Convergence Review: Wide-Ranging Reform on the Horizon

Ian McGill provides a snappy overview of the Convergence Review Committee's much-anticipated final report and discusses the reforms and the potential implications for media and communications industry participants.

The Convergence Review (the ***review***) was established in early 2011 by the Federal Government, to assess the policy and regulatory frameworks that apply to the increasingly converged media and communications landscape in Australia. The review's scope was determined by Terms of Reference set by the Government.[1]

The review's final report (the ***report***) presents the review's findings, and provides thought provoking and considered recommendations to the Federal Government in relation to media and communications delivery platforms and content.

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The report also considers and integrates the recommendations made by two other reviews that ran parallel to the Convergence Review and reported to the Federal Government in February this year: the Independent Inquiry into the Media and Media Regulation, undertaken by the Hon Ray Finkelstein QC (the ***Finkelstein Inquiry***); and the National Classification Scheme Review, *Classification – Content Regulation and Convergent Media* (the **Classification Review**), undertaken by the Australian Law Reform Commission.

Despite the broad scope of findings articulated in the report, several relevant areas still need to be integrated into a coherent convergent regulatory regime, particularly copyright reform and the anti-siphoning scheme. The report refers to the anti-siphoning scheme, but understandably falls short of making any detailed recommendations on that highly political regime, noting that it was recently the subject of a government review. The report does state, however, that the new communications regulator would administer any future anti-siphoning scheme and recommends a full review on the scheme within five years.[2] Since the report has been released, a Senate Committee has recommended that a Bill to amend the scheme be passed by Parliament with minimal amendments)[3]. The legislation may well continue its legislative passage when Parliament sits in June this year.

This article steps through the background and context of the review, and considers the proposed reforms and some of the key implications for industry participants.

Regulatory focus

In a significant departure from the existing regulatory regime, the report considers that the focus of regulation should be on significant enterprises that control professional media content, irrespective of the platform that they use to deliver such content. The report, accordingly, proposes a concept of content service enterprises (***CSEs***), which would broadly refer to organisations that have:

- control of professional content they deliver;
- a large number of Australian users; and
- a high level of Australian-based revenue derived from supplying that professional content to Australians.

The precise thresholds applicable to CSEs would be set by the new statutory regulator, though the report recommends that the initial threshold for users be 500,000 per month and that the threshold for revenue be $50 million a year of Australian-sourced content revenue only. Although existing online providers (such as Telstra, Google and Apple) are unlikely at present to meet these thresholds, this may not be the case in the future.

The report has added the requirement of 'professional' content to the criteria specified in the interim report and confirms that it does not intend to focus on user-generated content published on social media sites. The report did note, however, that platforms that host user-generated content could be classified as a CSE where they have financial arrangements with professional content providers; for example, revenue-sharing advertising arrangements. Even though the platform operator does not have direct editorial control over the program, the report proposes that the financial arrangement may constitute control over the content.[4]

Who would regulate?

The report recommends the establishment of two new bodies that will regulate the media and communications industry:

- a new statutory regulator that would replace the ACMA; and
- an industry-led body to oversee journalistic standards for news and commentary (the news ***standards body***).

A new statutory regulator

The report recommends that a new statutory regulator (the ***regulator***) be established immediately that enabling legislation is passed. The regulator would commence work on the concepts that will underpin the framework (including the CSE thresholds referred to above). Once the proposed phasing out of the broadcasting licence

1 Commonwealth of Australia, *Convergence Review Terms of Reference,* http://www.dbcde.gov.au/__data/assets/pdf_file/0019/133381/Convergence-Review-Terms-of-Reference.pdf.

2 Commonwealth of Australia, *Convergence Review Final Report,* p. 35.

3 See the Broadcasting Services Amendment (Anti-siphoning) Bill 2012 and the Report of the Senate Environment and Communications Legislation Committee dated May 2012.

4 Above n 2, 11.

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regime has been completed, the regulator will replace and assume the remaining functions of the ACMA.

The regulator would be independent and operate at arm's length from the Government. Significantly, ministerial control of the regulator would be only through disallowable legislative instruments, not general directions. This differs from the existing framework, which gives the Minister an unfettered power to give the ACMA directions in relation to its non-broadcasting and non-online content functions.[5]

The report recommends that the regulator take the form of a statutory corporation managed by a board that has full power to act within the constraints of the law. The regulator would have broad powers to make rules (subject to ministerial direction in limited cases only). The regulator would, nonetheless, be held accountable for its decisions under existing parliamentary, judicial and administrative arrangements; for example, disallowance by Parliament, merits review by the Administrative Appeals Tribunal and judicial review. The report floats the suggestion that the regulator could also be supervised by a joint parliamentary committee, which would operate in a similar manner to the Parliamentary Joint Committee on Corporations and Financial Services.

The report also recommends that the existing practice of cross-appointments on a part-time basis between the regulator's and the ACCC's boards continue.

Following the Classification Review's excellent recommendations, the regulator would be responsible for the new national classification scheme for media content standards applying across all platforms, and also incorporate a new Classification Board.[6]

The regulator would also be granted specific new powers in relation to:

- *CSEs* – responsibility for threshold classifications, administering the media ownership tests, and monitoring compliance with Australian and local content standards;
- *content standards* – discretion to determine standards, complaints and investigation proceedings, as well as direct enforcement powers in response to breach of codes or standards; and
- *competition* – rule-making and investigative powers where content-related competition issues are identified, complementing ACCC functions and powers.

News standards body

The report recommends the establishment of an independent self-regulatory news standards body with responsibility for the content standards that apply to news and commentary across all platforms (not just traditional print media). The news standards body would develop and enforce a code aimed at promoting fairness, accuracy and transparency in professional news and commentary.[7] The body would absorb the functions currently performed by the Australian Press Council and also the ACMA (but only in relation to news and commentary).[8]

CSEs would be required to be members of the body, though other professional news and commentary providers would be encouraged to opt in to membership. National broadcasters would not be required to join the news standards body but should take into account the standards and procedures developed by this body in formulating their own codes.

Significantly, the report considers that membership could be a condition of retaining legal privileges currently provided for news and commentary in federal legislation. The board of the new body would comprise a majority of directors who are independent of members.[9]

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The recommended formulation of an industry body to oversee the development and application of the news and commentary standards sits in contrast to the Finkelstein Inquiry, which recommended a statutory authority as the appropriate body for these purposes. The report considers that a statutory authority should be an option of 'last resort'.[10]

Although industry-led, the new body would nonetheless have a range of remedies and credible sanctions available to it, including requiring members to publish findings on particular media platforms.[11] It would also be able to refer serious breaches of the code to the regulator.[12] Likewise, the regulator would be able to refer matters for investigation to the news standards body.[13]

The majority of funding for the body should be contributed by its members; however, the Government would also contribute funding to meet a shortfall or to fund specific projects.

Media ownership

The report recommends the following three key changes in relation to media ownership.

Reformulation of 4/5 rule

The existing 'minimum number of voices' or '4/5' rule, which requires there to be no fewer than five media operators or groups

5 The report notes that, rather than increasing the resources required to regulate the industry, the arrangements proposed, including the removal of the broadcast licensing regime and duplication in the classification scheme, should free up existing regulatory resources. Ibid, xiii.

6 Ibid, 38.

7 Ibid, 30.

8 Ibid, xiv.

9 Ibid, 51.

10 Ibid, 37.

11 Ibid, 51.

12 Ibid, 38.

13 Ibid, 37.

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in a metropolitan commercial radio licence area, and no fewer than four in a regional area, should be amended to 'minimum number of owners'.[14]

The regulator would administer the rule and be able to provide exemption in circumstances in the public interest (which would generally be in relation to availability of services and content). The existing concept of a 'commercial radio licence area' would be removed and the geographic scope of the new local areas determined by the regulator.

New public interest test

The report recommends the introduction of a public interest test to apply to proposed changes in control of CSEs that are of national significance.[15] The regulator would have the power to block such transactions that are not in the public interest.

The regulator would define the criteria for 'national significance', but a minimum threshold should be provision of content service in multiple markets and more than one state or territory.[16] Other likely determinants would be a minimum audience threshold (also to be determined by the regulator), and whether the content service enterprise has a controlling interest in one or more prominent media operations on different platforms.

The public interest test is intended to sit alongside, rather than cut across, the role and powers of the ACCC in relation to changes of control.[17]

Abolition of existing rules

The report recommends the abolition of the following current rules:[18]

- the '2 out of 3' rule applying to commercial television, radio, newspapers;
- the 'one-to-a-market' rule applying to commercial television;
- the 'two-to-a-market' rule applying to commercial radio; and
- the '75 per cent audience reach' rule for commercial television.

Content

Content-related competition issues

The report considers that, without regulatory intervention, content could become a 'new competition bottleneck' for the industry.[19] Particular areas of risk identified in the report include exclusive access to premium content, the bundling of carriage and content services, network neutrality, the provision of unmetered content and the re-transmission of free-to-air signals.

The report accordingly recommends that the regulator be given the power to conduct market investigations where potential content-related competition issues are identified. The report envisages that the regulator's powers to promote competition in content markets would complement the ACCC's existing powers to deal with anti-competitive conduct. Such powers would only be exercisable following a public inquiry.

Production and distribution of Australian and local content

The report highlights the need for continued support for Australian programs. In line with this objective, the report recommends a new uniform content scheme that abolishes the existing set of measures based on quotas and minimum expenditure. Under the proposed scheme, CSEs that offer professional television-like drama, documentary or children's content, and meet certain audience and revenue thresholds, would be required to contribute to the production of Australian content by either investing a percentage of their Australian market revenue in those genres or contributing to a central converged content production fund.[20]

The converged fund is a key production support measure and would also be funded by government appropriations and spectrum fees paid by broadcasters.[21] The existence of the investment and contribution options recognises that content providers should be able to choose whether they support Australian content directly or indirectly.

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The report also addresses the need for continued provision of local content services for the benefit of people living in regional and rural Australia.[22] In particular, commercial free-to-air television and radio broadcasters will be required to devote a specified amount of programming to material of local significance. To assist with these obligations, the report recommends that a more flexible reporting regime be implemented and the removal of current radio 'trigger event' rules.[23]

The report recommends transitional arrangements that should apply in the run-up to the commencement of the uniform content scheme, including a 50 per cent increase in Australian sub-quota obligations for drama, documentary and children's content to reflect their digital multichannels.

The report argues that this increased obligation to invest during the transition period recognises the existing concessions granted to the free-to-air sector, including an ongoing option to access spectrum, access to the higher 40 per cent producer offset, no full fourth commercial television broadcasting network and the protection of sports rights in the anti-siphoning list.[24]

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14 Ibid, 18.

15 Ibid, xvi.

16 Ibid, 24.

17 Ibid.

18 Ibid, xvii.

19 Ibid, 28.

20 Ibid, 66.

21 Ibid, 72.

22 Ibid, 79.

23 Ibid.

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Content standards

The report recommends a technology-neutral and flexible approach to media content standards, which would be administered by the regulator. CSEs would be subject to children's television content standards and content standards in relation to other areas where regulatory intervention is required, with existing codes registered under the *Broadcasting Services Act 1992* (the ***BSA***) to be used as a starting point.

Content providers that do not meet the threshold requirements of CSEs would be encouraged to opt in to compliance with such codes, or to develop their own codes.

The report also includes the findings from the review of Schedule 7 to the BSA, which is required under a statutory review provision in that Act. The key recommendation based on these findings is that, consistent with the review and the Classification Review, Schedule 7 to the BSA should be replaced by a new national classification scheme that would harmonise the regulation of content across all media platforms.

Spectrum issues

The report recognises that the existing approach to the provision of broadcasting licences is inconsistent with the principle that 'the government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communications services'.[25]

The report accordingly recommends the removal of the broadcasting licence regime. Existing apparatus licences would be replaced by renewable, fully tradeable 15-year spectrum licences, to be administered under the *Radiocommunications Act 1992* (Cth). The spectrum licence would be conditional on the provision (using that spectrum) of digital TV on one or more channels. There would be no other restrictions on the kinds of services that could be provided over the spectrum.

Consistent with the trend towards market-based approaches to spectrum, these spectrum licences would be fully tradable; that is, multi-channels could be leased or sold to a new content service provider. Licences would be subject to market-based pricing – an annual spectrum access fee would be payable based on the value of the spectrum as planned for broadcasting use.

Interestingly, the report recommends a degree of competition protection in relation to the sixth 'multiplex' (previously known as the sixth channel), which it suggests should not be allocated to a commercial broadcaster but be used for new and innovative services. The sixth multiplex could be operated as a consortium under similar arrangements already operating for digital radio services.

The report also recommends that there would be ministerial powers to reserve and allocate spectrum for policy objectives considered important by the Government and the Australian community.

What next?

Without enacting legislation, none of the recommendations will have immediate binding impact on the industry. At this stage it is not clear which, if any, of the recommendations will be acted on or how the Government will respond to the proposed reform agenda the review has set for it. In fact, the Government is not required to accept the recommendations or even respond to the report. The Minister has flagged the Government's desire to formally enter the reform conversation and the *Australian Financial Review* has reported that a response from the Government is expected mid-year.[26]

The Federal Opposition has said it will carefully examine the report and participate in public debate about the changes it proposes.[27]

It is not yet clear whether stakeholders will be offered by the Government a formal opportunity to make submissions in response to the report. As the Minister predicted, however, there is already 'robust public debate' about the recommendations.[28]

At the very least, the report is a highly desirable and long-overdue chance to reflect on and implement a regulatory, policy and legislative framework that befits a converged media and communications environment in Australia.

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24 Ibid, 70.

25 Ibid, .90.

26 Ben Holgate, 1 May 2012, *The Australian Financial Review,* Networks slam new media rules – http://www.afr.com/p/national/networks_slam_new_media_rules_qYQUY4bZ6M0NvdIcQUT55N.

27 Malcolm Turnbull, 30 April 2012, *Convergence Review: More Regulation & Government Intrusion* – http://www.malcolmturnbull.com.au/media/convergence-review-more-regulation-government-intrusion/.

28 Senator Stephen Conroy, 30 April 2012.