
DIGITAL TELEVISION AND ITS DISCONTENTS: COMPETITION POLICY AND BROADCASTING IN AUSTRALIA

by

Julian Thomas *

A. Introduction

Media policy and the means to reform it vary dramatically across national boundaries. In Australia the problem of sustaining competition in a digital broadcasting environment does not arise, because competition is all but prohibited by existing media law. Instead the issue is whether digital broadcasting can facilitate the appearance of new players and new services. This problem is the theme of the present paper.

In 1999 media law in Australia was for the first time subjected to a review guided by the principles of the country's competition policy. A powerful, highly concentrated industry with a history of protection and politicking was examined by the Productivity Commission, an independent economic advisory body. The Commission recommended far-reaching changes to almost every aspect of media policy, but was especially critical of the anti-competitive aspects of Australia's rules for digital television. Opinion is divided as to whether this collision of high economic policy and deal-driven industry regulation was propitious. It may have far-reaching consequences for Australian media.¹

This article explores the difficulties of applying competition policy to media industries, taking as its point of reference the Commission's proposals to introduce greater competition to Australian broadcasting.² It seeks to explain a problem at the heart of the Commission's deliberations: for reasons which may well be specific to this jurisdiction, the conversion to digital broadcasting is crucial to achieving greater competition in Australian media. But at the same time, it appears unlikely that a successful switch-over to digital can occur without new services and new players creating demand. A resolute new policy direction is therefore essential.

* Electronic Policy Project, Institute for Social Research, Swinburne University of Technology, Australia. The views expressed in this article are those of the author.

¹ At the time of writing the Australian Government had not yet announced its response to the Commission's recommendations.

² The Commission's draft and final reports, together with all of the submissions and transcripts of inquiry hearings, are available online at <www.pc.gov.au>.

B. Pressures for liberalisation

The origins of the Commission's inquiry lie in broader economic and public policy pressures, as well as specific problems which emerged in Australian media policy in the 1990s. It was, first, an indirect outcome of the liberalising dynamic of economic reform. In Australia, as in other countries, competition policy is associated particularly with the challenges of regulating restructured utilities and services, especially telecommunications, electricity, gas and transport. These are industries which have been to a greater or lesser degree liberalised over the past decade: government ownership of the infrastructure has been diluted or divested entirely; and new players and services have encouraged. The aim of policy has been to place the new players on an equal footing with government. But Australian competition policy has gone substantially further. In 1995 the Commonwealth and State governments agreed to a broad set of reforms including the commitment that all Australian governments would review and reform all laws that restrict competition, unless the restrictions on competition satisfied a public interest test.³

The competition principles agreement set the framework for the Commission's broadcasting inquiry. The Commission was asked 'to advise on practical courses of action to improve competition, efficiency and the interests of consumers in broadcasting services' (PC 2000: iv), and was to apply the test that legislation restricting competition should be 'retained only if the benefits to the community as a whole outweigh the costs and if the objectives can be met only through restricting competition'. In the inquiry terms of reference the Treasurer (Australia's equivalent to a Finance Minister) noted also the aims of broadcasting legislation in seeking to protect diversity, plurality, and social and cultural values, and asked the Commission to focus particular attention 'on balancing the social, cultural and economic dimensions of the public interest and have due regard to the phenomenon of technological convergence in broadcasting markets'.

A second factor behind the inquiry was the need to resolve one particularly intractable media policy problem: the rules relating to the ownership and control of broadcasting services, and, in particular, the restrictions on cross-media ownership of television, radio and newspapers. Provisions introduced in 1987 aim to prevent a person controlling a commercial television licence from controlling a newspaper or radio station in the same licence area. As in other countries, the purpose of these laws is to encourage diversity and prevent concentration. They have reshaped Australian media industries around the separation of broadcasting and print interests, and for this reason have come under continuing political and industry pressure. Some of Australia's largest media firms have pressed for change. Australia's conservative government came to power in 1996 with a commitment to remove the restrictions on cross-media ownership, but had been unable to secure political or broad community support for change. At the same time it was increasingly obvious that the restrictions would operate unevenly and partially in a convergent environment: they did not extend to many 'new media' businesses. An independent inquiry was the logical option for government seeking a solution to this problem.

³ Further information on Australia's national competition agreements can be found on the website of the National Competition Council, www.ncc.gov.au.

The third shaping influence on the inquiry was technological change. Alongside burgeoning Internet services, and a growing subscription television sector, digital television was a major issue. Digital terrestrial broadcasting commenced in Australia on 1 January 2001, and the legislative framework for the new services was enacted in 1998. This meant that the Productivity Commission inquiry became in effect the first review of digital television policy. The digital legislation was bitterly contested by rival media interests and remains controversial.⁴ The 'new media' sector — telecommunications firms, pay television, internet service providers and multimedia developers — objected vociferously to the Government's decision to lend, free of charge, spectrum to existing broadcasters for their digital services for the duration of the conversion period. Provision was made for new interactive 'datacasting' services; but these were to be tightly regulated to preclude competition with the broadcasters.

Against this background, the challenge for the Commission was to develop an overall approach enabling greater competition in a rapidly changing environment, while preserving the social and cultural benefits associated with existing policy. Restraints on competition are not hard to find in Australian broadcasting, which remains one of the country's most regulated industries. The sector in its current form is also highly concentrated. Subscription services (comprising mainly analogue cable services, and smaller microwave distribution systems and a satellite-delivered digital sector) are nascent and have not yet reached 20 per cent of households. Three metropolitan commercial networks dominate free to air television. Their position is protected by a series of regulatory barriers to entry. The spectrum planning process has had the effect of constraining new entry. Licences are allocated according to non-technical criteria. Furthermore, section 28 of the *Broadcasting Services Act* 1992 bans the allocation of any new commercial television licence in any area before 31 December 2006.

C. The problem of the politics of convergence

The competition policy question is not whether restrictions on competition such as these exist but whether they are justifiable or necessary in the public interest. But this analytic bears little relation to the highly politicised present and past of Australian media policy-making. The long-standing practice of policy, as participants described it to the Commission, appeared to be an additive process of dispensing obligations and privileges in turn upon the various sectors of the industry. These obligations and privileges are the *quid pro quos*, as the Commission calls them, that justify otherwise anomalous provisions, including sweeping protection for incumbents. Over time the *quid pro quos* have become increasingly costly, discriminatory and complex. The Commission says:

Participants have emphasised how broadcasting policy is a structure built by quid pro quos: barriers to entry are balanced against programming obligations; free to air networks are prohibited from multichanneling to help subscription services which in turn are disadvantaged by restrictions on advertising and antisi-

⁴ For a general discussion of the public debate, see Jock Given, *The Death of Broadcasting?*, UNSW Press, Sydney, 1998.

phoning rules; free to air networks are required to broadcast in high definition because they have been lent the spectrum to do so; and so on and on. (PC 2000: 254.)

Australian law requires broadcasters to transmit a minimum number of hours of high definition television per week, not because of demand for this service, but in the name of fairness, because the bandwidth requirements of high definition have been used to justify the loan of the seven megahertz digital channels, the ban on new commercial television licences, and prohibitions on multichannelling. From this perspective, it does not matter that the high definition quota will increase costs for all free to air broadcasters (many of whom are now receiving government assistance to subsidise the required hardware), for programme producers and for consumers, and the argument that high definition television will be of interest to only a tiny group of affluent home cinema devotees is irrelevant. All this leads directly to the regulatory artifice of datacasting. If multichannelling is banned, datacasting must not be a means of multichannelling. If new commercial broadcasters are banned, datacasting must not be a means of broadcasting.

In this situation, governments can either keep juggling the myriad industry interests at stake, or attempt to change the way the game works, from treating everyone differently to treating everyone the same. Instead of weighing up the *quid pro quos*, the policy problem becomes a question of quantifying regulatory neutrality. In a well known discussion of policy options for universal service provision, the US media economist Eli Noam noted that policy reforms require certain attributes of 'friendliness' if they are to succeed.⁵ Firstly, they should possess *political friendliness*. They should deliver no shocks, windfalls or unilateral advantages to some competitors. Secondly they should possess *collection friendliness*: they should offer stability for targeted revenues. Thirdly, they should offer *administrative and user friendliness*: as Noam says, 'keeping things simple is a key requirement'. He goes on to note that policy reforms should be friendly towards pre-existing regulatory schemes, and should possess *productivity friendliness*: they should include incentives for efficiency.

These precepts should not be out of context in the field of broadcasting policy. Australia's digital television regime may nevertheless set new standards for unfriendliness in most or all of these fields. It delivers shocks, windfalls and unilateral advantages. It jeopardises future public revenues from the sale of spectrum. It is complex, and is likely to be unworkable. And while it may be too friendly towards some pre-existing policy, it is unfriendly towards other aspects of current broadcasting, and distinctly unfriendly towards productivity. The wider significance of the issue extends beyond its consequences for the corporate winners and losers concerned. The public interest lies in other issues: in the efficient use of the spectrum, and in the achievement of longstanding social and cultural policy goals for the media. Further, at a time of increasing concern about the influence and ethics of the media, we need to think about how these public debates are conducted. It is vital that media policy be subjected to public scrutiny and criticism. But media organisations of all kinds are themselves interested and involved parties in digital

⁵ Eli M. Noam, 'Beyond Liberalization III: Reforming Universal Service', *Telecommunications Policy*, 1994, vol 18, no. 9, pp. 691-2.

television, precisely because it is a new communications platform with the apparent capacity to offer new services seen as possible complements for a wide range of existing media and communications businesses.

In an industry where convergence is the dominant contemporary metaphor, digital television is often presented as if it were the ultimate convergent medium, delivering the bandwidth and universality of broadcasting together with the interactivity of the Internet. Digital television appears to offer broadcasters an escape route from the declining business of free to air television, while at the same time holding out to internet and online service providers the prospect of a market beyond personal computer users. Whether the flexibility of the platform can produce successful commercial applications beyond the established models is not yet known. We don't yet know how convergent digital television will prove to be. But the powerful image of convergence invites all media interests to see their future selves reflected in the idea of digital television, and this has created new potential for conflicts of interest in media coverage, and new problems for government. In the face of sustained media criticism in the last year, the Government has often had to shift the ground to exposing or protesting against the self-interest of the discontents. The politics of convergence form an alignment against the politics of incumbency. The game of media policy is no longer contained within a small circle.

This means that the way the game is played has to change. When the game is played by a small number of players, disagreement can be managed through a rough balancing of regulatory dispensations and obligations. But as the Commission's report suggested, *quid pro quos* no longer work when media industries become more complex, through technological developments, evolving industry structures or the emergence of competition from adjacent industries. Each new policy adjustment threatens the last. The policy debate becomes an argument about revisiting the privileges granted to others, rather an evaluation of the public interest or broader industry directions. Every new review or legislative amendment is an opportunity to return to the starting point. For its participants, these arguments appear to become a vivid struggle between monopolists and freebooters. On the outside, it looks like a quarrel over the distribution of obscure regulatory dispensations. The result is that the policy debate is deprived of a future tense: it is dominated by the attempt to modify recent or impending government decisions. Inevitably, the balancing becomes too difficult.

D. A new regime for digital television?

The present impasse highlights the political and policy complexities of liberalising media policy. The Productivity Commission's inquiry suggests the steps required for a more neutral approach. The central problem with the existing policy framework is a lack of credibility in the longer-term digital switch-over. While the legislation concentrates on the introduction of digital services, it has little to say about switching analogue services off, and in fact provides for the extension of the analogue simulcasting period. At the same time there appears little attractive enough in the new digital offerings to drive digital take-up. This means that would-be digital broadcasters have little confidence that the incumbents will ever be asked to give up their valuable analogue spectrum. So an alternative strategy has to address several problems at once: the

need to open up digital services, and the need to shift industry attention towards the medium term outcomes of policy, rather than the immediate winners and losers.

This requires comprehensive reform. Several areas are particularly important: access to the spectrum; the digital conversion process; and more technologically neutral rules for regulating ownership and control.

I. Providing access to spectrum

The Commission's proposals for changing spectrum planning and licensing received little attention in media commentary on the report. However, they are central to the proposed new structure of media regulation. The primary objective of the inquiry's recommendations in this area is to ensure more efficient use of the spectrum, which is understood as a valuable public resource. Under Australia's current system, broadcasters are treated very differently from other commercial users of the spectrum, who purchase spectrum at auctions conducted by the Australian Communications Authority. Instead, broadcasters are allocated spectrum without charge within the broadcasting services bands by the Australian Broadcasting Authority (ABA). Spectrum is planned and allocated by the ABA according to its judgement of the 'viability' of the broadcasting service and its need for spectrum. The result is that very substantial amounts of spectrum are used by a small number of analogue television services. Local translator channels are provided to ensure reception in hilly areas. In the greater Sydney area, five separate seven megahertz channels are allocated to each station. Generous buffer channels are also allocated between every channel to ensure that there is no interference. It has been argued that equivalent analogue services could have been planned more efficiently. However, digital transmission offers the potential for far more efficient use of the spectrum. Digital channels do not need to be separated by buffer channels, and single frequency networks may be used instead of multiple translator channels. Analogue television is thus a voracious consumer of spectrum, but Australian broadcasters do not pay for the spectrum they use. Instead of paying for spectrum, commercial broadcasters pay a licence fee based upon their station revenues.

The logic of this system derives from an earlier era of television broadcasting, when reception equipment was cruder than today, when alternative delivery platforms did not exist, and when there were few alternative commercial uses of the spectrum. But better reception equipment minimises the need for buffer channels today; with digital transmission they may be unnecessary. Single frequency networks should cater for audiences in areas which suffer from poor terrestrial reception, along with potentially more efficient alternatives to terrestrial broadcasting, such as satellite or cable systems. And the extraordinary growth of wireless communications in the past decade means that there are increasingly valuable alternative uses of the spectrum now given over to broadcasting.

The Commission recommended splitting broadcasting licences into two: a licence to be a broadcaster, and a licence to use spectrum (PC 2000: 193). Licence fees currently levied on station revenue can then be converted over time into fees based upon spectrum use. This shift has significant consequences: it gives broadcasters an incentive to use only as much spectrum as they need, rather than using as much spectrum as possible in order to keep competitors out.

And the best way for broadcasters to reduce their demand for spectrum is through a timely conversion to digital transmission.

II. The conversion to digital television

In the initial public hearings and the 1999 draft report, the inquiry provided a forum for reviewing Australia's 1998 digital television legislation. Several issues emerged particularly sharply: the peculiarity of the Australia's mandatory high definition transmission quota in an international context; the higher than foreseen consumer costs of high definition television, and the difficulties in extracting a workable definition of datacasting from the legislative framework. The problem of defining the new service of datacasting received considerable media coverage, owing to the media interests of the parties involved. But the high definition issue did not come into focus until the high likely costs and low market uptake of high definition receivers emerged. A typology of media users prepared for the Commission emphasised the inequitable consequences of imposing the 'home cinema' solution of high definition television on all viewers (PC 1999: 128). In December 1999 the Minister for Communications announced a new policy of requiring digital broadcasters to transmit a standard definition signal, in addition to the high definition quota. The Minister said:

The Government wants people to have the choice to buy SDTV equipment because it will be a lot cheaper than HDTV equipment, at least in the early years of digital television. HDTV television sets will be a lot more expensive than SDTV sets. HDTV set top boxes, too, will cost more than SDTV set top boxes. It would not be fair if digital television was so expensive that only rich people could afford it. The Government has decided on SDTV must-carry so that digital television will be as affordable as possible for ordinary Australians. (Alston 1999: 11)

The Minister's statement also acknowledged the risk in emphasising digital high definition television at a time when only one other country (the United States, using the different ATSC standard) provided for it.

The analysis of the digital television issue developed considerably between the draft and final inquiry reports. The emphasis in the final report is less on the specific regulatory problems surrounding the introduction of digital television and more on the strategic question of ensuring an effective transition to digital in the medium term.

Analogue switch-off is critical because the existing analogue terrestrial television services use an enormous amount of spectrum, which could otherwise be freed for many other purposes, including new, competitive services. There can be no significant diversity or competition in free-to-air television broadcasting without an analogue switch-off. (Substantial investment in alternative platforms might achieve the same effect, but at greater cost.) The value of the spectrum currently used by analogue television is such that private firms aspiring to offer new services may well find it economical to clear that spectrum at their own cost, by providing consumers with digital set-top boxes (Fairfax 1999). But no policy framework is in place to allow spectrum clearance. Further, unlike the United Kingdom and even the United States, the Australian Government has no policy or legal means of ensuring that analogue television ever ends.

So the Commission emphasised ways of facilitating the switch-over from analogue to digital. Far from blindly believing in the future of digital, the inquiry emphasised the contingencies applying to a successful switch-over. It raised the question of the conditions of possibility that must exist for a successful digital free to air conversion. This involves answering several basic questions which had not been addressed in the Australian context: who will drive the switch to digital television?; who when will the analogue switch-off happen?; and how can the digital switch-over occur?

The recommended reforms to spectrum pricing are crucial to allowing the market to play its part in the conversion process. But as in any complex conversion, clear signals from government will be crucial. A range of instruments are suggested, using a combination of regulatory and market mechanisms. The Commission recommends setting a definite switch-off date for analogue services, and aligning regional and metropolitan conversion processes. It recommends means of releasing analog spectrum rapidly for alternative uses, including the auction of analogue spectrum prior to the analogue switch-off. The report recommends further that Government develop clear criteria for approving analog switch-offs, and notes that Government will also need to consider 'policy options for assisting low income Australians to continue to receive their existing services' (PC 2000: 238).

Here the Commission takes a very different position from those commentators and industry players whose primary objection to the Government's plan was the free loan of spectrum for digital channels during the legislated conversion period. From the perspective of the medium term, the loan of seven megahertz is of little consequence compared to the continuing use of, for example, 35 megahertz for analogue services in Sydney, not including the wasteful buffer channels. The allocation of seven megahertz channels for digital simulcasting was consistent with the system of allocating spectrum according to the regulator-determined needs of a broadcasting service. Instead of quibbling about the details of the *quid pro quo*, the public interest and the interests of the wider industry are best served by an effective conversion process designed with the long term interests of viewers in mind.

III. Ownership and control

Participants in the inquiry generally supported changes to the foreign ownership restrictions which are a feature of current media policy in Australia and many other countries. Participants such as former Prime Minister Paul Keating and the journalists' union saw 'globalisation' as a powerful force for change. Further, foreign ownership was widely seen as a second-order issue in comparison to diversity and concentration.

As elsewhere, Australia's cross-media rules are the primary instrument for preventing further concentration of ownership, but the central problem with the cross-media rules is that they apply only to what is crudely considered 'old media': newspapers, radio and television. As we have noted, the rules were enacted in 1987 and have deeply influenced the present structure of Australian media. But they have never been amended to apply to new media forms and distribution platforms, such as subscription television, datacasting, Internet media or telecommunications. Considerable cross-ownership now exists within new media and between new and old

media. There is also the possibility of increasing concentration as old and new media converge and as Internet businesses mature. New technologies are no longer be seen as inherent forces for plurality and diversity: the Microsoft anti-trust litigation highlights the sensitivity of regulators and competitors to the actions of large players assuming powerful positions in new industries by exploiting their dominance in other markets.

In recent years the financial press has mooted media acquisitions which would, if they had eventuated, demonstrated the antiquity of the cross-media rules. No current Australian media or competition laws would prevent the country's dominant telecommunications firm Telstra from buying a commercial television network. The most profitable commercial television network is owned by My Kerry Packer's PBL. It is PBL's arrangements with its Foxtel pay television partners that prevent it — for the moment at least — from buying the rival pay television business Optus Television, not any regulatory constraint. Would anyone care if these transactions occurred? Both hypothetical developments might well raise *prima facie* concerns about concentration in 'the market for ideas'. Both are plausible scenarios in the present. They do not belong to some remote scenario of complete media convergence. There is a strong case for addressing these questions sooner rather than later, notwithstanding the difficulties raised by the fact that some media forms (whatever distribution platforms they may use) may continue to be more 'influential' than others.

The question then becomes the means of regulating concentration in the wider media arena. The inquiry report saw benefits in an approach which was both more flexible and wider in scope than the existing rules. Australia's Trade Practices Act (TPA), however, appears to define markets too narrowly to do the job. The Commission recommends that a media-specific public interest test be added to the Trade Practices Act. This test would prohibit mergers and acquisitions between business in prescribed media industry sectors, unless it could be shown that the proposed merger was not contrary to the public interest in a diversity of sources of information and opinion. Reversing the usual requirements of the TPA, the onus would be on industry players to prove that a proposed merger was in the public interest. This test would function in addition to the 'substantial lessening of competition' test already applied by the Australian Competition and Consumer Commission (ACCC) to mergers and acquisitions. It would be administered by the ACCC with advice from the ABA on the social, cultural and political dimensions of the public interest. Most importantly — and here the model appears to depart from the United Kingdom approach — the Commission emphasises the need for as much transparency as possible in the administration of the public interest test, including public consultation.

The Commission recommended that the cross-media rules should then be removed when the media-specific public interest test is in place, foreign investment restrictions have been repealed, and regulatory barriers to entry in broadcasting have been removed.

Inquiry participants raised a range of possible problems with public interest tests. Some industry participants were concerned that a public process would be too intrusive, complex, uncertain and expensive. The Communications Law Centre observed a lack of transparency in the decisions of the Independent Television Commission in the United Kingdom. The Com-

mission emphasised several areas where substantial further work needs to be done: the definition of the test, the development of guidelines, the specification of which sectors should be included in the test, the process of administering the test, and the process of appeals against decisions. An important element in all this work is developing a greater understanding of media influence. The final report says:

Given that the objective would be to capture mergers of only the more influential media businesses, the research [on influence] would be important in designing threshold tests (that is, examples of situations in which it is unlikely that the merger would be opposed — ‘safe harbours’) to guide firms contemplating a merger or acquisition of another firm covered by the new test (PC 2000: 362).

E. Conclusion

The Australian inquiry demonstrates the value of, first, a transparent, public policy process, and, second, an emphasis on medium-term policy outcomes.

Digital television offers the opportunity to ‘change the game’ in Australian broadcasting policy: to create a more competitive and diverse broadcasting system. Will the chance be taken? The problem with changing the game is that quantifying policy neutrality necessarily means revisiting all the old *quid pro quos*. Some of the things governments want in a broadcasting system are embedded in that structure of compromise. But governments need not abandon too soon what we might call the ‘social capital’ role of broadcasting: its universality, its work as a social and cultural connector in a diverse and geographically dispersed nation. A comprehensive and purposeful approach is capable of reformulating the trade-offs now used to justify the protection of incumbents as positive requirements for new players.

Reforming media policy along the lines sketched here is likely to take many years. But the pressures for some form of liberalisation continue, and the machinery of Australian competition policy ensures continued scrutiny of this sector. The National Competition Council, a body set up to oversee competition policy, has recently published a stocktake on the implementation of competition policy. In relation to broadcasting, the Council noted that:

For the Commonwealth to be assessed as meeting the requirements of [national competition policy] in this area it will need either to make substantial changes to the legislation along the lines indicated by the Productivity Commission or present convincing evidence to support a case that there is a net public benefit in departing from the Productivity Commission’s recommendations (NCC 2001: p25.3).

References

Fairfax, 1999, Submission to the Productivity Commission Broadcasting Inquiry, Submission no. DR 182.

Productivity Commission 1999, *Broadcasting*, Draft Report, Canberra, Ausinfo.

Productivity Commission 2000, *Broadcasting*, Final Report, Canberra, Ausinfo.

National Competition Council 2001, *Framework for the Third Tranche Assessment of Governments' Progress with Implementing National Competition Policy and Related Reforms*, 5 February 2001