converged environment.
2. Second, the recommendations, if implemented, will create considerable uncertainty. The proposed recommendations would vest significant discretion in the new regulator to determine

6 Convergence Review, *Final Report*, March 2012, p x.

7 Convergence Review, *Final Report*, March 2012, pp xvi and 18.

8 Convergence Review, *Final Report*, March 2012, p 21.

9 Convergence Review, *Final Report*, March 2012, p 21.

10 Convergence Review, *Final Report*, March 2012, p 23.

11 Convergence Review, *Final Report*, March 2012, p 24.

12 Convergence Review, *Final Report*, March 2012, p 24.

13 Convergence Review, *Final Report*, March 2012, p 25.

not only the content of the prohibition, but also the persons to whom the new prohibitions will apply.

3. Third, to the extent the new rules are intended to complement the ACCC's existing powers, it is difficult to see how this would work in practice. In particular, there is significant scope for overlap and for the ACCC and the new regulator to reach different conclusions, even when applying what appears to be the same test.

We deal with each of these criticisms below.

No real policy rationale for the reforms

The key issue which has not been adequately addressed by the Review is whether it is necessary, in a converged environment and as a matter of principle, for media regulation to continue to specify a minimum number of owners in each local market or a public interest test for CSEs of national significance.

The answer given by the Review as to why the reforms are necessary, is that they provide a 'safety net' to ensure that a diversity of ownership is maintained. In this respect, the final report relevantly provides:

> …the introduction of new services into a market does not necessarily improve diversity of news and commentary on its own. While there may be multiple publications or outlets through traditional and online media, ***if they are*** owned and controlled by the same people this results in the same number of separately controlled media operators in a market. This is particularly the case in regional markets, where economies of scale naturally promote the tendency towards monopolies or oligopolies. Ownership and control rules provide a ***safety net*** to ensure that a diversity of ownership is maintained.[14] (***emphasis added***)

It is submitted that implementing these reforms in order to provide for a 'safety net' does not provide a sufficient justification on policy grounds. The reforms proposed by the Review are wide-ranging and will provide the new regulator with significant discretion in determining both the scope of the prohibitions and the entities which will be bound by them. They are also likely to impose a significant compliance burden on the media industry. Further, it is clear that there have been structural changes to the media industry. In this respect, it is not controversial that consumers' usage of online media services have changed significantly over the past five years and that recent technological developments have increased the prospect of new content services being available over the internet in the short to medium term. New players have also entered the media industry and existing players have been forced to alter their business case to address these developments. Given these matters, the need for implementing such wide-ranging reforms in a converged environment should be clearly identified now rather than left to be addressed by the regulator when implementing the new laws.

The recommendations will create significant uncertainty

It is a generally accepted principle of good public administration that laws should be certain in their operation and should limit the extent to which they confer discretion on regulatory bodies. Recommendations 6 and 7 do not satisfy that principle. As regards uncertainty, the new regulator will have the power to determine:

- the thresholds to apply in determining which entities constitute CSEs;
- the circumstances in which the 'minimum number of owners' rule will apply to entities which do not constitute CSEs;
- the circumstances in which the public benefit exemption will apply to the 'minimum number of owners' rule;
- the boundaries of the 'local markets' in respect of which the 'minimum number of owners' rule will apply;
- the quantitative limits to be set for metropolitan and regional markets as part of the 'minimum number of owners' rule;
- the circumstances in which CSEs will constitute entities 'of national significance' such that they should be subject to the public interest change of control test; and
- guidelines concerning the application of the public interest test.

The 'public benefit' and 'public interest' tests are inherently uncertain. What constitutes a public benefit is open to interpretation and begs questions such as, against what standard is the public benefit to be assessed?; how will the regulator weigh private and public benefits?; what threshold of benefit must be achieved by the transaction? Unless the tests are defined appropriately (and with some specificity), the extensive discretion afforded to the new regulator may make it extremely difficult for CSEs (and other media entities subject to the rules) to assess whether a proposed transaction is likely to be against the public interest and therefore unlikely to be cleared.

The 'public benefit' and 'public interest' tests are inherently uncertain

The Review recommends that the regulator develop and issue guidelines concerning the public interest test, akin to the ACCC's guidelines on mergers. The object of the guidelines will be to provide the media industry with greater certainty concerning the application of the test. As a practical matter, these guidelines will be of limited utility. First, they will more than likely be prepared at a high level of generality in order to provide the regulator with flexibility. Second, given their status as guidelines, the regulator will not be bound by them. At most, the regulator will be bound by an obligation to afford an affected person procedural fairness before departing from the guidelines or taking into account matters not specifically addressed by the guidelines.

These uncertainties engender concern with the proposals, and it is questionable whether the articulated 'public purpose' behind the recommendations is sufficient to justify the scope of the suggested changes.

Significant overlap between the new regulator and the ACCC

The Review suggests that the additional powers conferred on the new regulator will complement rather than duplicate existing powers under the CCA. However, the Review fails to recognise that there will be significant overlap between the role played by the ACCC and/or the Australian Competition Tribunal on the one hand, and the new regulator on the other.

Section 50 of the CCA prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. The prohibition in s50 applies to mergers in all sectors and industries, including the media. In relation to media mergers the ACCC has published additional guidance material outlining the framework that the ACCC will use to assess media mergers and its approach to defining media markets.[15] The Review suggests that the problem with s50 is that it limits the ACCC to conducting an 'economic market analysis' only. This criticism does not properly describe the analysis conducted by the ACCC in media mergers and the extent to which there will be overlap with the public interest test.

The ACCC's guidelines in assessing media mergers make it clear that the ACCC defines markets by reference to four product segments, including the market for the supply of content to consumers. In determining whether different media platforms compete in this product market, the ACCC has regard to the extent to which consumers view the different sources of content as substitutable. If they do, products will be considered to be in the same market and the ACCC will assess the effect on competition in the supply of content to those consumers. In assessing the effect on competition, the ACCC will have regard

14 Convergence Review, *Final Report*, March 2012, p 20.

15 Australian Competition and Consumer Commission, *Media Mergers*, August 2006.

to whether the quality of the content provided to those consumers will decrease. This includes considering the extent to which there will be a reduction in diversity of content.

By comparison, the Review makes it clear that the new regulator will be required to take into account factors such as whether the outcome of the transaction would be to diminish the range of content services at a national level as well as the diversity of unique owners providing general content services. Given this, there is a real possibility that the ACCC's assessment will overlap with the assessment conducted by the new regulator when applying the public interest test.

In addition, under the CCA a party may also apply to the Australian Competition Tribunal for authorisation to complete an acquisition. The Tribunal will grant the authorisation if it is satisfied that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur. It is not clear how this process will relate to the new proposed process. For example, if the Australian Competition Tribunal grants authorisation on the basis that it is in the public interest, how will that assessment affect the assessment being conducted by the new regulator?

there may be benefits associated with a regulator having the capacity to conduct market investigations

Content related competition issues

The final report considers that in a converged environment, there is a risk that content will be a 'new competition bottleneck' for which regulatory intervention will be required.[16] The Review therefore proposes that the new regulator should have flexible powers to make rules on content-related competition issues. Recommendations 8 and 9 of the final report provide that:

- The new communications regulator should be empowered to instigate and conduct market investigations where potential content related competition issues are identified.
- The new communications regulator should have flexible rule making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the ACCC to deal with anti-competitive market behaviour and should only be exercised following a public enquiry.

Under the existing regulatory framework, the ACCC is responsible for competition regulation, including in the communications sector. The ACCC carries out its functions under (a) industry-specific competition and access regulations in the CCA[17] and (b) through provisions in Part IV of the CCA that prohibit corporations from misusing market power and entering into certain agreements that have the purpose or effect of substantially lessening competition.[18]

The Review concludes that:[19]

- the powers available to the ACCC focus on anti-competitive conduct and economic market analysis and are not comprehensive enough to effectively deal with particular aspects of the content market, such as content rights;
- proactive regulatory powers are needed that can respond to fast-moving content-related competition issues and promote competitive outcomes, rather than relying on *ex post* powers; and
- a regulator with proactive powers to make rules and issue directions, as required, in the content market will be better placed to administer regulation that is 'targeted, more responsive and effective' and will be able to deal with issues in a flexible manner.

The Review notes that the regulator's proactive content related competition powers will complement, rather than duplicate or replace, the ACCC's existing powers to deal with anti-competitive behaviour, and recognises that there is a close relationship between the issues that the regulators will have responsibility for.

Are the changes necessary?

Many of the existing powers in Part IV of the CCA are sufficient to address competition issues relating to content, such as the ability to access premium content and the effect of bundling content and services. By way of example, under the CCA a court is entitled to aggregate all of the exclusive programming agreements entered into by a broadcaster in order to determine whether those agreements together have the effect of substantially lessening competition in a market. The ACCC has publicly stated that it is aware of, and concerned about, the potential for exclusive programming agreements to inhibit competition in emerging modes of media.[20]

Despite this, there may be benefits associated with a regulator having the capacity to conduct market investigations and to allow potential content related competition issues to be identified in advance of agreements being entered into. This approach would serve to proactively address potential competition issues associated with access to content and provide the industry with appropriate guidelines as to how to structure agreements without raising competition concerns. The Review does not adequately address why such proactive powers could not be vested in the ACCC. The fact that the new regulator's powers are designed to complement the ACCC's existing powers is again likely to lead to inevitable duplication associated with increased regulation. It is also not clear how the two regulators will operate in circumstances where they may have differing views on what conduct is appropriate.

However, the Review goes further and recommends that the new regulator also have the power to make rules which prohibit certain conduct or arrangements. The Review does not make clear why it is necessary to implement these reforms, other than to state that it is necessary for the new regulator to be able to deal with any emerging issues in a flexible manner. It is submitted that this 'safety net' approach to the issue does not justify such sweeping reforms and the grant of an unconstrained power to a regulator to make rules if the regulator considers it necessary to do so.

Conclusion

The Review's assessment of media and telecommunications regulation in Australia is timely. In the digital age it is important that Australia has in place a regulatory system that can deal with issues associated with the changing media landscape, including ownership and control of the media and content related issues. Recommendations 6 to 9 in the Review's final report attempt to deal with these issues by strengthening the regulatory framework surrounding these questions and by introducing regulatory tests that are seen as more 'flexible'. Although it can be argued that additional ways of dealing with competition in the media sector are useful, the Review has failed to justify sufficiently why the new regulatory schemes are required and why the ACCC cannot take a more proactive role in this area. Instead, the Review's recommendations will increase the regulatory burden on certain media companies while also generating significant uncertainty. More thought must be given as to how these proposals will, and should, operate in practice.

Kon Stellios is a Partner and Catherine Bembrick is a Senior Associate in the Competition group at Allens.

---

16 Convergence Review, *Final Report*, March 2012, p 28.

17 CCA Parts XIB and XIC.

18 CCA sections 45, 46 and 47.

19 Convergence Review, *Final Report*, March 2012, pp 28 and 29.

20 The ACCC has not yet commenced proceedings in relation to this issue.

Australian Media Ownership Controls: Where To Now?

Dr Martyn Taylor examines the recommendations made by the Australian Convergence Review Committee in relation to the ownership and control of media entities.

The Final Report of the Australian Convergence Review Committee (***ACRC***) recommended substantive reforms to Australia's media ownership controls. The proposed reforms involve the repeal of Australia's existing media diversity rules and their replacement with simpler tests based on local media diversity and the national public interest.

Australia's media ownership controls

Australian media ownership is currently subject to four key controls, each with a different policy objective:

- **Merger rules:** Acquisitions are prohibited if they have the likely effect of substantially lessening competition in an Australian market. The merger rules apply to all sectors of the Australian economy and protect against excessive concentration of market power, such power potentially capable of use to raise prices to the detriment of consumers.
- **Foreign investment rules:** Foreign persons must seek approval for media investments of 5% or more. The Commonwealth Treasurer can block foreign acquisitions that are not in the national interest. The foreign investment rules protect against foreign control of strategic domestic assets, such control potentially exercisable in a manner contrary to Australia's national interest.
- **Media diversity rules:** The existing media diversity rules are complex and are set out in the *Broadcasting Services Act 1992* (Cth) (***BSA***). The media diversity rules are more onerous than the merger rules, effectively trading-off economic efficiency for the perceived social benefits of diverse media ownership. The media diversity rules protect against excessive concentration of media influence, such influence potentially capable of use to manipulate public opinion and restrict freedom of expression.
- **Suitability rules:** The suitability rules are also set out in the BSA and are a weaker variant of the 'fit and proper person' tests of other jurisdictions. The suitability rules ensure that ownership of certain media assets can be prevented if there is a significant risk that the owner may contravene the BSA.

In its Final Report, the ACRC considered whether the media diversity rules and suitability rules should be amended to reflect changes in technology and business models associated with the convergence of media content and delivery platforms.

Concerns with the existing media diversity rules

Australia's existing media diversity rules are complex. Generally, no person may exercise control of:

- commercial television broadcasting (CTVB) licences in multiple CTVB licence areas, if the combined population of those areas exceeds 75% of Australia's population;
- more than one CTVB licence in the same CTVB licence area;
- more than two commercial radio broadcasting (CRB) licences in the same CRB licence area; or
- more than two of three specified media platforms in a CRB licence area, such platforms being CTVB, CRB, and any substantial local newspaper.

Similar rules exist for directorships in Australian media companies.

Under a complex points-based system, no fewer than five independent media operators are also permitted in a *metropolitan* CRB licence area and no fewer than four in a *regional* CRB licence area. This rule is known colloquially as the '4/5 rule'.

The ACRC identified two principal concerns with these existing rules:

- First, the rules focus on local broadcasting licence areas, yet this measure of media diversity is historic and decreasing in relevance. Many alternative media platforms exist beyond broadcasting involving content delivery at a national, even global, scale. The existing rules may impede realisation of greater efficiencies that could arise by consolidating some of these historic media platforms.
- Second, the existing rules do not recognise the diversity flowing from new media platforms, particularly Internet delivery. The rules similarly fail to recognise the important role of national newspapers and subscription television services. The inequitable treatment of these platforms may distort investment in favour of new media and may permit excessive consolidation that could be adverse to media diversity.

To address these concerns, the ACRC recommended various reforms to the media diversity rules.

the ACRC proposed the simplification of the media diversity rules rather than their outright repeal

Reform of the media diversity rules

The ACRC recognised that media diversity rules are vital in ensuring the free flow of news, commentary and debate in a democratic society. Accordingly, the ACRC proposed the simplification of the media diversity rules rather than their outright repeal.

The ACRC recommended the adoption of two new rules applying at the national and local levels:

- **National public interest test:** While media delivery platforms have diversified, the underlying news and information content is often sourced from the same traditional national media outlets. The ACRC therefore proposed a new public interest test to preserve *national* media diversity. Only the most influential and nationally significant media content providers would be regulated.
- Specifically, a new Communications Regulator (replacing the Australian Communications and Media Authority) would be empowered to block any 'change in control' of a content service enterprise (CSE) of national significance that was not in the public interest. A CSE would be defined as a media organisation suppling professional content in its control to a large number of Australian users (>500,000 per month) and receiving a high level of Australian-sourced revenue from that supply (>$50 million per annum). A CSE would be of national significance if it supplied content services in multiple markets across more than one State or Territory.
- **Local minimum number of owners (MNO) rule:** The greater availability of national and global content can crowd-out locally sourced news and information. The ACRC therefore proposed the MNO rule to preserve *local* media diversity. Only the most influential CSE in local markets would be regulated.

Specifically, no influential local CSE would be permitted to have a dominant influence in a local market, subject to public benefit exemptions. Different dominance thresholds would apply to metropolitan

and regional local markets, based on a minimum number of owners over all media platforms. An influential local CSE would be a media operator that had editorial control over news and commentary supplied either to a minimum number of users, or reaching a minimum population percentage, in that local market.

How would a national public interest test be applied?

The use of a public interest test can involve challenges due to the inherent subjectivity of any such test. To mitigate such issues, the ACRC has recommended that guidance be provided as to how the test would be practically implemented:

- The test would focus on maintaining diverse content at the national level. Key factors would include whether a transaction would diminish the number of unique owners providing content or diminish the number of content services.
- Second, the existing suitability rules would be repealed and instead conflated into the new national public interest test. Another key factor would therefore be whether there was a significant risk that an owner of a CSE could not comply with its obligations.

We would expect a regulator to give greater weight to suitability where a market was more concentrated. To some extent, media diversity is a safeguard against the need for a more pervasive suitability test. If media ownership is diverse, there is less ability for any individual to have any disproportionate influence over public opinion. Accordingly, in a diverse market there is less need to screen for suitability because any media owner that is 'unsuitable' will have little influence.

The use of a public interest test can involve challenges due to the inherent subjectivity of any such test

How would a local market be defined?

A key issue in the application of the new MNO rule is the definition of a local market. A list of local markets will ultimately be determined by the new Communications Regulator and updated from time to time.

The 'local market' concept proposed by the ACRC is conceptually different from the 'market' concept used in competition law. For the media diversity rules, the relevant concept is media *influence* not market power:

- The product scope of a local market is straightforward to predict. The ACRC implicitly assumes that all forms of news and commentary exert influence, hence co-exist in the same market, irrespective of the media platform. A local market therefore covers all media delivery platforms.
- The geographic scope of a local market is more difficult to predict. The ACRC recommends adoption of the historic planning criteria used to determine broadcasting licence areas. While these criteria give significant discretion to ACMA, this discretion has normally been exercised in favour of the geographic status quo. A status quo approach would mean that the new local markets would be strongly influenced by existing broadcast licensing boundaries. A key issue would be how the new regulator would reconcile the (many) CRB licence areas with the (few) CTVB licence areas. Ultimately, we would expect local markets to reflect a geographic compromise between CRB and CTVB licence areas.

Can media diversity be addressed by merger rules alone?

One argument directed at the ACRC during its review was that media diversity rules should be repealed entirely and merger rules alone should be relied on to ensure sufficient media diversity.

In most instances, merger rules do indeed ensure continued media diversity. An acquisition in a concentrated media market may lead to both excessive market power and media influence, hence may be prevented by both merger rules and media diversity rules. However, the different policy objectives of merger rules and media diversity rules mean that they do not always perfectly align.

When applying the merger rules, the ACCC is normally restricted to considering market power effects. Media diversity and suitability are irrelevant considerations in most merger analysis. Accordingly, the ACCC could permit an acquisition because it did not substantially lessen competition, even though it removed an important independent voice.

By way of example, a large media outlet may seek to acquire a small media outlet that is also an important and independent voice. The small outlet may not materially constrain the market power of the larger outlet. The ACCC may permit the acquisition, notwithstanding that the larger outlet subsequently exercises editorial control over the smaller outlet and removes its independent voice.

What is the likely practical impact of the reforms?

If the proposed changes to the media diversity rules were implemented, we would expect the level of regulation imposed on 'traditional media' to decrease, while the level of regulation imposed on 'new media' would increase.

The removal of the existing diversity rules will generally have four key effects on traditional media:

- First, greater aggregation of commercial radio stations will be permitted.
- Second, common ownership of commercial television stations may be permitted, subject to the merger rules and the national public interest test (involving considerations whether other media platforms are sufficient to ensure continued media diversity).
- Third, greater cross-media ownership of radio, television and local newspapers will be permitted, particularly if the geographic parameters of a "local market" are increased.
- Fourth, metropolitan television stations may merge with regional television stations to achieve greater national population coverage.

The enactment of new diversity rules will in theory increase the level of regulation applied to 'new media' (such as Internet delivery and subscription television), but the practical impact of any such increase in regulation is lessened by the simultaneous regulatory recognition of a much greater diversity of different media owners and platforms:

- A 'new media' provider will become subject to regulation if it has editorial control over news and commentary supplied to a minimum number of users, or reaching a minimum population percentage, in a local market. In such circumstances, the new media provider could be restricted from acquiring too many other independent sources of news and commentary in that local market.
- A 'new media' provider may also become regulated if it became a CSE that supplied content services across multiple States or Territories. In such circumstances, the CSE would become subject to the national public interest test, involving potential considerations of suitability as well as restrictions from acquiring too many other sources of nationwide content, news or commentary.

However, in both cases restrictions may only arise in practice if the relevant local or national market already has concentrated cross-media ownership and insufficient media diversity.

Conclusions

While the proposed reforms to the media diversity rules have been criticised by some quarters, the reforms are widely recognised as long overdue. While some key issues remain to be resolved, the proposed reforms are sensible and appear to strike an appropriate balance between efficiency and media diversity. If implemented, the reforms should ensure Australia is better placed to appropriately regulate convergent media content in a 21st century broadband world.

Dr Martyn Taylor is a Partner at Norton Rose.

Screen Producers Association of Australia Welcomes Convergence Review Recommendations

Owen Johnston, writing in his capacity as a Production Executive at Screen Producers Association of Australia (SPAA), considers the recommendations made in the Convergence Review Final Report from the perspective of content producers, shedding light on some of the potential impacts for that industry.

What was your overall impression of the Convergence Review Final Report?

The independent sector was pleased and Screen Producers Association of Australia (***SPAA***) supports the major findings and recommendations of the Convergence Review Final Report (***Final Report***). Given that the digital revolution is changing everything so fast – the kinds of programs we make, the way we make them, the multiple platforms and devices the programs can be screened on, and critically for our sector, the increased access Australian audiences have to programs from all over the planet – it was important to think really hard about how Australian content will survive in the new landscape, in both the short and long terms.

We have already seen how many more foreign television programs are available on Australian screens via the new digital multi channels and how the Australian story presence has been diminished in the overall media landscape since the multi channels started. This imbalance will soon be amplified by IPTV. It won't be long before you can use your remote to click between an Australian free to air channel on your smart TV and a global TV station like Google or Amazon TV, effectively on the next channel. One is currently a broadcaster with Australian content obligations, and the other is currently an IPTV broadcaster with no Australian content obligations.

The Convergence Review panel (the ***Panel***) clearly identified Australian content as a major issue very early on in their consultation process and it has been a constant feature in all of the papers they have produced during the last year. Given the difficulties of the technologies and the legislation and the time it will take to construct a new regulatory environment, we agree with the Panel's recommendation of a principles based approach that is platform neutral. We certainly support the notion that that 'those who stand to make the most from the Australian market should make the greatest contribution to the achievement of public policy outcomes'. Broadly, we support the idea that Australian content obligations should be determined by the size of revenue and audience share that a platform neutral enterprise has in the Australian market.

The Panel has suggested that the qualifying measure for a Content Services Enterprise (***CSE***), which would be subject to regulation, be revenue of $50 million and a monthly audience of 500,000. However, only those CSEs with revenue of $200 million and 500,000 watchers every month would be subject to Australian content regulations. This effectively captures the current major players. However the current Australian Content Standard was developed in a far less spectrum abundant environment and with far fewer significant competitors. In recent times, the Internet and telecommunications providers have become significant content carriers and competitors for the entertainment audience in Australia. We had submitted that a more graduated system might more fairly allocate responsibilities for the provision of Australian content. We think that the suggested threshold is fair for the application of Australian content quota obligations but would have preferred a model that requires significant content providers that do not meet this threshold, such as Google, Apple, and Telstra, to be subject to a reduced spending obligation, similar to what now applies to subscription television. The Panel has argued that the bar be set high in order to prevent the exposure of providers to a 'commercially unsustainable regulatory arrangement'. We agree with this and think that a graduated system could still work without endangering the sustainability of the larger Internet and Telco content providers.

On traditional platforms, advertising revenue has always been critical to content providers and content makers. We need to be wary about the effects of the uncoupling of this relationship on media platforms in the future

The new regulator will face difficulties in dealing with the different accounting and reporting systems global businesses like Google, Apple, Facebook, Amazon et al have in comparison with Australian businesses. However, we do recognise that the proposed model allows for these giants and the Telco to rise above the threshold and generate Australian content requirements.

The Final Report recommends, in regards to IPTV, that only Australian sourced revenue from the streaming of professional media content would be considered in determining whether an entity meets the relevant revenue threshold for a CSE. We are still considering the ramifications of this as some Internet players generate enormous advertising revenue from non-professional or user generated content. We are concerned that the new platform entertainment providers like Telcos and internet companies drain advertising revenue away from traditional platforms, regardless of whether the content they show is 'professional'. On traditional platforms, advertising revenue has always been critical to content providers and content makers. We need to be wary about the effects of the uncoupling of this relationship on media platforms in the future.

SPAA endorses the staged approach to implementation suggested by the Final Report and we recognise that it will take many years to achieve this scale of reform. The challenges are equal to or even greater than the challenges faced by the introduction of radio and the introduction of television. In the case of television, it took from 1956 to around 1970 to bed down a workable Australian content regulatory and legislative environment.

What recommendations in the Report specifically benefit content producers?

The Final Report proposes that the commercial free-to-air channels should broadcast more Australian content to offset the vast increase in foreign content on the multi-channels. The Final Report also suggests that this requirement to increase Australian content is appropriate given the benefit that is now flowing to broadcasters as a result of the availability of additional spectrum in a limited competitive environment and the consequent increase in advertising revenue.

The Final Report recommends that sub-quotas for first release adult and children's drama and documentary programming be increased by 50% to cover the multi channels. If implemented, this will benefit the independent sector and the Australian production industry more generally. We estimate, based on previous ACMA compliance figures, that such an increase would cost the free to air networks around $22 million each per year. Given that the three channels have been given an extension on the relief from their license fees for public spectrum in excess of 300 million dollars, we think this is affordable. A 50% increase would amount roughly to around 40 more hours of quality adult television drama per channel, which is less than one extra hour per week.

The tax offset will also be a shot in the arm for new platform producers who are producing ambitious games, Apps, and interactive web sites and again encourage Australian businesses to grow further into the international market

The increase would require the commercial networks to show an additional 10 hours of first release Australian documentary. However, the commercial networks are currently well in excess of their documentary requirements so we don't anticipate any change from the increase in sub-quotas there. It is more difficult to predict the impact on children's drama because the commercial networks have both a total hours obligation (which can include repeats) as well as a first release obligation. At a minimum, the networks would be required to show an additional 22.5 hours of first release 'C' children's drama.

The Final Report recommends that the ABC be required to match the commercial channel's obligation to show 55% Australian content between 6am and midnight. This could potentially mean a substantial boost for Australian content requiring the ABC to increase their Australian content by about 15%. While the ABC would probably love to do it, it would require an increased appropriation from government to achieve this.

The Final Report recommends that SBS be required to have an Australian content standard of half of that of the commercial channels – 22.5%. Our understanding is that they would meet this already so there would be little or no increase there.

On Pay TV, the Final Report recommends extending the obligation that currently exists for drama programs to children's and documentary channels. Pay TV channels are currently required to spend 10% of their program acquisition costs on first release Australian drama. This is a positive proposal for the independent sector as the Pay TV channels source nearly all their programming externally. We were surprised, given the enhanced market position Foxtel now has since the merger with Austar, that the review didn't recommend increasing the spend quota to 20%, which they are able to do without offending the US Free Trade Agreement. If the proposed 'uniform content scheme' becomes a reality in the future, this obligation will presumably be replaced by the new system and so we would like to see the increase to 20% occur now, particularly if the merger leads to a rationalisation of movie channels and less acquisition costs.

SPAA has lobbied hard for some time for an increase in the producer tax offset for television as a means of creating more Australian content. Given the limitations placed on local content regulation by the US Free Trade Agreement, the tax base, which is exempt, is the most viable mechanism remaining for local industry support. We were pleased with the recommendation in the Final Report that the television offset be increased from 20% to 40% for 'premium' television programming over a yet to be determined budget threshold. This could allow some high budget drama mini series, really ambitious documentaries, and international co-productions to come back into the television space.

The Final Report also acknowledges the growth of interactive media and digital games and recommended a tax offset of 30% for projects above $500,000 and 20% for projects above $200,000. This could make a real difference to both interactive producers and traditional platform independent producers. Traditional platform producers have been required by broadcasters to supply a range of costly digital add-ons or extensions of the program's narrative and thematic universe such as web sites, Apps, mobisodes and the like, without being adequately resourced. This measure will assist their viability and make complete program packages more competitive for international sales. These days you cant just make a television program and leave it at that. You need digital materials, an interactive website, a Facebook page, clips on You Tube etc. When Australian producers go to sell their programs overseas and earn export income, they need these materials to be competitive.

The tax offset will also be a shot in the arm for new platform producers who are producing ambitious games, Apps, and interactive web sites and again encourage Australian businesses to grow further into the international market.

The Final Report recommends a separate review of the independent sector and it's terms of trade with broadcasters. We think this is important to ensure that the independent sector remains vibrant and that these new changes don't lead to an imbalance between independent production and in-house network production.

In our view, there is no impediment to the government introducing these measures to support Australian content almost immediately. They can all be achieved in the first stage recommended in the Final Report.

Assuming future governments continue with the plan and progress to stage two and the redrafting of the *Broadcasting Services Act*, we note that the new regulatory environment will give CSEs that have Australian content obligations the option of either investing their obligation on programming to screen themselves or contributing to a Converged Production Fund which will administer and invest the funds in Australian content. In our view, this fund should operate separately from existing federal funding arrangements and involve the marketplace in the decision making process as this is where the funds will be drawn from. This would ensure diversity and competitiveness in our Australian content funding environment. We endorse the Panel's suggestion that a portion of the sale of publicly owned spectrum be contributed to the Converged Fund. This already happens in Canada and is justifiable as the spectrum allows privileged access to Australian audiences.

We would also caution against losing the real market pressure that currently attaches to the Australian Content Standard provisions on commercial television, whereby Australian programming is required to be screened in prime time. We would argue that this market pressure has created the kind of investment in talent, production and marketing that has led to the high quality Australian programming currently enjoying high ratings. We will need to be careful that this is not unpicked in the process of moving to a regulatory model that is based on spending rather than on when programs are screened.

Owen Johnston is a Production Executive at the Screen Producers Association of Australia.

Link in with CAMLA

Keep in touch with all things CAMLA via the new Communications and Media Law Association LinkedIn group.

You will find information here on upcoming seminars, relevant industry information and the chance to connect with other CAMLA members.

LinkedIn is the world's largest professional network on the internet with 3 million Australian members.

To join, visit www.linkedin.com and search for "Communications and Media Law Association" or send an email to Cath Hill - camla@tpg.com.au

Contributions & Comments

Contibutions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in hard copy and electronic format and comments should be forwarded to the editors at editors of the Communications Law Bulletin at editors@camla.org.au or to

Valeska Bloch or Victoria Wark

C/- Allens
Deutsche Bank Place
Corner Hunter & Philip Streets
SYDNEY NSW 2000

Tel: +612 9230 4000
Fax: +612 9230 5333

Please note the change to CAMLA details:

Email: camla@tpg.com.au
Phone: 02 9399 5595
Mail: PO Box 237,
KINGSFORD NSW 2032

Communications & Media Law Association Incorporated

The Communications and Media Law Association (**CAMLA**) brings together a wide range of people interested in law and policy relating to communications and the media. CAMLA includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CAMLA members include:

- defamation
- broadcasting
- copyright
- advertising
- information technology
- freedom of information
- contempt
- privacy
- censorship
- film law
- telecommunications
- the Internet & on-line services

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

Disclaimer

The Communications Law Bulletin is the journal of the Communications and Media Law Association (**CAMLA**) which is an independent organisation which acts as a forum for debate and discussion and welcomes the widest range of views. The views expressed in the Communications Law Bulletin and at CAMLA functions are personal views of the respective authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

CAMLA Website

Visit the CAMLA website at www.camla.org.au for information about CAMLA, CAMLA seminars and events, competitions and the Communications Law Bulletin.

Application for Membership

To: The Secretary, camla@tpg.com.au or CAMLA, Box 237, KINGSFORD NSW 2032
Phone: 02 9399 5595

Name:...

Address: ....

Telephone: ....Fax: ....Email: ....

Principal areas of interest:

I hereby apply for the category of membership ticked below, which includes a Communications Law Bulletin subscription, and enclose a cheque in favour of CAMLA for the annual fee indicated:

☐ I Ordinary membership $130.00 (includes GST)

☐ Student membership $45.00 (includes GST)
(please provide photocopy of student card - fulltime undergraduate students only)

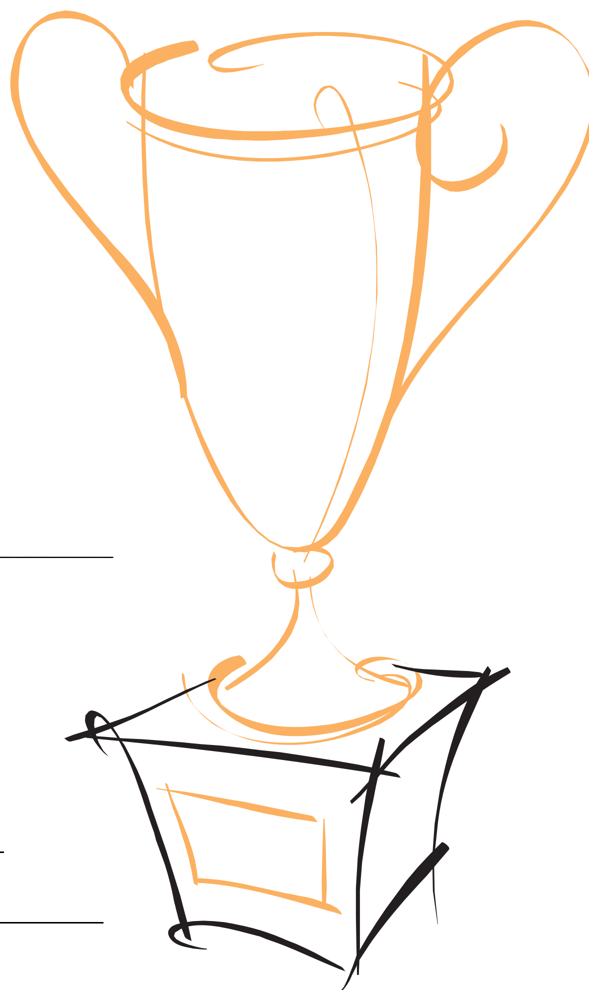
☐ Corporate membership $525.00 (includes GST)
(list names of individuals, maximum of 5)

☐ Subscription without membership $150.00 (includes GST)
(library subscribers may obtain extra copies for $10.00 each + GST and handling)

Signature: ....

CAMLA CUP TRIVIA NIGHT

It's on again!
Test your knowledge of communications and general trivia.
Out-play your competitors.
Take home The Cup!



THURSDAY 16TH AUGUST

6:00pm for 6:30pm start
(9:00pm finish)
NSW Leagues' Club
Level 2, 165 Phillip St, Sydney

$60.00 per head (includes GST)
$480.00 for a table of 8 (includes GST)
Finger food included. Cash bar.

TAX INVOICE: ABN 66 435 886 177
Contact: Cath Hill
camla@tpg.com.au
CAMLA
PO Box 237
KINGSFORD NSW 2032

Contact name___________________________

Organisation___________________________

Team Name ___________________________

Phone_______________Email_______________________________

Cost : _________ @ $60.00 per head (incl GST) or _______________table/s @ $480.00 per table of 8 (incl GST)

Total $______________Cheque ☐ M/Card ☐ Visa ☐ NB We do not accept Amex or Diners Card

Card number_____________________________________Expiry Date____________

Name on card____