



Waiting for the convergent regulator

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Paper (minus diagram) delivered at the Communications Research Forum, Canberra, 2 October 2002.

Abstract

This paper presents a historical analysis of the ideas and decisions that have led to the current regulatory structure governing Australian communications. In particular, it asks what happened to the idea of a convergent communications regulator in the lead up to the 'post 1997' telecommunications regime.

There has been discussion for decades about whether to introduce a single convergent communications regulator. This has centred around the potential of such a regulator/planner to introduce a broad view, reduce duplications and conflicts, and be sufficiently large to avoid capture by particular viewpoints and short-term sectoral demands. In the last decade there has been a new driver, in the form of 'convergence' or the 'digital

revolution', which has produced a new crop of confusions and overlaps, and brought into focus the discrepancies between different regulatory systems affecting equivalent forms of communications.

In the early 1990s, it was expected that a convergent regulator would be the next step in the transition of communications, to merge and simplify the work of the Australian Telecommunications Authority (AUSTEL), the Spectrum Management Agency (SMA) and the Australian Broadcasting Authority (ABA). However, the 1997 reshuffle of roles was instead dominated by the new role of the 'super-regulator', the Australian Competition and Consumer Commission (ACCC), with accompanying merger of AUSTEL and the SMA to form the Australian Communications Authority (ACA) and retention of the ABA (plus executive government and a host of other bodies with some regulatory, planning or advisory role).

The paper finds that a combination of factors contributed to preventing the 'post 1997' policy-review process from producing a convergent regulator: lack of an appropriate champion; the apparent difficulty of the task; the distraction of the competing competition agendas; and a focus on telecommunications, rather than the whole communications sector. The lessons to be learned from that history have particular resonance in late 2002, as the roles of the ABA and ACA are again being examined.

¹ The research work for this article was undertaken in the authors' capacity as staff of Network Insight, a research group of RMIT University. It is part of the Inclusive Communications Structures project, which is funded by an Australia Research Council grant with industry partners Accenture and Minter Ellisons. The authors gratefully acknowledge the assistance of the Hon Michael Lee (former Minister for Communications and the Arts), Chris Dalton (formerly of Price Waterhouse Government Liaison and advisor to Vodafone), Graeme Ward (former Director of Corporate Planning at Telstra), Graham Evans (former Secretary of the Department of Transport and Communications) and Tony Shaw (former head of Planning and Review Division, DOCA, and now Chair of the ACA), who provided background information for this article. Unless otherwise indicated, the views expressed, and any errors or oversights, are those of the authors. Thanks also to Sarah Barns and two anonymous referees who provided comments on an earlier draft.

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Introduction

There has been discussion for decades about whether to introduce a single convergent communications regulator. Specifically, increasing technological and corporate convergence of broadcasting, telecommunications and radiocommunications in the 1980s and early 1990s prompted calls from an assortment of players, academics, regulators and politicians for a parallel convergence of Australia's communications regulators/planners and laws.² Suggested advantages involved a single regulator's ability to introduce a broad view; reduce duplications and conflicts; accommodate new convergent services; and be sufficiently large to introduce more independence from individual players, lobby groups and executive government (which – through the statutory mechanism of 'the Minister' – is the only body spanning, and with significant decision-making power over, the whole communications sector).

Rather than evaluating or advocating particular regulatory models, this paper examines what happened to the idea of a convergent regulator during the last major reorganisation of Australia's communications regulators, which occurred in the lead up to 'post 1997' telecommunications environment. Some people anticipated that shake-up to produce a single regulator/planner that would merge and simplify the work of the Australian Telecommunications Authority (AUSTEL), the Spectrum Management Agency (SMA) and the Australian Broadcasting Authority (ABA). However, that was not to be. The reshuffle was instead dominated by the new role of the Australian Competition and Consumer Commission (ACCC), with accompanying merger of AUSTEL and the SMA into the Australian Communications Authority (ACA) and retention of the ABA, plus a continuing significant role for executive government and a host of other bodies with some regulatory, planning or advisory role.

While a single convergent regulator was not established in 1997, the issue of appropriate regu-

latory structures for the convergent communications sector remains relevant. In August 2002, the Minister for Communications, IT and the Arts released a discussion paper about spectrum management and the roles and responsibilities of the ABA and ACA. It invited comments on options including merging the ABA and ACA into a single organisation and transferring some ABA functions to the ACA (Alston 2002; DCITA 2002). The implications of convergence for the regulatory structure were also considered in the departmental digital television Convergence Review (Commonwealth of Australia 2000: 8-9, 112-116) and two recent Productivity Commission reviews (2000; 2002).³

In addition, there is an international trend towards convergent regulators (Goldsmith et al 2001: 22). For instance, the long-standing North American examples, Canada Radio-Television and Telecommunications Commission (CRTC) and the Federal Communications Commission (FCC), have recently been joined by the Malaysian Communications and Multimedia Commission (CMC), which in April 1999 became responsible for economic, technical, consumer and social regulation of the telecommunications, broadcasting and IT industries.⁴ And the draft UK Communications Bill of May 2002 would replace five existing telecommunications, broadcasting and radiocommunications bodies with the Office of Communication (OFCOM), covering all these roles (DTI/DCMS 2002).⁵

The paper presents a historical sketch of what led to the post 1997 telecommunications regulatory structure and then offers some reasons that the

² For examples, see Armstrong (1987: 21; 1990), Dwyer (1998: 22), Free (1990: 18-19; 1992: 104), Hardy et al. (1994: 178) and Peters (1994: 191).

³ The Convergence Review report concluded that 'continued separate operation of [the ACCC, ACA and ABA] would be the best approach for the foreseeable future' (Commonwealth of Australia 2000: 9). The Productivity Commission report on broadcasting (2000: 177-220) and draft report on radiocommunications (2002: 74-75, 209-239) both recommended that the ACA take over allocation of broadcasting spectrum from the ABA, as part of a move to elevate economic efficiency over other objectives in spectrum allocation. The final radiocommunications report was provided to the Minister in July 2002, but at the time of writing had not been tabled or published (see <http://www.pc.gov.au/inquiry/radiocomms/index.html>).

⁴ Communications and Multimedia Commission Act 1998 (Malaysia), Parts VI – IX.

⁵ The UK Draft Communications Bill is available at www.communicationsbill.gov.uk.

convergent regulator did not eventuate. We do not aim here to evaluate or analyse the advantages and disadvantages of various convergent regulator options, a task deserving of at least a whole paper. We do, however, believe that the option of a convergent communications regulator should be properly considered, in the light of convergence. This paper provides some lessons that could prove helpful as part of that process.

A historical outline of 'post 1997'

The three sectoral regulators

The public policy discussion about the post 1997 environment began in earnest in 1994. However, there had already been significant change in the preceding decade. Each of the three major sectoral regulators that existed in 1994 was a relatively new feature of the communications landscape; and each was created with a radical revision of the relevant laws.

In telecommunications, AUSTEL was established as the independent regulator by the *Telecommunications Act 1989* (TA 1989), which also introduced limited forms of competition. AUSTEL was responsible for economic and technical regulation of Australian telecommunications and provision of advice to the industry and the Minister, and with the *Telecommunications Act 1991* (TA 1991) it gained a pro-competitive role.⁶ The *Broadcasting Services Act 1992* (BSA) merged the broadcasting planning elements of the Department of Transport and Communications with the previous Australian Broadcasting Tribunal (ABT) to create the ABA as 'a single body responsible for the regulation of all aspects of broadcasting' (Australia, Senate 1992: 3604). This accompanied introduction into broadcasting law of several new concepts, such as more reliance on self-regulation and different ways of managing control and ownership of media. The SMA was established in June 1993 with commencement of the *Radiocommunications Act 1992*, with spectrum planning and licensing responsibilities that had previously been the domain of the Department. At the time, there was a widespread expectation that the next step would be to unite all three regulators into one, variously called the 'Australian Communications Commission' or 'Australian

Communications Authority' (distinct from the ACA that actually exists now).

Hilmer Report on National Competition Policy

While everyone was concentrating on bedding down the new 1991-1992 laws, and suffering a dose of legislative fatigue, a new turf war started. In August 1993, the Hilmer Report on National Competition Policy (Commonwealth of Australia 1993) was released. This was part of the move headed by the Treasury to make the Australian economy more competitive. Two of the key principles were removal of industry-specific regulation, and the creation of a new economy-wide super-regulator, the 'Australian Competition Commission' ('ACC'). The Hilmer report attracted widespread support from business, particularly because the super-regulator would not be susceptible to the level of political interference that afflicted current regulators. Its principles were accepted by the Council of Australian Governments (COAG) and incorporated in the *Competition Policy Reform Act 1995*, by which time the 'ACC' had included consumers to become the ACCC. This was a vastly bigger process than the communications reforms, and attracted more attention and support from politicians and bureaucrats. National competition policy was not an optional extra for the Commonwealth in its review of telecommunications (Hardy et al 1994: 168; Raiche & Given 2001: 15). Indeed, it dictated the communications regulation we have today.

Beyond the Duopoly

In 1991, the government foreshadowed a review of telecommunications policy in preparation for expiration of the duopoly/triopoly of Telstra, Optus and Vodafone in June 1997. The Minister for Communications and the Arts, Michael Lee, released the issues paper, *Beyond the Duopoly: Australian Telecommunications Policy and Regulation* (Lee 1994). The paper asked about regulatory arrangements relating to a swag of telecommunications issues, including – and of most interest here – institutional arrangements.⁷

⁶ TA 1989 s. 18; TA 1991 ss. 36(a), 37.

⁷ Other issues were: industry structure; competition policy; powers and immunities; universal service, affordability and content; consumer protection and privacy; national interest considerations; technical regu-

Two of the key themes running through the paper were competition and convergence.

When competition was introduced in the early 1990s, it was thought that the *Trade Practices Act* (TPA) might be insufficient to deal effectively with market dominance, so it was supplemented with industry-specific telecommunications competition law. The future of this specific law was a major question for the review, heightened by Hilmer developments. The issues paper expressed government preference for reliance on 'the wide range of legislation and policy that generally applies to all sectors of the economy where this is appropriate' but was open about whether some form of industry-specific law might also still be needed (Lee 1994: 22-24, 33-42, 93-95).

The regulatory issues raised by convergence were described as 'central to this Review' (Lee 1994: 19) and the prospect of a radical legislative re-structure was foreshadowed:

While communications is currently subject to three main pieces of legislation, each Act covers a distinct area and is coordinated with the other Acts. In a dynamic industry like communications, however, this may not remain the case, especially as unanticipated technological, service or market developments arise. Every effort will need to be made to avoid a situation developing where the regulatory requirements of converging industries are confusing, costly and complex for industry participants. (Lee 1994: 6)

Furthermore, the review was, in part, to examine:

the future role of AUSTEL as a specialist industry regulatory agency ... including having regard for ... the roles and functions of other relevant specialist regulatory agencies, in particular the Australian Broadcasting Authority (ABA) and the Spectrum Management Agency (SMA), in the light of the evolving convergence of different communications technologies and services. (Lee 1994: 94-96)

The section on institutional arrangements did not, however, include any direct suggestion of a single convergent communications regulator; rather, it focused on the carve-up of competition regulatory territory between the 'ACC' and an industry-specific regulator, and whether to merge AUSTEL's and SMA's technical roles (Lee 1994: 90-92; see also 78-81).

lation; electronic addressing and directories; and industry policy.

The 70 plus written submissions contained (amongst other things) proposals and views on various combinations of the existing regulatory bodies and 'ACC', including suggestions for a single convergent regulator (see later discussion for examples).

Telecommunications Advisory Panel

Michael Lee established a 16-member Telecommunications Advisory Panel (TAP), which had an advisory and representative, rather than decision-making, role.⁸ It met several times between late 1994 and April 1995 and responded to discussion papers prepared by a departmental team. Of particular note was a wide-ranging options paper provided for discussion at the final meeting. The paper presented four broad models based on the approach to competition law, characterised as: status quo (with amendments), new industry-specific law, supplemented general law and general law (DOCA 1995: 7; table reprinted in Corner 1995a: 16-17).

Options for institutional arrangements, presented as dependent on decisions about competition policy and technical regulation, included various merged possibilities: a single communications regulator, applying industry-specific regulation across all communications; a single communications-wide technical regulator; and AUSTEL, minus its competition role (given to the ACCC), merged with the SMA and possibly the ABA (retaining AUSTEL, or AUSTEL minus competition, were other options). Advantages of the various convergent options included: providing a 'one stop shop'; facilitating a common approach; concentrating knowledge, expertise and skills; and (particularly if some AUSTEL functions were lost to the ACCC) the efficiencies of retaining a critical mass of workload. Disadvantages included: the downside of major institutional change – relocation of staff and risked loss of expertise; possible limits on common expertise between the cur-

⁸ Members were: Hon Leo McLeay MP (Caucus Committee on Transport, Communications and the Arts), Frank Blount (Telstra), Bob Mansfield (Optus), Brian Perkins (SPAN), Alfred Forster (CEPU), Neville Roach (AIIA), Ron Spithill (ATIA), Roman Domanski (BCA), Trish Benson (CTN), Neil Tuckwell (AUSTEL), Prof Allan Fels (TPC), Brian Johns (BSEG/ABA), Bruce Gyngell (FACTS), Prof Mark Armstrong (CMTLP), George Maltby (ATUG), and John Rohan (Vodafone).

rent separate regulators, reduced scope for efficiency and effectiveness gains; and difficult tensions between conflicting objectives (DOCA 1995: 104-107; see also 86-88).

The policy, a change of government, and the legislation

A 99-point cabinet-endorsed statement of principles was released on 1 August 1995, with the usual leaks and press speculation beforehand (including one that AUSTEL would be merged with the ACCC). In fact, the decision was that industry-specific competition regulation would be transferred to a new division of the ACCC, formed from AUSTEL resources and staff, and that AUSTEL's remaining functions would be merged with the SMA (Commonwealth of Australia 1995: points 93-94; Hilvert 1995: 19; Levy 1995: 17). The new structure was included in exposure drafts of the Telecommunications Bill 1996 and Trade Practices Amendment (Telecommunications) Bill 1996 released by DOCA in December 1995. While debate continued about many details of telecommunications policy, the institutional arrangements reflected in the 99 principles document were not changed before the final package of bills was passed in March 1997 (Australia, House of Representatives 1997: 3071-3113).

The March 1996 federal election brought a change of government, with Senator Richard Alston becoming the new Minister responsible for communications. The timing created considerable pressure to establish the new telecommunications regime quickly. The need to establish the new regulatory regime quickly was heightened by what was probably the most significant distinguishing feature of Coalition policy: its commitment to partially privatise Telstra (Alston 1996). This also added to the department's workload and fostered speculation about whether the telco's potential share price was influencing the post 1997 changes (*Exchange* 1996b: 2; Forster & Oriti 1996: 48).

By May the Minister had released a new discussion paper with a framework for post 1997 legislation, which formed the basis of discussions at a well-attended Sydney Telecommunications Working Forum. It retained the institutional arrangements agreed by the previous government: the ACCC responsible for regulating competition policy, with both general and industry-specific

provisions incorporated in the TPA; and technical regulation of telecommunications and radiocommunications combined in a merged AUSTEL and SMA (*Exchange* 1996a: 4-5; Gibson Quai and Associates et al 1996).

The Minister appointed a four-person telecommunications expert group to advise on post 1997 policy, and the exposure draft legislation was published, in three packages, between August and October 1996 (*Exchange* 1996c: 2; 1996d: 2; 1996e: 4-5; 1996f: 2; Gibson Quai and Associates et al 1996).⁹ The package of eleven bills was introduced into the House on 5 December and subsequently referred to a Senate Legislation Committee (Australia, House of Representatives 1996: 7799-7811). The Committee generally did not question the broad policy positions in the legislation, and neither the majority nor two minority reports recommended changes to institutional arrangements (Senate Environment, Recreation, Communications and the Arts (ERCA) Legislation Committee 1997). The bills completed passage through the House on 26 March 1997, incorporating the Senate amendments and with no further changes to institutional arrangements.

Why didn't the convergent communications regulator eventuate?

There were a number of reasons why the convergent communications regulator was forgotten in the lead-up to the post-1997 changes.

No appropriate champion

Few players seem to have opposed the idea of a convergent regulator. Rather than any deliberate rejection, there was a lack of concerted, proactive focus on it. In particular, the idea of a convergent regulator was not championed by those able to take an overview position, namely executive government. For instance, *Beyond the Duopoly* mentioned that telecommunications, broadcasting and radiocommunications regimes need not remain separate, but did not advance a specific unifying proposal. The later TAP discussion paper included

⁹ The expert group consisted of Allan Horsley, of ATUG, Mara Bun, of the Australian Consumers' Association, Phil Singleton, a member of the Telecommunications Industry Development Authority, and Henry Ergas, Professor of Network Economics and Communications.

various convergent options, but did not explicitly promote them.

That does not mean that discussion of regulatory convergence was off the post-1997 agenda. For example, as part of its quest for minimal regulation, the AIIA called for a specialist division of the ACCC to absorb the converging functions of AUSTEL, the ABA and SMA and administer minimalist industry-specific competition, technical regulation, numbering and spectrum management (but not content) functions (AIIA 1994: 6). This could have produced a different kind of convergent regulator: an ACCC with a substantial team of engineering and policy expertise across the communications sectors. Seeking a focus on consumer, rather than competition, issues, the Consumers' Telecommunications Network (CTN) recommended a single communications regulator to replace the ABA, SMA, Telephone Information Service Standards Committee (TISSC) and AUSTEL functions (CTN 1994: 11, 86). On the other hand, Telstra argued that, despite convergence, technical management of telecommunications, broadcasting and radiocommunications would still require specialist expertise and 'may need to operate independently' (Telstra 1994: 54); and the ABA argued for retention of the existing network of agencies (ABA 1994: 15-19).

More common than direct arguments for or against a convergent body were views that a combined communications regulator (in some form) was an acceptable option, or likely to be created in the future. For example, AUSTEL's submission, couched in the measured terms of a regulator, presented a convergent communications authority as one sensible option (AUSTEL 1994: 24-26, 30, 35, 86-87, 96-97; Levy 1994-95: 20, 22). Optus, while seeking continuation of AUSTEL's role to start with, suggested that government might find it desirable to create a communications technical regulator; and Service Providers Action Network (SPAN) envisaged a similar future possibility (Optus Communications 1994: 46; SPAN 1994: 4). Treasury suggested that there could ultimately be a single Communications Act, with the ABA becoming the Australian Communications Services Authority and a merged technical/spectrum body absorbing ABA, AUSTEL and SMA functions (*Exchange* 1995: 3-4). And the TPC noted the likelihood that an all-encompassing agency could be needed to deal with technical changes (TPC 1994: 41).

Such passive (let alone active) support of players and other interested parties would ease any transition to a convergent regulator. However, there was an important missing ingredient. Such a significant change would have required considerable determination by those able to drive the process and take an overview position above existing vested interests and turf wars – the executive government.

The too-hard basket

One of the reasons that the executive government may not have championed the shift to a convergent regulator is that it just seemed too difficult. This is not an idle or derogatory comment. The sector-specific post-1997 review, like each of the major preceding legislative overhauls, was significant and time-consuming. For example, Senator Collins noted that the Broadcasting Services Bill 1992 was 'the culmination of a long effort to bring the 50 year old Broadcasting Act of 1942 up to date'. For departmental personnel who had worked on a previous bill said to establish a broadcasting framework 'that will serve Australia into the 21st century' (Australia, Senate 1992: 3599), there would have been little incentive to undo that work and start again. Even when considered in isolation from previous efforts, it would have been pragmatically and politically easier to make a relatively gradual change than to attempt to implement a grand new communications vision.

It is possible that this could have been addressed by creating the convergent regulator through a minimalist merger of the existing regulators, rather than a total revision of the still-new laws. In principle, it could have been relatively easy to pass one Act that erased all references to AUSTEL, the ABA and the SMA, and substituted 'Australian Communications Commission' (or similar). It could have provided for a new, collated charter, and transfer of the staff from the three original bodies to the new one, with little further change. In practice though, even this would have required effort and caused disruption in the short term; and any benefits would only start down the track. In addition, the other agendas dominating the discussion would have made it difficult, if not impossible, to introduce a minimalist structural change without introducing changes of substance.

Competing competition agendas

The Hilmer developments meant that the nature of competition regulation was firmly on the 'post 1997' agenda. It was also of vital interest to all the telecommunications players, who saw it as directly affecting their future chances. There was fierce argument about the nature of competition rules and who would administer them, which swamped discussion about longer-term questions such as convergence.

In theory, the outcomes of the competition debate need not have precluded regulatory convergence: for example, a convergent communications regulator could have been created, alongside the ACCC applying general TPA law to communications, as it does to other sectors of the economy. But it seems that concern about telecommunications competition was so powerful that convergence issues were practically forgotten. As some of our interviewees commented, a convergent regulator might be 'nice to have', but was not the priority. The final result actually went in the other direction: inserting telecommunications-specific provisions into the TPA. This was not because of any view about convergence, but simply a mechanism to entrench rights of new telecommunications players. Of course there were many desires informing the different agendas (for example, Telstra's desire to be rid of AUSTEL, Canberra's intention to boost the new ACCC, and particular desired outcomes on access and Telstra's conduct). This is necessarily a short summary and does not attempt to cover the complexity and context of all the issues and debates.

Arguments about competition were organised around two axes: the first was whether or not there should be 'industry-specific' competition policy; the other, in many cases secondary, one involved who should administer competition law. There was fairly widespread support for long-term migration of telecommunications to general competition law, following the new National Competition Policy. The issue was whether that should happen in the immediate post-1997 environment.

Telstra led arguments for reliance on the general rules of the (modified) TPA, administered by the ACCC, rather than AUSTEL (which had previously presided over telecommunications competition regulation). It was argued that competition would be sufficiently widespread by 1997 for a general regime and the new general access and anti-competitive provisions of the TPA would be

sufficient for telecommunications. Other arguments were that a general regime provides uniformity and certainty, whereas a separate industry-specific regulator would risk inconsistent approaches; an industry-specific regulator would lack wider competition-skills and experience; an industry-specific regulator would be prone to industry 'capture', resulting in over-reliance on the regulator to resolve disputes, and discouraging use of commercial negotiation, self-regulation, and economy-wide solutions; the ACCC's arbitration processes would encourage rapid and satisfactory commercial negotiations; economic 'markets' were no longer sensibly defined within the traditional telecommunications sector in a convergent context; and industry-specific regulation would impose extra costs (Blount 1995: 65; Corner 1995b: 18; DOCA 1995: 11; Hilvert 1995: 19; Telstra 1994: 19; 21-25; TPC 1994: 5-10, 14, 20, 30, 40-41).

Counter arguments, in support of industry-specific regulation (and in some cases, regulator), centred around: the relative immaturity of the sector, requiring additional protection to support competition; the existing regime's certainty and comprehensiveness; limited power for access disputes to be notified to the ACCC under the proposed general access regime; the additional powers of AUSTEL to constrain Telstra where it is dominant in a market, encouraging investment by new market entrants; the time, cost and certainty advantages of avoiding legal cases through AUSTEL's power to make non-appealable determinations (particularly important for smaller players); the need for industry-specific experience, expertise and knowledge to deal with the complexities of the sector and ensure fair, efficient outcomes; the costs to smaller players of establishing relationships with a new regulator; and the interrelationships between economic and technical issues in areas such as spectrum allocation and licensing, rendering a single industry regulator more efficient and effective (AAPT 1994: 1; Bailey 1995: 65; DOCA 1995: 10-11; Optus Communications 1994: 44-45; SPAN 1994: 1-15, 26-27; Vodafone 1995).

Examples of positions on competition rules and regulator

	Competition Rules	Competition Regulator
Telstra	General	ACCC
AIIA	General	Specialist division of cross-industry body, such as ACCC
TPC/Fels	General (as far as possible)	ACCC
Treasury	General (preferably, but any required industry-specific rules to be included in TPA)	ACCC
AUSTEL	Probably need industry-specific	Telecommunications division of ACCC or separate communications regulator
Optus	Industry-specific	AUSTEL as standalone body or absorbed as specialist division of ACCC: law and expertise are main thing
AAPT	Industry-specific	AUSTEL or an umbrella communications regulator, to be reassessed in five years
ATUG	Industry-specific	Favours separate body, but could be division of ACCC; same group should oversee competition and other carriage issues
SPAN	Industry-specific (for 5-8 yrs, then general)	AUSTEL in first instance, then a specialist group in ACCC from around 2002
Vodafone	Industry-specific (for 5 years)	Industry body (in short term)

Sources: AAPT 1994: 1; AIIA 1994: 5-6; AUSTEL 1994: 16, 28-30, 32, 58; Bailey 1995: 68; Blount 1995: 65; Corner 1995b: 13-14, 18; *Exchange* 1995: 3; Fels 1995: 63; Optus 1994: 2, 5; SPAN 1994: 3, 12; SPAN 1995; Telstra 1994: 1-2, 21-25, 32; TPC 1994; Vodafone 1995.

The table above gives examples of some key players' positions on competition rules and regulator. Telstra and others who supported complete reliance on the general rules in the TPA wanted competition regulation to be undertaken by an independent ACCC, not an industry-specific body. There was more ambivalence from those who supported retention of some industry-specific rules. Some wanted telecommunications competition regulation initially governed by an industry body (which could be extended to include other areas of communications). Others were happy for a separate body, or a separate division of the ACCC, to have that responsibility. The final result was somewhere in the middle: one side got its ACCC, but industry-specific competition rules were included in the TPA.¹⁰ The main point is that

the competition outcomes were more important to almost all of the players than the potential for a convergent regulator.

A review of telecommunications

Like previous communications reviews, the post-1997 review was explicitly focused on one segment of the communications sector, in this case telecommunications. This was mainly because the review process fitted into an established schedule of telecommunications reform, typically described

litical will to introduce the ACCC, meant that there was never any real scope for it not to become the telecommunications competition regulator. Significant factors behind the decision to include industry-specific rules included the need to retain access conditions that had been agreed to in licence agreements; and the implications for access of the particular 'any-to-any' nature of telecommunications.

¹⁰ It has been suggested that the desire for consistent application of competition law, plus the prevailing po-

in terms of deregulation and the full introduction of competition. This meant that, while it allowed some consideration of broader issues, the detailed problems – and therefore solutions – were framed primarily in telecommunications terms. It is also worth noting that the deregulatory and competitive agenda for telecommunications was different to the agenda for, say, regulation of television or regional radio. This difference is another reason that the idea of a convergent regulator was not squarely on the review agenda.

The focus on one part of communications probably compromised the review's ability to produce a convergent regulator. Any strategic investigation into restructuring regulation and planning of the existing tripartite communications system would need the widespread involvement of players, and balanced assessment of the different interests, objectives, practices, laws and cultures from each sector. In short, it would need a review of communications, rather than just telecommunications.

Another point, related to the telecommunications focus, was the subtle prevalence of the distinction between 'content' and 'carriage' in the conduct of the review. The idea that content and carriage must be regulated separately meant that a single communications regulator was not an obvious regulatory solution.

This distinction was expressed in the official *Beyond the Duopoly* and TAP documents.¹¹ For example, '[t]he importance of clearly distinguishing between issues of carriage and content and applying to each appropriate regulatory arrangements ...' was an underpinning principle of the review (Lee 1994: 24). Thus, while acknowledging that 'content is one of the social dimensions of the telecommunications services', the focus of the review was on the traditional telecommunications realm of carriage, with content matters raised only in relation to point-to-point telecommunications services not covered by existing laws (Lee 1994: 61-62, 92; see also DOCA 1995: 77-78).

The content-carriage distinction, and the conservative assumptions built into it, were often unmentioned – presumably taken for granted – in submissions. In some cases, telcos recognised the real danger of becoming content censors and

openly supported the distinction (e.g. Telstra 1994: 43, 45-46). Models such as that proposed by Treasury relied on the content-carriage distinction to reformulate the regulators, from industry-specific to 'function'-specific: a competition regulator, services/content regulator and carriage regulator (*Exchange* 1995: 3-4). Similarly, the TAP options paper provided a fairly positive assessment of a model involving a single technical/spectrum regulator (DOCA 1995: 107).

While, in theory, there could be potential for regulatory convergence within the two categories of content and carriage, the *divergence* of content from carriage tended to discourage communications-wide thinking. The main point is that focus on a single part of communications is unlikely to be conducive to convergent thinking.

Conclusion

As we again come to consider whether or not Australia should create a convergent regulator, it is useful to ask how we got to where we are today. In one sense, today's structure could be seen as largely an accident: the product of a series of struggles around different short-term competition agendas. It was certainly shaped much more by the competition agendas affecting telecommunications than by ideas about convergence. A combination of factors contributed to preventing the 'post 1997' policy-review process from producing a convergent regulator: lack of championship from above; a possible perception that the task was too difficult, exacerbated by the fact that the rules were being changed, not just structures; the distractions of the more immediate competition agendas; and a focus on telecommunications, rather than involvement of the whole communications sector. Determining, and creating, the best regulatory structure for Australia's convergent communications future is not a trivial task. However, these historical lessons might make it more feasible.

¹¹ It is worth noting, however, that several of our interviewees did not consider the content-carriage distinction an important or memorable aspect of the review.

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