Convergence and Media Policy in Australia

Franco Papandrea
University of Canberra, Australia
Email: franco.papandrea@canberra.edu.au

Abstract

In early 2011 the Australian Federal Government established a committee of experts to examine the challenges to regulatory policy emanating from convergence and advise on policies on how best to address those challenges. After extensive public consultations, the Convergence Review delivered its report to the Government at the end of March 2012. The report, however, did not live up to the promising expectations that accompanied the establishment of the Convergence Review. With what proved to be a timid approach, the Convergence Review failed to seriously challenge and rethink the justification and necessity of some major legacy media regulations. Nonetheless, it produced many recommendations that could help improve future regulatory structures for the media and communications services.

The Convergence Review concluded that there were "three areas where continued government intervention is clearly justified in the public interest". The three areas for which ongoing regulation was recommended were: media ownership and diversity, media content standards across all platforms, and support for production and distribution of Australian and local content.

While some of the Convergence Review proposals would clearly be an improvement on current regulatory arrangements. Others, particularly those in relation of Australian television content and media ownership, are not built on solid foundations and are likely to perpetuate and heighten current regulatory strains in a converged environment.

The paper will provide an outline of Australia's current media regulatory policy system and will highlight the increasing strains on its sustainability that are being generated by convergence.

Keywords:

Convergence, Media, Policy, Regulation, Australia, Media Ownership, Local Content.

1. Introduction

The convergence of telecommunications and information technologies has brought about considerable change in the supply of voice, video, data and other information products and services and has significantly eroded the boundaries that traditionally separated the markets for those products and services. As a result, consumers are provided with an expanding set of competitive services – traditional and new – and benefit from improved choice and convenience.

In Australia, traditional media structures and their tailor-made regulatory systems are increasingly being challenged by the process of convergence. Consumers already have access to a greater range communications and media services than ever before through an expanding variety of delivery platforms. Digital conversion of terrestrial free-to-air television is due to be completed this year and has already more than trebled the number of available channels. The building of a national broadband network (NBN) is already underway and by 1920 will bring a fibre-to-the-home connection to 93% of all dwellings in the country (the remainder will be provided with high-speed wireless or satellite internet connections). This too will boost the already extensive range of media services accessible on internet delivery platforms. Regulatory structures already under considerable strain will become increasingly irrelevant.

To better understand the challenges to regulatory policy emanating from these developments the Federal Government established a Convergence Review Committee of experts in early 2011. The Committee delivered its report to the Government at the end of March 2012 and made extensive recommendations on future regulatory structures for the media and communications services.

Having formed the view that "market forces alone" will not deliver objectives which "Australians continue to place a high value on" the Convergence Review (2012, p. 4) concluded that ongoing regulation was necessary to ensure:

- "diversity in ownership of news information and commentary sources"

☞ "content standards that reflect community expectations"
☞ "Australian and local content."

The proposals will be examined in detail below. To set the context for that analysis it is useful to examine briefly the underlying economic effects on market competition that are typically associated with major innovations and technological changes.

2. Market impact of innovation and technological change

Before the onset of convergence, the Australian communications sector comprised three broad but distinct markets with little interaction between them. Traditional services such as voice telephony, data services and broadcasting services were delivered over separate networks subject to separate regulatory arrangements. With digitisation delivery platforms have become increasingly interchangeable and have blurred the boundaries of what were distinct markets.

So far, the convergence of markets has not been accompanied by convergence of regulatory arrangements. Distinct regulatory arrangements continue to apply to:

☞ telecommunications services ;
☞ free to air broadcasting (radio and TV) ;
☞ pay Television;
☞ other forms of broadcasting (public broadcasting, community broadcasting, narrowcasting services, and multichannelling);
☞ Internet.

At a general level, the notion of converging markets suggests an increase in competition and a consequential reduction in market power. In reality, however, increased competition is not necessarily assured. Much will depend on the structure and performance of both the existing and

emerging markets, the existence of barriers to entry, including regulatory barriers, and the economic power of incumbent players in the markets. Other economic factors that may restrain competition include first mover advantage, economies of scope, product bundling strategies by multiproduct firms and network effects.

As markets converge there is a considerable risk that essentially the same service will face different regulatory burdens because of their use of different means of delivery. Consequently, providers with a lower regulatory burden will have a competitive advantage over those subject to a higher burden. The different regulatory treatment will also signal different incentives to investors and thus may lead to potentially serious distortions of investment decisions and efficient use of resources.

Papandrea (2003) noted that when markets converge, "there are several implications for regulatory policies including:

> ☞ regulation should not impede the process of market change that flows from convergences unless the changes clearly lead to undesirable concentration of market power;
> ☞ regulation must avoid the situation where competing firms delivering highly substitutable products or services are treated differently. Efficiency requires neutral regulatory treatment of different technologies. A focus on regulation of services rather than their delivery technology will help this;
> ☞ if competition increases as a result of convergence, pre-existing regulation needs to be reviewed. It should not be assumed that pre-existing instruments continue to be necessary or valid in the converged market. When markets with different regulatory treatment converge the question arises as to which treatment should apply to the converged market. If regulation is needed, the less intrusive of the two should be favoured as the starting point for evaluation of further liberalisation;
> ☞ if new services emerge from convergence, the necessity of regulation needs to be considered carefully if growth is not to be obstructed. With completely new services, market power is not usually an issue and the need for regulation should be low;

☞ if new services develop that compete with existing services subject to regulatory control, regulatory authorities need to address the problem of what kind of controls should apply;
☞ convergence may also increase uncertainty. Risk associated with new investment may increase particularly if different regulatory treatments are likely to apply in a merged market or when substitute services are likely to be treated differently. To promote efficiency products or services likely to be substitutable or interchangeable with each other should not be accorded different regulatory treatment."

These implications provide a useful framework for the evaluation of the Convergence Review's approach to regulation and of its recommendations for reform.

3. The Convergence Review Approach to Regulation

The Convergence Review (2012, p. 1) acknowledged that "Convergence of media content and communications technologies had outstripped the existing media policy framework". In coming to this conclusion, the Convergence review drew upon earlier analysis by the Australian Communication and Media Authority (ACMA). A paper published by the ACMA (2011a) in the months preceding the establishment of the Convergence Review outlined the problems posed by convergence to Australia's legislative and regulatory framework for communications and media and identified more than 50 'broken concepts' that needed to be addressed. A companion paper (ACMA, 2011b) outlined 'enduring' concepts which the ACMA considered to be of ongoing importance to media and communications in Australia.

The two ACMA papers provided a very useful launching pad for further analysis and consideration by the Convergence Review which approached its task with the express intention of favouring deregulation guided by the principle 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" (Convergence Review, 2012, p. 1). Further, "a regulatory response should be used only where there is an identified problem that requires intervention" (ibid, p. 3). However, in attempting to balance competing vested interests, some of its important conclusions and recommendations appear to have strayed from this commendable principle and clearly compromise economic efficiency.

The Convergence Review proposals were intended as the basis of a broad technologically-neutral policy and regulatory framework administered by an independent statutory regulator with independent rule-making powers capable of adapting and responding quickly to market changes. While it presented the Government with an extensive range of deregulatory recommendations to facilitate convergence, including some commendable proposals for change, it identified three broad areas of current media policy where it concluded that ongoing regulation should be retained in the public interest:

Media Ownership – according to the Review regulation is "vital to ensure that a diversity of news and commentary is maintained". It proposed that current ownership limits applying to commercial broadcasting be replaced by a 'minimum number of owners' rule in any one market and the application of a public interest test on changes of control of media content enterprises deemed to be of national significance. It also proposed the abolition of broadcasting licensing and other barriers to entry.

Media content standards across all platforms – needed to ensure that services "reflect community standards" such as protection of children from inappropriate content. The review proposed the establishment of an independent classification board for all media content and an industry-developed news media code for fairness, accuracy and transparency administered by an independent self-regulatory standards body.

Production and distribution of Australian and local content. The review proposed retention of current provisions in support of Australian content on commercial television with some modifications and the application of the same provisions to all major content service enterprises, including public broadcasters, irrespective of their delivery platforms.

The key recommendations relating to each of these three areas of proposed regulation are examined in detail below. Other than in passing

references, where appropriate, other recommendations of the Convergence Review are not canvassed in the paper.

4. Media ownership and diversity

Australian policymakers have sought to promote diversity of opinion in Australia's traditionally concentrated media sector with a variety of regulatory limits on the ownership and on the population reach of commercial electronic media that have been modified on several occasions in recent decades (Papandrea, 2010). In brief, the current rules proscribe:

- fewer than five independent operators of commercial television, radio or newspapers in a metropolitan market and no fewer than four in a regional market (commonly referred to as the 4/5 voices rule);
- control more than two out of three commercial media (television, radio and newspapers) in a market (the '2 out of 3' cross-media rule);
- control of more than one commercial television broadcasting licence in a market ('one-to-a-market' rule);
- control of more than two commercial radio broadcasting licences in a market ('two-to-a- market' rule;
- control of multiple commercial television licenses with a combined licence area reach exceeding 75 per cent of the national population.

The Convergence Review (2012, p. 18) concluded there was a continuing need for rules on media ownership to ensure access to a diverse range of news and commentary from a variety of local sources. The rules were needed because although "convergence is undoubtedly increasing the diversity of content from various sources both globally and nationally… it can have a negative impact on the amount of locally sourced news and information" and because "a small number of media groups still own and control most media outlets" from which "most people still get their news and information".

The review recommended the repeal of the 75 per cent audience reach rule, the '2 out of 3' rule, the television 'one-to-a-market' rule and the radio 'two-to-a-market' rule. It also recommended conversion of the '4/5 voices' rule to a '4/5 owners' rule to be applied to "all entities that provide news and commentary and have a significant influence in a local market" (ibid). In exceptional circumstances the regulator could provide an exemption from the new rule if it was satisfied a merger or acquisition leading to a reduction of owners below the relevant minimum threshold provided a public benefit in the local market. The regulator was also to be given powers to vet changes in control of 'content services enterprises of national significance' and block any not deemed to be in the public interest (proposed public interest test).

Unlike the existing provision which apply only to traditional media *located in* the local market defined as the coverage area of the related commercial radio licence, the proposed rule would apply to all influential *providers* of news and commentary services in a local market as defined for the purpose by the regulator. Thus coverage of the rule would be extended to previously excluded media such as national newspapers, pay television services and online services identified by the regulator as having 'influence' in the local market. Services with a population reach or with an annual number of users above thresholds to be determined by the regulator would be deemed to have influence. Different thresholds were to be determined to apply in regional and metropolitan markets.

The prospective benefits of the proposed change were not detailed by the Convergence Review. The proposed rule, however, would undoubtedly add unnecessary complexity to current arrangements and would not provide greater assurance of diversity of news and commentary sources in local markets. The threshold test could pose significant administrative costs as reach in local markets may be difficult to measure particularly for non-locally based sources. Additional difficulties would also arise in defining local markets – a task that would be left to the regulator on a case by case basis – and in determining the extent to which a negative 'influence' on diversity in a single or small number of local markets would have on mergers involving suppliers of news and information in a large number of local markets. Furthermore, while traditional media remain the primary sources

of news and commentary accessed by consumers, abolition of the "one-to-a market", "two-to-a- market" and "2 of 3" media rules would act to reduce diversity of sources, the opposite of the outcome which the proposed rule seeks to promote.

An earlier review of cross media rules and limits on common ownership of broadcasting licences in the same area by the Productivity Commission (2000) recommended a set of pre-conditions before moving to abolish the rules and establish a media-specific public interest test to vet mergers and acquisitions. The Commission stressed it 'would not be wise" to repeal the rules until limits on allocating more than three television licences in an area continue and spectrum is made available to new entrants (p. 364-365). The Convergence Review noted the Commission's public-interest test proposal to lend support to its proposal, but made no reference to, nor took heed of the related pre-conditions. Indeed it went further and recommended that spectrum currently available on the currently unutilised sixth television multiplex should not be allocated to new commercial television services (Convergence Review, 2012, p. 95). The recommendation is thus not only contradictory to the Convergence Review's stated commitment to a "deregulatory approach", but is also potentially damaging to the prospects of sustaining diversity and to efficient allocation of resources.

Abolition of the 75 per cent national population reach by holder of multiple commercial television licenses would be unlikely to have a significant impact on diversity in local markets. Currently, commercial television in Australia's metropolitan and regional markets is provided by three capital city networks and three regional networks which apart from small amounts of local programming, broadcast programs of the respective metropolitan networks supplied under program affiliations agreements. Consequently, program distribution is not affected by the population reach rule for commonly held licenses. Abolition of the rule could lead to improved efficiency through economies of scale resulting from national networks of stations under common ownership.

5. Media Content Standards

A variety of codes and standards have been employed to ensure that communications and media services available to the general public do not offend community standards and prevent harm from access to inappropriate and offensive content. These include codes for the promotion of fairness, accuracy and transparency in news and commentary, protection of privacy, protection of children from harmful content, and program classification standards.

The existing content codes are typically platform or technology-specific and in some cases provider-specific. While they address similar matters or practices, the rules are often inconsistent across the platforms and can be inflexible and confusing in their application.

As part of its consideration of the issue, the Convergence Review was required to take account of the findings and recommendations of a review of media content classification by the Australian Law Reform Commission (ALRC, 2012) and a review of news standards by the Independent Inquiry into Media and Media Regulation (2012).

An area of particular concern in light of the effects of convergence has been the different treatment of news depending on the delivery platform – existing standards apply only to content delivered by traditional means. Currently, newspapers have a form of self-regulation involving voluntary membership to an industry-funded body with no power to enforce rulings on members, licensed broadcasters are regulated by a statutory regulator which can impose sanctions for breach of mandatory standards, and public broadcasters adhere to self-imposed standards. There are no prescribed standards for news delivered online or via mobile technology or other means. This means that not only is the content of different media subject to different standards, but also the content of a traditional medium is treated differently depending on its delivery platform.

The Convergence Review proposed a new approach to provide more consistent treatment of content standards across different platforms and effective complaints and enforcement processes. General media content and classification standards were to be the responsibility of the media

regulator, while a separate new industry body was to be given responsibility for standards relating to news and commentary on all platforms.

The "general" content standards recommended by the ALRC were endorsed by the Convergence Review and the proposed arrangements for their implementation have generally been considered to be appropriate by commentators. The proposed arrangements for news and commentary standards, however, have been strongly opposed by newspaper interests with intense lobbying and a vigorous and largely misleading campaign against the proposal. The government nevertheless decided to adopt the recommendation, but was inept in its attempt to have the necessary legislation approved by the Parliament.

PRODUCTION AND DISTRIBUTION OF AUSTRALIAN CONTENT

Mandatory requirements for the broadcasting of domestic content have been a central feature of media policy in Australia since the early days of television and have enjoyed popular support.

Currently television operators must comply with specific regulations for the transmission of Australian television programs. Free-to-air commercial television broadcasters must broadcast Australian programs for at least 55 per cent of their on-air time between 6:00am and mid-night on their primary channel. They are also subject to specific domestic sub-quotas for first-release Australian documentaries, adult drama, children drama and children programs. Complying sub-quota programs are awarded a set number of points reflecting their duration and format with broadcasters having to secure a given a minimum number of points in any one year and an average over there years. Quotas also apply to television advertising – at least 80 per cent must be Australian produced. Subscription television drama channel providers are required to spend at least 10 per cent of their total programming expenditure on new Australian drama productions.

The existing regulation of Australian television content developed for a highly controlled licensing system with a restricted small number of players does not fit well in the new environment. On the consumer side, the

much larger choice of services available to viewers will fragment audiences and consequently diminish the influence of each individual service. The anticipated structure of television is one where a multitude of specialist channels and other sources providing viewers with a catalogue of choices to be selected at will, rather than the traditional passive selection of one of the few available choices on free-to-air channels at the time of viewing. On the supply side, many of the new sources of programs accessible by viewers are either not conducive to control with the existing regulatory instruments or may even be beyond the jurisdiction of domestic regulatory authorities.

The development and growth of the online environment has provided significant opportunities for both established operators and new entrants to experiment with and use new platforms for the delivery of both traditional and emerging video services likely to appeal to consumers. According to the Australian Communications and Media Authority (ACMA, 2011a) consumer interest in online video services has grown rapidly in recent years. This includes access on mobile devices. The already wide range of potential options (free or pay) available to those with access to the internet is set to expand significantly with the building of a national fibre optic network that will connect almost all homes. The development of online video services comes on top of a threefold expansion of free-to-air television channels from three to 15 as a result of digital conversion. Some 30 per cent of households have access to a much wider range of channels supplied by subscription television providers. Convergence is also enabling consumers to access the separate delivery platforms onto a single reception device such as new generation television sets.

The changing environment will considerably increase the already evident strain on the effectiveness of the legacy quota system for Australian television content. The multichannel nature of subscription television, introduced almost two decades ago, is an early example of difficulties of extending an instrument designed specifically for one delivery platform is extended to other platforms. In recognition of the multichannel nature of subscription television only predominantly drama channels have been subjected to a variant of the domestic content requirement which mandates that 10 per cent of their total annual program costs be dedicated to the production of new Australian drama without specifically requiring their

broadcast. The more recent introduction of digital multichannelling has added some further strain as only the main channel of a commercial broadcaster is subject to the Australian content regime. Differential treatment is also accorded to IPTV services. Over a decade ago, a ministerial determination ruled that "Internet services providing television and or radio programs outside of the broadcasting services bands should not be regulated as a broadcasting service" (Department of Broadband, Communications and the Digital Economy, 2000). Some IPTV services, such as those of Foxtel and Transact (licensed subscription TV providers), to the extent to which they are classified as part of their subscription television services, are captured by the Australian production obligations applying to subscription television predominantly drama channels. Other IPTV services supplied by ISPs for download over the Internet are not subject to Australian content regulation. Although access to these services is essentially on a single program basis, rather than a 'channel' basis, the application of regulation along lines similar to those applied to subscription television providers could be conceivable. But even such a possibility would be difficult to conceive for web TV and satellite TV services, particularly those from providers located outside Australia's territorial jurisdiction. Further details of current pressures on the regulation are provided in the ACMA (2011a).

Notwithstanding these difficulties, as acknowledged by the Convergence Review, the need to ensure access to an adequate level of Australian content continues to be a crucial objective of media policy. However, the Convergence Review proposal which retains the quota system as a central feature does not adequately address the cause of the current strains on the regulation. Essentially, the proposed measure involves some modifications of the provision currently applying to commercial free-to-air and subscription television and extension of the revised arrangements to all major content service enterprises, including public broadcasters, irrespective of their delivery platforms. The proposal seems to have been designed more to appease the powerful production industry and cultural policy lobbies than coming to grips with the exigencies of developing an effective and efficient policy to guarantee access to Australian content.

The development of an effective and efficient scheme in support of Australian content necessarily needs to commence with a determination

of what benefits accrue and are being sought by the application of the current regulatory regime. Of the existing instruments, historical compliance data clearly show that the 55 per cent transmission quota has had little if any noticeable impact on the behaviour of broadcasters and appears to be redundant (Papandrea, 2011). Consistent supply of Australian content significantly in excess of the quota requirement is a strong indication that consumer preferences rather than the quota are the main determinant of a broadcaster's output.

Different considerations apply to programs subject to specific sub-quotas for documentaries, adult drama, children drama and children programming. These program genres are considered to be of particular importance to the development and enhancement of national culture and identity. Historical data on compliance indicate that broadcasters' outputs of adult drama, children drama and children programming in particular are driven by the need to comply with the requirements. In the absence of the quotas, output would most likely decline. The evidence is less clear in relation to the Australian documentaries sub-quota. Compliance data for documentaries show that while average performance has consistently exceeded the quota, the performance of one of the main networks has consistently been only marginally above the requirement.

Because broadcasters will seek to minimise the cost of compliance with the sub-quotas they have an incentive to eschew high-cost productions. As a result, while there have been some fine examples of mini-series and drama features that have proved highly popular with audiences, long running serials and series have consistently been the mainstay of genres used to comply with quota obligations. Various attempts made over the years to encourage broadcasters to favour longer-forms of drama in complying with the quota requirements have not had a significant impact. Pressures to minimise production costs are more intense with regard to children drama and children programs generally. This divergence of desired and actual outcomes of the current adult-drama and children programming sub-quotas should also be addressed in any future mechanism.

The tinkering of current quota arrangements proposed by the Convergence Review would entrench both unequal treatment of competitors and the inefficient/ineffective features of the current regime.

A potentially effective and efficient solution that readily comes to mind would be the replacement of the existing quota regime with a subsidy for the production of Australian audio-visual content deemed to be of particular importance to the development and enhancement of national culture and identity. A well-targeted subsidy would eliminate the distortions inherent in the current disparate treatment of existing and emerging delivery platforms. The subsidy could be directed specifically and limited to desired program genres and adjusted to reflect desired production values.

GOVERNMENT RESPONSE TO CONVERGENCE REPORT

The Government was slow in responding to the recommendations of the Convergence Review. When it did, almost 12 months after receiving the report, the response encompassed only a small number of the matters canvassed in the report. These included minor amendments to the charters of the two public broadcasters to formally authorise their online activities, extension of Australian content requirements to multichannels of commercial television operators balanced with a permanent halving of the broadcaster's annual licence fees, the establishment of a press standards self-regulation scheme for print and online news media, the introduction of a public interest test to ensure diversity is given due consideration in media mergers and acquisitions, and the allocation of digital spectrum for community based television services with a concurrent permanent ban on new commercial television services (Conroy, 2013).

In an inept attempt to ram the proposed package of measures through Parliament, the Government tabled five legislative bills giving Parliament only three days to debate and enact the legislation. Not only was this contentious *per se,* but also some of the matters addressed in draft legislation, such as the self-regulation scheme for print and online news media were politically sensitive. In the ensuing political controversy two of the bills were passed by Parliament, and as no agreement could be reached on the others, they were withdrawn by the Government.

The two approved bills authorised the minor changes to the charters of the two public broadcasters, the extension of Australian content requirements

to multichannels of commercial television operators, the related reductions in licence fees, and the removal of the 75 per cent population reach limit of commercial television networks the permanent ban on the licensing of new commercial television services.

6. Conclusion

The establishment of the Convergence Review was well received by the media industry, commentators and the wider community and was widely regarded as a commendable forward-looking initiative with the promise to enhance Australia's capacity to address the policy challenges of convergence. The outcome, however, did not live up to the initial favourable expectations.

The Convergence Review generated extensive useful public debate on, and analysis of, the issues confronting Australia as it attempts to position itself to best garner the benefits of the digital age. It started well. It released a range of discussion papers and enunciated and adopted guiding principles for its analysis that were consistent and largely compatible with general principles for the development of sound policy for the management of technological change. However, it appears to have partially lost its way and to have allowed other considerations to influence the development of its policy prescriptions thus limiting the value of its report.

Its approach on some major regulatory issues was timid and its prescriptions appear to have been tailored with an eye to avoiding confrontations with powerful vested interests or upset the status quo too much. Thus its analysis stopped short of seriously challenging and rethinking the justification or necessity of legacy media regulations. This timidity is best illustrated by its considerations and proposals to ensure continued access to Australian audio-visual content.

The government's response to the Convergence Review is even more disappointing. It failed to take the opportunity to better prepare Australia for the digital age. The net result is that adoption of measures to address the many concepts of media policy that were already broken before the Convergence Review was established has been postponed to a later date.

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