

Convergent Regulation - Ofcom's First Two Years

Ofcom was established under the UK Office of Communications Act 2002 as a fully converged regulator for the UK communications industries. It is equivalent, in Australian terms, to the ACMA plus the telecoms regulation team inside the ACCC.

In a speech to the 2005 ACMA Annual Broadcasting Conference on 10 November, Richard Hooper, the outgoing Deputy Chairman of Ofcom and Chairman of its Content Board, identified what he believes to be Ofcom's key success factors and challenges faced by the two-year-old super-regulator.

It is my view that Ofcom has been a distinctive innovation in convergent regulation. Normally it is not Ofcom's style to assert its own success, but this piece is a retrospective so some indulgence is surely allowed and some rules can be broken.

The retrospective is in three parts. First I am going to try and answer the question – how would you know if a regulator like Ofcom was successful? I will then go on to set out what have been, in my personal view, the key success factors for Ofcom. These may or may not be relevant to other countries like Australia which are converging their regulators as well. I will conclude with identifying the challenges and problems that lie ahead.

Regulation is very culturally embedded and country-specific so we all learn from each other at conferences like this in different and subtle ways. I first came to Australia on regulatory business in the early 1990's having just been appointed to the Radio Authority, one of the five regulators which ending up being converged into Ofcom. I have a clear memory of being taught by my host in a Sydney restaurant that content regulation was actually best thought of as context regulation – a wisdom that has stayed with me and has informed my judgements at the Radio Authority and at Ofcom ever since.

What does success look like for a regulator such as Ofcom?

There are a number of ways of measuring a regulator's success. The vast majority of Ofcom's stakeholders including the UK Government itself have stated that they think Ofcom has got off to a good start and indeed our own continuous research indicates our approach to regulation is to date generally well received. But those are subjective judgements – let me try out a few more quantifiable assessments.

Price reductions

From a consumer point of view (we are statutorily required to further the interests of citizens and consumers) I can point quantifiably to significant price reductions for example in mobile call termination and access to broadband. During our watch broadband penetration has accelerated rapidly, driven by lower prices and increased competition.

Public service broadcasting

From a citizen point of view, our major report on public service television broadcasting (**PSB Review**) published last year very strongly endorsed the importance of state-funded public service broadcasting in the digital age, especially after full

digital switchover, now 2012 in the UK. There was a view among some people when Ofcom was being set up that it would just be an economic regulator and that citizen's interests "beyond the market" would be neglected. This has absolutely not happened.

Investment and innovation

From an industry point of view, how have we done against the wording set out in 3(4)(d) of the *Communications Act 2003* (UK): "have regard....to....the desirability of encouraging investment and innovation in relevant markets".

The conclusion of the Telecoms Strategic Review (**Telecoms Review**) earlier this year has led to greater investment confidence in British Telecom (**BT**), the incumbent, and in both types of BT competitors – infrastructure competitors like Cable & Wireless, and service competitors like Carphone Warehouse – a win, win, win situation I believe. However time will be the proper judge of the review's conclusions. The Telecoms Review began from the frustrating position that, after 20 years of sectoral regulation, BT still had some 70 per cent of the fixed line market in the UK.

In the wake of the Telecoms Review, the pace of consolidation in the industry has clearly picked up with Cable & Wireless proposing to buy the altnet Energis, and the two "triple play" cable operators NTL and Telewest proposing to merge to form a strong intermodal competitor to BT in telephony and to Murdoch's BSkyB in pay television. And BSkyB has just announced its plan to move into telecommunications and buy the broadband and local loop unbundler Easynet. These transactions are currently awaiting competition clearance. In general Ofcom encourages where appropriate greater consolidation.

In broadcasting, institutional investment has picked up substantially in independent television production companies as a result of a new code of practice introduced by Ofcom which shares the spoils from primary and secondary/tertiary rights more evenly between commissioning broadcasters and commissioned production companies.

Ofcom's Statutory Duties

Under the Communications Act 2003 (UK)

"3(1) It shall be the principal duty of Ofcom, in carrying out their functions;

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition"

Ofcom's specific duties fall into six areas:

1. Ensuring optimal use of the electro-magnetic spectrum
2. Ensuring that a wide range of electronic communications services – including high speed data services, is available throughout the UK
3. Ensuring a wide range of TV and radio service of high quality and wide appeal
4. Maintaining plurality in the provision of broadcasting
5. Applying adequate protection for audiences against offensive or harmful material
6. Applying adequate protection for audiences against unfairness or the infringement of privacy

We hope to have encouraged not just investment but also "innovation". Innovation was a keynote of the PSB Review, with our recommendation for a Public Service Publisher to increase competition in public service broadcasting – competition for quality. And innovation is at the heart of our philosophical approach to spectrum allocation, which moves away from the traditional command and control (governments and regulators deciding who has what spectrum for what uses) towards a trading approach (where the market decides who uses what spectrum for what at what price). I will come back to this under Headaches/Challenges in part three.

Rolling back regulation

Another criterion for success stems from one of our key regulatory principles – bias against intervention. We have taken this very seriously and during our first two years some real rolling back of regulation has happened. For example we have moved the regulation of broadcast advertising from Ofcom to the Advertising Standards Authority under a co-regulatory arrangement. We have also pioneered new ways of policing specific industry concerns, for example BT's conduct and performance in local loop unbundling, by appointing independent adjudicators. Our latest Annual Report sets out the examples of deregulation or forbearance such as Voice over IP.

Bias against intervention should not be misunderstood however as a bias against enforcement. We can be light touch in our approach to market interventions but very heavy touch when it comes to enforcement.

Cutting costs

There is a very quantifiable way of measuring regulatory roll-back – the costs of regulators. Under the leadership of a private sector-experienced chief executive (more of him later), we are proud of the way in which for three years running we have cut costs. How many regulators can claim that? Ofcom is currently in the midst of what is delightfully termed "restacking". The chief executive decided recently to lose a floor of our building and once sublet it to an outside tenant. That will save us half a million pounds a year or so. At a recent board meeting to discuss next year's annual plan, the chief executive talked of "the natural tendency of bureaucracies to find stuff to do" – it is a tendency we actively fight against.

Incidentally, one of the drivers of convergent regulation is reducing costs. Ofcom today has 32 per cent fewer "staff" than the five previous regulators, and running costs are some 10 per cent below the previous system on a like for like basis, and still going down. We envisage further savings of some £10million per annum on IT in the next planning period. We quite specifically made a decision to have a smaller number of better paid colleagues rather than a larger number of less well paid colleagues. We believe that has turned out to be the right decision for us in our circumstances.

Content regulation issues not swamping the Ofcom agenda

The final evidence of some success for Ofcom in its early years moves closer to my own responsibilities as Chairman of the Content Board. When David Currie, the Chairman of Ofcom, and I were appointed back in 2002, many people said that Ofcom as a converged regulator would be swamped by content issues. Nudity, sex, violence, and four letter anglo-saxon words (unknown of course in Australia) – these make the newspaper headlines in a way that the finer points of equivalence of input in BT regulation probably don't.

The main Board of Ofcom sensibly delegated what we call Tier One content regulation (accuracy and impartiality, harm and offence, fairness and privacy) to the Content Board, a committee of the main Board. This, allied to the professional way that the work has been done by a strong team of executive colleagues, has meant that the Ofcom agenda has not once been swamped (touch wood). The recently introduced Ofcom Broadcasting Code is a significant improvement on the previous codes of the three broadcast regulators – much shorter, much clearer and more principles-based and less rules-based.

In the USA, by contrast to UK's handling of these content regulation issues, I sense that the FCC has got unduly caught up in the tsunami of social conservatism stemming from the famous wardrobe malfunction on primetime television of Janet Jackson. Meanwhile, according to the UK's Internet Watch Foundation, the USA still hosts something like 40 per cent of the world's child abuse/paedophilia websites – of far greater concern I would have thought than an errant nipple during family viewing.

Success factors

Let me identify what I believe to be the key success factors in the creation of a fully convergent regulator for the UK communications industries with particular responsibilities for competition policy, for telecommunications, broadcasting and wireless frequencies/spectrum.

Taking convergence seriously

Ofcom has taken convergence seriously. There are three dimensions to it. First of all, and most obviously, at the heart of our work is a recognition of the grow-

ing importance, despite some false starts during the dotcom boom, of network, device and corporate convergence stemming from the convergent nature of digital technology. The modern IP network carries everything from voice to moving pictures. Spectrum is the glue of a convergent communications industry. TCP/IP is the language.

The second dimension of convergence is rather different. It is the one that, speaking for myself, has been especially interesting. Ofcom's statutory duties focus on the interests of both consumers and of citizens as I have already mentioned. Thus Ofcom is a convergent regulator in the sense that it brings together in one place both economic regulation (the encouragement of competitive markets that benefit consumers alongside sensible concern for the financial health of the industry) with cultural regulation (the interests of citizens "beyond the market", the interests of society as a whole in communications matters).

There was widespread concern, as I have already alluded to, when Ofcom began that it would be a hard-nosed, quantitative economic regulator with only passing interest in the "fluffier" aspects of culture and the qualitative judgements that concern for the citizen demands. I am told this fear of domination by economic regulation is why in France the broadcast regulator does not wish to be converged with the telecoms and posts regulator.

I believe that Ofcom has demonstrated that it is possible within one organisation to have due regard to the interests of citizens and consumers, but it is never a simple problem. This links to the third dimension of convergence – we did not put together the five legacy regulators and leave them as five departments or siloes under a unified board. We set out from the start to converge the organisation from top to bottom as appropriate, a rather different approach from that taken by the ACMA in Australia and the FCC and the CRTC in North America.

Start-up not a merger

The Board in one of its earliest decisions (late 2002) agreed to move into a new building on the south bank of the Thames, rather than occupy an existing building of one of the previous regulators. As a result, culturally, we like to think of ourselves being involved in a start-up not a merger. I believe that has been one of the key factors central to its success.

25 per cent of the Ofcom senior management team came from the staff of the five previous regulators and 75 per cent from other worlds. Only three out of the nine members of the Ofcom Board formed in late 2002 came from the previous regulators (Of tel and the Radio Authority).

This start-up mentality connects to the principle embedded in Ofcom of "constructive disruption", where positive change from the past ways of doing things is possible and is actively sought after. The internal culture of Ofcom encourages challenging and open debate. Few conventional wisdoms are allowed to go unchallenged for long.

The new building reminds visitors more of a professional services firm than a government department. It is open and airy and transparent and modern. All of which helps to attract talent in a competitive labour market like London. And we have one single main building, with all our headquarters and quite a lot of operations people all in one place. For us, an effective model. For federal countries like Australia, this might not be appropriate of course.

Inclusive, non-hierarchical culture

The Ofcom main Board is always an inclusive, non-hierarchical affair. At the Board meeting held in May, for example, 32 executive colleagues (part of the culture change is to stop using the word "staff") – senior and junior – presented their papers to the Board and debated with Board members. That is normal practice. The Ofcom Board does not meet in some ivory tower although the 11th floor boardroom has stunning views across the river from Wren's great masterpiece, St Paul's, to the Tower of London and Tower Bridge to the east.

Ofcom engages with its stakeholders not via remote control but with the emphasis on face to face meetings, presentations and seminars, not just in London but also around the devolved nations and regions.

The commission model

The UK has with Ofcom moved decisively away from first person singular regulation, as in the model of the Director General of Of tel. Ofcom has moved decisively towards the commission model. But the commission model with a difference. When I chaired the Radio Authority, the chief executive was not a member of the Board – it was made up purely of part-

Ofcom's Regulatory Principles

- Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives
- Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve
- Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required
- Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome
- Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives
- Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding
- Ofcom will consult widely with relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market²

time non-executives. Ofcom has done away with this. We have six non-executives and three executives including the chief executive on the Board – and it works. The combination of a non-executive chairman in Lord Currie and a chief executive in Stephen Carter, which is now the model of corporate governance in the UK for all listed companies, also works. The new converged ACMA here, by contrast, has decided to combine chief executive and chairman roles.

Team working

One other thing to note about the Board which is another success factor, in my view. Under David Currie's leadership, the Board of Ofcom operates as a team, as a collegiate entity. There is much open and robust debate in the boardroom but all members, without exception, support

the decisions taken when the boardroom door opens. To date there has been no single leak from either the main Board or the Content Board (touch wood again) thus collegiality is combined properly with, and reinforces, corporate discipline. How the senior people in any organisation behave (what they do as distinct from what they say) affects and infects people throughout the organisation.

People

Getting the people right and getting the right people in Ofcom have been crucial. It is a truism in all organisations whether private or public. Getting the people right starts at the point of recruitment but does not stop there – Ofcom has introduced a strong process of performance management, performance appraisal, performance-based pay which any private sector company would be proud of and many public sector organisations might be fearful of.

I believe that Ofcom, both in human resources matters and elsewhere, offers a new model for running a UK public sector body, combining the best of private and public sectors. We require, like many professional services firms, time-sheets to be filled in. These ensure that our costs are appropriately charged to the right industry sectors since they, not taxation, pay for most of Ofcom's expenditure.

Whilst in the team environment that is Ofcom it would be invidious to pick out any one person, I am going to break that rule too. This is a retrospective, as I said at the beginning! Stephen Carter, the chief executive of Ofcom, has been and is a central factor in our success. He came from the private sector, with no experience of the public sector. He has managed in my view to combine the best qualities of the private sector (hard driving, performance-focussed, cost reducing) with the best qualities of the public sector – the aspiration to deliver public value and public service to citizens and consumers in the UK. He is young – or rather he was when he joined us in February 2003!

Stephen has selected and managed to attract, Pied Piper like, a very talented senior group to work with him. He leads from the front and has a quite remarkable ability, I call it bandwidth, to operate and negotiate and communicate across the extraordinary width of Ofcom's convergent statutory responsibilities from spectrum to telecoms and broadcasting. A width that non-executive board mem-

bers like myself do on occasion struggle with. As people in this room will know well, the art of regulation is to get the right balance between strategic policy overview at thirty five thousand feet and absolute attention to detail (especially process) on the ground.

An entrepreneurial regulator?

There is an entrepreneurial air to Ofcom's approach to regulation which might surprise people and might on occasion be more reminiscent of the private sector than the public sector. There is an element of deal-making in Ofcom's approach to some big regulatory issues, getting people around a table and hammering out an acceptable solution and way forward. Whilst there is and has to be great attention to process, process should not suck the regulator away from finding lateral, creative, innovative interventions. There needs to be a balance between speed of decision-making and care for process detail. To move regulation forward, Ofcom has to be prepared to take risks and not become risk-averse which is the natural tendency of a bureaucracy. Reducing regulation involves risks (and opposition from interested parties) whereas regulatory creep is less risky. Ofcom does not like regulatory creep – nor for that matter regulatory creeps.

Evidence-based regulation

It is easy, especially in broadcast regulation, to lapse into anecdotal generalisations and rather ill-informed value judgements. Ofcom has allocated much resource to researching the topics thoroughly that we are required to rule on. The evidence gathering around the complex issue of food advertising to children in relation to obesity, for example, has been of a consistently high quality and has played a major role in our decisions and the Government's. In our creation of the new Ofcom Broadcasting Code (replacing the codes of the previous regulators), we relied on a combination of research and the views of stakeholders – some 900 responses to our consultations. A huge amount of evidence. Evidence-based regulation works.

Size matters

When Ofcom was created, there was much talk that it would be too big and too powerful. There was talk of a need for a plurality of content regulators by people like Greg Dyke, the previous Director General of the BBC. But there is

no doubt in my mind that Ofcom's size has been a success factor. It has allowed us to be properly evidence-based as just discussed, to do deep level research and high quality policy. It has allowed us to hire quality people in a range of functions including for example competition law, and offer these people real career development paths. I sense that the companies we regulate, including the very big ones like the BBC, ITV, BT and BSkyB, believe that we have earned the right to be treated with respect.

Independence

One final success factor. When talking to regulators around the world, I find they are especially interested in the extent to which Ofcom operates independently of Government. Ofcom is statutorily a creature of Parliament and not of Government. I believe that Ofcom has in its opening years successfully trodden the difficult line between keeping the Government fully informed, involving the Government in the debates, ensuring the Government makes the decisions that it is required to do (the dates of Digital Switchover for example), whilst remaining firmly independent of Government. Recently, for example, Ofcom published its response to the Green Paper on the BBC Charter Review. We did not agree with some key aspects of Government thinking. A modern regulator, to be successful, must keep its independence from all stakeholders including the Government whilst fully consulting all of them. It must also concern itself with making what it feels to be the right decisions, which are not necessarily the popular decisions or the decisions which will play well in the media on the following day. Good regulatory decisions are made for the long term and not for the flotsam and jetsam of tomorrow morning's headlines. The Ofcom Board and Content Board do not allow the PR implications of a decision to be considered until after the decision has been made. That is the right sequence. Decide first what is the right course of action and only then consider the handling issues.

Issues of concern

I would like to conclude by noting the five key challenges that Ofcom faces.

Keeping young

The first is how to keep the organisation young and diverse (in terms of gender and ethnic background). For those of you

who have experienced start-ups, there is a special quality in the air, a special sense of purpose, of doing new things, of inventing the future. Ofcom does not want to lose this as it moves into its third year of regulation, and as some of the pioneers like myself move on to new lives outside Ofcom. Stephen Carter has just done a significant reorganisation of Ofcom, giving existing people new challenges and opening doors to new recruits at senior level, thus refreshing the organisation. We want to encourage more of the American-style interchange between private and public sectors – thus enriching both sides and giving really creative career paths to bright young people.

Consumer policy

The second challenge is to get the balance of our policy towards consumers, especially in telecoms, right – not an easy thing to do for one reason. The Ofcom Board believes that its major task is to create and sustain competitive markets because those bring maximum consumer benefit. That is to say, Ofcom acts on the market and the market acts on consumers bringing them benefit. The consumer lobby often wishes Ofcom to act directly on consumer deficits, for example informing consumers directly about the complicated price structures in the five operator mobile telecoms market. That consumer lobby can also be quite antagonistic towards competition as the force that will bring consumer benefit. In the UK, but much less so from my experience in the USA or in Australia, the consumer can be heard to complain of too much choice. The political left in the UK has historically been sceptical about the power of competition and of competitive markets.

Whilst we are clear that we have a consumer protection role in telecoms (not to mention broadcasting), we are less keen to take on any major role of consumer empowerment/information, believing that is better done by the market and consumer groups themselves.

Yet, paradoxically, our work on media literacy (a statutory requirement) is spreading into so many different policy areas where we need the consumer and the citizen to be better informed, to be more media and communications literate – because we want to be lighter touch, less interventive and more deregulatory. Communications and media literacy are critical to our aspiration to roll back sec-

toral regulation and encourage more self- and co-regulation. An old Ofcom joke points out that there are two regulators in every pommy living room – Ofcom and Ofswitch.

Spectrum liberalisation

Thirdly, our policy towards spectrum allocation already mentioned, from command and control to market liberalisation, can cut across the interests of incumbent operators in telecoms or broadcasting as a result of previous regulatory decisions. For example, UK mobile operators are not necessarily happy at the prospect of spectrum being liberalised in such a way as to introduce new mobile competitors. UK broadcasters have traditionally had rather privileged access to spectrum without debate. Moving spectrum allocation more towards market mechanisms challenges these traditional attitudes. Australia's experience of auctioning commercial radio licences is followed with interest in Ofcom. We are required by statute to use the 'beauty parade' method for *Broadcasting Act 1990* (UK) licences.

Execution

The fourth challenge is to execute the fine detail of the conclusions of the Telecoms Review in relation to the future of BT regulation. Ofcom has developed a strong reputation for policy and strategic thinking, now its execution skills will be tested.

It may be a peculiarity of the British public sector that more status is accorded to policy-making than to service delivery and execution. We try to reward and incentivise both more equally.

The Telecoms Review requires major organisational and behavioural changes within BT. We are confident that BT's wholesale and economic bottleneck products, in the local loop but not just the local loop, can be provided to BT's retail arm on a strictly equivalent basis to the way those products are provided to BT Retail's service and infrastructure competitors such as Cable & Wireless or Carphone Warehouse.

Australia faces the classic conflict between the Government wanting to get as much dollar as possible in the sale of its final shareholding in Telstra, and the possible need to constrain Telstra to create a more effectively competitive future market.

I would urge Australian regulators to think seriously about how they regulate

those parts of Telstra which are enduring economic bottlenecks – a euphemism for the good old natural monopoly! Unlike the USA or Hong Kong, we did not feel in the UK environment that the problems would be solved readily by intermodal competition, for example competition between cable operators and BT.

Content regulation in the digital age

The fifth and final challenge is content regulation in the multi-platform multi-channel digital age – worth a speech all on its own¹.

The European Commission appears to be keen, in current discussions to update the "Television Without Frontiers" Directive, to extend the scope of regulation to non-linear audiovisual content on any platform including the Internet. This would clearly go beyond the current rules for regulating linear audiovisual content on only broadcasting platforms. Ofcom is not so keen.

Yet there are important issues here where a convergent regulator finds itself not very convergent. For example we can uphold a fairness complaint within a TV programme but not if it is on the programme-related website.

Conclusion

I have tried in this retrospective to give a flavour of Ofcom. It has created huge interest around the world, so much so that we are having to ration visits from time to time. I have tried to pick topics that would interest Australians. But as I said in the opening words of my speech here on April 30th 2002: "A visiting Pom travels cautiously through Australian conferences. Whilst he can give plenty of needed advice and instruction to Australians on matters such as how to win at cricket or rugby union, he is wisely more humble on matters concerning public policy, broadcasting, regulatory regimes."

¹ A speech I gave on this subject in Hong Kong in August 2005 can be found on the Ofcom website: www.ofcom.org.uk

² Ofcom website: www.ofcom.org.uk