# The Convergence Review - Did ISPs and Carriers Get Off Lightly?

## Thomas Jones and Jennifer Dean consider the potential implications of the Convergence Review Report for ISPs and telecommunications carriers.

Despite broad terms of reference – which included examining the operation of media and communications regulation in Australia and assessing its effectiveness in achieving appropriate policy objectives for the convergent era – the Convergence Review committee (the ***Committee***) focussed less on the role of internet service providers (***ISPs***) and carriers in the converged media environment than might have been expected.

Indeed, the ISPs and carriers have largely escaped additional regulation proposed in the Committee's final report (the ***Report***). However, even if they are adopted, there is no guarantee that the initial regulatory framework proposed by the Report (including in particular the thresholds for assessing influence) will remain unchanged. Moreover, given the growing recognition by ISPs and carriers of the critical role that content will play in differentiating their services, it seems likely that the number of users of content provided by ISPs and carriers, and the revenue that ISPs and carriers generate from that content, will continue to increase. For these reasons they may well face increasing levels of regulation over time.

**Depending on the levels at which the revenue and audience thresholds are set, this approach could lead to a significant shake-up of media regulation and, in particular, to major changes in the way content delivered over the Internet is regulated.**

In this context, it is disappointing that the Committee did not squarely address some of the most difficult questions associated with convergence, for example, how are ISPs that operate in Australia and overseas to be regulated? and what degree of control over content will be sufficient to attract regulation?. Until these (and other) issues are resolved, the 'holy grail' of a workable regulatory framework that recognises the fundamental differences between delivery platforms, but nevertheless produces consistent outcomes across those platforms, is likely to remain elusive.

### 1. The new concept of the 'content service enterprise'

The large majority Committee's recommendations are directed at those entities that the Committee sees as the most influential in the Australian media landscape. A key, and perhaps surprising, finding by Committee is that the entities that continue to exert significant media influence are the providers of traditional media (free-to-air television, subscription television, radio and newspapers), notwithstanding that in many instances they are now providing content via alternative platforms.[1]

One of the Report's principal recommendations is that regulation, in terms of media ownership and content, should no longer be tied to specific ***kinds*** of businesses (for example, free-to-air television, radio and newspapers), but rather should target all enterprises that:

- have ***control*** over the ***professional*** content they supply;
- have a large number of users/audience members in Australia; and
- receive high levels of revenue from supplying that content, regardless of the platform over which their services are delivered.[2] These enterprises are to be designated 'content service enterprises' (***CSEs***).[3]

Depending on the levels at which the revenue and audience thresholds are set, this approach could lead to a significant shake-up of media regulation and, in particular, to major changes in the way content delivered over the Internet is regulated. When the Convergence Review Interim Report (the ***Interim Report***) was released last year, there were suggestions that the Committee was seeking to 'regulate the internet'.[4]

However, if the proposed thresholds ($50 million per annum in Australian-sourced professional content revenue and more than 500,000 viewers/users per month) are adopted, it is likely that the only enterprises to qualify as CSEs will be those that are already regulated under the *Broadcasting Services Act 1992* (Cth) (***BSA***).[5] Preliminary analysis by PricewaterhouseCoopers suggests that, while the merged Foxtel/Austar business may be subject to media ownership restrictions for the first time, the other entities that would qualify as CSEs are free-to-air television providers and the larger radio and newsprint operators.[6]

On one view, the ISPs and carriers operating in the content space appear to have escaped the proposed regulation. However, there are a number of questions in relation to ISPs and carriers that the Review does not address, creating a level of uncertainty for these sectors.

First, while it will be a relatively simple matter for a free-to-air television station or newspaper to determine the amount of revenue it generates from professional content, the same cannot necessarily be said for new media. For example, where an ISP, carrier or other internet content provider makes a combination of professional and user generated/amateur content available via the same Internet portal, what is the appropriate mechanism for determining the proportion of revenue that is attributable to the professional content?

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1 Commonwealth of Australia, *Convergence Review Final Report,* 7-10 (the '***Report***')

2 Ibid, 10.

3 See, eg, Ibid, 2.

4 See, eg, Ibid, 13; Bernard Keane, *Convergence Review: Time to Regulate the Internet* (15 December 2011) Crikey <http://www.crikey.com.au/2011/12/15/convergence-review-time-to-regulate-the-internet/>.

5 See above n 1, 12.

6 Ibid, 12.

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Secondly, there is a question about how 'control' of content is to be assessed. A critical issue for carriers and ISPs will be whether they only control content that they explicitly offer to their customers or whether they control other content that is delivered via their services as well.[7]

Thirdly, according to the PricewaterhouseCoopers research, a relatively small increase in revenue or customers may lead to Telstra qualifying as a CSE under the thresholds currently being proposed.[8] Moreover, as carriers and ISPs increasingly move into the content space, it seems likely that more carriers and ISPs are likely to qualify as CSEs. This will raise difficult questions for carriers and ISPs about how to manage their regulatory obligations and the possibility that they may move in and out of the sphere of regulation due to fluctuations in revenue and users.

## 2. Impact of media ownership changes

The key recommendations of the Report in relation to the media ownership rules include reformulating the 'minimum number of voices' test as a 'minimum number of owners' rule to better reflect the national reach of many content sources in the internet age, and the introduction of a national public interest test for changes of control that are nationally significant.[9] The Report also recommended the elimination of broadcasting licences along with the 'one to a market', 'two to a market', 'two out of three' and the '75 per cent audience reach' rules.[10] The changes are likely to enable a certain amount of consolidation in metropolitan areas where there are a larger number of 'voices' and markets are less concentrated.

Perhaps the most significant issue for carriers and ISPs, given that they may not qualify as CSEs immediately, is how entities that sit at the margins of the proposed revenue and audience thresholds, will be affected. This is an issue that Telstra in particular may face in coming years.

In the Report the Committee stated:

> [t]he Review is not recommending forced divestments of media interests to ensure that a media group complies with the [proposed minimum number of owners] rule. As in the current scheme, the proposed scheme would simply prevent changes in control that would lead to a reduction in the number of owners in a media market.[11]

This may avoid some of the more severe effects for an enterprise. However, it may become extremely difficult for enterprises on the cusp of the CSE thresholds, or that may move in and out of the sphere of regulation for a period, to effect changes in ownership, mergers or acquisitions.

## 3. Competition-related content issues

The importance of access to content for traditional and new media players should not be underestimated. As the Committee points out, 'access to premium content, such as first-release movies and live sport, can be vital to ensure the success of media platforms including new and emerging platforms.'[12] Although dealing with alleged copyright infringement (and not competition law issues), the recent Optus TV Now decision also underlines the increasing significance of content, and exclusivity of content, for carriers.[13]

One of the more controversial proposals in the Report is that the new communications regulator be given ex-ante rule-making powers and the power to issue directions regarding competition-related content issues such as exclusive content rights, bundling, net neutrality, and metering.[14]

This recommendation may have significant implications for the business models of many ISPs and carriers. Providing un-metered content from preferred sources, throttling data from other sources and bundling content and services are all common features of many internet and telecommunications services plans.

**For carriers, the proposed arrangements seem to leave open the real possibility that different sets of rules may overlap or that their interaction may produce unintended consequences.**

The proposed new rule-making powers are intended to 'complement' the existing powers of the Australian Competition and Consumer Commission (the '***ACCC***') under the *Competition and Consumer Act 2010* (Cth) (***CCA***).[15]

The Report notes that arrangements in which separate regulators have concurrent responsibility can be found in other jurisdictions, specifically in the UK, the US and Canada.[16] While this may well be the case, the arrangements proposed by the Committee in the Report appear to be particularly complex. The Report proposes that the new communications regulator would be empowered to exercise rule-making powers in relation to content issues, while the ACCC would retain responsibility for regulating content issues via the general anti-competitive conduct provisions under Part IV of the CCA.[17] In addition, the ACCC would remain responsible for telecommunications-specific regulation under Part XIB and Part XIC of the CCA

7 The decision in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 arguably supports a more confined view of what content an ISP controls. However, that decision related to copyright and in the context of CSEs, much will turn on how any amending legislation is ultimately drafted.

8 Above n 1, 12.

9 bid, 18–27.

10 Ibid, 1–2, 18.

11 Ibid, 22.

12 Ibid, 30.

13 See *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012).

14 Above n 1, 28–30.

15 Ibid, 28.

16 Ibid, 123–7.

17 Ibid, 29–31.

18 Ibid, 29–31.

**However, the question of what can be reasonably required of ISPs in this context is an issue that has been subject to considerable debate within the industry and is one that the Report does not engage with or elaborate on.**

as well as regulation of telecommunications facilities access under *Telecommunications Act 1997* (Cth) (***TA***), with these powers to be reviewed after the National Broadband Network is implemented.[18]

For carriers, the proposed arrangements seem to leave open the real possibility that different sets of rules may overlap or that their interaction may produce unintended consequences. This is particularly so in circumstances where a carrier is using a listed carriage service and/or elements of its own network to provide a content service and may thereby be simultaneously subject to both content-related rules and the CCA and the TA access regime in relation to the same activity.

The proposal put forward in the Report would also require the new communications regulator to have a high level of competition expertise available to it, which may largely duplicate expertise within the ACCC, particularly with respect to competition issues in the telecommunications sector.

## 4. Content standards

The proposed changes to the content standards regime would see the complaints-based Schedule 5 and Schedule 7 of the BSA, which currently regulate restricted and prohibited content on the Internet, replaced with a national classification scheme.[19] The national classification scheme (recommended by the ALRC in its final report to the Federal Government dated 28 February)[20] and adopted by the Report would apply to all media, regardless of the delivery platform, and would require content providers to 'take reasonable steps' to restrict access to adult content (18+ or X18+) distributed to the Australian public.[21]

The Report quite sensibly suggested that what is 'reasonable' would depend on the delivery platform.[22] However, the question of what can be reasonably required of ISPs in this context is an issue that has been subject to considerable debate within the industry and is one that the Report does not engage with or elaborate on. Given the sheer volume of adult content online (as acknowledged by the ALRC),[23] even requiring low-level monitoring of content by carriers, ISPs or other providers of content may represent an onerous obligation and/or substantial increase in costs. Ultimately, the extent to which any proposal is workable will depend in part on which enterprises are treated as content providers under the scheme.

The additional changes proposed may also see media standards, children's content obligations (where applicable to non-linear programming), technical standards associated with restricting access to content, and Australian content obligations apply to larger ISPs, carriers and other internet content providers for the first time. This may not be a bad thing. However, as with media ownership rules, entities that are sitting just below the CSE thresholds, or moving in and out of the sphere of regulation due to fluctuations in user numbers or revenue, may struggle to manage compliance.

## 5. Spectrum allocation and management

The Review recommends an overhaul and simplification of the current licensing regime. Instead of broadcasting licences which entitle broadcasters to apparatus licences, the Review recommends moving to spectrum licences (under the *Radiocommunications Act 1992* (Cth), rather than the BSA) with market-based pricing to apply. The Review also recommends amending spectrum planning mechanisms to explicitly take public interest considerations into account.[24] In part, these suggested changes are driven by a desire to promote freedom of communication by removing licensing requirements for a subset of content delivery platforms.[25] They also reflect a recognition that the current spectrum regime fails to ensure that a scarce resource moves to its highest value use, thereby promoting consumer welfare.

**Given the valuable nature of this spectrum and the explosion in the volume of mobile traffic, participants in the telecommunications industry may question whether this recommendation represents the highest value use of that spectrum.**

In relation to the sixth multiplex, the Report said that capacity should continue to be used for distribution of community television services as well as being made available to new and innovative services that will increase diversity.[26] Given the valuable nature of this spectrum and the explosion in the volume of mobile traffic, participants in the telecommunications industry may question whether this recommendation represents the highest value use of that spectrum.

## 6. Conclusion

The Federal Government and the Opposition are both yet to respond to the recommendations put forward in the Report. Accordingly it is difficult to judge how many of the proposed changes will be adopted. Moreover, much of the detail associated with the implementation of the proposals has been left to be resolved by the new communications regulator. This approach has meant the Report could sidestep some of the more intractable problems associated with a truly converged regulatory framework.

Nevertheless, political imperatives together with the solid commonsense of many of the Report's recommendations (particularly those which lead to a simplification of the existing regulatory regime) suggest to us that some action by the Government is likely.

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19 Ibid 44–47.

20 Australian Law Reform Commission, *Classification — Content Regulation and Convergent Media: Final Report,* Report 118 (2012). The Final Report can be viewed on the ALRC website under Publications.

21 Above n 1, 44–47.

22 Ibid, 46.

23 Above n 20, 26.

24 Above n 1, 88.

25 Ibid, 4.

26 Ibid, 88.