Rules and Realities - Delineating the Boundaries between Broadcasting and Telecommunications Regulation

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INTRODUCTION

The present day broadcasting and telecommunications laws are founded on decades of measured deliberations and careful craft. The dramatic technological advances and product development in the broadcasting and telecommunications sector has over the last ten years dramatically and comprehensively altered the landscape of media operations. A myriad of services never envisaged by the original draftsmen are provided by media operators. Such operators commonly defy the delineation between "broadcasting" and "telecommunications" which lies at the heart of the present laws. In such a context, an issue to be determined is if, and to what extent, the present regulatory framework which sharply distinguishes between broadcasting and telecommunications is consistent with the reality of modern media operations.

The article will begin by considering the intended ambit of operation of broadcasting and telecommunications laws, and the way in which the legislation seeks to delineate the boundaries between these two regulatory frameworks.[1]

This theoretical analysis will be followed by an empirical examination of the reality of broadcasting and telecommunications operations. Of special relevance is the increasing success of tripleplay and Internet based media operators.[2] The empirical results will be used to question whether there continues to be reasons for having two discrete and separate regulatory frameworks for broadcasting and

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[1] *See* B Lawrence and M Chung, "The Layers Principle: Internet Architecture and the Law," (2003) 55 *University of San Diego School of Law and Legal Theory Research Papers* 29.

[2] P Budde and P Harpur, *Digital Media, Convergence, Tripleplay and IPTV,* Buddeomm Report, 7th Ed, 2006. Website - www.budde.com.au.

telecommunications or whether there is a need to amalgamate and reconcile the two statutory regimes.[3]

1. THE LEGISLATIVE FRAMEWORK GOVERNING BROADCASTING

1.1 Identifying Broadcasting Services

The *Broadcasting Services Act* 1992 (Cth) regulates the provision of commercial television broadcasting licences,[4] commercial radio broadcasting licences,[5] community broadcasting licences,[6] subscription television broadcasting services[7] and data transmitter licences.[8] Certain aspects of the provision of online services are also subject to the Act.[9] Whilst the *Broadcasting Services Act* governs the broadcasting sector, the initial allocation of radiofrequency spectrum is regulated by the *Radiocommunications Act* 1992 (Cth).[10]

Central to the scope of operation of the *Broadcasting Services Act* is the definition of a "broadcasting service" in s 6 of the Act. Section 6 defines a "broadcasting service" to be a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service. The permitted modes of delivery are radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means.

However, a service that provides no more that data or no more that text (with or without associated still images) is expressly excluded from the definition. [11] An

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[3] Productivity Commission, *Broadcasting Inquiry Report*, 2000, 122, noted the need to address this issue in the future; *See also* R Whitt, "A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model" (2004) 56 *Fed. Comm. L.J.* 587 at p 590.

[4] *Broadcasting Services Act* 1992 (Cth), Pt 4.

[5] Ibid.

[6] Ibid, Pt 6.

[7] Ibid, Pt 7.

[8] Ibid, Pt 5.

[9] Ibid, Sch 5.

[10] Other relevant Acts includes the *Australian Broadcasting Corporation Act* 1983 (Cth) which establishes and governs the operation of the Australian Broadcasting Corporation (the "ABC"), and the *Special Broadcasting Services Act* 1991 (Cth) which establishes and governs the Special Broadcasting Service ("SBS"). The payment of licence fees by commercial radio broadcasters is regulated by the *Radio Licence Fees Act* 1964 (Cth), whilst the payment of licence fees by commercial television broadcasters is governed by the *Television Licence Fees Act* 1964 (Cth).

[11] *Broadcasting Services Act* 1992 (Cth), s 6(1) (a).

example of such an excluded service is a teletext service. Moreover, a service that makes programs available on demand on a point-to-point basis is not a "broadcasting service."[12] An example of such an excluded service is a dial-up service. Finally, any service or a class of services that the Minister determines, by notice in the Gazette, is excluded from the definition of a broadcasting service.[13]

"Programs" is defined to mean a matter the primary purpose of which is to entertain, to educate or to inform an audience, or advertising or sponsorship matter whether or not of a commercial kind.[14] Interestingly there is no requirement that a "program" be directed at the public.[15] This would seem somewhat inconsistent with the primary rationale for the regulation of broadcasting which is the protection of public interests.

There is little case law on the meaning of "broadcasting service" in the present context of services that blur the boundaries between broadcasting and telecommunications services. Hence it is useful to consider what little is available in some detail.

Mickelberg v 6PR Southern Cross Radio Pty Ltd

The issue of whether Internet streamed programs constitute "broadcasting services" within s 6 of the *Broadcasting Services Act* has not been brought before the court in the context of the distinction between the telecommunications and broadcasting regulatory frameworks. The issue has however been considered by the court in the context of a defamation case.

In *Mickelberg v 6PR Southern Cross Radio Pty Ltd*[16] allegedly defamatory material was broadcast on the 6PR radio station and also simultaneously further "broadcast" by 6PR on the Internet.

The primary judge held that the determination made by the Minister on 12 September 2000 pursuant to s 6 (1) of the *Broadcasting Services Act* was relevant. The Minister had stipulated that "a service that makes available television programmes or radio programmes using the Internet, other than a

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[12] Ibid s 6(1) (b).

[13] Ibid s 6 (1) (c). *Ministerial Determination No 1 of 2000* provided that services streamed over the Internet were not "broadcasting services" for the purpose of the *Broadcasting Services Act.*

[14] Ibid s 6.

[15] D Butler and S Rodrick, *Australian Media Law* (2004) 486, Lawbook Company Ltd, 489.

[16] Federal Court, Full Court, Unreported, 26 September 2002.

service that delivers television programmes or radio programmes using the broadcasting services bands" is not a broadcasting service.[17] The judge also referred to the Macquarie Dictionary definition of "broadcast" which describes a verb as meaning "to send (messages, speech, music, and etcetera) by radio."[18] The judge concluded as no transmission had been made using the radio frequency spectrum, the delivery of the radio program on the Internet was not a "broadcasting service" s 6 of the *Broadcasting Services Act.*[19]

On appeal, the court noted that "whatever may be the proper construction of the word 'broadcasting'" it was unclear exactly "the manner in which, or the means by which, the interview was published on the Internet."[20] There was insufficient evidence as to whether the radio broadcast was streamed live or published later. Accordingly, the court of appeal did not consider it appropriate to address the meaning of "broadcasting services" within s 6. The appeal was allowed on other grounds relating to the law of defamation.

Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd

In *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd*,[21] Justice Davies considered the meaning of "service" in the very narrow context of whether the word was limited to the supply of broadcasting services through single-channel services or whether the word also embraced transmission through multi-channel cable services.

The court concluded that there is no established difference between receipt of a broadcasting service on a television set that is attached to cable and one that is not so attached. Accordingly, the re-transmission of free-to-air services via a cable television service consisting of multiple channels was within the regulatory reach of the *Broadcasting Services Act*, specifically the re-transmission regime established by s 212.[22]

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[17] Ibid 9.

[18] Ibid 10.

[19] Ibid 10.

[20] Ibid 14.

[21] (1995) 60 FCR 483; 32 IPR 323; (1995) AIPC 91-199; BC9502758.

[22] This principle was more recently applied by the Federal Court in *Asia Television Ltd v Yau's Entertainment Pty Ltd (No 222)* June 2000, BC200003415.

1.2 Identifying Broadcasting Service Providers

An operator providing a broadcasting service is required to obtain a licence under the Act. The nature of the required licence is dependant on the nature of the broadcasting service provided. [23] Categories of regulated service include national broadcasting services, commercial broadcasting services, community broadcasting services and subscription broadcasting services.

A "national broadcasting services"[24] is defined to be either a service provided by the ABC under the *Australian Broadcasting Corporation Act* or a service provided by the SBS under the *Special Broadcasting Service Act* or a service provided under the *Parliamentary Proceedings Broadcasting Act.*

In comparison, a "commercial broadcasting service"[25] is essentially a service that appears intended to appeal to the general public, able to be received by commonly available equipment, made available free to the general public, usually funded by advertising revenue and operated for profit. Clause 14 of the *Explanatory Memorandum to the Broadcasting Services Bill 1992 (Cth)* states that in determining whether a service appears intended to appeal to the general public, it is necessary to consider the overall programming of the service in preference to discrete segments of the total programming. In determining whether a service provides programs that are able to be received by commonly available equipment, it is necessary to consider whether the relevant equipment is readily available and affordable in the community.

A "community broadcasting service"[26] is provided for community purposes, not operated for profit, able to be received by commonly available equipment and made available free to the general public. The Act does not define "community purpose." The phrase was considered in *3AW Southern Cross Radio Pty Ltd v Inner North East Community Radio Incorporated* (1994) 16 ATPR 41-313. Justice Heerey found that the broadcasting of Australian Football League games were for a "community purpose" despite the fact that such games were likely to also be of interest to the wider Australian community. Justice Heerey suggested that "community purpose" may extend to matters of interest to persons outside the local community and is not restricted to matters of exclusive local interest. It has however been suggested that in order for a service to have a "community purpose" the service must be directed to community interests.[27]

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[23] Butler, above n 15.

[24] *Broadcasting Services Act* 1992 (Cth), s 13.

[25] Ibid s 14.

[26] Ibid s 15.

[27] P Mallam, J Moriarty and S Dawson, *Media Law and Practice* (2001-) [18.650].

A "subscription broadcasting service"[28] is a service that appears intended to appeal to the general public and only made available to the general public on payment of a subscription fee. In contrast, a "subscription narrowcasting service"[29] is a service whose reception is limited by being targeted to special interest groups, or intended only for limited locations, or provided during a limited period, or provides programs of limited appeal or for some other reason, and is only made available on payment of subscription fees. An "open narrowcasting service" [30] is essentially a service whose appeal is limited as outlined in relation to a subscription narrowcasting service but whose provision is not subject to a subscription fee.[31]

Finally, an "international broadcasting service" is a service that is targeted to a significant extent to audiences outside Australia where the means of delivery involves the use of a radiocommunications transmitter in Australia, whether alone or in combination with other means.[32]

Therefore the primary sceptre of regulation of the *Broadcasting Services Act* is the licensing of operators providing broadcasting services, and the nature of the licence required is dependant on the nature of the provision and terms of supply.[33]

[28] *Broadcasting Services Act* 1992 (Cth), s 16.

[29] Ibid s 17.

[30] Ibid s 18.

[31] Australian Broadcasting Authority, *Narrowcasting for Radio: Guidelines and Information about Open and Subscription Narrowcasting Radio Services* (2002) provides guidelines as to the application of the definition of "open narrowcasting services"; *See also* M Leiboff, "Clarifying Open Narrowcasting" (2001) 6(2) *MALR* 131; and M Leiboff, "Open Narrowcasting Radio Services" (2002) 7(4) *MALR* 327.

[32] Section 18A; The *Broadcasting Services Amendment Act* 2000 (Cth) added the category of "international broadcasting services" into the *Broadcasting Services Act.* The Australian Broadcasting Authority, *Broadcasting Services (International Broadcasting) Guidelines* (2000) provides guidelines as to the application of the definition of "international broadcasting services."

[33] For example, whether the broadcasting service is a national service, is free to air or a subscription service; *See further* C Weare, T Levi T and J Raphael, "Media Convergence and the Chilling Effect of Broadcasting Licensing" (2001) 6 (3) *Harvard Journal of Press and Politics* 47.

2. THE LEGISLATIVE FRAMEWORK GOVERNING TELECOMMUNICATIONS

2.1 Identifying "Carriers"

The central legislative enactment regulating the telecommunications industry is the *Telecommunications Act* 1997.[34] The main stated objective of the *Telecommunications Act* 1997, when read in conjunction with Parts XIB and XIC of the *Trade Practices Act,* is to provide a regulatory framework that promotes:

> (a) The long-term interests of end-users of carriage services or of services provided by means of carriage services; and
>
> (b) The efficiency and international competitiveness of the Australian telecommunications industry.[35]

The *Trade Practices Amendment (Telecommunications) Act* 1997 (Cth) inserted two new parts into the *Trade Practices Act*. Part XIB outlines special rules applying to carriers and carriage service providers aimed at controlling potentially anti-competitive behaviour. Part XIC establishes an access regime for the telecommunications sector.[36]

The Act seeks to regulate the telecommunications sector by addressing the activities of two main entities:

> (a) Carriers; and
>
> (b) Service providers,

The primary regulatory focus of the *Telecommunications Act* is on carriers.[37] The requirement to obtain a licence extends only to carriers. Carriers are required to

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[34] The *Telecommunications Act* 1997 replaced the *Telecommunications Act* 1991; *See* D Lloyd, "Australia's Third Generation of Telecommunications Regulation – Heading in the Right Direction?" (2001) 5 *TeleMedia* 1, 1 for a consideration of the continuing effectiveness of the package of laws introduced in 1997. *See also* J Pinnock, "Consumer Issues in the Co-Regulated Telecommunications Environment" (1998) 2 *TeleMedia* 41, 42; and M Armstrong (ed), *Telecommunications Law: An Australian Perspectiv*e (1999) Media Arm Pty Ltd.

[35] *Broadcasting Services Act* 1992 (Cth), s 3 (1); *See* P Wilson, "Productivity Commission Review of Telecommunications Specific Competition Legislation" (2000) 4(4) *TeleMedia* 47.

[36] *See generally* A Grant, *Australian Telecommunications Regulation: The Communications Law Centre Guide* (2004) University of New South Wales Press; *See also* P Jensen, *From Wireless to the Web: The Evolution of Telecommunications*, 1901 to 2001 (2000); and A Moyal, *Clear Across Australia: A History of Telecommunications*, (1984) for a historical overview.

[37] *See* M Cosgrove, "Regulatory Environment for Carrier Services," (2000) 4 (3) *TeleMedia* 25, for a discussion of choosing the best strategy for carrier regulation.

hold a licence issued under s 56 of the Act. In contrast, service providers are merely subject to the service provider rules outlined in the Act.

As so much significance attaches to classification of an operator as either a "carrier" or "service provider," it is useful to examine in detail the relevant provisions and the nature of the vastly different obligations and liabilities that attach to each such classification.

"Carriers" is beguilingly defined as a holder of a carrier licence. A "carrier licence" is equally minimalistically defined as a licence granted under s 56. The real definition of "carrier" is embedded in the substantive provisions relating to prohibitions relating to carriers in s 42. Section 42 in Part 3, Division 2 forms the heart of the *Telecommunications Act*.[38]

Section 42 prohibits the owner of a network unit supplying a carriage service to the public unless the owner is the holder of a carrier licence or a nominated carrier declaration. Further, the owner of such a network unit is prohibited from allowing or permitting another person to supply a carriage service to the public unless the owner is the holder of a carrier licence or a nominated carrier declaration.

Where the network unit is owned by two or more owners, the owner of the network unit is prohibited from using the unit, either alone or jointly with one or more persons to supply a carriage service to the public unless the owner is the holder of a carrier licence or a nominated carrier declaration. Similarly, the owner of the network unit is prohibited from allowing or permitting another person to supply a carriage service to the public unless the owner is the holder of a carrier licence or a nominated carrier declaration.

Therefore, on the basis of s 42 an owner of a telecommunications "network unit" used to "supply" a carriage service to the "public" is required to hold a carrier licence. "Network unit" and "supply to the public" are hence central elements of the definition of a carrier as they serve to attract the regulating burdens imposed by the Act. These terms warrant consideration.

"Owners of Network Units"

A "network unit" has a detailed definition under s 27 of the *Telecommunications Act.* A network unit is a line link that fulfils one set of the following three requirements:

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[38] Australian Communications and Media Authority, *Guide to Carrier Licence and Nominated Carrier Declaration*, Issue No 6, 15 June 2005.

(a) If a line link connects distinct places in Australia and the distinct places are at least the statutory distance apart;[39] or

(b) If the same person owns two or more line links and each of these line links connects distinct places in Australia, and the aggregate of the distance between the distinct places is more than the statutory distance;[40] or

(c) In relation to two or more line links, the owners of the line links are bodies corporate, the owners of the line links are all members of the same related company group, each of those line links connect distinct places in Australia, and the aggregate of the distance between the distinct places is more than the statutory distance.[41]

The Full Court in *Foxtel Management Pty Ltd v Seven Cable Television*[42] considered the definition of "network unit" in the context of the exemption in s 48 of the *Broadcasting Services Act.* The court noted that it is clear that Parliament intended the supply of "certain broadcasting services" to be a supply of a carriage service to the public within s 48.[43] However, Foxtel did not fall within the exemption because its service did not involve communications carried between the head end of a cable system and the equipment used by an end-user to receive a broadcasting service.

The court also noted that Parliament intended that "network units" used for the supply of cable broadcasting services to the public would, if not subject to the exemption in s 48, be subject to s 42.[44] In the present case, the exemption was not satisfied as the relevant network unit did not consist of a facility used to carry communications between head end of a cable transmission service and the equipment used by an end-user to receive a broadcasting service. Therefore s 48 was irrelevant and s 42 applied.

A "line" is defined to mean a wire, cable, optical fibre, tube, conduit, wave-guide or other physical medium used as a continuous artificial guide for or in connection with carrying communications by means of "guided electromagnetic energy."

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[39] *Broadcasting Services Act* 1992 (Cth), s 27 (1).

[40] Ibid s 27 (2).

[41] Ibid s 27 (3).

[42] (2000) 102 FCR 555.

[43] Ibid 567.

[44] Ibid 567.

"Linked lines" is defined in s 30. If a line is connected to another line, and the other line forms part of a line link, the first-mentioned line and the second-mentioned line together constitute a line link.[45]

"Supply" to Public

Where a network unit is owned by a single owner and there is no nominated carrier declaration in force, a network unit is taken to be used to "supply a carriage service to the public" if the supply mechanism satisfies the conditions of any one of three stated scenarios in s 44(2).[46]

Firstly, where the unit is used for the carriage of communications between two end-users, and each end-user is outside the immediate circle of the owner of the unit. Secondly, where the unit is used to supply point-to-multipoint services to end-users and at least one end-user is outside the immediate circle of the owner of the unit. Finally, where the unit is used to supply designated content services (other than point-to-multipoint services) to one or more end-users, where at least one end user is outside the immediate circle of the owner of the unit.

Section 23 defines "immediate circle" to include employees of an individual,[47] an employee of a partnership,[48] an officer of a body corporate,[49] and a body corporate related to another body corporate within the meaning of the *Corporations Act* (Cth).[50] Therefore, where each end user is outside the immediate circle of the owner of a network unit, that network unit is deemed to have been involved in the supply of services to the public.

The Full Court in *Foxtel Management Pty Ltd v Seven Cable Television*[51] considered the meaning of "supply." The court noted that it was established that a service by which information streams generated by a content provider such as Foxtel are carried to customers is a "carriage service."[52] The issue in the present

[45] *Broadcasting Services Act* 1992 (Cth), s 30 (2).

[46] Ibid s 44 (1) and (2); *See* J Pinnock, "Consumer Issues in the Co-Regulated Telecommunications Environment" (1998) 2 (4) *TeleMedia* 42.

[47] *Broadcasting Services Act* 1992 (Cth), s 23 (1) (a).

[48] Ibid s 23(1)(b).

[49] Ibid s 23(1)(c)(i).

[50] Ibid s 23(1)(c)(ii).

[51] (2000) 102 FCR 555.

[52] Ibid 563.

case was whether the information streams themselves constituted a "carriage service."

Foxtel contented that they did not and that it did no more than contract to provide content to Telstra.[53] Again, the court rejected Foxtel's reasoning. The court concluded that the question of who is supplying a carriage service is not answered by the consideration of who is operating the equipment by which supply is effected. Rather the relevant inquiry is who is undertaking to provide the service. This is a technology neutral approach as it is based on the nature of the service rather than the nature of the operating equipment. However it seems inconsistent with the courts technology specific interpretation of other concepts such as those relating to delivery and ownership of network infrastructure.

2.2 Identifying Service Providers

For the purposes of the *Telecommunications Act*, service providers are divided into two categories – carriage service providers and content service providers. A "carriage service" means a service for carrying communications by means of a guided and/or unguided electromagnetic energy. A "carriage service provider" is a person who supplies or proposes to supply a listed carriage service to the public using a network unit owned by one or more carriers, or a network unit which is the subject of a nominated carrier declaration.[54]

Importantly, organisations that merely resell time on a carrier network for telephone calls are likely to be "carriage service providers" and "not carriers."[55] Additionally, Internet service providers who provide access to the Internet over infrastructure owned by another organisation will be characterised as a "carriage service provider."[56]

In an international context, a person who supplies or proposes to supply a listed carriage service to the public using a line link connecting a place in Australia and a place outside Australia or a satellite-based facility is also a "carriage service provider" if the particular service is a "listed carriage service" for the purposes of s 16(1) (b) or (c).[57]

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[53] Ibid.

[54] *Broadcasting Services Act* 1992 (Cth), s 87(1); *See* Australian Communications and Media Authority, *Guide to Service Provider Obligations*, Issue No 4, 15 June 2005.

[55] Australian Media and Communications Authority, *Know Your Obligations*, 2004, 3.

[56] Ibid.

[57] *Broadcasting Services Act* 1992 (Cth), s 87(2).

A "content service provider" is a person who uses or proposes to use a listed carriage service to supply a content service to the public. A content service is supplied to the public where at least one end-user of the content service is outside the immediate circle of the supplier of the content service. "Content service" is defined by s 15 to mean a broadcasting service,[58] an on-line service,[59] or a service of a kind specified in a determination made by the Minister."[60]

Hence, the legislature is seeking to combine a specific definition designed to provide certainty in the market place with a general open provision enabling the regulatory scheme to evolve with changing technology. Increasingly, the reliance on delegated legislation is seen as a more responsive and flexible means of ensuring that a regulatory regime remains current and relevant.

The specifically identified content services are a "broadcasting service,"[61] an "on-line information service (for example, a dial-up information service),"[62] "an on-line entertainment service (for example, a video-on-demand service or an interactive computer game service),"[63] and "any other on-line service (for example, an education service provided by a State or Territory government)."[64]

Interestingly, an example is provided for an "on-line information service," an "on-line entertainment service" and "any other on-line service" but not for a "broadcasting service." Presumably, the assumption in 1997 was that "broadcasting service" had a clear and established meaning but that the other terms, especially relating to on-line services, were not part of the accepted vernacular.

Concepts of "Carriage" and "Delivery"

In *Foxtel Management Pty Ltd v Seven Cable Television,* the Full Court of the Federal Court explored the concept of "carriage." [65] The issue to be determined

[58] Ibid s 15(1)(a).

[59] Ibid s 15(1)(b)-(e).

[60] Ibid s 15(1)(e) and 15(2). A determination made for the purposes of s 15(1) (e) is deemed to be a disallowable instrument for the purposes of the *Acts Interpretation Act* 1901(Cth), 15(3).

[61] Ibid s 15(1)(a).

[62] Ibid s 15(1)(b).

[63] Ibid s 15(1)(c).

[64] Ibid s 15(1)(d).

[65] (2000) 102 FCR 555.

was whether Foxtel was a "carriage service provider" within the *Telecommunications Act* or merely a "content service provider."

Foxtel provided a pay TV service that was transmitted using existing residential cable television. In addition to the pay television programs, Foxtel re-transmitted free-to-air broadcasts. The pay TV services and the free-to-air services travelled over the network unit owned by the carrier, Telstra. Additionally, equipment necessary for the reception of Foxtel's program package was maintained and used by Foxtel. There was no contractual relationship between Telstra and the subscribers who received the combined package of pay TV and free-to-air retransmissions.

It was contended that Foxtel was merely a "content service provider" and not a "carriage service provider." It was argued that Foxtel did not provide a service whereby its subscribers could "send communications to others."[66] It did not for example provide such "communication" services as telephony, Internet services or banking services. It merely supplied content and was passive.

The trial judge disagreed and found that Foxtel was both a content service provider and a carriage service provider. The trial judge noted that whilst the three functions of carrier, content service provider and carriage service provider are different, a single party may carry out one or more of these functions at any one time. It was always necessary to examine the relevant commercial relationships.

On appeal, Foxtel submitted that the trial judge had made a mistake. Foxtel's submission was not that the "roles" of carriage service providers and content service providers were mutually exclusive but that carriage services and content services are mutually exclusive.[67] Foxtel submitted that this must be so: the difference is between the service of carrying communications and the communications themselves. To use a common example, the service of distributing mail is distinct from the mail itself. Hence a single operator can only be both a content service provider and a carriage service provider if they are involved in different activities.

The full court rejected Foxtel's submissions. The full court affirmed the trial judge's reasoning and found that Foxtel's contractual obligations to subscribers included not only the provision of content but the delivery of content.

This "delivery" was established by two facts. Firstly, as far as the customer was concerned, Foxtel installed and maintained the equipment at the place of reception by the subscriber. This was irrespective of the fact that the equipment was installed and maintained on behalf of Foxtel by Telstra. Secondly, whilst the

[66] Ibid 562.

[67] Ibid.

content was delivered to subscribers by way of Telstra's multimedia HFC network, Telstra had no contractual obligation to the subscribers to deliver or transmit the content. Accordingly, Foxtel carried the obligation to provide both content and carriage service.

Whilst the case centres on the distinction between carriage service provider and content service provider, the court makes some interesting observations which are of broader relevance in construing concepts of "communication" and "delivery" which are so critical to the delineation of the boundaries between telecommunications and broadcasting activities.

The court rejected Foxtel's submission that it did not deliver a service because its subscribers did not receive the "facility to carry communications" and merely received the "communication."[68]

The court accepted the contention that merely "delivering communications to the customer" is an act of carriage irrespective of whether the party also provides the customers a service of carrying that communication to others. Accordingly, providing a facility to deliver a communication is the not a necessary component of being a carriage provider.

2.3 Contrasting Obligations of Broadcasters, Carriers and Service Providers

Therefore the classification of a media operator as a provider of "broadcasting services," a "carrier" or a "service provider" is determinative of the nature and extent of the regulatory obligations imposed. Accordingly, an artificial or arbitrary classification has the potential to be damaging to research and development, variety and quality of service provided.[69]

As discussed, a media operator who wishes to provide a "broadcasting services" is required to obtain a licence under the *Broadcasting Services Act.* The nature of the regulatory obligation is dependant on the nature of licence required.[70] A media organisation that is classified as a "carrier" under the *Telecommunications Act* attracts a variety of regulatory obligations. First and foremost they must apply for a licence under the Act. Additional however to the central licensing

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[68] Ibid 564.

[69] S John, *Australian Use of Information Technology and its Contribution to Growth* (2002), Reserve Bank of Australia.

[69] *See further* F Scherer, *New Perspectives on Economic Growth and Technological Innovation* (1999) Washington, Brookings Institute; S John, *Australian Use of Information Technology and its Contribution to Growth* (2002), Reserve Bank of Australia.

[70] Butler, above n 15.

requirement is a variety of regulatory, reporting, technical and access obligations.[71]

In contrast, a media operator which is classified as a "service provider" under the *Telecommunications Act* does not require a licence from the Australian Communications and Media Authority (the "ACMA") under the *Telecommunications Act*.

The ACMA was formed in1 July 2005 and mergers the functions of the formerly distinct Australian Broadcasting Authority ("ABA") and Australian Communications Authority ("ACA").[72] The merger is a powerful acknowledgment of the dissolving boundaries between the broadcasting and telecommunications sectors. In the *Media Release* introducing the new ACMA, Senator Coonan, the Minister for Communications, Information Technology and the Arts, significantly stated that:

> "The merger of the two regulators recognises the changing nature of the telecommunications, broadcasting and media industries. *Convergence* of technology and new technology developments are *challenging the old regulatory structures* and ACMA will be well placed to deal with these new challenges in the future."[Emphasis added].

Instead of regulation by licensing through the ACMA, the regulation of service providers is in the form of mandatory compliance with the "service provider rules." The service provider rules consist of the rules set out in Schedule 2 of the *Telecommunications Act,* the rules set out in s 152BA(2) of the *Trade Practices Act,* and determinations made by the ACMA in relation to specified carriage services or specified content services.[73]

3. DEFYING THE BROADCASTING/TELECOMMUNICATIONS REGULATORY DIVIDE - "TRIPLEPLAY" OPERATORS AND INTERNET MEDIA COMPANIES

Increasingly, the neat regulatory demarcation between broadcasting and telecommunications is being defied by the increasing success of tripleplay

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[71] Both under the *Telecommunications Act* 1997 (Cth) and under Part XIC of the *Trade Practices Act* 1974 (Cth).

[72] The *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005* (Cth) No. 45 amended the *Broadcasting Services Act* 1992 (Cth) (the "*Broadcasting Services Act*") and the *Telecommunications Act* 1997 (Cth) (the "*Telecommunications Act*"). The ACMA replaces both the ABA which was formerly subject to the *Broadcasting Services Act* and the ACA which was subject to the *Telecommunications Act.* The ACMA has been entrusted with the overseeing of the regulation of broadcasting, radiocommunications, telecommunications and online content.

[73] Section 98.

operators. Tripleplay operators provide services that combine: (1) data; (2) audio; and (3) video.[74] Such operators typically provide services over both broadcasting and telecommunications networks.[75] A common example is live streams of sport, news or music that are simultaneously available on the television (broadcasting) and on the Internet (telecommunications).[76] Other such services include voice over Internet protocol services and television programmes delivered to 3G mobile phones.[77]

Similarly, the rise of Internet based media companies is challenging the regulatory distinction between "broadcasting" and "telecommunications."[78] Internet companies such as Google, ebay, Yahoo, Vonage, AOL, MSN, News Limited and Amazon have built media operations based on high speed broadband infrastructures and have been dubbed the "New Media."[79] The second stage of this development is that established "Old Media" operators such as News Limited are increasingly migrating into the realm of the "New Media" and offering Internet based services. Again, such developments defy the neat demarcation of "broadcasting" and "telecommunications" operations.

The following table of media advertising expenditure illustrates the rising popularity of the "New Media" as a perceived mode of commercial communication.[80]

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[74] Budde, above n 2.

[75] C Blackman, "Convergence between Telecommunications and Other Media" (1998) 22 (3) *Telecommunications Policy* 163 at 165.

[76] D Austerberry, *The Technology of Video and Audio Streaming* (2004) Focal Press; R Costelloe, "Internet Television and Radio Services – The Streaming Controversy" (2000) 5 (4) *TeleMedia* 68.

[77] Australian Communications Authority, *Regulatory Issues Associated with Provision of Voice Services Using Internet Protocol in Australia,* Discussion Paper, October 2004; M Mueller, and C Tinellis, "Internet Telephony" (1999) 2 (7) *TeleMedia* 1.

[78] *See* M Fransman, *Telecoms in the Internet Age: From Boom to Bust to …?* (2002) Oxford University Press; S Black, Telecommunications *Law in the Internet Age* (2002) Harcourt.

[79] Budde, above n 2, 37; *See also* J Weinberg, "The Internet and "Telecommunications Services," Universal Service Mechanisms, Access Charges and Other Flotsam of the Regulatory System (1999) 16 *Yale Journal on Regulation* 211; and D Clone, "The Times They are a-Changing" (1997) 11 (1) *Harvard Journal of Law and Technology* 275.

[80] Reproduced with permission of Paul Budde Communications Pty Ltd; Budde, above n 2 at 36: Website - www.budde.com.au.

MEDIA	2002	2003	2004	2005
Newspapers	3,030	3,295	3,617	3,800
Television	2,592	2,830	3,142	3,615
Radio	702	737	841	950
Magazines	789	821	894	950
Outdoor	261	297	328	370
Cinema	58	66	74	75
Pay TV	74	93	123	140
Internet	167	236	388	647
TOTALS	7,673	8,375	9,407	10,547

Examples of telecommunications and broadcasting operations that display convergence characteristics are outlined in the table below.[81]

Nature of Service	Nature of Convergence
Voice and Data	Voice over Internet Protocol services
Fixed and Mobile	Convergence of access technology (fixed, wireless and mobile)
Telecoms and Media	Telecommunications, Broadcasting media and content service convergence
Telecoms and Information Technology	IP networks converging with IT networks (NGN architecture)
Device	Consumer electronics converging with traditional telecommunications

4. AN EMPIRICAL ANALYSIS

4.1 Aims, Objectives and Methodology

A study was recently conducted to examine the nature and incidence of the overlap between broadcasting and telecommunications operations.[82] The aim of the study was to consider the extent to which the distinction between "broadcasting services" and "telecommunications services" continues to be relevant in the present media industry.

The objective of the study was to identify companies that hold *both* a commercial television broadcasting licence under the *Broadcasting Services Act* and either a carrier licence under the *Telecommunications Act* or are content/carriage service

[81] Reproduced with permission of Paul Budde Communications Pty Ltd; Budde, above n 2, 102: Website - www.budde.com.au.

[82] Macquarie University, Division of Law, 2005-2006. The study was funded by a Macquarie University New Staff Grant.

providers under the *Telecommunications Act*. Four potential circumstances of potential overlap were identified and examined:

a) Free-to-Air television broadcast licence holders regulated under the *Broadcasting Services Act* that also have interests in telecommunications and are therefore regulated under the *Telecommunications Act*.

b) Commercial radio broadcast licence holders regulated under the *Broadcasting Services Act* that also have interests in telecommunications and are therefore regulated under the *Telecommunications Act*.

c) Pay television licence holders regulated under the *Broadcasting Services Act* that also have interests in telecommunications and are therefore regulated under the *Telecommunications Act*.

d) Telecommunications companies that have interests in broadcasting companies.

Data was primarily collected from the ACMA records and the Telecommunications Industry Ombudsman records. The information was then separated into two databases outlined at 4.2 and 4.3 below.

4.2 Operators Regulated Under the Broadcasting Act

(a) Commercial Television Licence Holders: Information was collected on 54 Commercial Television Stations (that is 54 licences) comprising in total of 408 owners. The data reveals that particular groups of organisations/individuals hold multiple licences in each Australian state. For example, the licence for Channel Seven Sydney Pty Ltd is held by a consortium of 10 individuals and organisations. [83] This same core group of owners also hold licences for Channel Seven in other metropolitan cities of Australia.[84] A similar pattern of ownership is evident for the Channel Nine and Ten Networks. It is also evident that groups of organisations hold multiple licences across states in a regional context. For example, the licence for WIN Television NSW Pty Ltd is held by a core group of owners who hold similar regional licences across most States of Australia.[85]

(b) Commercial Radio Licence Holders: The study identified 271 Commercial Radio Stations from all states and territories. The 271 licences are held by

[83] These owners include Ashblue Holdings Pty Ltd, Channel Seven Sydney Pty Ltd, Christopher Smailes, Kerry M Stokes, Redlake Enterprises Pty Ltd, Richard Norton, Seven Network (Operations) Ltd, Seven Network Ltd, Thornleigh Pty Ltd and Tiberius Pty Ltd.

[84] See for example Channel Seven in Adelaide, Brisbane, Melbourne and Perth, with slight variations in ownership that take into consideration local interests of the particular state.

[85] Key stakeholders are Bruce Gordon Hoverton Pty Ltd, WIN Television NSW Pty Ltd, WIN Television Network Pty Ltd and Win Corporation Pty Ltd. Also evident are the Prime Television group of companies.

multiple groups of 1939 owners. Although there is a greater diversity of radio licence owners than commercial television owners, there are distinct similarities between the ownership structure of the larger nationally affiliated radio networks and the larger commercial television networks (such as Channel Seven, Nine Ten). For example, the Austereo Network is a company within a group [86] that holds multiple commercial radio licences across the country. [87]

(c) Pay Television Licence Holders:[88] The study identified approximately 46 companies that are subscription television licensees under the *Broadcasting Services Act*.[89] It is in this context of subscription television broadcasting that there is the clearest direct evidence of companies that are regulated under both broadcasting and telecommunications legislation. Two leading examples are Telstra Pay TV Pty Ltd and Optus Vision Media Pty Ltd.[90] Optus Networks Pty Ltd is both an Internet and telephone provider with carrier licence under the *Telecommunications Act*,[91] and the Telstra Corporation holds a telephone licence and is an Internet service provider under the *Telecommunications Act*. [92]

Apart from companies that are directly regulated by both telecommunications and broadcasting legislation, "double regulation" in the subscription television industry is also evident in a more indirect way. For example, Foxtel Cable Television Pty Ltd holds a subscription licence under the *Broadcasting Services Act.* The three major stakeholders of Foxtel are Publishing and Broadcasting Limited (PBL), News Corporation and Telstra. All three of these companies have interests that are regulated under the *Telecommunications Act* and/or the *Broadcasting Services Act*. [93]

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[86] This group consists of Austereo Group Limited, Austereo Pty Ltd, Beatrice L Kirby, First Gatoom Pty Ltd, Graham William Burke, John Ross Kirby, Kirby Capital Growth Trust, Kirby Investments Pty Ltd, Positive Investments Pty Ltd, Robert George Kirby, Roc Kirby, Today FM Sydney Pty Ltd, Today Radio Network Pty Ltd, VRB Pty Ltd, VRC Investments Co Pty Ltd, Village Roadshow Corporation Ltd, and Village Roadshow Limited.

[87] Southern Cross Broadcasting also holds multiple AM commercial radio licences across the country. See more detailed analysis of both Austereo and Southern Cross Broadcasting below.

[88] Material recorded under s 96 of the *Broadcasting Services Act* 1992 (Cth).

[89] The ACMA states that "There are no provisions under the Act that require holders of section 96 licences to notify ACMA if they become aware of any changes in control or ownership of the licences, except where the change relates to the foreign ownership provisions" <http://www.ACMA.au.

[90] Optus is now controlled by the Singapore Telecommunications corporation Singtel.

[91]See Telecommunications Ombudsman Registry <http://www.tio.com.au/aboutmembership/Members_search_details.asp?strID=OPT&TradingID=OPT> (accessed 5 April 2006).

[92]Ibid<http://www.tio.com.au/aboutmembership/Members_search_details.asp?strID=TEL&TradingID=TELBUZ> (accessed 12 April 2006).

[93] The activities of PBL and Telstra will be examined in case studies below.

4.3 Operators Regulated Under the Telecommunications Act

Telecommunications data collected was divided into the following six categories:[94]

a) Telephone service providers (305 companies);
b) Telephone service providers with a carrier licence (14 companies);
c) Internet service providers (1058 companies);
d) Internet service providers with a carrier licence (106 companies);
e) Internet and telephone providers (230 companies); and,
f) Internet and telephone providers with carrier licence (30 companies).

Although there are significantly more telecommunications companies than broadcasting companies, very few of these companies have direct interests in broadcasting. As suggested above, two notable examples of companies that are directly regulated by telecommunications and broadcasting (subscription television) legislation are Telstra and Optus.

4.4 Emerging Trends

The data collected suggests that there are a limited number of examples (with the exception of large telecommunications companies such as Telstra and Optus) where companies are directly regulated by both telecommunications and broadcasting legislation. There is however evidence in the data to suggest that circumstances of regulatory overlap are starting to rapidly develop. In particular, some of the larger television and radio broadcasting companies are expanding their interests into the telecommunications industry. A notable characteristic of some of these broadcasting companies is that they often hold multiple licences across Australia. This trend suggests that regulators will have to carefully consider the way in which these larger commercial radio and television broadcasting companies, who hold multiple licences across the country, will be regulated in the future.

By way of case study illustration, it is worth considering a sample of television and radio companies whose activities are increasingly expanding across both broadcasting and telecommunications industries. Two companies with television broadcasting interests that extend across multiple states of Australia were examined: PBL and the Seven Network. Three companies with radio interests (Austereo Network, Southern Cross Broadcasting and the Macquarie Radio Network) were also selected for examination. Both the Austereo Network and

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[94] Telecommunications Ombudsman Registry, <http://www.tio.com.au/aboutmembership/searchmembers.htm> The TIO records do not include members under administration, receivership or in liquidation, nor does it include members that the TIO has found itself unable to locate.

Southern Cross Broadcasting hold licences across multiple states. [95] Foxtel is also an important company to examine because its ownership structure is divided between companies that have both broadcasting and telecommunications interests. Indeed, it is Foxtel that is arguably at the cutting edge of developing ways in which telecommunications and broadcasting interact with each other.

4.5 Commercial Television

PBL – Nine Network and Ninemsn

PBL is a television broadcaster (owns and operates the Nine Television Network) and magazine publisher with gaming, entertainment, subscription television and digital media interests. The Nine Network Australia operates free to air commercial television stations and provides programming to stations in most metropolitan cities of Australia, Prime NZ and some regional markets.

For a considerable length of time PBL has been expanding its business interests into the telecommunications industry - particularly in terms of acquiring interests in content service providers. For example, PBL owns approximately 50% of Australia's leading Internet portal ninemsn, 41% of Australia's number one online auto and trader classifieds site carsales.com.au and 25% of the nation's number one online employment business, SEEK.[96] As discussed above, PBL also has a 25% interest in Australia's leading subscription television business, Foxtel. [97]

A critical reason why television broadcasters such as the Nine Network are expanding their interests into the telecommunications industry is because of the fierce competition between rival commercial television networks.[98]

In May of this year, Nine became the first Australian network to make available complete episodes of programs on the Internet directly after show content had gone to air.[99] Downloading to the Internet is only the first step.[100]

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[95] Macquarie Radio network has been chosen for examination because of the size of audience (on the basis of its AM Sydney stations 2GB and 2CH). Macquarie Radio Network is also a good example of a radio company that is developing its telecommunications interests.

[96] PBL website at <http://www.pbl.com.au/ article.aspx?id=3886> (accessed 3 March 2006).

[97] PBL also owns 50% of subscription television content provider The Premier Media Group, producer of leading sports channels Fox Sports 1 and Fox Sports 2.

[98] J Schulze, "Networks Take Rivalry Online," *The Australian*, 25 May 2006, 15. Shulze notes: "Beneath the surface of the daily television ratings battle, the Seven and Nine networks are locked in an equally fierce stoush for online supremacy. Since the Seven Network teamed up with global search engine Yahoo ! in December last year, a large transformation has occurred in the online scene. Ninemsn, the venture between Nine's parent company Publishing and Broadcasting Limited and Microsoft, was the first partnership between a TV network and a technology group."

[99] J Lee, "Nine goes one up with TV downloads," The *Sydney Morning Herald*, 18 May 2006, 25.

Broadcasters such as the Nine Network are making these cross-platform services available for one very important reason: they are witnessing a steady decline in television viewing. Another important consequence of making content available on other platforms is the need to reconsider approaches to advertising. [101] The fierce competition in the Australian commercial television industry has lead North American analysts to believe that Australian broadcasters are "emerging as world leaders in putting together cross- platform [advertising] deals."[102]

PBL and the Nine Network's interests in telecommunications will undoubtedly continue to develop in the face the increasing competition from the other major commercial television networks. There is however indications that a push into the telecommunications industry is becoming increasingly profitable for the group.[103]

Seven Network

Apart from commercial television interests, the Seven Network has a 100% interest in Pacific Magazines. Other investments include Sports arenas (Perth Entertainment Centre and management of Telstra Dome); Ticketmaster 7 (ticketing); and AOL/7 (online consumer services). In December 2004, Seven sold its direct interest in telephone and Internet provider B Digital (mobile telephony). [104]

Seven owns and operates commercial television stations in Sydney, Melbourne, Brisbane, Adelaide and Perth. Much of the Group's programming is Australian content. The network continues to focus on moves into digital television. Seven is the first Australian network to archive and distribute all content from digital servers. As part of the development in digital, the Network is creating new

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O'Connell, the Ninemsn director of content, suggests that a critical current issue in the industry is how to best utilise other technology platforms such as mobile phones and iPods in order to download television content.

[100] Ibid.

[101] P McIntyre, "Australia leads way in cross-media promotions," *The Sydney Morning Herald*, 30 March 2006, 27. McIntyre notes "[m]edia companies are ramping up there efforts to push "cross-platform" advertising deals across their divisions to firm up revenue and poach market share from rivals."

[102] Ibid.

[103] James Packer, the PBL Executive Chairman, recently announced that the 2005/2006 25.7% net profit increase from the previous year "reflected improvements in its Pay TV and Internet businesses": "PBL tops $610m profit," *The Sydney Morning Herald Online* <www.smh.com.au/news/business/pbl-tops610m-profit/2006/> (accessed 23 August 2006).

[104] Note that B Digital is a telecommunications carrier licence holder.

content including the production of a Seven Digital channel, Channel 77, featuring a 24 hour programme guide, and real-time news and weather.[105]

As the Nine Network has begun to form closer cross-platform relationships with Ninemsn, the Seven Network has arguably built a very similar relationship with Internet Service Provider Yahoo!. Seven Network and Yahoo! Inc have recently agreed to combine their online, mobile and IPTV businesses in Australia and New Zealand. Under the terms of the agreement, the companies have formed a new 50-50 holding company that will own Yahoo! Australia and NZ. The companies combine their online teams and launched a new name, Yahoo! 7, and online presence in late January 2006. [106] The initial impact of this relationship has been significant.[107]

Soon after the commencement of its relationship with Yahoo!, the Seven Network began drawing up plans to launch its own shows in cyberspace, and considering ways in which to maximise its online advertising revenue. [108] Despite the apparent similarities between the Yahoo!7/Seven Network and the Nine Network/Ninemsn relationships in terms of cross-platform content transmission and advertising potential, Seven disputes the claim that they are involved in a "me too" venture. [109]

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[105] *Seven Network Limited Annual Report 2005*, "From the Executive Chairman," 2-3. Executive Chairman Kerry Stokes states: "We are developing new business partnerships to leverage our creation and marketing of our television and publishing content, and we remain committed to a strategy that will see our content and broadcast platform extending beyond our television business and reaching into new and expanding forms of technology."

[106] *See* C Catalano, "Yahoo! 7 to Make TV, Web Click," *The Age* (Melbourne), 31 January 2006, 3; Neil Shoebridge, "Seven Cries Yahoo ! as Site Takes Flight," *Financial Review*, 31 January 2006, 11.

[107] J Schulze, "Networks Take Rivalry Online," *The Australian*, 25 May 2006, 15. Schulze suggests:"[S]ince the Seven Network teamed up with global search engine Yahoo!... a large transformation has occurred in the online scene… Nine and Seven are the only two television companies in Australia to have teamed up with search engines to create large internet portals… As soon as Seven teamed up with Yahoo!, it returned from the internet wilderness to become the country's fourth most popular site."

[108] P McIntyre, "Seven, Yahoo ! Trumpet their New Venture," *The Sydney Morning Herald*, 2 February 2006, 25. McIntyre suggests popular local content shows "Dancing with the Stars " and "All Saints" would be available over a broadband connection for free at Yahoo!7.

[109] J Lee, "Yahoo! 7 Venture Working," *The Sydney Morning Herald*, 6 April 2006, 25. Ryan Stokes, the Director of Seven, and John Marcom of Yahoo! state: "If anyone thinks it's a me – too in a few months, we haven't done our job … Yahoo! isn't MSN. It's not our competition. Yahoo! is very much about the human experience and engaging with information, communication and entertainment. We have a very broad conception of what that is, we're at a point with the internet where people are generating content themselves. It's just not about receiving passively what's being fed to you. What we're doing is very different to our competitors." Early indications suggest that new developments in cross platform operations

The more traditional controversies concerning cross media ownership laws in print and media industries have overshadowed some of the emerging issues in the context of the overlap between broadcasting and telecommunications.[110] In an increasingly competitive commercial television broadcasting environment that is forcing the major competitors to look online to attain new streams of advertising revenue and provide consumers with new platforms to view content, it is inevitable that closer consideration will have to be given to how broadcasting and telecommunications industries interact with each other.

4.6 Commercial Radio

As previously suggested, there are distinct similarities between the activities of the larger commercial radio networks and the commercial television networks/owners. For instance, some of the larger radio companies that hold multiple licences across the country are also at the forefront of expanding their interests into telecommunications. Three examples will be considered.

Austereo Network

Austereo Limited operates radio stations in all capital cities of Australia. The company is mainly operated under two network brandings, the Today Network and the Triple M network. The licence held by both networks cross the country. The Today Network consists of: Sydney - 2DAY FM, Melbourne - Fox FM, Brisbane - B105, Perth - Mix 94.5 FM, and Adelaide - SA FM. The Triple M Network consists of: Sydney - 2MMM, Melbourne - 3MMM, Brisbane - 4MMM, Adelaide - 5MMM and All New 92.9. Joint venture stations FM 104.7 and Mix 106.3 operate in Canberra, while NX FM and KO FM operate in Newcastle.[111]

Austereo has committed to expanding its interests into the telecommunications industry over the past two years. Considering Austereo's key demographic is an "under 40" age group adept at using multiple forms of new technology, it is not surprising that the company's commitment to telecommunications is strong. In the 2005 Annual Report it is noted:

> "Austereo's vision also extends further into the new fields of multimedia, covering internet, podcasting and other equally exciting opportunities. We are leading our industry in exploration of these new opportunities. A

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have been successful for the Seven Network. Whether the consumer would actually believe that the two broadcasting giants are not directly in cross-platform telecommunications competition is questionable.

[110] C Catalano, "Forget TV, Big Media Companies Eye Internet," *The Age* (Melbourne), 1 February 2006. Bruce Wolpe, head of corporate affairs at Fairfax, states: "[t]he growing popularity of the internet as consumers' first choice for news and information was making aspects of the proposed media ownership laws redundant."

[111] Austereo has also diversified its radio operations into selected international territories including Malaysia, Greece and the UK.

> specialist group has been established to achieve first-mover advantage with emerging media… Multimedia initiatives have been embraced by Austereo with many new online options for clients to advertise and integrate their brands via new platforms. Clients now have advertising platforms such as podcasting, mobile phones and cutting-edge online opportunities to leverage their radio campaigns and position themselves as leaders in technology alongside Austereo ...Our multimedia vision is to deliver profitable integrated client marketing solutions by uniting our communities of listeners, using our pervasive entertainment brands and content, across multiple interactive and digital media platforms."[112]

The above statement articulates a message similar to that of the large commercial television companies: new telecommunications platforms to listen to Austereo Network content and new opportunities on these multiple platforms for advertisers (and undeniably new opportunities to raise revenue from advertisers). Over the past year, Austereo cemented its place as commercial radio market leader in the development of multimedia. The company suggests that the development of multimedia strategies is a response to a consumer that increasingly wants:

> "[o]n demand personalised media and …[is] prepared to consume media across multiple media channels … With an estimated 500,000 unique visitors per month to our websites, it is appropriate to leverage this audience both from a programming and advertiser perspective. Online offers Austereo the opportunity to increase its audience reach and in conjunction with the projected growth in online advertising revenues, we believe this environment will create unique content and revenue opportunities." [113]

In December 2005, Austereo and SonyBMG announced a new webcast music show that they claimed would be Australia's first IPTV service.[114]

Austereo has also started to make significant inroads into the mobile phone platform. During the year, Austereo entered into a tactical partnership with M.net, a mobile platform integration technology provider, to deliver both externally sourced and internally generated content across various carrier mobile platforms.[115] Premium mobile content is an area in which the company states:

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[112] Austereo Group Limited, *Austereo Group Limited 2005 Annual Report*, 3, at 7.

[113] Ibid.

[114] *See* C Jenkins, "Austereo, Sony in Web Music Duet," *The Australian*, 21 December 2005, 31. Jenkins suggests it is "possibly the first move by an Australia radio broadcaster to move beyond audio, as conventional media groups of all kinds race to the multimedia potential offered by the internet."

[115] Austereo Group Ltd, above n 111, 25.

> "[is] already witnessing significant uptake by its core demographic. Ring tones, wallpapers and other premium SMS content services are growing rapidly and given Austereo's music and entertainment focus, the company is well positioned to take advantage of the changing landscape in the areas of mobile content delivery and mobile marketing… The mobile phone is fast becoming the ubiquitous marketing tool of the 21st century and once again Austereo is well positioned to leverage content capabilities in this exciting market."[116]

Southern Cross Broadcasting/Macquarie Radio Network

Southern Cross Broadcasting is one of Australia's leading media companies with a diverse network of radio and television operations in Australia. Its interests extend from metropolitan and regional television to metropolitan radio, TV production and distribution and related businesses. The group's television and radio operations reach 94% of Australia's population.

Southern Cross Broadcasting is one of the few companies identified in the study that has specific licences in both the broadcasting and telecommunications industries. For the purpose of this study we focussed on its commercial radio interests. The company holds multiple radio broadcasting licences across Sydney (2UE), Melbourne (3AW), Brisbane (4BC) and Perth (6PR). In addition, Southern Cross Telecommunications, a wholly owned subsidiary of Southern Cross Broadcasting, is a licensed telecommunications carrier.[117]

Unlike the Austereo Network that has a key demographic of technology savvy listeners under the age of 40, the Southern Cross Broadcasting commercial radio stations, and other highly successful networks such as the Macquarie Radio Network, have much older listening demographics.[118] Concerns have been raised whether older listeners would embrace the new technology changes. One industry sceptic suggests "[p]odcasting [for example] works best with music, comedy, and news programs, not daily commentaries or cooking tips… also… you do not see many over- 50's carting around iPods." [119]

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[116] Ibid.

[117] Southern Cross Broadcasting Ltd, *Southern Cross Broadcasting Annual Report* 2005, 20. Southern Cross Telecommunications has constructed a microwave network from Toowoomba via Brisbane to Cairns at a cost of approximately $25 million. The network will satisfy the group's digital television broadcasting and broader communication needs and will have extensive additional broadband capacity available for sale to third parties. See

[118] N Shoebridge, " 2GB's Alan Jones to Have a Prod at Podcasting," *The Australian Financial Review*, 31 August 2005, 3. Macquarie Radio Network Owns the Licences of NSW Stations 2GB and 2CH.

[119] Ibid.

Despite the sceptics, this has not stopped Macquarie Radio and Southern Cross Broadcasting forging ahead with plans to provide content and advertising on telecommunications platforms such as audio and video podcasts. [120] Initial indications suggest the initiative has been successful. Macquarie Radio's 2GB started podcasting in September 2005. By December the Network was doing "50000 to 60000 [downloads] a month."[121]

By September 2006, Macquarie Radio was ready to launch a cluster of websites and preparing itself to be the first company in Australia to podcast its shows to mobile phones.[122]

What is clear from the above analysis is that there is a general consensus within the commercial radio broadcasting industry that providing content on multiple platforms (and opportunities for advertises to advertise on these platforms) is no longer a distant issue for future contemplation. Whether the key listening demographic is below or above 40, radio broadcasters are beginning to embrace new technologies on telecommunications platforms. It is therefore critical that regulators carefully consider the ramifications of double regulation across telecommunications and radio broadcasting industries as these new cross-platform strategies continue to rapidly develop.

4.7 Subscription Television

Foxtel

Foxtel is the one broadcasting company that clearly illustrates the fusion between telecommunications and broadcasting interests. The company is owned by leading telecommunications and broadcasting companies (50% owned by Telstra, 25% News Corporation and 25% PBL) and is at the forefront of digital broadcasting technology.

Foxtel is Australia's leading subscription television provider. [123] Foxtel states it "is now available to more than 70% of Australian homes, with more than 1.18m

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[120] J Lee, "Talkback Radio Goes Visionary," *The Sydney Morning Herald*, 11 February 2006, 548

[121] P McIntyre, "Podcasting Drifts towards Radio's Mainstream," *The Sydney Morning Herald*, 8 December 2005, 27; P McIntyre, "Radio Stations Thrilled to Send More Podcasts to the Willing," *The Age*, 17 December 2005, 10.

[122] J Lee, "Macquarie Radio on a New Wavelength," *The Sydney Morning Herald*, 7 September 2006. Chief Executive of the Macquarie Radio Network, Angela Clark, noted: "over the past year the company has learned what content worked and what content did not, judging by the material downloaded from its existing websites."

[123] Foxtel commenced distributing its services on cable with 20 channels in 1995, expanding to 31 channels and satellite distribution in 1999. It further increased its offering to 45 channels in 2002 following the completion of the FOXTEL-Optus Content Supply Agreement <http://www.foxtel.com.au/168.htm> (accessed 1 September 2006).

homes currently connected to the FOXTEL service directly or by receipt of services provided on a wholesale basis to other providers such as Optus TV."[124]

The company launched its much awaited digital service in early 2004 providing viewers with over 100 channels from Australia and overseas. As part of its digital innovations Foxtel has added interactive features and the FOXTEL iQ fully integrated Personal Digital Recorder commenced operation in February 2005.[125] A staggering 90% of all Foxtel Pay TV users now subscribe to the digital service after just 18 months of operation.[126] Paul Budde suggests the reason for this is that "multichanneling and interactive TV are available on their digital service." [127]

The competitors to Foxtel, and for that matter other television broadcasters, do not exclusively exist within the broadcasting industry. Australian's have embraced broadband Internet technology over the last three years. Many television executives have become concerned because, "consumers can increasingly download films or shows directly from websites, circumventing TV operators."[128]

In April 2006, Foxtel outlined plans to compete directly with its 50% stakeholder Telstra, whose Internet arm Telstra BigPond provides a movie download service, by launching its own broadband service. [129] A Foxtel representative states "[w]e are determined to launch a broadband download to PC [personal computer] service in the next 12 months and have already started to acquire appropriate rights to enable this." [130]

In what is looming as an extraordinary battle, Foxtel's largest stakeholder Telstra responded to the Foxtel announcement by stating that they would be "preparing to take on its own Foxtel partnership with Internet-based video services when its non-compete period with the group expires in 2008."[131] Sainsbury and Carson report:

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[124] Ibid.

[125] Ibid.

[126] Budde, above n 2, 14.

[127] Ibid.

[128] L Murray, "Foxtel Wants a Tighter Internet," *The Sydney Morning Herald*, 10 March 2006, 21: Murray suggests "there is nothing to stop a broadband provider from bidding for and winning exclusive sports rights." As a result, Foxtel has been forced to continue to diversify its operations and provide its services on Internet telecommunications platforms.

[129] See J Lehman, "Foxtel Downloads," *The Australian*, 6 April 2006, 14.

[130] Ibid.

> "Telstra confirmed the plans for Internet based video services, broadly known as IPTV, which are at the heart of its proposed $3 billion residential fibre network now under discussion with the competition regulator. The plans would put Telstra on a collision course with its partners in Foxtel – The Australian's publisher, News Corporation, and Publishing and Broadcasting Limited." [132]

The above relationship between telecommunications company Telstra and subscription television company Foxtel highlights the complexity of merging broadcasting and telecommunications industries. Given the complexity of such arrangements, it is inevitable that the way in which the two industries interact in a regulatory sense will need to be closely scrutinised. Foxtel Chief Executive, Kim Williams, has stressed the need to reconsider Internet regulation in light of converging telecommunications and broadcasting platforms. Williams believes that although broadband is undoubtedly an opportunity, as indicative of Foxtel's very own push into telecommunications, it also:

> "[h]as none of the content regulation we [speaking at an Australian Subscription Television and Radio Association conference] have… There is no regulatory impediment to broadband taking out a whole football code's content exclusively and in its entirety."[133]

In this new multi-platform world, where the regulatory framework is still being defined, the recent experiences of European and North American companies suggest that there are opportunities for companies such as Foxtel to successfully expand business across multiple platforms without the direct assistance of telecommunications companies.

Budde notes that in Europe and North America such companies are providing broadband services that deliver VoD, high speed Internet access and VoIP services for one single access charge. [134] In Australia, the market strength of Telstra is such that it is able to provide separate services (and accounts) for

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[131] M Sainsbury and V Carson, "Telstra in the ring with Foxtel," *The Australian*, 18 April 2006, 17. Tensions have certainly been evident between Telstra and Foxtel in recent months. Telstra chief Sol Trujillo states: "There is always going to be some tensions because everybody has core business… And then when they venture, and joint venture, that has tangential interests, but it may not fully align with the core business." Telstra subsequently modified its position and raised the possibility of using its Internet systems to deliver pay television services to its broadband customers: J Lehman, "Telstra May Offer Foxtel Part in Online Movie Sequel," *The Australian*, 26 June 2006, 33:

[132] Ibid.

[133] Murray, above n 129, 21.

[134] Budde, above n 2, section 15.5.5, 122-123.

telephone, broadband access and pay TV.[135] The North American and European experience is a movement away from such discrete product and accounting operations to an integrated service that seamlessly crosses the telecommunication and broadcasting divide.[136]

Conclusion

Therefore it is submitted that the rigid regulatory divide between "broadcasting" and "telecommunications" is no longer an effective basis for regulation in Australia. An examination of media operations reveals an increasing trend of broadcasting operators with multiple broadcasting service licences migrating into the provision of Internet and traditional telecommunications based services.

In such circumstances, the rigid classifications in the legislation relating to operators providing "broadcasting services," "carriers" and "service providers" has the potential to impose artificial and arbitrary distinctions, and make the resulting regulatory obligations inappropriate to the nature of the services actually provided.[137]

In such an environment of flux and convergence, there is a now an urgent need to consider a movement away from sector-specific regulation to a new regulatory framework for "electronic communications" that regulates on the basis of the nature of the service provided rather than on the basis of increasingly artificial distinction between "broadcasting" and "telecommunications."

[135] Ibid.

[136] Ibid.

[137] The negative effect of inappropriate regulation on economic growth and technological innovation is well established. *See* S John, *Australian Use of Information Technology and its Contribution to Growth* (2002), Reserve Bank of Australia; and F Scherer, *New Perspectives on Economic Growth and Technological Innovation* (1999) Washington, Brookings Institute; P Drysdale (ed), *The New Economy in East Asia and the Pacific* (2004) Routledge.