

The PC's 'open letter'

1. In 1999, the Productivity Commission wrote an open letter to Government asking for wholesale changes to the 1998 vision for TV digitalisation. It argued that rapid digitalisation required the spur of new competing services and the realisation and exploitation of the underlying value of the spectrum currently locked up by analogue television if complete transition was to be achieved quickly. (I am referring, of course, to its draft report into the Broadcasting Services Act.)
2. With the passage of the datacasting amendments in 2000, Government made it plain it was not deterred from its own, quite different policy, announced in 1998.
3. With the failure of the report to achieve its goal, the interesting question became what, if anything, could usefully be salvaged from the PC's many recommendations on broadcasting services bands radiofrequency spectrum planning and allocation?
4. The Productivity Commission's vision in brief:
 - a. Demolish barriers to entry to free-to-air broadcasters; by extending existing non-broadcasting services bands regulatory model to broadcasting services bands services, namely,
 - b. The 'natural content regulator', the ABA, restricted to issuing content licences; and
 - c. The 'natural spectrum regulator', the ACA, then able to bring its superior expertise in the packaging and sale of spectrum to bear on any remaining broadcasting services bands spectrum;
 - d. The non-profit sectors of free-to-air broadcasting – national and community – would meanwhile be dealt with via directions from Government notifying numerical targets for services in areas, based on broad demographic/geographic criteria rather than the ABA's more *ad hoc* and locally-responsive demand-driven approach.
5. There would also be incentives for existing broadcasters – separation of content licences from transmitter licences, with increased freedom to sell the

latter and exploit more economical methods of delivering their signals to viewers.

6. In a freer market, the Commission believed, most people would still be able to receive 'some' commercial television services: 'although the era of a limited number of almost ubiquitous services is coming to an end.'

Government response

1. Has so far been one of indifference. Why?
2. We need look no farther than recent government behaviour in relation to regional broadcasting.
 - a. It took analogue television 35 years for the bulk of regional Australia to achieve equalisation with the big cities. By contrast, a quarter of a billion dollars has been committed to ensure regional commercial digital television achieves equalisation in a mere four or five years. In other words, taxpayers are subsidising the private sector to push out television coverage well beyond what might otherwise be viable or profitable.
 - b. Meanwhile, Telstra sale money has been spent to improve analogue television reception through a 'black spots' policy – which puts money into local government or community hands to push terrestrial analogue coverage beyond what broadcasters themselves are interested in doing/able to afford to do.
 - c. And the Government likes the results so much, it is now going to do it for regional commercial radio.
3. In short, at least with respect to television, & notwithstanding the prognostications of the Commission, Government remains committed to making a very limited number of services still more ubiquitous by giving out yet more channels and subsidising broadcasters or communities to fire up the transmitters.
4. Only one of the Productivity Commission's planning recommendations really seems to have developed legs, and that is the suggestion to transfer spectrum planning to the ACA. (Explain how the issue keeps coming up.)

ABA position

1. It should not surprise anyone that the ABA affirmed the continuing relevance of broadcasting planning criteria to broadcasting services bands spectrum planning.
2. What is I guess more surprising – genuinely interesting, in fact – is that the ABA should recommend its own abolition. Why did we do that?
3. I will leave the ‘big picture’ to my colleague Malcolm Long. But at its most reductive, just as there are strong reasons to believe a broadcasting planning sensibility will continue to be required when Govt plans broadcasting services bands spectrum, there are also strong reasons why, in future, spectrum should be regulated by a single agency.
4. Non-broadcasting issues are going to become increasingly relevant to the planning of broadcasting spectrum. The biggest example is analogue clearance. (Remind audience of digital television’s spectrum efficiency relative to analogue. Explain how non-broadcasting, as well as broadcasting applications are under development that may benefit from the opportunities opened up by eventual analogue clearance. Suggest that the task of adjudicating between broadcasting and non-broadcasting users requires reference to broader criteria and objectives than those in the Broadcasting Services Act.)
5. But similarly, broadcasting criteria are becoming increasingly relevant to non-broadcasting services bands spectrum. (Explain how satellite delivery is critical to television delivery in outback Australia; as television digitalises, the majority of viewers may move to direct satellite reception. But the high political sensitivity of free-to-air broadcasting issues will not diminish. Another example is digital radio – contender technologies use both broadcasting services bands and other spectrum.)
6. There are in addition a range of managerial benefits to a merged regulator - economies of scale and scope, enhanced opportunities to attract and retain the best staff, enhanced career paths for essential specialist skills...

Breaking up the ABA

1. So there we have it, by mid 2002 the Productivity Commission's agenda for removing the special planning approach to BSB spectrum had been reduced down to a proposal that the ACA take over spectrum planning from the ABA, with a question mark over whether the special planning criteria should stay or go.
2. Reading the public submissions suggests no-one in Government believes the time is right for abolishing the broadcasting planning criteria – at least, neither the ACA nor ABA, though both – please! - would like to see a little streamlining for minor planning changes (examples?)
3. It follows that if the planning power is to be transferred, it must be for some other reason, perhaps because the ACA is going to make a better fist of decision-making under the BSA, or simply because it is better to have all your engineering issues managed from one place.
4. Well - that's hardly controversial, is it? After all, our predecessor, the Australian Broadcasting Tribunal, didn't have a spectrum planning role?
5. No – but the present planning regime is undoubtedly a huge improvement on the pre-1992 arrangement, where planning was an opaque, Ministerially-controlled process and the ABT was left to make a public fuss over the arguably less important licence allocation decisions that followed it.
6. The problem with a straight move of planning to the ACA is that planning, allocation and indeed enforcement are ideally iterative processes, that is, processes with feedback loops from allocation experience back into planning. The ABA is an enormously stronger licence allocation agency, for being able to re-visit its licence area plans when it finds it got the original service mix or technical specifications wrong.
7. So why would you move from the present integrated model, to a model where the licence allocating agency is reduced to writing frantic letters to the Minister and/or the ACA – 'hey, we've found two outstanding applicants for a single community licence, but the power is too great and the site is too expensive and distant from the main town, can you help?'
8. So to kill the fly of iteration between planning and licensing, we have the spider of transferring licensing to the ACA as well as planning. And to kill the

spider of the close interrelationship between licensing, imposing licence conditions and enforcement of Broadcasting Services Act obligations more generally, we have the cat, or rather, the horse, of transferring planning, licensing and enforcement functions to the ACA.

9. Reading the several telecommunications submissions supporting the ‘horse’ option leads me to some amusing reflections about what else they think the ABA does, up at Telstra. For the record, we have six staff that work on online regulation and a team that works intermittently on standards and code registration, both of which are, of course, in part enforcement powers.
10. I don’t really expect Telstra to have a detailed and sympathetic understanding of the scale of the ABA’s activities that are not enforcement, licensing or planning, but I know Tony Shaw at the ACA does – and indeed the ACA submission makes a throw-away suggestion at the end, in what I am inclined to guess is a concession to telecommunications sensibilities, that the ABA’s residual content roles could be merged with the OFLC to create a usefully-sized Sydney-based content regulator. This is an elegant suggestion, albeit it would combine a Federal communications regulator with a Federal-state regulator that currently reports to seven different Attorney Generals. We’re not pushing it, and nor are they.
11. But the central point I want to make to you about ‘mix and match’ is that whatever you do, make sure you preserve the scope of your broadcasting enforcement agency.
12. The Broadcasting Services Act was designed to address the ‘toothless tiger’ criticism of the ABA’s predecessor, by providing for useful, tiered sanctions that permitted proportional responses to regulatory compliance problems as they emerged.
13. The Commercial Radio Inquiry provides a perfect illustration of tiered sanctions in action. (Explain how examination of its terms of reference so a wide range of potential sanctions, including licence conditions, suspension of licences and determination of new, industry wide mandatory standards – each fitted to a different type or seriousness of finding.)
14. To protect this vital component of the scheme, it is essential that whichever regulator you give the enforcement power to has unfettered access to the full

range of regulatory sanctions, and that you are not simply creating two weaker and less effectual bodies.

Conclusion

1. So there you have it – the ABA, caught between the inexorable logic of convergence on the one hand, and the synergies inherent in its current size and scope on the other, found itself strongly opposed to dismemberment on the one hand, but on the other, deeply uncomfortable with a status quo approach. The resolution? A merger with the regulator responsible for wider communications carriage issues to create a single, large, well-resourced, wide-scope agency.
2. I hope that helps to understand a decision that may appear controversial.
3. What is striking is that the ACA independently reached the same conclusion.

Giles Tanner

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