Convergence Review: An Ambitious Agenda for Overdue Reforms

Kate Jordan and Toby Ryston-Pratt take a look at the Convergence Review Committee's Interim Report, its implications for the media and communications industry and make some observations about the current recommendations, including proposed changes to media ownership laws.

'Convergence' continues to be the buzz word in the media and communications industry in particular following the release of the Convergence Review Committee's Interim Report in December 2011.[1] While the Interim Report provides some insight into the likely tone and content of the Final Report due in March 2012, key details are still lacking and it is too early to say what impact the Convergence Review will have on the shape of Australia's media and communications market.

Background

The Convergence Review was established by Senator Conroy in December 2010 to examine the policy and regulatory frameworks governing the converged media and communications sectors in Australia. The objectives of the review are noble. The regulatory framework that applies to the Australian media and communications market is badly outdated. Overly complex legislation is in need of substantial simplification and consolidation.

The key question coming out of the Interim Report is whether the Government will be able to implement any of the ambitious agenda outlined in the Interim Report prior to the next Federal election. With the National Broadband Network the number one communications issue on the policy agenda (and likely to remain so given its prominence in the political debate), it seems unlikely that we will see significant legislative change any time soon.

In practice, this means media and communications companies are likely to have to continue to work within the existing regulatory framework for some time to come. Rapid technological change will only place increasing pressure on the regulatory boundaries.

The strain placed on the regulatory regime by converging technologies is clearly highlighted by issues arising in the delivery of sports content. The recent TV Now case between Optus and the NRL (see the previous article in this edition for more details) effectively allows mobile carriers to stream television content on their mobile devices without a grant of rights. Other examples exist that have not had the same publicity. Sony's PSP has permitted similar functionality to the Optus TV Now service for some time. This summer with the Cricket Live iPad application installed on your iPad you can watch subscription cricket content directly on your Apple TV without the need for a Foxtel subscription.

These examples defy the historical industry structures that have been replicated in regulation and contracts and raise questions such as: Is this content being delivered by television, mobile or internet? When content can be so simply shifted from one device to another, how can it be regulated?

These issues demonstrate the ambitious task ahead of the Convergence Review Committee and ultimately the Government. It is clear that our existing regulations will continue to struggle to keep pace with technological change and will become increasingly irrelevant. However, a comprehensive revision of the laws like the one contemplated by the Interim Report would require considerable time and care.

The Interim Report is set to be followed by a final report in March 2012 that will also take into account the reports of the Independent Media Inquiry and Australian Law Reform Commission's review of the National Classification Scheme. What the Federal Government does with those reviews remains to be seen.

The Opposition's response to the report will also be significant given the minority Government and in light of a likely 2013 election.

The regulatory framework that applies to the Australian media and communications market is badly outdated.

If the current Government is serious about making any significant changes arising out of the Convergence Review, it may be better placed confining its focus to more manageable elements such as the repeal of the clearly outdated statutory limitations on media ownership and control. It could then defer the more aspirational task of rewriting Australia's media and communications legislation until the National Broadband Network is a reality. These outdated statutory limitations are the statutory control rules and the 2 out 3 rule (which is one of the media diversity rules). A first phase could be to abolish these rules, but retain the current minimum number of voices rules. A subsequent phase or phases could look to implement some of the more ambitious and controversial aspects of the proposed reforms. Such an approach would be consistent with the Interim Report which contemplates the possibility of a gradual implementation of changes between now and 2015.

Given the operation of section 50 of the *Competition and Consumer Act 2010* (Cth) – which prohibits acquisitions which would have the effect of or likely to have the effect of substantially lessening competition in the relevant market – we would expect that the removal of the statutory control rules would be uncontroversial. The removal of the 2 out of 3 rule may be more controversial, but the simple fact is that this rule is completely out of date and diversity can be protected through the retention of the voices rules in their current form until the implementation of later phases of reform.

Media ownership and control changes

The Interim Report recommends significant amendment of the current statutory control rules and media diversity rules.

In summary the Interim Report recommendations in this area are:

1. a new number of voices rule to replace the current voices rules being that there must be no less than:
   - 5 independent media groups in metropolitan radio licence areas; and
   - 4 independent media groups in regional radio licence areas.[2]

1 See here: http://www.dbcde.gov.au/__data/assets/pdf_file/0007/143836/Convergence-Review-Interim-Report-web.pdf

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The new rule would apply to changes in control involving the new and as yet undefined concept of 'Content Service Enterprises'.[3]

The Interim Report notes that a Content Service Enterprise would be determined by threshold criteria relating to the scale and nature of operations, and states that those criteria might include:

- the viewer/user/subscriber base meeting a threshold;
- the service originating in Australia or being intended for Australians;
- the provider having the ability to exercise control over the content; and
- the operating revenue or commercial scale of the enterprise meeting a threshold.4

What is proposed as the final criteria (including actual measurements) and what discretion the regulator will have remains to be seen, but will no doubt be contentious particularly if the thresholds are set low.

2. removal of the following statutory control rules:[5]
   - the 75% audience reach rule – a person must not be able to exercise control of commercial television licences where the combined licence area populations exceed 75% of the population of Australia;[6]
   - the '2 to a market rule' – a person must not be able to exercise control of more than two commercial radio broadcasting licences in the same radio licence area;[7] and
   - the '1 to a market rule' – a person must not be able to exercise control of more than one commercial television licence in the same licence area.[8]
3. replacing the media diversity rule known as the '2 out of 3 rule' (where a person must not be in a position to exercise control of any more than 2 out of 3 of a commercial radio broadcasting licence, a commercial television licence and an associated newspaper in a radio licence area)[9] with a public interest test that examines influence at a national level.

The Interim Report contains very little detail about the proposed public interest test, other than that to note that such a test has been adopted in other jurisdictions including the United Kingdom[10] 'as a flexible way to assess the influence of different media in a converged environment' and to state that a public interest test 'would allow the regulator to better assess market concentration and diversity issues for mergers involving Content Service Enterprises that are significant at a national level'.[11]

Beyond these statements, how this public interest test will work, and how it will sit with competition assessment, has not been articulated. Whilst a public interest test may give greater flexibility to a regulator it will also result in decreased certainty for the media sector. This is demonstrated by the Sky / ITV case in the United Kingdom in which the Court of Appeal was critical of the fact the UK public interest provisions were open to conflicting interpretations and indicated that aspects of the legislation may need to be amended.[12]

Other recommendations for change

Set out on page 9 is a high level overview of some of the other recommendations made in the Interim Report and some corresponding observations.

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2 Sections 61AG and 61AH of the *Broadcasting Services Act 1992* (Cth) (the ***BSA***).

3 The Convergence Review Interim Report recommends that Content Service Enterprises also be subject to content standards and Australian content obligations.

4 The Convergence Review Interim Report, page 5.

5 The statutory control rules also apply to directorships. For example a person is prohibited from being a director of a company or companies that would be in a position to exercise control beyond the 75% audience reach.

6 Sections 53 and 55(1) and (2) of the BSA.

7 Sections 54 and 56 of the BSA.

8 Sections 53 and 55(3) and (4) of the BSA.

9 Sections 61AMA and 61AMB of the BSA.

10 The UK rules apply to a 'relevant merger situation' and a 'special merger situation' (See *Enterprise Act 2002* (UK) (the ***Enterprise Act***), ss 23, 42 and 59).

A relevant merger situation focuses on turnover and market share. It exists where two or more enterprises 'cease to be distinct' and where either the value of the turnover of the enterprise exceeds £70 million or the merger would result in the creation or enhancement of at least a 25% share of the supply of goods or services of any description in the UK or a part of the UK (see s 23 of the Enterprise Act).

A special merger situation in the media context exists where:

- at least one-quarter of all the newspapers which were supplied in the UK, or in a substantial part of the UK, were supplied by the person or persons by whom one of the enterprises (merger parties) concerned was carried on; or
- at least one-quarter of all broadcasting of that description provided in the UK, or in a substantial part of the UK, was provided by the person or persons by whom one of the enterprises concerned was carried on (see s 59 of the Enterprise Act).

The public interest criteria differ depending on the class of merger situation and whether the enterprises in question are newspaper or broadcasting related, but include considerations such as:

- the need for accurate presentation of news and free expression of opinion in newspapers;
- the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or part of the UK;
- the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience; and
- the need for availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests.

11 The Convergence Review Interim Report, page 9.

12 *British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907 at [123]. The Convergence Review Discussion Paper on Media Diversity, Competition and Market Structure also discussed this case: see http://www.dbcde.gov.au/__data/assets/pdf_file/0004/139270/Paper-2_Media-diversity_competition_access.pdf, page 18.

Recommendation	Detail	Observations
Establish a new, independent regulator	New regulator for content and communications to have: • broad rule making powers within government policy frameworks; • flexibility in application of regulations; and • powers to encourage media diversity and to deal with content-related competition issues, distinguished from and exercised in coordination with the general powers of the ACCC.	The interplay between the new regulator and the ACMA, or whether the new regulator is a re-formulation of the ACMA is not clear. Details of how the new regulator's and the ACCC's functions will be split to be elaborated.
Remove content licences	Remove the precondition that content providers on some delivery platforms hold a licence in order to provide content. Specific communications content regulation will still be required to promote public interest outcomes, applied on a technology-neutral basis.	Reforms the outdated approach to regulation based on traditional media platforms (radio, television and newspaper). Details of the public interest regulation to be elaborated.
Develop a common and consistent approach to the allocation and management of broadcasting and non-broadcasting spectrum	Provide spectrum planning mechanisms that explicitly take into account public interest factors, and social and cultural objectives currently reflected in the BSA. Provide a market based pricing approach for the use of spectrum and greater transparency where spectrum is used for public policy reasons. Provide greater certainty for spectrum licence holders around licence renewal processes.	Details of the new market based approach to be elaborated beyond the replacement of the current broadcasting licence fee with charges that better reflect the value of the spectrum.
Promote Australian content	All Content Service Enterprises to meet Australian content requirements by either: • committing a % of total program expenditure to Australian content; or • contributing to a converged content production fund. Retain the 55% transmission quota for commercial free-to-air broadcasters for a transitional period and increase Australian content sub-quotas, with flexible application. Provide certain direct and indirect subsidies for premium television content produced in the independent sector and interactive content such as games and applications.	Australian content requirements will apply to a broader range of content providers.
Promote local and community content	Continue to apply minimum content requirements to free-to-air broadcasters with a more flexible compliance and reporting regime. Remove the trigger event rules currently in place for radio. Encourage content providers to explore new ways to deliver local content including on new delivery platforms. Continue to make spectrum available to community radio and provide digital channel capacity to existing community television services	The Interim Report flags that in the longer term other incentives may need to be developed to encourage local content distribution as more content is delivered outside spectrum based services.
Reforms to Public Broadcasting	Update the ABC and SBS Charters to expressly refer to the range of existing services undertaken including online activities. Apply Australian content requirements to the public broadcasters. Provide digital television channel capacity to the National Indigenous Television Service.	The Interim Report flags that in the longer term other incentives may need to be developed to encourage local content distribution as more content is delivered outside spectrum based services.
Content Standards	Any new regulatory framework for content standards should reflect the individual rights of adult Australians to read, hear, see and produce content of their choosing within the law, with appropriate protections against offensive content. Content standards should reflect the importance of fairness, accuracy and ethical behaviour in news, opinion and current affairs.	The Interim Report acknowledges that other reviews are examining this topic and is therefore brief in its treatment of it.

Next steps

The Convergence Review Committee is scheduled to provide its final report to the Government in March 2012, after which time both the Government and the Opposition can be expected to respond, although the timing of any such response is unknown.

The final report will reflect findings of the Independent Media Inquiry and the Australian Law Reform Commission's review of the National Classification Scheme, both due to report to Government on 28 February 2012.

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