Will A New Communications Act be Allowed to Work?

Mark Armstrong discusses the political context affecting communications law reform.

A new Communications Act for the information age is a good idea, but will it be subverted? The answer depends on whether institutions which now deal with the media will be reformed. A new Act could offer a revised taxonomy of the new and old media platforms, but fail to meet the challenges in practice.

The Minister reportedly told the Australian Information Industry Association in July 2010 that "If elected, the Labor government will move to commence a comprehensive review of communications regulations", to consider things such as:

- all media platforms, including free TV, subscription, video on demand, IPTV and mobile TV;
- appropriate licensing, regulatory obligations and consumer protection arrangements across all platforms;
- audience reach rules for television; and
- how Australian content can be delivered in future.

Those topics all deserve analysis, followed by bold decisions for the future. However, some people calling for the review may not have thought about what will make reforms viable in the information economy.

Here are a few illustrations of essential changes needed to give any substantive changes in the law a chance of success. They show how decisions about media platforms have been dealt with in the last 10 years, mostly involving the Broadcasting Services Act 1992 (Cth) (**Broadcasting Services Act**). The same issues will affect new platforms including the Internet, mobile, VOIP and other services under any new laws, whatever the titles of converging Acts.

Can the continuous amendments be stopped?

Most of the laws which now distress people are to be found in the Broadcasting Services Act. When enacted in 1992, it had a simple, coherent scheme. The original Act was about 10 per cent the size of the current version. One might agree or disagree about particular policies contained in the Act. Nevertheless, there was a consistent, durable structure and set of concepts. The scheme of that original Act could have been updated organically over the last 20 years, to resolve most of the issues which are now causing distress. The reason we have a mess is not some inherent problem in the 1992 Act. The mess has been created by frequent, short-sighted amendments.

As each of the new services and issues came along, including various forms of digital broadcasting, datacasting, IPTV, Internet, 'anti-siphoning', local content in regional areas and Internet censorship, they could have been accommodated within the original structure, or the structure could have been expanded in a consistent way. Instead, each change was inserted in a sheaf of prescriptive, turgid pages.

The 1992 Act was like a cleanly-written computer program. The continuous amendments have been like patches added by later programmers, written in spaghetti-style code, with little regard for the logic or structure of the original. As each year passed, the disregard for the parent Act became greater. Why would anybody want the communications laws to be turned to spaghetti?

Unless we can expose the causes and stop them, the huge effort of revising the current Acts will make little difference. The temptation is to blame parliamentary counsel for bad drafting, but the real causes lie in the modus operandi of governments since 1992.

Ministers or media managers?

The greatest single cause is that over the last 20 years, the executive government has tried, increasingly, to directly micro-manage communications: especially media, which are of more interest to governments than any other sector. The Coalition and Labor parties seem to have been in competition to see which of them could exert the highest level of direct control over media growth. Perhaps they share the winner-takes-all idea: when you win government, all the spoils are yours to distribute. Ironically, much of this intervention was disguised as advancing competition, deregulation or micro-economic reform.

The Fraser and Hawke governments had a less interventionist approach to media. The current trend seems to have started with Senator Graham Richardson, who became Minister at the key stages of drafting instructions for what became the Broadcasting Services Act. The modus operandi he explained in his 1994 book Whatever it Takes has persisted throughout the Howard era from 1992 until the current day.

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The Minister-driven approach is based on personal negotiation and dealmaking. When the Minister has completed negotiations with the parties, it is time to cement the deal. If it were a negotiation between private parties, a contract would be signed. But since we are dealing with public policy, what better instrument than an Act? So the Parliament is used as a kind of notary public, to entrench the deal into Australian law. That seems to be a reason why amendments to the Act tend to ignore the fabric of the parent Act. The purpose of the amendments is to entrench the details of the deal, not to update the Act.

In a Parliament with a mind of its own, amendments would take the form of principles and basic rules, to be applied through the ordinary processes of public administration. But in modern Australia, Ministers and governments have not usually trusted public administrators to decide on the merits how to implement the principles. Their goal is to ensure that nothing will be changed without the consent of the parties.

Restoring parliament's role

Are there any prospects that the forward-looking principles of a new Act will be respected by governments in future? The best prospect would be for the houses of parliament to function as they are intended, rather than tolerating shoddy amendments. Two developments raise some hope: a new House of Representatives in which independents might succeed in some procedural reform; and a Senate in 2011 where the Greens might restore scrutiny and lawmaking. The Democrats ensured that that function was per-

formed in the time of the Fraser and Hawke governments. The major parties tend to compromise themselves on media issues, so minor parties are particularly important.

The 'winner takes all' approach of the major parties has some unintentional allies among the big Commonwealth departments, especially Treasury and Finance. We can be grateful that these departments are aggressive watchdogs, always ready to guard the public purse, and to seize any opportunity for new revenue. Then there are departments like Prime Minister and Cabinet, keen to remove any obstacles to the goals of the Prime Minister. That is healthy too. The problem comes when there is no counter-balance to these imperatives.

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In the last decade, the parliament, the courts, and the rule of law have often been derided as obstacles to 'the Government' (meaning of course the executive government) from implementing its plans. Due process has often been derided as a selfish attempt by lawyers to make money for themselves. If the executive government announces that a change constitutes economic reform, then of course the Parliament (and by implication the Constitution) have to 'get out of the way.'

A good example of recent thinking by federal departments was the Uhrig Report of 2001, which told us that 'the role of government is to govern'. This report recommended that Ministers should be given increased their control over statutory bodies. This led to the executive seizing even more control over the Australian Communications and Media Authority (**ACMA**) through the neutral-sounding Financial Management and Accountability Act 1997 (Cth)

Many people are unaware that powers given by the laws to Ministers are actually exercised by Departments. Furthermore, there is a hierarchy of Departments. Regardless of which party is in power, PM&C, Treasury and Finance are at the top, and Communications is usually towards the bottom. So the Department of Broadband Communications and the Digital Economy often gets the blame for policies for which it is only an agent of the big departments.

A classic case of the hierarchy is in spectrum allocation. Finance and Treasury are major participants in spectrum policy. They aim to extract the maximum revenue in the shortest time from broadcasters and telcos. This tax-gathering attitude to a public resource is nicely concealed by the mantra that spectrum fees are determined by auction. So the market is demanding high prices, not the government. This overlooks the reality that there are many different ways to parcel the spectrum for sale, and the packages which ensure the highest price in the short term are not necessarily the most efficient.

Executive government and media independence

The example of spectrum allocation links back to another challenge for the writing of any new Act. A durable, efficient Communications Act would need to be implemented by an authority with expertise and independence. Without that, the Act would need to be excessively detailed, and subject to the same flood of amendments which made spaghetti of the Broadcasting Services Act, the Telecommunications Act 1991 (Cth) and the Radiocommunications Act 1992 (Cth); and for that matter the Broadcasting & Television Act 1942 (Cth). Will the executive government tolerate an Act based on stated principles, plus an authority which implements those principles with the level of independence found in most developed economies?

The opposite result would come from a Communications Act which confirmed the trend of the last 10 years. The executive government would be intervening in a whole range of issues about information and freedom of speech. The problem is that the executive government is an interested party: in fact, it is the most interested party of all. Governments have a close interest in being favourably treated by the media, new or old, in print or online.

All governments spend a lot of their time cultivating favourable coverage. That is why nearly all developed countries have an independent regulator, and usually an independent planning and policy body. The big exception is Italy, where the influence of the media proprietor/prime minister Berlusconi seems to override the institutions.

The Broadcasting Services Act saw the Australian Broadcasting Authority (**ABA**) created with a narrower role than its predecessor. Even the function of the former Broadcasting Tribunal to assemble information about broadcasting, and the obligation to make information available, were removed. So were most of the public processes which provided the opportunity to test and challenge the information on which decisions were based.

Another example of the gradual erosion of rights related to international covenants. One of the few opportunities to raise freedom of communication issues, namely section 160(d) of the Broadcasting Services Act was repealed in 1999. A rather technical explanation for this, involving the CER treaty with New Zealand, was offered to the Parliament. There was no reference to the fact the change would shut the door to the ABA being forced (or even allowed) to consider free speech issues raised under the International Covenant on Civil and Political Rights. The limits on the ABA were then transferred to the ACMA, which we now have.

Thinking ahead

We have reached the point where there is little similarity between the authorities which deal with new or old media content in Australia and the organisations with which it used to be compared, such as: the FCC (US), the CRTC (Canada) or Ofcom (UK) and the other Western European countries. People often say how much useful information is to be found in the reports which come from those sources. They rarely consider why we no longer have those sources in Australia.

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In the last 10 years, how many Australian reports have offered frank, forward-looking or positive directions for the future of our media? There has been plenty of good, conscientious work by dedicated people in our organisations, but it is difficult for people tied to the executive government to offer fresh and positive thinking. Rightly or wrongly, they are not permitted to challenge the status quo. They are more likely to focus on 'enforcement' which is what you can expect when the official structure does not allow forward thinking.

The point of all this is that our institutions have been degraded by political conflict of interest and by parts of the executive government which have no interest in communications. Until reform of those structures is demanded by the Parliament or communications players, then no rewriting or merging of Acts or re-categorising of different kinds of media is likely to do much good.

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