OVER-REGULATION IS STIFLING AUSTRALIA'S MEDIA

The current regulatory framework is broken, with poor prospects for reform, argues **Ian Robertson**

When the *Broadcasting Services Act* (BSA), which regulates broadcasting and online services in Australia, was passed by Parliament in 1992 it totalled fewer than 100 pages. Today it is 10 times that length.

The BSA was intended to be a significant departure from the previous regime of detailed and complex black letter law and an adversarial approach to regulation and enforcement. The Act aimed to substantially free up broadcasting regulation in Australia with a much lighter touch approach, and an emphasis on co-regulation and appropriate flexibility to meet ever-changing circumstances. And for a while it did.

However, regular complex amendments to the BSA in the 20 years since have significantly increased its length and made parts of it similar to income tax law in the complexity of their provisions. Much of this complexity stems from the BSA's underlying principles of strong restrictions on ownership and control, and extensive anti-avoidance provisions to prevent them from being circumvented. Other restrictions in the BSA are intended to stifle competition. The very detailed provisions restricting the activities of datacasters are an example—they have operated effectively to ensure that datacasting has not occurred in Australia.

And the Australian Communications and Media Authority (ACMA), which is the regulator responsible for the BSA and 25 other Acts and 523 pieces of regulation that regulate much of Australia's media, itself recognises that the current media regulatory model is substantially flawed. In its submission to the Convergence Review, titled 'Broken Concepts,' the ACMA reviewed the 55 legislative concepts that form the basis of current Australian media regulation and found the majority to be either 'broken or under significant strain.'

The Convergence Review

In December 2010, Minister for Communications Stephen Conroy announced the Convergence Review. At the time of releasing the terms of reference for the review he said: 'The government recognises that regulatory measures designed in the 1980s may not be the most appropriate for the 21st century.'

The Convergence Review Committee was established in early 2011 with Glen Boreham, a former managing director of IBM Australia and current chair of Screen Australia, as its chair. The terms of reference for the review covered a broad range of issues, including media ownership laws, media content standards, local content rules, and the allocation of radiocommunications spectrum.

The review set out on a deregulatory path

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from the outset. It adopted the following fundamental principle:

> Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose.

In its final report, the review stated that a consistent theme of the submissions it received was that the communications environment, particularly broadcasting, is overregulated and many of the rules are unnecessary and difficult to comply with. The review agreed and concluded that a range of existing regulations no longer served their policy purpose, were difficult for government to administer, and were an unnecessary burden on industry.

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In the important area of ownership and control, the review proposed that the only ownership and control rules which were required were a 'minimum number of owners rule' at the local level, and a public interest test at the national level should apply to changes in the control of media companies of national significance. The review recommended that all other ownership and control rules should be abolished and that the licencing of broadcasting services should be ended.

The review recommended a shift towards principles-based legislation rather than rigid black letter law so that the regulatory environment could respond effectively to the future challenges of convergence. The review stated:

> Given the ongoing changes in technology and in the way Australians use media, legislation would be more effective if it focused on creating a framework of principles within which an independent regulator could apply, amend or remove regulatory measures as circumstances require. This approach is used in comparable countries such as the United States, the United Kingdom and Canada.

The review also stated in its final report that the new communications legislation should give the regulator clear guidance that regulatory forbearance—that is, the option not to apply regulation in a specific case—is often the most desirable approach.

The review recommended the abolition of the existing communications regulator, the ACMA, and its replacement with a new regulator that would operate largely independent of government control and with the flexibility necessary to properly administer new principles-based communications legislation to efficiently achieve the best possible policy outcomes in the interests of the industry and the public.

The collision of the Convergence Review and the Independent Media Inquiry

In September 2011, almost a year after announcing the Convergence Review, Senator Conroy announced an 'independent inquiry into the Australian media' to be conducted by a former judge of the Federal Court, Ray Finkelstein QC.

Senator Conroy stated that the Independent Media Inquiry would focus on print media regulation, including online publications, and the operation of the Press Council:

> The Government believes a separate and distinct examination of the pressures facing newspapers and their newsrooms, including online publications, will enhance our consideration of the policy and regulatory settings Australia needs to ensure that the news media continues to serve the public interest in the digital age.

The inquiry was greeted with a mix of deep suspicion and outright hostility by Australian

news media companies. Most considered it a political response to the media's critical reporting of the federal government and a tawdry attempt to muzzle the press and bring it under government control.

The government also decided that rather than reporting directly to it, and notwithstanding that the government directly commissioned and paid for the inquiry, the inquiry would report to the Convergence Review and its findings would be incorporated into the review's final report. The reason for this was never explained and the decision was surprising given that the issues being considered by the inquiry had only peripheral relevance to the issues being examined by the review.

This set the review on a collision course with Australia's media. Whereas the review favoured substantial deregulation of the media, the inquiry recommended precisely the opposite.

The inquiry recommended the establishment of a new government-funded body, the News Media Council, to set journalistic standards for the news media and to handle complaints when those standards are breached. The inquiry also recommended that the News Media Council should have these roles for news and current affairs coverage on all platforms—print, online, radio and television.

The Convergence Review did not agree with these proposals:

> While the establishment of a publicly funded statutory authority to look at news and commentary as proposed by the Independent Media Inquiry remains an option available for government, the Review considers this to be a position of last resort.

Instead, the review recommended the establishment of an industry-led body to promote standards, adjudicate complaints, and provide timely remedies. The body would be funded principally by its members with some government funding, and would cover all platforms—print, online, television and radio.

While a less interventionist model than that proposed by the Independent Media Inquiry, the Convergence Review proposals were strongly opposed by the media; Mark Day, a leading columnist for *The Australian*, wrote a front page article attacking the review's final report days before the report was published.

As a result, rather than being welcomed as an important step towards deregulation, the review's final report was generally criticised by the media.

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The ACMA and the co-regulation of content

Australia operates a 'co-regulatory' system for regulating broadcasting content and dealing with complaints about that content. The peak bodies that represent Australian broadcasters—principally Free TV Australia and Commercial Radio Australia—develop codes of practice, after consultation with the general public, that prescribe content and programming practices. The codes must be registered by the ACMA if the ACMA is satisfied that the codes are endorsed by the industry, the public has had an adequate opportunity to comment, and the codes provide 'appropriate community safeguards.'

In practice, members of the public make few submissions to the periodic reviews of the codes of practice undertaken by the broadcasting industry, and the wording of the codes is the result of tough negotiations between the peak broadcasting industry bodies and the ACMA.

A person who wishes to complain about material broadcast by an Australian broadcaster must first complain to the broadcaster, and if dissatisfied with the response, may then complain to the ACMA. The ACMA may also initiate investigations about material broadcast by a broadcaster if the ACMA considers the issues involved to be sufficiently serious.

In performing its regulatory functions, the ACMA often demonstrates undue emphasis on

black letter law rather than displaying flexibility to achieve outcomes that serve the public interest and the needs of the industries it regulates. The ACMA's adversarial approach to regulation has seen it involved in frequent litigation, and its relationship with key industry sectors is thought by many leaders of those industries to be strained.

In a recent federal court case, the owner of Sydney radio station 2GB successfully sought to have the ACMA stopped from conducting an investigation concerning breach of the commercial radio codes of practice because a valid complaint had not been made. In his judgment, Justice Buchanan was critical of the ACMA for not being able to state a clear position to the court as to whether the relevant code of practice, which had been developed in conjunction with the ACMA, applied to the complaint made to 2GB. The court rejected all of the ACMA's submissions in the case and ordered it to pay 2GB's costs.

The case took five and a half years to resolve in Google's favour and involved more than 16 days of hearings before nine judges in three courts.

In addition, the ACMA, like some other regulators, has a well-resourced media unit headed by a senior former journalist to ensure that the ACMA is portrayed in the best possible light. It clearly sees public relations and publicity as important weapons in its regulatory armoury. For example, in a recent investigation concerning a Sydney FM radio station, the ACMA held a press conference to announce tough licence conditions before the radio station had had time to exercise its statutory right to make submissions to the ACMA.

The ACCC and the media industry

Another regulator with extensive power that affects the news media is the Australian Competition and Consumer Commission (ACCC). In addition to its role in competition law, which has the practical effect that anybody wishing to acquire an Australian broadcasting business has to seek the approval of two regulators, the ACMA and the ACCC, the ACCC also has a significant role in consumer protection. One of the areas of consumer protection in which the ACCC is and always has been active is misleading and deceptive advertising.

In a number of cases over more than a decade, the ACCC has sought to make media companies, including advertising agencies, publishers, broadcasters and most recently the search engine provider Google, responsible for publishing or broadcasting misleading or deceptive advertising even though the relevant advertiser is clearly liable.

In the Google case, the ACCC claimed a number of search engine results displayed by the Google search engine between 2005 and 2008 were misleading and deceptive, in breach of section 52 of the *Trade Practices Act* (which is now section 18 of the *Australian Consumer Law*). The search results were a form of paid advertisement known as 'sponsored links' or 'AdWords.'

The case took five and a half years to resolve in Google's favour and involved more than 16 days of hearings before nine judges in three courts. It was undoubtedly enormously expensive for both parties, including the Australian taxpayer. A company with fewer resources than Google may not have been able to afford to fight the ACCC all the way to the High Court and would, instead, have had to agree to accept liability and a penalty sought by the ACCC even though it had not, as determined unanimously by the High Court, breached the law.

It was not in contention in the High Court that the sponsored links in question, concerning travel, car sales, classified advertising and dog training, were misleading and deceptive. However, Google successfully argued that each sponsored link was specified by the relevant advertiser and Google merely implemented the advertiser's instructions and was not responsible for the misleading and deceptive representations.

The High Court rejected the ACCC's contention that Google rather than the advertisers produced the sponsored links. The High Court also accepted that Google's behaviour in displaying sponsored links at the direction of advertisers was the same in principle

as the behaviour of other intermediaries such as newspaper publishers and broadcasters who publish, display or broadcast the advertisements of others.

In absolving an intermediary from liability for the publication of misleading and deceptive advertising, the Google case is consistent with some earlier cases in which the ACCC sought unsuccessfully to make advertising agencies liable for misleading advertisements prepared for their clients.

In 2003, the Full Federal Court overturned on appeal a decision that an advertising agency should be held liable for misleading and deceptive conduct in preparing an advertisement for the health fund MBF. The case was one of several in which the ACCC sought to impose the role of gatekeeper on advertising agencies to make them primarily responsible for misleading and deceptive advertisements. However, in the MBF case, the Full Federal Court decided that advertising agencies would only be liable for such advertising if they were reckless, negligent or knew misleading representations were conveyed in an advertisement.

Another area of frequent conflict between the ACCC and Australian businesses accused of misleading or deceptive conduct is in the area of corrective advertising.

The *Competition and Consumer Act* and its predecessor legislation, the *Trade Practices Act*, contain provisions that enable courts to, among other things, make what is described as 'a non-punitive order' requiring corrective advertising to be published if a breach of the legislation has occurred.

However, the ACCC has never been happy that the relevant provisions are intended to be used for a non-punitive purpose rather than to punish offenders. In a large number of cases over many years, the ACCC has sought orders from the Federal Court requiring that corrective advertising be published by businesses that have engaged in misleading and deceptive conduct. In most of these cases, the court has refused to accede to the ACCC's request.

In a recent case concerning misleading and deceptive advertising of air fares by the airline Air Asia on its website, the Federal Court was willing to order a pecuniary penalty and to accept an undertaking from the airline. However, the court was not prepared to accede to the ACCC's request for an order for corrective advertising to be published on the Air Asia website to punish the airline for its conduct. The court commented that the power to make corrective advertising orders under the *Competition and Consumer Act* 'is intended to be protective and not punitive' and was not appropriate even though conduct that misled consumers about the price of air fares had clearly occurred.

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Conclusion

There is general agreement among all relevant players, including the federal government, that the Australian media is over-regulated and that the current regulatory model is broken. However, there is no indication that any meaningful change is likely in the foreseeable future.

At the time of writing, the federal government's legislative response to the Convergence Review appears likely to be limited to a licence fee rebate for commercial television broadcasters and some inconsequential changes to local content rules for commercial television. Even the simple removal of the 'reach' rule, which prevents one person controlling television stations that broadcast to more than 75% of the Australian population, appears to have fallen victim to vested interest and political weakness.

The cases referred to above highlight the importance of regulators such as the ACCC and the ACMA exercising appropriate regulatory forbearance and carefully considering the impact of their actions on those they regulate.