Digital Terrestrial Television -Implications for Australian Television

Jock Given looks at some practical and policy considerations behind the introduction of Digital Terrestrial Television in Australia and explains why bandwidth is the villain of the piece.

ontent is king, or so the cliche goes. Of course, if it were, we probably wouldn't be here arguing about Digital Terrestrial Television (DTT). Content often looks like it's king: the studios in Hollywood have been wearing their crowns comfortably enough for decades. Super League and the ARL are killing each other for content. At the current rate, they'll be doing it until there's no content left standing. Stuart Diver scrambles out of his icy private nightmare to find the media carriers - or is it carrion? - waiting, no longer with those grubby chequebooks, but with 'contracts of employment' (an enterprise bargain if ever there's been one), and Diver himself an instant King of Content. If only public tragedy wasn't so damned unpredictable, you could start up a niche channel.

But content is not king, because bandwidth is such a bugger. And whatever the zealots dream about the endof-scarcity, from where I'm standing, bandwidth looks like it's going to become an even bigger bugger. This is why DTT is so important a development. If you think competition in the provision of bandwidth is important, then DTT might prove to be the most viable wireless link to the home - the one best able to compete with the copper that's already there. And if you think having different content providers controlling different lines of access to their audiences is a useful starting point for ensuring a diversity of views, then DTT might look more attractive than a solitary superhighway, however wide.

BANDWIDTH SCARCITY

Bandwidth is a bugger because there's not enough of it. The Telstra Multimedia/ Foxtel and Optus/Optus Vision cable rollouts have significantly expanded the available bandwidth in the areas they have covered. Satellites are further expanding them. But so too, the revised powers and immunities for carriers under the *Telecommunications Act 1997* will constrain the terrestrial bandwidth bonanza we've seen in metropolitan areas over the last few years. Telstra and Optus both appear to be saying that their rollouts have effectively stopped. We might find, far from 1 July 1997 being the dawn of a new era, that 1991-97 proves to have been an unusual window where optimism and activity in building terrestrial facilities overflowed. Warren Lee spoke earlier of DTT as a 'spectrum grab' by free-to-air broadcasters. We could equally see the extensive powers and immunities granted to Telecom and its predecessors until 1991, and to all three carriers between 1991 and 1997, as a 'sidewalk grab' or a 'nature strip grab' - a special set of rules which allowed them to build telecommunications infrastructure without all the state and local government planning complexities which confronted anyone who wanted to build anything else and which now confront both them and their new competitors.

And what abundance there is so often seems to vanish before our eyes. In the US, local cable viewers have significant viewing choices taken away from them when their monopoly provider chooses to switch their channel line-up on cable systems with very finite space, given the technology of the day. Spare channels on Australia's cable systems diminish by the week, Telstra's overseas lines get eaten up by Internet traffic as soon as they're laid, Word 6 devours the new hard drive whose speed so mesmerised you last Christmas, cinema audiences who were perfectly happy with daggy looking dinosaurs one decade want real ones the next and won't be remotely scared by anything else. Wide screens, Dolby Stereo, surround sound, they're going to be wanting to smell the things next. God help the people who have to sit in the mixing room editing that.

Expectations escalate, bandwidth demands soar and scarcity hangs on very tight. So who we let use or construct the bandwidth and what we let them use it for are critical public decisions.

RE-THINKING REGULATORY POLICY RATIONALES

Bandwidth is also a bugger because it's not a neutral concept. The architects of

the Broadcasting Services Act might have wanted that legislation to be technologically neutral, but reality keeps busting out all over the legislative shop. Separate satellite pay TV licences in the Act hinted that seamless technology neutrality was an illusive creature, even in 1992. Digital radio is forcing some rethinking about whether special rules are going to be necessary to accommodate this new way of delivering radio or whatever other services the relevant spectrum might be wanted. And on-line services are not fitting neatly into or out of the service categories in the Act.

Elsewhere, the government picked GSM and bunked AMPS as the technology-ofchoice for mobile telephony not so much because it was a 'better' technology (whatever that might mean), but because it was thought better capable of sustaining competing service providers. Hasn't that made them some friends in the bush, once AMPS' superior coverage characteristics have become clearer. The government has arm twisted and eventually legislated Telstra into a commitment to make available a specific technology, ISDN, to most Australians. The spectrum licensing system, whose very rationale was its ability to leave technology choices to the market, has found it hard, in practice, to resist prescription about the uses to be made of particular technologies.

So the technology choices keep getting made by governments, despite the rhetoric that they don't, and each time they're laden with value judgments. I don't mind value laden judgments being made about technology choices because decisions to leave those choices, to the market place are no less value laden. Leaving Telecom to choose its technology to deliver telephony to remote Australia may have been a crucial factor in limiting the development of satellite over the last decade and a half - a technology perhaps peculiarly well-suited to Australia. Leaving Foxtel and Optus Vision to drive a truck through the Broadcasting Services Act in relation to the development of cable TV, while setting up a special regulatory regime for satellite pay TV, has been arguably the most important element of recent media policy history.

As so often happens with major technological change, the scale of the investment and planning required for DTT gives us a chance to use the moment to think carefully about where we want our media industry to go. The introduction of radio in the 1920s and 30s gave us the chance to invent a national broadcaster. The introduction of television gave us the chance to decide that the 'dual system' of commercial and public broadcasting which we had arrived at by the 1950s would serve us well in this new medium. FM in the 1970s gave us the chance to invent community broadcasting. UHF television made regional commercial TV aggregation and truly national commercial television networks feasible.

CONTROL OVER BANDWIDTH

So the task is to work out what policy challenges are around for Australian television and communications that DTT might help us address. For me, there's one central issue: the main reason bandwidth in Australia is a bugger is because the same buggers have got it all.

Compare us with the US. Network TV, cable TV, DBS, local exchange carriers, long distance carriers - all essentially different businesses run by different people, although the (US) *Telecommunications Act 1996* wants them all to move onto, and compete in, each others' patches. Network television has got its hands on spectrum for digital transmissions, but they have to hand it back, at some rapidly receding point in the future.

Look at the UK. Terrestrial TV dominated by the BBC, Granada and Carlton; pay TV dominated by satellite operator BSkyB; cable TV consolidating around Cable and Wireless, but with BSkyB wielding huge influence; telephony dominated by British Telecom. Although the mechanism is very different to the US, terrestrial TV in the UK has got its hands on the digital TV spectrum. Very big players, but quite a few of them.

Then look at Australia. Over 60% of the terrestrial TV audience is taken by PBL and Seven, where News is a significant shareholder; pay TV clamouring to be allowed to consolidate around News Corporation and Telstra, with PBL "equalising" its way in somehow; telecommunications dominated by Telstra. And the ABA has recommended that terrestrial TV get the digital TV spectrum, initially.



COMPETITION AND DIVERSITY OF OWNERSHIP

I think we have to see DTT as an opportunity to diversify players in the Australian media business, or at least to ensure that the limited diversity already existing is not further reduced. In that, I think DTT's capacity to offer a link to households which is not dependent on the cable or satellite infrastructure controlled by the telecommunications carriers is vital (although the set-top box is still capable of achieving any of the gatekeeper power that centralised transmission infrastructure does not). Broadcasters have always been in control of their own technical destiny and I want to see them at least with the option of choosing to stay that way.

The tough issue is how to achieve it. Do we seek competition and diversity within platforms or between platforms? That is, do we try to get many players into DTT, or do we try to encourage a big new player which concentrates its attention on digital delivery and can compete with the major terrestrial and pay operators? I don't think the latter is really an option, because I don't think the commercial future of the digital terrestrial platform is secure enough for anyone to take a punt on it alone. Our best option is to ensure there is space for existing free-to-air broadcasters on the digital platform, although I'm troubled by the nature of the ABA Report on Digital Terrestrial Television which appears so focussed on that as the sole objective.

PROBLEMS WITH THE ABA REPORT

The main purpose of the ABA's approach seems to be to replicate in the digital transmission era the structure of the analogue free-to-air television industry. It's not at all clear why that should be the only goal. In particular, we might look much more closely at the experience of regional commercial television under aggregation and investigate ways of using DTT in the bush to do something more than slavishly follow the metropolitan industry structure. That is what is happening in telecommunications, with regional operators like Northgate.

I agree totally with the scepticism which has already been expressed about High Definition Television as a major driver in the consumer television market. People have been talking about HDTV for decades - successive improvements in the black and white days were thought of as 'high definition' at the time. When the technologies that now bear the name 'HDTV' began to be developed, the goal was cinema quality pictures and CDquality sound. The problem is, cinemaquality pictures have got better and better, and cinema sound is now capable of way more dramatic things than simple home CDs. Further, the cinema has reinvented itself as a social experience, totally differentiating itself from the experience of even high resolution audiovisual entertainment in the home. I simply don't believe a substantial share of consumers are going to think HDTV alone is worth many dollars to them.

Finally, the ABA report seems to have problems even on its own terms. It tries

to treat the existing free-to-air stations equally, promising each a digital channel. Yet the reality is that this can only be achieved if there is shuffling around. I don't understand all the technical issues, but I'm troubled at the implications that Channel 10, the most vulnerable commercial broadcaster in a multichannel environment, will need to shift frequencies - a fairly inequitable outcome, in a vision which is entirely based on equity for existing players.

ROLE OF NATIONAL BROADCASTERS

It's worth noting that in the UK, the BBC has been given the DTT multiplex with the best reach. One of the most important things that needs to happen with DTT in Australia is a restatement of the enduring significance of the national broadcasters, the ABC and the SBS, to our television culture. They need to be given a central place in any future television transmission system. The ABC, the SBS, the Ten Network - I'm not at all averse to the vulnerable getting a leg up. If the strong complain, we can always tell them to bugger off.

This is the full text of a speech given by Jock Given, Director, Communications Law Centre, UNSW at the IIC Conference in Sydney on 13 August 1997.

Telstra v APRA -Implications for the Internet

Simon Gilchrist examines recent High Court decision and the implications for Internet service providers in terms of their liability for infringement of copyright on-line

The recent High Court of Australia case on the liability of Telstra for the playing of music on hold (Telstra Corporation Limited v Australasian Performing Right Association Limited (14 August 1997)) has immediate implications for the development of the Internet industry in Australia.

At its broadest, the case imposes strict liability on Internet Service Providers (ISPs) for the transmission of copyright material to their customers - even material over which they have no control and no knowledge. This has exposed all Australian based ISPs to the very real risk of being at the receiving end of legal proceedings.

BACKGROUND TO THE CASE

The proceedings were brought by APRA (an Australian collecting society for musical works) against Telstra (one of the general telecommunications carriers) over the issue of who, if anyone, should be liable for the music transmitted over the general telecommunications network as "music on hold". Telstra's involvement in the provision of music on hold occurs the following ways:

- (a) an organisation plays music to its callers that it puts on hold. In this case Telstra's only involvement is the operation of the telecommunications system.
- (b) Telstra plays music to callers to its service centres that it puts on hold.
- (c) Telstra provides its CustomNet service to certain customers. The CustomNet service is a call managing system. As part of the service Telstra provides music on hold to callers to CustomNet customers that are put on hold.

In each of the above circumstances, music is played either via a CD or tape player or via a radio receiver.

THE CLAIM

APRA commenced proceedings in the Federal Court of Australia against Telstra arguing that the transmission of music in each of the above circumstances constituted an infringement of its diffusion right in the music and that Telstra was liable for that infringement. APRA is for all practical purposes the owner of the diffusion right in all musical works in which copyright subsists.

The High Court accepted APRA's arguments. (The trial judge found for Telstra ((1993) 118 ALR 684; (1993) 27 IPR 357; (1993) 46 FCR 131) but APRA successfully appealed to the Full Federal Court ((1995) 131 ALR 141) and the High Court rejected Telstra's appeal.)

The case focused on the meaning of the diffusion right, which is defined in section 26 of the Copyright Act - one of the less clear sections of the that Act. The owner of the diffusion right in a work has the exclusive right to object to the transmission of the work to subscribers to a diffusion service.

Section 26 provides that "the transmission of material to subscribers to a diffusion service" means the transmission by wire of the material in the course of a service of distribution of broadcast or other material (whether provided by the person operating the service or not) to the premises of subscribers to the service.