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MEDIA CONVERGENCE: Can anyone control the content?

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[date]
August 2010

In a keynote speech to the Australian Information Industry Association on 30 July 2010, the Minister for Communications, Stephen Conroy, confirmed that, if re-elected, the Federal Government would push ahead with its media convergence strategy seeking to overhaul the legislation that currently governs the media and communications sectors. Although any agreed changes won't be implemented until 2012, at the earliest, after an extensive period of consultation which is anticipated to take place during 2011.

The current regime

At present, the media and communications sectors are regulated under various pieces of legislation, predominantly the *Broadcasting Services Act* 1992 (the ***BSA***) for the broadcasting sector and the *Telecommunications Act* 1997 (the ***TA***) for the telecommunications sector. This legislation was enacted in an environment governed by what is increasingly referred to as *old media*: namely,

- traditional commercial free to air and subscription television services, and radio services under the BSA and
- fixed line and relatively simple mobile telephony services under the TA.

For decades, we had been consuming media in the same way: in printed newspapers, and printed books, in cinemas and on television. Technology constraints forced media consumption to be centralised in the hands of a few media companies; broadcasters and publishers dictated what you saw or read and the dissemination of movies, books, television programming and newspapers could be effectively regulated by government as a consequence.

However, the advent of the Internet forever altered the landscape of content dissemination and, critically, control. Without borders or respect for national laws, the Internet provided a plethora of content, both legal and illegal under Australian law, delivered immediately to homes unregulated and from all points of the globe.

Successive Federal Governments have responded by tinkering with the BSA, but the results have provided little, if any, impact on the regulation of content via the increasingly dominant 'new media'. With a ubiquitous, high speed national broadband network now firmly within the sights of the government, and broadcasters of *old media* increasingly expressing concerns about the inequity of regulation between traditional, linear broadcasting and delivery of content over the Internet and via mobile phones, there is a renewed interest in overhauling the current regulatory environment to provide a more effective regime that covers all forms of media in a more equitable manner.

Regulation Based on Degree of Influence: An Outdated Policy?

The policy objectives of the BSA are spelt out in Section 4 of the BSA, which states:

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

Recent studies have revealed the following interesting statistics on market penetration[i]:

- free to air television has a 99.7%;
- subscription television, 34%[ii];
- Internet, 81%[iii] ;
- mobile 3G, 56%[iv]; and
- commercial and national radio broadcasters, almost 100%.

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Yet, a review of the BSA shows that the inclusion of regulatory control over *internet services* is little more than an acknowledgement of its presence rather than any material attempt to control its content. The BSA, and the regulations and Codes implemented under the BSA, impose a disproportionate level of regulation on linear television broadcasters and radio broadcasters, in comparison to those who deliver content over the Internet or via mobile telephony services.

Given the current and growing penetration levels for the Internet, it would be hard to argue that it is *not* a significant factor in shaping community views in Australia. Indeed, with the rapid growth of social networking sites, blogs and interactive participation on news sites the Internet could be described as perhaps the most influential media source for shaping our views of the world. So consistent with the BSA policy objectives it would seem timely for a review of the regulatory control over new media.

This chart illustrates a high level summary of the current regulatory environment. It shows the regulatory control exercised for some key issues for television, internet and mobile providers under the BSA and associated legislation.

	Commercial FTA	STV	Internet	Mobile
Australian Content Obligations	55% of all content broadcast between 6am and midnight must be Australian[v]	Equivalent of 10% of programming budget for each 'drama' channel must be spent on Australian drama content	No obligations	No obligations
Advertising Limits	Limitations on amount of advertising per hour	Need to ensure that subscriptions remain predominant source of revenue	No limitations	No limitations
Classifications	Cannot screen any programming above "AV" (adult violent) and can only broadcast adult themed content in restricted time zones	Cannot screen any programming above "R" or, for channels of popular appeal, "MA"	No limitations, unless content is hosted in Australia, where content needs to be behind a restricted access system if "MA" or "R"	Cannot screen content above "MA" and need to ensure "MA" content is behind a restricted access system
Closed Captioning	All programmes broadcast in primetime must be captioned, and at least 70% of all content is to be captioned[vi]	At least 25% of programs to be captioned on a significant number of channels[vii] (currently over 40 channels and120,000 hours annually)[viii]	No obligations	No obligations

Background to the current regulatory position

Regulators and the commercial free to air and subscription television broadcasters have lobbied, negotiated, developed and grown the current regulatory position over several decades. It reflects two main factors:

- linear television services are only permitted by government approval; and
- the historical importance that linear television has played in the Australian media landscape.

The BSA not only regulates the commercial free to air and subscription television industries; it also establishes them. In particular, commercial free to air networks have been *gifted* valuable public spectrum (although licence fees do attach to their operations, recently reduced by some $250m by the Federal Government) to enable them to broadcast their signals. Also and critically, these networks have legislated protection against further competition - the BSA currently prohibits a fourth free to air network.

The importance of linear television to government policy is best illustrated in the anti-siphoning list. This list which requires certain events of cultural significance (all of which are presently sporting or related events) to be made available to free to air broadcasters for broadcast on their primary, or core, channel services before subscription broadcasters are entitled to bid, let alone, broadcast them. In return for the benefits gained from holding licences under the BSA, governments have imposed obligations on the linear television sector, primarily focused on increasing the presence of Australian based content and ensuring that adult focused content is restricted or prohibited.

In contrast, the Internet came into being, and grew exponentially, with little or no government control over its content. While the TA regulates the providers of internet services, or ISPs, there are no impositions on ISPs similar to those of television broadcasters; there are no Australian content requirements, no limits on the amount of advertising or requirements for content to be closed captioned for the hearing impaired. There is an obvious reason for this: ISPs

merely grant access to the Internet; in their identities as ISPs, they play no part in the content to be found on the Internet. That is, unlike broadcasters, they are not an appropriate target for government content obligations. The government's only answer to this dilemma to date has been to flag the introduction of a compulsory internet filter, which has caused significant (and predominantly negative) debate.

However, the lack of regulation of content available over the Internet, as well as on mobile telephony, is proving to be of great concern to traditional broadcasters. The regulation subjects their businesses to significant legal and financial constraints. Certainly there is a compelling case to be made for continued regulation of commercial free to air broadcasters, given their:

- use of public spectrum,
- protection from direct competition from other commercial free to air operators; and
- the benefits they enjoy from the anti-siphoning list.

That case is less sure with respect to subscription broadcasters, who face no restrictions on competition, are not gifted public spectrum and are faced with the prospect of being unable to bid for highly attractive sporting events. They rely on their commercial free to air competitors to sub-licence those sports on terms entirely within the free to air broadcasters' discretion.

Can a Level Playing Field Be Achieved Through Regulation?

One of the primary issues that will face government when it seeks to re-write broadcasting legislation in a media convergent environment is: can you have an agnostic regulatory environment when dealing with greatly divergent delivery technologies, cost structures and business models? Further, can regulation of content be divorced from other policy considerations that are currently enshrined in the BSA, such as the anti-siphoning list and protection against competition from a fourth free to air network?

Free to air television, subscription television, the Internet and mobile telephony services are all vying for the same viewers. However, technological issues and, in the case of the Internet, cross-border issues may prevent or inhibit equitable regulation. While the BSA has shown that it is a relatively simple process to regulate content where that content is generated or broadcast in Australia, it is not so simple a task to regulate content that is not only hosted overseas, but delivered by individuals and corporations that have no nexus to Australia. .

The table below sets out a summary of the main categories of players in audio-visual content delivery serving the Australian market and their respective business models and current legislative control over their operations:

Free to Air/FTA	Subscription TV/STV	IPTV/INTERNET	MOBILE
Advertiser/Taxpayer supported	Subscriber supported	Advertiser and/or subscriber supported	Subscriber supported
Primarily linear delivery system	Primarily linear delivery system	Emphasis on video on demand or point to point delivery	Emphasis on video on demand delivery, or shorter form programming
Significant licence fee payments in return for use of spectrum	Significant start up and on-going delivery costs	Cheaper start up and on-going costs *(in comparison to FTA and STV)*	Cheaper start up and on-going costs *(in comparison to FTA and STV)*
Content requirements attach to primary or core channel	Content requirements attach to drama channels	No content requirements	No content requirements
Multichannels have no content requirements	Content requirement don't apply to narrowcast channels	No concept of broadcast and narrowcast	No concept of broadcast and narrowcast
Has benefit of no further FTA competition	No restriction on competition	No restriction on competition	No restriction on competition

Conclusion

It is unlikely that any government will materially reduce the current obligations imposed on broadcasters relating to Australian content. To do so would adversely affect local television production, although it could stimulate greater competition amongst broadcasters (assuming that the fourth free to air network restriction is removed). Similarly, governments have shown no stomach for reform that would remove or significantly alter the anti-siphoning list to the benefit of subscription television broadcasters.

How, then, will future governments approach the growing disparity between the *old media* players who are heavily regulated and *new media*, who have by and large escaped regulation? It would be impossible for a government to levy local content obligations on Internet content providers located outside Australia who have no Australian presence. It is highly likely, however, that the anti-siphoning list will extend to IPTV/Internet and mobile operators, but, again, how will such changes catch broadcasters who operate outside of Australia and have no connection to the Australian broadcasting landscape?

These issues all feed into a vastly more complex set of considerations that will need to be addressed to provide a comprehensive overview of the media and communications industries and the regulatory priorities in a convergent world. In order to adequately address the sector as a whole, the government needs to adopt a holistic approach to reform, leaving no element of current policy quarantined.

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[i] FreeTV 2009 Year in Review
[ii] ASTRA Auspoll reseach 2009
[iii] CCi Digital Futures 2010 Report
[iv] ACMA 2008-2009 Annual Report
[v] Applies to primary or core channel only
[vi] Exemption provided under s55 of the Disability Discrimination Act; applies to primary or core channel only
[vii] Exemption provided under s55 of the Disability Discrimination Act
[viii] ASTRA website