

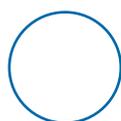
IPA Submission to

Meeting the Digital Challenge

Discussion Paper on Media Reform Options

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Introduction

The Australian media is heavily regulated by a wide range of legislation and industry codes. Ownership, content, structure and reach are all subject to government interference. These regulations are complemented by numerous government interventions and subsidies – film financing, public broadcasting, arts grants, tax concessions.

The Productivity Commission report into broadcasting services argued that the current approach ‘reflects a history of political, technical, industrial, economic and social compromises. This legacy of quid pro quos has created a policy framework that is inward looking, anti-competitive and restrictive.’¹ The regulatory and subsidy labyrinth has been a recipe for inefficient and inequitable outcomes. It represents failures in Australian governments’ attempts to manage the introduction of new technologies and services, to foster ‘diversity’ and equal access and unnecessary measures to prevent monopoly.

Relatively recent far-reaching technological changes in media content production and delivery have exacerbated the adverse efficiency effects of this unsatisfactory policy progression. The upshot has made it more urgent to implement a major adaptation of the sector’s regulatory framework. As the Institute of Public Affairs has long been involved in the economic, social and political debate over media and communications policy, we welcome the chance to comment on the government’s media reform discussion paper in the light of these developments.

Legacy of media regulation in Australia

Media regulation in Australia has been characterized by concern over competitive outcomes. These have been motivated by fears that untrammelled competition would lead to undersupply of content or at least an undersupply of the variety of content. They have also been motivated by fears of monopoly which might pose threats to democracy and the free flow of information. In more recent years, the rationale for this policy response has been reinforced by the vertical integration of the industry as a content supplier, platform owner and a supposed monopoly over content delivery.

Compounding this, when not assuming outright ownership, government policy since federation has often been focused on ensuring the commercial viability of media and communications firms.

In the first parliament, Sir Edward Braddon asked Prime Minister Barton whether the proposed wireless link between Tasmania – then thought of as a primarily point to point communication device – would damage the viability of existing postal or telegraph services. The Prime Minister responded that the system was not advanced enough to do so.² Since this initial exchange, broadcasting has been thought of as not merely a commercial service, but an essential service which needed government regulation to ensure its viability.³ Indeed, commenting on the possibility of advertising on the ABC, Prime Minister John Howard criticized the proposals by questioning how it would affect the commercial networks.⁴

Despite demonstrable consumer demand for media, concern for the commercial success of broadcasters has historically been so important to government policy that the government’s 1923 radio broadcasting conference was focused on developing a business model for the industry– the famously short-lived ‘sealed set’ regulations.

But this protectionist strain is not absolute. From the *Wireless Telegraphy Act* of 1905 to the competition law of the 21st century, fears of the size and reach of media and communication companies have countered this strain by imposing limits on ownership and control.

These two competing strands of regulatory approaches are detectable in the earliest interactions between the wireless media and the government.

For instance, it has been argued that the *Wireless Telegraphy Act*, which gave the Commonwealth control of the new medium, was broadly accepted because of concerns over the relative power of the telegraphic cable companies – power which the government did not want to see replicated in the wireless field.⁵

Given the presumed power that media and communications organizations have in the public arena, governments have placed restrictions on ownership, content and micromanaged the utilization and uptake of new technologies.

A (more appropriate) digital action plan

The government must recognize that the transition from analogue to digital television signals has been a policy failure of the highest order. Any Digital Action Plan must necessarily focus on how best to extricate the government and industry from this legacy.

Digital television offers the consumer little above what they already receive, and uptake reluctance is understandable. This is not a failure of the *technology* – until relatively recently, DTV could be considered cutting edge – but instead a failure of the government’s approach to the new medium. Regulations designed to protect incumbents and to ease the digital transition have held back uptake and damaged digital television’s competitive advantage.

This section will look at the rationale for compulsory digitization of the television networks, and then propose an alternative approach which would better allow industry and consumers the freedom to choose the technologies and products they prefer.

Why enforce digital at all?

What is the rationale behind the compulsory transfer to digital television? In many respects it is a technology which has already passed into near obsolescence.

Freed from regulatory constraints, DTV is certainly a technological jump ahead of analogue television, and can provide consumers with a significantly better choices and experiences. Utilizing better compression techniques, it can fit more content into less spectrum, provide interactivity, and enhanced picture and sound quality.

But the government and regulators need to face the fact that, even if they get the switchover perfect from here on in, and the regulatory environment is at its theoretical most effective, digital television is unlikely to ever be the cornerstone of Australian media. That ship has long sailed.

It is not even appropriate to call media delivered over the internet ‘next generation’ – new services like Google Video and iTunes, delivering television and video content on demand for negligible cost may be the sharp end of the wedge, but they are fully functional and increasingly popular. On the same day that of the release of the discussion paper, Apple’s iTunes – which has already sold 1 billion music files worldwide, and offers extremely popular television programs like *Lost* and

Desperate Housewives – offered its first movie for purchase and download. The online retailing giant Amazon will shortly offer movie downloads, and Google Video has been offering classic films since the start of the year. This is all before accounting for the massive, virtually immeasurable peer-to-peer networks trading in current international television programs and films.

Unlike digital television, the advantages of these new services are clear – providing content free from quotas, timetables or geographic borders.

Even in its infancy, the internet commands significant ground in consumers’ entertainment choices. This is before on-demand television and film services have begun to take effect – most services currently available were only launched in early 2006. It is unquestionable that during the six years before the DTV switchover date, consumers will migrate more of their entertainment options on to the internet.

While the cost of broadband is often considered prohibitively high for many lower income households, it bears noting that this cost is going down rapidly—there is no reason to suggest it won’t have plummeted in real terms by 2012.

It may be important to note that consumer reluctance to purchase a set top box during the dual transmission period could be considered an entirely rational one. Given that the current meager offerings on DTV provide little incentive to convert, consumers would be well advised to wait until the cost of the conversion goes down. As, in 1999, the cost of a entry-level set top box was roughly \$500,⁶ and it has lowered since then to roughly \$200,⁷ it is inevitable that these prices will continue to decrease.

Government should not be managing the transition from one technology to another technology – it should not be in the business of ‘picking winners’. Governments, and the bureaucracies that advise them, have very poor track records in choosing technologies for consumers. Technological changes are often incremental and evolutionary, and that the application of current embryonic innovation is impossible to predict.

While this holds true economy-wide, it is a particularly important point in the media and communications sector, which has experienced particularly rapid rates of innovation and change since the beginning of the twentieth century.

Instead, technological change and uptake should be left to market forces and competitive pressures. It is an inappropriate realm for government action.

A Market-based Digital Action Plan

In this light, IPA recommends a Digital Action Plan which better reflects the needs and desires of consumers. This plan would consist of three major features:

1. Remove content restrictions on DTV services

Commercial broadcasters are prohibited from offering multichannelling until the switchover date. But it is clear that the limited features of DTV are a major barrier to consumer uptake. Given that the government has happily delayed the switchover date before due to lack of consumer enthusiasm - it would be unlikely that until broadcasters are allowed to offer consumers value for their investment in a digital box, this reluctance to embrace the new technology will continue.

It follows then that content restrictions which hold consumer uptake back would be removed if the government is serious about DTV. Concerns about the commercial impact on broadcasters of greater choice for consumers bring into question the government and regulator's appreciation of consumer preferences.

This has been recognized by the removal of multichannelling restrictions on the national broadcasters. Equivalent removals should immediately apply to commercial broadcasters.

Similarly, anti-siphoning regulations lower the capacity of DTV broadcasters to provide value to consumers. Anti-siphoning provisions lock consumers into old technologies, rather than encouraging them to migrate to new ones. As the provisions target content (ie sport) that is deemed *specifically* popular, this effect is all the more intrusive.

2. Postpone analogue switchoff indefinitely

If broadcasters are allowed to provide new services on the digital spectrum, the requirement that they switchoff the analogue spectrum in the future is no longer necessary. IPA recommends that the switchoff date be postponed indefinitely. There is no good reason to forcefully remove a legacy network; particularly when there is a clear demand for the services provided upon it, and to do so would incur significant cost on consumers and, if done equitably, government.

3. Allow broadcasters freedom to trade and utilize spectrum as they see fit

Rather than have government and regulators manage the use of spectrum by broadcasters, a better approach would be to allow the broadcasters to do so.

In order to facilitate this, the IPA recommends that the restrictive *apparatus licenses* which govern the broadcasting services band be converted into the far more flexible *spectrum licenses*. Broadcasters could then manage their licenses as they see fit, whether that is to divide them up, trade them on secondary markets, or to use them to experiment with new technologies and services.

While we recognize the substantial cost of the conversion from apparatus licenses to spectrum licenses, this is a cost which needs to be borne in order to facilitate new networks and services. This cost, in the long run, would be substantially lower than the cost of pursuing outdated technology and mandating the digital conversion. Giving broadcasters the flexibility to manage their conversion between services themselves, rather than having the government force them, sets Australian broadcasting up to cope with any number of unforeseeable, but inevitable, technological developments.

Ownership Restrictions

The IPA broadly welcomes the partial relaxation of foreign and cross-media ownership restrictions contained in the discussion paper. But the proposals beg the question, not adequately address, why retain these legacy restrictions at all? Ownership restrictions are applied to only some of the media marketplace—broadcasting and newspapers, but not internet media, for instance, or magazines. Given that all segments of the media sector are subject to economy-wide competition law, it makes sense to re-examine the rationale behind media-specific ownership regulations.

Diversity of ownership in media is not a goal in itself, particularly when potential lessening of competition through takeovers is protected by competition law. There is some evidence to suggest that regulating for ownership diversity in the media can lead to loss of significant efficiencies. These efficiencies can have notable effects on services and competition:

The potential for stitching together media businesses to create a fully integrated corporation—from making the product to selling it in more and more markets to controlling the very outlets from which customers buy or rent—offers the vertically integrated corporation significant economic advantages.⁸

The challenge of providing a product with the global scale and quality of content that is expected from the broadcast media, particularly when it competes with a huge range of—regulated and unregulated—competition, is a challenge best met with large, integrated corporations. The fantasy that small, localized media organizations can meet this demand is unsustainable.

Ownership restrictions for diversity

Here's the truth: the ownership debate is about nothing but content... [The ownership rules] became a stalking horse for a debate about the role of media in our society... It was really an invitation for people with particular viewpoints to push for a thumb on the scale, for content in a direction that people preferred.⁹

The goal of ownership restrictions is not diversity of ownership *per se*, but diversity of **content** and **opinion**. And in this, it must be recognized that such restrictions are a strikingly indirect method of achieving this goal.

Concentration of ownership does not necessarily im-

ply concentration of content. As Adam Therier argues in *Media Myths: Making Sense of the Debate over Media Ownership*, “competition and concentration are not mutually exclusive; citizens can have more choices even as the ownership grows somewhat more concentrated or vertically integrated.”¹⁰ Even with the fixed-pie in television of three commercial networks and two national broadcasters, program managers have incentives to differentiate their networks from the others—to search out new markets, to increase their share of the viewing public. As content offerings spill over into 3G mobile phones and the internet, content diversity and choice is increasing.

Rather than being merely due to the introduction of personal computing and high speed broadband services, this massive increase in content has been a process over the past thirty years, since the introduction of subscription television, video games, compact disks, recordable VCRs and DVD players. Even with the artificial restrictions on broadcast networks placed upon the Australian media, our access to content is unparalleled in history.

A further claim on the benefits of ownership restriction is that it regulates not merely for diversity of content, but also diversity of **opinion**. Popular criticism argues that corporate ownership of the media affects the opinions broadcast. This view has been summarized by the Productivity Commissions 2000 Broadcasting Inquiry:

The likelihood that a proprietor's business and editorial interests will influence the content and opinion of their media outlets is of major significance. The public interest in ensuring diversity of information and opinion, and in encouraging freedom of expression in Australian media, leads to a strong preference for more media proprietors rather than fewer. This is particularly important given the wide business interests of some media proprietors.¹¹

This argument can be taken much further—the conspiratorial view of, for instance the war in Iraq has media moguls, in this case Rupert Murdoch, pressuring the British government into going to war.¹² Noam Chomsky argues that media corporations in concert with government manufacture “propaganda” for the purposes of “controlling the public mind”.¹³

Modern conspiratorial views of media owners radically underestimate the diversity of opinion in forms in media producers which share the same ownership. By being able to cater to a wider variety of niche markets—and, in the internet era, servicing the long tail—corporations are able to expand their market. For instance, given an order from the owner to run a specific line on an issue, companies with shared owners would be suddenly forced

to compete with each other. If *The Age* and the *Australian Financial Review* were compelled to share the same opinion on, say, the deregulation and sale of Telstra, they would eat into each others—previously separate—market. Media proprietors have a vested interest in increasing, rather than decreasing, the variety of opinion they broadcast.

Given the multiplicity of sources of opinion, even before internet access became near ubiquitous, the influence of contemporary ‘moguls’ like Rupert Murdoch pale in comparison to early 20th century media owners like William Randolph Hearst in the United States and Lord Beaverbrook in the United Kingdom. The competition between media platforms available to consumers in the 21st century and abundance of opinion quashes any capacity owners may have to engage in monopolistic practice in the market of ideas.

It therefore must go without saying that any artificial ownership restrictions designed to enhance diversity of opinion will never be able to compete with the diversity of opinion afforded by the internet. Given that ‘bias’ in the traditional media is a reflection of carefully researched consumer demand and that, for those who desire a viewpoint that they may not commonly hear on traditional media services, there is near ubiquitous internet access available, the justification for such restrictions are receding rapidly.

Foreign Ownership

IPA welcomes long needed adjustments to foreign ownership restrictions. However, given that the government considers that there is ‘no compelling basis’ for singling out newspapers and commercial free to air television broadcasters for specific limitations on foreign ownership, this begs the question: why limit foreign ownership in the media sector at all? While relaxations are certainly welcome, it is not necessary to retain the media as a ‘sensitive sector’ under Australia’s Foreign Investment Policy.

Foreign ownership restrictions necessarily limit the pool of potential investors, and constrains media organizations’ capacity to utilize international assets and networks. In industries like the media, which often require large capital investment—and, as has become common to innovative new networks and services in the internet era, the capacity to sustain losses for sometimes up to a decade before turning a profit—disallowing foreign investment restrains potential media options for consumers.

Such decisions should not be left up to a political actor—who, due to electoral pressure has an interest in gaining the confidence of existing or potential media personalities—but instead should be left up to the market to

allocate the most efficient owner of media organizations.

Fears over foreign interference in domestic media are also becoming more irrelevant as internet vastly expands the array of media available. Owners, of whatever nationality, are less able to force their views on consumers who have access to a multiplicity of services.

Minimum numbers of owner rules

Proposals to replace cross-media ownership rules with minimum numbers of owner rules address substantial potential inefficiencies. By their very nature, such restrictions prevent innovative products which, in the post-convergence era, blur dimensions between previously distinct outlets.

But the retention of restrictions on ownership misses the essential changes in the nature of media consumption and production in the last three decades.

Why do we need ownership restrictions at all?

Entertainment and information gathering services have faced changes on all sides—from distribution to storage. For instance, in 1970, television programming was distributed from a single source—broadcast FTA stations—received on a single device—a television set. Programs were consumed on an ‘appointment’ basis—if you missed a program, there was no way to watch it again unless it was repeated by the broadcasters.

Compare this with 2006. Television programming can be distributed from FTA stations, pay-TV, satellite television, the internet, VHS tapes and DVD discs. It can be received by computer screens, portable devices such as travel DVD players, and, of course, traditional television sets (themselves with an ever widening variety of choice—LCD, plasma or CRT). Freeing consumers from appointment based consumption, it can be stored on VCR, recordable DVDs, hard drives, and PVRs.

This example is easily replicated across the media landscape—radio, music, movies, print media etc. But adding to the existing services we can add media like video games, internet content and e-mail, and new pay-TV services.

Briefly scanning such a landscape illustrates its expanse. It makes little sense to define a media market by a specific technology—television or radio—when it competes with video games, the internet, and even *pre-recorded* television or radio content. If it was a sensible policy goal to enforce, for example, minimum number of owners in the media, then these restrictions would apply uniformly across all distribution networks and content formats. But, as this is clearly not possible, the rationale for such restrictions is severely undermined.

Ownership restrictions create significant potential inefficiencies, do not address questions of content and opinion diversity, and are inapplicable to the continuously expanding media landscape faced by consumers and industry. Media should be subject merely to economy-wide competition law, rather than industry specific ownership restrictions.

Anti-siphoning restrictions

Anti-siphoning impedes pay television from acquiring sporting content on a fair playing field with free to air providers. At the minister's discretion, the list of protected content under anti-siphoning provision now covers 10 separate sports – from soccer to motor racing - and the Olympic and Commonwealth games.

The logic behind these restrictions are necessarily stacked heavily against pay television and, potentially, new services. Any event that the Minister considers is popular enough to make the anti-siphoning list is an event presumably (giving the Minister full benefit of the doubt) popular enough to add value to a pay television network. By obstructing pay television's capacity to acquire this content, the value of pay television is artificially reduced along with consumer incentive to subscribe. Given the slow uptake pay television has had in Australia – Foxtel only lay claim to a operating profit after interest and tax for the first time in January 2006 – it is hard to avoid the conclusion that anti-siphoning regulations needlessly stack the deck against subscription television services.

No content laws are content neutral, but anti-siphoning and anti-hoarding laws are the most highly subjective. If the Minister decides that an event should be “available free to the general public” it is eligible to be placed on the list. All events on the list are sporting events, even though the BSA does not specify that they are a requirement.

Instead of devising methods by which loopholes could be closed in anti-siphoning laws, their utility should have been seriously questioned. Anti-siphoning laws reduce value in new services and thereby lock in outdated technology.

Premium content and the ACCC

The ACCC is now presenting the acquisition of content as a significant enough barrier to entry to warrant government intervention.¹⁴ This is a most unwelcome development for choice and technological innovation. The ACCC chairman's formulation assumes a fixed quantity of desirable content which must be divvied up amongst providers – the reality is that the sporting content delivered on a mobile device or via the internet will be so dramatically different to the sporting content delivered on a television to render it incomparable. The medium that content is delivered on influences the content itself – for instance, an internet live broadcast of a football match could be heavier on statistics than would be possible on the less interactive traditional television broadcast.

But the most disturbing aspect is that the ACCC is indicating that it wishes to run media content regulation parallel and supplementary to the existing scope of the ACMA. Presumably, the “premium sporting content” will be decided in a manner similar to anti-siphoning provisions – that is, in an arbitrary and subjective fashion by a political appointee.

ACCC creep into media regulation beyond the norms of competition law is an undesirable development, and will, if statements by the chairman are any indication of ACCC thought in this area, produce public policy detrimental to media diversity and consumers.

Any reform covering either content regulation like anti-siphoning, or the role of the ACCC, must recognize and anticipate the danger of expanding competition regulation into the distribution and creation of content.

Recommendations

Digital Action Plan

- Remove content restrictions on DTV services.
- Postpone analogue switchoff indefinitely.
- Allow broadcasters freedom to trade and utilize spectrum as they see fit.

Ownership restrictions

- Remove foreign ownership limits on media, including classification as a 'sensitive sector' under foreign investment policy.
- Remove cross media ownership rules and 'minimum voices' restrictions.

Content

- Remove anti-siphoning restrictions.
- Restrict ACCC from content considerations in determining competition bottlenecks.

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