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Abstract

A three-member Convergence Review has recommended fundamental changes to media and communications regulation in Australia (Boreham, Long and McElvogue 2012). Set up in December 2010 to ‘take a fresh look at Australia’s existing regulatory frameworks with a view to modernising them’ and released in April 2012, the Convergence Review proposes less regulation, differently-targeted, and new regulatory institutions to do it. Broadcast licensing would end but some of the obligations currently imposed on licensees would continue for major ‘content service enterprises’. At the time of writing, the Government had not announced a formal response to the Review’s recommendations.


Australia’s Convergence Review

Convergence has been talked about for decades. The Australian Government decided to commission a review because of a group of overlapping communications policy questions. Early in 2010, it was strongly criticised for its decision to temporarily reduce the annual licence fees paid by commercial TV broadcasters (Conroy 2010). Those fees totaled A$270 million the previous year (the $A now hovers around parity with the US). Though widely perceived to have been the big winners from digital terrestrial TV policy, the networks now argued their capacity to deliver popular services with expensive Australian programs and new free-to-air digital multi-channels was being fatally undermined by fragmenting audiences and revenues, especially during the Global Financial Crisis. They were already handing back a 126 MHz ‘digital dividend’ of vacated TV spectrum, to be reallocated once analogue services are shut down at the end of 2013. They were also worried about the competing video services that would be able to set up using the National Broadband Network, a government network announced in 2009 to deliver very fast fibre-to-the-home broadband to 93 per cent of Australia’s residential and business premises, at a public cost of tens of billions of dollars.

Incumbent broadcasters had been the beneficiaries of decades of broadcast regulation that imposed obligations on licence holders but restricted the number of licences – in the case of television, to three commercial operators in the major cities since the mid-1960s. Now, they feared IPTV or ‘over-the-top’ video providers would be able to establish competing services quickly and cheaply using high quality fixed and mobile networks, without the regulatory obligations applying to licensed broadcasters, especially about expensive Australian, local and children’s programming.

Before the Convergence Review reported, another independent review was established. This one would examine regulation of the print media, including online publications, and the operation of the self-regulatory Australian Press Council. Officially, the government said ‘a separate and distinct examination of the pressures facing newspapers and their newsrooms, including online publications, will enhance our consideration of the policy and regulatory settings Australia needs to ensure that the news media continues to serve the public interest in the digital age’. Unofficially, it was at war with Rupert Murdoch’s daily newspapers, especially the tabloids in Sydney and Melbourne and the national broadsheet, The Australian. A particularly sensitive issue was the reporting of the National Broadband Network. This was a popular initiative with voters that helped convince independent members of Parliament to support a minority Labor Government after a tight election in mid-2010. The Australian started an almost daily ’NBN Watch’ column that focused relentlessly on the high public cost of the NBN rather than the long-term vision and less tangible benefits the Government was trying to stress.

As the phone-hacking scandal prompted global scrutiny of the output and work practices of Murdoch journalists and editors, Australia put a former Justice of the
Federal Court, Ray Finkelstein QC, to work on this rapid 'Independent Media Inquiry', assisted by a journalism professor and former journalist Matthew Ricketson. Their report became an input to the Convergence Review, conducted by former IBM Australia and New Zealand managing director Glen Boreham, former SBS managing director Malcolm Long, and Louise McElvogue, who worked in the UK on the video-on-demand products SeeSaw (formerly Project Kangaroo) and Channel 4’s 4oD.

What the Convergence Review recommends

The Convergence Review’s final report concentrates most of its energy on a few big topics that are profoundly affected by ‘convergence’. These are spectrum management; diversity and competition; respect for community standards in media content; and requirements for Australian programs and local news and information.

On spectrum management, the Review recommends that spectrum for TV and radio broadcasting be allocated in the same way, for the same duration and at the same price as it is allocated for telecommunications uses like mobile telephony and broadband. To some extent this has already happened, because the digital dividend spectrum will be re-allocated by auction and probably acquired by telecoms companies for mobile broadband. The even tougher step is to shift all remaining TV and radio spectrum over to a new scheme of allocation and charging. The Review thinks incumbent commercial TV and radio operators should automatically receive new ‘spectrum licences’ lasting for 15 years, like the ones the mobile phone companies already have. At the expiry of that term, the spectrum may be re-allocated by auction. But without auctions to set the price for the broadcasters’ initial 15-year spectrum licences, the new fees will have to be set by the communications regulator (currently the Australian Communications and Media Authority), probably based on the results of the auction for digital dividend spectrum. So the path to more consistent spectrum management and charging would be long and involve some more big regulatory choices.

On the other three major issues, the Review recommends a fundamental change to the way broadcasting regulation works. Until now, diversity and competition, respect for community standards and requirements for Australian and local content have all been dealt with through conditions attached to TV and radio licences. Over the decades that scheme has been in place, commercial TV and radio stations have held a uniquely significant place in the electronic media landscape. ‘Convergence’ and other changes mean this is no longer true. Companies like Google, Facebook, Apple and Amazon are at least as visible and arguably as influential.

Having decided that diversity and competition, respect for community standards and Australian and local content all still matter, and are likely to require continuing regulatory intervention, the Convergence Review had to come up
with a structure for it that didn’t depend on the most important electronic media enterprises all holding broadcasting licences.

The concept it produced is the ‘content service enterprise’. These will be ‘large enterprises that provide professional content services to a significant number of Australians’. They will continue to have their ownership scrutinized more closely than the general competition law allows, and will have to ‘meet community expectations about standards applicable to their content’ on matters like sex and violence and accuracy and fairness in news and current affairs, and ‘contribute in appropriate ways to the availability of Australian content’.

What all this might mean depends on who the ‘content service enterprises’ are. The proposed definition is intended to catch ‘only the most substantial and influential entities’. They will be organizations that have control of the professional content they deliver, meet a threshold of a large number of Australian users of that content (proposed to be at least 500,000 unique viewers/users per month in a country with a total population of nearly 23 million), and meet a threshold level of revenue from supplying that professional content to Australians (proposed to be $A50 million per year).

The precise thresholds of users and revenue will be determined and periodically reviewed by the communications regulator. Rough calculations included in the report suggest the proposed thresholds are designed to preserve the status quo for now: incumbent broadcasters are caught; those that are not include Google (more than enough monthly users but not enough revenue according to PwC), Apple (not enough monthly users or revenue yet according to PwC, although according to Nielsen, iTunes had a unique monthly audience of 2.8 million as far back as June 2011) and Telstra, the country’s biggest telco (Curtis, Given and McCutcheon 2012).

Having proposed this new mechanism for applying regulation to different media and communications enterprises, the Convergence Review also recommended changes to regulation that should be imposed. On diversity and competition, it proposed removing most of the current strict media-specific ownership limitations that prevent a single operator controlling more than two of three major media (daily newspaper, commercial TV station, commercial radio station) in an area, more than two commercial radio stations or one commercial TV station in a market, or commercial TV stations broadcasting to more than 75% of the national population. The existing law requiring a minimum number of ‘voices’ or media owners in local markets would remain but be revised, and a new, more flexible ‘public interest’ threshold would need to be met before major media mergers could be approved. The public interest test is the same idea proposed in the 2000 broadcasting review by the Productivity Commission, a government agency that reviews major areas of policy and regulation (Productivity Commission 2000).

On the sensitive issue of Australian content regulation, the Review concluded Australian drama, documentary and children’s programs still needed regulatory support. (PwC data published as part of the report estimates that without the
existing quotas, spending on children’s programs would be wiped out completely, spending on adult drama would fall by 90% and on documentaries by 50%.) But ‘the situation may change in the future and the regulatory environment should be flexible enough to allow for this’.

The Convergence Review wants a ‘uniform content scheme’ under which all content service enterprises have two options: to invest a percentage of their Australian market revenue from professional television-like content in new Australian drama, documentary and children’s content (the ‘investment option’), or to contribute to a central converged content production fund (the ‘contribution option’). Once that scheme is in place, the Review wants Australian content quotas abolished. While the transition is occurring, however, it wants them changed: first, to increase the commercial TV drama sub-quota by 50% but allow it to be met by programs screened on digital multi-channels as well as main channels, and second, to require subscription TV children’s and documentary channels to spend 10% of their program budgets on new Australian programs, like the movie and drama channels.

On respect for community standards in media content, the (Finkelstein) Independent Media Inquiry, reporting a few weeks before the Convergence Review was published, found existing self-regulation, regulation and general law were not working to ensure the news media lived up to the standards set out in its own codes of practice. It recommended that the federal government establish and partly fund a new regulator for ‘news media’.

This News Media Council should comprise community, industry and professional representatives. It would cover print and online news media as well as radio and TV, and apply to small, though not all, outlets. It should ‘provide redress in ways that are consistent with the nature of journalism and its democratic role’, adopting ‘timely, efficient and inexpensive’ complaint-handling procedures. ‘In appropriate cases’, it ‘should have power to require a news media outlet to publish an apology, correction or retraction, or afford a person a right to reply. This is in line with the ideals contained in existing ethical codes but in practice often difficult to obtain’ through the self-regulatory mechanism established and funded by commercial print media organisations, the Australian Press Council.

The Finkelstein plan would mean a form of statutory content regulation for the print media over matters such as fair and accurate reporting. Even for broadcast media currently subject to ‘co-regulation’ by the Australian Communications and Media Authority, ACMA, it would strengthen the regulator’s powers. For the print media, it represented a significant step from regulating itself through the Press Council to a form of statutory regulation.

The Convergence Review endorsed Finkelstein’s analysis but not his remedy. It effectively recommended instead that the print media be given another chance to lift its game before statutory regulation was imposed. Agreeing there was ‘no longer any rationale to treat print and broadcast media differently’, it thought there should be ‘a single cross-platform body responsible for news and commentary standards’. Rather than move print and online media into statutory
regulation as Finkelstein recommended, however, the Convergence Review thought broadcast news and commentary should be shifted into a self-regulatory structure together with print and online media.

The Convergence Review has adopted a deregulatory approach and therefore proposes the self-regulatory structure for all news and commentary in the first instance. This will allow the industry to demonstrate the effectiveness of platform-neutral, self-regulatory arrangements. Once this scheme has operated for a period of time, the government can determine whether self-regulation is working or whether further measures should be considered.

The Review has concluded that a media industry scheme with an independent governance structure is the most effective way of promoting standards, adjudicating on complaints, and providing timely remedies. It would also avoid the sensitivities associated with direct regulation of journalism, which plays such a key role in scrutinising the processes and activities of government (Boreham, Long and McElvogue 2012).

Rather than the statutory agency recommended by Finkelstein, this was to be an ‘industry-led’ body, independent from Government and only partly funded by it.

Reactions

Most mainstream media organizations immediately condemned the Finkelstein proposal as an unwarranted and inappropriate intrusion into media freedom. They reminded their audiences there was no evidence at their organizations of the kinds of malpractice being exposed in the UK. The Australian’s editor-at-large Paul Kelly called the Finkelstein report ‘a watershed in Australia’s political history … a blueprint for enforced media regulation never before seen in Australia … compiled in haste, shoddy in argument and evidence and, above all, a deeply ideological document revelatory of our times’. Finkelstein’s quest – ‘to protect our democracy from unethical and biased journalists, notably at News Limited’ – was ‘honourable in its utopianism’, but the resulting document was:

... another threat to freedom in Australia. It testifies to the extent that elite opinion is fixated on legal controls of institutions and people whose ideas it dislikes. It is vital that the media challenge this report and then resist its implementation if it becomes law (Kelly 2012).

The Convergence Review was careful to distinguish its recommendation about regulation of news media and commentary from Finkelstein’s, but they shared enough elements for the torrid criticism of the earlier report to stick to the Convergence Review’s more modest plan. The Convergence Review’s final report also drew negative commentary from online and mobile media enterprises and telcos that have never had to deal with all the regulatory apparatus that applied to TV and radio broadcasters and did not like the possibility that they could fall within the definition of a ‘content service enterprise’ at some point in the future (Flynn 2012). They argued that bringing new kinds of organizations within the
regulatory net was inconsistent with the Review’s overall claim to be
deregulatory.

On the Review’s other recommendations, media organizations predictably
welcomed the removal of strict media ownership limits but not the imposition of
a new test they thought vague and likely to be interpreted unpredictably and
inconsistently in practice. The Liberal (Conservative) Opposition’s
communications spokesperson said ‘It is a concept that is so general and so
elusive it is incapable of ever being applied other than in a manner which most
people will regard as being entirely political’ (Bolt 2012).

Other commentators, like University of Sydney academic Tim Dwyer, shared the
concern over the precision of the proposed provisions about media diversity, but
from a different perspective. He had ‘doubts about the ability of these proposed
measures to provide the kind of certainty required, let alone the promised
diversity of owners, in Australia’s already highly concentrated media’. Describing
the ‘majority reaction of key stakeholders [as] primarily one of open hostility’, he
found the whole Convergence Review Final Report ‘a curious mixture of
innovative and lower risk measures calculated to progress the convergence
policy agenda up to a certain point’.

Dwyer also worried that the benefits for the production sector from the Review’s
‘innovative ways of shoring up Australian content into the future, are tarnished
by the costs of recommendations that may well result in unrestrained media
concentration’. Television broadcasters welcomed the proposed removal of
program quotas, but not the scheme proposed to replace them. Academics Ben
Goldsmith and Julian Thomas also criticized the Review’s proposed new scheme
for content regulation. In its continuing emphasis on ‘professionally-produced
content’, especially drama programs, the Review’s principal concern, they said:

was not to maintain or adapt the social and cultural objectives of the
previous framework to the convergent media environment. Instead, the
Review is concerned with extending the model built around commercial
television broadcasting, in order to ensure the sustainability of the
traditional content production industry. The concerns of one well-
established, highly articulate quarter of the digital media production sector
may well be legitimate, worthy and defensible. They are also inevitably
self-interested, and should invite careful scrutiny. Here they have
prevailed, without extended analysis or investigation of the alternatives, or
the consequences. The risk is that this will be at the expense of a flexible
system that can respond rapidly to industry change and properly account
for and nurture the dynamism emerging in the games, interactive, informal
or semi-professional production sectors (Goldsmith and Thomas).

What will happen?

In late-June, Australia’s media industry announced it was doing some converging
of its own. Commercial media organizations released plans that will
fundamentally transform the Australian media scene. Partly responding to these announcements, the Government was reported to be moving quickly to implement elements of the two media inquiries’ recommendations.

Fairfax Media announced big job cuts, the closure of its printing facilities in Sydney and Melbourne and the conversion of the Sydney Morning Herald and The Age from broadsheet to tabloid formats (Fairfax Media 2012). Meanwhile, its board negotiated with mining billionaire Gina Rinehart, now the company’s largest shareholder, over board seats and the company’s charter of editorial independence. Treasurer Wayne Swan criticized Rinehart’s acquisition of a stake in Fairfax in a speech to the National Press Council in March, having earlier indirectly referred to her in an article as one of ‘a tiny handful of people ... who mobilise their considerable wealth against policies designed to benefit the majority’ (Swan 2012).

News Limited, the local arm of Rupert Murdoch’s global media empire, also announced job cuts, but also a bid for James Packer’s remaining media assets and the acquisition of a small, successful business media company owned by some of the country’s best finance journalists. The Packer bid would take News to full ownership of Fox Sports, which supplies the main pay TV sports channels, and to 50 per cent of Foxtel, the main pay TV operator (ABC 2012).

The following week, Fairfax’s national financial daily carried news that the Government was working urgently on legislation to establish a news media regulator, along the lines proposed by the Finkelstein inquiry, and to impose a separate public interest test for media mergers, to be administered by the competition regulator, the Australian Competition and Consumer Commission (Daley and Anderson 2012). Some interpreted this as a vulnerable, minority government preparing for life in opposition after the election due to be held around the middle of 2013. The Liberal/National Opposition declared it would repeal any such changes.

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REFERENCES


