

CONVERGENCE - THE ARGUMENT OF CONVENIENCE?

The Productivity Commission is looking into the future of broadcasting legislation in Australia. Rachael Osman examines the industry push to get rid of the existing cross-media ownership restrictions.

The big news in media law is this - the not so secret password is "convergence". If you want to challenge cross media ownership restrictions, broadcasting licence restrictions, geographical restrictions, or almost any other type of restriction that currently exists regarding ownership of Australian media, begin your argument under the heading of "convergence".

THE CONVERGENCE ARGUMENT

"Convergence" is the word being used to sum up technological changes in the way media is or can be delivered to the public. It is a word that is featured heavily throughout the submissions received from big media players by the Productivity Commission's Inquiry into Broadcasting Legislation, which began in March.

The argument of convergence is basically this: because all existing communications are or can be digital, all existing communications have the capacity to be transported the same way, i.e. by satellite, cable, telephone and television. This means the existing divisions of media into the three pigeon holes of newspapers; television (analogue) and radio won't mean much because their digital equivalents will be travelling through the same tubes.

Submissions to the Productivity Commission's Inquiry into Broadcasting Legislation repeat this new wisdom as the reason why the Australian Government should consider current restrictions on media ownership as obsolete. Those in the "new media" camp (e.g. Ozemail and AOL) happily argue convergence. Those who are not in the established free to air broadcasters camp (e.g. Fairfax) also happily argue convergence. Packer's Publishing and Broadcasting Limited argues convergence up to a point, that point being the current moratorium on issuing any new commercial broadcasting licences and giving spectrum to people other than existing broadcasters. Foreign media proprietors who want a bigger share of Australian markets (i.e. News Limited) are more than happy to argue convergence.

The question is - will these arguments of convergence convince the Australian Government that media ownership rules need a fundamental overhaul?

THE PRODUCTIVITY COMMISSION'S VIEW?

Jock Given from the Communications Law Centre answered this question by stating:

"It is no secret that the Prime Minister would like to change cross-media ownership rules. This inquiry is a good vehicle to at least have a hard look at the existing media ownership rules."

The inquiry has arisen from the requirement under the Competition Principles Agreement to review all legislation restricting competition. However, one look at the Issues Paper makes it clear that the Productivity Commission is fully convinced about the power of the convergence argument:

"The development of other services using telecommunications and Internet technologies is further blurring the bounds of broadcasting markets."

"This is Australia's most comprehensive public inquiry into broadcasting ever," says Prof. Richard Snape, the Presiding Commissioner of the Productivity Commission. "Revolutionary technology is opening exciting new opportunities through the convergence of conventional television and radio with telecommunications and the Internet."

This convergence argument has got a lot of people excited. However, do these technological arguments justify the abandonment of existing restrictions on media ownership?

THE MOTIVATION BEHIND THE CONVERGENCE ARGUMENT

Jock Given maintains that the current arguments for convergence are really justifications for established media entities to increase their market

dominance and for "new media" entrants to establish as much media dominance as they can in an environment that won't restrict them. "Arguments against cross-media ownership laws are being made by persons who would like to own more," he said.

Seen from this perspective, the basic premise of the arguments put forward by the big players appear very much as being primarily self interest as opposed to neutral arguments based on technological realities. An excerpt from the submission by News Limited reads:

If we are to share in the benefits flowing from these opportunities we must be prepared to face the challenges thrown up along the way with enthusiasm and daring, not seek to hide behind walls of protectionist regulation. Otherwise we face the real danger of being left in a communications backwater... Cross-media and foreign ownership restrictions are inappropriate and irrelevant and should be removed...

Convergence is not a theoretical issue: it is a reality which is blurring the lines between the delivery platforms of the media industry, making it counter-productive for government to attempt to create artificial barriers or distinctions between these traditional segments.

Similarly the basic argument of the Fairfax submission reads:

We believe that media diversity, in an age of technological convergence, can be maintained and enhanced by competition policy and open markets and by the full and proper application of competition policy to these industries - rather than by regulation of media ownership.

The submission by Publishing and Broadcasting Limited does a dog-leg by first advocating the need to continue "limiting the number of available licences so that broadcasters can deliver the types of services consumers demand, including high levels of Australian content". The

submission then advocates the desirability of abandoning cross media ownership restrictions by claiming "The advantages of cross-ownership do not lie in homogenising various media products, but in providing administrative and operational efficiencies..."

The message from the above excerpts is clear: because the world is changing we, the media proprietors, should be left to do as we please.

WHY THE RESTRICTIONS SHOULD REMAIN

What are the restrictions that they are trying to get rid of? The three kinds of limits placed on media ownership are: limits on ownership within a local area (i.e. the number of licences a person can hold in a defined licence area and restrictions on controlling more than one

type of media), national limits (i.e. a person must not be able to control enough TV licences to reach over 75 percent of the Australian population) and foreign ownership limits. The basic idea behind these limits is that they encourage some sort of diversity in the media offered to the Australian public.

It is highly debatable whether the current media restrictions are doing a good job of providing diverse media in Australia. However, Jock Given is not of the opinion that our media ownership rules are ready for the scrap heap: "It is not a bad idea if major media is controlled by different people. While it is becoming more difficult to have legislation that deals with the different methods of delivering media, the current law is not obsolete yet," he said.

Convergence is a technical possibility. However, it remains to be seen whether the technical possibility becomes commercial reality. The media players are arguing that it will and that the only suitable type of regulation is general competition regulation under the *Trade Practices Act*. However, there is always the possibility that digital media might merely be an additional form of media, adding to consumer choice, the way analogue television did. As Jock Given puts it: "We need to be careful not to think that the world will end up with one media industry."

Rachael Osman is a postgraduate journalism student at UTS and a practising solicitor

THE UNIVERSAL SERVICE OBLIGATION RECENT EVENTS AND COMING ATTRACTIONS

Caroline Lovell examines recent developments in relation to the provision of the USO and outlines some future developments already on the horizon.

Part 7 of the *Telecommunications Act 1997* (Cth) ("Act") provides for the Minister for Communications, Information, Technology and the Arts to declare specified telecommunications carriers to be the universal or regional service providers in Australia. A universal service provider is required to fulfil the Universal Service Obligation ("USO"). This involves ensuring that all Australians, wherever they reside or carry on business, have reasonable access, on an equitable basis, to standard telephone services, pay telephones and prescribed carriage services¹.

Telstra is currently the sole universal service provider. Part 7 of the Act also contains a scheme for the assessment of the cost of providing the USO and for the collection, recovery and distribution of a universal service levy which shares amongst carriers the losses which result from the supply of services in the course of fulfilling the USO. The levy from each

carrier is essentially a function of that carrier's proportion of the total revenue generated by carriers.

The assessment process takes place each financial year. The Australian Communications Authority ("ACA") is responsible for administering the process.

TELSTRA'S NET UNIVERSAL SERVICE COST CLAIM FOR 1997/8

In 1993/4, Telstra's cost claim was set at \$230 million indexed to the CPI for the purposes of the 1994/5, 1995/6 and 1996/7 years as a result of a compromise between Telstra, Optus and Vodafone. For 1995/6 and 1996/7 Telstra's claims averaged about \$250 million. For 1997/8 a new costing method was developed by Bellcore International Inc by agreement between Telstra, Optus and the ACA. On 25 September 1998, the ACA

made the Net Universal Service Cost Avoidable Costs Determination 1998 which reflected the costing method developed by Bellcore.

Just a couple of days later, on 28 September 1998, Telstra filed its claim for the 1997/8 year with the ACA. The total of the claim was \$1.8 billion. Not surprisingly, the magnitude of this claim caused an immediate reaction from the other carriers and the government because of its potentially negative impact on competition, investment and industry stability². Without prior warning, the claim imposed a large liability on each carrier other than Telstra.

THE REACTION OF OTHER CARRIERS

Other carriers, for example Optus, immediately disputed Telstra's claim. Optus also made public statements that