

D Discussing the Draft Report

The Communications Law Centre / Clayton Utz seminar attracted speakers from telecommunications and media organisations and law firms. This is what some of them had to say.

Deena Shiff, Director, Regulatory, Telstra

Ms Shiff noted that the Productivity Commission (PC) seemed intent on applying National Competition principles to an industry which had been shielded from the regulatory reform process which had transformed the telecommunications sector over the last decade. In particular she suggested that broadcasting was regulated in such a way that monopoly privileges and rights acted to limit competition and to protect vested interests that control free-to-air television services. These regulations constrained the ability for new players to enter the market and the types of services they may operate.

She cited a number of instances where the Productivity Commission's draft recommendations could provide a way forward for regulating broadcasting in the age of convergence by encouraging competition between existing operators and new services. Among these she noted the need for a liberal approach to digital datacasting that allowed new operators to enter the market and provide services rather than just allowing existing free-to-air broadcasters to continue to monopolise these types of services. Telstra would also favour having datacasting spectrum available in 7Mhz blocks rather than smaller segments that would limit capacity for interactive services to be provided through this means.

"We want the lots to be 7Mhz and not to create cottage industries with small amounts of spectrum going to the market", Ms Shiff said.

Spectrum access was another area where Telstra supported regulatory reform. Currently, commercial broadcasters obtain a right to access spectrum in tandem with a licence to operate services. These licences include a presumption for renewal which is not present in spectrum access arrangements in telecommunications. Ms Shiff noted that telecommunications carriers have had to adapt to a regulatory environment that includes the risk of asset and investment stranding if they lose spectrum access at the end of periods of tenure. The fact that all spectrum could be used for various broadcasting, telecommunications and other communications activities was not lost on Telstra.

"Telstra, having survived under a regime of spectrum clearance and auctions was pretty keen that there was some rationalisation of the way spectrum is managed", Ms Shiff said.

Whilst supporting the general proposition of rationalising spectrum access to ensure broadcasters used only what was necessary, it was also clear that managing licence allocation would present political and regulatory difficulties. Although the telecommunications regime does not have presumptions of licence renewal or compensation for any stranded investment she agreed that the broadcasting situation presented a different set of issues that would require a long period of transition.

Deena Shiff also raised the issue of how the Productivity Commission's recommendations for the removal of restrictions on cross media ownership could be thwarted under the Trade Practices Act. In essence companies would be restricted in their capacity to enter new media markets

through takeover of existing players or the establishment of joint ventures to provide new types of services.

Mr Mark Crean, Partner, Freehill Hollingdale Page

Mark Crean noted that the PC report was refreshingly non-politicised and approached the broadcasting sector with an open mind that sought logical outcomes rather than to achieve pre-determined positions. His presentation addressed the issues of regulatory overlap and achieving consistency between industries. The prospect of digital communications to enable convergence across broadcasting and telecommunications industries required regulations to be brought closer together and for government administration to be simplified.

He suggested that regulatory overlap, where both the Australian Communications Authority (ACA) and Australian Broadcasting Authority (ABA) administer access to spectrum, should be removed. The PC's recognition that it was logical to remove overlaps and duplications between the ACA and ABA should facilitate improved regulation of the new media and communications environment. Crean supported the ACA gaining responsibility for determining technical access through management of the spectrum, the ABA being given control over content whilst the Foreign Investment Review Board could provide oversight of foreign ownership issues.

Crean, who was one of the architects of CanWest's acquisition of the TEN Network, supported removal of foreign ownership rules before permitting other types of deregulation including removal of cross-ownership controls. He believed that to remove cross-ownership regulations alone without wider reforms would merely entrench the position of existing

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media players and prevent meaningful competition. Removal of foreign ownership restrictions would also act to bring the media into line with other industries in Australia that had faced the realities of the global economy. "The legislation is simply out of date with the realities of large listed public companies in this country", Mr Crean said.

The inadequacy of the Broadcasting Services Act (BSA) to deal with convergence was another issue addressed in the presentation. The inadequacy of the definition of broadcasting within the BSA is likely to cause significant problems as the industry, government, and courts grapple with services and content that can be delivered via television or personal computer. "Who's to know where the line is between a television and a computer", Mr Crean said.

The peculiarities of the Australia media industry would also cause difficulties when considering regulatory models to be applied particularly if lessons were to be drawn from experience overseas. He noted that regulators and industry should be cautious when drawing conclusions about how media industries and consumers might interact. For instance, pay TV in the United Kingdom provided a poor model for Australia as the power dynamics of the industry were different to local conditions. In the UK pay TV operators were able to obtain access to sport, whilst there were more competitors in the marketplace.

Barry Melville, Policy Adviser, Community Broadcasting Association of Australia (CBAA)

Mr Melville gave top marks for the PC's intention to encourage diversity and discourage concentration and said that the Commission's new broom approach merited praise.

He indicated that the CBAA was

gratified that the Commission seemed to fully apprehend the significance of the community broadcasting sector and impressed with the recommendation that indigenous broadcasting become a sector in its own right.

The CBAA was heartened by recognition of the problem with delinquent narrowcasters. However, Mr Melville said that while they would support greater efficiency in the ABA planning processes, the CBAA could not endorse an inherently inflexible blanket reservation of spectrum for non-commercial broadcasting needs. He indicated that while the report might generally garner praise from the community broadcasting sector, there would be brickbats for some of the draft report's specific proposals including that a value be placed on the spectrum reserved for community broadcasting and the recommendation that the CBAA be tasked with deciding access to community licences.

The CBAA also did not agree with the recommendation that revenue foregone from not charging for spectrum access should be considered as subsidy and/or funding support. As such, the Commission's proposal that the ACA quantifies and publicly reports on the value of spectrum reserved for non-commercial broadcasting seems dubious.

Mr Melville noted that the existing statutory scheme for digital conversion provides for the digital transmission of standard definition community television, free-of-charge. The idea is that datacasting licensees will operate multiplexes and will be obliged to provide carriage for community broadcasters. He suggested the Commission's proposal that there be greater scope for multichannel television and that the community access carriage obligation be subject to tender, warranted consideration.

Although, the Commission sought comment on a submission that the CBAA become the licensing authority for the community broadcasting

sector, Barry Melville argued that it was inappropriate for a peak body to determine who gets access to broadcasting facilities.

He summed up by saying that community broadcasting stations were vital for the cohesion of local communities, particularly in regional areas and that this sector is unique in its ability to address the diverse needs of communities.

Jenny Buckland, General Manager, Australian Children's Television Foundation

Ms Buckland noted that there had been significant changes in the global programming purchasing arrangements which threatened the income derived from overseas sales of Australian content despite an overwhelming increase in the number of channels to be filled and the number of buyers in the market. She noted the number of program buyers in Europe has increased in the last ten years from 20 or 30 to 300 or 400 at present.

"One of the major things that has changed in the past 10 years for these program buyers is the terms of the contracts. Ten years ago, they could have demanded strict exclusivity but not any more, programs are being sold over and over again. Mainly due to free-to-air broadcasters now having to share with the pay services," Ms Buckland said.

Moving on, Ms Buckland stated that local content quotas are becoming more prevalent and the reason for this is that as more services and platforms open up they are being dominated by American companies. It seems that mega-companies are consolidating distribution and channel networks and the impact is being felt all over the world.

One particular case that has been brought up this year involves 20th Century Fox. David Duchovny star of the *X-Files* has alleged that Fox has been selling the program to other

News Corporation owned networks for less than market value to prevent him earning income based on program profits.

Another point Ms Buckland made was that children in the US and Europe were being sidelined because fewer households have children in them. She said that timeslots for children in western countries were diminishing with networks placing more emphasis on older age groups.

She feels that in Australia we need to affirm the commitment to children's television. She stated that Australia currently had one of the best evolved children's television industries in the world and this is supporting children's programming in a way that many other countries are unable to do.

One particular area of concern for Ms Buckland was the P (pre-school) quota, which she said was so tiny that one season of *Teletubbies* would cover one commercial broadcaster's quota for two years.

In summing up she stated that whilst it is important to be concerned with the audience, it is also important to acknowledge that the audience can't be served unless there is a thriving production industry in this country.

Tony Branigan, General Manager, Federation of Australian Commercial Television Services (FACTS)

Mr Branigan suggested that despite the Productivity Commission's report he expected the industry will end up with the approach that is set out in legislation.

He explained that the line of argument running through the PC report on the standard applied to digital television was incorrect.

The fundamental points of difference were that FACTS saw digital definition broadcasting as an immensely important development that was going to shape our broadcasting system and the range of industries that develop via digital television for at least the next

twenty to thirty years. He noted that the press was only interested in how much an HDTV set will cost in 2001.

"Now to me it seems that a focus on the first year, or the first two or three years, at the expense of this twenty or thirty year prospect, is a profoundly mistaken focus", Mr Branigan said.

He identified another misconception in press coverage on HDTV which he thought also surfaced in the Productivity Commission report. This was the assumption that the population is being asked to choose between high definition or standard definition.

"The reality is that if we take the high definition route, it doesn't preclude any level of quality below that but there is unlikely to be a market for receiving equipment that cannot make sense of a high definition signal", Mr Branigan said.

He noted that quality of the signal and the display were two quite different issues. Broadcasting in high definition does not rule out standard definition displays. It does not rule out continuing to use your existing analogue set with a suitable decoder. The sorts of information that is most commonly reported, and which is accepted by the Productivity Commission about the difference in the cost of the electronics, is something that FACTS simply cannot reconcile with the information it had received from the people who make these electronics.

The difference between the prices of sets raised by the Productivity Commission in its report and the figures quoted by FACTS were put down to different approaches to costing televisions.

"What we've been concerned to ascertain is what the cost of the components that are available to every manufacturer is. But how they factor the costs into their final retail price, is total black magic", Mr Branigan said.

Mr Branigan also addressed the recommendation in the PC report for the introduction of new broadcasting services. The recommendations for

removal of restrictions on new commercial services did not surprise FACTS. However, FACTS was puzzled by the recommendation that datacasters be effectively permitted to do what they like with no dividing line between datacasting and broadcasting.

He noted that this appeared to be consistent with having no restrictions on entry. This seemed to be based on the assumption that more competition and fewer restrictions will result in a better fit between what viewers want and what broadcasters provide.

However, he saw problems emerging from this approach including that while expanded competition and slimmer margins may result in more program diversity it was likely that this would be off-the-shelf content rather than new productions. He commented that off-the-shelf meant off-the-satellite programs made for other markets.

"I think it's often assumed that the only casualties of a totally free market approach would be drama, children's programs, and perhaps documentaries, sort of Australian versions of *Living with Dinosaurs* but the reality is that there are other programs that we take for granted at the moment as immovable parts of the scene, that would also be very vulnerable", Mr Branigan said.

He used the effect of aggregation in regional Australia to make the point. Competition certainly brought choice, but generally not in news. Many aggregated market stations nowadays provide absolutely no news at all.

The Productivity Commission's report can be found at <http://www.pc.gov.au/> <

Stephen McElhinney, Monique Williams