

Convergence and the Media: Regulatory Review at Last

Convergence of content across platforms, such as broadcasting, telecommunications, and the Internet, presents great opportunities. With the opportunities come considerable challenges, including the prospect of shifting concentration of control of content and content delivery platforms. Internationally, a frequent tension point is access to premier sports such as the Super 14 and rugby tests. Government has commenced a review to address whether there should be any regulatory changes.

Government has commenced a regulatory review of digital broadcasting (which includes terrestrial broadcasting such as TV over the Internet (IPTV)).

Big initiatives like free-to-air digital television (DTV), unbundling the local loops, operational separation of Telecom, etc, are significant. But in isolation they don't address the challenges of convergence of content and its delivery. Convergence and media control can move bottleneck control from one point to another.

There are multiple ways in which content is created and delivered. Often the same content can be provided by several channels, such as free or pay TV, the Internet, mobile phones, etc.

With those opportunities come challenges. Internationally, a frequent bottleneck is premium sport, such as the Super 14 and rugby tests. Control of access to premium sport can skew the market from a competition perspective, creating barriers to entry. The TV broadcaster that has those rights has considerable advantage as against other broadcasters. Sports fans often buy pay TV subscriptions largely driven by the sport content. Broadcast channels that don't have that premium content find it difficult to compete: increasingly so as providers move to triple play (voice, video, and data) and quad-play (which adds mobile to the triple-play mix).

With convergence, there is the risk of bottleneck control as well on the Internet. An ISP or equivalent supplier that gets the right to broadcast premium sport content over

broadband may get bottleneck control. That ISP could be owned by the TV broadcaster (so the possible anti-competitive effects of aggregation could be a risk). Or it could be another provider (an Xtra, an ihug, etc). Various permutations are possible.

Some can lead to bottlenecks and anti-competitive outcomes. Others can be pro-competitive. For example, supply of sports content over different platforms (TV, broadband, WiMAX, mobile phones, etc) may be positive depending on ownership and other market conditions.

Other countries have concluded that generic competition law, and existing regulatory agencies, cannot handle these problems alone. This has led to substantial regulatory change and activity.

New Zealand is coming to this late as we note in the June update of our online article, *Demystifying What's Happening in New Zealand Telecommunications Regulation*.¹

Traditionally, each of the content delivery mechanisms has been treated in its own silo from a regulatory perspective. For example, broadcasting is regulated in a different way than telecommunications and the Internet.

This may need to change with the increasing evolution toward convergence. That's challenging.

¹<http://www.wigleylaw.com/Articles/LatestArticles/demystifying-what-s-happening-in-telecommunication/>

Other countries recognised these problems some time back. For example in 2003, the United Kingdom converged its radiocommunications, broadcasting and telecommunications regulators into one regulator: the highly effective Office of Communications (Ofcom).

The Australians did something similar in 2005 with the formation of the Australian Communications and Media Authority (ACMA). Currently there is the high profile debate in Australia about cross-media ownership regulations. Additionally, the Australian equivalent of our Commerce Commission (ACCC) is focussing on the broadband, telecommunications and pay TV markets in relation to premium content and the potential stifling of competition.²

The UK and other European countries have seen much regulatory activity such as in relation to:

- BSkyB and claims that it is unduly dominant;
- a move, driven by the regulator, for the Football Premier League to auction rather than sell match broadcast rights; and
- an Italian pay TV merger clearance which included conditions allowing competitors of the merged pay TV operation to access bottleneck activities.

In New Zealand, the Ministry for Culture & Heritage, working closely with the Ministry of Economic Development, has commenced a regulatory review, *Review of Regulation for Digital Broadcasting: Terms of Reference*.³ Initially the issues are being researched by Government. Then there is to be public consultation on the basis of that research, and an options paper produced for public review. The public aspect (in particular, submissions) will happen between September and

November 2007. Then there will be recommendations to Cabinet (for regulatory change or otherwise) in December 2007.

An issue that might be up for review is the prospect that Sky TV could be required to provide certain content across its service.

Another is that Sky may be required to include particular programmes in what will be increasingly important: its Electronic Programming Guide (EPG). The EPG comprises the “pages” on the Sky service that allow quick selection of programmes, ease-of-recording using the MySky service, etc. The EPG will increasingly become the mechanism by which consumers access content.

All these issues raise challenging and complex competition and regulatory matters. There are few simple answers.

Up for consideration also is likely to be the desire to encourage competition on the one hand and meet public good needs (such as public broadcasting) on the other. These are challenging issues but Government, with its firm intervention in telecommunications, demonstrates a willingness to engage.

As well as competition issues, the review will cover areas such as regulation of content (such as porn), copyright, etc. This also is challenging. For example, can and should the standards imposed on broadcasters by the Broadcasting Standards Authority be applied to the Internet. If yes, how?

Government’s review is a particularly important and challenging initiative.

² *Regulating media and broadcasting networks in a changing media environment*. Speech by ACCC Chairman Graeme Samuel March 2007
<http://www.accc.gov.au/content/index.phtml/itemId/781929/fromItemId/8973>

³
http://www.med.govt.nz/templates/MultipageDocumentTOC_27318.aspx

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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Wigley & Company, Barristers & Solicitors | E: info@wigleylaw.com | P: (04) 472 3023