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SERVING THE PUBLIC INTEREST IN REGULATING MEDIA CONVERGENCE

Peter Gerrand
Managing Editor, TJA

This editorial introduces the special June 2012 issue of TJA on the theme of Convergence.

In this bonus fifth issue of the normally quarterly TJA, the TJA Editorial Board has sourced ten articles to critique different aspects of the recent Convergence Review Expert Committee’s Final Report (the ‘Convergence Review’) and the associated Report of the Independent Inquiry into the Media and Media Regulation (the ‘Media Inquiry’).

The conclusions drawn by our authors are insightful.

For example, Christopher Marsden, in surveying the results of previous governmental reviews in Europe (including particularly the UK) and North America, each stimulated to anticipate the desirable effects on regulatory frameworks of new forms of technology convergence, reaches a lugubrious conclusion. He notes that each of the former reviews, introduced with the promise of introducing greater diversity, has in fact left the former ‘analogue monopolists’ with their media empires well preserved.

That is a sober perspective, given the dominance in Australia of News Ltd, which controls Australian newspapers enjoying more than 70% of total circulation in Australia’s cities, and with a monopoly in daily newspapers in three capital cities. Given the recent announcements by both News Ltd and Fairfax that they will be accelerating their transition to online news media, it is pertinent to note that in addition to its 167 separate mastheads, News also owns 15 of the country’s top 22 metropolitan news journalism websites (Crook 2011).

This dominance would be tolerable if News Ltd sought to provide political balance in its coverage. But since 2007 it has rather blatantly sought to control the national political agenda, with the transparent aim of achieving a government more amenable to its own ideology, relentlessly serving up opinion as front page news, and frequently attacking those politicians, political parties and even police commissioners that stand in its way – or stand up to it (Manne 2011). Not to mention its partisan attacks on the National Broadband Network project.

As this Journal goes to press, the Government’s policy options in protecting media diversity have become complicated by the likelihood that the world’s richest woman, Australia’s mining oligarch Gina Rinehart, will mount a takeover of the country’s second largest media empire, Fairfax Media, while refusing to sign its Charter of Editorial Independence. This highlights the fact that media diversity – in terms of the range of political views published – cannot be protected by the application of economic competition principles alone. If a set of oligarchs own all the major media outlets, and promote a narrow range of political policies and cultural values to the exclusion of other alternatives, then we will have lost a democratically valuable feature of media diversity. This would be an unexpected form of ‘media convergence’: the alignment of political agendas in the mainstream media.
THE NEED FOR MORE EFFECTIVE MEDIA REGULATION

Many Australians have been dismayed at the weak regulatory powers of the current broadcasting regulator ACMA (and its predecessor the ABA) when dealing with egregious behaviour by radio shock jocks, commercial breakfast radio commentators or TV current affairs programs.

It is therefore hardly surprising to see first the Media Inquiry and then the Convergence Review recommending a strengthening of media regulation – with the latter recommending an obligatory form of industry self-regulation, to apply to ‘professional’ news and commentary service providers that qualify as Content Service Enterprises (CSEs). This would apply to both broadcasters and the press, and could extend to online content providers, as a CSE is meant to be a technology neutral regulatory concept. An industry self-regulator with suitable powers of coercion could provide greater rights of redress to victims of inaccurate and damaging reporting – greatly in the public interest. The strengths and weaknesses of this approach are discussed by several authors in this issue.

Whether this requires the creation of a new media regulator, or – as suggested in an article by Michael Gordon-Smith – simply calls for the strengthening of ACMA’s current powers, is a matter of policy implementation by the federal government.

COMPLAINTS HANDLING AND A NEW INDUSTRY CODE OF PRACTICE

A desirable policy goal is that there should be a robust, reputable and effective complaints handling process by the new regulator, particularly to accommodate complaints from individuals who consider they have been personally wronged by a report or agency in the public media. And as Mark Briedis and William Renton point out in their article, there are issues of accuracy, fairness and privacy that need to be taken into account in an enforceable industry code of practice for the mainstream media.

Other articles in this special issue of TJA reflect on the likely impact of the Convergence Reviews’ recommendations on the proportion of Australian content, on broadcast licensing, on media ownership and diversity, on the feasible limits of content regulation, and finally – in a paper from global player Google – on perceived missed opportunities in the Convergence Review recommendations.

Subscriptions to TJA – and pay-per-view for individual articles – can be arranged here.

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Crook, Andrew. 2011. ‘Forget media diversity, the Internet has tightened News’ squirrel grip’, Crikey.com.au, 8 November 2011.


In this article I argue that monopolists have used the ‘threat’ of an upsetting of the media apple-cart to persuade politicians to grant them extended privileges in their analogue empires, both extending their reach into new markets in which they have (so far unsuccessfully) attempted to extend their dominance, and delaying the onset of real digital convergence. I do so via a review of the convergence reviews of the 1980s, 1990s and 2000s, focussing on the US and UK. It may provide some lessons for policymakers in the next policy cycle in convergence, intended as simply a warning from legislative and regulatory history. The UK will have a new Communications Bill published in 2012, and the US a general election later in the same year. Australia has concluded its review. I focus on the media mergers that took place in response to decline in the traditional media, focussing on Rupert Murdoch’s media empire, its newspaper monopoly in the UK and Australia and its growth as an analogue entrant into television in the UK and US. This is not simply in response to sensationalist recent coverage, but to the wealth of evidence of the undermining of media regulation uncovered by the Leveson Inquiry into the culture, practice and ethics of the press (Leveson 2012; Evans 2012; Murdoch 2012). I therefore examine convergence reviews from the realpolitik of the merger reviews which have created our media landscape, not the phoney wars of policy reviews (Collins 2010).

INTRODUCTION

Digital convergence between media has been predicted since the birth of the transistor and before (Shannon 1948). It was the subject of speculation during the era of the Minitel and Prestel, networks created commercially while the Internet was still an academic plaything. Queen Elizabeth sent her first email in 1973, on a visit to the Post Office Research Laboratory.

I choose the 1980s as my first example because digitisation was by then well understood technically, and beginning to be understood by policymakers (Kubicek et al. 1997). Earlier 1970s policy discussion had centred on computerisation and other scale effects in print journalism, leading to much greater concentration and such legislative responses as the 1973 Newspaper Preservation Act in the US (McChesney 1997), and provisions for newspaper mergers in the 1973 Fair Trading Act in the UK. Information sociology had made substantial progress in mapping the future policy horizon (Bell 1973; Minc and Nora 1978; Minc 1993), but this had not yet percolated into legislative policy making. Such mergers as took place were typically within one industry, such as the rapid expansion of newspaper empires owned by Rupert Murdoch, Conrad Black, and others of interest to current or former policing inquiries (Leveson 2012).

The UK high-point of this period was Murdoch’s acquisition of the world’s highest-selling tabloid Sunday newspaper, the News of the World, in 1969, and Times Newspapers in 1981 [with the active acquiescence of the new Prime Minister Margaret Thatcher] (Evans 2012).
the US, a much more active policy had been taken towards satellite telecommunications and
cable broadcasting, in both Nixon and Carter administrations, which promised more
competition and convergence in the 1980s (Hazlett and Bittlingmayer 2001).

1980s DIGITAL POLICY

The 1980s produced a great deal more discussion of the ‘digital revolution’ (sic), with the
development of first micro-computing then personal computing, as well as video gaming and
the analogue video cassette recorder’s wide adoption. In policy terms, it produced two seismic
shifts towards liberalisation in anticipation of convergence. These were the liberalisation of
landline telecoms together with the introduction of mobile telecoms, and the legislative
underpinning and regulatory sponsorship of cable and satellite broadcasting (Hazlett 1999).

In the US, the seismic event was the antitrust case against AT&T, which resulted in a
Modified Final Judgement in 1984, after which settlement Judge Harold Greene effectively
became the competition regulator for fixed line telecoms in the US. Note that the much-
maligned FCC had, in three Computer Inquiries in 1966-1980, prevented AT&T from
denying service to computing applications (Cannon 2003).

In the UK, it was the Baker Report of the Information Technology Advisory Panel to the
Cabinet Office which had resulted in the 1984 Cable and Satellite Broadcasting Act. This Act
aimed to ensure that digital (or analogue as it turned out) technology would be freely
available to entrepreneurs aiming to provide converged services to consumers. A cash crisis
induced by the same year’s Finance Act prevented much activity on this front throughout the
later 1980s, activity in which British Telecom only participated via cable franchises in
Westminster and Milton Keynes (Marsden 1997; Marsden 1998).

At the end of the 1980s, UK regulators found enormously flexible methods of encouraging
foreign investment, mainly from US ‘Baby Bell’ regional monopolies prevented by Judge
Greene from entering cable markets at home but allowed by the Cable Authority established
under the 1984 Act to establish ‘offshore’ trusts in Jersey and Guernsey to provide foreign
ownership by the back door (Marsden 1997). However, a much greater immediate regulatory
flexibility to allow foreign ownership was that of soon-to-be-deposed Prime Minister
Thatcher (she resigned on 28 November 1990) in allowing Rupert Murdoch to acquire a 50% stake in the merged British Sky Broadcasting satellite provider, by reversing his Luxembourg flag-of-convenience Sky Television into the f ailing UK British Satellite Broadcasting in
November 1990. This occurred over the dying body of the soon-to-be-abolished Independent
Broadcasting Authority (IBA), as the Broadcasting Act 1990 was being signed (Murdoch
2012).

Murdoch had been using Luxembourgeois frequencies just as CLT had for many years in its
various RTL radio-television broadcasts, now given freedom to legitimately compete under
the Television Without Frontiers Directive (EC/87/552). Bertelsmann of Gutersloh in
Germany was soon to join Murdoch atop his rocky legal fortress sandwiched between
Belgium, France and Germany (Collins 1993). Murdoch had completed his digitalisation of
newspaper publishing via his move of all titles to union-free Wapping in 1986, which
prompted all other London newspapers to almost immediately abandon Fleet Street for
warehouses or office blocks in East London (or Farringdon or High Street Kensington).

Murdoch’s cross-ownership of television stations and newspapers, fiercely resisted by the
IBA throughout the previous 25 years, was permitted by the nice legal fictions of his non-
control of Sky and its non-UK basis (its satellite slots did indeed remain Luxembourger until
after the 1996 Broadcasting Act). He was also able to enter the US television market through
the sponsorship of the Republican FCC in the late 1980s, creating the Fox network as a fourth
rival to the three main commercial networks, acquiring Twentieth Century Fox film studios,
newspapers such as The Village Voice (somewhat by accident) and the New York Daily
News, and Harper Collins publishers. He was required to become a US citizen and relinquish
his Australian nationality to own the Fox network stations.
In both BSkyB and Fox, these plucky upstarts would in the early 1990s rise to prominence via the purchase of exclusive broadcasting rights to football (soccer) in the UK, and football (grid iron) in the US, as well as the animation series *The Simpsons*. In this, he was following cable entrepreneur Ted Turner who had purchased a satellite and cable TV station, a failing movie studio, a baseball team, and started the Cable News Network (Shawcross 1993). Both had their extraordinary expansion financed by the legendary ‘junk bond king’ and convicted felon Michael Milken (Bruck 1989). Milken’s conviction aside, cable television deregulation caused so much consumer angst that one of the last acts of the 1990-2 Congress was to re-regulate rates in 1992.

**1990s CONVERGENCE FRENZY**

The 1990s convergence frenzy was altogether more structured and deliberate. In 1992, Bill Clinton had won election partly on his ‘vision thing’ with Al Gore of an ‘Information Superhighway’ that would transform economy and society via a single pipe carrying all media (McChesney 1997). This led, after three epic years of corporate lobbying [1993-5], to the much-lobbied Telecommunications Deregulation (sic) Act 1996, which let those ‘Baby Bell’ monopolies compete with, and eventually swallow whole, the long distance and cellular companies AT&T and MCI. The competitive provisions in the Act to permit local telecoms competition were gradually dismembered by the courts and astute Baby Bell lobbying of both Clinton and Bush Junior FCCs, until opponents of their takeover of the entire communications market were forced to rebrand the mediaeval notion of ‘common carriage’ as ‘network neutrality’ in 2003 (Wu 2003; Wu 2010). Apart from weak network neutrality provisions in the various mergers that created a duopoly of AT&T and Verizon across Internet service, local, long distance and cellular service until 2011, telecoms has finally been deregulated leaving the predicted monopoly. Indeed, television stations such as NBC got in on the act in merging with Universal, as did Comcast cable provider (Crawford 2011).

UK response to the frenzied US lobbying of 1993-5 was the lobbying by domestic media owners seeking deregulation, without which they claimed they would not be able to compete with Murdoch and other foreign media owners whose road to ‘digital convergence’, meaning cross-platform monopoly, was further advanced than their own (Marsden 1997; Marsden 1998; Marsden 1999). In particular, they wished to purchase domestic Channel 3 (ITV) regional monopolies to accompany their regional newspaper monopolies and national newspapers (a competitive market).

Murdoch’s price-cutting war on national newspapers in 1993 had a salutary effect on competitors. In response, government offered many but not all of the concessions that newspaper owners requested in the 1996 Broadcasting Act, yet were outbid by the ferociously reformist Blair New Labour project, whose amendments would have granted all newspapers except News Corporation carte blanche to buy into terrestrial TV (Marsden 1998). Blair’s project had also conducted its own concurrent convergence review, and decided to have a mega-merger of five existing communications regulators (Collins and Murroni 1996). This eventually resulted in the 2003 Communications Act and the formation of Ofcom. [Note: through mergers regional ITV rapidly became a single national channel from 1994 onwards, though Murdoch was eventually prevented from acquiring a significant stake in both ITV and Manchester United football club by the competition authorities in the late 1990s].

1996 saw the biggest policy convergence review of them all. The European Commission instructed KPMG to produce a convergence report, which led to the liberalisation of the communications market in several stages. Its own Convergence Green Paper of 1997 urged as much generic ex post anti-trust regulation as possible, in contrast to prior regulation and licensing which had been the common approach (Marsden 2000a; Marsden 2000b). This report was concurrent with the mildly deregulatory revision of the Television Without Frontiers Directive in 1997. It led to the wider liberalisation of European telecommunications in a series of 1998 Directives, then the 2002 Regulatory Framework (of five Directives and a Decision), and its 2009 revision (Marsden 2012). We’re all converging now, apparently.
2000s: HOW SOON IS NOW?

By the last decade, it became difficult to imagine what further deregulation could be needed, at least in the United States. Remarkably little collateral damage was done to ‘convergence policy’ by the Internet bubble’s bursting in 2000-2. This is in part because the enormous pain caused to most start-up companies also led to a later increase in concentration in the Internet access market. The competition designed to be introduced in the 1998 and 2002 reforms withered away by mid-decade. What became clear was that the convergence phenomenon had accompanied a deregulatory zeal across all network industries in the last quarter of the twentieth century, a zeal which extended across all regulatory sectors by the start of this millennium, and continues as a ghostly echo of excess even five years into the Long Depression caused by the ludicrous and criminal activities of a cabal of investment bankers in the first decade of the millennium.

Yet the convergence phenomenon was no end of history, it really is happening. No matter that many of the convergent devices are made in the single giant Chinese labour camp of Foxconn, convergence is occurring. In fact, it was clear that extraordinary innovation occurred in the five year period to the end of 1999, when application, content and service providers were using an open and rapidly growing Internet market to innovate without permission. The rise of online social networks, Google’s many-headed ventures, and online gaming, as well as smartphones and the Internet of Things, are fundamental changes to media consumption, though substitution is less the pattern than addition. We Tweet and text as we view, always consuming, with radio and texting (which is the modern form of telegraphy) as revenue-generating as they were fifty years ago – despite the electronic blizzard of choices (IDATE 2012).

The market that has emerged is very concentrated, though not as much so as the industries it is both bolstering and propping up. Newspapers, cinematic production and traditional analogue music publishing are in long-term revenue decline, though online publication and music publishing have provided a far wider consumer choice than before. Broadcasting appears poised on the edge of an unknown future, with much advertising revenue leaching onto the Internet and even Facebook, a great deal of revenue added by telecoms vote-in participation, yet as much consumer consumption measured in conventional terms as ever before.

CONCLUSION: DIGITAL PRESERVATION, CONSERVATISM, PROTECTIONISM, LIBERALISATION?

Convergence policy questions now boil down to preservation, conservation, protectionism and liberalisation, rather than competition. Legislation both promulgated and proposed is devoted to preserving analogue privileges, some merited by public good provision, some examples of shocking regulatory capture by lobbyists. In the former category, one can place the maintenance of public service broadcasting, notably radio and educational programming. It is arguable that the populist elements of some broadcasters, notably RAI in Italy but by no means excluding the BBC in the UK, have a disproportionate share of a lump sum settlement awarded to an increasingly sclerotic analogue beast, from whose maw the digital public services should be liberated.

In the latter category of capture I place the copyright industries’ continued self-aware self-preservation via legislation, both in communications specific laws such as the UK Digital Economy Act 2009 and the Audio Visual Media Services Directive 2007 (Marsden 2012), as well as a web of more general intellectual property excessive special pleading in trade agreements at regional and global level, notably in the Anti Counterfeiting Trade Agreement and the Pacific Free Trade Agreement. This brings me to conservatism.

The Leveson inquiry’s second part (it is a three-course feast) focussed on pre-digital deals between News Corporation and various governments (Leveson 2012), notably regarding the mergers in 1969 (News of the World), 1981 (Times Newspapers), 1990 (BSB) and finally, the
digital 2012 (BSkyB). While it produced amnesia in Murdoch himself (Murdoch 2012), Evans and others were more forthcoming in their contradiction of his evidence (Evans 2012). What it reveals is that political interest in media coverage and therefore ownership was of vastly greater importance than any digital reviews. The instinct towards the protection of their friends in the media was evidently strong in politicians, and a reshuffling of the analogue deckchairs was paramount, rather than Schumpeterian creative destruction (Noam 2000). This phenomenon continues into copyright industries and intellectual property owners more broadly than the media, notably with promotion of such regressive laws as SOPA, ACTA, to protect ‘our industries’ – not Schumpeterian creative destruction (where are the votes in that?), and of no help to Skype, or Peer-to-Peer. It will be fascinating to see digital generation voter response to the Pirate Party in upcoming 2014 European Parliament elections.

Protectionism is rife in digital convergence reviews outside the United States: Internet companies are seen as American as well as foreign as well as invasive. Hundreds of digital channels demand millions of hours of content, much of which is American retransmitted imports, whose marginal reproduction costs for export make local equivalents uncompetitive. Even inside the United States, Internet content is seen as parasitical of the established copyright industries. Digital consumers appear less concerned than policymakers by the deluge of digital data, and the YouTube-Facebook generation needs protection from its own over-optimistic view of commercial actors’ treatment of their sensitive personal data, as well as a continued subsidy for the market-leading creation of quality public service content. It is notable that the BBC, Channel4 and other public service broadcasters appear closer to the curve of digital convergence than politicians, and are generally better supported by the citizen.

Policy reviews have been shown in this article to be occasions for regulatory capture, and for reshuffling of the analogue deckchairs. Legislation which follows is typically designed to permit greater consolidation of local actors, via media ownership reform – meaning concentration – to prevent the Google-isation of every digital channel. Legislative changes also permit mobile cartels to expand into new technologies, with minimal nods towards market entry by for instance secondary trading of spectrum (likely to be a key feature of any UK Communications Bill in 2013/14). The real action takes place in merger reviews, which are normally predicated on market strategy and political reaction, though the News Corporation/Sky Television merger failure in 2011-12 may demonstrate a more thorough policy review. Schumpeterian creative destruction is postponed, perhaps permanently, by political insider trading.

As regards liberalisation, the neo-Chicago School approach argues that there is no need for competition regulation in a competitive market, which is claimed to always swing towards equilibrium, despite all empirical evidence to the contrary. This leads to a clear playing field for Microsoft and the new monopolists – Apple, Amazon, Google, Facebook – by contrast with the old monopolists in Europe (and Australia?).

Big questions remain for competition policy and market definition: if we don’t raise our game on the net size, we let the big fish out, both old monopolists and new digital giants. Market definition in convergence erodes regulators’ ability to catch monopolizing tendencies by both their old allies and the new American giants. This is not a particularly novel insight, and in 2000 I wrote that regulators were abandoning media ownership control in favour of an industrial policy that encouraged ever greater concentration (Marsden 2000b). That remains my view, and the historical argument in this article reinforces it, as does much of the Leveson evidence. Convergence reviews are a gauze designed to camouflage capture of political regulators by incumbent interests.
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The final report of the Convergence Review put more flesh on the bones of the interim report released last December. The majority reaction of key stakeholders has been primarily one of open hostility. It is argued that in a time of deregulated rule-making for media diversity the CR authors have not taken an entirely expedient approach to critical issues of media ownership and control. The suggestion is that final report is in fact a curious mixture of innovative and lower risk measures calculated to progress the convergence policy agenda up to a certain point. Yet, media commentators, including the author, have expressed their 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.

INTRODUCTION

When the Convergence Review (CR) committee’s interim report was released in December 2011 it met with mixed reviews. The general tone of media commentariat criticism was that the interim report was rather too ambitious, wide in scope, but lacking in the necessary level of detail for a report of such high consequence (Jackson 2011; White 2011). The committee’s final report, however, has met with open hostility by the majority of media stakeholders including the powerful Free-To-Air television lobby, newspaper publishers, subscription TV, Internet and telecommunications groups.

The policy inquiry and development process leading up to the release of the interim, and then final reports, has been in many respects typical of a large review in the media and communications sector - as judged by the range of consultations, feedback and phasing processes. First we had a background paper and draft and final terms of reference, a framing paper, an emerging issues paper and then specific key topic papers: ‘Media diversity, competition and market structure’; ‘Layering, licensing and regulation’; ‘Spectrum allocation and management’; ‘Australian and local content’; and ‘Community standards’. In short, the process has been hard working and consultative. Why, then, all the tension and hostility? Perhaps the industry opposition can be construed as evidence that the CR authors are pressing all the right public policy buttons? Or, is this actually a no-win situation, where making market fettering rules in the public interest, in a context of rapidly changing industries, was never going to be warmly embraced?

THE FINAL REPORT

The final report emerged on schedule at the end of April, and as expected, it basically put flesh on the bones of the recommendations mooted in the CR interim review report handed down in December 2011.

The report lays bare its rationale in the early pages and this is signposted through the question-headings: ‘What regulation should be removed? and ‘What regulation is still
necessary?’ These questions belie the intentions and modus operandi of the reviewers’ investigations. One part rhetoric and two parts pragmatism, the CR authors have not taken an entirely expedient approach to these critical issues of media ownership and control. They acknowledge “serious concern in submissions from many individuals that any relaxation of existing controls over media ownership would create a more concentrated media, with a consequent reduction in the range of news and commentary” (DBCDE 2012b: 5.) The authors draw on consumer sentiment surveys by the ACMA’s Digital Australians research report to highlight the point that Australians can spot differences in traditional and new media distribution. However, for Australian audiences the authors note, the ‘most important distinction’ is about content. There is no specific mention by CR authors that these issues are two sides of the same coin – although it can be inferred from much of their discussions, for example in relation to competition and content diversity.

Similarly, the CR authors’ argument that rules based on the fading concept of a ‘broadcasting service’ as being increasingly ineffective, recognizes these concerns. Their recommended “Content Service Enterprises” (or CSE) framework is in fact a fresh approach that attempts to rein in the media corporations “that the community expects to be regulated.”

In the section ‘Has the Internet changed everything?’ the report acknowledges that the largest telco and Internet operators have predictably protected their own interests by arguing for “removing all justification for any ongoing regulation of media ownership other than general competition law.”

The CR authors express the news source diversity issue this way:

First, in the online environment, a small number of media organisations remain by far the most influential sources of news and commentary. While there is a rich seam of information available on the Internet from a multitude of sources, when it comes to consumption patterns for news and commentary little has changed. Many Australians are accessing news and commentary through new platforms like social media or over new devices such as smartphones and tablets—but they are getting their news from the same news gathering organisations.

Second, even if the current level of diversity is adequate, this could change. For example:

- Large media organisations and technology companies could become even more influential across platforms and control access to news and commentary.
- New media enterprises could become the new gatekeepers, exercising enormous influence through control over content delivered through popular platforms, social networks or devices (DBCDE 2012b: 6).

These are critical arguments to make, and although the report authors have clearly sidestepped many of these concerns completely in their recommendations by excluding large offshore Internet corporations, they have at least articulated what the issues are, and put them on the table as key concerns for future governments.

The CR final report recommendations are a conscious ‘shift towards principles-based legislation to ensure the policy framework can respond to the future challenges of convergence’ (DBCDE 2012b: xii). The review team has envisioned a bigger role for an independent regulator (i.e: independent from government and industry), and a ‘principles-based approach would provide increased transparency for industry and users’ (Ibid). This recommendation is to be greatly admired if it ultimately reaches the implementation stage. It would certainly represent a healthy shift from the current cosy relations with both government and industry to a more independent regulatory supervision framework. Significantly, it would also require an orientation that fosters expert regulatory decision-making that is genuinely independent from political pressures.

As earmarked in the interim report, the central feature of the final report is the recommendation that the government replaces the existing regulator, the Australian Communications and Media Authority (ACMA), with a new, and as yet unnamed regulator,
that would complement the functioning of the competition regulator, the Australian Competition and Consumer Commission (ACCC).

The CR authors have recommended the decoupling of owning spectrum and holding a licence: a radical scenario resulting in arrangements whereby holding a licence will no longer be a precondition for providing a content service. The rationale for this measure being a view that regulatory obligations arising from a content service ought to be imposed consistently, and irrespective of the delivery platform. Despite the claim this is, overall, a deregulatory set of measures.

Perhaps most innovatively though, the reviewers recommend the creation of a new legislative structure for industry providers known as a “content service enterprises” (or CSEs), which would be a “platform-neutral regulatory framework”. The idea is that these CSEs would be defined according to the scale, nature of operations and the entity involved in providing the content services. CSEs would then be regulated for content standards, media diversity and Australian content. Obligations would be differentiated depending on the actual size of the entity supplying there service: for example, major ‘branded’ CSEs would have different obligations than smaller, less well known CSEs. In broad terms this might be seen as equating to the treatment of term ‘influence’ in existing laws.

The review committee has recommended abolishing the distinction between spectrum allocated for broadcasting, and for spectrum used for other purposes. Their argument is that market-based pricing mechanisms should replace existing broadcasting licence fees.

**MEDIA OWNERSHIP DIVERSITY**

The recommendations of most consequence for media pluralism are those measures directed at diversity of voice and opinion: the removal of the remaining (post 2007), media ownership, including cross media limits:

- 75% audience reach rule
- 2 out of 3 rule
- 2 to a market rule, and
- 1 to a market rule.

The CR committee argues that these would then be replacing with new rules including:

- a revised number of voices (or ‘media owners’) rule for local markets; and
- the introduction of a public interest test (to be implemented by the Committee's proposed new regulator) for significant merger or acquisition transactions (the Committee refers to the UK position as support for this proposal). ([DBCDE 2012b: pp. xv-xvi](#)).

The obvious criticism to be made about these deregulatory steps is that while the report has recommended innovative ways of shoring up Australian content into the future, the benefits for the production sector are tarnished by the costs of recommendations that may well result in unrestrained media concentration.

The mooted ‘minimum number of owners’ rule would apply to all CSEs that provide news and commentary services in a local market. The CR authors have responded to the reality that content is being delivered through technologies that are not limited to a specific geographic area, and under these conditions news at a local level is simultaneously very important, and an endangered species. They openly acknowledge that local news emerged as an important component in their consultations, noting that ‘in some markets there will still be influential news and commentary services that are provided by media operators that do not meet the threshold for a content service enterprise.’ As a result they recommend that the new regulator will be empowered to make judgment calls in relation to the number of media owners on the basis that:
the media operator has editorial control over its news and commentary service

the number of users for that 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.

The reviewers argue that ‘the regulator should have the power to obtain information from content service enterprises and content service providers. This could include information in relation to circulation and/or audience reach when requested’ (DBCDE 2012b: 23).

The application of the new ‘minimum number of owners’ rule would be a discretionary matter for the regulator. Since larger nationwide media groups are to be included, they would be caught in these local assessments. On the other hand, smaller operators currently included in the 4/5 ownership rule may now fall outside its scope. The reviewers argue that the new minimum number of owners rule will provide flexibility to include ‘influential news and commentary services’ that are currently not within the thresholds but may become ‘locally significant’ in a market over time. These kinds of specific geographic evaluations that take into account existing media groups and their programming are of course very important and recognise that ‘influential’ media is not a one-size fits all calculation. The reviewers make the point that since the number of media groups in some markets may already be below the ‘minimum number of owners’ rule, the proposed scheme would aim to prevent any further concentration.

However, uncertainty remains concerning the factors that the regulator would take into account beyond that the reviewers’ suggestion that the 4/5 rule would be the starting point, and there would be no further concentration in markets already below these thresholds. Would, for example, news websites affiliated to a news media group’s main masthead brand (a newspaper or TV or Radio) be calculated as an extension of that outlet’s audience reach? For these rules to be meaningful they would need to be make such cumulative assessments. Or, would an online only news site linked to a major brand – e.g. Fairfax Media’s Brisbane Times – be added to any national assessment of the total audience for Fairfax Media? (This is also a critical factor that should be taken into account in the assessment of merger situations using the proposed public interest test). Questions in relation to genre are also relevant. How for instance would a future regulator view an influential blogger who also had a high rating television or radio programming? Would that be taken into account in smaller regional and larger metropolitan markets?

The discussion in the report regarding determining local markets needs some unpacking as well. The new regulator would be compiling a list of geographic markets and these will no longer be based on commercial radio licence areas. The way that boundaries are drawn will be highly consequential for media groups’ new and existing media assets, and therefore the level of media concentration in particular markets. The regulator will decide the ‘minimum number of owners’ in metro and regional areas, and these will be subject to periodic review using public consultation processes (DBCDE 2012b: 27).

The introduction of a public benefit exemption from quantitative media ownership limits is canvassed in the CR final report. In smaller regional markets, the CR authors argue that consolidation should be allowed when the transaction would result in a public benefit in the local market. The relevant criteria that the proposed regulator would take into account include whether or not:

- the transaction would lead to a substantial increase in the volume of local news, advertising, current affairs and local information specifically relevant to the local market
- local news specifically relevant to the geographic area contained in the market would be available across more platforms
- it could mean the withdrawal of a service from a market (DBCDE, 2012b: 22).
A concern arises that these criteria for activating the public benefit exemption may actually undermine media diversity objectives. A ‘substantial increase’ in the volume of news content (and advertising and local information), and possibly across more platforms, could translate to less diversity in potential voices in a given market.

**A PROPOSED PUBLIC INTEREST TEST**

“The new communications regulator should have the ability to examine changes in control of content service enterprises 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” (DBCDE 2012b: XVI).

Undoubtedly one of the most controversial components of the report is the recommendation to introduce a public interest test. The reviewers recommend that a new test be introduced, when the remaining ownership limits are removed, (the ‘75 per cent audience reach’ rule, the ‘2 out of 3’ rule, the ‘two-to-a-market’ rule and the ‘one-to-a-market’), and after the new ‘minimum number of owners’ rule takes effect.

This public interest test would be applied by the new regulator to situations of changes in control of content service enterprises of ‘national significance’. The intention of such a test, the reviewers argue, would be to maintain diversity at a national level and the new regulator would work cooperatively with the ACCC and it’s existing mergers and acquisitions powers. The reviewers argue:

The increase in the number of media outlets with a national reach means that a media-specific regulatory measure is needed to ensure appropriate diversity of owners. The measure would maintain diversity at a national level. Current media diversity rules focus only on media platforms associated with local broadcasting licence areas. A public interest test should be developed to ensure that diversity considerations are taken into account in transactions where there are changes in control of content service enterprises of national significance. (DBCDE 2012b: 23)

This kind of public interest test mechanism has been in the wings for over a decade. The Productivity Commission’s Report of 2000 recommended a media-specific public interest test to be inserted into existing competition laws, that would replace cross and foreign ownership limits:

The Trade Practices Act 1974 should be amended immediately to include a media-specific public interest test which would apply to all proposed media mergers. The test would be administered by the Australian Competition and Consumer Commission, and require that the commission seek ABA input on social, cultural and political dimensions of the public interest. (PC 2000: Rec. 10.3, p. 366)

The PC’s report recommended that the test should be introduced immediately without waiting for repeal of ownership and control limits, and that the new public interest test would apply across traditional media, telecommunications and Internet businesses (Ibid.). There was a consensus that general competition policy laws, with their narrowly constructed objects, were ill-suited to assessing the full implications of media concentration for audiences in particular locales. In this regard, the CR report notes ‘it would be separate test that complements rather than duplicates the ACCC’s existing mergers and acquisitions powers’ (DBCDE 2012b: 24).

Several submitters to the CR interim report supported a public interest test at a national level (this included the Screen Producer’s Association of Australia, the Communications Law Centre, and my own department at the University of Sydney.)

However, our argument was qualified in some important respects. Firstly, we argued that there was a clear need to broaden the scope of the existing cross-media rules to apply to major online news media sources, and if it did so, the government would be making public policy that responsibly responds to the changing characteristics of influential media.
Secondly, we made the point that exposure diversity data demonstrates how Australians tend to choose news from within the pre-existing media ecosystem, and therefore there is a basic need to extend cross-media ownership regulations to highly trafficked online sites and services. Web and mobile news should be included in the existing ‘influential’ media platforms of television, radio and hard copy newspapers. This has become a recommendation in the final report. Decisions would be made according to which online news sites reached a specified threshold of traffic to popular sites. Comparative circulation and audience reach will also be taken into account in assessing the number of media owners in local market mergers, depending on the size of particular players in specific metro and regional markets.

So our argument was in favour of the extension of the cross-media rules to influential online news sites could be undertaken in conjunction with a media specific public interest test to disallow media mergers that are against the public interest on concentration of ownership (influence) criteria. We argued that the primary intention would be for an independent regulatory body to adjudicate on mergers which otherwise pass particular measures of exposure diversity. Popular online news media sites should be specifically included in such a public interest test. The assessments need to look at the cumulative audience reach of all news and current affairs across platforms and formats, including for instance ‘celebrity’ bloggers who also work for mainstream outlets. The concept of a rejuvenated approach to media diversity policy is being taken very seriously internationally. For example, the European Commission’s major pluralism study (from 2007) has developed a diagnostic monitoring tool for assessing the risks of media pluralism, taking into account the challenges of convergent new media (EC 2009a; EC 2009b).

A WATCHING BRIEF ON OFCOM’S PUBLIC INTEREST TEST

The UK’s media regulator Ofcom has had a public interest test process since the introduction of the UK’s Communications Act in 2003. However, as the recent News International/BSkyB political debacle indicates, the Ofcom public interest test has its own share of problems. These can be summed up in the observation that the Ofcom administered public interest test is not insulated from pressures from ruling political elites of the day. The CR reviewers expressly note in relation to the recommended communications regulator in Australia that it is ‘vital that the decision-making process is independent of government’ (DBCDE 2012b: 24). Whether this ‘independent’ model makes it off the drawing board remains to be seen, and will depend on whether the full-strength regulator itself, as currently recommended, is implemented.

So in thinking about the CR final report recommendations, it’s worth briefly considering on how the UK process for administering their public interest test has played out in this case.

A proposal by News International in 2010-11 to take full ownership (from 39% to 61%) of British Sky Broadcasting (BSkyB) was an event that concentrated the minds of the Cameron government and its regulatory agencies. The possibility of News owning a swath of the newspaper sector (currently approximately 37%), as well as a dominant position in the highly popular satellite broadcaster - in particular as Sky News channel has around 35% of the TV market (Financial Times 2011), and major online news sites, quite rightly set off alarms (Dwyer et al. 2011).

Jeremy Hunt, the UK’s culture secretary, under his role specified in the Enterprise Act, 2002, investigated News’ proposed acquisition of BSkyB. Hunt was required to decide whether he should refer the £8.3 billion merger to the EU Competition Commission to see whether the deal would have an adverse impact on news markets (with Ofcom having already formed this view). Opponents of the deal argued that News’ influence on the UK media landscape would be too great it had full control of BSkyB and its £950 million cash flow. Initially Hunt chose to not refer the merger to the Competition Commission as recommended by Ofcom, and released the latter agency’s report. Hunt’s intentions were apparently to allow the deal to proceed without even being considered by the Competition Commission, as required by the public interest (or ‘plurality test’) process for mergers (Financial Times 2011; Watson and Hickman 2012).
Questions were raised regarding whether his actions were in the public interest; Hunt decided to begin direct negotiations with News International. The Secretary of State’s European intervention notice for the public interest is concerned with the plurality of control of media enterprises, that is:

the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience” (Enterprise Act 2002: s.58(2c)(a)).

Ofcom’s direct concerns centred on the provision of news programming. Inevitably, the potential cross-media combination of News Corporation’s and BSkyB’s news assets – the News International newspapers and Sky News were the focus of the regulator’s attention. Ofcom’s ‘invitation to comment’ document revealed the main factors it was required to consider in weighing up whether the deal would adversely affect the public interest. In essence, Ofcom’s core interest was focusing on the “need for sufficient media plurality in the functioning of a healthy and informed democratic society”.

To this end, Ofcom sought comment on the likely impact of the acquisition on:

- Content types
- Audiences
- Media platforms
- Control of media enterprises
- Future developments in the media landscape (Ofcom 2010).

Under the ‘media platforms’ category, Ofcom was specifically interested in the Internet platform in reviewing the implications of the proposed acquisition. The regulator noted that it would: “consider how future market developments, including the convergence of broadcast, print and Internet media may affect consumers consumption of relevant media and the current levels of media plurality”. In broad terms the purpose of the Ofcom plurality test is to assess: “how the proposed acquisition may affect the level of plurality of persons with control of the media enterprises serving the relevant audiences” (Ofcom 2010: 1.10 and 1.12).

It has to be said that these factors of concern to Ofcom are more comprehensive than the criteria identified as by the CR reviewers as significant to public interest assessments: ‘Whether the combined audience of a single service is above a threshold figure to be determined by the regulator’; and, ‘whether the content services enterprise has controlling interest on one or more prominent media operations on different platforms’ (DBCDE 2012b: 24).

In early March 2011 Hunt approved News International’s takeover of BSkyB, despite being ‘very aware’ of criticisms of the threat to media plurality, and peoples’ ‘suspicions of the motives of politicians’ (Press Association 2011). The deal had been, in the end, referred to the Competition Commission in Brussels, as had been Ofcom’s preference, and subsequently given the green light. In evidence to the Leveson Inquiry it transpired that Jeremy Hunt sent a text to James Murdoch, BSkyB’s chairman, saying “Great and Congrats on Brussels, just Ofcom to go!” (Leveson Inquiry, 2012, p. 35). The main features of the takeover in the deal negotiated by News International were:

- The board of Sky News would have a non-executive, independent chairman and a majority of non-executive, independent directors;
- News proposed that shares in Sky News be distributed among existing shareholders, with Mr Murdoch's company maintaining its 39% holding.
- News would not be allowed to increase its shareholding without the permission of the culture secretary for 10 years.
- News would provide funding in the form of ‘a substantial revenue stream’ to Sky News for 10 years.
Media academic Steven Barnett assessed the public interest risk: “This deal raises profound questions over what will happen to the ownership of Sky News in the longer term - who will make senior editorial appointments and for how long a so-called separation of one channel from a corporate parent can be sustained”. Other commentators feared it would irreversibly change the UK news media landscape for the worse, creating the largest news organization in the country (BBC 2011).

In the event the fate of the deal was determined, at least in the short term, by the rapidly changing fortunes of News following its decision to close the 168 year old News of the World, and the related public furore arising from the phone hacking scandal. On 14 July 2011 News Corporation’s 13 month campaign to fully own BSkyB came to an end. In order to pre-empt a reversal of the decision that was almost in the bag, and in an effort to stem a hemorrhaging share price, News had made a calculated decision to withdraw its bid. Some commentators speculated that the bid will be made at a later date, after hostile public opinion has subsided (Shoebridge 2011). After phone-hacking and Leveson, such an outcome now seems remote. As evidence adduced in the Leveson inquiry indicates, the Culture Secretary was in charge of a seriously corrupted ‘public interest test’ process (Leveson 2012).

COMPETITION AND CONTENT DIVERSITY

It is recommended by the CR authors that the new regulatory body replacing the ACMA would have additional competition powers, in consultation with the ACCC, to issue directions and make rules regarding for example, in relation to questions of content and market power. We can speculate that in practice these new powers will be similar to the role that the ACCC has recently taken in the context of the $1.9 million Foxtel-Austar merger, where detailed undertakings require some programming (in all genres) to be made available on a non-exclusive basis to emerging IPTV providers using the NBN (Durie and Kitney 2012).

This much deferred decision by the ACCC regarding the Foxtel-Austar merger was fairly widely reported. The main sticking points in gaining the ACCC’s approval related to the position such a merger would put Telstra (50% owner of Foxtel) in for the emerging IPTV market. Competitors complained the undertakings made to the ACCC allowed Telstra and Foxtel ‘too much freedom’ in this market (Durie 2012).

So in a manner not inconsistent with the Foxtel-Austar investigation, the CR final report recommends that the new regulatory ‘should be empowered to instigate and conduct market investigations where potential content-related competition issues are identified’. In addition, the regulator, the CR authors suggest, ‘should have flexible rule-making powers that can be exercised to promote fair and effective competition in content markets’ (DBCDE 2012b: xvii). Again, as with the proposed administration of a public interest test, the authors argue that the regulator should work in a complementary way with the ACCC and the manner in which they are able to use powers to deal with anti-competitive market behaviour.

‘UNRULY’ STAKEHOLDERS

The CR inquiry received over 80 submissions in response to the interim report, and these were digested for the final report. Some organisations led coordinated member responses, for example, by Avaaz (27790 submissions) and the Friends of the ABC (315 submissions).

There is insufficient space here to represent all the arguments, so I will consider a brief selection of what I consider were the most difficult, and in a sense ‘unruly’ submissions for the CR inquiry process to channel in any consensual kind of way (DBCDE 2012a: submissions). Deregulatory discourses are usually at their strongest in this group of actors wishing to expand their media businesses: they signpost the heartland of neoliberal rubrics concerning governance, commercial media and audience relations (Berkman Center 2010). Supporting this view, Curran in a retrospective study on past new media technologies (cable TV, local community TV, the dotcom bubble and interactive digital television) has noted that
“the hyping of new technologies sometimes took a form that served a neoliberal agenda, and originated from sources that favoured media deregulation”. His view of the role of the news media in this connection is also relevant to the reporting of the CR’s final report: “By responding often uncritically to this hype, the press rendered more acceptable the partial deregulation of television during the 1990s and early 2000s, and the prospect of more far-reaching deregulation in the future (Curran 2010: 32-33).

A group submission led by the Australian Interactive Media Industry Association (AIMIA), representing a coalition of ‘key stakeholders in the Australian Internet economy’ (Google, Facebook, Yahoo!, ninemsn and Telstra), are very concerned that the Review Committee are ‘proposing a regulatory model that will not support the continued growth and contribution of the digital economy to Australia’s economic growth and social well-being’ (DBCDE 2012b: submission 1). They urged the CR Committee to reconsider their approach for the final report. Their view is that the regulatory measures for content and infrastructure as proposed in the interim report would stifle the otherwise strong growth potential of the NBN in particular (DBCDE 2012a: AIMIA submission, p.5). The group submission cites a similar policy review process undertaken in Canada, where the regulator ‘chose not to extend regulatory obligations to emerging services’ because of the unintended consequences this may lead to. In essence, the joint submitters are apprehensive about adverse impacts on online service providers and criticise the reviewers for a lack of empirical grasp on ‘what emerging services will likely be successful in Australia’ (DBCDE 2012a: AIMIA submission, p.6).

Individual submissions by this group, for example by Facebook and Google, argue their own specific business cases. Facebook took the opportunity to make some general critical observations regarding the need to recognize the societal and economic benefits of social media. In what I read as emblematic of the ‘new media’ response to convergence rule-making, Facebook caution against regulatory interventions in a ‘fragile Internet ecosystem’, which they argue may stifle innovation. In particular, Facebook are very critical of the CR support for Australian content and information and opinion diversity and community standards (DBCDE 2012a: Facebook submission, pp.1-3). More specifically, Facebook argue that ‘considerable refinement’ of the recommendations is required for a new regulator, the notion of ‘content services enterprises’, Australian content and content standards (Ibid., p.5).

Again, these criticisms are primarily concerned with the threat Facebook sees to their bottom line, and the impact on innovation in a digital economy context as outlined in the Government’s National Digital Economy Strategy. Facebook quote the Strategy’s vision statement which defines the digital economy as:

the global network of economic and social activities that are enabled by information and communications technologies, such as the Internet, mobile and sensor networks. (see http://www.nbn.gov.au/ndes_site/ndes_section2-web-2.html) (Ibid., p.5).

Google, in their submission point out that the CR represented a ‘crucial opportunity to develop a policy framework capable of promoting a diverse, innovative and efficient communications and media sector for Australia’ (DBCDE 2012a: Google submission, p. 1).

They argue that they thought the earlier ‘Framing’ and ‘Emerging Issues’ papers’ governing principles and approach were on the right track, and in their response to the interim report they claim to be ‘surprised and disappointed’ that the committee has chosen go against those principles, and impose ‘unprecedented and unwarranted regulation on the online sector’ (DBCDE 2012a: Google submission, p. 1).

It’s worth noting that the CR final report invokes the ACMA’s ‘Enduring Concepts’ paper (a companion to their earlier ‘Broken Concepts’ report, (ACMA 2011a and 2011b)) to discuss the enduring regulatory concerns that will need to continue to be applied in a digital IP/‘layered’ model of media and communications service delivery and regulation (ACMA 2011b: 22). Yet, some of these ‘enduring concepts’ are trenchantly contested by submitters.

Google conclude their submission by arguing ‘the proposed regime would lead to greatly increased government regulation of the new media sector without any expressed in principle justification. We are concerned that if the recommendations in the interim report were
implemented Australia would become a less attractive place for Internet industries to invest and grow (DBCDE 2012a: Submission 17).

Many of the comments made by News Corporation in their submission relate to protecting their existing investments in traditional media, or a desire for further expansion (e.g. a sixth commercial television network). But they also express views about the perceived impact of the Committee’s recommendations on new media investments. They argue ‘the digital economy is producing greater plurality of voices than at any time in history and any additional regulations are unnecessary and inconsistence with the Committee’s principle of regulatory forbearance’. They further suggest that a minimum number of owners rule and a public interest test would ‘add nothing’ to existing ACCC powers, and would be ‘entirely subjective and impossibly imprecise’ (DBCDE 2012a: Submission 2).

The Australian Mobile Telecommunications Association (AMTA), the peak body for the mobile telecommunications industry, in their submission to the CR, wished to make the point that ‘the regulatory framework must promote and encourage continued innovation in convergent technologies as well as ongoing investment in infrastructure, including spectrum for mobile broadband’ (DBCDE 2012a: AMTA, p. 3). AMTA are unequivocally deregulatory in their comments regarding diversity of voice, and see the CR recommendations are extending ‘the scope of existing diversity of ownership regulation to emerging markets that are already highly diverse compared with legacy broadcasting and markets’. Furthermore, they argue that the consequences of their implementation would be to: ‘create regulatory uncertainty for many transactions which pose no threat to diversity, restricting investment and undermining the productive dynamism of the digital content market’ (DBCDE 2012a: 8).

CONCLUSION

The CR final report is a curious mixture of innovative and lower risk (in terms of paths of least resistance) measures calculated to progress the convergence policy agenda up to a certain point. The review authors have shrewdly included the 15 largest Australian-owned media groups in the proposed arrangements, but left out the major off-shore groups (Apple, Google, Facebook) and local titan Telstra, that would be more difficult to include in the new content and ownership rules. The opposition communications spokesman Malcolm Turnbull responded at the time of release of the final report that the conservative side of politics would block the CR recommendations if elected in 2013 (or before). Their view was that the proposed new public interest test was likely to be undermined by ‘endless political pressure’ (Dodson 2012).

Indeed, many media commentators have expressed their doubts about the ability of these proposed measures to provide the kind of certainty required, let alone the promised diversity of voices, in Australia’s already highly concentrated media.

In light of this pessimism it’s worth remembering that there is an enduring rationale behind continuing numerical limits on the number of media owners, and transparent, easy for all to understand rules that prohibit further concentration. These rules can at the same time, as the CR has recommended, accompany the development of measures taking into account the increasingly popular online news media. Further concentration of media ownership allows powerful vested interests to dominant public debate across media platforms whenever it is in their interests to do so.

While there is clear evidence of dramatic changes underway in the distribution of traditional news and information though socially-networked media, including via Facebook, Twitter, and major online news aggregators (see Fig.1.4 in DBCDE 2012b: 27), the take-away message from a range of research, including research informing the CR, is that these popular new media channels are redistributing a great deal of existing branded content. In this context while the observation made by the CR authors that “Australians now use content from around the world” is true, it’s also in many ways, beside the point. What really counts is diverse, accessible, fair and accurate local and national news to inform audience decisions about life in
Australia: for retail decisions by consumers, for business decisions, and for political decisions by citizens, especially on polling day.

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CONVERGENCE AND MEDIA OWNERSHIP
THE MERITS OF REPEALING THE ‘2 OUT OF 3 RULE’ AND ADOPTING A NATIONAL PUBLIC INTEREST TEST

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The convergence of media and communications technologies has radically altered the nature of content-related competition in the media sector and undermined the effectiveness of the present regulatory framework. One of the issues identified for consideration in the Convergence Review - Emerging Issues Paper of July 2011 was whether cross-media ownership rules are still necessary in a multi-platform environment. The purpose of the present paper is to examine the continuing relevance of the ‘2 out of 3’ rule in the Broadcasting Services Act 1992 (Cth) in the context of the recommendations outlined in the Convergence Review - Final Report of April 2012. The article seeks to evaluate the extent to which the recommended reforms would serve to enhance regulatory parity and support media diversity within an increasingly converged media landscape.

INTRODUCTION

The radical evolution of media and communications technologies has served to dissolve the traditional boundaries between different categories of media service and altered the nature of content-related competition in the media sector. In such an environment of converging media technologies, markets and services, an issue of significance is the continuing relevance of the ‘2 out of 3’ rule in s 61AEA of the Broadcasting Services Act 1992 (Cth) (‘BSA’). This rule applies to the licensing of commercial radio and television services and operates to prohibit the acquisition of more than 2 out of 3 types of media operations (i.e. commercial radio, commercial television or an associated newspaper) in a specified radio licence area. The Convergence Review - Final Report (CRC 2012) recommends the repeal of this rule and the application of a public interest test to assess proposed changes in the control of content service enterprises of national significance. It is envisaged that the review, to be conducted by a new communications regulator, would complement the existing framework for mergers review under the Competition and Consumer Act 2010 (Cth) (‘CCA’). It is widely accepted that regulatory parity and media diversity are two critical objectives of communications law. The objective of this article is to evaluate the extent to which the above recommendations for reform would serve to enhance regulatory parity and strengthen media diversity within an increasingly converged media landscape.

The release of the April 2012 Final Report marks the end of a year of deliberation by the Convergence Review Committee. In April 2011, the Convergence Review –Framing Paper (CRC 2011a) introduced the topics to be addressed and sought feedback from stakeholders as to the principles that should underpin the new policy framework. In July 2011, following the consideration of 65 submissions, the Convergence Review - Emerging Issues Paper (CRC 2011b) stated that the object of the review was the formulation of ‘a new policy framework’ for federal communications law that addressed the convergence of media on older technologies, such as television, with the Internet.
For purposes of the present analysis, of particular interest are the five content-related competitions questions posed in the *Emerging Issues Paper*:

(a) In a multi-platform environment, are cross-media ownership rules still necessary to ensure a diverse media sector?

(b) Should cross-media provisions extend to cover new media services, such as IPTV and Internet-based media enterprises?

(c) To what extent do the current diversity rules impact on innovation in media and content services?

(d) Should cross-ownership rules be relaxed or removed in favour of a public interest test?

(e) Are the current merger provisions of the CCA sufficient to ensure media diversity in Australia? *(CRC 2011b)*

The objective of the present article is to apply the scholarly literature on regulatory parity and media diversity to examine the effectiveness of the recommended repeal of the ‘2 out of 3’ rule and the adoption of a national public interest test. In order to do so, the article will examine the merits of the existing provisions in the BSA and CCA, as well as the convergence law review discourse culminating in the April 2012 *Final Report*. The *Final Report* considers the nature of regulatory intervention in a variety of areas, including media ownership, media content standards, and Australian and local content.

The discussion in the present paper is confined to the recommendations relating to media ownership. The article begins in Part 1 by introducing the notion of convergence. Part 2 considers the existing laws, and Part 3 outlines the proposed reforms. In order to examine the merits of the recommendation it is necessary to consider the indicia for judging effective communications laws. Hence, Part 4 examines the theoretical framework and policy basis for laws in this area. Parts 5, 6 and 7 examine the amendments proposed by the Convergence Review Committee, and consider the extent to which the proposed reforms are likely to enhance regulatory parity and media diversity. Finally, Part 8 briefly considers the regulatory framework for electronic communications introduced in the European Union in 2003 and subsequently implemented in the United Kingdom. The EU and UK laws are widely regarded ‘best-practice’ in this area, and provide useful insights for reform and refinement of Australian communications laws *(ACMA 2011: 6)*.

1 THE NATURE OF CONVERGENCE

Convergence has been described as the coming together of one or more of the following: information technology (computing hardware and software used in conjunction with public communications networks), telecommunications (voice and data), broadcasting and other networked audio-visual services. The word was initially used to describe the dissolving of the clear boundaries between the telecommunications and information technology sectors *(Larouche 2003)*. It was subsequently used to describe the erasure of the clear boundaries between the telecommunications and broadcasting or electronic media sectors *(Walden 2003)*. Bar and Sandvig note that the Internet offers ‘a range of applications that once existed in different domains, governed by different policies,’ and presents new applications that ‘defy traditional classification’ *(Bar and Sandvig, 2000: 590)*. Similarly, Werbach notes that ‘[h]ermetically-sealed categories’ are foreign to the Internet *(Werbach 2002: 39-40)*.

In the *Convergence Review – Emerging Issues Paper*, it is noted that as nearly all platforms and devices in the convergent era are digital, they are able to converge to a common network that operates over a variety of infrastructure types such as mobile wireless, copper phone lines, satellite and optical fibre-based infrastructure *(CRC 2011b: 11)*. This allows users to access the Internet on their television or mobile phone, or watch television or listen to the radio on a personal computer. The Review noted that it is no longer ‘useful’ to look at broadcasting, radiocommunications and telecommunications as ‘separate and distinct industries with unique policy frameworks,’ and that a ‘more useful approach’ would be to
recognise market structures as consisting of a series of layers created by convergence (CRC 2011b:12).

The Australian Media and Communications Authority (‘ACMA’), in its July 2011 *Occasional Paper* entitled *Converged Legislative Frameworks – International Approaches*, introduces the concept of ‘legislative convergence’ as the coming together of communications and media legislation, under a single converged legislative framework. ACMA notes that legislative convergence has often been viewed as a best practice response to issues raised by convergence. (ACMA 2011:1).

## 2 THE EXISTING LAW

The control and ownership of media in Australia is regulated by three distinct regulatory frameworks: the BSA, the CCA and the *Foreign Acquisitions and Takeovers Act* 1975 (Cth).

### THE PRESENT OPERATION OF ‘2 OUT OF 3’ RULE IN THE BSA

The BSA regulates media control and ownership through a combination of statutory control rules and media diversity rules. The control and ownership laws are largely implemented through the commercial television and radio services via the licensing process.

The ‘2 out of 3’ rule provides that a party cannot control more than two out of three specified media platforms of commercial television, commercial radio, or a newspaper that service a particular radio licence area. Fifty per cent of the geographic area of the radio licence must fall within the television licence area for this prohibition to apply, as per s 59 of the BSA.

Section 61AEA provides that an unacceptable 3-way control situation exists in relation to the licence area of a commercial radio broadcasting licence (the first radio licence area) if a person is in a position to exercise control of: (a) a commercial television broadcasting licence, where more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence; and (b) a commercial radio broadcasting licence, where the licence area of the commercial radio broadcasting licence is, or is the same as, the first radio licence area; and (c) a newspaper that is associated with the first radio licence area. Section 6 provides that ‘control’ includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

### THE PRESENT OPERATION OF S 50 IN THE CCA

A second and distinct tier of regulation of media control and ownership is provided by s 50 of the *Competition and Consumer Act*. Section 50 regulates mergers that would have the likely effect of substantially lessening competition. In contrast to the BSA media ownership provisions, s 50 of the CCA applies to all markets and is not confined to media market transactions. Section 50(1) provides that a corporation is prohibited from directly or indirectly acquiring shares in the capital of a body corporate or acquiring any assets of a person if the acquisition would have the effect, or be likely to have the effect, of substantially lessen competition in a market. Section 50(2) provides a prohibition for such acquisitions by persons. Section 50(3) outlines a non-exclusive list of the matters that may be taken into account for the purposes of s 50(1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

A corporation or person will not, however, be prevented from making the proposed acquisition if it is in the public benefit and the corporation or person is granted a clearance by the Australian Competition and Consumer Commission (‘the ACCC’) under s 95AC(2) or the acquisition is authorised by the Australian Competition Tribunal pursuant to 95AT(2). The *Merger Review Guidelines* of 2006 and *Formal Merger Review Process Guidelines* (ACCC 2009).
2006), together with the *Formal Merger Review Process Guidelines* (ACCC 2008), serve to outline the ACCC’s approach to the assessment of the public benefit of mergers.

The relevant factors for purposes of assessing the ‘effect on competition’ under s 50 include:

(a) the actual and potential level of import competition in the market;
(b) the height of barriers to entry to the market;
(c) the level of concentration in the market;
(d) the degree of countervailing power in the market;
(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
(f) the extent to which substitutes are available in the market or are likely to be available in the market;
(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
(i) the nature and extent of vertical integration in the market.

Extensive judicial consideration has been given to the concept of ‘substantially lessening competition’. In *AGL v ACCC* (2003) 137 FCR 317, the court held that if the lessening of competition is ‘real’ or ‘of substance’, it will be a breach of s 50 and that the likely future state of affairs is relevant to such an assessment. The dynamic character of the market, including the nature and extent of innovation and product differentiation is also relevant for a s 50 inquiry. In *Coca-Cola Amatil/Berri Coca-Cola Amatil/Berri*, ACCC Competition Assessment, 8 October 2003, the ACCC took into consideration the dynamic character of the market when making an assessment. In its *Media Mergers, Executive Summary*, the ACCC indicated that in assessing the likely competitive effects of a merger it will make a determination of the likely state of the market within a two to three year time frame based on actual evidence rather than hypothetical conjecture (ACCC 2006).

Graham Samuel has provided helpful insights into the assessment of competition in the media market (Samuel 2007). In determining whether a cross-media merger should proceed, a critical element will be whether the merging outlets are significant competitors for advertisers, consumer and/or content owners despite being different types of media. Hence, a television company could potentially be a competitor of a radio company if both broadcast in the same region. Samuel notes that whilst the effect of future technological evolution is relevant, the effect of future technological advances which are in the realm of speculation and conjecture cannot be considered for the purpose of s 50. ‘Media mergers that, based on the best available evidence, are unlikely to substantially lessen competition should not be hindered on the basis of speculation of what technology might bring in the future.’ On the issue of bundling, Samuel interestingly states that even if the relevant media outlets do not significantly compete for advertisers and consumers, competition concerns may be created if the media merger would facilitate tying and bundling of products. Whilst in some circumstances bundling may in fact increase efficiency by reducing production and distribution costs, it may be anti-competitive if it enables a firm with market power to extend that power by raising barrier to entry and harm potential competitors.

## 3 RELEVANT PROVISIONS OF THE PROPOSED REFORMS

The *Final Report* notes that in a converged environment there is a risk that content will be a new competition bottleneck for which regulatory intervention will be required. The *Final Report* affirms that competition is a key driver of innovation and investment and forms the foundation of positive consumer outcome. Accordingly, the *Final Report* recommends that
significant media enterprises, defined as ‘content service enterprises,’ be subject to a variety of regulatory measures relating to ownership and content.

In order to be classified as a ‘content service enterprise’, the enterprise needs to meet a threshold relating to revenue and users. The Final Report states that the thresholds for revenue and users would be set at a high level so that only the most substantial and influential entities are within the category of a content service enterprise (CRC 2012: xviii). The threshold for users and revenue would be set at a high level so as to exclude small and emerging content providers. The Final Report further notes that the proposed framework is only concerned with professional content. For example, it would include ‘television-like’ services and newspaper content but exclude social media and other user-generated content. As a guide, modelling conducted for the Review indicates that currently around 15 media operators would be classified as content service enterprises. This modelling suggests that currently only existing broadcasters and the larger newspaper publishers would qualify as content service enterprises.

In relation to media ownership and competition, it is stated that media ownership and control rules should promote a diverse range of owners at a national and local level. A new communications regulator would examine changes in control of content service enterprises of ‘national significance.’ The new communications regulator would be empowered to instigate and conduct market investigations where potential content-related competition issues are identified. It would have the power to block a proposed transaction if it is satisfied that the proposal is not in the public interest (CRC 2012: 2). It is recommended that the new communications regulator should have ‘flexible rule-making powers that can be exercised to promote fair and effective competition in content markets’ (CRC 2012: 28). The objective of the test is to maintain diversity of content services at a national level. It is envisaged that these powers would complement rather than duplicate the powers of the ACCC. The Final Report recommends the repeal of the ‘2 out of 3’ rule as well as the ‘75 per cent audience reach’ rule, the ‘two-to-a-market’ rule and the ‘one-to-a-market’ rule.

In contrast, the ownership of ‘local media’ would continue to be regulated through a ‘minimum number of owners’ rule. 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. The new communications regulator should be able to provide an exemption from the rule in exceptional circumstances, if it is satisfied that a transaction will provide a public benefit in a specific local market.

4 A THEORETICAL FRAMEWORK FOR EVALUATING THE RECOMMENDATIONS

In order to evaluate the merits of the proposed reforms, it is necessary to consider the criteria by which effectiveness of laws in this area can be judged. Two veins of legal scholarship are of particular relevance to evaluating the merits of the reform: the scholarship on the need to maintain media diversity and the scholarship on the benefits of regulatory parity, that is, the need for similar services to attract a similar incidence of regulation. It is useful to consider both these areas of scholarship to determine how they may inform the design of effective laws in this area.

MEDIA DIVERSITY

The relationship between media concentration and media diversity has been the subject of intense scrutiny. ‘Media concentration’ is a term used to indicate a scenario where one or a few companies dominate the media sector with substantial barriers to the entry of new players, resulting in limited concentration in the media sector (Doyle 2002). Concentration can be vertical, involving ownership of multiple production activities in a single supply chain, horizontal, involving cross-ownership within the same industry sector or diagonal, involving combined ownership of activities in several different areas of the media (Breuer 2011). It is
widely accepted that media concentration has the potential to lead to oligopolistic pricing and restrictive trade practices, and that when it occurs in the media sector, it has the added threat to transform a country’s values, ideas and politics, perhaps even the national character ((Breuer 2011, citing Miller 2003).

The corollary to the above is that media competition generates media diversity. Media competition leading to media diversity is commonly held to be important as it leads to ‘fairness and balance’ and ‘greater responsiveness to the interest of citizens’ (Entman 2002). Doyle defines ‘media diversity’ as comprising both of ‘a diversity of media supply’ and ‘a diversity of media’ available to the public (Doyle 2002). Perusko presents seven elements of media diversity. The elements consist of a plurality of suppliers, free and affordable access, the service of the public interest through diverse and high quality content, the presence of diverse news sources, the existence of independent editorial news practices, diverse and transparent ownership structures, and the presence of social and cultural diversity (Perusko 2010).

The social responsibility of the media, taken as a whole, is to provide socially desirable content with a greater substance of cultural/social and political varieties, that is, heterogeneous content. Heterogeneous content is provided when the media provides a range of choices in both content and format, and provides a diversity of political orientations and cultural traditions. The media also has a responsibility to avoid the duplication of content that only targets mainstream audiences and serves popular demands, that is, homogeneous content. McCann notes the media should encourage independent thought and expression, innovative content even if it is unpopular and participation through diverse information (McCann 2007).

It is argued that whilst the media has a social responsibility, because most media organisations function on a profit-seeking mechanism, they will not automatically pursue or even gravitate towards providing diversity. The economic approach favoured by Brown and Van Culemborg essentially views the media as being motivated by supplying services (in this context, ideas) that satisfy audience demand (Brown 1996; Van Culemborg 2003). In such a context, self-regulation will not necessarily satisfy proper societal standards of media diversity. McCann describes this as the inherently ‘amoral’ character of the media (McCann 2007: 4).

It is therefore concluded the State has a critical role to play in protecting public interest through the design and implementation of regulation to achieve media diversity. However, as Breuer notes, whilst it is widely accepted that media concentration poses a threat to democratic values, the conflicting political and economic values make it difficult to formulate widely accepted media policy that satisfies the varied interests of media sector stakeholders (Breuer 2011). This is because, as Hitchens states, the media itself serves multiple, and at times conflicting, public functions that encompass both the economic and the non-economic (Hitchens 2006). Breuer, Abramson, and Blevins further suggest that there is a tension between the protection of competition and the protection of media diversity. This is because competition policy focuses on the economic effects of media concentration, such as the low output and higher prices resulting in a reduction in social welfare, whilst social policy focuses on the threat that media concentration poses to media diversity which has the potential to homogenise content and restrict cultural choice. The challenges for lawmakers in this area is hence not only to design laws that prevent undue media concentration and support diversity but also to formulate a test that provides an effective mechanism for achieving the appropriate level of media diversity.

REGULATORY PARITY

As well as supporting media diversity, an established objective of communications regulation is the achievement of parity. In the communications sector, technological neutrality is critical to the achievement of regulatory parity. ‘Technological neutrality’ is the idea that government policies should not treat services differently purely on the basis of the technology used to deliver them. The Convergence Review - Emerging Issues Paper notes that ‘regulatory parity and technological neutrality’ would be enhanced by a transition to a horizontal layered model.
of regulation (CRC 2011b: 13). The paper recommends the need to shift from a vertical industry ‘silos’ approach to a horizontal market structure based on ‘layers’ approach. It is suggested that such a shift would enable the policy framework to focus on the services offered by each layer, rather than each industry (CRC 2011b: 12). Hence, instead of regulating on the basis of vertical silos such that one set of laws governs radio and another set of laws applies to television, it is necessary to look at the industry as a whole, and make decisions based on the substantive features of the area to be regulated rather than on the basis of predetermined categories.

Leading legal scholarship on the nature of regulatory parity is provided by Ismail (Ismail 2003). In his seminal article on regulatory parity, Ismail notes that in order to achieve regulatory parity in communications policy, if all other factors are equal, regulators should treat similar services the same. The central justification for regulatory parity is economic efficiency. It is argued that unless all suppliers of similar services are treated equally, it will be regulation, rather than the ability to satisfy consumer demands efficiently, that will determine which suppliers will prevail in the communications market place (Ismail 2003, citing Entman 2000). If decisions as to supply are largely determined by regulation, it is argued that this is likely to result in ‘lower quality, less innovation and investment, and higher costs and prices.’ Regulatory parity is also justified on the basis of equity or the need to provide suppliers with ‘a level playing field’ (Ismail 2003: 485).

Hence in the present context, the objective of regulatory parity will be satisfied if like services are regulated on like terms. Thorne states that ‘[a]ll important legal issues in the new telecommunications operators cut across technology and traditional categories of service, and that modern telecommunications operators encompass television, cable and telephone. ‘It spans wireline and wireless. It is underground, in the air, and in the geosynchronous orbit. It doesn’t move voice, video or data; it moves bits’ (Thorne 1995: 178).

Therefore, in a converging media landscape, the challenge is to design laws that satisfy both the objective of the maintenance of diversity and the achievement of regulatory parity. This challenge will be the subject of the remainder of the article.

5 THE LIKELY EFFECT OF THE REPEAL OF THE ‘2 OUT OF 3’ RULE ON REGULATORY PARITY

The operation of the present s 61AEA is not technologically neutral as it uses the mode of transmission of a service as a basis for the nature and level of regulation. The scope of s 61AEA is expressly delineated by technology as it is limited to mergers occurring within the ‘television’, ‘radio’ and ‘newspaper’ sectors. The technological non-neutrality of the provision is further accentuated by the fact that s 61AEA does not apply to commercial radio services that do not use the broadcasting services bands or commercial television services that are provided by satellite.

The Emerging Issues Paper states that ‘regulatory parity’ is founded on ideas of fair competition which, at their broadest, suggest treating all content equally and is an important objective in designing the new regulatory framework (CRC 2011b: 13). The Emerging Issues Paper acknowledges that Australia’s media diversity and control rules do not apply to a variety of media which have grown more influential in recent years, including subscription television and online media, and that the penetration of subscription television has increased and as have the range and number of available news and information channels. Some of these commentators were of the opinion that the Internet has significantly increased diversity and provided greater choice and avenues of accessing information and entertainment. Other commentators did, however, point out that the greater volume of views expressed through the Internet was not tantamount to meaningful diversity of voice.

Applying Ismail’s theoretical framework, the option presented by the Final Report is preferable to the alternative of retaining the substance of the ‘2 out of 3’ rule and merely widening the categories of service included in the rule to encompass new media. As Ismail notes, maintaining categories of service and achieving regulatory parity is not easy, as it is
difficult to accurately identify what constitute ‘similar services’ that warrant similar regulatory treatment (Ismail 2003: 449). On the basis of Ismail’s framework it would have been unhelpful to replace one set of rigid categorisation that unhelpfully distinguished between television, radio and newspaper with another set of rigid categorisation relating to what constitutes similar services. Hence, it is argued that on this level, the repeal of the ‘2 out of 3’ rule would support regulatory parity.

However, the recommendations in the Final Report compromise regulatory parity in one critical respect. The Final Report expressly does not seek to regulate Internet media. The recommended threshold for ‘content service enterprises’ is such that no Internet company is within the definition. Keane notes that whilst Google is comfortably outside the definition, Telstra and Apple ‘come close’ (Keane 2012: 2). The 15 potential content service providers identified by the Final Report are all broadcasting or newspaper providers such as Foxtel, Nine Entertainment, Seven West Media and News Ltd. The present threshold setting for content service enterprises hence seriously undermines the regulatory parity rhetoric of the report. The only consolation is that the formulation of content service enterprise through the use of thresholds leaves open the door for online media to be regulated in the future (Keane 2012: 3).

6 THE LIKELY EFFECT OF THE REPEAL OF THE ‘2 OUT OF 3’ RULE ON MEDIA DIVERSITY

The ‘2 out of 3’ rule was originally intended to support media diversity. Greater regulation of radio, television and print was traditionally considered necessary as these mediums exerted significant influence on society. The Emerging Issues Paper acknowledges the historical significance of the rule and the fact that ‘[t]he existing regulatory arrangements reflect in large part the ‘audience influence’ principle—the idea that the level of regulation attached to a sector is in proportion to its level of influence in shaping community views. Media ownership rules apply to commercial television, commercial radio and newspapers within the same licence area as they have traditionally been considered the most influential services in the community.’ The Interim Report on Media Diversity echoes this sentiment and opens by acknowledging that ‘ownership and control rules are still necessary to promote a diverse and pluralistic media environment.’

However, as the Emerging Issues Paper correctly notes, the existing media diversity and control rules do not apply to a range of ‘new media’ which have become popular in the last few years such as online media and subscription television services. It is also significant that the penetration of subscription television has increased and that a variety of news and information channels are now provided. Similarly, online services are increasingly becoming ‘more influential’ sources of news and entertainment. Ironically, it is noted that people are increasingly using the online discussion pages to express their thoughts on the nature of diversity within Australia’s traditional media.

During the course of the 2006 amendment to the BSA, strong concerns were raised as to the likely negative effect of changes to media ownership rules such as the ‘2 out of 3’ rule on media diversity. Proposed amendments to the BSA were met with strong opposition in 2005 from certain sections of the media, especially trade union and professional associations of media workers who adopted the slogan ‘Fewer voices. Fewer choices.’

The media diversity provisions in Part 5 of the BSA were designed in part to address this concern (Warren 2007 and McGill 2007). Hence, the media ownership section of the Final Report begins by expressly making the point that the present media landscape is vastly different to that of 2006 when the media ownership and control rules in the BSA were last amended. In 2006, social media was in its infancy and broadband penetration and speeds in Australia was relatively low, and that subsequently convergence has allowed people to have ‘instant access to information and services across platforms’ (CRC 2012: 19-20). It is argued
that new media has served to substantially increase the diversity of voices in the Australian market. This is a valid point and the Final Report recommendation of removing the ‘2 out of 3’ rule will not compromise media diversity if an effective alternative mechanism is adopted to ensure the appropriate level of media diversity is maintained. The question then becomes how effective is the proposed national public interest test? This will be the subject of the next section of the paper.

Further, the repeal of the 2 out of 3 rule has also been supported on economic grounds. The Productivity Commission (‘PC’) in its Broadcasting Report of 2000 argues that any value cross-media rules have in relation to media diversity is mitigated by their economic effect (PC: 369). The PC argue that by preventing mergers across the boundaries of radio, television and newspapers, the cross-media rules potentially have an efficiency cost. The PC also notes that the law was designed when the Internet was in its fledgling stages and prior to subscription or digital television (PC: 344).

7 THE MERITS OF ADOPTING A NATIONAL PUBLIC INTEREST TEST

PRESENT LIMITATIONS OF THE CCA

In its present form, there is a critical limitation to the use of s 50 of the CCA to regulate media ownership and control. The ACCC’s consideration of the effect on diversity is limited to economic considerations relevant to the assessment of the level of competition in the sector (ACCC 2008: 28). As the primary objective of s 50 is to protect consumers, the relevant factors to be considered under s 50(3) are essentially all economic in nature. Whilst the ACCC can consider the impact of a merger on media diversity, it is bound to do so within the relatively narrow and constraining context of the impact of such a merger on levels of competition in the media sector (Veljanovski 2000). This serves to limit the effectiveness of s 50 of the CCA in regulating media control and ownership. A proper assessment of media diversity may however require a wider range of issues that relate to the broader public interest.

Papandrea compellingly articulates the distinction between the objectives of competition and consumer protection laws and media diversity law (Papandrea 2006: 307). In an ‘economic market,’ such as those regulated by the ACCC, ‘competition is promoted by substitutability between differentiated products.’ Accordingly, the less differentiated the products, the greater scope for substitutability and hence the greater the competition between them. In marked contrast, in the media sector, which Papandrea terms ‘the ideas market,’ the efficiency of outcome is supported by greater differentiation between competing ideas (Papandrea 2006: 307). Butler similarly interprets the Explanatory Memorandum to the Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth) as suggesting that the ACCC is not authorised to consider the impact of the merger on the diversity of opinion of media sector transactions (Butler 2006: 903).

Significantly, Samuel notes that whilst the key purpose of the Trade Practices Act 1974 (Cth) (now the CCA) is to protect competition and the primary protection for media diversity is provided by the BSA, the ACCC will consider whether a merged media business could exercise its market power to reduce the quality of content, which could include reducing ‘diversity’ of such content (Samuel, 2007). In its Media Mergers Executive Summary, the ACCC expressly states that it will consider whether a merged media business could exercise market power by reducing the quality of content it provides consumers, which could include reducing the diversity of the content it provides. Whilst this approach would serve to mitigate some of the concerns raised by Papandrea and others, it does not alter the fact that the primary focus of the s 50 CCA test is economic.

As a result of the perceived limitation to the use of s 50 of the CCA to comprehensively regulate media mergers, there has long been a call for a media-specific public interest test that would enable the ACCC to properly consider the full social, political and cultural effects of a merger. As early as 2000, the sceptre of a media-specific public interest was raised by the PC.
The PC considered the adoption of media-specific public interest test that could be incorporated into either the BSA or the *Trade Practices Act 1974* (Cth) (now the CCA) (PC: 359).

**MERITS OF THE PROPOSED TEST**

The ambit of the public interest test proposed in the *Final Report* is wider than the present BSA media control and ownership provisions as the new test would extend into sectors not covered by the present media. The media would not be applied by the ACCC but by a new communications regulator. The reforms essentially reject radio licence areas as a basis for imposing regulation and adopt a public interest test for assessing the impact of proposed media mergers. As discussed, the proposal can be supported on the basis of furthering regulatory parity and it can be argued that extending media control laws is justifiable to the extent that those media operations have substantial influence.

However, there are certain limitations and areas of concern. Firstly, the *Final Report* neither provides a clear definition of ‘public interest’ nor provides clear guidance as to the considerations relevant to the assessment of public interest. In this regard, the approach is similar to the framework adopted by the CCA which also does not have a definition of the ‘public interest.’ The *Final Report* provides some broad guidance on the factors that should be taken into account. These include whether: the outcome of the transaction would diminish the diversity of unique owners providing general content; services as well as news and commentary at a national level; the outcome of the transaction would diminish the range of content services at a national level; the person(s) taking control of a content service enterprise would represent a significant risk that the content service enterprise would not comply with its obligations.

In the absence of a statutory definition of public interest in the CCA, the ACCC has in the past speculated on what such a definition would look like. In its *Broadcasting Report*, the PC refers to the ACCC’s discussion of a media-specific public interest test in *Merger Guidelines: A Guide to the Commission’s Administration of the Merger Provisions* (s 50, s 50A) of the *Trade Practices Act* (ACCC 1996). The ACCC noted that delineation of the public interest may involve the consideration of such criteria as ‘the likely impact of an acquisition on editorial independence, the free expression of opinions, and the fair and accurate presentation of news’ (ACCC 1996: 17 discussed by PC: 359). In comparison to the ACCC and PC deliberations, the considerations in the *Final Report* are broad-brush, and it would perhaps have been useful to provide more finely honed criteria to add certainty and transparency to the application of the test. The *Final Report* also notes that where the regulator decides that a transaction requires a public interest assessment, it should conduct a public consultation process to seek industry and community views. This would serve to add further uncertainty to the application of the public interest test.

In considering the likely application of the public interest test, Australia can take some guidance from the United Kingdom which has adopted a liberalised approach to cross-media regulation and incorporated a media-specific public interest test. The test is applicable in situations where the holder of a specified radio or television licence wishes to form an association with the owner of a newspaper. In such a situation the test outlines the matters that must be considered by the regulator. Relevant matters include the desirability of promoting plurality of ownership in broadcasting and newspaper industries, the desirability of promoting diversity in the sources available to the public and in the opinions expressed on television or radio in the newspapers and the economic benefits that may be expected to result from the holding of the licence by the applying body as against a nether body which was not connected with the proprietor of the newspaper. The PC notes with approval the references to plurality of ownership and diversity of information and opinion and the possibility of benefits accrued through economies of scale and concluded that the Australian test might likewise include some of these criteria (PC: 359).

Secondly, it is relevant to note that the present ‘2 out of 3’ rule in the BSA is numerically based. It hence provides certainty and a reasonably predictable and stable basis for business
decision making. In marked contrast, the proposed test involves a high level of subjectivity and discretion. This is compounded by the above lack of detailed guidelines as to the criteria to be employed when applying the public interest test. When a media-specific public interest test was formerly raised, there was industry opposition on the basis that the test would serve to undermine the business certainty and confidence necessary to support investment, especially significant in an industry that already experiences significant ongoing technological and regulatory uncertainty. Indeed, when launching the present laws, the government defended them on the basis that they would support growth and investment in the industry, and would encourage new entrants to enter the market, providing new sources of information and entertainment (Coonan 2006). In its Broadcasting Report, the PC also acknowledges industry concerns that the test may be overly complex, uncertain and involve substantial compliance costs (PC: 360). In light of these concerns, it would also have been useful for the Final Report to have provided firmer guidance on the considerations relevant to the application of the public interest test.

Thirdly, the ambit of operation of the new public interest test is constrained by the restrictive definition of ‘content service enterprise’. In its 2000 report, the PC notes that the media-specific public test should potentially cover Internet service providers, telecommunications firms and subscription television operators. The PC recommends that a list should be enacted through regulation rather than legislation as it would enable coverage to be more responsive to technological change and convergence. As discussed, due to the delineation of thresholds for content service enterprises, Internet companies are presently excluded from the application of the test, making the test narrower in ambit than that recommended by the PC.

Finally, it is relevant to note that the test proposed in the Final Report does not involve a reversal of the burden of proof. At present, the onus lies with the ACCC to challenge a merger or acquisition on the grounds that it substantially lessens competition (ACCC 2008: 361). The proposed test similarly requires that the onus is on the regulator to demonstrate that the outcome of the proposed transaction is not in the public interest.

In 2000, the PC concluded that the implementation of a media-specific public interest test is both achievable and desirable. ‘Such is the speed with which convergence is occurring in the ownership of media and communications businesses that the test be implemented as soon as possible, and apply more widely than the current rules’ (PC: 363). Twelve years has passed since that exhortation, and the effects of convergence, and the consequent case for the adoption of a media-specific test, have strengthened with the passing of time. Therefore, as discussed above, whilst certain matters still need to further clarified and developed, they do not detract from the central value of a communications regulator applying a national public interest test to assess the effect of a proposed transaction.

8 THE EUROPEAN UNION AND UNITED KINGDOM EXPERIENCE

In the context of the complexity and the variance of opinion on the issue, it is useful to briefly examine a jurisdiction that has already adopted a new regulatory framework in the communications sector to address the effects of convergence. In its 2011 report on convergence, ACMA notes that the European Union’s converged legislative framework enacted in 2003 to govern ‘electronic communications’ is ‘often considered a best practice model’ (ACMA 2011: 8). ACMA notes that Selvadurai (Selvadurai 2007) has called for the application of the EU model in Australia and that Frieden (Frieden 2003: 209) has called for the use of this model in the United States.

The ACMA notes that the trend in the United Kingdom towards reliance on competition law has been extended to broadcasting regulation (ACMA 2011: 40). The United Kingdom government in its Communications White Paper has described its approach as ‘competition plus’ (RAND et al. 2003: 11). The term describes an approach that utilises general competition law as a basis for structural regulation with the additional retention of sector-specific media regulation in circumstances deemed necessary by government. ACMA consider whether the UK legislative enactments in the area have led to greater regulatory
parity by surveying the empirical findings in the field (ACMA 2011: 23). De Steel argues that it is unclear whether the goal of proportionality has been achieved and that the rhetoric on this topic is greater than the actual outcome (De Steel, 2008). A report by Orangjee, prepared by RAND for the Netherlands’ telecommunications regulator OPTA, was inconclusive as to the success of laws designed to more effectively regulate communications sector in the context of convergence (RAND et al. 2003: 92). Overall, whilst the UK was found to have the most coherent and well-developed regulatory framework, the precise extent to which its laws addressed the effects of convergence was unclear. It was also evident that the regulation still experienced difficulty responding to change and uncertainty. Despite these acknowledged limitations, the framework for the governance of electronic communications remains the most comprehensive and ambitious regulatory response to the effect of convergence on the media sector.

CONCLUSION

As the Internet has served to dissolve technology based distinctions between media services, such categories no longer form relevant as a basis for imposing different forms of communications and content-related competition regulation on radio, television and print. Australia is by no means alone in grappling with the complex and vexed issue of designing effective communications laws to address the reality of convergence. Nations around the world are also battling with the tangled issue of how to amend their communications laws so as to enhance regulatory parity and technological neutrality whilst continuing to protect media diversity. Malaysia was one of the first nations to address this issue, passing the Communications and Multimedia Act in 1998. After the watershed of the EU enactment of the electronic communications law in 2003, a variety of nations passed similar laws. South Africa enacted the new Electronic Communications Act in 2005, and Korea and Japan both enacted reforms to their existing regulatory frameworks to address the effects of convergence (Nasseri 2008; Kennedy 2010; Hayashi and Marumo 2011:101). Taiwan has also announced an intention to enact converge laws by 2014.

The Australian federal government has long acknowledged the need for reform to address the digital revolution, ‘the impact of digital technologies means the current regulatory settings, which are largely designed for an analogue world, risk becoming outdated’ (DICITA, 2006). The Broadcasting Services Amendment (Media Ownership) Act 2006 (Cth) (‘BSAMOA’) enacted significant amendments to the BSA. The Act repealed the former wide-ranging cross-media ownership laws. The repeal of the broad cross-media ownership laws formed an acknowledgment of the evolution of the media sector and served to increase the currency and relevance of Australian communications law. Indeed, in introducing the amendments, the government expressly stated that the media ownership amendments were ‘technology and consumer driven’ (Coonan, 2007). However, the BSAMOA also inserted a new set of media control provisions. One of these rules was the technology-specific three-way control rule that prohibits the acquisition of 2 out of 3 types of media platforms in the same licence area. In this context of the ‘technology driven’ objective of the 2006 amendments, it is difficult to explain reliance on the ‘2 out of 3’ rule. The provision serves to regulate similar services in different ways, undermining a central tenet of communications law, the achievement of regulatory parity. The present convergence review provides a fresh opportunity to extend and build upon the 2006 reforms.

Therefore, the repeal of the technologically discriminatory ‘2 out of 3’ rule, the introduction of a new national public interest test, together with the continuance of s 50 of the CCA, provide an effective framework for the attainment of both media diversity and regulatory parity. As discussed, whilst a variety of matters need to be clarified and developed, greater reliance on content-related competition laws would allow for both the protection of media diversity and the enhancement of regulatory parity in the governance of the communications sector. Placing greater emphasis on flexible notions of content-related competition and national public interest to determine appropriate levels of media diversity, and less reliance on inflexible numerical rules that differentiate between various media platforms, is consistent
with the international trend towards the design of technology neutral communications legislative frameworks.

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ENDNOTES


2. A consideration of the Foreign Acquisitions and Takeovers Act 1975 (Cth) is outside the ambit of the present article.
‘POLITICS NOT POLICIES’ RE-VISITED

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The Australian government’s Convergence Review: Final Report, released in April 2012, is analysed as a case study of public policy process about media and telecommunications. Several key perspectives are addressed— the accuracy of the mass media coverage of the report before and after its release, the effectiveness of public participation in the creation of the findings by the committee, how the government framed the enquiry in advance, and how it responded when the report was released. This paper cites examples of grossly inaccurate press reporting. The contrast of this government’s approach to making policy in 2012 is contrasted with what has come to be regarded as a seminal public policy report for telecommunications in the mid 1980s. At this stage it is too early to judge whether the government might implement the long term key recommendations, or opt for short term pragmatic decisions. The Convergence Review presents a fascinating story of the complex interactions between government, policy makers, media, industry stakeholders and the public at large.

INTRODUCTION

The processes which underpin the creation and implementation of media and telecommunications public policy have been subjected to scant research in Australia. Over twenty-five years ago in a chapter titled ‘Politics Not Policies’ in the Penguin book, The Electronic Estate, I wrote about the complexities of the forces at work related to the formulation of public policy:

(First) …. A small elite group… holds the balance of power in the decision making process… the mass media are structured in such a way that relatively few people have access and that the accepted conventions of presentation restrict discussion and exploration of complex subjects…(Second) decisions are made in forums which are essentially private and closed and within institutions able to wrap themselves in secrecy (and) … in the context of technological change and the future, the political system as a whole has the effect of inhibiting curiosity and limiting public awareness. (Third)… Ad hoc decision making is the inevitable consequence of an essentially irrational political process, from which clear comprehensive statements fail to emerge as blueprints for action. The response to technological choices by governments in Australian communications policy has essentially been either a series of short term pragmatic decisions or the shelving of decisions in complex policy areas (Barr 1985).

This article re-visits the three assertions made at the time, and tracks how they stand up today in an examination of the 2012 Convergence Review.
AGENDA SETTING BY THE MEDIA ELITE

The notion of the ‘agenda setting function of the media’ was in vogue in 1985, especially in the context of press reportage - as it was evident again in the reporting of the Convergence review in 2012. Some highly misleading coverage occurred before the release of the Final Report about its major findings and recommendations made in two of Australia’s major daily newspapers. On April 26, two days prior to its release, an ‘exclusive’ by Mark Day was the front page feature in The Australian:

A new regulatory body, funded by government and with powers to impose fines and sanctions on news outlets, is a key proposal of the long-awaited Convergence Review of the media sector…. It is believed the review panel recommends the creation of a referral panel, headed by a retired judge, that would have the power to administer fines or sanctions on news outlets for grave or consistent breaches of standards applied by the Australian Press Council (Day 2012a).

And just hours before the report was publicly released, The Age editorial headed ‘Beware the state that reins in free media’ copycatted the assertion that ‘a “super regulator”, headed by a retired judge, be given the power to impose fines and sanctions on news media.. This cobbled-together "solution" invites multiple criticisms… A state –appointed and funded regulator throws the door open to political influences’ (The Age 2012).

After the report was released it became clear that none of these predictions were accurate. The Review actually recommended two separate regulatory bodies for the converged environment. First it advocated that ‘a new communications statutory regulator be established to replace the existing Australian Communications and Media Authority, which ‘should operate at arms length from government direction.’ Second the Review recommended ‘that content services enterprises be required to be members of an industry-led body established to develop and enforce a media code aimed at promoting news standards, adjudicating on complaints and providing timely remedies (Convergence Review 2012: xii- xiv).

There was no reference in the entire report to a ‘retired judge… with the powers to impose fines and sanctions on news media.’ Regular columnist, and a former editor- in-chief of The Australian, Mark Day, responded to criticism a few days later:

I was told what I was told. I felt confident that the information was on the money. As it turned out, some of it wasn't, but that sort of thing happens when you do speculative journalism like this… Well, journos have been doing it since I was a cub. You're trying to get a jump on the story. (Media Watch 2012)

Within hours of its release, the report was widely castigated in multiple media reports and one could only wonder how much of the report itself had been closely read by its critics, or how thorough their advisory briefings may have been.

Most of the space given to the first day’s coverage was devoted to attacks on alleged proposals for new and excessive regulation. The most blistering and overarching attack came from News Limited chief executive, Kim Williams who made four assertions:

The report recommends more heavy handed regulation contrary to its remit. Second, it proposes new regulations which are imprecisely defined and left to the discretion of the proposed regulator. Third, it recommends increasing regulation on traditional media companies with additional ownership rules, additional content competition rules and additional press complaints rules. Fourth, it bizarrely excluded from regulation some powerful companies who compete against traditional media companies today (Canning and Davidson 2012).
Williams’s successor at Foxtel, chief executive, Richard Freudenstein added a fifth:

Foxtel is concerned that overall the review recommends needless new regulation that will stifle competition and innovation and does not recognise market reality… In particular a new public interest test would be broad and subjective, and by the review’s own admission may increase regulatory burden (Holdgate 2010).

The assertion of increased regulation was also taken up by Telstra spokesperson, Karina Keisler:

The review was a missed opportunity to modernise Australia’s communications and media regulation. At a time when there’s less need clearly for regulation the report recommends the imposition of more regulation on more organisations in the digital economy. Telstra believes that many of the committee’s objectives can be achieved without the heavy imposition of more regulation on an already heavily regulated sector (Smith 2012).

There had been an awareness by the members of the Review Committee, based upon submissions to the Interim Report, that any form of regulation they might recommend would be highly contentious in media establishment circles. Their report stated:

The regulator should operate at arm’s length from government direction except in a limited number of specified matters (and) .. ministerial control over the regulator generally should be exercised through legislative instruments disallowable by either House of Parliament, to allow for greater parliamentary scrutiny. (Convergence Review 2012: 44)

The Chair of the Convergence Review Committee, Glen Boreham later expressed his frustration with the media reporting about issues related to regulation contained in the final report:

Having waded through the pages of existing regulation over the past year I can assure you that in no reasonable interpretation would our recommendations mean more regulation. Our recommendations will result in less regulation that is better targeted and delivered by a smaller, streamlined regulator - quite the opposite of the ‘super regulator’ conjured up by one reporter, apparently to be headed by ‘a retired judge’ with ‘the power to impose fines’.

A quick checklist of some of the regulation we recommended removing includes: abolishing content licences and a raft of attached regulation, removing ineffective local content regulations concerning changes in control, such as trigger events in radio; removal of reporting a raft of reporting compliance in local media; sharpening media ownership rules to reflect influential content players beyond TV, radio and newspapers; removing much ownership regulation that is no longer effective because of converging media; and recommending light touch regulation for all smaller players, whatever their platform of delivery (Boreham 2012: 1).

The final report also pointed out that ‘the close relationship between media and politics’ had led many countries to establish a media regulator that is largely independent from government control. The communications regulator in the United Kingdom, Ofcom, was:

an entity independent of government ... in staffing and financing and in authority and ( where) ... brave decisions could be made independently of the political cycle in much the same way they are made in financial services. Accordingly, careful consideration needs to be given to any circumstances in which the regulator may be subject to government direction in the performance of its functions. (Convergence Review 2012: 42- 43)
Unsurprisingly the commercial television stakeholders chose to stick to their vested interests. Within hours of the release of the final report Free TV chief executive Julie Flynn’s expressed her disappointment with the proposed changes to the local content rules for her member organisations:

We are facing unprecedented challenges and it is difficult to understand how anyone can believe we can sustain increased obligations... We’ve got programming costs going up, revenue going down. And now we’re being told that we have to pay more (Crowe and Bodey 2012).

Similarly Ten Network Holdings chief executive, James Warburton, complained:

The higher content quotas for documentaries and children’s programs, for example, are yet another regulation that only applies to the free-to-air television industry…. It is simply unfair to continue to squeeze free-to-air broadcasters while some of our competitors are allowed to operate without contributing to local production without excessive regulation (Davidson 2012).

And the Head of Broadcasting Policy at Ten Network similarly pleaded:

The argument that an increase in the content obligations is justified given the rebate on free-to-air licence fees ignores the fact that free-to-air broadcasting is undergoing permanent structural change…. Even with the current 50% licence fee rebate, Australian broadcasters pay far more than their international counterparts. Adding more content obligations is not reasonable or sustainable (Herd 2012).

For members of the telecommunications industry the use here of ‘structural change’ gives new meaning to the term ‘protectionism.’

**DECISIONS MADE IN PRIVATE FORUMS**

Assertion two above was that:

... decisions are made in forums which are essentially private and closed (and) ... in the context of technological change and the future, the political system as a whole has the effect of inhibiting curiosity and limiting public awareness.

One of the most unusual features of the Convergence Review is that the core concept of ‘convergence’ is nowhere explained to its readers. Somewhat oddly the term ‘convergence’ does not appear in the glossary of terms, either in the Interim Report (p 22), or the Final Report (pp 174-176). One wonders how many people in the industry could offer their own pithy definition of the term. In a document which correctly acknowledges an increase in the number of media outlets, platforms, and services, some readers might feel that a more appropriate term to describe the complexity of issues canvassed might be ‘divergence.’

But speaking in a conference forum during the course of this review committee chairperson Glen Boreham offered his own sense of the meaning of this elusive term. He suggested at the Communications Policy and Research Forum (CPRF) in Sydney in November 2011, in an unpublished speech, that one might think about convergence in this way. Twenty or so years ago the television set generally was housed in the lounge room, the computer in the study, and the radio in the kitchen or elsewhere. So modes of communications were generally separated, and the content was delivered through separate ‘silos’. But today, Boreham suggested, so much content has come together, or is converged on one platform, notably with an iPhone which can bring together voice, email, Internet searching, and some video content. Hence new and complex public policy issues arise out of radical changes in modes of convergent media and telecommunications delivery. For this author though there was a missed opportunity for a
fuller picture similar to this useful explanation to be fleshed out for ordinary mortals in the final report.

The Convergence Review was announced in December 2010 together with draft terms of reference, and its three person committee came together in April 2011. Its initial consultation process, which led to the release of an Interim Report in December 2011, followed on from its seven discussion papers, from consultations with industry stakeholders, and also from taking counsel of public meetings held in metropolitan and regional locations. Over 250 submissions were received by the Review, most of which were publicly available on the departmental website. We do not know how much networking by members of the community occurred as a result of so much documentation being available, but it surely is a commendable improvement on historical practices.

The practice of providing an interim report for public examination was a substantial improvement on prior comparable public consultation practices for major reports in communications. Some significant attempts were made to heed valid criticism of particular positions taken in the Interim report, notably early proposals for new forms of web based content accountability.

In the preparation of the Final Report the committee explained:

Throughout 2011 the Review conducted a comprehensive consultation process to inform its findings and provide all Australians with the chance to have their say. During this process, the Review held public forums in metropolitan and regional locations across Australia, met with industry representatives, and analysed more than 340 detailed submissions and over 28,000 comments. The Review was also asked to take into account the findings of the report of the recent Independent Inquiry into the Media and Media Regulation in its deliberations. In addition, it has also taken into account the recommendations of the Australian Law Reform Commission’s review of the National Classification Scheme (Convergence Review 2012).

Regarding the vexed issue of the appropriate role for government regulation it can be seen that the committee faced two competing and irreconcilable camps- industry members who generally opposed any regulation except where their interests might benefit, as opposed to a big group of non-industry based constituents who identified the need for particular regulation to be retained or strengthened. The committee was never going to be able to ‘win’ on this key issue.

The Review’s agenda of major issues clearly emerged from the open and strong public consultation process as the committee explained:

Three clear areas emerged from the Review’s work where continued government intervention is clearly justified: Australians want diversity in media ownership and control, they expect content standards and they want Australian content. Any new policy framework should reflect these key expectations (Convergence Review 2012).

The Final Report also took into account wider dimensions of public participation than had been usual practice in recommending that the regulator ‘would be the successor to the ACMA for the range of regulatory functions that continue following the abolition of the broadcasting licensing regime.’

The role of the regulator, it was suggested, should not be limited to direct regulation, but should also:

- promote the development of the sector,
- engage with industry in developing solutions to problems,
- report on the state of the market and report on the performance of market participants,
protect users, including supervising complaints processes, 
inform users through education programs, and 
provide advice and propose initiatives to government.

However, parts of the proposed public consultation process remained vague, especially how the burgeoning number of consumer complaints might be best handled. This has long been a vexed policy issue and we might look back at a major review of Australian telecommunications policy back in 1988 where one of the key objectives was stated as to ‘ensure the highest possible levels of accountability and responsiveness to customer and community needs on the part of the telecommunications enterprises’ (Evans 1988).

This review committee made similarly generalised remarks that ‘the regulator should be required to develop efficient and effective procedures for dealing with complaints from the public… (and) should also have the ability to exercise discretion on how to most effectively deal with complaints.’ It also added:

The Review believes that many of the changes recommended in this report will streamline the regulator and increase the efficiency of the regulator’s operations. In particular, the abolition of the broadcasting licensing regime and the removal in duplication of classification functions should have an impact on the resource requirements of the regulator (Convergence Review 2012).

A LACK OF BLUEPRINTS FOR ACTION

Assertion three above was that:

Ad hoc decision making is the inevitable consequence of an essentially irrational political process, from which clear comprehensive statements fail to emerge as blueprints for action.

It may be useful to contrast the policy approach undertaken with this review about the complexities related to convergence with a previous public policy report recalled by some as seminal good practice. In May 1988, Senator Gareth Evans, then Minister for Transport and Communications, tabled *Australian Telecommunications Services: A New Framework*, which advocated a gradual shift towards de-regulation of the Australian telecommunications market. It was one of the few times in Australian telecommunications policy history that a government outlined its overall objectives for the industry before seeking public and industry input. Labor was flagging the winds of change, though by international standards at the time this was incremental in terms of policy change and was politically cautious.

However, looking back one of the most innovative aspect of the Evans policy document was the proposal by the government of the day to establish a new telecommunications regulatory authority, to be called Austel. There had long been complaints that in Australian telecommunications, Telecom had been principal player, umpire and arbitrator, and many advocates proposed the need for an independent regulator. So the government took a somewhat bold position at that time – to create an Austel as a single specialised telecommunications regulatory agency, independent of the carriers, and answerable to the government through the Minister of Communications. Notice the contrast with the Convergence Review in that the Gillard government did not commit its position on a regulatory position in advance, nor offer any possible options.

At the time of receiving the Final Convergence Review Report the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, opted for a highly cautionary media strategy at the time of receiving the report. He embargoed it for one month ostensibly to consider its findings. A media release of 30 April, stated:
The Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, has received the final report of the Convergence Review officially marking the end of this landmark review of Australia's media and communications regulation... At a time of significant structural change brought about by digital switchover, the advent of new technologies and the rollout of the National Broadband Network, the work of the Convergence Review will be of particular importance in positioning Australia's communications and media sector to meet the digital future, Senator Conroy said. The Government will consider the findings of the Review ahead of releasing it publicly by late April. The Government will formally respond to the Review later in the year and will seek to begin delivering reforms during the course of 2012 (DBCDE 2012).

The Minister offered little public comment during the pre-release period but he was interviewed on Channel Nine’s, Today programme on 26 April, 2012, which was subsequently reported on Media Watch in a remarkably well researched critique of the media coverage of the Convergence Review:

Georgie Gardner: Let's move on. The Australian reports this morning that the Convergence Media Review will recommend a new regulatory body with powers to impose fines and sanctions on news outlets. Is that something you'd support?

Stephen Conroy: Well we received that recommendation in the report a few weeks ago, we're still considering it, we'll be releasing the full report at the end of the month, and then there'll be, I'm sure, a very robust community debate (Media Watch 2012).

The Minister may have come to regret making this appearance given that he did not rebut the incorrect assertion about the alleged and highly contentious powers of the new regulatory body ‘to impose fines and sanctions on news outlets.’ Given the sensitivity here it was unfortunate that his advisers did not warn him in advance so he could reject the assertion on the spot.

More misconceptions about the Convergence Review were perpetuated by the Shadow Minister for Communications, Malcolm Turnbull, who got more media coverage than his government counterpart. He offered, in part, the extraordinarily unfounded claim that:

On content, the Review’s fundamental premise appears to be a firm conviction that it (and by implication the Government) knows better than existing media outlets, the marketplace or consumers what material should be delivered to Australians (Turnbull 2012).

Following this initial release period the Minister left the explanation and advocacy for the report essentially to the Review Committee. Chair Glen Boreham did a prime time interview with Fran Kelly on RN’s Breakfast program on 2 May 2012, and he followed up with the detailed article in The Australian previously quoted here. It is not an uncommon strategy for a Minister of Communications to leave the brunt of the ‘selling’ of a major report in communications prepared by an independent panel to the report’s authors.

In the late 1980s advocacy of the Australian Broadcasting Tribunal’s five volume report into the introduction of cable and subscription television services in Australia was deputed to chairman David Jones in a five week media blitz. The then Minister of Communications, Michael Duffy, probably did so at the time because he was aware of reservations held by his Cabinet colleagues advocating the opposite to the Jones report, especially by Labor’s influential Leader in the Senate, John Button. Button had strongly urged the government not to introduce subscription television because ‘it belonged to the silk department’. However in 2012 one might have expected an intricate report about convergence to be not as problematic for Conroy as the ABT’s one was for Duffy.
At the time of writing it is too soon to judge the likely effectiveness of the outcome of the Convergence Review report. Minister Conroy could already be judged to be one of the most successful reforming Ministers of Communications in the history of the Commonwealth of Australia. He has implemented legislation and got in principle agreement by Telstra to its structural separation, implemented the vision of the national broadband network and garnered the future co-operation of Telstra with NBN Co. But there can be a major disjunction between the attributes of a Minister and public perception of his or her worth.

CONCLUSIONS

To a long time observer of the media coverage of major communications policy the old maxim of ‘more information, more channels but less understanding’ appears even further apposite in our new communications world. The media coverage of the Convergence Review showed that the notion of ‘agenda setting’ is alive and well. As documented above, major media coverage centred on highly selective commentary around the most vital issues to their self interest. Despite the attention given to the complexity of issues about promoting Australian content in the future, newspaper coverage centred on the protection of vested interest for the commercial television industry. There can be many debates about the merits of particular recommendations in the Convergence Review’s Final Report but is difficult to assert an overall lack of rigour in the investigation process. Clearly too the public consultative processes would have been more effective had the enquiry committee members been given more time to test their proposed recommendations.

Paradoxically while The Australian offered misleading coverage before the report was released, its block extracts from the report document published on May 2, the day after the release of the report, were the most helpful of all press coverage to readers who wanted a basic factual summary.

We are sometimes told that we have entered an era of ‘rich media’ with ‘24/7 coverage’. This view is promulgated by advertising guru, Harold Mitchell, who offered his reflections about the reporting of the government’s budget the week after the release of the Convergence Review Final Report:

   Budget week is leak week but this week I am in London... The Budget is our economic news of the week and it’s important to I comment, but my dilemma is that I wrote the column before it. Not to worry, it had all been leaked or announced anyway. That, of course, is the modern media miracle: there is nowhere to hide. Nor should there be (Mitchell 2012).

If the media coverage of the Convergence Review is an exemplar of our ‘modern media miracle’ it may actually be best if everyone goes off to hide.

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PRINCIPLES OF ACCURACY, FAIRNESS AND PRIVACY UNDER A NEW CODE

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Recent reports into regulation of the media recommend the creation of a ‘news standards body’ to oversee news providers and to create a new code. The new code should be founded on the public interest. It is an opportunity to recognize and entrench the legitimate interests of those affected by the presentation of news material. The fairness of news information should be based on the accuracy of the implied facts of news material. News providers will have freedom of speech in presenting opinion, but will be discouraged from presenting inaccurate material. With respect to privacy, the new code should strike a proper balance between the public interest in receiving information and the rights of the individual. The test for privacy invasion should be based upon the reasonable expectation of privacy.

INTRODUCTION

In February 2012, the Report of the Independent Inquiry into the Media and Media Regulation (‘Finkelstein report’) was presented to Government, followed a month later by the Convergence Review: Final Report (‘Convergence report’). Both reports recommend that a single body should be responsible for the regulation of news and current affairs material on all platforms.

The Finkelstein report recommends that such a body should be an independent, Government-funded, statutory body, responsible for the creation of standards and with the authority to impose non-financial sanctions (such as the requirement to print adjudications and corrections).

The Convergence report recommends legislation requiring news providers that qualify as ‘content services enterprises’ to become members of a ‘news standards body’ that is adequately funded by industry, has a board with a majority of independent directors, and has the authority to refer non-compliant members to the new communications regulator (as outlined by the Convergence report) (CR 2012: 51). The body would have ‘the power to order members to prominently and appropriately publish its findings’ (CR 2012: 51). This power would derive from contractual arrangements with members. The report also recommends that the ‘news standard body’ should be responsible for:

The establishment of standards for the production of news and commentary, including specific requirements for fairness and accuracy…

Therefore, whatever approach Government decides to adopt, the new body is likely to play a key role in establishing the fundamental principles for the professional conduct of news providers. This article provides a brief analysis of the existing codes and regulatory systems, and puts forward the recommendations of the Communications Law Centre (CLC) with respect to a new code, focusing on the principles of accuracy, fairness and privacy.
TWO REGULATORY SYSTEMS

The Australian Communications and Media Authority (ACMA) is currently responsible for regulatory oversight of broadcasting content, including news and current affairs material. Broadcasting codes are developed by industry in consultation with the ACMA, in line with public interest objects in Section 3 of the Broadcasting Services Act 1992:

(g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance; and

(h) to encourage providers of broadcasting services to respect community standards in the provision of program material.

The ACMA has enforcement powers with respect to these codes. The press, on the other hand, is subject to industry self-regulation. The Australian Press Council (APC), an incorporated association funded by its members, creates standards that are applied in considering complaints about member publications. The role of the APC is outlined in its Constitution:

(1) The objects of the association are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by

(a) considering and dealing with complaints and concerns about material in newspapers, magazines, journals and other print media;

(b) encouraging and supporting initiatives by the print media to address causes for readers’ complaints and concerns.

The APC, as a body independent of government, has no direct responsibility to any party other than its own members, whose interests it represents by encouraging high standards of professional conduct.

The new ‘combined’ body, while also independent of government, is likely to have certain functions defined by statute – for example, those recommended by the Convergence Review Committee with respect to remedies and sanctions. In addition, the prescribed basis of the news standards body should be closely considered and include a requirement to develop codes and regulate news material in the public interest.

WHAT ARE THE PRINCIPLES?

The existing codes express similar requirements, such as the need for fairness and accuracy, and the need to respect privacy. While these requirements are expressed as ‘principles’, they do not have their origins in common law or statute. Further, no system of precedent attaches to the codes to allow for the development of principle over time.

While this poses a challenge, it also creates an opportunity to design a code that operates clearly in the public interest, and that recognizes the legitimate interests of parties affected by the presentation of news material. Table 1 outlines some of those interests and related concerns.
The connection between accuracy and fairness is reflected in a number of the codes, but nowhere are the terms defined. Some codes, such as the UK’s Editors’ Code of Practice (UK code) (Beales 2012) and the Commercial Radio Codes of Practice (commercial radio code) (Commercial Radio Australia 2011) refer only to accuracy and not to fairness.

The Oxford English Dictionary provides the following definitions of ‘accurate’:

1. correct in all details; exact. accurate information about the illness is essential to an accurate assessment;
2. providing a faithful representation of someone or something: the portrait is an accurate likeness of Mozart.

These definitions emphasise different things: detail and the overall picture. This difference in emphasis is apparent in the existing codes that apply to news providers.

### Table 1 - Parties with an interest in the regulation of news material.

<table>
<thead>
<tr>
<th>Legitimate interests</th>
<th>Background</th>
</tr>
</thead>
<tbody>
<tr>
<td>The public</td>
<td>Opinion may be freely expressed. However, inaccurate speech is circumscribed by different laws and the principles that apply to broadcasters and the press.</td>
</tr>
<tr>
<td>Individuals</td>
<td>· Defamation law provides a remedy for individuals prepared to risk legal proceedings.</td>
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<tr>
<td></td>
<td>· Article 12 of the Universal Declaration of Human Rights protects both privacy and reputation.</td>
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<tr>
<td></td>
<td>· Privacy receives piecemeal protection via a number of separate torts and the Privacy Act 1988 (Cth) (which relates to information privacy).</td>
</tr>
<tr>
<td>Businesses</td>
<td>· Information providers (including media organisations) enjoy a safe harbour from the application of trade practices law.</td>
</tr>
<tr>
<td></td>
<td>· There is a public benefit in the provision of accurate information about businesses.</td>
</tr>
<tr>
<td>Groups</td>
<td>· Racial groups are protected by the Racial Discrimination Act 1975 (Cth) and State and Territory anti-discrimination laws.</td>
</tr>
<tr>
<td></td>
<td>· Any individual who identifies themselves as belonging to a group has an interest in that group being correctly portrayed.</td>
</tr>
<tr>
<td></td>
<td>· Accurate information about groups benefits social cohesion and tolerance.</td>
</tr>
</tbody>
</table>

### PRINCIPLES OF ACCURACY AND FAIRNESS

The Australian Press Council principles
- Publications should take reasonable steps to ensure reports are accurate, fair and balanced. They should not deliberately mislead or misinform readers either by omission or commission. (General Principle 1)
- News and comment should be presented honestly and fairly, and with respect for the

Editors’ Code of Practice 2012 (UK)
- The Press must take care not to publish inaccurate, misleading or distorted information, including pictures. (Clause 1)
- The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact. (Clause 1.3)

Media Alliance Code of Ethics
- Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available fact, or give distorting emphasis. Do your utmost to give a fair opportunity of reply. (Clause 1)
privacy and sensibility of individuals. (General Principle 4)

**Herald and Weekly Times Editorial Code of Conduct**

· Facts must be reported impartially, accurately and with integrity.
· Try to always tell all sides of the story in any dispute.
· Do not knowingly withhold or suppress essential facts.
· Journalists should not rely on only one source. Be careful not to recycle an error from one reference source to another. Check and check again. (Clause 1)

**2010 Commercial Television Industry Code of Practice**

· [L]icensees: must broadcast factual material accurately and represent viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program;
· An assessment of whether the factual material is accurate is to be determined in the context of the segment in its entirety. (Clause 4.3.1)
· In broadcasting news programs (including news flashes) licensees: must present news fairly and impartially. (Clause 4.4.1)

**Commercial Radio Codes of Practice (2011)**

· In the preparation and presentation of current affairs programs, a licensee must use reasonable efforts to ensure that: Factual material is reasonable supportable as being accurate. (Clause 2.1)
· In the preparation and presentation of current affairs programs a licensee must ensure that… Reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance, either within the same program or similar programs, while the issue has immediate relevance to the community. (Clause 2.3)

**Table 2 - Accuracy and fairness in the existing codes.**

**ACCURACY**

The codes in Table 2 express the need for accuracy in different ways. The codes for the Herald and Weekly Times (HWT), the UK, commercial television and commercial radio refer to the accuracy of facts, factual material and information – emphasising exactness of detail. On the other hand, the APC requires publications to ensure reports are accurate, and the Media Entertainment and Arts Alliance (MEAA) requires journalist members to report and interpret honestly, striving for accuracy – emphasising accuracy as ‘faithful representation’.

**FAIRNESS**

The APC and the MEAA connect the words accuracy and fairness in their codes, suggesting that the two ideas form the same principle. The HWT code meanwhile states that facts must be reported with integrity. The codes for commercial television and commercial radio with respect to current affairs programs do not refer to fairness, but to viewpoints. The commercial television code requires licensees to represent viewpoints fairly, whereas the commercial radio code has a requirement that reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance – a provision intended to achieve balance.

The HWT code and the commercial television code also refer to impartiality. On commercial television, the need for impartiality refers to the presentation of news on news programs and in news flashes, whereas the HWT code relates impartiality to the reporting of fact. However, opinion and analysis, integral features of news reporting, are inherently partial, and so it is difficult to interpret the need for impartiality beyond a need for accuracy.

The same problem exists with the use of the word fair in the APC code, which states that publications are to ensure that reports are accurate, fair and balanced. This does not seem to
state the principle correctly, as it also ignores the place of opinion in the presentation of news material – and opinion, more or less, is free.

The UK code, on the other hand, states openly that the press is ‘free to be partisan’, so long as it is accurate and ensures the distinction between fact, comment and conjecture.

**A NEW APPROACH TO ACCURACY AND FAIRNESS**

**The Need For Principles To Evolve**

Currently, decisions by the APC or the ACMA do not create precedent or develop principle. The problem with this approach is that vague and uncertain ideas, such as fairness and accuracy, remain vague and uncertain. The CLC recommends that the news standards body should develop key principles, over time, through written decisions, in order to provide greater certainty. In doing this, it should maintain the distinction between genuine principle and prescriptive rules.

**Separation Of Accuracy And Fairness**

Accuracy and fairness, while related, should be treated as separate concerns. Accuracy (defined as ‘faithful representation’) should be protected on the basis that the public has a legitimate interest in receiving accurate information. A separate set of principles that relate to fairness of news information (or harmful misrepresentation) should be developed which establish specific duties not to cause harm to legitimate interests through inaccurate news material.

**Accuracy And Fairness Relate To Fact**

It should be clearly stated in the new code that accuracy and fairness relate only to fact, and not to comment.

**Accuracy Test**

To provide a sound basis for investigations, an accuracy test should be developed by the new standards body to be applied in investigations into complaints about accuracy and fairness.

**THE ACCURACY TEST**

There are many ways in which news material can mislead, such as through the omission of key facts in a news story, through exaggeration and distortion, through providing unreasonable viewpoints uncritically, and through the presentation of comment or opinion as fact. All of the codes take some of these practices into account.

Rather than attempt to identify all the different practices that may lead to a person being misled, the better approach is to consider each case in terms of implied fact. The news standards body may wish to be guided by the approach of the courts in defamation cases in which juries are tasked with finding the meaning of defamatory imputations. Under this approach, the ‘natural and ordinary’ meaning of news material should be applied as understood by the ordinary reasonable person.

To reduce concern about the potential of bias, it would be better for the public members of the news standard body to take on the role of finding implied facts in news material. A ‘statement of implied fact’ would provide the inflexible basis upon which principle is applied. The statement of implied fact should also be provided to news organisations in order to allow an opportunity for response.

Alongside the implied facts, it would be necessary for an assessment to be made about the real circumstances upon which news material is based, in order to consider the implied facts for accuracy.

**PLATFORM**

In its submission to the Convergence Review, the CLC recommended that media content regulation should be applied consistently across media and platforms (CLC 2011). This makes
sense as content is now made available on multiple platforms. However, a platform-neutral code has another benefit in that it enables the development of principles based purely on the ethical considerations of content and its external impacts. Another implication is that each investigation by the news standards body will have industry-wide relevance, which will be important for the effectiveness of the news standards body in responding to community concerns about the conduct of the media.

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**Case study. Applying the accuracy test to ‘comment’**

A newspaper article describes a new government initiative to release up to 100 asylum seekers per month into the community. The headline reads *Revealed: Boat people to flood our suburbs.*

What is fact? What is comment?

This headline has elements of fact: a number of asylum seekers will be released into the community under a government proposal. The headline implies another fact: that the number released will have a negative impact on the community. The headline also expresses an opinion: that the community should fear the release of asylum seekers.

The distinctions between fact and comment expressed here are a matter of interpretation. Another reader may have a different view about what constitutes fact and comment. As such, it is better to disregard considerations of what constitutes comment, and focus on implied fact.

**The accuracy test**

The news standards body would look at the words of the headline and article in terms of the implied fact. Opinion itself is not at issue, except to the extent that fact is implied.

In this case, an ordinary reasonable person might judge the implied fact to be that the number of asylum seekers released will be ‘so large that it will have an overwhelming negative impact on the community’.

In order to apply the principle of accuracy, the news standards body should consider additional facts. For instance, under which circumstances would it be accurate to say that the release of asylum seekers would have an overwhelming negative impact on the community?

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**ETHICAL CONSIDERATIONS OF FAIRNESS AND ACCURACY**

Finding accuracy serves a number of ends. Firstly, news providers have a relationship of trust with the public in providing information. Unless the matter is trivial, accuracy is worth protecting in its own right. Secondly, accuracy provides the factual basis for determining whether news material is fair to those affected by that material.

From an ethical perspective, however, less harm is caused by news material found to be merely inaccurate compared with news material that is both inaccurate and unfair. It is, therefore, necessary to consider how these breaches would be addressed by the new code.

**Publishing Corrections And Adjudications**

The requirement to publish an adjudication or correction is the means by which the facts, as found by the news standards body, can be laid bare. In the case of mere inaccuracy, this allows the public to understand a better version of the facts. In such a case, the requirement to publish need not be regarded as a judgment upon the performance of the news provider. In fact, the willingness to provide corrections is likely to improve public trust in news organisations.

In cases involving unfairness, publication of the facts puts the public in the position of the news standards body, and allows members of the public to form their own opinions about the fairness or unfairness of the news provider. The public response to the news provider, and the subsequent erosion of trust, creates the sanction.

The news standards body should also make it clear when a finding is made on the grounds of fairness. Fairness, and the conduct of the news provider in presenting news material, should also
be the basis for any additional action, such as the decisions to refer the news provider to a statutory body.

**FAIRNESS OF NEWS INFORMATION**

‘Fairness of news information’ relates to the negative impact of inaccurate news content on the reputation of individuals, groups and businesses, and on the integrity of debate on matters of public concern. These interests receive piecemeal protection in the existing codes. Legal protection with respect to trade practices and data privacy is also limited due to exemptions enjoyed by media organisations. The absence of legal protection creates a greater need for responsible conduct on the part of media organisations, which should be met in a new code.

Further, certain ‘vulnerable’ groups – such as asylum seekers, teenagers or the unemployed – do not have rights with respect to how they are portrayed by the media, which creates an ethical responsibility to portray these groups accurately.

**WHEN IS NEWS INFORMATION UNFAIR?**

News information is unfair when it has the effect of diminishing reputation, image or respect for an individual, group, business or public policy.

**INDIVIDUALS**

Under defamation law, a person succeeds in a case against a publisher of defamatory material where that material cannot be shown to be true. However, not all complainants are willing, or can afford, to pursue defamation in the courts. The reputation of an individual is not specifically recognized or protected by any relevant code in Australia, and must rely on general code provisions that require accuracy and fairness.

One reason for entrenching protection of reputation in a new code is to establish the news standards body as a viable alternative to the courts. A properly applied standard for the protection of reputation would have the potential to save media organisations from significant legal expenses, as well as providing remedies to individuals in the form of published adjudications, corrections and replies.

**GROUPS**

The APC General Principle 8 states:

> Publications should not place any gratuitous emphasis on the race, religion, nationality, colour, country of origin, gender, sexual orientation, marital status, disability, illness, or age of an individual or group.

Similar provisions with respect to ‘gratuitous emphasis’ exist in other codes.

Gratuitous emphasis, however, is unlikely to cover all examples of unfairness to groups. It is important that whenever a group is the focus of a news item that the group is fairly and accurately portrayed.
Case study
A newspaper article states: ‘Shocking new figures show adolescent crime in Ballarat has nearly doubled in the past five years, with approximately one in four teenagers aged 15 to 17 committing offences.’

The article is subsequently found to have misinterpreted police statistics, which provide the total number of offences committed by young people, not the proportion of young people who committed offences.

Issues: the interests of many groups are not formally recognized by the existing codes and people who identify with a group are vilified by inaccurate reporting.

Drawn from APC Adjudication No. 1512, September 2011

BUSINESSES

Misleading information about a business has the ability to inflict serious economic and reputational damage. Defamation law does not extend to businesses that have ten or more employees, and the media safe-harbour in trade practices law creates an exemption, inclusive of news providers, for misleading and deceptive conduct. The exemption exists to prevent a chilling of free speech with respect to reporting on businesses and business activities. This ‘legal vacuum’ creates a need for an improved ethical requirement.

The CLC recommends that the news standards body should be authorised to refer news providers that fail to meet their ethical responsibilities with respect to businesses to the Australian Competition and Consumer Commission (ACCC). Consideration should also be given to amending the Competition and Consumer Act 2010 to enable the application of ‘misleading and deceptive conduct rules’ to news providers who are referred to the ACCC.

Case study
A series of newspaper reports make incorrect and misleading claims about the costs associated with connecting to the National Broadband Network (NBN).

An adjudication by the Australian Press Council in December 2011 expresses the concern that:

…within a short period of time three articles on the same theme contained inaccurate or misleading assertions. It considers that this sequence of errors should not have occurred and that they should have been corrected promptly and adequately when brought to the newspaper’s attention.

Issues: businesses rely on general provisions of fairness and accuracy. The media safe-harbour is also open to abuse, and the requirement to publish adjudications and corrections is unlikely to be an adequate remedy or sanction. Public/private enterprises are particularly vulnerable as there is a political incentive to report inaccurate information.

Drawn from APC Adjudication No.1515, December 2011

PUBLIC POLICY

While media organisations should continue to be free to express opinion about public policy, they also ought to ensure accuracy. The implied freedom of political communication, as established by the High Court, holds that there ought to be free discussion of matters of political concern.

It is also important that the information underlying public debate should be accurate and truly stated, as this impacts upon the ability of citizens to construct informed opinions, which in turn influences government policy and how people vote.
The need for accurate information in public debate also relates to the ‘marketplace of ideas’ – a theory that it is better to allow free competition in ideas in order that, over time, the best ideas and policies emerge. To this, it should be added, the marketplace of ideas is more likely to be effective where the creators of those ideas are required to strive for accuracy.

**Applying the Accuracy Test to Fairness of News Information**

In determining whether news material is unfair it is necessary to consider whether it is inaccurate. The accuracy test when applied to the fairness of news information should consider accuracy in terms of the impact of misinformation upon reputation, image or respect.

**Conduct of News Providers Not Relevant to Fairness and Accuracy**

A number of codes express the need for accuracy or fairness in terms of the reasonable conduct of the news provider. In other words, the question is not whether a news item is prima facie accurate, but whether there is a reasonable attempt at ensuring accuracy.

This approach is explained in the UK’s *Editors’ Codebook*:

> The Code is careful not to demand perfect accuracy, which would be impossible to achieve. Instead, [the Code] obliges publications to take care not to publish inaccurate, misleading or distorted material, including pictures. That is a simple, practical and deliverable requirement, applying to all they do ahead of publication. If sufficient care were taken, then that would be a defence to any subsequent complaint. (Editors’ Codebook 2012, 16)

This reflects the imperfect reality – the fact that mistakes happen. The good intention of the news providers is, however, irrelevant to victims of unfair news material. Principles of inaccuracy or unfairness should be judged solely according to content. Where inaccuracy is found to exist, it should be corrected as a matter of course, and where news material is found to be unfair it should be acknowledged as being unfair.

While findings of accuracy and fairness must apply to content, the conduct of news organisations in presenting news material should determine the extent to which a news provider may be considered to be ‘accountable’.

**Accountability and the Regulation of News Material**

A separate code provision should provide a non-exhaustive list of criteria with respect to ‘responsible journalism’. This list should include the extent to which the publishing of particular news material is in the public interest and the efforts of the news provider in checking the accuracy of information.

Any decision on fairness and accuracy should also include a statement based on the provision for responsible journalism that makes clear whether the news provider was justified in presenting news material. Such a finding would be relevant to any further action the news standards body may wish to take, such as referring a news provider to a statutory body.

**Recommendations:**

- The news standards body should have a public interest role under statute.
- **Accuracy** should be understood to mean ‘faithful representation’.
- The news standards body should be open to developing key principles over time.
- Accuracy and fairness should be regarded as separate principles.
- Accuracy and fairness should only relate to fact.
- An accuracy test should be developed based on the ‘implication of fact’.
- The public members of the news standards body should be responsible for implying the facts of news material.
- Separate principles of fairness of news information should protect the interests of those affected
by news material.
• The new standards body should be authorised to refer news providers that breach ethical responsibilities towards businesses to the ACCC.

PRIVACY

Privacy is a broad concept, often characterised as a collection of rights, which includes the right to seclusion, personal information and personal affairs. In Australia, there is no right to privacy under law. Separate rights with respect to privacy exist under the torts of nuisance, trespass and confidentiality, and information privacy is protected by the Privacy Act 1988. The High Court in Australian Broadcasting Commission v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 (‘Lenah’) opened the door for the development of a tort of privacy, and a statutory tort for ‘serious invasion of privacy’ is now the subject of review by the Commonwealth Government.

While media organisations are subject to the law of the land with respect to separate privacy concerns, they enjoy an exemption from the application of the National Privacy Principles (NPPs) outlined in the Privacy Act, which includes the requirement of organisations to collect personal information ‘only by lawful and fair means’ (NPP1.2), and to inform people about the purposes for which information is collected (NPP1.3).

PRIVACY UNDER EXISTING CODES

The absence of legal protection creates an ethical responsibility that should be catered for in the new code.

While all the code provisions presented in Table 3 recognise a general right to privacy, none offer a definition of ‘privacy’. The codes do, however, refer variously to ‘private grief’, the ‘sensibilities of individuals’, ‘personal and private affairs’ and respect for ‘private and family life, home, health and correspondence’.

The general rule under the codes is that the privacy of an individual is protected except when publication of material is in the public interest. A number of these codes offer the same definition of ‘public interest’. The UK code is different in that it lists elements included within the ‘public interest’, such as detecting or exposing crime.

There are three main questions that must be addressed in considering a new code:

1. When is there an invasion of privacy?
2. How should the public interest be defined?
3. How should the balance be struck in applying the public interest?

<table>
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<tr>
<th>Australian Press Council principles</th>
<th>Editors’ Code of Practice 2012 (UK)</th>
<th>Media Alliance Code of Ethics</th>
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| News and comment should be presented honestly and fairly, and with respect for the privacy and sensibilities of individuals. However, the right to privacy is not to be interpreted as preventing publication of matters of public record or obvious or significant public interest. Rumour and unconfirmed reports should be identified as such. (General Principle 4) | • Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.  
• Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.  
• It is unacceptable to photograph individuals in private places without their consent. (Clause 3) | Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude. (Clause 11) |

……

"Public interest"
For the purposes of these principles, "public interest" is defined as involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others.

Public interest
- The public interest includes, but is not confined to:
  > Detecting or exposing crime or serious impropriety.
  > Protecting public health and safety.
  > Preventing the public from being misled by an action or statement of an individual or organisation.
- There is a public interest in freedom of expression itself.
- Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity

Herald and Weekly Times Editorial Code of Conduct
All individuals, including public figures, have a right to privacy. Journalists have no general right to report the private behaviour of public figures unless public interest issues arise. The right to privacy diminishes when the suitability of public figures to hold office or perform their duties is under scrutiny and such scrutiny is in the public interest.

“Public interest” is defined for this and other clauses as involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others. (Clause 4.1)

2010 Commercial Television Industry Code of Practice
In broadcasting news and current affairs programs, licensees...must not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, other than where there is an identifiable public interest reason for the material to be broadcast. (Clause 4.3.5)

Commercial Radio Codes of Practice (2011)
In the preparation and presentation of current affairs programs a licensee must ensure that:...the licensee does not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, unless there is a public interest in broadcasting such information. (Clause 2.3(d))

Table 3 - How existing codes deal with privacy.

WHAT IS THE PRINCIPLE OF PRIVACY?

The broad scope of privacy is well-recognized. As Gleeson CJ stated in Lenah, ‘there is no bright line that can be drawn between what is private and what is not’ (Lenah 2001: 42). He suggested a ‘useful practical test’: namely, that what is private can be found by considering whether conduct would be ‘highly offensive to a reasonable person of ordinary sensibilities’ (Lenah 2001: 42). Rather than attempt to exhaustively define the concept of privacy, the new
code should apply a test, similar to the one referred to by Gleeson, to determine privacy on a case-by-case basis.

By adopting this test, industry would be held accountable to a broad principle of privacy, capable of evolving over time, and there would be no need for a piecemeal set of prescriptive rules such as currently exists under various codes (see Table 3). However, principle stated this broadly would require an additional framework to ensure a level of certainty.

Jessie Porteus’ submission to the review on the statutory privacy tort recommends eleven factors to be taken into account when considering whether an invasion of privacy has occurred (Porteus 2012). A number of these factors should be included in the body of the new code in order to establish relevant considerations for the application of the principle. The factors include:

- the nature of the material (the more sensitive, the more care must be taken);
- the nature of the conduct (the more intrusive, the more care must be taken);
- whether the material is essential to explain the substantive issues in the story;
- whether the material directly or indirectly contributes to the audience’s capacity to assess an issue of importance to the public, and its knowledge and understanding of the subject;
- the extent of the subject’s public profile;
- the extent of the subject’s vulnerability; and
- whether consent has been given (including implied consent).

HOW SHOULD ‘PUBLIC INTEREST’ BE DEFINED?

There have been many attempts over the years to define ‘public interest’. Rather than attempt to define the public interest, it is probably more instructive to provide indications of its scope. The ACMA’s Privacy Guidelines for Broadcasters (‘ACMA privacy guidelines’) state that public interest issues include:

…public health and security; criminal activities; corruption; misleading the public; serious anti-social behaviour; politics; government and public administration; elections; and the conduct of corporations, businesses, trade unions and religious organisations.

(ACMA 2011)

This list should be included in a new set of guidelines to be developed by the news standards body. The guidelines should also provide examples of issues that are not in the public interest: for instance, the personal lives of celebrities.

Applying The Public Interest In Relation To Privacy

In the privacy provisions listed in Table 3, the ‘public interest’ relates to the benefit to the public in receiving news material. However, it should be acknowledged that privacy is also a public interest concern. The new code should take into account all public interest concerns, and not just consider privacy against the public interest in receiving news information.

STRIKING THE BALANCE BETWEEN PRIVACY AND PUBLIC INTEREST

The existing codes do not appear to strike the balance evenly between the privacy of the individual and the public interest in receiving news information. For example, the commercial television code states that privacy must not be invaded other than where there is an identifiable public interest reason for the broadcast. This formulation, echoed in the commercial radio code and the APC code, may be described as a ‘threshold’ test – once public interest is established with respect to news material, any invasion of privacy is acceptable. This approach ignores both the degree to which the news material is in the public interest and the extent to which privacy is invaded.

The ABC Code of Practice emphasises balance. It states:
Intrusion into a person’s private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances.

The CLC recommends that the principle of privacy under a new code should be similar to the ABC code in being even-handed in its treatment of competing interests.

**THE NEED FOR A COMMON SET OF GUIDELINES**

Compliance with the privacy principle in the new code is likely to be greatly improved if news providers have well developed guidelines on which to base their decisions. The guidelines would assist in describing the public interest, and demonstrate how the requirement for privacy is likely to be applied in different situations. The ACMA’s privacy guidelines are a useful template that provides a number of case studies (ACMA 2011). The guidelines should evolve over time and include practical guidance on expected conduct with respect to:

- the collection and use of people’s private information;
- understanding when consent has been given;
- photographing people in private places;
- the privacy rights of public figures;
- hidden surveillance and subterfuge; and
- harassment.

### Recommendations:

- The new code should strike a proper balance between the right to privacy and the public interest in news information.
- The test for invasion of privacy should be based upon the reasonable expectation of privacy.
- Factors relevant to the test for invasion of privacy should be included in the body of the code.
- The news standards body should develop privacy guidelines to help news providers comply with their obligations under the new code.

**CONCLUSION**

The creation of the news standards body is an opportunity to take a look at how news material has been regulated in the past and how it ought to be regulated in the future. Creating a new code requires the development of principles that apply equally on all platforms. The new code must be founded on the public interest and ought to entrench the legitimate interests of those parties affected by the presentation of news material. The fairness of news information should be based on accuracy as determined by the implied facts of news material. This approach will allow news providers freedom of speech in presenting opinion, but discourage the inaccurate and unfair presentation of fact. The new code should also improve the level of privacy protection by striking a proper balance between the public interest in receiving information and the right of the individual to privacy. The question of privacy invasion should be based upon the reasonable expectation of privacy, clarified by a list of relevant factors.
REFERENCES


The final report of the Convergence Review, which was released in April 2012, makes radical recommendations for reforming existing broadcasting regulation, essentially by proposing a convergent regulatory regime, that regulates communications content regardless of the platform by which that content is delivered. This article explains and analyses the recommendations of the Convergence Review – and of the associated reviews of the classification system by the Australian Law Reform Commission (ALRC) and of the regulation of news and commentary by the Independent Media Inquiry (IMI) – as they relate to broadcast licensing and content regulation.

In doing so, the article claims that the recommendations made by the Convergence Review are seriously compromised by the inadequate analytical framework applied by the Review. In particular, the article argues that the claimed benefits of a platform-neutral approach to regulating communications content are belied by the detail of the proposed regulatory regime, which necessarily means that difficult regulatory distinctions must be drawn between different content. In any event, the most important consideration to be applied in developing a new regulatory regime is to ensure that regulation appropriately and effectively deals with the regulatory objectives sought to be achieved. This does not mean automatically applying a form of convergent regulation, especially when differences between different kinds of content or services mandate different regulatory treatment. As the Convergence Review has neither paid sufficient attention to these potential differences, nor engaged in sufficient analysis of the objectives of regulating communications services, the article concludes that the recommendations of the Review should not be implemented without further independent analysis.

Well, broadcast TV is – is living on borrowed time. It’s not going to be long before it goes the way of vinyl records and eight-track tapes.

Approaches to regulation developed for other means of communication—such as telephony and broadcasting—cannot simply be transferred to the Internet, but, rather, need to be specifically designed for it.
INTRODUCTION

Colin Blackman commenced a 1998 article in *Telecommunications Policy* with the question: ‘How can it be that we are still talking about the coming of the Information Society and the implications of convergence?’ (Blackman 1998: 163). Much earlier, in his 1982 text on Australian broadcasting law, in a section headed ‘Convergence of Media’, Armstrong referred to a 1978 German study that already accurately foresaw that the domestic television receiver could be used for ‘thousands of different technical applications’ (Armstrong 1982: 5). While the basic concept of convergence was so well-established by 1998 as to provoke questions of its continued salience, it was not until March 2011 that the Australian Minister for Broadband, Communications and the Digital Economy issued final terms of reference for an independent expert committee to undertake a fundamental review of communications regulation, specifically to take into account convergence (DBCDE 2011).

The terms of reference established extremely broad parameters for the review, but were imprecise about what is meant by convergence. Referring to the ‘phenomenon known as convergence’, the Preamble to the terms of reference simply stated that:

The development of digital broadcasting, data compression and internet-based technologies, coupled with improved infrastructure capability, means that content and services that were previously constrained to one delivery channel can now be delivered over many different platforms (DBCDE 2011).

Subsequent publications issued by the expert committee, including the final report publicly released in April 2012 (the ‘Convergence Report’), also failed to engage in much (if any) serious analysis of the concept. The problem is that, in the abstract, the term ‘convergence’ might be highly suggestive but, without further elaboration of its meaning (or meanings), it can operate as little more than a buzzword that refers to any and all changes in the media and communications landscape. As Marsden and Verhulst put it, convergence ‘is mainly used as an umbrella term for some of the technological changes within the media, but disagreement exists as to what should and what should not be included’ (Marsden & Verhulst 1999: 3).

In a series of papers, the OECD has engaged in significantly more analysis of convergence than the recent Australian policy reports. For example, in a 2008 Ministerial Background Report on *Convergence and Next Generation Networks*, the OECD outlined a number of dimensions of convergence, including:

- **Network convergence** - driven by the shift towards IP-based broadband networks. It includes fixed-mobile convergence and ‘three-screen convergence’ (mobile, TV and computer);
- **Service convergence** – stemming from network convergence and innovative handsets, which allows access to web-based applications, and the provision of traditional and new value-added services from a multiplicity of devices;
- **Industry/market convergence** – brings together in the same field industries such as information technology, telecommunication, and media, formerly operating in separate markets (Sarrocco and Ypsilanti 2008: 7).

The complex, and often contradictory, nature of developments sometimes described as convergence suggests that, rather than relying on a poorly defined high level concept, such as ‘convergence’, a safer form of analysis is to focus on the particular development, or developments, in technology, services or markets that are relevant to a specific policy issue. For example, if the analysis is directed at determining the implications for competition and market power, then developments such as the potential vertical integration of infrastructure providers, such as carriers, into content markets are obviously relevant. On the other hand, if the policy issue concerns the regulation of access to the radio frequency spectrum, then efficiency gains arising from the transition to digital, and the emergence of digital sharing technologies, are more relevant than the extent to which services may be provided across...
platforms. The fundamental point is that the use of a broad, vague term, such as convergence, may have more potential to obscure than enlighten.

To be fair, the collection of publications, which together should be regarded as comprising the Convergence Review, engage in some more satisfactory (if patchy) analysis and, by necessity, identify particular developments that are relevant to specific regulatory issues. The relevant publications include those produced by the expert committee, including a framing paper released in April 2011 (CR 2011a); an issues paper, known as Emerging Issues, released in June 2011 (CR 2011b); and five discussion papers which examined issues relating to specific areas (licensing and regulation; spectrum allocation and management; Australian and local content; media diversity, competition and market structure; and community standards).

In addition, during the period of the review, the Australian Communications and Media Authority (ACMA) produced two significant reports on the impacts of convergence on existing communications regulatory concepts – known as the Broken Concepts (ACMA 2011a) and Enduring Concepts (ACMA 2011b) reports – which were clearly intended to feed into the convergence review process.

Finally, the Convergence Review cannot be separated from two other important policy reviews that addressed issues with considerable overlap with the Convergence Review: a fundamental review of the regimes for classifying and regulating non-broadcasting content undertaken by the Australian Law Reform Commission (ALRC 2012); and an independent inquiry into the effectiveness of media codes of practice undertaken by an independent committee headed by a former Federal Court judge (Finkelstein 2012).

In its Emerging Issues paper, the Convergence Review committee early on signalled that it was contemplating fundamental reform, concluding that:

Australia’s communications sectors are undergoing profound change as a result of convergence. Existing regulatory arrangements built around industry ‘silos’ are challenged by new technologies, market structures and business models. In this committee’s view it is likely that revolutionary change to the existing policy framework will be needed to respond to convergence (CR 2011b: 11) (emphasis in original).

The ACMA, in its Broken Concepts report, was a bit more specific about what it understood to be meant by convergence, stating that:

Within the ACMA, convergence is primarily framed to refer to the merging of the previously distinct platforms by which information is communicated. The historical distinctions between radiocommunications, telecommunications, broadcasting and the internet are blurring (ACMA 2011a: 5).

Although the ACMA went on to refer to five, relatively amorphous, causes of change - technological developments; market developments; changing consumer and/or citizen engagement; globalisation of markets and regulation; and national digital communications strategies – its analysis is really pitched at too high a degree of generality to have much explanatory power. In other words, to be analytically useful, these changes need to be unpackaged and their implications more fully explained.

By way of contrast, a more satisfactory analysis of the issues that arise in assessing the particular issue of the continued viability of broadcast licensing is found in a 1999 OECD report on Convergence and Licensing in Broadcasting (OECD 1999). In that report, the OECD, as part of the process of explaining the particular developments relevant to the policy analysis of broadcast licensing, identified the implications of the emergence of new platforms for the delivery of broadcasting-like services in the following terms:

The ability to use different platforms to transmit programming has loosened the close linkage that existed between services and infrastructures. In the past broadcasting infrastructure could only be used for transmission of programming while the public switched telecommunication infrastructure could only be used for a narrow range of telecommunication services. … The break in the close linkage between services and
infrastructures implies that the present broadcast licensing framework which covers transmission and service regulation may no longer be appropriate (OECD 1999: 7).

If we follow this example, and confine the focus to the viability of broadcast licensing, and of the regulation of broadcasting-like content, then it is possible to identify the following as especially relevant to these issues:

- the development of infrastructure which allows for the delivery of broadcasting and broadcasting-like services via alternative delivery platforms, including mobile networks and the Internet, and which will be accelerated in Australia by the rollout of the National Broadband Network (NBN);
- the transition to digital broadcasting, which increases the number and functionality of services provided over existing parts of the spectrum used for broadcasting; and
- changes in the way in which the audience consumes broadcasting programs, and especially the extent to which viewers record television programs for later viewing, or take advantage of ‘catch-up’ programs, which broadcasters make available over the Internet.

If, however, the focus is on other policy issues, such as the future of Australian content quotas for commercial broadcasters, or of broadcasting-specific regulation of ownership and control, then different developments in technologies, services and markets are more relevant. For example, a key issue in the future of Australian content regulation is the extent to which broadcasting-like services can be streamed to Australian consumers from entities located outside of Australia. As explained later in this article, this possibility is also broadly relevant to any form of content regulation, including proposals for mandating classification of television content. And, as suggested previously, market developments, such as increased competition from Internet-based services, such as IPTV, and vertical integration across carriage and content services, are relevant to any analysis of ownership and control regulation.

To the extent that the Convergence Review reports do not engage in this more specific analysis, the recommendations of the review may obviously be questionable. Nevertheless, despite the shortcomings with the analytical framework applied by the review, the Convergence Report includes serious recommendations for dealing with real regulatory dilemmas. Although there are problems with the way in which the recommendations are explained, and the reasoning in the Report, many of the recommendations merit either serious consideration or support.

This article focuses on an explanation and analysis of the recommendations in the Convergence Report that relate to broadcast licensing and the regulation of content, including recommendations relating to the regulation of news and commentary, but does not include a detailed analysis of the proposals relating to regulation directed at ensuring the production of Australian content.

First, this article identifies some of the problems involved with the law reform process adopted for the Convergence Review, which may have compromised some of the recommendations arising from the review. Secondly, the article introduces and explains the main recommendations of the Convergence Report relating to broadcast licensing, general content regulation and the regulation of content services that provide news and commentary, but does not include a detailed analysis of the proposals relating to regulation directed at ensuring the production of Australian content.

Thirdly, the article introduces and analyses the main rationales given for the regulation of broadcasting, which forms the essential background for an assessment of the recommendations made in the Convergence Report, and assesses the extent to which the Report adequately addresses regulatory rationales. Fourthly, the article critically assesses the main recommendations of the Convergence Report relating to broadcast licensing, general content regulation, and the regulation of news and commentary. The article concludes with a summary of the main criticisms made of the Convergence Report’s recommendations, and some suggestions for how the regulatory reform process might proceed.
PROCESS PROBLEMS

From the outset, the Convergence Review suffered from process problems. As suggested above, the terms of reference for the review, released on 2 March 2011, were extraordinarily broad. In essence, the terms of reference required a complete review of the policy framework for the production and delivery of media content and communications services and, in particular:

- To (a) develop advice for the government on the appropriate policy framework for a converged environment; (b) advise on ways of achieving it, including implementation options and timeframes where appropriate; and (c) advise on the potential impact of reform options on industry, consumers and the community;

- In undertaking this, to inquire into and advise on: (a) whether the existing regulatory objectives remain appropriate in a converging environment; and (b) if so, whether the regulatory approach embodied in the current policy framework remains the most effective and efficient; and (c) in light of this, the preferred alternative regulatory or non-regulatory measures to form a new framework; and

- In light of the views on the preferred policy framework, to advise on the principles that will underpin any new framework (DBCDE 2011).

These terms are at once very demanding – apparently requiring nothing less than recommendations for a complete overhaul of the communications regulatory framework – and remarkably imprecise – not merely because of the use of the undefined term ‘converged environment’, but by, for example, requiring advice on general ‘principles’. The review also incorporated a mandatory statutory review of the operation of Schedule 7 of the Broadcasting Services Act 1992 (Cth) (the ‘BSA’), which deals with the regulation of non-broadcasting content delivered via the Internet and mobile devices (BSA 1992: Schedule 7, cl 118) – in itself, a very significant challenge.

Soon after the establishment of the Convergence Review, on 24 March 2012, the Commonwealth Attorney-General issued terms of reference to the ALRC for a fundamental review of the systems for regulating non-broadcasting content under the Classification (Publications, Films and Computer Games) Act 1995 (Cth), and of Schedules 5 and 7 of the BSA. In large measure, the review was initiated in response to opposition to the Commonwealth government’s proposal to introduce mandatory ISP-level filtering of Refused Classification (RC) content. The terms of reference specifically required the ALRC to have regard to the Convergence Review, and to make and accept referrals of relevant issues to and from overlapping reviews. As events transpired, the final ALRC classification report was released before the final report of the Convergence Review.

Meanwhile, in September 2011, the Minister for Communications issued terms of reference for an independent inquiry into the effectiveness of media codes of practice, especially in the light of technological changes affecting the news media (Finkelstein 2012). The Independent Media Inquiry (IMI), which was much more narrowly-focused than the Convergence Review, was motivated by revelations of unethical and apparently illegal activities by News Corporation employees in the UK, and by perceptions of bias in elements of the Australian press. Like the final ALRC report, the final report of the IMI was released before the Convergence Review was finalised.

Coherent policy development does not result from a patchwork of overlapping reviews, some of which respond to short-term political objectives, and some of which have unfocussed objectives. The lack of clarity in the terms of reference for the Convergence Review, and the parallel overlapping inquiries, made the task of the Review Committee more complex than it might have been.

The processes adopted by the Committee did not help matters. In April 2011, the Review Committee released a framing paper (CR 2011a), which set out eight high-level preliminary principles, which were meant to guide the review. The principles were of such a high degree
of generality as to be impossible to disagree with. Even if the principles had been explained in more detail, however, this approach provides very limited practical assistance in policy development. Following submissions and consultations on the framing paper, in June 2011, the Committee released a further paper, known as Emerging Issues (CR 2011b) which set out ten high-level principles, which consisted of reformulations and additions to the original eight principles, and which also included brief explanations of the main policy issues identified by the Committee. The ten principles, which made some semantic changes to the original eight principles, included what was regarded as the ‘first and most fundamental principle’ (CR 2011b: viii), namely that:

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 (CR 2011b: 8).

While unexceptional in itself, this principle clearly raises important questions, especially in relation to where regulation might be required and what might be the relevant public purposes, which were not satisfactorily pursued by the review.

In the second half of 2011, the Review Committee released five discussion papers which, as mentioned above, examined issues relating to the following general areas: licensing and regulation; spectrum allocation and management; Australian and local content; media diversity, competition and market structure; and community standards. Each of these areas raises policy issues of considerable complexity. Unfortunately, the analysis undertaken in the discussion papers was generally superficial, lacking in both substance and detail. In this respect, the Convergence Review reports compare poorly with the analysis undertaken in the Productivity Commission reports on Broadcasting (PC 2000) and Radiocommunications (PC 2002), both of which are more than a decade old, but which examined equally complex issues in a more comprehensive and satisfactory way. The analysis in the Convergence Review reports also compares unfavourably with the ALRC Classification Report and the IMI report, both of which had tight deadlines.

The processes used for assessing regulation are well-established and hardly controversial. For example, the Australian Government’s Best Practice Regulation Handbook states that:

Determining whether regulation meets the dual goals of ‘effectiveness’ and ‘efficiency’ requires a structured approach to policy development that systematically evaluates costs and benefits.

The problem to be addressed and the related policy objective should be identified as first steps in the policy development process. A range of options for achieving the objective should be considered (as well as a no action or the status quo option); and an analysis of the likely economic, social and environmental consequences. (Australian Government 2010: 4).

While parts of the Convergence Review reports, such as the first general principle set out above, pay lip-service to aspects of this process, nowhere in the reports produced by the Review Committee is there a coherent analysis of the objectives of regulation; nor is there any systematic assessment of the regulatory options for addressing identified problems. The fundamental problems with the processes adopted by the Review Committee – which seem to have privileged consultation with stakeholders at the expense of policy analysis – naturally cast doubt on the recommendations, however arrived at, made by the Review. That said, to the extent that the recommendations attempt to address genuinely difficult regulatory problems, they merit independent assessment. But any such assessment must be based not on high-level principles, but on a coherent analysis of regulatory objectives, as well as of the regulatory options for achieving the relevant objectives, which is the approach applied to the analysis of broadcast licensing and content regulation in the remainder of this article.
It is clear from the Convergence Review reports that the central problem addressed by the recommendations relating to licensing and content regulation is that, mainly as a result of the emergence of viable alternative delivery platforms, and especially the National Broadband Network (NBN), it is increasingly possible for broadcasting-like services to be delivered across a variety of platforms, including the Internet. This section of the article introduces and explains the main recommendations of the Convergence Report on licensing and content regulation, including the general recommendations on content regulation and the more specific recommendations on the regulation of services that provide news and commentary.

As will become apparent, each of the main recommendations of the Convergence Report on licensing and content regulation is based on the principle of platform-neutrality, otherwise known as the principle of regulatory parity. This principle requires that like services should be regulated in a like manner, regardless of the delivery platform. To understand the recommendations, it is first necessary to explain the relevant features of the current regulatory regime, which, in contrast to the principle of platform-neutrality, draw important technology-based distinctions.

The most important technological distinctions are made by the concept of a ‘broadcasting service’, which defines what is and is not regulated by the current broadcasting regime. A ‘broadcasting service’ is defined, ostensibly in platform-neutral terms, as:

a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means…(BSA 1992: s 6(1)).

The basic definition is, however, subject to exceptions, two of which allow for important technology-based distinctions. First, paragraph (b) of the definition excludes ‘a service that makes programs available on demand on a point-to-point basis, including a dial-up service’, which effectively excludes video-on-demand services from broadcasting regulation. Secondly, paragraph (c) of the definition provides for the Minister to determine further exemptions from the definition. In September 2000, the Minister exercised this power to exempt the following class of services:

a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs using the broadcasting services bands (Alston 2000).

The broadcasting services bands, which means that part of the radiofrequency spectrum that is designated for broadcasting purposes, are not currently used for delivering programs using the Internet.

The current regulatory regime applies different forms of regulation to different categories of broadcasting services in accordance with the regulatory policy set out in section 4(1) of the BSA, which states that:

The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services … according to the degree of influence that different types of broadcasting services … are able to exert in shaping community views in Australia.

Section 11 sets out the categories of broadcasting service, namely: national broadcasting services; commercial broadcasting services; community broadcasting services; subscription broadcasting services; subscription narrowcasting services; open narrowcasting services; and international broadcasting services.

Following from the regulatory policy, section 12 of the BSA distinguishes different methods of regulating particular services, providing that commercial, community, subscription television and international services all require individual licences, while all other services (except for the national broadcasters) are provided under a class licence. The national
broadcasters – the ABC and the SBS – are each established and regulated under their own legislation. As the BSA effectively deals with content and not delivery, even if a service operates pursuant to a licence or class licence under the BSA, the service provider must still obtain access to a delivery platform. If the service is to be delivered by use of the radio frequency spectrum, it requires a licence under the Radiocommunications Act 1992 (Cth) (RA).

**Broadcast Licensing**

Commercial television and radio licensing is dealt with under Part 4 of the BSA, while community licensing is dealt with under Part 6. Under sections 36 and 80 of the BSA, the ACMA is effectively confined to allocating commercial and community broadcasting licences to the delivery of programs by means of the broadcasting services bands. There is a moratorium on the issue of additional commercial television broadcasting licences and, in November 2011, a mandatory review of the moratorium was deferred from 1 January 2012 to 1 January 2013, to allow for consideration of the Convergence Review (BSA, ss 35A, 35B).

Under section 102 of the RA, if a commercial or community broadcasting licence is issued for operation via the broadcasting services bands, then the ACMA must issue a transmitter licence authorising use of the spectrum. In this way, despite technology-neutral definitions of the categories of broadcasting service, commercial and community services are tied to delivery over the radiofrequency spectrum. Given the exemption of services delivering programs by means of the Internet, however, a commercial television service could be delivered in this way, such as by use of the NBN, without any need whatsoever for a broadcasting licence under the BSA.

The main recommendations of the Convergence Report relating to broadcast licensing are radical: first, to abolish the existing categories of broadcasting service and, even more importantly, to eliminate the need for individual licences under the BSA. The Report essentially concludes that the availability of alternative delivery platforms, especially the Internet, has obviated the need for broadcast licensing (CR 2012: 4). The effect of this recommendation would be to completely remove the link between broadcasting regulation and licensing of spectrum access as, while not requiring a broadcasting licence, a broadcaster wishing to deliver content by means of the radio frequency spectrum would still require a licence to use the spectrum, which it would no longer be automatically entitled to. The proposal to abolish licensing does not, however, entail removing all regulation of broadcasting content, but it does entail fundamentally changing the form of regulation. Thus, in place of requiring a licence as a pre-condition for providing a service, the Report recommends imposing regulation by means of administrative rules determined by the communications regulator, in a form such as the service provider rules that may be imposed on carriage or content services under section 99 of the Telecommunications Act 1997 (Cth) (CR 2012: 107).

**Who should be regulated? Content service enterprises**

As explained above, the BSA applies a tiered approach to regulating different categories of broadcasting service, with the greatest amount of regulation being applied to commercial broadcasting services and the least amount to narrowcasters. The Convergence Report’s recommendation for removing the categories of broadcasting service raises the question of which entities should be subject to regulation. In effect, the Report’s answer to this question is meant to establish the scope of the proposed new convergent regulatory regime.

The problem identified by the Report in determining the scope of the proposed new regime is essentially that media content ‘of wide appeal’ is increasingly available over non-broadcast delivery platforms, especially the Internet and mobile networks (Convergence Report, 7). The Convergence Report addresses these developments by proposing to de-couple regulation from the provision of ‘wide appeal’ content by means of a specific delivery platform – namely, the broadcasting services bands – and, instead, to focus regulation on ‘significant enterprises that
provide professional content to Australians’ (Convergence Report, 10). The Report proposes to do this through the new technology-neutral concept of a ‘content service enterprise’ (CSE).

According to the Report, a CSE is a significant enterprise that provides professional content to Australians and is characterised by:

- control over the content supplied;
- a large number of Australian users of that content; and
- a high level of revenue from supplying content to Australians (CR 2012: 10).

Adopting a broad-brush approach, the Report avoids entering into detail regarding the criteria for identifying CSEs, but does provide some general guidance. For example, in relation to control over professional content, the Report suggests that platforms that host user-generated content would not normally amount to CSEs, unless the platform operator enters into arrangements with professional content providers, in which case it might qualify as a CSE. As far as the proposed thresholds for Australian users and revenue are concerned, the Report recommended that the proposed new communications regulator undertake an investigation into these matters. As preliminary estimates, however, the Report suggested that the number of users or audience members might be set at 500,000 per month, with Australian-sourced content revenue being set at $50 million per annum (CR 2012: 12). According to the Report, these thresholds would currently capture the main commercial television broadcasters, the major commercial radio networks and the major Australian newspaper groups, but not new media enterprises such as Google, Apple and Telstra.

WHAT SHOULD BE REGULATED?

As noted above, the first of the principles adopted by the Convergence Review incorporated the general principle that regulation ‘should be the minimum necessary to achieve a clear purpose’. The recommendations to remove broadcast licensing, and to abolish the existing categories of broadcasting services, represent major applications of this principle. Applying the principle that unnecessary regulation should be removed, the review recommended that communications regulation should be confined to the following three areas:

- **Media ownership:** the review recognised that, in the interests of maintaining diversity of media content, there is a need for retaining media-specific ownership and control regulation. In place of the current rules, however, the review recommended applying two new rules to CSEs: a ‘minimum number of owners’ rule to local markets for news and commentary; and a nation-wide public interest test to be applied to changes in control of CSEs of national significance.

- **Australian and local content:** the review also recognised that there is a continued need to regulate to ensure minimum levels of Australian content, and proposed a new ‘uniform content scheme’ to apply to CSEs with significant revenues from television-like content. The new scheme, which would apply only to CSEs that offer drama, documentary or children’s programs, would require CSEs to expend a minimum percentage of revenue on Australian content in those three areas or, in the alternative, to contribute to a ‘converged content production fund’ for investment in Australian content.

- **Content standards:** the review broadly accepted the recommendations of the ALRC’s classification report, which are explained further below, that a flexible and technology-neutral approach should apply to all media content.

GENERAL CONTENT REGULATION

The current broadcasting regime regulates content by means of standard licence conditions, program standards and co-regulatory codes of practice. The licence conditions, set out in Schedule 2 of the BSA, include obligations in relation to election advertising, advertising of
therapeutic goods and tobacco advertising. The conditions prohibit commercial television and subscription television licensees from broadcasting programs that have been classified as Refused Classification (RC) or X18+-rated, or unmodified films classified R18+, and prohibit subscription television licensees from broadcasting R18+-rated programs. Section 122 of the BSA requires the ACMA to determine program standards, which are binding rules determined by the ACMA, for Australian content and children’s programs broadcast by commercial television licensees. The Children’s Television Standards (CTS 2009), determined by the ACMA, establish a range of obligations that are designed to safeguard the interests of children, including providing age-appropriate content. For example, the CTS establish ‘bands’ of the day when children’s content – consisting of ‘P’ content, which is suitable for pre-school children, or ‘C’ content, which is suitable for older children (aged 5 to 14) – can be shown.

Under section 123 of the BSA, industry groups representing the different categories of broadcasting must develop codes of practice which reflect community attitudes and, in doing so, are linked to the national classification scheme administered by the Classification Board. In particular, the commercial and community television codes are required to apply the film classification system administered by the Classification Board (BSA 1992: s 123(3A)). If an industry group fails to adopt a code that provides appropriate community safeguards, the ACMA may determine binding program standards (BSA 1992: s 125). Extraordinarily, broadcast standards or codes may be amended by both Houses of the Commonwealth Parliament (BSA 1992: s 128). The BSA also mandates time-zone restrictions for commercial and community television licensees, such as requiring that films classified as M (Mature) only be broadcast between the hours of 8.30 pm and 5.30 am on the following day.

The existing regulatory framework means that, apart from standards for Australian content and children’s programs, the details of content regulation are dealt with by co-regulatory industry codes. For example, programs and advertising on free-to-air commercial broadcasting are regulated by the Commercial Television Industry Code of Practice 2010, which is developed by Free TV Australia in consultation with the ACMA. While the classifications applied to television programs under the Code are aligned with the national film classification system, the Code provides more detailed guidance on specific subject matter, and includes additional classifications to provide viewer information, such as Preschool Children (P), Children (C) and Adult Violence (AV). All content broadcast on free-to-air commercial television is classified by in-house classifiers, many of whom have experience as content classifiers under the national classification system.

The Convergence Review recommendations regarding the future of broadcast content regulation cannot be understood in isolation from the recommendations of the ALRC review of the national classification scheme. Although the terms of reference for the ALRC review did not extend to traditional broadcast content, the ALRC was required to have regard to the Convergence Review, and it decided to extend its inquiry into the role of television content in the classification system, at least in part because of the increasing difficulty in distinguishing broadcasting from Internet content. In contrast to the Convergence Report, which focuses on regulating CSEs, the ALRC classification report focuses on regulating particular kinds of content.

The current national content classification scheme applies different classification systems to submittable publications; films and videos; and computer games (Butler & Rodrick 2012: 562-8). In addition, Schedule 7 of the BSA establishes a converged content regulatory regime that applies to most non-broadcasting, electronic content that does not fall within the national classification scheme - including stored Internet content, live streamed Internet content and premium mobile services – provided there is a sufficient Australian connection (Lindsay, Rodrick & De Zwart 2008).

The ALRC Classification Report recommended the adoption of a completely new platform-neutral classification scheme, through the enactment of an omnibus Classification of Media Content Act, with a single regulator being responsible for classification of content. In essence, the ALRC proposed a two-tiered regulatory regime, consisting of:
compulsory classification of particular content with a sufficient Australian link (with voluntary classification of other content); and

- an obligation on content providers to take ‘reasonable steps’ to restrict access to adult content, meaning content classified R18+ or X18+, that is sold, screened, provided online or distributed to the Australian public.

Recognising that the volume of content accessible by Australians, especially over the Internet, makes it impractical to attempt to classify all media content, the ALRC recommended that the following content should be compulsorily classified prior to being sold, screened, provided online or distributed to the Australian public:

- feature films (but not online video clips, such as most of those posted to platforms such as YouTube);
- television programs, including situation comedies, documentaries, children’s programs and drama; and
- computer games likely to be classified MA15+ or higher (ALRC 2012: 125-135).

In addition, classification of these products would be mandatory only where they are made and distributed on a commercial basis and likely to have a significant Australian audience.

As far as other media content is concerned, including lower level computer games, books, magazines, websites, music and mobile ‘apps’, the ALRC recommended that they be subject to voluntary classification by industry bodies, with the proposed regulator being required to encourage the development of codes for low level computer games, magazines likely to be classified R18+ or X18+ and music with a ‘strong impact’ (ALRC 2012: 144). In relation to this content, the ALRC also recommended that the proposed regulator be given the power to request the development of industry codes and to approve voluntary codes. In addition to classification of content, the ALRC recommended that industry codes could deal with matters such as methods of restricting access to certain content, for protecting children from certain content and providing consumer information (ALRC 2012: 312-13).

While the ALRC recommended that more kinds of content than is currently the case be subject to classification by industry, it concluded that there remains a need for an independent Classification Board, essentially to provide benchmarks for industry classification. So as to provide flexibility for potential future changes in content, the ALRC recommended that the proposed regulator be given the power to determine the categories of content to be classified by the Classification Board, but with the initial categories set as feature films for Australian cinema release and computer games likely to be classified as MA18+ or higher. This would mean that, although television programs would be subject to mandatory classification, this would be undertaken, as it currently is, by industry. So far as regulatory responsibility for the proposed new regime is concerned, the ALRC recommended the establishment of a single independent regulator, which could form one part of either the ACMA or a proposed new convergent regulator, with an independent Classification Board retaining responsibility for mandatory classification of content.

As noted above, the BSA mandates time-zone restrictions for commercial television and community television broadcasters. In addition, further time-zone restrictions, relating to C, G and PG content, are established under industry codes of practice. Given the availability of alternative delivery platforms, which do not incorporate such restrictions – including subscription television, ‘catch up’ TV and digital recording – the ALRC concluded that time-zone restrictions are likely to become unnecessary in the future. Accordingly, it recommended against legislating mandatory time-zone restrictions, while allowing for these to be provided for in industry codes, so as to allow for flexible responses as patterns of media consumption change over time (ALRC 2012:193-6).

As further noted, the ALRC report was released prior to the Convergence Report, meaning that its detailed recommendations must be interpreted in light of the subsequent recommendations made in the Convergence Report. A fundamental recommendation of the Convergence Report is the establishment of a new communications regulator to replace the
ACMA, and to operate at arm’s length from the government (Convergence Report, 15-16). In broadly endorsing the ALRC recommendations, the Report accepted that a uniform classification scheme should apply to media content, proposing that the new convergent regulator assume responsibility for content regulation, including responsibility for administering the proposed new national classification scheme, but excluding responsibility for news and commentary (CR 2012: 38). As explained below, it is proposed that news and commentary be subject to a completely separate regulatory regime. The Report also recommended that a classification board be re-constituted as part of the proposed new regulator, while retaining independence (CR 2012: 44).

Furthermore, the Report specifically endorsed the following features of the ALRC proposals:

- technology neutral obligations to classify and restrict content;
- mandatory classification of feature films, television programs and high-level computer games before these are sold, screened, provided online or otherwise distributed to the Australian public;
- new convergent classification legislation that applies to all media content, including publications, films, computer games, online and mobile content, and broadcasting content;
- a co-regulatory regime, with powers for the regulator to approve industry codes for classifying and regulating content and, in the absence of a suitable code, for the regulator to make a binding standard;
- an obligation for content providers to take reasonable steps to restrict access to adult content where that content is sold, screened, provided online or otherwise distributed to the Australian public; and
- broad discretion for the regulator to investigate complaints (CR 2012: 44-5).

Just as the ALRC recommendations relate to classification of media content, regardless of whether or not it is provided by CSEs, the Convergence Report’s recommendations about content regulation are, for the most part, not confined to CSEs. Some of the recommendations made about content regulation in the Report are, however, limited to CSEs, or to a sub-set of CSEs. While the Convergence Review generally accepted the ALRC recommendation that a technology-neutral approach be applied to content classification and regulation, it acknowledged that some flexibility might be required to take account of different kinds of content, or different services. In this respect, the Convergence Report stated that:

The Review considers that ‘technology neutral’ should mean that there are common and non-discriminatory content standards across delivery platforms. There should, however, also be flexibility for standards to be applied in different ways, depending on how services are delivered (Convergence Report, 42).

Applying this principle, the Convergence Report recommended that, over and above the general regime proposed for media content, two specific obligations should apply to CSEs:

- mandatory content standards set by the proposed new communications regulator where there is a clear case for intervention, and especially in relation to children’s television content; and
- specific obligations for CSEs that provide news and commentary in relation to standards of fairness, accuracy and transparency (CR 2012: 41).

In relation to mandatory content standards, the Report saw a continuing need for regulation of children’s television programs, apparently endorsing mandatory standards to be set by the proposed regulator, but taking into account the applicability of regulation to children’s content provided on non-broadcasting platforms (CR 2012: 55). While the report did support the retention of compulsory children’s standards, it also recommended that a more flexible approach be adopted to meeting the standards, including reviewing restrictions on advertising during C programming, so as to allow for the generation of greater revenues, and a more
flexible approach to free-to-air broadcasters meeting their obligations via multi-channels. Although the review specifically considered that standards should apply to children’s television content provided by CSEs, there is a degree of ambiguity in the Report about the extent to which standards should apply to other children’s content, including non-television content and content supplied by entities that are not CSEs. In any case, in relation to time zones, which are particularly relevant to children’s programming, the Convergence Report agreed with the ALRC recommendation that zoning should not be mandated, but also considered that the proposed new regulator should be given the power to determine time-zone restrictions, especially in the form of children’s content standards (CR 2012: 45).

In addition to the recommendations for mandatory children’s standards, the Convergence Report recommended that the proposed new regulator should have a power to set mandatory content standards to apply to CSEs ‘if there is a need for regulatory intervention’ (CR 2012: 56). Applying the principle that content standards may need to be applied flexibly, the Report specifically acknowledged that some standards might apply solely to particular services, such as free-to-air broadcasting or subscription television. In this respect, the Report specifically stated that ‘the principle of technology neutrality does not demand that standards be applied in an identical way to all services’ (CR 2012: 56). A particular area of emerging concern identified by the Report is the need for clear demarcations between advertising and sponsorship, on the one hand, and content, on the other hand, including in relation to online advertising for online services provided by CSEs.

**NEWS AND COMMENTARY**

In September 2011, the Minister for Broadband, Communications and the Digital Economy announced an independent inquiry, to be headed by former Federal Court judge Ray Finkelstein QC, into media regulation, and especially the effectiveness of media codes that regulate the press (Conroy 2011). The inquiry had been motivated, in part, by revelations about unethical and potentially unlawful activities, especially hacking, undertaken by News International in the UK (Finkelstein 2012: 15). Complying with a tight deadline, the report of the IMI was released on 28 February 2012, in time for its findings to be taken into account by the Convergence Review.

The IMI report focussed on the adequacy of existing mechanisms for ensuring accountability of the media in relation to news and commentary. Like the Convergence Review, a significant issue was the extent to which different regulatory regimes apply to different media platforms. As explained above, broadcasting content is regulated predominantly by co-regulatory codes of practice, which are designed to ensure appropriate community safeguards for broadcasting content, and which include obligations in relation to fairness and accuracy. In assessing the broadcasting regime, the IMI Report essentially found that it failed to ensure an adequate level of accountability, mainly as a consequence of its processes for dealing with complaints being too slow and cumbersome (Finkelstein 2012: 180).

As opposed to broadcast content, the print media are subject to self-regulation, with the most important accountability mechanism being the Standards of Practice, which include obligations of accuracy, fairness and balance, and which is administered by the Australian Press Council (APC), a voluntary, non-profit organisation funded mainly by the press. In addition to the print media, the self-regulatory system has been voluntarily applied to the print media’s online publications and to two online publishers, <crikey.com.au> and <ninemsn>. While the IMI Report acknowledged that self-regulation had played a role in maintaining press standards, it found that, ultimately, it had been ineffective, especially because the APC has insufficient powers, insufficient resources and is at the mercy of its members, who can withdraw at any time (Finkelstein 2012: 8).

In order to deal with the identified regulatory failures, the IMI Report recommended replacing self-regulation with a new regulatory model, to be administered by an independent statutory body, the News Media Council (NMC), to be adequately funded by government, which would take over the functions of the ACMA and APC in regulating the news media (Finkelstein 2012: 290). The Report recommended that the NMC would be responsible for: developing
aspirational principles and binding standards, including minimum standards for fairness and accuracy; investigating and resolving alleged contraventions of standards; and educating the news media and public about media standards. In relation to coverage, the IMI report recommended that the regime should apply to news media across all platforms, including broadcasting and print, and extending to online media, but not to publishers that distribute 3,000 or less copies of print per issue, or online news sites that have less than 15,000 hits per annum (Finkelstein 2012: 295).

The Convergence Review was required to take into account the recommendations of the IMI Report (CR 2012: vii). Accepting the need for regulation of the news media, the Convergence Report recommended establishing a new body, separate from the proposed new communications regulator, to be responsible for regulating a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary (CR 2012: 38). As opposed to the IMI recommendations, however, and largely as a result of perceived sensitivities about government involvement in regulating the news media, the Convergence Report recommended a self-regulatory structure, explaining that:

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 (CR 2012: 50).

While supporting a self-regulatory model, the Convergence Report included recommendations for addressing some of the weaknesses of the current APC regime identified by the IMI Report. First, the Convergence Report recommended that the proposed regime should apply to all professional news and commentary providers that are CSEs (CR 2012: 51). In order to ensure that relevant news media organisations subscribe to the scheme, the Report recommended that legislation require CSEs that provide news and commentary to become members of the scheme. Moreover, to encourage other content providers to join, the Report recommended that membership in the scheme be a condition for retaining legal privileges available to the news media, especially the exemption available to media organisations under s 7B(4) of the Privacy Act 1988 (Cth) and exemptions relating to misleading and deceptive statements available to ‘information providers’ under the Competition and Consumer Act 2010 (Cth).

Importantly, while supporting a platform-neutral approach to the regulation of news media, the Convergence Report proposed that the regime should only be compulsory for CSEs, considering that the thresholds proposed in the IMI Report (3,000 print copies or 15,000 hits per annum) are so low that they would be too resource-intensive for an efficient regulatory regime. Accordingly, the Convergence Report recommended that membership in the regime by professional news and commentary providers that fall below the threshold for CSEs should be voluntary. Secondly, to deal with the resource constraints identified by the IMI Report, the Convergence Report recommended that the government should make a financial contribution to the proposed new regulatory body, potentially up to one third of the funding, provided that the majority of the funding be sourced from industry (CR 2012: 52).

WHY REGULATE BROADCASTING?

As recommended in the Australian Government’s Best Practice Regulation Handbook (2010), and by regulatory experts such as Joskow (2010) and Freiberg (2010), the first step in developing a regulatory framework is to clearly and precisely identify the objectives sought to be achieved by regulation. This practice is followed in the IMI Report, which identifies a number of market failures in the production and consumption of news media: external social benefits that arise from the production of news that may not be fully captured by news producers; the information asymmetry between producers and consumers, which means that consumers may not have sufficient information to assess the quality of a news story; and
concentration of ownership of mainstream news services (Finkelstein 2012: 279-80). In addition, in addressing the adequacy of regulation of the broadcasting regime, the IMI Report incorporated an analysis of the historical justifications for imposing more regulation on broadcasting than is imposed on the press (Finkelstein 2012: 166-8).

It is unusual, and disappointing, that the publications produced by the Convergence Review, including the Convergence Report, fail to engage in sufficient analysis of the rationales for regulating broadcasting, including the extent to which developments in technologies, services and markets may have undermined these rationales. In place of a more precise analysis of regulatory objectives, the Report adopts a catch-all statement of reasons for regulating from the DBCDE Future Directions report (DBCDE 2009), that intervention is justified to ‘fill a gap left by the market, address social inequity, protect the community, assist markets to work fairly and efficiently, and address market failures’ (CR 2012: 3). Without further elaboration, and application to particular issues, this statement serves little purpose. Beyond this, the Report includes general references to existing regulatory policy, but appears to accept that there is no need to fundamentally re-examine regulatory rationales, apparently endorsing the ABC’s submission that:

while the media landscape has changed, the policy principles which have formed the rationale for regulation largely endure (CR 2012: 3).

In jumping to this conclusion, the Convergence Report effectively avoided engaging in the precise analysis of regulatory objectives, including complex issues relating to the different regulatory treatment of broadcasting and the press, which is essential to any thorough review of the continued viability of broadcasting regulation.

A number of justifications have been proposed for the differential treatment of broadcasting and the press, especially in the US, where any form of regulation is subject to First Amendment limits. In Australia, where there is no First Amendment, the regulatory rationales have tended to be less clearly defined, and sometimes mixed. For example, the seminal 1976 Green Report into broadcasting stated that:

The public own the airwaves … since frequencies are scarce, and the broadcast media are influential, to grant a broadcast licence is to bestow a privilege. This privilege carries with it an obligation to provide the public with programs which meets the standards it expects (Green Report 1976: 43).

This statement manages to uncritically combine the three most important justifications for regulating broadcasting. First, as the radio frequency spectrum is a public resource, it is sometimes claimed that the government is entitled to impose terms on the use of the resource. As Barendt has pointed out, however, this argument confuses the opportunity for regulating with whether or not regulation can be justified and, thus, cannot be sustained (Barendt 1993: 4). The argument is commonly combined with a ‘social compact’, or quid pro quo argument – that in return for the privilege of using a public resource, broadcasters have public interest obligations to provide certain sorts of programming. Although the pragmatic, quid pro quo rationale has commonly underpinned the Australian approach to broadcast regulation, as Corn-Revere has argued, it completely fails to provide any limiting principle – or any guidance whatsoever – on the appropriate form of regulation (Corn-Revere 1997: 14).

Secondly, probably the most widely used rationale for broadcasting regulation is the alleged scarcity of available radio frequency spectrum. In Red Lion Broadcasting Co v FCC (395 US 367 (1969)), for example, the US Supreme Court was required to determine whether or not the FCC’s fairness doctrine – which, in part, effectively conferred a right of reply in relation to political matters – complied with the First Amendment. In concluding that the doctrine did not infringe freedom of expression, the Court held that the restrictions on broadcasters were justified on the basis of the limited available frequencies, stating that:

When there are substantially more individuals who want to broadcast than frequencies to allocate, it is idle to posat an unbridgeable First Amendment right comparable to the right of every individual to speak, write, or publish (395 US 367: 388 (1969)).
The scarcity rationale for regulating broadcasting, as opposed to regulating access to the spectrum, has never been entirely convincing. To begin with, regulatory decisions about the allocation of spectrum for particular uses means that scarcity for broadcasting purposes is the artificial result of administrative decisions, it being always possible for spectrum allocated for other uses to be re-zoned for broadcasting. Furthermore, as Coase first argued, it is possible for spectrum scarcity to be dealt with by the market rather than regulation: provided tradeable property rights are established, access to spectrum is no more nor less problematic than access to any other scarce resource (Coase 1959). Finally, as Barendt observes, if actual scarcity of channels is identified as the problem, there has, for some time, been more broadcasting channels than daily newspapers (Barendt 1993: 6). If actual scarcity is, indeed, an issue, the area of greatest current concern is the scarcity of quality press.

Spectrum scarcity, as a regulatory rationale, has never been influential in Australia. Moreover, since the 1960s, there has been ample spectrum available for additional radio and television stations, with restrictions on the number of licensed broadcasters resulting primarily from political decisions to protect incumbent broadcasters and not from any technical constraints. This points to the extent to which the regulation of broadcasting in Australia has been based upon an unspoken bargain between government and broadcasters, whereby broadcasters have been protected from competition in return for complying with regulatory obligations, such as minimum Australian content standards or payment of broadcasting licence fees. Despite this, the scarcity rationale has continued to be invoked in current debates about the continued need for broadcasting regulation. For example, in recommending the abolition of broadcast licensing, the Interim Report of the Convergence Review observed that:

Historically, licensing regimes were typically established to manage or control a scarce resource. Clearly, in a converged world where content can be delivered via multiple platforms – including increasingly over the internet – managing scarcity for content distribution is becoming irrelevant and unworkable (CR 2011d: 4).

In the final Convergence Report, however, the argument was slightly rephrased, with the scarcity rationale being confined to justifying regulation of spectrum access (CR 2012: 4). Nevertheless, by adopting the argument that the emergence of alternative delivery platforms removes the need for broadcast licensing, the Convergence Report appears to endorse spectrum scarcity as the rationale for licensing. This, it would seem, confuses two distinct issues: the argument for separating the regulation of broadcasting content from the regulation of spectrum access, on the one hand, and the rationale for broadcast licensing, on the other. The extent to which broadcasting regulation in Australia is not based on the scarcity argument is, in fact, acknowledged by the Convergence Report in its treatment of the submissions from News Limited and Google, which argued that, as broadcasting regulation is based on the use of a scarce public resource, there can be no justification for regulating online media. Rejecting this argument, the Report pointed to the regulatory policy in section 4(1) of the BSA – that different levels of regulation should apply according to the degree of influence of a broadcasting service – to conclude that it is the influence of broadcasting as a medium, and not spectrum scarcity, that is the rationale for the current regulatory regime (CR 2012: 6).

The third main rationale for broadcasting regulation is that regulation is justified because of its strong influence in shaping public opinion. This rationale was emphasised in the Explanatory Memorandum (EM) to the Broadcasting Services Bill 1992 which, in explaining the regulatory policy in section 4(1), stated that:

A high level of regulation is to apply to commercial broadcasting services as those services are considered to exert a strong influence in shaping views in Australia (EM 1992: 11).

The ‘influence’ rationale was promulgated by the US Supreme Court in FCC v Pacifica Foundation (1978), where it was argued that the FCC’s regulation of ‘indecent’ language – in that instance, George Carlin’s ‘filthy words’ monologue - infringed the First Amendment. In finding that the regulation was permissible, the majority of the Court held that broadcasting could be subject to more regulation than other media for two main reasons. First, the majority referred to the ‘uniquely pervasive’ nature of broadcasting, meaning that, once it is turned on,
it intrudes into the home and it is impossible for the audience to screen out unexpected content \((\text{FCC v Pacifica} 1978: 748)\). Secondly, the majority relied upon the need to protect children, pointing out that, while it was comparatively easy to prevent children from gaining access to books and films, broadcasting in the home was ‘uniquely accessible’ \((\text{FCC v Pacifica} 1978: 749)\).

The ‘influence’ rationale, even as expressed by the Supreme Court, is less precise than it might be. If, as suggested by the Explanatory Memorandum to the BSB, the argument is interpreted to mean that there is a case for greater regulation depending upon how persuasive a medium is, then this would seem to penalise a medium simply on the basis that it is more effective \(\text{(see Barendt 1993: 7)}\). Moreover, at least historically, the press has arguably had more influence on shaping public opinion on matters of public importance than broadcasting, although this is obviously less relevant in the contemporary media environment. If, however, the argument is that broadcasting is more intrusive than other media, the contrary argument is that broadcasting can always be switched off. Finally, if the rationale is based upon the difficulty of controlling broadcasting streamed into the home, once it is turned on, then this would only justify certain forms of regulation, such as time-zoning of children’s programming.

Although there is effectively no analysis of the ‘influence’ rationale in the Convergence Report, it seems clear that it accepts that the influence that can be exerted by communications content in shaping community views remains the most important justification for regulating content providers. For example, in explaining the reason for focusing regulation on CSEs, the Report states that:

> The potential to influence is still a critical consideration. At present, influence is identified through the breadth of appeal of a service - regardless of whether the service delivers news and commentary or other content such as entertainment and sport. The Review considers that influence remains a relevant criterion in the converged world \((\text{CR 2012: 7)}\).

The criteria for identifying a CSE – that it has a large number of Australian users and a high level of revenue – can therefore be regarded as proxy measures for ‘influence’.

The broad-brush, and frankly cavalier, approach of the Convergence Review to regulatory rationales completely overlooks the extent to which different considerations may be relevant to different regulatory issues. If we take the regulation of markets and competition, for example, then, just as in other industries, the central concerns are the concentration of market power, and abuses of market power. In applying competition analysis to determine whether or not a firm has market power, the number of users and level of revenue may be relatively imprecise measures.

If, however, non-economic considerations – specifically, the desirability of ensuring a plurality of voices in a democratic society – are regarded as significant, then, a different form of analysis is required. As C Edwin Baker has pointed out, the democratic argument for media diversity is much more complex than simply adding up the viewpoints expressed in the media, as otherwise increased media concentration may not necessarily result in reduced diversity \((\text{Baker 2009)}\). As Baker further explains, a case for media-specific rules against concentration can be made from two groups of arguments relating to the role of media in a democratic society: recognising the power of public opinion, the importance of dispersing sources of power; and the role of the media in providing safeguards on political power. In addition, essentially for reasons explained in the IMI Report, unregulated media markets will not result in adequate incentives to produce quality content, as it is impossible for media proprietors to recover the positive externalities that arise, for example, from more informed voters \((\text{Baker 2009: 659)}\).

Over and above the market failures that characterise media content generally, particular issues arise in relation to advertiser-supported media, such as free-to-air broadcasting. As the German Constitutional Court concluded in the Third Television case \((\text{1981)}\), the market for free-to-air broadcasting is unlikely to provide sufficient variety of programming.
with advertising-supported media arise from the extent to which such markets are two-sided: essentially meaning that free-to-air broadcasters are not so much supplying a product to viewers, but are in the business of selling an audience to advertisers. This means that advertising-supported broadcasters have an incentive to provide programming to the broadest audience, even where the intensity of demand for such programs is quite low, rather than to a smaller audience with a high level of demand for particular programs (Baker 1997). This explains, for example, the banality of much free-to-air programming, as well as why programs, which are very popular with minority audiences, are either not broadcast, or broadcast at unpopular times.

If we apply these arguments to the Convergence Report’s recommendations for regulating CSEs, the arguments for promoting media diversity in a democracy, and the market failures that characterise commercial media markets, suggest that, as the Report concludes, there is a continued need for media-specific rules to prevent undue concentration in media markets, and especially for enterprises that provide news and commentary. In the interests of commercial certainty, it may be that indicative rules for identifying regulated entities, based upon audience numbers and revenue are a useful tool. There are, however, elements of the Report’s proposals that require clarification. Given that the Report suggests that entities such as platform operators that host content may eventually become CSEs, there is a need to distinguish CSEs that provide news and commentary from CSEs that do not, which may be a necessary distinction, but which is far from straightforward. Similarly, given that the Report recommends limiting regulation to professional content, there will be difficulties in distinguishing professional from non-professional content, especially in the online context, where these categories can be blurred.

Over and above this, a potential problem that fails to be acknowledged by the Convergence Report is that, if the rationale for regulatory intervention is the influence exerted by a content provider, there is no guarantee that the largest, or most profitable, content providers are the most influential. For example, it may well be that a smaller content provider can exert a disproportionately high level of influence by virtue of being regularly read or viewed by opinion setters or decision makers. The Report deals with this issue by describing CSEs as ‘the most substantial and influential media groups’ (Convergence Report, 12). The fundamental problem, however, is that the failure to engage with regulatory rationales at a greater level of detail and sophistication means that the reasoning behind many of the Report’s recommendations is insufficiently clear.

The extent to which the convergent regulatory concept of a CSE depends upon criteria – such as the distinction between professional and non-professional content – that remain to be spelt out, is but one example of how the regulatory framework proposed in the Convergence Report is deceptively simple. A good example of this is the need for the CSE concept to be qualified when it is used in particular regulatory contexts. Thus, the Convergence Report’s recommendations relating to Australian content are confined to CSEs that offer ‘professional television-like drama, documentary or children’s content’ (CR 2012: 66). Moreover, although the Report recommends a technology-neutral approach to regulating content, as pointed out above, it expressly acknowledges that there should ‘also be flexibility for standards to be applied in different ways, depending on how services are delivered’ (CR 2012: 42). In a way, this statement seems to fudge the distinction between different standards, on the one hand, and differences in the application of common standards, on the other. This may be illustrated by the recommendations made in relation to mandatory children’s content standards, which, as explained above, appear to be initially confined to CSEs that provide children’s television content. Applying a greater degree of regulation to television-like content makes sense if, as suggested by the US Supreme Court in Pacifica, this platform continues to be more pervasive, intrusive and difficult to control than other platforms. But, if the regulatory objectives are best met by drawing a distinction between different platforms, then this undermines the rationale for attempting to use the platform-neutral concept of CSEs in all contexts.

For instance, if the objectives are to safeguard children against unsuitable material that is streamed on television-like services, and to provide content that is appropriate for children, then there is a good case for the regulation of all television-like content, and not just content
provided by CSEs. Similarly, if there are less concerns about other forms of content, or if the concerns are better dealt with by other forms of regulation, such as access-control technologies, then, as the Report acknowledges, an appropriate form of regulation should apply to all content providers, not just CSEs. The point is that the distinction between entities that are CSEs, and those that are not, is not the relevant distinction for this regulatory purpose; it is the nature of the service that is provided that is relevant.

**BROADCAST LICENSING**

As explained above, the Convergence Report recommends both abolishing the different categories of broadcasting service established under the BSA, and eliminating altogether the need for individual broadcasting licences, thereby effectively decoupling broadcasting regulation from spectrum access. As further explained, in place of a licensing regime, the Report recommended imposing enforceable administrative rules, such as service provider rules or class licences.

The Productivity Commission’s 2000 report on *Broadcasting* recommended splitting broadcast licensing from spectrum licensing, mainly on the basis that this would improve efficient use of spectrum currently allocated to broadcasting (PC 2000: 192). The availability of alternative platforms for delivering content, and especially the NBN, is an additional reason for decoupling the regulation of content from the regulation of carriage. As Coase (1959) first clearly explained, rules relating to broadcasting content have no necessary relationship with the need to efficiently allocate the scarce spectrum resource. Furthermore, as both the Productivity Commission and the Convergence Report argue, this may result in greater innovation in the use of spectrum, such as the development of multiplex arrangements managed by non-broadcasters (CR 2012: 92). The removal of an entitlement to spectrum also removes any specific need for individual broadcasting licences: if, as seems likely, another form of regulation is equally effective and less costly, as appears to have been the case with the class licences that regulate narrowcasting services, there is no reason for individual broadcasting licences to be retained.

The Convergence Report also recommended converting the existing apparatus licences held by broadcasters, which are relatively prescriptive, to tradeable spectrum licences (CR 2012: 94). As Coase pointed out, as a general rule, property rights in spectrum can be justified on the basis that market-based decisions made by users are more likely to result in efficient spectrum use than centralised, administrative decision-making. While the Report recommended introducing market-based pricing for spectrum, this recommendation is subject to important qualifications. First, as a transitional measure, and to ensure continuity of service, the Report recommended that commercial broadcasting licensees have their current apparatus licences converted to spectrum licences, with 15 years’ tenure (CR 2012: 99).

Secondly, the Report recommended that spectrum licences issued to commercial television broadcasters be subject to a condition that the licence must be used to continue to provide one or more channels of digital television. Thirdly, the Report recommended that, to support diversity, spectrum be continued to be made available to national and community broadcasters (CR 2012: 87).

In effect, then, the recommendation of decoupling the nexus between broadcasting regulation and spectrum access is confined to commercial broadcasters (there being no existing nexus for subscription broadcasting). As far as community broadcasters are concerned, as the Convergence Report concedes, an entitlement to spectrum necessarily means the retention of eligibility requirements (CR 2012: 87). Although not dealt with in the Report, the differential treatment of community broadcasting also presumably means that there remains a need for separate regulation of content delivered by community broadcasters, especially in relation to sponsorship and advertising. The combination of differential regulation that may apply to CSEs that deliver different services – such as the proposed Australian content standards, which may only apply to certain CSEs – with the need for a separate regime to apply to community broadcasters, casts doubt on the central case made by the Report for removing the existing categories of broadcasting service: the reduction in regulatory costs associated with
distinguishing between categories of broadcasting (CR 2012: 1). In short, while there may be some savings in moving from individual licensing to an administrative system, this is unlikely to mean that there is no longer a need to make sometimes-difficult distinctions between different services. For example, the specific problems identified earlier with advertising-supported services, including issues relating to the need to regulate particular kinds of advertising, suggest that there remains a regulatory need to distinguish commercial services from other kinds of service, such as community and subscription services.

As explained above, the government has extended the moratorium on issuing a fourth commercial television licence to January 2013, to allow for consideration of the recommendations of the Convergence Review. The planning for digital conversion of the broadcasting services bands allow for a 7MHz multiplex – commonly referred to as the ‘sixth channel’ – which is currently unallocated, except for capacity that, since 2009, has been made available to community television broadcasters in mainland state capital cities. The Convergence Report made relatively detailed recommendations about the use of the ‘sixth multiplex’, including that it not be used for a new fourth commercial broadcasting service (CR 2012: 95). Compared with most other recommendations made in the Report, the recommendations relating to use of the ‘sixth multiplex’ are remarkably prescriptive, including that:

- the services offered would not simply replicate services provided by the three existing commercial free-to-air television networks;
- services would be original and distinctive and add to the creative diversity of the broadcasting sector;
- the content could be focused and thematic, presenting programming on, for example, history, science, arts, comedy, education, sport, documentaries, current affairs or drama;
- business models could include advertising, sponsorship or subscriptions; and
- applicants would need to demonstrate a sustainable business model (CR 2012: 95-6).

As one of the successes of Australian broadcasting regulation has been the diversity arising from different sectors of broadcasting, there remains a demonstrable need for supporting community broadcasting by providing access to spectrum for community television. Apart from this, however, the constraints proposed for the use of the ‘sixth multiplex’ are reminiscent of the content restrictions imposed as part of the deeply flawed datacasting services regime (BSA 1992: Schedule 6). Just like the datacasting services regime, it would seem that one of the main effects - if not the express purpose - of the restrictions, would be to continue the unfortunate tradition of protecting incumbent commercial television broadcasters from competition. The best way of ensuring the viability of new services, as well as the most efficient use of the available spectrum, would be to allow proposed users to make their own business decisions about the services to be provided without any vague eligibility criteria, such as ‘original and distinctive’ programming, and certainly without the regulator assuming responsibility for determining whether or not a particular applicant has ‘a sustainable business model’. Just as the detailed, prescriptive nature of the recommendations for the use of the ‘sixth multiplex’ sits at odds with the much less detailed recommendations generally made in the Convergence Report, they appear to contradict the general principle, which underpins the recommendations for removing licensing and the categories of broadcasting service, of reducing regulatory costs, including the costs imposed on content providers.

**CONTENT REGULATION**

As explained above, the Convergence Report broadly endorsed the ALRC classification report’s recommendations relating to the classification and regulation of content, which would essentially involve mandatory classification of a limited range of content, including television programs, with classification and regulation of other content being dealt with by co-regulatory industry codes. Over and above the general scheme proposed by the ALRC, the Convergence
Report recommended that specific obligations be imposed on CSEs where there is a clear case for regulatory intervention, and especially in relation to children’s content, as well as in relation to news and commentary provided by CSEs.

If the ALRC and Convergence Report recommendations were accepted, some difficult issues would arise in implementing the proposals. First, the ALRC recommendation, accepted by the Convergence Report, for mandatory classification of television programs, includes a recommendation for including a platform-neutral definition of a ‘television program’ in the proposed new classification Act (ALRC 2012: 140). Although the ALRC report provides examples of television programs – comedies, documentaries, children’s programs, drama and factual content – it will obviously be difficult to determine platform-neutral criteria for distinguishing television programs from other video content. As noted above, in accepting this recommendation, the Convergence Report must also be taken to have accepted that mandatory classification of television programs is not confined to programs provided by CSEs. To some extent, this issue is dealt with by the ALRC proposal for mandatory classification to be confined to programs that are both likely to have a significant Australian audience and are made and distributed on a commercial basis. As these criteria differ from the criteria for identifying a CSE, which is based on the number of Australian users and Australian-sourced revenue, this raises the spectre of the convergent regulator applying two different, but overlapping, standards for essentially determining whether a program or service is sufficiently ‘influential’ to be regulated. As clearly recognised by the ALRC in its discussion of the inherent uncertainties that arise in determining whether a program is likely to have a significant Australian audience, much work would need to be undertaken before these recommendations could be implemented.

Apart from genre restrictions, it would seem that some technology-based distinctions might well be required in order to satisfactorily define a ‘television program’. For example, one possible distinction could be based upon whether or not a program is first made available via a streamed service, rather than a service that makes content available on demand. In this respect, an important distinction is often drawn between content, such as traditional broadcasting, which is ‘pushed’ to an audience, and which is also known as linear content – meaning that it is streamed in the sense that the audience has no control over what is broadcast at any particular point in time – and content that the audience ‘pulls’ to itself, which is also known as non-linear content, or content that is made available ‘on demand’. The Convergence Report apparently endorsed the validity of this distinction in referring to comments in the submission made by Ericsson that:

> Within the scope of regulated media services, it is possible that all regulatory obligations are NOT applied symmetrically i.e. further flexibility can be introduced by focusing on the different nature of regulated services such as linear – push services and non-linear – pull services (CR 2012: 42).

Drawing such a distinction, which would separate streamed services such as traditional broadcasting and IPTV from video-on-demand services, could be based on the distinction that the US Supreme Court in Pacifica considered relevant to the differential regulation of broadcasting and the press: that it is difficult, ahead of time, to control what a viewer is exposed to in linear content, whereas a viewer that accesses non-linear content makes a conscious decision to expose themselves to that particular content.

Unfortunately, neither the ALRC classification report, nor the Convergence Report, engaged in any analysis of the desirability of drawing regulatory distinctions between linear and non-linear services. This is all the more surprising, given that the distinction between streamed and on demand services is one of the criteria, set out in the definition of a ‘broadcasting service’, for distinguishing between services regulated as broadcasting services under the BSA and non-broadcasting services. In the absence of any such analysis, one interpretation of the ALRC classification report and, possibly to a lesser extent, the Convergence Report, is that ‘television programs’ may well amount to all video content that fits within certain genres, and that do not fall within the definition of a ‘feature film’ that has an Australian cinema release. The failure to fully consider the issues involved in distinguishing linear from non-linear
programming, and whether this is relevant to the decision about which content should be subject to mandatory classification, is yet another example of a tendency in the reports to avoid some of the complexities in attempting to apply a technology- or platform-neutral approach.

As mentioned above, this sort of difficulty also arises with the Convergence Report’s recommendations that would allow for the regulator to impose mandatory standards on CSEs where there is a clear case for regulatory intervention, and especially in relation to children’s television content. First, there is the difficulty of distinguishing ‘television’ content from other video content. On this, the general approach applied by the Convergence Report is to gloss over the issue, by referring to ‘television-like’ content, without any explanation of precisely what might be encompassed by that term. Secondly, as also noted above, if there is a clear case for regulatory intervention, and especially if the regulation is considered necessary to protect children, it is far from obvious that a distinction should be drawn between content provided by a CSE and content that is provided by an entity that is not a CSE. Provided a commercial service has a sufficient nexus with Australia, the concern with regulating the content is surely with the nature of the content, and not with whether or not the content provider satisfies audience reach or revenue thresholds. For example, it is hard to imagine that a content provider that, in the future, provides children’s television programming via the NBN that becomes very popular in a regional area, but does not satisfy the thresholds for a CSE, should not be subject to children’s television standards.

At the same time, it may be important not to over-state this particular objection. To an extent, applying the combined recommendations of the ALRC and the Convergence Report, content regulation of programming by non-CSEs will be dealt with by a combination of the obligation on content providers to take ‘reasonable steps’ to restrict access to adult content, and the application of voluntary codes of conduct. Moreover, if minimum requirements are to be imposed for investing in Australian children’s programs, it may be appropriate for these to be confined to significant content providers, such as CSEs.

With the development of delivery platforms, and especially broadband to the home, comes the inevitable prospect of regulatory circumvention by services based offshore. For example, it may be that the current role of commercial broadcasters as content aggregators is gradually superseded by content providers that host television-like content on servers, providing either advertising-supported or fee-based services. If that is the case, and the services are predominantly video-on-demand, the geographical location of the server may be notionally irrelevant. As the ACMA Broken Concepts report puts it, the distinction between Australian and overseas is ‘challenged by the recent industry practice of hosting content in the cloud so that its location inside or outside of Australia is not able to be determined’ (ACMA 2011a: 81).

The ALRC classification report deals with this issue by recommending that classification and content regulation should apply to any content with an Australian link, regardless of where it is hosted, giving the example of an entity that ‘carries on business or activities in Australia involving the provision of online content to Australian consumers’ (ALRC 2012: 119). Proposals for extending regulation to online services that are not geographically located in Australia raise the well-rehearsed policy issues that inevitably arise from attempts to apply territorially-based laws to the Internet. The Convergence Report addresses this issue by simply asserting a right to control such content, stating that:

Any enterprise with a significant presence in Australia should be accountable in Australia. This is particularly true of those in the media. Just as online banking is regulated in the same way as banking in the branch, significant media enterprises should be expected to meet the expectations of the Australian public irrespective of the platform used (CR 2012: 13).

In practice, there is little that can be done to impose regulation on offshore entities, unless they have a business presence in the jurisdiction. In the absence of other forms of regulation, the only possible form of regulation would be to impose some form of technological control, such as ISP-level blocking or filtering. In its discussion paper, the ALRC recommended that,
if the government’s policy of imposing mandatory blocking of RC-rated material were implemented, the sub-set of RC-rated material consisting of real depictions of actual child sexual abuse or actual sexual violence should be added to any blacklist (ALRC 2011: Proposal 10-1). While not engaging in an extensive analysis of ISP-level filtering, the ALRC final report expressly stated that it did not recommend that the obligation imposed on content providers to take reasonable steps to restrict access to prohibited content should apply to ISPs, and other intermediaries, that merely provide access to adult content provided by others.

Needless to say, imposing mandatory blocking and filtering is contrary to the essential principle that adults should be able to determine what they read, see and hear for themselves. On the other hand, and leaving aside the particular issues relating to RC-rated material, if non-ISP content providers are able to escape regulatory obligations by the simple expedient of locating offshore, this obviously undermines the regulatory playing field to the disadvantage of content providers located in Australia. Consequently, it seems that issues relating to offshore content providers are only likely to become more difficult with the deployment of broadband networks.

NEWS AND COMMENTARY

As explained above, the Convergence Report recommended establishing a new, cross-platform body to be responsible for news and commentary standards, on the basis that ‘there is no longer any rationale to treat print and broadcast media differently’ (CR 2012: 50). As also explained, the Convergence Report differed from the IMI Report in recommending that the proposed regulatory arrangements be self-regulatory, whereas the IMI Report had concluded that self-regulation of the press had failed. Furthermore, while the IMI Report recommended that the proposed new regulatory regime should extend to online media, including news sites with 15,000 hits per annum or more, the Convergence Report recommended that the self-regulatory regime compulsorily apply to only CSEs that provide news and commentary.

The IMI Report identified a number of problems with the levels of accountability, and processes, of the existing self-regulatory regime that applies to the press. Key weaknesses identified with the APC regime include the adequacy of funding and the voluntary nature of membership, which means that members may withdraw at any time. The Convergence Report proposed dealing with each of these issues: by proposing that government provide a proportion of the funding for the new body; and by introducing a statutory requirement, presumably in a form such as the proposed service provider rules, for CSEs to join the new body. Moreover, the Convergence Report recommended that other content providers be encouraged to join the new body by making certain legal privileges conditional on membership. It would seem that the Convergence Report’s proposals for targeting substantial media organisations (CSEs), while providing an incentive for other content providers to join, is a reasonable way of dealing with the potential over-extension of the scope of regulation in the IMI’s proposals, which could capture relatively small news sites.

A difficulty with both proposals, however, is that neither of the reports sufficiently addresses the extent to which the precise rules that apply to text-based news and commentary may differ from the rules for audiovisual material in sufficient detail. While it is certainly the case that newspapers have significant online presences, which incorporate audiovisual material, this does not eliminate potentially important distinctions between print and audiovisual media. It may be that the general principles – such as fairness, accuracy and protection of privacy – that apply to news and commentary services are common, but this does not necessarily mean that there are no important differences in either the precise rules adopted, or the application of the rules. The IMI Report, at least, recognises this, when it observes that:

The same standards need not apply across delivery platforms. Some aspects will need to be platform specific (Finkelstein 2012: 291).

It remains the case, then, that regardless of the form of regulation – explicit government regulation or self-regulation – there will be significant challenges in attempting to apply a
single regulatory regime to the press, broadcasting and online media. For example, with audio-visual content, more meanings may be implied than is the case with text, which suggests that there may be important differences in the application of an accuracy principle.

While there is universal support for some degree of regulation of mainstream news and media commentary, disagreement has centred on the form of regulation. In this respect, it is important to appreciate that, rather than fitting within hard and fast categories - such as self-regulation, co-regulation (or quasi regulation) and command and control regulation - it is more accurate to conceive of a spectrum of regulatory options, ranging from black letter law to pure self-regulation. The IMI Report claims that black letter law, as opposed to the current form of self-regulation, will deliver the following:

- The creation of an independent and transparent body for hearing complaints will right wrongs perpetrated by the media.
- The improvement of journalistic standards.
- Making the media, which exercises enormous power, accountable to their audiences and to those covered by the news.
- Enabling the public to have confidence that journalistic standards will be upheld and that complaints will be resolved without fear or favour.
- Enabling complaints that might otherwise have been resolved through lengthy and expensive litigation to be dealt in a timely and efficient manner.
- Enhancing the public flow of information and the exchange of views (Finkelstein 2012: 300).

The major problems with the APC regime identified by the IMI Report, however, relate to failures in effectively dealing with complaints and weaknesses with enforcement. The Convergence Report, on the other hand, fails to deal with the potential for regulatory capture, which is generally recognised as a problem with pure self-regulation. While the Convergence Report recommends that the proposed self-regulatory body should have appropriate enforcement powers, including the power to impose credible sanctions, and that it should be able to refer significant breaches to the proposed communications regulator (CR 2012: 51), there may be options – falling short of command and control regulation – for introducing additional safeguards to ensure the integrity of the self-regulatory model.

For example, the proposed convergent regulator could be given the power to approve codes of practice developed by the regulator, and to make binding standards in the event of regulatory failure. The statutory regulator might also be given the power to deal with appeals from an independent body that would, in the first instance, be responsible for dealing with complaints. In effect, then, this would amount to extending a form of co-regulation – which already applies to broadcasters - to the press and online media, with some additional improvements in processes and enforcement. This could address some of the weaknesses with both the existing self-regulatory and co-regulatory regimes, and may have the additional benefit of introducing a degree of coherence and consistency between the regulation of news and commentary, and other elements of the proposed new communications regulatory regime.

CONCLUSIONS

It is clear from the Convergence Review reports that the central problem addressed by the recommendations relating to licensing and content regulation is that, mainly as a result of the emergence of viable alternative delivery platforms, and especially the NBN, it is increasingly possible for broadcasting-like services to be delivered across a variety of platforms, including the Internet. Other developments that are relevant to these issues are the transition to digital broadcasting, and more especially, changes in the consumption of broadcasting programs. The Convergence Report (and the associated ALRC and IMI reviews) attempts to deal with these challenges by applying one-size-fits-all principles of platform-neutrality, or regulatory parity. It seems that, largely because the review was designed to investigate the implications of
convergence, it was simply assumed that regulatory parity, however ill-defined, is the only logical response.

Unfortunately, while there may be some merit in some of the recommendations made in the Convergence Report, many of the recommendations are not sufficiently explained, and there is a lack of rigour and clarity in the reasoning behind the recommendations. In particular, the Convergence Review has failed to adequately engage with the rationales for regulating communications content, as well as with the extent to which developments in technologies, services and markets impinge on those rationales. As this article has explained, some of these difficulties may be traced to the terms of reference for the review, and to the difficulties arising from three simultaneous reviews with overlapping terms of reference; but some of the difficulties also arose from the methodology adopted by the Expert Committee, and the way it interpreted its tasks.

A central problem with the recommendations relating to licensing and content regulation arises from an attempt to provide a convergent regulatory framework to different services, without sufficient analysis of whether differences in services require different regulatory treatment. Again, it seems to have simply been assumed that the possibility of identical or similar services being delivered across platforms necessarily removes the need for regulatory distinctions between different kinds of service, such as advertising-supported, subscription and community services. Although the Convergence Report claims that the removal of the existing categories of broadcasting service will simplify regulation, and reduce regulatory costs, an analysis of the detailed recommendations made by the three relevant reviews reveals that this claim is implausible. As this article has explained, any attempt to implement the recommendations of the reviews would involve making legislative or regulatory distinctions between services that are no less difficult than the distinctions currently drawn between categories of broadcasting service by the BSA.

For example, while there are merits in abolishing broadcast licensing and, over time, in severing the nexus between broadcasting regulation and spectrum access for commercial broadcasters, the need to ensure spectrum access for community broadcasters means that there will be a continuing need to distinguish community broadcasting from other sectors. Moreover, the particular market failures associated with advertising-supported services suggest that there may be an ongoing need to distinguish commercial, free-to-air services from other services. Given the claims made by the Convergence Report that regulation should be restricted to the minimum necessary to achieve a public purpose, the comparatively elaborate regime proposed for regulating the ‘sixth multiplex’ is difficult to justify. It may be that there are political explanations for this proposal, as well as for some of the other recommendations made in the Convergence Report – but, in the absence of a more rigorous analytical framework, this is difficult to assess.

In relation to the recommendations for regulating communications content, it is clear that, despite the ‘platform-neutral’ rhetoric in the reports, there is a continued need to distinguish between different kinds of content. Thus, if mandatory classification is to be confined to ‘television programs’, there is a need to understand what is meant by this term in a multi-platform environment. Ideally, any such regulatory distinction should be based upon an analysis of the reasons for making this sort of distinction. For instance, if the concern is with linear (or ‘pushed’) programming, rather than stored (or ‘pulled’) programming, a distinction based upon whether or not the content is made available ‘on-demand’ would be relevant. Again, unfortunately, neither the Convergence Report nor the ALRC report engages in any analysis of the potential regulatory implications of the distinction between linear- and non-linear programming.

A similar sort of distinction to that proposed to be made between ‘television programs’ and other content is required to implement the Convergence Report’s recommendations relating to mandatory children’s programming standards, which would be confined to television content. On this issue, as in so many other difficult regulatory issues, the Convergence Report tends to gloss over the difficulties by referring to ‘television-like’ content, and by relying on the proposed new convergent concept of a CSE. Nevertheless, a more precise analysis of the need
for regulating certain forms of content, rather than an attempt to mechanistically apply a preconceived convergent concept, might suggest that there is a need to apply content regulation to children’s programming, regardless of whether or not it is provided by a CSE. While the concept of a CSE may be relevant to particular forms of regulation – such as media-specific regulation of ownership and control, or mandatory Australian content standards – it is not necessarily relevant to all other aspects of the regulatory regime. In the longer term, the ability of content providers to migrate offshore is likely to provide a significant regulatory challenge to Australian communications regulation. Neither the Convergence Report nor the ALRC report engages in substantial analysis of controversial issues relating to technological control of content hosted outside of Australia which, again, might be attributed to political sensitivities.

In implementing either the recommendations of the Convergence Report or those of the IMI Report relating to the regulation of news and commentary, difficult distinctions may need to be drawn between services which offer news and commentary, and those which do not. If, however, news and commentary is to be regulated in some form, such distinctions are inevitable. A more difficult issue is adapting a convergent regulatory regime to apply across platforms: to the press, broadcasters and online media. While acknowledging that common standards should apply to all news and commentary, it may be that continuing differences between, for example, print media and audiovisual media, mean that it is impossible for these to be satisfactorily regulated in the one code. To ensure consistency across platforms, as well as to deal with some of the regulatory failures identified with the self-regulatory regime that applies to the press, it may be possible to devise an improved form of co-regulation, with the proposed new convergent regulator having a role in monitoring and safeguarding industry regulation.

Although the Convergence Report (and the two related reviews) has identified serious regulatory challenges, and deficiencies with the current regimes, inadequacies in the analysis applied to the regulatory problems, and especially the weaknesses in the explanation of the reasons for many of the recommendations made in the Convergence Report, mean that the recommendations should not be accepted without further analysis. In any case, many of the recommendations, and especially the recommendations relating to content regulation dealt with in this article, require much further elaboration before they can be adequately assessed. On the other hand, the three reports have collectively resulted in a body of material that can provide a foundation for the next stage of policy development. As the Convergence Report itself acknowledges that there needs to be a phased transition to a regulatory regime that better maps developments in technologies, services and markets, it may be that incremental improvements can be made to the existing regime, while further analysis is undertaken of the elements of a potential future regulatory framework. Overall, however, the convergence review has been a missed opportunity to engage in the much-needed fundamental and serious policy analysis required to develop an efficient and effective next-generation Australian communications regulatory regime.

REFERENCES

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ENDNOTES

1. The author would like to thank the two anonymous reviewers for their insightful and helpful comments, which have improved the arguments made in this article.

2. The Report also referred to legislative, institutional and regulatory convergence; device convergence; and converged user experience.

3. The report of the statutory review of Schedule 7 of the BSA appears as Appendix G of the Convergence Report.

4. See also Joskow (2010) and Freiberg (2010).


6. Although the precise wording of this obligation in the Report can be read to suggest that classification obligations should extend to all content provers that distribute content to the Australian public, it is assumed that the convergence review meant to endorse the ALRC recommendation that mandatory classification be confined to feature films, television programs and high-level computer games.

7. See, for example, the discussion of the delay in introducing FM radio in Armstrong (1982: 42-3).

THE CONVERGENCE REVIEW AND THE FUTURE OF AUSTRALIAN CONTENT REGULATION

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This article examines the place of Australian and local content regulation in the new media policy framework proposed by the Convergence Review. It outlines the history of Australian content regulation and the existing policy framework, before going on to detail some of the debates around Australian content during the Review. The final section analyses the relevant recommendations in the Convergence Review Final Report, and highlights some issues and problems that may arise in the new framework.

INTRODUCTION

Almost every aspect of the contemporary media landscape appears to underline the limitations of current Australian policies for media content and communications services. The broadband Internet; the mobile Internet; new patterns of consumer behaviour; new global media businesses; new national digital strategies; cloud-based media; the rise of user-generated content: all of these represent new and complex challenges to the once-familiar world of the Broadcasting Services Act 1992 (BSA), and its many accretions. It was therefore a positive step when, in late 2010, the Australian Government commissioned the Convergence Review.

The Review’s brief was to examine the current policy framework and regulatory objectives, recommend a new framework and advise on the principles that will underpin it. This would involve analysis, condensation and revision of the most relevant pieces of legislation: the BSA, the Telecommunications Act 1997 (TCA), the Radiocommunications Act 1992 (RCA), the Australian Broadcasting Corporation Act 1983 (the ABC Act), and the Special Broadcasting Service Act 1991 (the SBS Act).

Although not made explicit in the Review until the release of the Emerging Issues paper in July 2011, one of the motivations behind the process was the desire to ensure that ‘legacy policy frameworks should not hamper convergence, investment and choice in the marketplace’ (OECD 2008: 2). The implication here that ‘legacy policy frameworks’ might not only need to be amended, but scaled back in order to encourage innovation and competition, was directly incorporated in the first of the principles established by the Review committee to guide its work. This principle states: ‘Citizens and organizations should be able to communicate freely, and where regulation is required, it should be the minimum needed to achieve a clear public purpose’ (Convergence Review 2011b: 8).

The Review’s deregulatory brief was reinforced by the publication of two reports by the Australian Communications and Media Authority. The first, entitled Broken Concepts: The Australian Communications Legislative Landscape, discussed the relevance and utility of 55
legislative concepts deemed to ‘form the building blocks of current communications and media regulatory arrangements’ (ACMA 2011a, 5). The companion report released in November 2011 entitled Enduring Concepts: Communications and Media in Australia (ACMA 2011c) sought to identify the concepts that would underpin relevant regulation in the emerging convergent media environment. In its Final Report (Convergence Review 2012), the Review acknowledged that there remain areas in which government intervention in the public interest is justified and necessary. Three areas in particular were nominated for ongoing oversight and action: media ownership and control; content standards; and Australian content production and distribution. The last of these is our concern in this essay.

Australian content regulations and mechanisms to support production and distribution have been core components of media policy for many years. With the advent of media convergence and digitisation, access to the means of production and distribution is now more widely available. These factors have reduced production costs for some if not all content, and at the same time they have expanded the venues and modes of cultural production, blurring the distinctions between amateur and professional content producers/distributors upon which much support and regulation has traditionally been based.

This new configuration requires policymakers to face two questions. First, should the existing mechanisms and frameworks be amended or replaced in order to achieve the cultural objectives that have traditionally underpinned content regulation? And second, are the forms of Australian content that traditionally have been the beneficiaries of media policy and regulation on the basis that they make significant contributions to Australian national and cultural identity – principally long-form drama, documentary, children’s programming, and news and current affairs – the only forms that should be supported in the digital environment? Or should other forms including games and non-professional media content (forms of user-generated content), also benefit from content regulations, subsidies and incentives?

In part, the answers to these questions depend on the extent to which intervention is intended to support and maintain the accessibility of professionally produced Australian content. If the objective is merely to provide broad access to such forms of Australian content, then attention will focus on regulations or incentives to support or enable its widespread production and distribution. If, however, the principle acknowledges that a broad variety of forms of content can contribute to the development of national and cultural identity, then the objective must be to acknowledge and facilitate widespread participation in content production and distribution.

Before exploring how these questions were discussed during the Review, and then analysing how the Final Report answers them, it may be useful to recount briefly the evolution of the regulation of Australian content in broadcasting.

**HISTORY OF AUSTRALIAN CONTENT REGULATION**

Kim Dalton, currently Head of Television at the ABC, observed in 2007 that the history of Australian content in broadcasting has been a history of regulation (Dalton 2007). As the Productivity Commission noted in its Broadcasting Inquiry Report (2000: 379), the objectives of such content regulation ‘are cultural and social rather than economic’.

And yet the regulation of Australian content in broadcasting has historically had significant economic implications for broadcasters, for producers and for the Australian government. Indeed it can be argued that the imposition of Australian content regulations on commercial broadcasters has been a response to those broadcasters’ economic imperatives, with intervention justified in terms of ‘market failure’. That is, the fact that much Australian content costs more to produce and distribute than the cost of licencing imported content is a disincentive to investment by commercial broadcasters. But since Australian content is considered to serve important social and cultural functions, market distortion in the form of broadcast quotas and production subsidies has been deemed reasonable.

The first such measure was introduced in the Broadcasting Act 1942, when a 2.5% quota for Australian-composed music was imposed on commercial radio broadcasters. The quota was
increased in 1956 to 5%, and in 1973 a 10% quota for Australian-performed music was added to the mix. Three years later, this quota was increased to 20%. Under the terms of the Australia-US Free Trade Agreement (2005), the Australian music quota was capped at 25% although quota levels vary for different music genres. In 2010, despite music industry protests, the Australian government waived content quotas for digital-only radio stations for three years.

Content quotas were first imposed on Australian commercial television broadcasters in 1961 in response to what the government considered to be unacceptably low levels of Australian programming. Television stations that had been established for at least three years were required to screen Australian programs for 40% of total transmission time, and to screen at least one hour per week of Australian programming in prime time (which at that time was deemed to be 7.30-9.30pm).

The following year, the prime time quota was increased to two hours per week. In 1964, UK programs were permitted to fill 5% of the total quota, which was increased to 45% of transmission time. It was raised again in 1965 to 50%. In 1967 the prime time quota was lifted to twelve hours every twenty-eight days (including two hours of drama), with children’s programs included for the first time. Two years later the prime time quota rose to eighteen hours per twenty-eight days, and was amended again in 1971 to 45% of programming between 6 and 10pm, including at least six hours of first release Australian drama per twenty-eight days.

The following year, 1972, the prime time quota was raised again to 50% of broadcasts between 6pm and midnight, before the overall quota was replaced in 1973 with a points system based on program type, cost, employment and length. Following a public inquiry in 1990, the Australian Broadcasting Tribunal introduced an overall quota of 35% of total transmission time for Australian programs, with the level increasing by 5% per year until 1993. Points systems for first release drama and six ‘diversity’ program categories were introduced in 1990 before being overhauled in 1996 when a new definition of ‘Australian content’ was applied and a quota was introduced for first release Australian documentaries of ten hours per year in prime time. In 1998 the overall quota increased to 55% of transmission time between 6am and midnight. That next year, following a High Court judgment that Australian content standards were inconsistent with Australia’s Closer Economic Relations agreement with New Zealand, programs made in New Zealand were made eligible as Australian for content purposes [Blue Sky v Australian Broadcasting Authority [1998] HCA 28].

The subscription television sector also has local content obligations. Since 1999 – and before that on a voluntary basis – certain designated drama channel providers have been required to spend at least 10 per cent of their total programming expenditure on new Australian drama productions, which could be feature films or television programs. According to ACMA, in the 2010-11 reporting period the subscription television industry spent $33.5 million on Australian and New Zealand drama programs in meeting its obligations under this scheme.

One of the initial objectives of both radio and television content regulation was to nurture the Australian music, film and television production industries. A requirement introduced in the 1956 Broadcasting and Television Act that Australians be employed in the production and presentation of television programs remained in force until 1995. In advertising, the Australian quota for commercial television introduced in 1960 was explicitly intended to nurture the development of a domestic production industry.

In its 2000 Broadcasting Inquiry, the Productivity Commission took the view that while support for the production industry was a consequence of the content regulation system outlined in the Broadcasting Services Act (1992), this was not its principal purpose. The Inquiry’s report noted that ‘The stated rationale for Australian content policy is the promotion of social and cultural objectives, not assistance to the local production industry’ (Productivity Commission 2000: 384).

Over a decade later, in a changed media environment, the Convergence Review took a
different approach. Reinforcing the guiding principle first outlined in the Framing Paper published in February 2011, the Review’s Emerging Issues paper not only affirmed the importance of Australians having access to Australian content, but added a new principle which stated that this content ‘should be sourced from a dynamic domestic content production industry’ (Convergence Review 2011b: 9). The subsequent Discussion Paper on Australian and Local Content conceded that ‘[m]aintaining a particular level of activity for the content production industry is not a stated objective of the current regulation’, but went on to note that ‘it is generally accepted that if production activity is not maintained at a level that supports professional employment then the cultural and social objectives of Australian content regulation cannot be achieved’ (Convergence Review 2011a: 6).

There are two problems with this reasoning. First, it leads to the view that it is the current production industry, with all its particular strengths and weaknesses, that is necessary to the social and cultural objectives, although of course this is not so, especially in a period of rapid change. Second, the fact that one cannot have local content without local production should not mean that local production becomes, by default, the policy priority. If it does, there is a clear risk that, where they diverge, the social and cultural objectives will take second place to industry support. In our view, this is what has occurred in the Convergence Review.

DEBATING AUSTRALIAN CONTENT REGULATION IN THE REVIEW

At an early stage, the Review outlined its view that existing regulation built around industry ‘silos’ and addressed to the particularities of different platforms and networks has been rendered obsolete by new technologies, market structures, business practices and audience/user behaviour. In place of the unique policy frameworks governing broadcasting, telecommunications and radiocommunications, the Review suggested an approach previously described by ACMA (ACMA 2011a: 6). This approach would ‘recognise new market structures as a series of “layers” created by convergence, including the underlying infrastructure which transports the content, the network which manages and directs the content, the specific content or application and the device upon which the content is assessed’ (Convergence Review 2011b: 12). Following from this, and informed by the concepts of fair competition and technology neutrality, the Review indicated that its subsequent work and ultimate recommendations would be guided by the concept of ‘regulatory parity’, or equal treatment of content and services. Although many submissions supported this general approach, many also pointed out that for various reasons ‘regulatory parity’ might not best serve the objective of ensuring the production, distribution and availability of Australian content.

Australian content regulations have been imposed on broadcasters and not on other media and content providers, in large part because of the principle that the type and weight of regulation applying to a service should be proportional to that service’s degree of influence over community opinion and outlook. Without much in the way of empirical analysis, television broadcasting has historically been considered the most influential medium, and has therefore borne the heaviest burden in terms of content regulation. Free to air television broadcasters are more heavily regulated than subscription television broadcasters, principally because of the former’s larger audience reach. The public service broadcasters, ABC and SBS, are not currently subject to the same regulations as their commercial counterparts, much to the latter’s dismay. And at present, television-like services on the Internet, via catch-up services run by broadcasters both in Australia and internationally, Internet protocol television (IPTV), and file-sharing networks, are not subject to any of these regulations or codes of practice.

Many submissions to the Review, particularly from industry, argued strongly against the extension of Australian content rules to convergent platforms on the grounds that the imposition of content rules in order to achieve some kind of regulatory parity could potentially have a chilling effect on innovation and competition2. At the same time, however, recent research by the ACMA shows high levels of public support for Australian content rules for Internet services. ACMA’s Digital Australians online survey found that 84% of respondents agreed that it was somewhat/quite/very important for the Australian government
to put in place rules to ensure that high-quality Australian content is available on the Internet (ACMA 2011b: 62-3). This is lower than the equivalent figure for television (92%) (ACMA 2011b: 62).

But importantly the demographic registering the highest level of agreement with the proposition that it is important for rules to be put in place to support the availability of Australian content on the Internet is the 18-29 group. This is the demographic that recorded the highest levels of online video content consumption, the highest level of catch-up television viewing over the Internet, the highest level of offline and online viewing, and the highest level of online-only viewing (ACMA 2011b: 12-13). That is to say, the group that is most engaged with online content is also the group that is most supportive of regulatory intervention to ensure the availability of Australian content on convergent platforms. It is, however, by no means clear that what this group wants would be the kind of content favoured by the Convergence Review – focus groups conducted by ACMA as part of the same research appear to have emphasised the importance for them of Australian information online, rather than content resembling traditional television.

In August 2011, the Review released a set of discussion papers, including one on Australian and Local Content. This paper canvassed a range of issues, including the underlying rationale for supporting Australian content production and distribution, support for new content forms, and options for future content regulation. The paper made explicit the link between the ‘significant cultural benefits’ flowing from Australian media content – principally ‘a stronger sense of national identity, the promotion of social cohesion, and cultural diversity’ – and the need for government support to ensure that such content would not be ‘under-produced’ (Convergence Review 2011a: 7).

The ‘special place in the content ecosystem’ of drama, documentary and children’s content was foregrounded, with the former in particular framed as ‘arguably the most artistically rich content [with] the greatest capacity to tell complex stories and convey important social, cultural and political messages’ (Convergence Review 2011a: 7). Despite the suggestion that a case could be mounted against the elevated status of drama, at no point did the Review research or explore this question, or provide detailed reasons for its position. When the Final Report appeared in April 2012, the qualification ‘arguably’ had disappeared; it is asserted as self-evident, without justification or equivocation, that ‘Drama contains the most artistically rich content and has the greatest capacity to tell complex stories and convey social and cultural messages’ (Convergence Review 2012: 59). The ultimate rationale for government intervention came down to the cost of producing these genres, and the reluctance of commercial broadcasters to fund and screen them without specific requirements.

The Review acknowledged in the Discussion Paper, albeit again prefaced as an arguable proposition, that the cultural objectives of Australian content policy ‘could also be supported by Australians participating in social media or interactive environments such as virtual worlds or games’ (Convergence Review 2011a: 10). Participants were invited to comment on whether policy measures should be implemented to promote these newer forms of content. It was clear, however, from the limited discussion of these newer forms in the Discussion Paper that the Review did not consider them on a par with the traditional genres of drama, documentary and children’s content. This would be reflected in the recommendations contained in the Final Report.

With the benefit of hindsight, it is possible to identify the Review’s preferences and ultimate recommendations in the questions posed in the Discussion Paper around particular content forms and types of regulation. The final recommendation to phase out the commercial television content quotas (albeit after a transitional period in which they would be increased and also imposed upon the public service broadcasters), and institute a minimum expenditure model to all media platforms along the lines of that applying to subscription television, can be projected from the ways in which the questions are framed in the Discussion Paper. And, as would become more obvious in the Final Report, the Review was clearly taking a lead from the October 2011 submission by Screen Australia (2011), which outlined most of the options for Australian content that appear in the Final Report’s recommendations.
In December 2011 the Review released its Interim Report (Convergence Review 2011c), which outlined the key areas for legislative and regulatory reform. These broadly followed the areas covered in the five Discussion Papers: media diversity, competition and market structure; layering, licensing and regulation; spectrum allocation and management; community standards; and Australian and local content. In the subsequent round of submissions, the Interim Report was criticised by many participants for the lack of detail in its recommendations. Many of these submissions also took issue with specific proposals outlined in the Interim Report, although when the Final Report was made public at the end of April 2012 – a month after its presentation to the Minister for Broadband, Communications and the Digital Economy – almost all of the recommendations remained intact.

THE FINAL REPORT AND RECOMMENDATIONS

Fourteen of the Final Report’s thirty recommendations relate directly to the regulation of Australian and local content on screen and radio, by commercial, community and public service enterprises. Several of the sixteen remaining recommendations also have the potential to affect the regulation of Australian and local content, and we will turn to these first.

The proposal to create a new regulator to replace the existing Australian Communications and Media Authority has a number of implications, not least in its powers to ‘apply, amend or remove regulatory measures as circumstances require’ (Convergence Review 2012: xvi). These regulatory measures will obviously include those governing the production and supply of Australian and local content. The new regulator will also potentially impact Australian content regulation via its responsibilities to address changes in industry structure and to oversee the new content and communications regulatory policy framework.

This framework is built around the concept of a ‘Content Service Enterprise’ (CSE), a new term to cover those entities ‘involved in supplying content services’ (Convergence Review 2011c: 5) including potentially not only broadcasters and print media companies based in Australia, but also those based overseas if they supply into the Australian market. The new framework is focused on regulating ‘significant’ enterprises, with significance determined by their ‘potential to influence’ (Convergence Review 2012: 7), as well as on the services they provide. This is a significant departure from the present system of media and communications regulation, which is organised around the level of influence of the particular delivery platforms on which those services are delivered.

In the new system, an enterprise’s ‘potential to influence’ will be determined by the new regulator, with particular attention paid to its reach in terms of the number of users of the content it controls across all platforms and services, and by the size of the revenue it draws from the Australian market. Through a series of measures, including time spent with different media, advertising revenue for different media by market share, main sources of news, and online news sites accessed in Australia, the Review concludes that ‘traditional media remains [sic] dominant’ with television in particular considered the ‘most significant content service’ (Convergence Review 2012: 8). These findings, coupled with the high thresholds of users per month (500,000) and revenue ($50m p.a. of ‘Australian-sourced content service revenue’ (Convergence Review 2012: 12)), mean that only a limited number of very large media companies appear likely to qualify as CSEs and therefore become subject to media diversity and Australian and local content regulations.

Of the fifteen companies that qualify as CSEs under the thresholds proposed in the Final Report, two are principally print and news media providers (Fairfax Media and APN News and Media), four are principally radio broadcasters (DMG Radio Australia, Australian Radio Network, Macquarie Radio Network, and Grant Broadcasters), one is a radio and television broadcaster (Southern Cross Austereo), one is the local subsidiary of a global media behemoth (News Limited), and seven are principally television broadcasters (Foxtel, Austar, WIN Corporation, Ten Network Holdings, Prime Media, Seven West Media, Nine Entertainment). This indicative list of companies is drawn from research commissioned by the Review Committee from PricewaterhouseCoopers that has not been made public. The
Final Report contains a graphic (Convergence Review 2012: 12) illustrating the proposed thresholds and the relative positions of the aforementioned companies, together with three that narrowly failed to qualify. While Google comfortably surpasses the threshold for estimated total monthly audience/users in Australia, it appears to fail by some distance to reach the revenue threshold. Telstra is closer to the revenue threshold, but still below it, while also falling some distance below the threshold of users. The third of the also-rans, Apple, appears on this evidence to be well short of both thresholds.

The Final Report does not explain how the thresholds were determined, or provide details on actual figures or information on how data on revenue and use for the companies concerned was gathered. The Review anticipates that the new communications regulator will determine the initial threshold levels of revenue and users, and will periodically review them. The reporting requirements for likely CSEs and for those that might become CSEs in the future are not specified. In this case at least, the Review provides no real guidance as to how ‘principles-based regulation’ might be translated into the dreary business of collecting public revenue data and ensuring compliance. Given the complexity and trans-national character of the new media industries, this promises to be a time-consuming, contested, and complicated research and assessment task for the new regulator.

The requirement that an enterprise ‘have control over the content supplied’ (Convergence Review 2012: 10) permits Internet service and telecommunications providers to avoid classification as a CSE except where they have direct interests in (ie. control over) content provision as distinct from simply providing access to a service. The Final Report also places heavy emphasis on the production and control of ‘professional content’ as a determinant of CSE status. The explicit exclusion of user-generated content from regulation also excludes those enterprises whose principal business is hosting such content, although it is suggested that the growing practice of partnerships between enterprises like YouTube and ‘professional content providers’ means that in the future these enterprises might qualify as CSEs should their revenues and reach meet the thresholds set by the regulator.

One immediate problem here is that the distinction between ‘professional’ and ‘user-generated’ content provider is often not nearly as clear-cut as the Final Report seems to imply. Much will depend on the definition of ‘professional content’ adopted by the regulator. The Final Report is not enormously helpful in this regard, with the only attempt at a definition coming in a lengthy quotation from the ACMA’s report Digital Australians (ACMA 2011b), the nub of which is that ‘Content produced by traditional media organisations – whether for print or broadcast, and whether offline or online – was seen [by most research participants] as professional content, produced for broad audiences’ (quoted in Convergence Review 2012: 5). That is to say, one of the core determinants of a company’s status as a CSE, and therefore one of the core determinants of regulation intended, amongst other things, to secure the future production and supply of a broad range of Australian and local content, is whether an enterprise is a traditional media organisation that produces traditional media content. It is difficult to see how this could meet the Review’s brief to create a future-proof regulatory framework.

One other proposal that will likely have significant implications for Australian and local content production and supply is Recommendation 29 that the new communications regulator allocate channel capacity on the sixth planned digital television multiplex (commonly known as the ‘sixth channel’) to new and innovative services, and to community broadcasters. The Final Report also recommends that existing commercial free-to-air and public service broadcasters not be permitted to obtain any of this spectrum, which in concert with Recommendations 2 and 28 would effectively end the long-standing moratorium on new commercial broadcasting services entering the free-to-air market.

Among a series of recommendations specifically relating to Australian content regulation, the Final Report proposes a short-term increase in the quotas and minimum expenditure obligations for drama, documentary and children’s content applying to free-to-air and subscription broadcasters before they are ultimately phased out and replaced with an expenditure levy. Qualifying CSEs will be required to invest a percentage of total revenue
earned from ‘professional television-like content’ (with a level of 3-4% suggested) either directly in the production of Australian drama, documentary or children’s content, or as a contribution to a new Converged Content Production Fund (Convergence Review 2012: 68). This fund will be supplemented by direct appropriations from government, and spectrum fees paid by radio and television broadcasters. The likely amounts of these appropriations and fees are uncertain, and it is also unclear who will administer the fund. While the most obvious candidate is Screen Australia, a number of submissions to the Review registered concerns about the agency’s lack of transparency and allocation of existing funds.

The Converged Content Production Fund is one of three measures intended to support innovative and interactive content, along with Recommendation 17, to create an interactive entertainment tax offset similar to the existing Producer Offset scheme, and Recommendation 29, to open up the sixth channel for new and innovative services. However, the Final Report proposes that the Fund’s primary roles will also be to support the production by the independent production sector of drama, documentary and children’s content, the production of local and regional programming, and contemporary music. Coupled with the reasonable expectation that most CSEs will choose to invest in content production themselves rather than contribute to the Fund (in order to acquire intellectual property rights and therefore potentially benefit from future exploitation of that content), and the much-reduced spectrum access fee, the Converged Content Production Fund may not only have to spread its investment across a broad range of content types and genres, but also will have extremely limited funds to invest overall.

As a transitional measure, the Final Report recommends (Recommendation 18) that the existing 55% transmission quota for free-to-air commercial broadcasters be retained and supplemented with a 50% increase in the sub-quota obligations for drama, documentary and children’s content. While a free-to-air broadcaster could choose to fulfill all of its new obligations on its main channel, the increase in the sub-quotas is a direct response to the limited volume of Australian content on the two additional channels operated by each free-to-air commercial broadcaster. The 10% minimum expenditure requirement for drama on subscription television is also to be retained in the interim, with the addition of a new 10% minimum expenditure requirement for documentary and children’s channels on subscription services.

Under Recommendation 26, the ABC will also be subject to the 55% overall Australian content quota on its primary television channel ABC1, with the other public service broadcaster, SBS, required to broadcast 22.5% Australian content. These requirements and Recommendation 25 (to update the ABC and SBS charters) have long been demanded by the commercial broadcasters, and could be considered to be preparatory measures in anticipation of the imposition of the ‘uniform content scheme’. In reality, however, the ‘uniform content scheme’ is nothing of the sort, since it only applies to those CSEs with both ‘significant revenues from television-like content’ and interests in drama, documentary or children’s content (Convergence Review 2012: xi). It is unclear whether or not the ABC and SBS will be treated as CSEs for Australian content purposes in the future.

Drama, documentary and children’s content are the only specifically protected program genres, due to the expectation that they ‘will continue to be the most significant forms of programming in the short to medium term’ (Convergence Review 2012: 59). No evidence is offered to justify this claim. Regulatory protections for these genres will also be maintained on the grounds of ‘market failure’; that is, without such support, these genres would be ‘under-produced’ as commercial providers would simply look to program low cost/high return content, much of which would be likely to be sourced from overseas.

The emphasis placed in the Final Report on conventional genres, coupled with the adoption, virtually in toto, of Screen Australia’s proposals for future Australian content regulation in its October 2011 submission, suggest that the Review’s principal concern is 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.

The interests of audiences and users of Australian content have also been left behind by the
proposed framework. The eventual repeal of the overall transmission quota on free-to-air
television not only removes the incentive for breadth and diversity of content, it also abolishes
the requirement that certain kinds of Australian content be screened in prime time, or
children’s time, or indeed at any time. That is to say, the repeal of the quotas abandons the
distribution guarantee inherent in the previous system, and opens up the possibility for
Australian content to be marginalised in the schedule or on the menu. The proposal is
essentially an extrapolation to the whole system of the pay television production quota,
which, for all the problems it has raised as a somewhat arbitrary quid pro quo, nevertheless
possessed some logic in terms of the repetitive programming practices of pay TV channels. In
the free to view environment, it is very hard to see how this model can be presented as
cultural or social policy. It is not sufficient to argue in response that the availability of catch-
up services on the Internet renders the concept of prime time redundant, or that audiences will
be able to watch Australian content at their leisure. These are insufficient arguments because
there is no certainty that broadcasters will maintain freely accessible Internet-based catch-up
services, or that all content on those services will be available to all Australians. On this
question of distribution and availability, the review’s industry support focus diverges from the
longstanding cultural and social objectives of broadcasting policy.

In radio, after avoiding the issue of Australian music quotas until the Final Report, the
Review ultimately recommends that the quotas will continue to apply to analog radio services,
and be extended to digital-only radio services, as long as these services are offered by a
content service enterprise (Recommendation 19). Music quotas will not be applied to
occasional or temporary digital radio services (Recommendation 20), or Internet-based music
services (Recommendation 21). The continuation of music quotas will be welcomed by the
Australian music industry, but the proposal as it stands will potentially reduce the overall
amount of Australian music played on radio across the country. This is because radio stations
owned by groups or entities that do not qualify as CSEs will no longer be subject to the
Australian music quotas. While the requirement may ensure that stations owned by CSEs will
likely maintain their share of Australian music, it is reasonable to assume that the absence of
equivalent requirements for smaller stations will result in an overall drop in the total volume
of Australian music.

In terms of local content, the Final Report recommends that ‘commercial free-to-air television
and radio broadcasters using spectrum should continue to devote a specified amount of
programming to matters of local significance’ (Recommendation 22). Currently, television
broadcasters must comply with a points system, which requires the broadcast of
approximately six hours of local news or twelve hours of other locally significant material
over a six-week period, with at least 45 minutes of local news or 90 minutes of other locally
significant material broadcast every week. Radio broadcasters must broadcast minimum
amounts of locally significant material, with the actual amount varying depending on the type
of service and licence held. Some regional commercial radio broadcasters are also required to
broadcast local news, weather, community service announcements and emergency warnings,
albeit only after a ‘trigger event’ such as a takeover or merger. The Final Report does not
specify the new requirements for regional radio broadcasters, except to note that it expects
that ‘these requirements will vary considerably from region to region based on community
needs and circumstances’ (Convergence Review 2012: 82). The requirements for holders of
spectrum licences for television will also vary. The new regulator will set the ‘nature and
quantum of local content obligations’ at some unspecified point in the future.
CONCLUSION

The Convergence Review has made a serious new attempt to address the digital media landscape. In the field of Australian content, proposals such as the plan for a production fund supporting innovation deserve serious consideration. However, in our opinion the Review suffers from an overly cautious approach to the problem of rapid change. Its focus on the immediate agenda of the established Australian production sector, rather than the opportunities genuinely arising from new platforms and services, represents a lost opportunity. In a period of disruption and volatility in all sectors of the digital economy, the claims of the local professional production industry, however worthy, should no longer serve as a proxy for a forward-looking cultural and social policy.

One further aspect of concern for professional and scholarly readers of the Review concerns its knowledge base. Unlike other inquiries in the field, including the recent Independent Media Inquiry and the ALRC Classification review, the Final Report of the Convergence Review, along with the various interim documents, is notably thin in terms of argument, evidence and analysis. There is a perfunctory tone to the exposition, as if the conclusions were manifestly inevitable and incontrovertible. Neither the draft nor final reports respond in detail to the substantial volume of submissions put to the review. Positions which have significant implications for the overall recommendations — such as the special valorisation of drama — are presented without consideration of alternative views, or any weighing of the evidence. Finally, it is worrying that relevant academic research and analysis, which was extensively drawn upon in the Finkelstein report, and somewhat less so in the ALRC report, is virtually invisible in the Convergence Review.

REFERENCES


ENDNOTES

1. Average production cost per hour (AUD$ millions) for particular forms of Australian content:

<table>
<thead>
<tr>
<th>Form</th>
<th>2000/01</th>
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<tr>
<td>Children’s Drama</td>
<td>0.67</td>
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</tr>
</tbody>
</table>

2. Quoting figures collated by Screen Australia and reported in its October 2011 submission, the Review (2011a: 8) notes that the indicative production cost of one hour of new release American drama for free-to-air television ranges from $2.5 million to over $5 million, while the same figure for Australian adult drama series over the last three years is between $400,000 and $1.8 million. The indicative cost to Australian broadcasters to licence one hour of American drama is between $100,000 and $400,000, while the cost of licencing or investing in one hour of Australian drama is between $350,000 and $1.4 million. [All figures in AUD$]

3. See for example the submissions in response to the Interim Report by Foxtel (2012); the joint submission by AIMIA, Google, Telstra, Facebook, Yahoo! and ninemsn (2012); the Australian Industry Group (2012); the Australian Competition and Consumer Commission (2012); and the joint submission by iiNet, TransACT Communications, Internode and Adam Internet (2012).

4. These findings support those of the CCI Digital Futures 2010 report by Scott Ewing and Julian Thomas, which reported that over 59% of people aged 18-29 downloaded or watched online video content at least weekly in 2009 (Ewing and Thomas 2010, figure 4.25: 33).

5. The Final Report was released prior to approval being granted by the Australian Consumer and Competition Commission for the takeover of Austar by Foxtel.

6. Recommendation 2: ‘There should be no licensing or any similar barrier to market entry for the supply of content or communications services, except where necessary to manage use of a finite resource such as radiocommunications spectrum’. Recommendation 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 broadcast use;
b) commercial broadcasting licensees should have the flexibility to trade channel capacity within their spectrum.’
IS ACCESS TO CONTENT REALLY THE NEW BOTTLENECK? OR SHOULD WE BE CONTENT ABOUT CONTENT?

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PP Consulting Telecommunications Media

Exclusive rights to premium content, and other content-related factors, are identified in the Convergence Review Report as potentially powerful impediments to competition in the rapidly converging telecommunications and media sectors. Substantial revisions to existing regulatory arrangements are recommended in the Report to address this threat. However, it is not apparent that these concerns are justified, or that the dramatic institutional changes proposed are warranted.

Rather, a number of convergence-related developments in premium content demand, availability, and distribution suggest that any market power bestowed by exclusive access rights in the past may be eroding. This paper highlights these developments. It is concluded that, that taken together, they do indeed have the scope to weaken the threat to competition seen in exclusive content rights. Caution is counselled in proclaiming the prospect of emerging content-related threats to competition, and instituting changes to the regulation of communications competition in Australia, until market evidence is examined more closely.

INTRODUCTION

The Convergence Review Report advises that the prospect of significant content-related competition issues in the emerging converged environment warrants revised regulatory arrangements. It is reasoned that, as market developments are occurring rapidly, a regulatory framework is required that would allow a rapid response if competition problems emerged. It is recommended that, in conjunction with the Australian Competition and Consumer Commission (ACCC), such competition issues be addressed by the proposed new communications regulator—which notably would have rule-making powers.

Exclusive rights to premium content—live sport and blockbuster movies—head the list of competition issues discussed in the Report. The authors are not alone in this regard. Similar views have been expressed by the chairman of the ACCC, most recently in the context of the Foxtel-Austar merger where Mr Sims signalled ongoing ACCC disquiet about exclusive broadcasting rights for live sport.

The Foxtel undertakings limit the number of major movie studios and distributors with whom Foxtel can hold exclusive access rights, allowing entrant pay TV and content-on-demand operators access to this type of content. Notwithstanding its ongoing concerns about exclusive sports rights, the ACCC did not demand this issue be addressed in the undertakings on the basis that the competition implications of exclusive rights to sports content would not be impacted by the proposed merger. Interestingly, the ACCC indicated that access to some Hollywood movies, and other non-premium-sport material, would in its view be sufficient for new entrants to establish a customer base (Masters 2012: 7).
In the same vein, Ofcom and the Competition Commission in the United Kingdom have been active in pursuing competition concerns relating to exclusive audio-visual rights to Hollywood movies and live broadcasts of high profile sport.

While it is obvious that things are changing fast in the audio-visual content area, it is not apparent there will be significant restrictions to competition from exclusive content rights. Rather, a number of convergence-driven developments in premium content demand, availability, and distribution give rise to the prospect that any market power bestowed by exclusive access rights in the past may be eroded in the near future—if this has not already happened. This suggests the Convergence Review recommendation that the new communications regulator include content-related competition issues in its mandate may be premature and unduly bold, given the financial and broader efficiency costs that would ensue from this major change.

In this paper, recent developments in audio-visual content supply, demand, and distribution that have the potential to strengthen competition in the market for premium audio-visual content are considered. The aim is to shed some fact-based light on the thesis that convergence, and the associated market responses, are in fact resulting in a lessening of any anti-competitive potency of exclusive rights to premium content.

As such, the paper focusses on one side of the ledger only. It does not address developments that may suggest a contrary view, such as the mooted rising value assigned to the broadcast rights to National Rugby League (NRL) football in Australia (Chessell 2012d: 3). Rather, it’s more modest purpose is to caution against pre-judgement on the competition-limiting influence of exclusive content rights in a converged world and premature changes to the regulation of communication competition in Australia, before the facts unfold.

In the following section a broad overview of the key convergence drivers of change in the audio-visual content area is given, followed by sections addressing developments in content supply, demand, and distribution. The paper concludes with a discussion of the competition implications of these observations.

**WHAT IS HAPPENING OUT THERE?**

Two principle consumer experience manifestations of convergence are platform diversity and viewing time flexibility. These lie at the heart of the market developments that are arguably reducing the competition significance of exclusive content rights.

Audio-visual content has traditionally been available to consumers in cinemas and on home television screens via free-to-air (FTA) broadcasts. However, technological changes over the past two to three decades have widened the range of viewing platforms—first to cable- and satellite-connected TV screens (via encryption-decoding set top boxes for paying subscribers) and then to Internet-connected fixed and mobile devices such as personal computers (PCs), smart phones, tablets and Internet-enabled televisions.

Viewing time flexibility for home consumption of audio-visual content has traditionally been provided by videocassette recorders (VCRs) and digital video discs (DVDs). Two Internet-related technological and commercial developments have extended the scope for viewing time flexibility: video-on-demand (VoD) and cloud-based time-shifting of linear (that is, programmed) content.

These developments are relevant to competition in two main ways. First, they have the capacity to broaden the scope of the markets in which premium content is supplied. For example, pay TV, FTA TV, and online distribution platforms have traditionally been considered by regulators to be separate markets. Convergence threatens this traditional view. Secondly, these developments have the capacity to heighten the scope for robust competition within markets.
CONTENT SUPPLY CHANGES

There are a number of market developments in the way premium audio-visual content is supplied to distributors and consumers that are opening up the availability of premium content, potentially eroding the customer-attraction potency of exclusive broadcasting rights. There have also been dramatic changes in the type of audio-visual content available to consumers, again with the potential to weaken any anti-competitive power of exclusive rights.

LIVE SPORT

Coverage of major sporting events holds a special place in Australian society. This is reflected in the ‘anti-siphoning’ rules introduced by the Parliament in 1992 in response to concerns that television FTA coverage of major sports would be ‘siphoned off’ to pay TV and not available for free anymore. These rules, which are still in place today, allow the FTA broadcasters to bid for the rights to the listed sporting events without competition from pay television operators up until a short time before the event—usually 12 weeks. While these arrangements are often seen as tilting the competitive arena in favour of the FTAs, regulator concerns have focussed in particular on the live sport exclusive access deals struck by pay TV networks (as described above).

There are, however, three key developments in the supply of live sport content with the potential to dissipate concerns regarding market power imbued by exclusive access rights. These are the fragmentation of rights, rights being extended to a time-shifted as well as a real time basis, and the distribution of content directly to customers by the content owner. While examples are drawn from Australia and overseas, the content rights focussed on in particular are those to Australian Football League (AFL) and National Rugby League (NRL) live games, as these have traditionally been considered prime drivers of FTA and subscription television viewership in Australia.

Fragmentation of rights

Fragmentation of rights—the selling of exclusive rights to smaller parcels of content, such as in-season games, finals and grand finals, special games (for example, NRL State of Origin and international games)—provides the opportunity for a wider range of parties to buy rights to this highly prized content. The motivation for the content owners to fragment rights are twofold: to maximise revenue from the rights, and (possibly more significant from a fragmentation perspective) to maximise exposure for the code to achieve an increased following and ensure stronger game attendance, merchandise sales, and advertising revenues.

For both the AFL and NRL, there is already some fragmentation of rights occurring. For example, the current arrangements involve the sharing of rights to in-season games between the FTA and pay TV distributors Nine Network and Foxtel (Stensholt 2012a: 44; Chessell 2012c: 46). The current bidding process for rights to NRL content for the next five years gives a useful insight of future fragmentation possibilities, with a range of fragmented as well as lumpier options being mooted (Masters 2012: 7; Chessell 2012d: 3; Read & Honeysett 2012: 40).

Adding to the opportunities for fragmentation of rights is the scope to sell the rights for different competing platforms (devices), in particular the online rights that allow viewing on PCs, smart phones and tablets (mobile), and Internet-capable TVs. This is already occurring, and will continue.

Time-shifting

Time-shifting is another dimension of rights fragmentation. The recent Optus TV Now copyright case is instructive in this regard. Putting aside the disputed legally or otherwise of the service, its provision demonstrates the technical capability and commercial viability of providing an easy-to-use means of time-shifting live events. Furthermore, Optus’ stout legal defence of its right under copyright law to provide this time-shift service, which allows consumers to view games online on a range of online devices as soon as two minutes after the
live broadcast, suggests there is significant demand for this delayed material (Edwards 2012: 4).

The FTA television networks are now providing a time-shifting of linear content on their digital channels, reflecting significant demand for time-shifted linear content. For example, the Ten Network has been distributing its digital programs on smart phones for the past 18 months, with around 1 million catch-up TV mobile application downloads and 1.5-2 million catch-up views per month (Holgate 2012b: 47).

**Direct supply to consumers by content producers**

Both the AFL administrators and the Collingwood club have signalled interest in the future possibility of selling AFL content directly to customers via their own channels. There is significant overseas precedent for this (Stensholt 2012b: 45; Stensholt 2012c: 50).

**Hollywood Movies**

There are two potentially competition-enhancing developments in the supply of blockbuster movies: changes in move release windows and the direct sale of movies to customers.

**Movie release windows**

A general shortening of movie release windows (the period of time in which a distribution channel can publicly screen the movie), and the addition of new windows, enhances the scope for competition by allowing movies to be more freely available early in their life, and permitting some new distribution means early in a movie’s release life. For example, shortened release windows are evidenced in Netflix messes up (The Economist 2011b: 81). Additional windows include the recent insertion of a video-on-demand window ahead of access by subscription television (Communications Day 2011c, 4), and Apple’s recently negotiated access to Hollywood movies on any Apple device via its iCloud service (Vascellaro & Orden 2012: 24).

**Direct distribution by studios**

A number of Hollywood studios have joined forces to release their movies through UltraViolet (Vascellaro & Orden 2012: 24). This breaks the power of those parties that have access to movies early in their release cycle, by providing customers with an online alternative to traditional outlets.

**Other content**

Another important development is the proliferation of highly desirable content. This provides an alternative source of content for market entrants that do not have the customer base to warrant (and finance) the acquisition of major rights. This alternative content is proving to be sufficiently attractive to sustain market entry, diminishing the traditional supremacy of Hollywood studio movie and live sport content. Four types of content are potentially important in this regard, some emerging only in recent years. They are: blockbuster TV-like content such as high quality mini-series and ‘soapies’, documentaries, amateur videos, and interactive games.

**Blockbuster TV-like material**

In the United States, some content subscription TV networks have been producing their own highly attractive content to ensure that, if there are ongoing limitations to access to Hollywood movies early in their life, they can offer content that will attract customers to their channels. For example, HBO has engaged top script-writers and producers to develop top rated shows such as *Sex and the City* and *The Sopranos* (The Economist 2011a: 58—60). Google has indicated it is in the process of creating more than 100 channels of content (Kermond & Dick 2011: 9).
In Australia, News Limited is reported to be in discussions with the related content producer Shine regarding access to attractive content to compete with prime content to which they do not have access (McIntyre 2012b: 46). Furthermore, Shine has also indicated it is likely to commence selling its content directly to customers in the next 5 years, presumably through its own subscription TV channels or online services (McIntyre 2012b: 46), as well as selling through its traditional wholesale avenues.

More broadly, the major Hollywood studios also produce and actively market high quality television material as well as movies, such as drama and comedy series comprising of standard half-hour episodes (Holgate 2012d: 5).

Amateur videos and interactive games

The recent huge popularity of amateur videos has the potential to undermine the real or perceived primacy of traditional premium content in driving demand for audio-visual outlets. This is typified by consumer-produced YouTube videos. Coupled with growing predominance of consumers born into, and inherently at ease and familiar with, an online world, this material has the very real potential to be a viable alternative to traditional premium content for market entrants.

Interactive games also have the potential to attract serious ‘eye-ball time’. This also diminishes the importance of tradition prime content in attracting ‘eye-ball time’. Significantly, the interactive game Call of Duty: Modern Warfare 3 generated greater revenue in the first weeks of its release than Avatar, the biggest-selling movie of recent times (Corrigan 2011: 11).

CONTENT DEMAND CHANGES

There are also a number of actual and emerging demand changes that have the potential to lessen any existing content-related competition constraints. These developments (and the content distribution developments described in the following section) are likely to be given particular potency by the changing population make-up, as the children and grandchildren of the baby-boomer generation begin to replace earlier generations as the key audiences. These later population cohorts are likely to have substantially different viewing tastes and patterns to baby-boomers. For example, they may have less of an interest in live sports, and the start-to-finish consumption of 90-120 minute movies, with a greater preference for consuming audio-visual content in short bursts, often while on the move.

LIVE SPORT

Key demand developments with competition implications are the apparent increase in consumers’ appetite for time-shifted live sport content, and the emergence of, and demand for, news-style presentation of live sport in a way that, in effect, circumvents exclusive access arrangements.

Fairfax Digital online news service provides an alternative to live sport coverage in the form of frequent ‘news’ bulletins before, during, and after major games. This allows customers on the move, or doing other things, to tune into the pre-game hype, get quick updates on the game as it progresses (such as the score, which players have scored, who is on the field, the number of penalty decisions against each team), and get the wrap-up at the end. This provides a ‘quasi-live’ form of live sport coverage with the potential to substitute for traditional live sport coverage for some fans.

Time-shifted material, which has already been discussed, is also proving to be popular.

CONTENT + SOCIAL INTERACTION

Distributors providing the means for mass social interaction during the broadcasting of linear content, on social platforms such as twitter and Facebook, have the potential to diminish any
overall advantage of platforms with exclusive access to premium content (Kermond & Dick 2011: 9).

CONTENT DISTRIBUTION CHANGES

Convergence is changing the platforms over which audio-visual content is made available to consumers, the distributors of this content, and the ease with which content can be accessed by consumers. These developments underpin the competitive forces outlined above that can weaken the position of exclusive rights to premium content.

PLATFORM CHANGES

Convergence has been driven by, and has in turn stimulated, substantial changes in audio-visual content distribution platforms. This involves changes to the traditional platforms of FTA and cable- and satellite-based broadcasting. New platforms are primarily fixed and mobile broadband for delivery of content over the Internet, including content from the new digital channels of the FTA television networks which have become multi-channel providers. There are also a number of developments that facilitate distributor use of, and customer access to, these various platforms. This change in the functionality of traditional platforms, and the entry of new platforms, has the scope to significantly strengthen the competitive landscape.

Both FTAs and pay TV bid hard for AFL and NRL rights, as reported in Canning’s article (2012b: 28). However, it is anticipated by some commentators the current sale of NRL content rights will be the last time the bidding will be dominated by the FTA networks and Foxtel. They suggest that Internet-based platforms will be much more active and important the next time round (Chessell 2012b: 56).

Many commentators believe take-up of the NBN will in large part be driven by demand for audio-visual content, as most Australians already have an excellent fixed line phone service and adequate Internet access service for current uses (email, web browsing, online transactions, and limited audio-visual downloads) (Duling 2012: 18). An interesting aspect of the NBN is that it expands the number of content delivery channels to the home. At present, there is in general just one fixed broadband ‘pipe’ to each home—a DSL service or, less frequently, an HFC connection. This means one network controls the access ‘pipe’, and the content in effect ‘sits on top’ of that platform. However, the NBN will have four data ports into each home meaning that, subject to cost, a customer can subscribe separately to a pay TV service, an IPTV service, and a broadband service with over-the-top (OTT) content through different ports. That is, access will not be controlled by any one network.

DISTRIBUTOR CHANGES

Additions to the list of parties distributing content also have scope to increase the level of content-related competition and weaken the market influence of premium content exclusive rights arrangements. These new distributors are the traditional telecommunications service providers, over-the-top content providers, communications eco-systems such as Apple and Google and various social network platforms, and news outlets. Illegal dissemination of content from piracy and file-sharing also provide an ‘off-market’ discipline on commercial content distributors holding exclusive rights to premium content.

Telcos

Traditional telecommunications carriage service providers such as Telstra, Optus and Vodafone, and ISPs, have all expressed keen interest in becoming content distributors in their own right, as carriage alone is no longer lucrative. This has added to the number of
distributors vying for access to traditional premium content, and sourcing and providing other strongly attractive content that has the potential to dilute the customer attraction potency of premium content.

The recent ACCC declaration of the copper-based (ADSL) Layer 2 wholesale bitstream service provided on Telstra’s network is significant in this regard. The Standard Access Obligations associated with this declaration, and Telstra’s Structural Separation Undertaking, assure that Telstra and entrant telcos and ISPs, and OTT operators, can all access customers on an equivalent basis.

Furthermore, established telecommunications service providers are in a position to leverage their existing product set, and network and platform assets, in providing high quality service. For example, Optus signalled its approach as offering ‘… better services, better innovation and giving people an overall better experience’ (Battersby 2012: 3). Optus has also signalled its direct content provision ambitions in pushing into the ‘live’ sports area with its (currently-suspended and strongly contested) TV Now time-shift service. However, the advantages of bundling in this way is qualified to the extent that bundling of content and telecommunications services is less successful than bundling of fixed services and mobile services.

Reflecting the range of devices to which telecommunications service providers now deliver services (including content services), there is reported to be particularly strong interest from them in emerging ‘transmedia’ content formatted several ways so that it runs effectively on a range of devices without further processing (McIntyre 2012d: 44).

**Over-the top operators**

Over-the-top operators (OTTs), who provide content over telecommunications networks, are widely seen as a threat to both traditional and newer content distributors. The vertically separated structure of the NBN is designed to promote service provider competition, including from OTTs (and the underlying retail broadband providers).

**Eco-systems**

In parallel with the shortening and proliferation of movie release windows, Apple has successfully negotiated the rights to distribute block-buster movies from the major Hollywood studios for block-buster movies (Vascellaro & Orden 2012: 24).

**Social network and search platforms**

Google has entered the content provision game, increasing the number of distributors that can bid effectively for premium content. Google is also adding to the range and volume of desirable content. Google has been quoted as saying that it is creating more than 100 new channels, which are embedded with social interactive capability (Kermond & Dick 2011: 9). Google is also reported as investigating the acquisition of the international rights to V8 Supercars sports content, potentially disciplining the holders of any Australian rights to this top-four sports content (McIntyre 2012a: 42). This weakens the significance of premium content as a key customer attraction element of distributors’ content offerings.

**News outlets**

Some news outlets have responded to the opportunities and threats posed by conversion by developing products that have the potential to be substitutes for some premium content. For example, the online Fairfax portal offers ‘news’ coverage of key NRL and AFL games by rapid-fire bulletins on events and developments occurring before and during the game, and a commentary after the game.

**Overseas sources of content**

There is also a geographic dimension to the rights issues and OTT applications. At present some content distributors (such as the BBC) do not allow users outside their country’s borders to access content. However, market forces and the cost recovery needs of public broadcasters such as the BBC, mean it is likely this will change over time. Furthermore, there are other overseas service providers—such as the US cable television networks—who provide access to
their content for customers in other countries. In a small market such as Australia with limited local content, this ‘imported’ competition could have a significant impact.

**Illegal access**

Illegal access to content from piracy and file-sharing raises substantial concerns from a copyright law and a content supply and innovation perspective. Nonetheless the demonstrated scope for piracy and file-sharing of premium audio-visual content, such as new release movies, imposes a significant price discipline (as well as an incentive to simplify access to the material) on holders of exclusive rights.

**IMPLICATIONS**

What are the implications of these various established, nascent, and in some cases merely potential market developments for content-related competition issues? Taken together, they would appear to reflect a potentially powerful force in favour of enhanced competition. This could occur, for example, in the following ways.

On the one hand, the matching trends of fragmentation of rights and multiplication of platforms could mean that, while premium content remains premium, competition problems have been ameliorated as there are now a number of different channels through which to view the content. That is, the environment is changing from one of pervasive exclusivity of content to exclusivity of content only on a particular platform.

On the other hand, it could be seen that, because of the developments discussed above, traditional premium content is no longer premium in so far as it is possible to enter consumer markets for the supply of quality audio-visual content armed with material that does not include the traditional premium content—Hollywood movies and live sport.

Realistically, however, the jury is still out, on two counts. First, these market developments need to be examined more carefully than this initial, precursory cataloguing of unfolding changes allows—in terms of both their economic significance in diminishing the market potency of exclusive access rights for premium content, and their likely evolution as convergence continues to play out.

Secondly, these developments represent only one side of the story. This paper has not examined current and potential convergence-related developments that have the potential to strengthen any market advantage accruing to exclusive access to premium content. Nor has it considered the relevance of some indications that, in some areas at least, the holding of exclusive rights to premium content is now more valuable than in the past.

For example, the NRL code administrators reportedly expect (or is it hope?) that the rights to NRL live broadcasts will net up to 50 per cent more than last time the rights were sold 5 years ago (Stensholt 2012a: 44; Stensholt 2012b: 45). If this ambition is realised, it could indeed reflect the contrary position that premium content is becoming more important in ‘eye-ball’ attraction. On the other hand, however, it might also—or alternatively—reflect the code administrators exercising greater skill in extracting a larger share of the (possibly declining) intellectual property value of the content.

Nonetheless the material presented in this paper does warrant a careful, measured approach to considering changes to the regulatory framework for content-related competition. The need for a carefully considered approach is heightened by the potential for the mooted changes to impose large pecuniary and broader economic efficiency costs on taxpayers, the telecommunications and media sectors, and customers.
CONCLUSIONS

While many of the developments described in the paper are recent, nascent, or still speculative, others are more established. All of these demonstrate the real or potential forces for the lessening of content-related competition constraints. Their significance in this regard will play out over the coming years, and needs to be watched carefully. However, their potential to quite dramatically change the competitive landscape means that judgement in this area must remain suspended. Actions to put in place new competition regulation arrangements should only be taken on the basis of robust, market-based evidence.

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In 2011–2012, the Australian Government commissioned two separate reviews of the country’s media regulation. Despite big differences in the way they approached their task and in the conclusions they reached, both reviews recommended the creation of new regulatory authorities backed by statute. Although for different reasons they also attached much significance to the idea of independence. Both reviews might have delivered better results if they had recognised that independence matters only as one of several factors affecting the broader and more important question of whether a regulator’s decisions are regarded as legitimate.

INTRODUCTION

The recent Convergence Review of Australia’s Media and Communications Policy (the Review) recommended the creation of a new regulator with more power to make and change rules than the existing Australian Communications and Media Authority (ACMA) and more discretion to decide how, or whether, to enforce them. The idea of an independent regulator ‘flexibly’ administering a much broader delegation from Parliament is a central part of the Review’s proposed solution to the problems it diagnosed in the current system.

The Review’s main concern about its proposed regulator, after increasing its power and discretion, is its independence. It does not believe that governments or the Parliament can be trusted with media policy. Its remedy is to delegate more legislative power to an independent regulator to reduce the involvement of politicians. If the Government were to adopt this recommendation, it would be a significant change not only to Australian media policy but also in the extent of policy responsibility delegated to an authority separate from the elected legislature. It deserves, as much as the Review’s other policy proposals, to be adequately explained justified and developed before it is adopted. (CRC 2012)

This article suggests that there are a number of problems with the Review’s analysis. There are confusions in its discussion of the advantages of a board structure for the new regulator, and a basic mistake in its account of the structure of the ACMA. Its argument for further delegation of the legislature’s legitimate authority is not supported with sufficient evidence to conclude that its proposal will deliver better results. The Review appears not to have considered the literature on the rise of the regulatory state, the growth in the use of independent regulatory agencies and analysis of their performance. In that context, independence might have been seen as one of several factors affecting the legitimacy accorded regulatory decisions. The broader idea of legitimacy might also have been a better foundation for evaluating questions of institutional design.
REPLACING THE AUSTRALIAN PRESS COUNCIL

Over the last year, the Australian Government commissioned two separate reviews of
Australian media regulation. Both advised it to create new regulatory authorities.

The Convergence Review of Australia's media and communications policy framework (‘the
Review’) was commissioned first and had a broader reference. The second, the Independent
Inquiry into 'certain aspects' of the media and media regulation, conducted by the Hon R
Finkelstein QC with assistance from Professor M. Ricketson (‘the Inquiry’), was more
narrowly focused on the 'effectiveness of the current media codes of practice'.

Although it was commissioned later, the Inquiry was asked to report first so that its
recommendations could be considered by the broader Review. The Inquiry recommended the
creation of a new independent statutory body to set standards for the news media in
consultation with the industry, and to handle complaints made by the public. This new
authority would replace the Australian Press Council, and the Inquiry suggested it might be
called the News Media Council. (Finkelstein 2012)

The Inquiry produced a long report of some 330 pages and a further 130 in appendices. It
describes at some length the reasons why it judged it necessary to create a new organisation
rather than to adapt or modify the Australian Press Council. It begins with the proposition that
self-regulation should be the preferred option. However, the Inquiry decided that self-
regulation could no longer be regarded as an adequate response, having already been
ineffectively attempted through a Code of Ethics administered by the Press Council. It also
examines the feasibility of strengthening the Australian Press Council and provides a number
of reasons why that would not be sufficient (Finkelstein 2012: 11.39–11.43), in particular that
it would allow news publishers to opt out of the scheme and to delay or avoid implementing
the Inquiry's recommendations. It would also result in 'an odd mixture of a private body with
some statutory powers being partly funded by government' likely to provide legal
complexities within the context of the Australian constitutional system.

To ensure this new council was 'free from the influence' of executive government, the Inquiry
made detailed recommendations about its composition (Finkelstein 2012):

- It would consist of a retired judge as its full-time independent chair, and
- Twenty (20) part-time members.
- All members would be appointed by another, independent body that might consist of
  three senior academics appointed by Universities Australia, the Commonwealth
  Ombudsman and the Solicitor-General for the Commonwealth.
- Half the members would be chosen from candidates who had responded to
  advertisements seeking applications from the 'public at large' and have no previous
  connection with the media.
- Half would be chosen from those nominated by the media or the MEAA. They would
  be from the media or have worked in it, but not be managers, directors or
  shareholders of media organisations.
- Half would be men and half women.
- It would be funded by the Government after an assessment of its budget claim by the
  Auditor-General.

The Review agreed with the Inquiry that news publishers should be held to a standard of
behaviour described in a code of ethics and should face sanctions for any failure to meet it.
The two teams agree that a 'platform-neutral' regulatory authority should perform the
Australian Press Council's role for news publishers in any medium including television and
radio broadcasting and the Internet. They also agree that news publishers should not be free to
opt out of the regulator’s jurisdiction, and that it should have more effective sanctions than the
Australian Press Council now has.
Ultimately, however, the Review rejects the Inquiry’s recommendation on a new media regulator on the grounds that a publicly-funded statutory authority should be ‘a position of last resort’. It proposed that a news standards body be established by the industry rather than by statute. It opposed the Inquiry’s recommendation that it should be wholly funded, recommending instead that it should be funded ‘primarily by industry with some government contribution, for example, to cover shortfalls in funding or to provide project funding’.

Provided the Inquiry's conclusions about problems and harms are accepted, there is a clear line of reasoning in support of the regulatory structure it recommends. Its report includes lengthy chapters on the historical background of the existing arrangements and on regulatory policy, some examination of the alternatives and of the costs and benefits. The industry’s response was largely hostile, and opposed in particular the creation of a news regulator by statute or any funding of it by government (Christensen and Meade 2012; Drum Wrap 2012).

Although the Review suggests some criteria for determining whether a revised self regulatory body would be considered effective, and ‘specified requirements’ that it considers necessary pre-conditions to the establishment of a new self-regulatory body, it gives only limited reasons for its different conclusion on whether a fix and the ‘odd mix’ is credible. One reason it cites is to ‘avoid the sensitivities associated with direct regulation of journalism’, inviting the reading that perhaps its proposal was informed by a pragmatic political response to the media’s vocal opposition to the Inquiry’s earlier report.

Industry commentators preferred the Review’s approach. Mark Day, a long-standing media columnist for *The Australian* condemned Finkelstein for having 'cobbled together nearly 400 pages of academic theory to support his recommendation' while faintly praising the Review’s report for being at least 'not an academic wank' (Day 2012).

The two investigations agreed that any regulator of news media should be ‘free from the influence of the executive’ and be seen to be independent. The Inquiry proposed a two-step appointment process for its News Media Council to increase the separation from executive government. However, its concern about independence also stems from its diagnosis of the risk that organisations like the Australian Press Council that are close to industry may regard self-justification as self-regulation. Its suggestions that the independent appointing body might consist of senior academics and that its chair would be a retired judge may be a good recipe for increased independence. Unfortunately, it also invited the easy criticism that the idea betrayed the professional solipsism of the Inquiry’s team more than it delivered a way to improve the News Media Council’s standing or reputation.

One of the major challenges faced by the Australian Press Council, and any replacement, is to be regarded as legitimate simultaneously by the industry and by actual or potential complainants. Many changes, such as increasing the number of members without media experience, that are proposed to improve how much one set of interested parties perceive the Council and its decisions as legitimate, simultaneously diminish its standing with the other. Legitimacy has long been an important concept in political analysis (eg Peter 2010) and in the study of administrative law and regulatory policy (Jones 1989). However, although it has implicitly informed the Inquiry’s consideration of the composition of its News Media Council, it was not explicitly addressed by either investigation.

Like other proposals in Australia, such as for the boards of public broadcasters, the Inquiry’s options for increasing independence were limited to the idea of appointing independent appointers or nominators. There are other options. Some European regulatory agencies have long used a method that mirrors the idea in the *Broadcasting Service Act 1992* (Schedule 1) that the power to appoint or veto the appointment of at least half the directors of a corporation amounts to control, and split rights to appoint between different holders of political power. The French Conseil Superieur de l'Audiovisuel, for example, has three members appointed by the French President, three by the President of the Senate, and three by the President of the National Assembly (Mediterranean Network of Regulatory Authorities 2012). It may not be the selection process that matters most. Even a process as impervious to gaming as the remarkable sequence of independent steps in the election of a Venetian Doge (Norwich 1989) will be undermined if the decision maker eventually appointed manages potential conflicts of
interest poorly, appears to have an allegiance to one set of interests, or participates in partisan politics.

If the recommendations of either the Inquiry or the Review were implemented, the Australian Press Council would need to be abolished or substantially changed. The failures that both reviews find with the existing system of regulation are connected to the institutional design of the Australian Press Council, in particular to its lack of investigative or enforcement powers, its relative lack of funding, its dependence on the ‘will of its constituent bodies’ and apparent lack of independence from its publisher members. The Inquiry examined similarly constituted overseas bodies and found they shared similar problems, citing for instance a UK review that concluded the self-regulatory Press Complaints Commission did not command public confidence and was not truly independent.

REPLACING THE ACMA

The Review also recommends replacing the ACMA with a new communications regulator, but it is less clear why institutional change is necessary to achieve any of its other recommendations.

In contrast to the situation of the Australian Press Council, the problems the Review finds with existing media regulation including ownership and control, management of spectrum, and the structure of broadcasting licenses, are not linked either to the performance or to the structure of the ACMA. The Review’s criticism is not of the ACMA’s work, but rather of the lack of policy discretions conferred upon it, of the prescriptive legislation that does not adapt over time and of restrictions on the ACMA’s power that make it difficult to deal with complaints and problems quickly. On the basis of these considerations the Review suggests a new regulator. It does not explain why, even if the need for greater delegation of regulatory powers is established, this would require another body instead of increasing the powers of the ACMA. Creating a new organisation has significant costs. Implementation of any changes would be much cheaper, quicker and easier if it did not require wholesale institutional change. The decision should therefore be justified by a demonstration that this option would not work or that there are benefits from the change sufficient to outweigh the substantial costs.

The Review provides no data to suggest a problem with the ACMA's performance and no analysis of whether the policy changes it recommends to ownership laws and spectrum management could be achieved without the need for substantial institutional change. In addition, the Review's focus was on only a portion of the ACMA’s work. The matters covered by the Broadcasting Service Act 1992 may not even comprise the majority of the ACMA’s work. The ACMA is also responsible for the administration of regulation under the Radiocommunications Act 1992 and the Telecommunications Act 1997. The Review made no suggestion about whether those responsibilities should remain with the ACMA or also be moved to a new more powerful regulator. This is an important oversight since the alternatives appear to be either to increase the number of regulators, or to introduce a substantially more powerful rule-making regulator to the entire telecommunications industry or to create a regulator that must operate in two different modes – with substantial discretionary power on media rules but in a more restrained manner on radio and telecommunications issues.

Apart from its ‘flexible powers’, the central feature of the new regulator proposed by the Review is that it is independent. The Review recommends that the regulator should be established as a board and prefers the ‘company model' of a board comprised of ‘a part-time chair, deputy chair and non-executive directors; and a chief executive officer and possibly one or two other senior executives’.

Its discussion of the idea of a board in the governance of independent regulators is confused. It mistakenly claims (CRC 2012: 18) that 'Commonwealth regulatory authorities, including the ACMA and its two predecessors, are usually established as statutory corporations that perform their regulatory functions through a board and delegates of that board'. In fact, the ACMA is governed under different legislation from its predecessors. Its chairman, Chris Chapman, described the difference in the organisation's first annual report:
A key difference between ACMA and its predecessor organisations is that the government created ACMA as an agency under the Financial Management and Accountability Act 1997 (‘FMA Act’). During the year we have been learning to operate under the rather more rigorous FMA framework than that imposed by the Commonwealth Authorities and Companies Act 1997, which applied to both of ACMA’s predecessor organisations. Under the FMA Act, ACMA is both an FMA agency and a body corporate, having a separate legal identity to the Commonwealth. While the FMA Act sets the framework for all ACMA financial matters, its separate legal identity allows the Authority—that is the members—to exercise collective decision-making in the performance of their statutory functions. (ACMA 2006: ix)

The Review gives four reasons for its preference for a board but no evidence in their support. First it suggests that a board is necessary because the regulator needs to hold money on its own account. As it happens, this issue was specifically considered when the ACMA was created but the opposite conclusion was reached. In 2005, the Department of Finance and Deregulation prepared a report to 'provide a strong platform for informed discussion ... on the merits of alternative structures for Australian Government bodies', that used the creation of the ACMA as a specific illustration of an authority where a board was unnecessary:

More recently, Parliament established the Australian Communications and Media Authority (ACMA) in legislation combining the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) as of 1 July 2005. Significantly, the ABA and the ACA operated under the CAC Act but, when ACMA was considered closely, there was no compelling reason for it to hold money on its own account. Accordingly, ACMA is established under the FMA Act. The members of the body corporate in this instance would have statutory powers (in most cases regulatory) but not generally any governance role.

(Dept of Finance and Deregulation 2005: 36)

Any money held by the ACMA is held on behalf of the Commonwealth. As the Department of Finance noted, it is desirable for any authority involved with licence fees to be subject to ‘a rigorous framework for the collection, management and expenditure of public money’. No evidence has been presented by the Review to suggest that this has been an impediment to the operation of its statutory responsibilities nor an explanation of how the performance of its regulatory functions would be improved by a change.

Next, the Review argues that the need for quick decisive action and the need to attract and retain qualified people require a board. This suggests the same confusion between the capacity for autonomous collective regulatory decisions and the arrangements for financial governance. There are other organisations that operate in the same manner as the ACMA, including the Australian Competition and Consumer Commission (ACCC), and the Human Rights and Equal Opportunity Commission. The Review has presented no evidence to suggest that the ACMA, or similarly constituted authorities, have been unable, because of their constitution, to act decisively within their areas of statutory responsibility or to have been attractive career options for appropriately qualified people. The exercise of independent statutory powers by a commission or an authority does not necessarily entail the use of a company structure.

The most curious reason the Review gives for its preference is that a board will provide more scrutiny of the regulator’s decisions, which amounts to a suggestion that the new more powerful authority will scrutinise itself.

The Review acknowledges that ‘a high level of independence from ministerial direction, together with strong regulatory powers, increases the importance of independent oversight and scrutiny’, but continues ‘a board comprising independent (that is, non-executive) directors can provide this kind of oversight and scrutiny’ (CRC 2012: 118).

Whereas the Finkelstein Inquiry provides a chapter (Chapter 10) on theories of regulation and refers to a number of sources, in its discussion of regulatory structures the Review refers
almost exclusively to the Review of Corporate Governance of Statutory Authorities and Office Holders undertaken in 2003 for the Commonwealth Government by former Rio Tinto and Westpac chairman, John Uhrig AO. Uhrig's report concentrated on imposing greater consistency and improving the accountability of statutory agencies. In making this argument the Review refers in a footnote to a section of Uhrig's report that suggests 'increased independence also increases the need for governance, particularly when this independence is combined with power. In the absence of the objective oversight a board comprised of independent directors can provide ... Some statutory authorities require an alternative form of independent oversight and scrutiny.' (Uhrig 2003: 36)

In the existing structure of ACMA and the ACCC, the chairman is also the chief executive officer, and has the necessary powers for financial and personnel management under the Financial Management and Accountability Act 1997 and the Public Service Act 1999. The Review recommends that the chief executive of the regulator should instead be appointed by its board. Together with this recommendation, its idea that the board would provide scrutiny suggests that it envisaged a full-time professional staff making regulatory decisions under the scrutiny of a part-time board. However elsewhere, such as in its discussion (25) of the administration of a public interest test for proposed mergers or acquisitions, the Review describes the board of the regulator as its decision-making authority. To answer Uhrig's concerns, and the increased need for accountability that must accompany an increase in power and discretion, it is the board's decisions that will require independent oversight. The board envisaged by the Review cannot provide any useful additional scrutiny since it, itself, is the regulatory authority that needs to be scrutinised.

Although the Review describes (120) a variety of accountability measures to which its new regulator will be subject, it is with only one exception identical to a list of existing measures to which the ACMA is already subject. The only addition is the suggestion of oversight by a special purpose parliamentary committee.

Where the Inquiry's interest in independence was driven at least partly by a concern that an inadequately independent regulator lacked legitimacy because it was seen to favour the interests of publishers, the Review's concern is not that the ACMA has been insufficiently independent, but that the Government and the Parliament cannot be trusted. The Review shares what it describes as 'community cynicism about the relationships between politicians and influential news media enterprises' and suggests that previous media legislation has given effect to 'specific outcomes negotiated by government with industry' and 'to private agreements between government and significant media interests'. The Review's concern is with the legitimacy of decisions by the Government and the Parliament.

The only remedy it considers is to find someone better to trust. Without a more thorough examination of the variety of factors affecting whether rules and decisions are 'felt to be legitimate and entitled to compliance' (Jones 1989) the Review emphasizes the significance of independence, of the regulator 'being and being seen to be independent of political control'. Unfortunately, it provides no evidence such as the quality of their regulatory decisions, or their standing and reputation, to suggest that the ACMA or other regulators with the same structure have been inadequately independent. The company board model it suggests for the new regulator has not been shown to provide any more independence than the ACMA's existing structure. Whether or not the Review has made a case for delegating more power from Parliament and the executive, it has not demonstrated the need for a new regulatory institution.

LEGITIMACY AND INDEPENDENCE

Despite the considerable attention both the Inquiry and the Review give to it, independence in a regulator is desirable as a means rather than as an object in itself. The Review hopes variouly that an independent regulator will prove more objective, less influenced by significant media interests, braver, more transparent, more consultative and open.
The Review appears not to have considered the well-documented recent history of the political character and foundations of the regulatory state (e.g. Braithwaite 2009; Jordana and Levi-Faur 2004), the proliferation of independent regulatory authorities and the associated issues of legitimacy (Gilardi 2005) or evidence on their performance and debates on the measurement of regulatory quality (Maggetti 2010).

Some independent regulators have clearly been successful. However, the Review's uncritical confidence that an independent regulator will provide better results ignores decades of cautionary analysis about the undesirable incentives that may be created simultaneously with any new regulator, from the idea of regulatory capture (Stigler 1971) to the observation (Keyworth and Yarrow 2007) that the supply of regulation creates its own demand.

The objective of regulation is to influence behaviour, and there is evidence (Black 2008: 148–9) that suggests legitimacy is a factor in its capacity to do so. Legitimacy might have been a more productive focus for the Review than independence when it considered the design and operation of regulatory authorities. The legitimacy of Parliament and executive government derives from its representativeness and a line of accountability back to an electoral process. The more separate a regulator is from that sequence the more it depends on a perception of its legitimacy from other factors including the quality of its decisions and the rigour of its accountability (Maggetti 2010).

Greater attention to legitimacy by the Review might have led to a consideration of other factors that contribute to the quality of decisions by successful independent regulators. One factor of particular importance is that legitimacy is easier to maintain for regulators that have a single purpose defined with focus and clarity. George Yarrow, director of the Regulatory Policy Institute expanded on this in submission to an inquiry by the UK Parliament's House of Lords (Yarrow 2007):

Independent regulation works best when duties/objectives are limited and precise. For example, focused objectives:

- tend to be associated with greater legitimacy of the regulatory process–whereas, in contrast, broadly defined duties imply the delegation of choices about trade-offs among ends (not just means) which are more appropriately determined by legislatures;
- make it easier to monitor regulatory performance and hold regulators to account;
- facilitate better management of regulatory agencies – a very important point given that largish executive agencies can be exceptionally difficult to manage well; and
- tend to provide greater stability in objectives, leading to greater consistency in decision making – which is important for regulatory certainty and investment.

Delegating a wider array of powers and responsibilities to a regulator increases the likelihood that it will damage its legitimacy in attempting to reconcile ambiguous and conflicting goals and to respond to pressures similar to those that inform political decisions.

The debates and decisions on food advertising and on local news content, inter alia, demonstrate that even without expanded powers, the ACMA and its predecessor have not been immune. The Review does not identify the legislative decisions it regards as having been compromised by private agreements between government and significant media interests but its own recommendation (CRC 2012: 88) on the potential use of the 'sixth channel' tastes disconcertingly like the regulatory confection of datacasting that arguably epitomised the kind of accommodation of commercial interest it condemns.

CONCLUSION

The Review’s proposed new regulator is the wrong solution to the wrong problem.

One of the key objectives of the Review was to limit the creation of excessively detailed regulation of the sort that ‘made spaghetti of the Broadcasting Services Act’ (CRC 2012: 14).
A better approach would have been more steadfastly to apply its principle (1) that 'where regulation is required, it should be the minimum necessary to achieve a clear public purpose'; to have recommended limiting regulation to a small number of well-defined goals, subjecting any new rules to a thorough risk-benefit analysis, and using sunset clauses to discourage their proliferation.

REFERENCES


THE CONVERGENCE REVIEW AND MEDIA POLICY – THE MISSED OPPORTUNITIES

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The Convergence Review report is in some respects a step in the right direction, but there are some missed opportunities, particularly with respect to kinds of online content and content platforms that would be subject to regulation. In this article I consider what the overall policy goals for the media and communications sector should be - and what role the online world is playing in reaching those goals – before setting out what I think is missing from the Convergence Review’s analysis of what regulation is needed and why when it comes to online content.

INTRODUCTION

Getting policy for media and content right is of fundamental importance for a flourishing society and economy.

The Government has identified the digital economy as being ‘essential to Australia’s productivity, global competitiveness and improved social well-being’, and has set itself the goal of becoming one of the world’s leading digital economies by 2020. As outlined by the Government in the Connecting with Confidence: Optimising Australia’s Digital Future discussion paper, this:

... is an optimistic vision which views digital technologies driving productivity, innovation and integration across our economy: empowering citizens; increasing the reach of critical services and reducing their costs; and connecting Australians to one another and to the world.

A key part of a successful digital economy is ensuring that Australia’s online media, communications and creative sectors are thriving. The Convergence Review represented a crucial opportunity to develop a policy framework capable of promoting a diverse, innovative, and efficient communications and media sector for Australia.

While the Convergence Review report is in some respects a step in the right direction, there are some missed opportunities. I’d like to focus on some of the questions I think are raised by the Convergence Review report, particularly with respect to kinds of online content and content platforms that would be subject to regulation. I’ll then set out what I think is missing from the Convergence Review’s analysis of what regulation is needed and why when it comes to online content. But I want to start by standing back to consider what the overall policy goals for the media and communications sector should be and to consider what role the online world is playing in reaching those goals.

I hope that this article can contribute to the ongoing conversation that we need to have about how to ensure that Australia takes full advantage of the opportunities that the Internet offers for creative industries and the digital economy.
POLICY GOALS FOR THE COMMUNICATION AND MEDIA SECTORS

Long-standing government policy in this area, re-articulated by the Convergence Review, aims for a media sector with diverse voices, lots of high-quality Australian material, and community standards for content. The key questions to ask in framing good policy are whether we are moving in the right direction and what role government needs to play.

Today, the most enduring “in-principle” justification for government regulation of TV broadcast content - the so-called “scarcity rationale” - has less and less relevance. This rationale was based on the fact that radio-frequency spectrum was a scarce public resource, not available to all, which, for that reason needed to be allocated by government in order to maximise public benefit. Government regulation of broadcast TV content was held to be justified on the basis that broadcasters could be expected to give a “quid pro quo” in return for having access to this scarce resource. It is worth noting that online content services do not avail of any such access to spectrum resources.

The scarcity rationale could also be said to have applied more broadly to the media sector where entry costs were typically very high. For example the cost of building and operating a cable TV network was significant.

The scarcity rationale has little if any continuing relevance in an era where more efficient uses of spectrum have resulted in relatively less “scarcity” and where, more generally, barriers to entry in the content and media sectors are much reduced.

More fundamentally, the Internet is not a scarce resource. On the contrary, anyone can launch a content service, or make content available to a global public, subject only to complying with the general law.

Talented young film makers, bloggers and musicians are making a living out of their creative content in ways they could not have imagined prior to the rise of social media and video-sharing sites.

Kate Crawford and Catharine Lumby (Crawford and Lumby 2011) have highlighted the way in which these developments have given rise to what they describe as a “new media ecology”.

In that new landscape users play an increasingly central role. According to Crawford and Lumby:

*Through their participation, [users] create normative language and behaviours, thus determining what will become the acceptable uses of an online space. Everything, from bonding and discussion, to fights, criticising and ‘trolling’, to creating content, downloading, and simply ‘listening’ to other users, create a current of activity that eventually shapes online engagement for other participants.*

Content creation is no longer the sole preserve of a ‘media sector’. Professionally produced content from traditional sources competes with user generated content shared via social networking, blogging and micro-blogging sites. Content consumption and engagement is no longer a one way street. Consumers are interactively engaged, responding to content, and generating new content to be shared with others.

This engagement is happening both inside and outside of mainstream media sites. The Internet has enabled the development of a wider range of both professionally produced content and user generated content that has never before been seen in the Australian media sector. Broadcast media outlets are offering innovative new products such as ‘catch up TV’ offerings (for example the ABC’s iView) which are changing the ways consumers access professionally-produced content. Australian media consumers are also benefiting from broadcasters merging aspects of Web 2.0 social networking features with traditional broadcasting content, such as ninemsn’s A Current Affair website and the ABC Local initiative, allowing user interactivity and response to program content. The National Broadband Network will provide the opportunity for an even greater diversity of voices including from remote regional areas.
Indeed our very conception of what is “content” needs to be re-considered. Australian successes like Halfbrick Studios (the creators of the wildly successful Fruit Ninja game app) are opening new frontiers in the world of content, bringing imagination and flair to the creation of new forms of digital media.

So, what do Australians think of all this new content? The authors of the recently-published report *Culture Boom: How Digital Media Are Invigorating Australia* (the Culture Boom Report) (Belza et al. 2012), commissioned by Google, surveyed more than 1000 Internet users of all ages across the country. They found that people are consuming more content, offline and online, than 3 years ago, believe online content is getting better, and generally prefer the choice and quality of the content they can access today. They also found that Australians value the content they can access online to the tune of $24 billion a year, in the form of a consumer surplus, or the value that consumers put on online content over and above what they already pay for it.

We are moving from the era of scarcity to one of diversity and plurality.

The Internet is also providing massive global opportunities for new and long-established Australian creative voices.

The success of the Sydney Opera House online is one such example. With the online audience this year expected to reach three times that of the physical audience, the Internet has truly become the ‘eighth stage’ of the SOH.

A very different but equally successful story, highlighted by the Culture Boom Report, is that of Perth native Nick Bertke (alias Pogo):

> In becoming the first video jockey to conclude a long-term movie-remixing deal with a major studio, Nick Bertke, alias Pogo, is continuing a spectacular trajectory made possible by Internet media. The Perth-based 23-year-old has not only worked with Disney, Pixar, Microsoft, Showtime, and even the United Nations but also won serious artistic recognition. His video “Gardyn” was among the exhibits in the YouTube Play show at the Guggenheim Museum in New York, sharing space with artistic icons such as Picasso and Chagall.

Bertke records sounds from his favourite games and movies, piecing them together like a jigsaw puzzle to create nostalgic, infectious, and original music. It has been a massive hit online, attracting 50 million YouTube views for his remixes of movies such as Alice in Wonderland.

> Although all of his work is free on YouTube and his own website, Bertke has monetised his output by selling the tracks for download using the pay-as-you-like schemes popularised by Radiohead in 2007. He has also turned to his audience using the crowd-funding platform Kickstarter to finance his new project, world remix, which he describes as “to travel the world capturing sights, sounds, voices, and chords, and use them to compose and shoot a track and video for each major culture of the world”. Offering contributors downloads from the new project after it is completed, Bertke was quickly oversubscribed, raising $25,000 when he initially needed only $15,000 (Belza et al. 2012: 23).

When it comes to the creation and availability of good Australian content, the survey in the Culture Boom Report finds that Australians believe that local content is as good as international content, and that the Internet makes it easier to promote Australian content overseas. Indeed, the report also found that on the Internet (where there are no content quotas) local Australian content is competing with foreign content and winning, with online video already generating a trade surplus (Belza et al. 2012: 15).

Online content platforms play a crucial role in facilitating the creation and consumption of this content. The significant value that consumers assign to these online platforms was recognised in the Culture Boom Report. As the report notes:

> Creators and producers can use these platforms to easily reach local and global audiences and benefit from the consequent revenue streams. Where platforms are
open, this capability comes at no cost to the creator, which dramatically lowers the barriers to entry for budding content producers to pursue new creative and commercial opportunities.

CONVERGENCE REVIEW FINAL REPORT

With this backdrop of change, the Convergence Review was faced with a monumentally large task: to examine the effectiveness of media and communications regulation in a rapidly changing environment and make recommendations for a new regulatory landscape that was appropriate in an age of media convergence.

There is much to support in the final report. For example, the recommended dismantling of unnecessary and out-dated regulation should be welcomed. But I’d like to suggest some relevant questions to ponder while we consider whether the Convergence Review recommendations ought to be welcomed. If implemented in their current form, would the recommendations encourage local creators and content businesses to innovate in the digital space? Would they encourage international companies to make technology investments in Australia? Would they establish a regulatory environment that could enable the next global Internet success story to emerge from Australia? I’m not sure that we can answer these questions in the affirmative.

While the report is a very significant contribution to the policy debate in this country, in many ways it raises more questions than it answers, particularly with respect to the regulation of online content. There remains much work to be done before we can say, with any confidence, that we have a clear blueprint for a policy framework capable of promoting a diverse, innovative, efficient and effective communications and media market.

There is a risk that the regulation recommended in the Convergence Review report will have the opposite effect of what is intended. The more successful a platform becomes at facilitating the creation and consumption of Australian content, the closer it will edge towards being subject to regulation in Australia. The Convergence Review report acknowledges this when it says that while the Australian content obligations would apply initially to a very small group of broadcast services, it would be realistic to expect that non-broadcast services would come within regulatory scope as they continued to expand in line with shifts in consumer preferences (Belza et al. 2012: 67). That is hardly an incentive to succeed.

WOULD THE PROPOSED REGIME LEAD TO REGULATION OF A MUCH BROADER RANGE OF CONTENT THAN WAS INTENDED?

The Convergence Committee has gone to great lengths to stress that content from social media, including bloggers and user generated content, should be free from new regulation. Their Final Report suggests that regulation would be confined to ‘professional media content’, and to those entities that have ‘control’ over the professional content supplied (Convergence Review: 2). This is an important principle, and the Convergence Review should be congratulated adopting it as a touchstone for regulation. But, as we will see below, it’s not clear that the report achieves its stated objectives of not regulating user generated content, nor entities that have no control over the content supplied.

The lines between ‘professional content’ and ‘user generated content’ are increasingly blurred. The Convergence Review suggests that user generated content is typically ‘short-form amateur video published on social media sites...’ and that professional content is typically produced by ‘traditional media organisations ... for broad audiences’ (Convergence Review: 11). It may be that the Convergence Review has in mind Internet TV and video-on-demand services when it uses the term ‘professional’, but as more made-for-internet content is created, distinctions between professional and user generated content are likely to become contested. As highlighted earlier in this article, the model of a professional media sector delivering content to passive consumers has been replaced by a model in which the lines between creation and consumption of content have been blurred.
In this new media content ecology, would a video blogger who serves ads on her blog be considered to be uploading user generated content or professional content? Would a comedian who earns a living from his craft be considered professional when he uploads content from his stage show onto a video-sharing site? Would content in a user discussion forum in an online newspaper be treated as professional, or user generated?

While the report attempts to draw a clear line between professional and user generated content, the reality is that doing so will be increasingly difficult. In seeking to determine where the lines will be drawn, we need to take great care to ensure that any new regime does not lead to the regulation of a much broader range of content and creators than was intended.

**WHO EXERCISES CONTROL?**

A more useful and relevant distinction when determining which media entities should be subject to regulation of content is to focus on who has ‘control’ over content. To some extent, the Convergence Review does this when it suggests that online platforms will not be subject to regulation over content over which they do not have control. Again however, there are real questions about how the Convergence Review recommendations would operate in practice.

It would appear from its report that the Convergence Review has in mind a definition of control that could result in content platforms - such as those that provide infrastructure but do not create or curate content - having regulatory obligations with respect to content that they exercised no editorial control over. The report suggests that platforms such as YouTube that have a ‘financial interest’ in offering content, for example through a revenue-share advertising arrangement, will be taken to have control over the content, even if they are not in a position to exercise editorial control (Convergence Review:11).

Such an approach would run counter to what’s happening in other jurisdictions, where regulators have acknowledged that platforms such as video-sharing sites, that provide the infrastructure for others to upload content online, are in a very different position to content services that exercise editorial content over content that they make available, such as broadcasters. This distinction is central to European regulation of audio-visual services. Under the EU Audio-Visual Media Services (AVMS) Directive only services that are ‘television-like’ and ‘under the editorial responsibility of a media service provider’ are subject to content regulation. Editorial responsibility requires ‘effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audio-visual media services’. Content platforms such as video sharing sites that do not have editorial responsibility are outside the scope of the AVMS directive. These sites are, of course, subject to general law obligations to remove illegal content upon receiving notification from users or law enforcement authorities.

In a speech to the Oxford Media Convention in January 2012, Ed Richards, CEO of the UK media and communications regulator Ofcom, highlighted the difference between broadcast communications and content delivered over the Internet, and the significance of those differences from a regulator’s perspective. In thinking about how to regulate a converged media landscape, he said:

*First, we should avoid tinkering with the established regulation around broadcast TV. It is respected and trusted by the public, and understood by practitioners.*

*Second, as I have mentioned, we should strive to preserve the spirit of the open Internet. This is desirable in and of itself. In light of the hundreds of thousands of services emanating from places well beyond the UK or even EU jurisdiction, it is also recognition of what is practical. That isn’t to say that people should be left unsupported to navigate this world.*

*My third area is the task for government, regulators and industry to provide clear information, education and a framework of personal responsibility through which individuals and families can exercise informed choice.*
In between the twin poles of linear TV and the open Internet, it becomes quite interesting – and this seems to me to be the fourth area. When something looks, feels and acts like TV, but is delivered over the Internet and into people’s living rooms, we need something that meets audiences’ expectations and provides the right degree of reassurance.

It is here that such services intersect with the views and concerns expressed by the participants in our research and where greater assurance than currently on offer may need to be considered.

It seems undesirable for these services to be subject to full broadcasting style regulation – by and large they belong to a different form of service and come from a very different context. But we do need to consider whether to develop the approach in relation to existing co-regulation for video on demand to offer greater assurance and to ensure there is public trust in the approach to regulation as these services become more and more pervasive and significant.

In other words, according to Ofcom, media regulators should have regard to the importance of an open Internet and the fact that services delivered over the Internet are very different to traditional broadcast services, and should not be subject to full broadcast-style regulation.

WHAT’S MISSING FROM THE CONVERGENCE REVIEW’S ANALYSIS OF WHAT REGULATION IS NEEDED ONLINE?

The Convergence Review concluded that the Australian public continues to expect large professional media organisations to meet appropriate content standards and provide an adequate level of Australian content (Convergence Review: 5). This conclusion led it to recommend that Content Service Enterprises (CSEs) – defined as entities that meet certain thresholds for Australian users and revenue from supplying content to Australian users, and who have control over the content supplied – should be subject to content standard obligations and required to provide support for the Australian content industries.

As I’ve already noted, the Convergence Review’s definition of control is not limited to editorial control, but would include having a financial interest, for example through revenue sharing advertising arrangements, in the content supplied.

The Final Report concludes that content standards will not be met, and Australian content will not flourish, unless online content platforms are subject to the same regulatory regime as traditional broadcasters. What’s largely missing from that analysis is the vast amount of evidence that suggests that these two important policy objectives are already being met online, without the need for any further government regulation. Also missing is a consideration of the potential economic consequences of extending broadcast-style content obligations to the Internet. Each of these areas requires much more detailed consideration before the Government moves forward with plans for a new regulatory framework for a converged media.

CONTENT STANDARDS

With respect to content standards online, the Convergence Review Final Report refers to a 2008 recommendation by a UK Parliamentary Committee to the effect that ‘proactive review of content should be standard practice for sites hosting user generated content’ (Convergence Review: 42). It is really not clear how this UK recommendation – which the Convergence Review sets out with apparent approval – sits with the Convergence Review’s recommendation to exclude user generated content from its proposed regime.

And in any event, the online world has changed dramatically since 2008. At the time that the UK Committee made its recommendations, 10 hours of video were being uploaded onto YouTube every minute. Today, an average of 72 hours of video is uploaded onto YouTube every minute. The volume of content hosted on online platforms fundamentally alters the way
that policy makers must think about regulatory frameworks for content. Shaping what was broadcast and when, how and by whom, was relatively simple in a world with a defined, limited number of television channels. The converged world makes this exponentially more difficult and in some cases, technically impossible or impracticable. Crawford and Lumby sum up this reality when they note that nations face challenges in enforcement due to the sheer volume of online user-generated content:

*The amount of material generated and viewed – some of it ephemeral – is clearly beyond the capacity of any national or international regulatory body to monitor and regulate in real-time. In practical terms, there are simply not enough people with hours in the day to monitor and flag the sheer volume of content created by users on a daily basis.* (Crawford and Lumby 2011).

It was also disappointing that the Convergence Review did not refer to the very many ways in which social networking sites and other online content platforms are already meeting the expectations of their users and the general public when it comes to setting and enforcing content standards. Indeed, the general openness of the online environment and the relative ease with which people can switch between the myriad of online offerings creates a very real necessity for providers of online platforms and services to focus directly on meeting and exceeding the needs of their users when it comes to content standards.

While these sites are not in a position to proactively preview content, due to the sheer volume of the content that they host, they are proactively engaged in ensuring that user and community expectations regarding content are met. This is occurring in many ways.

At the individual user level, online content platforms such as YouTube have developed tools that are used by those uploading content to apply a rating to the content. The YouTube Safety Mode tool works in conjunction with this rating system to enable individual users to block mature content that they or their children may find offensive. Users can exercise informed choices about the content that they or their children access.

At a user community level, online content platforms empower their users to flag and report content that breaches the site’s guidelines. One example is the YouTube flag system. If content is flagged by a user, YouTube is able to respond quickly and take action as appropriate. These tools are also used by user communities to set and enforce their own community norms. In the online world, standards have become more granular and varied according to the specific contexts and standards of online communities. As has been noted by Crawford and Lumby, ‘social mores and community perceptions differ markedly across cities, rural and regional areas and ethnic and religious groups’. As the Internet becomes populated by more and more diverse communities of interest, traditional rationales for government regulation of content that is legal, but likely to be offensive to some, have less widespread relevance. Online communities of interest can and are setting and enforcing their own community standards.

At an even broader level, online content platforms are actively engaged in education: ensuring that users - including parents and children - acquire the digital literacy skills that enable them to navigate the Internet safely. At Google, we have the Google Family Safety Centre, which contains tips from parents, and advice from Google partners such as the ACMA and the Federal Police, as well as information about Google safety tools. Another education initiative is the Cybersafety Help Button. This is a joint initiative between industry and government arising out of the Consultative Working Group, which advises the government on cybersafety issues. The Help Button provides easy online access to cybersafety information and assistance available in Australia. It offers counselling, reporting and educational resources to assist young people deal with online risks including cyberbullying, unwanted contact, scams and fraud, and offensive or inappropriate material.

Of course, government also has a vital role to play in ensuring that content standards are met, but the nature of that role must take into account the technical and jurisdictional realities of the global Internet environment. Governments have an important role to play in many areas, including working with industry and local and international law enforcement bodies to
promote a safe environment online, and ensuring that illegal content is dealt with appropriately by the criminal law. Another important role for government is working with industry – in the ways that I have described above – to promote user agency and literacy,

An approach that harnesses the resources of government, users and industry is best placed to ensure that community expectations are met, and that children and young people are protected from unsuitable content. Ultimately however, industry self-regulation is the only practical means of addressing most concerns regarding online content. A self-regulated industry is best placed to respond rapidly to technological change, tailoring content reporting and rating tools as new services and platforms emerge. It would have been great to see the Convergence Report focusing more on the very many ways that this is already occurring.

**MEDIA REGULATION AND THE DIGITAL ECONOMY**

Finally, it was surprising to see that the Convergence Review report did not address in any detailed way the potential economic implications of its recommendations with respect to online content. The regulatory framework for a converged media environment has the capacity to make Australia a more (or less) attractive place for investment and innovation. It is a necessary part of any business case analysis for a company contemplating establishing services in Australia (whether as a start up deciding whether to commence operations or an established company deciding whether to expand operations) to evaluate the regulatory framework. An unworkable or overly burdensome regulatory regime would potentially make a country a less attractive place to set up business. Digital industries are transforming the economy, opening new opportunities and helping to create new jobs, and it is imperative that any regulatory changes support rather than hinder this development.

A recent study on the impact of the Internet on the Australian economy, *The Connected Continent: How the Internet is Transforming the Australian Economy* (*Deloitte Access Economics 2011*), commissioned by Google, estimated that the direct contribution of the Internet to the Australian economy was worth approximately $50 billion or 3.6 per cent of GDP in 2010. That is expected to increase by at least $20 billion over the next five years to $70 billion, although the Connected Continent Report suggests that this estimate may well turn out to be on the low side in light of the fact that it is currently impossible to predict the myriad applications that will be made possible by broadband connections. This growth rate will only increase as the rollout of the NBN progresses. Use of social media is also growing exponentially. In their annual *Technology, Media & Telecommunications Predictions*, Deloitte Touche Tohmatsu (2011) suggested that in 2011 social networks will shortly pass the milestone of 1 billion unique members globally. Increasingly, social media is being embraced by the business sector as an essential means of connecting with customers.

I am concerned that the regulatory framework set out in the Convergence Review may, if adopted, lead to regulation of a much broader range of content than intended. For the reasons I have discussed, this has important economic implications for Australia. Again, it would have been great to see the Convergence Review address this.

**CONCLUSION**

The process that has been begun with the release of the Convergence Review report is of fundamental importance to the Government’s digital economy goals. The policy framework that is eventually adopted will impact greatly on whether or not the Government achieves its goal of ensuring that Australia is a competitive and attractive place to establish an Internet content business.

Are we there yet? No, I think there is much more work to be done in developing a regulatory blueprint capable of achieving these goals. But the conversation has begun.
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