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Making Converged Regulation Possible

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

1. Why such a bad press?

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

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

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

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

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

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

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

2. Radicalism through scope: unified field theory

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

3. Radicalism through regulatory design

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Ibid, 150-151.

6 Ibid, 117-119.

7 Ibid, 6.

8 Ibid, 10.

9 Ibid, 11.

10 Ibid, 11.

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

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

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

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

5. Radicalism by encroachment: content-related competition issues

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

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

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

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

11 Ibid, 12.

12 Ibid, 11.

13 Ibid, 28.

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

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

6. Summary

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

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

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

14 Ibid 28-29.

15 Ibid, 30.

16 Ibid, 33.

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

enjoy and with significant overlap with existing ACCC functions and jurisdiction.

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

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