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### **The Convergent Media Policy Moment**

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# The Convergent Media Policy Moment<sup>1</sup>

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## Abstract

This paper will consider some of the wider contextual and policy questions arising out of four major public inquiries that took place in Australia over 2011–2012: the Convergence Review, the National Classification Scheme Review, the Independent Media Inquiry (Finkelstein Review) and the National Cultural Policy. This paper considers whether we are now witnessing a ‘convergent media policy moment’ akin to the ‘cultural policy moment’ theorized by Australian cultural researchers in the early 1990s, and the limitations of various approaches to understanding policy – including critiques of neoliberalism – in understanding such shifts. It notes the rise of ‘soft law’ as a means of addressing the challenges of regulatory design in an era of rapid media change, with consideration of two cases: the approach to media influence taken in the Convergence Review, and the concept of ‘deeming’ developed in the National Classification Scheme Review.

**Keywords:** Convergence, media policy, soft law, regulation, Internet, platform neutrality

## A convergent media policy moment?

The period from 2011–2012 has been an unusually active one in Australian media and cultural policy. Among the inquiries and reports that have emerged in this period have been:

- The Convergence Review, an independent inquiry undertaken through the Department of Broadband, Communications and the Digital Economy, which was asked to “review the operation of media and communications legislation in Australia and to assess its effectiveness in achieving appropriate policy objectives for the convergent era” (Convergence Review, 2012: 110). It released its Final Report in April 2012.
- The Review of the National Classification Scheme undertaken by the Australian Law Reform Commission (ALRC). I was seconded from the Queensland University of Technology to lead this inquiry, and the final report, *Classification–Content Regulation and Convergent Media* (ALRC, 2012), was tabled in Parliament in March 2012.

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- The Independent Media Inquiry was established by the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, to review the adequacy of media codes of practice and related matters in September 2011. The Inquiry was chaired by Hon. Ray Finkelstein QC, and its Report was delivered to the Minister in February 2012 (Finkelstein, 2012).
- A National Cultural Policy Discussion Paper was released by the Office of the Arts in August 2011, and received hundreds of submissions in response. The release of a Final Report was delayed by the decision to undertake an independent review of the Australia Council as the peak arts funding body (Review of the Australia Council, 2012), and there is an expectation that it will finally be released in late 2012.

The return of media and cultural policy as a source of major debates in Australia during 2011–2012 was in some respects surprising. The period has seen the most sustained Federal government activity related to media and cultural policy since the early 1990s, when the *Broadcasting Services Act* (1992) and the *Classification Act* (1995) were legislated, and when the Keating Labor government presented its path-breaking *Creative Nation* (1994) national cultural policy statement. That period also saw a sustained debate about whether policy was constitutive of the media and cultural studies field, particularly in Australia, where the later works of Michel Foucault on governmentality were drawn upon to shed new light upon the role of government in the shaping of national cultures (Bennett, 1992; Cunningham, 1992; Flew, Hawkins and Jacka, 1994). But the forms of media and cultural policy activism of the early 1990s appears to be something undertaken a while ago, and scholarship once relevant to it seemed to have moved on to other fields such as copyright law, social media, anti-corporate online activism, digital innovation and creative industries.

International literature on media policy has proposed that an earlier orientation towards pluralism and the public interest had been subverted by the rise of neoliberalism as a dominant ideology of globalizing capitalism that no longer considered itself to be tethered to the nation-state (Hardt and Negri, 2000; Hesmondhalgh, 2007; Freedman, 2008). Indeed, there typically seemed to be more activism around eliminating the residual claims of nation-states to govern media content or to seek access to it. There appeared to be a consensus across the political spectrum that the combination of networked digital technologies, economic and cultural globalization, and the global market in media content enabled by new platforms and services have fundamentally eroded the structural bases of twentieth century mass communication media, and that we lived in something of a ‘post-policy’ global media environment, where nation-states and government agencies appeared as the enemies of global digital activist communities.<sup>2</sup>

But as economic geographers have observed, the globality and statelessness of corporations is frequently overstated. Dicken (2003) noted that most of the world’s largest non-financial

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<sup>2</sup> The clearest manifestation of such developments in recent years would be the emergence of WikiLeaks. Describing itself as “an uncensorable system for untraceable mass document leaking” (Flew and Wilson, 2012: 171), those involved in WikiLeaks, such as its founder Julian Assange, engaged in a practice of making state secrets available to global audiences in the interests of a self-defined doctrine of ‘radical transparency’. The philosophy of WikiLeaks was very much one of decentralized resistance that drew upon global ICT networks as a challenge to the centralized and unaccountable power of nation-states and government agencies, in a manner akin to the Deleuzian concepts of rhizomes and ‘nomadology’ (Flew and Liu, 2011; Flew and Wilson, 2012). The debate about WikiLeaks took an unusual turn in 2012 with the recommendation of the UK’s Supreme Court that Julian Assange should be extradited to Sweden to face sexual assault charges, and his own subsequent actions to seek political asylum in Ecuador. Perhaps indicating the limits of global cosmopolitan law, Assange’s supporters have demanded that the Australian Government do more to assist Assange as an Australian citizen.

corporations undertook 40–50 per cent of their activities in their ‘home’ countries: of the 16 per cent who undertook more than 75 per cent of their activities outside their home countries, most were in the resources and extractive industries, or were based in smaller European nations, and were facing the question of whether their country of origin (for example, Belgium) or the European Union was their home market. I have argued that this is particularly the case with global media corporations (Flew, 2012). Most of the largest media corporations continue to conduct the bulk of their activities in their home market, particularly North American corporations such as Time-Warner, Disney and Viacom. The only media corporation with genuine claims to be global, rather than a national corporation with international operations, is News Corporation, with its cross-media operations spanning five continents, and which holds over 50 per cent of its assets outside North America.

Moreover, the literature on the economic sociology of such corporations alerts us to the absence of institutional and policy convergence, as well as to the continuing significant differences in national business cultures. Meric Gertler (2003: 112) has observed that “the enduring path-dependent institutions of the nation-state retain far greater influence over the decisions and practices of corporate actors than the current prevailing wisdom would allow”. Even if we were to see News Corporation as a global media company, the Leveson Inquiry in the UK – established in June 2011 to assess the effectiveness of print media self-regulation in the UK – has made it clear that the company can be held to account at the national level, whether it be for the phone hacking allegations which initially prompted the Cameron Government to set up the inquiry, or concerns the wider influence of News International (its UK print division) over the British polity, as has been the more recent subject of investigation. Whatever the final outcomes of the Leveson Inquiry may be, it marks an important moment in the reassertion of the powers of the Parliament in relation to media conduct, and of national forms of regulation as they relate to multinational media companies.

In the ALRC Review of the National Classification Scheme, the need for reform of classification laws and regulations was approached at two levels. First, the inconsistencies, anomalies and inflexible elements of the current scheme were acknowledged, and our assessment of these problems was widely shared among over 2,300 submitters who responded to the ALRC’s ‘Issues Paper’, released in May 2011. At a second level, it was argued that fundamental reform of media classification, as with all other aspects of media and communications policy, was necessitated by the challenges of media convergence. The concept of convergence was used here as an umbrella concept to capture eight macro-forces of transformation in the global media and communications environment. The following extracts from the ALRC’s final report (2012: 66–74) illustrate these macro-forces:

1. *Increased access to high-speed broadband Internet:* As of December 2010, there were 10.45 million active internet subscribers in Australia, of which 8.15 million were household subscribers and 2.3 million were business and government subscribers. Nearly 15.1 million Australians aged 14 or over (83% of the population) went online during the December quarter of 2010, and 71% of internet users went online at least once a day. Approximately 3.1 million Australians aged 14 or over accessed the Internet via a mobile phone handset during December 2010, as compared to 1.9 million during December 2009.
2. *Digitisation of media products and services:*...It is estimated that 60 hours of video are uploaded every minute onto YouTube, and four billion videos are viewed every day worldwide from that site alone [(News.com.au, 2012)]. In Australia, there are an estimated six million YouTube users, watching over 200 million videos per month.

The Apple iTunes store now sells almost 10 million songs per day, making it by far the major music retailer worldwide...At a more general level, Deloitte Access Economics estimated that in 2010, the direct contribution of the internet to the Australian economy was approximately \$50 billion, or 3.6% of Australia's Gross Domestic Product.

3. *Convergence of media platforms and services*:...[For all media organisations,] digital content services are now very much at the heart of their operations, and it no longer makes sense to maintain platform-specific organisational practices...At the same time, media convergence has increased the tendency towards media globalisation...the [Apple] iTunes site attracted four times the number of video downloads of the largest Australian providers (ABC iView, Yahoo!7 and NineMSN), and...its viewers spent over 10 times longer on iTunes than on the equivalent Australian sites [(Telstra, 2011)].
4. *Globalisation of media platforms, content and services*:...At one level, it can be argued that media globalisation is not a new phenomenon. Hollywood movies and American television programs have been a feature of the global media landscape for most of the 20th century...[while] local audiences have frequently displayed a preference for culturally relevant local media content where it is available [(Tunstall, 2008)]...What has changed has been the extent to which digital media content can be sourced, distributed and accessed from any point in the world to any other point in the world. This has led to the rise of content distributors such as YouTube, and media platforms such as Apple iTunes and Android Market, that sit across national boundaries [and regimes of jurisdictional authority].
5. *Acceleration of innovation*:...The World Intellectual Property Office [(WIPO)] has observed, for example, that the number of patent applications worldwide has grown from about 1 million in 1995 to 1.9 million in 2008, and the number of patents granted has grown from 450,000 in 1995 to 750,000 in 2008 [(WIPO, 2010: 33)].
6. *Rise of user-created content*:...An important shift in the media associated with convergence is the rise of user-created content, and a shift in the nature of media users from audiences to participants [(Bruns, 2008; Leadbeater, 2008)]...The rise of user-created content is associated with broader trends away from a 20th century mass communications model, characterised by large-scale distribution, media content largely produced and distributed by media professionals, and a clear distinction between media producers and consumers. The emergent 21st century framework is one of convergent social media, characterised by dramatically reduced barriers to user participation through easy-to-use Web 2.0 technologies, and the resulting blurring of the producer/consumer distinction as there is ubiquitous user-created content accessible across multiple media platforms [(Flew, 2012: 165)].
7. *Greater media user empowerment*: The rise of user-created content, and the shift in the nature of audiences towards a more participatory media culture, is associated with greater user control over media. This is partly related to a greater diversity of choices of media content and platforms, but [it is also related to] the ability to achieve greater personalisation of the media content that one chooses to access...[While] the capacity for more personalised media is strongly related to the internet...it is also increasingly characteristic of more traditional media platforms, such as the increasing number of Australian households with some form of personal video recorder (PVR).
8. *Blurring of public/private and age-based distinctions*:...Historically, there has been more extensive regulation applied to the media which has been publicly available or distributed (cinema, radio and television) than towards print media (books, newspapers, magazines) whose distribution and consumption were considered to be

more private and personal in nature...While expectations that the media continue to meet community standards remain important, the distinctions between media distribution methods are now less clear-cut. Newspapers, magazines, audiovisual media content, music and film are increasingly distributed and consumed online, in environments that are both public in terms of the networked platforms from which they are accessed, and private in terms of their consumption in the home rather than in public places...It is considerably more difficult to restrict access to online content than is possible for other media platforms [as measures such as age-verification are easily thwarted by the determined user].

In terms of policy and regulation, the key issue arising from convergence is the manner in which it breaks the link between media content and delivery platforms. Convergence points towards a shift from *vertically-integrated industry 'silos'* (print, broadcast, telephony, etc.), and the associated need for sector-specific regulation, to a series of *horizontal layers* of (1) infrastructure; (2) access devices; (3) applications/content services; and (4) content itself.

In an overview of Australian broadcasting and telecommunications regulations undertaken for the Convergence Review, ACMA (2011) identified 55 'broken concepts' in current legislation, including: the concept of 'influence' in broadcasting; the 'Australian identity' of media owners; the concept of a 'program' in broadcasting; the distinction between a 'content service provider' and a 'carriage service provider' in relation to the Internet; and regulations specifically applied to activities such as telemarketing or interactive gambling. At the core of these 'broken concepts' was the manner in which digital convergence is making media services and content increasingly independent of particular delivery technologies. Its central regulatory consequence is that "regulation constructed on the premise that content could (and should) be controlled by how it is delivered is losing its force, both in logic and in practice" (ACMA, 2011: 6).

The Convergence Review concluded from such developments that not only was new media policy required, but a new approach to media policy was necessary, as:

Convergence of media content and communications technologies has outstripped the existing media policy framework. Many elements of the current regulatory regime are outdated or unnecessary and other rules are becoming ineffective with the rapid changes in the communications landscape (Convergence Review, 2012: 1).

Such an approach should move away from a platform-based approach to regulation, towards what the ALRC referred to as "platform neutrality" whereby "in the context of media convergence...[there is a] need to minimise platform-based distinctions to the greatest degree possible, in order to maintain an adaptive regulatory framework that can be oriented towards future media developments" (ALRC, 2012: 75).

### **Policy, politics and principles**

The easy part of a review of current legislation, in media and communications as in other policy fields, is that of identifying the problems with the current framework. Moreover, the public submissions process will amplify the evidence of approaches that are outdated, inconsistent, inflexible, not working, at odds with current community expectations,

inconsistently applied between industries, etc. Of the over 2,300 submissions that the ALRC received in response to its May 2011 ‘Issues Paper’, the clear message was that it was time for fundamental reform to media classification laws in Australia, and that what currently existed was “an analogue piece of legislation in a digital world” (Simon Bush, quoted in Australian Publishers Association, 2011: 5). This quote from the Telstra submission provides a good example of the general view of industry in particular:

Despite its [sic] worthy underlying intent, successive Governments have responded to challenges to the system posed by rapid technological change with a series of issue specific regulatory responses. After more than a decade of incremental changes, the National Classification Scheme as it stands today is a complex arrangement of parallel and sometimes overlapping systems of classification...In this context, rather than seeking to address the issues with the classification scheme that have emerged as a result of rapid technological change with further *ad hoc* reforms...the ALRC should undertake a holistic examination of the *National Classification Scheme* with the objective of developing a new classification framework for the modern media environment (Telstra, 2011: 2).

The more difficult issue, of course, is proposing an alternative framework. The issue here is not simply one of policy versus politics, or the rational-comprehensive or evidence-based approach undertaken by independent policy experts being thwarted by a prevailing political culture of incrementalism, elite bargaining or subordination of good policy ideas to the management of the 24-hour political news cycle by the ‘Hollow Men’ in Ministers’ offices (Althaus, Bridgman and Davis, 2007: 59–71). The point about fundamental reform is that it inevitably means going back to first principles. Both the Convergence Review and the ALRC Classification Review had to consider why media were regulated in the first place, and in both reviews there was considerable work undertaken through discussion papers and online consultation to identify core principles that should frame future legislation. It must be noted that this occurred in a context of fundamental disagreement about first principles and uneven levels of participation among different interest groups: the ALRC blog, for instance, received a lot of critical commentary on the notion that ‘protection of children’ was a worthy principle of a National Classification Scheme.

One of the purposes behind a statement of principles, as identified in the Australian Public Service Commission (APSC) guidelines for ‘smarter policy’, is that it enables discussion of policy goals to be uncoupled to some degree from evaluation of the available policy instruments (APSC, 2009). It can also anchor the policy goals over time, as changes in the external environment (technological change, changing consumer demand, etc.) necessitate changes in the mix of policy instruments being used. Drawing upon submissions received, existing laws and codes, relevant international conventions and Australian public policy guidelines, as well as an online consultation process and the other media inquiries, the ALRC proposed eight guiding principles for reform that should inform the development of a new National Classification Scheme. The aim was to balance the potentially conflicting goals associated with community needs and expectations – safeguarding individual rights and freedoms at the same time as protecting children from potentially harmful media content, for instance – while also being more effective in the scheme’s application, and responsive to the challenges of technological change and media convergence. The report sets out its eight guiding principles in the following language (ALRC, 2012: 77–96):

1. Australians should be able to read, hear, see and participate in media of their choice;

2. Communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;
3. Children should be protected from material likely to harm or disturb them;
4. Consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;
5. The classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;
6. The classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;
7. Classification regulation should be kept to the minimum needed to achieve a clear public purpose;
8. Classification regulation should be focused upon content rather than platform or means of delivery.

The Convergence Review developed 10 guiding principles in its *Emerging Issues* paper, of which the key one was that “citizens and organisations should be able to communicate freely and, where regulation is required, it should be to the minimum necessary to achieve a clear public purpose”. The corollary of this principle was that ‘unnecessary regulation should be removed’ (Convergence Review, 2012: viii). The Review identified three enduring principles that should provide the cornerstone of ongoing Australian government regulation of media and communications to safeguard public interest concerns in the rapidly changing landscape. The Convergence Review expressed these three principles in the following manner (2012: viii):

- *Media ownership*—A concentration of services in the hands of a small number of operators can hinder the free flow of news, commentary and debate in a democratic society. Media ownership and control rules are vital to ensure that a diversity of news and commentary is maintained;
- *Media content standards across all platforms*—Media and communications services available to Australians should reflect community standards and the expectations of the Australian public;
- *The production and distribution of Australian and local content*—There are considerable social and cultural benefits from the availability of content that reflects Australian identity, character and diversity [and in the absence of regulation] culturally significant forms of Australian content...would be under-produced.

One aspect of current policy that is striking is the extent to which the search for alternatives to what is variously labelled ‘black letter law’, ‘hard-wired legislation’ or ‘command and control regulation’ (see, for example, APSC, 2009) draws upon behavioural assumptions that are recognizable to those familiar with the work of Michel Foucault on governmentality, or the role played by policy in shaping action at a distance (Rose, 1999). Some work in relation to media policy has picked up on this parallel between theories of governmentality and governmental practice. For example, Lunt and Livingstone (2012) have drawn upon theories of governmentality to understand the ‘citizen-consumer’ couplet as it developed in the UK with the passing of the *Communications Act* (2003) and the establishment of Ofcom as a convergent media regulator. Such developments are, however, difficult to capture in models

of the policy process that are couched in binary oppositions between the state and the market, public and private, or regulation versus deregulation.

More commonly, media policy tends to be approached from two perspectives: the lapsarian and the libertarian. The lapsarian account contrasts a prior era in which a pluralistic and civic-minded approach to public policy prevailed to the current epoch, which is presented as one of ascendant and rampant neoliberalism. The Convergence Review Committee was invited by the Communications Minister, Senator Stephen Conroy, to “propose an alternative structure [for media regulation] that would encourage continued innovation and protect citizens’ interests in an age of convergent communication” (Convergence Review, 2012: 111). This could be read by critics as simply being “based on an increasingly narrow and an instrumental commitment to market forces as the central dynamic of contemporary communications” (Freedman, 2008: 78), with the concept of ‘citizens’ interest’ being seen as a sop, an afterthought or – as with the ALRC National Classification Scheme Review – a measure to appease noisy morals campaigners and religious lobbyists. Indeed, such reviews have been interpreted by their academic critics as being grounded in neoliberal ideological principles, but also – perhaps paradoxically – as unlikely to amount to anything much. Martin Hirst’s commentary on the Convergence Review would be such an example:

This report and its recommendations is the sort of Clayton’s reform we have come to expect from expensive government inquiries; fiddle with the terminology, shuffle the paper, look busy for a while, collect the cheque and quietly slip out the backdoor.

The report is very business friendly – there’s nothing in here to frighten the market and nothing to excite or enthuse anyone campaigning for real and meaningful change. The only substantial achievement in this review is a recognition that convergence in media technologies and platforms means that there must be some sort of change. However, only mild change has been proposed; really it’s no more than tinkering (Hirst, 2012).

It is notable that such contemporary critiques of neoliberalism in the policy domain strongly resemble earlier accounts, such as Michael Pusey’s work on the ‘economic rationalism’ of the 1980s, and can be themselves critiqued on similar grounds – namely, that they harken back to a ‘Golden Age’ that turns out to have never actually existed. One can note, for instance, that the *Broadcasting Services Act* was widely criticised for selling out ‘public interest’ principles to market doctrines, even if the early 1990s has now been presented as a ‘Golden Age’ of principled public interest interventions in media and cultural policy (see, for example, Turner, 2012). As Ian Hunter previously noted in relation to Pusey’s work, the practical effect of such an account can be one of “divorcing itself from the social machinery in which cultural attributes have been formed as objects of knowledge and administration” (Hunter, 1988: 88).

The libertarian position is interesting in that it has more momentum in this field, with the Internet being understood as the ‘technology of freedom’ that Ithiel de Sola Pool identified back in the early 1980s (Pool, 1983), which will roll back regulation in relation to all other media, even if national governments attempt in vain to stem this historical tide. The submission of Internet activist Mark Newton to the Convergence Review gives a sense of this position:

The Convergence Review is suffering from the same problems as the ALRC's Classification Review, in that it's searching for local provincial regulatory responses to a global phenomenon. By casting 'convergence' as an Australian media issue which requires an Australian regulatory response, it's easy to predict that the results of the review will be obsolete by the time they're published, overtaken by global developments which pay scant attention to Australian regulators (Newton, 2011).

Rather than view these reports from a lapsarian or libertarian perspective, or to accuse them of either doing too little or trying to do too much, I want to consider some of the challenges presented by innovating in the area of regulatory design. One of the difficulties with the push/pull between neoliberal critiques of the capitalist market on the one hand, and libertarian critiques of the 'nanny state' on the other, is that we tend to work with a quantitative model of regulation, i.e., more market/less state, or more state/less market (or less freedom from a libertarian perspective).

In the critical accounts of neoliberalism, this is overlaid with what Clive Barnett (2005) identifies as a two-dimensional model of power, where many of the more interesting propositions arising out of the later work of Foucault – such as the paradoxes of freedom in liberal societies – have been squeezed out by the reinsertion of these ideas into traditional Marxist theories of power. The result is a “trouble-free amalgamation of Foucault's ideas into the Marxist narrative of 'neoliberalism' [which] sets up a simplistic image of the world divided between the forces of hegemony and the spirits of subversion” (Barnett, 2005: 10). When this is added to the propensity for critics of the neoliberal present to idealise a past 'Golden Age' of progressive and pluralistic public policy, it is not surprising that one would find here little but 'tinkering', or even 'fiddling', perhaps while Rome – or in this instance the pluralistic public sphere – burns.

By contrast, the academic literature on regulation makes little reference to a state versus markets dichotomy, whether in the form of “a motivated shift away from public-collective values to private-individualistic values” (Barnett, 2005: 8), as posited in theories of neoliberalism, or in terms of the rise of a 'nanny state', as feared by libertarians. Rather, both states and non-state actors are seen as being intertwined in complex regulatory regimes, where there are interdependencies between actors. Markets are seen as inherently regulated or regulatable spaces under what John Braithwaite terms 'regulatory capitalism' (Braithwaite, 2008). Contrary to the parable of a neoliberal state that is being progressively “hollow[ed] out” by anti-statist ideologues:

Markets...have tended to become more vigorous, as has investment in the regulation of market externalities. Not only have markets, states, and state regulation become more formidable, so has non-state regulation by civil society, business, business associations, professions and international organisations. Separation of powers within polities have [sic] also become more varied, with more public-private hybridity (Braithwaite, 2008: 26–27).

### **The radicalism of regulatory design**

Rather than seeing these reviews as essentially business-as-usual in media policy, as a continuation of a flawed neoliberalism or a last-gasp stand against the ubiquity of unregulated

global Internet content, I want to consider the argument made by Peter Leonard (2012) that there is a degree of regulatory radicalism in the approach taken to media in the reviews. Leonard suggests four areas in which the Convergence Review is radical, explaining in part the negative media commentary that the report received on release, even though its tenor is generally deregulatory, and is not politically partisan:

1. *Radicalism through scope*: aiming for consistency of regulation across media platforms is radical in terms of twentieth-century media policies, which tended to be platform-specific, and in relation to developments internationally;
2. *Radicalism through regulatory design*: there is a proposed move away from Parliamentary legislation and towards regulator discretion in the setting and enforcement of regulations, which would change relations between the Minister and their Department, regulators, and key media players, who have traditionally focused on Ministers as the locus of power in the field;
3. *Radical selectivity*: the concept of a Content Service Enterprise (CSE) is developed by the Convergence Review as the basis for identifying media organizations that continue to be of influence, and hence subject to greater degrees of regulation, in a way that is tied to their audience reach and revenue base rather than their delivery platform;
4. *Radicalism by encroachment*: the Convergence Review identifies the ability to control access over content as a potential new competition bottleneck, proposing that the new convergent media regulator, rather than the Australian Competition and Consumer Commission (ACCC), be the primary agency for addressing such concerns.

In noting Leonard's comments, I was reminded of how the paradoxes of regulation kept emerging for each of the media inquiries in question. For the Convergence Review, its challenge was how "to promote consistency between platforms while being deregulatory where possible" (Convergence Review, 2012: 50). It had to do so in the context of both its own principles-based approach that identifies ownership and control, community standards and local content as ongoing issues, and a situation where not only do significant platform-based distinctions prevail (for example, broadcasting is highly regulated and the Internet is for the most part not regulated: where does that leave IPTV or web-based catch-up services?), but where the development of new services within platforms creates its own anomalies.<sup>3</sup>

For the National Classification Review, the challenge was how to achieve platform neutrality in the classification of similar media content without simply extending the rules developed for one media platform to another. In doing this, we had to grapple with the paradox of an Australian community generally happy (albeit with some notable exceptions) with the reduction of the amount of material that is censored or banned compared with previous decades, but which continues to value the informational role attached to media content classification. The ACCC pointed out that "the availability of adequate information for consumers to make informed choices is an important characteristic of a competitive industry", and that "an effective and consistent classification system is one possible tool to

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<sup>3</sup> An example is provided by the digital multichannel services that have operated in Australia since 2009. In December 2011, the five main free-to-air television channels accounted for 54.9 per cent of the capital city TV audience, the 10 digital channels accounted for 26.5 per cent, and the 200+ pay TV channels accessible through FOXTEL and AUSTAR for 18.6 per cent. Rules pertaining to local content and time-zone restrictions apply almost exclusively to the main free-to-air TV channels, but they account for only 55 per cent of viewing activity in the 30 per cent of Australian homes that access a pay TV service, and 67 per cent of viewing in the 82 per cent of Australian homes with digital television (ALRC, 2012: 73).

achieve this” (ACCC, 2011: 2, 1–2), while the Australian Children’s Commissioners and Guardians (ACCG) observed that “for the classification system to meet its objectives it must be, and must be seen to be, reliable by the community” (ACCG, 2011: 5).

In addressing the limitation of news media regulation as it currently exists in Australia, the Finkelstein Review recommended the establishment of a government-funded statutory regulator to be called the News Media Council to take over the functions of the Australian Press Council, and also the functions of the ACMA that related to news and current affairs. It proposed that the News Media Council would be neither a government regulator nor a self-regulatory industry body, but rather a co-regulatory hybrid mechanism engaging in what the Report terms ‘enforced self-regulation’: “an independent system of regulation that allows the regulated parties to participate in the setting and enforcement of standards (as is presently the case), but with participation being required, rather than voluntary” (Finkelstein, 2012: 287). The Finkelstein Review argued that the enforced self-regulation model would be in line with provisions that currently operate in Australian broadcasting, where industry bodies develop and administer codes of practice as required under government legislation, with the regulator having the powers to oversee and enforce compliance with these regulatory codes.

Now ‘enforced self-regulation’ may sound like the worst of all worlds, upsetting both neoliberals and their critics alike. But something that needs to be borne in mind about regulation, at least as it is understood at a conceptual level, is that the concern is less with regulatory instruments and agencies than with their impacts upon the behaviour of regulated entities. As Arie Freiberg observes in *The Tools of Regulation*: “it is the objective or the effectiveness of the intervention, not its form, that is important” (2010: 4). Drawing upon a variety of definitions of regulation that prioritize the production of the desired regulatory outcome over the means of achieving it, Freiberg defines regulation as “an intentional measure or intervention that seeks to change the behaviour of individuals or groups” (Freiberg, 2010: 4). He outlines four analytical and practical consequences of such a definition of regulation:

1. Regulatory actions have a purposive and intentional dimension: there is a meaningful relationship between regulatory goals and actions, and actions are intended to solve recognizable problems or move towards desired social outcomes in a conscious – and typically measureable – way;
2. Government regulation is only one element of regulation: just as power is dispersed among social institutions, the capacity to regulate exists among both government and non-government institutions, including government regulation undertaken through non-government bodies;
3. “Regulation is not limited to laws or rules”: Freiberg identifies a range of regulatory instruments not primarily based in legislation including market-based instruments; regulation through contracts or procurement requirements; licensing, registration and accreditation; regulation through design rules (physical, environmental, process) or through the architecture or ‘code’ underlying technologies; and informational regulation, including performance indicators and credit ratings;
4. “Regulation is not just restrictive or coercive; it can also be constitutive, facilitating and enabling” [Freiberg cites Karen Yeung’s *Securing Compliance* at this observation]. Regulation can make things happen, as well as stop things from occurring – importantly, it can create and shape markets as well as regulate the conduct of participants within already existing markets (2010: 4–5).

The revisiting of 20-year-old legislation in the context of radical technological and industry change raises the question, not only of the need for new legislation, but the effectiveness of legislative approaches where the only certainty in the media field is that of constant change. The pros and cons of legislative approaches (the ‘black letter law’, ‘hard-wired legislation and ‘command and control regulation’ mentioned above) are widely discussed in the policy literature (APSC, 2009; Freiberg, 2010: 182–83). The advantages are:

- Legal certainty for citizens and market participants;
- Clear enforcement provisions for those who are in breach of the law;
- Recognition of the sovereignty of Parliament as the elected representatives of the people.

The disadvantages of this legislative approach are considered to be:

- The lack of flexibility in adapting laws over time can lead to it becoming out-dated, counter-productive and an obstacle to innovation;
- The perpetual need for more regulation in order to adapt laws to changing circumstances;
- The time lags involved in making and amending legislation;
- Legislation may be poorly equipped to deal with complex problems, and may promote an adversarial relationship with the subjects of the legislation;
- Compliance costs may be high for both regulators – as it requires an enforcement infrastructure that will often be quasi-legal in nature – as well as those subject to regulation;
- The adversarial relationship promotes an industry culture of minimal compliance, with no incentives to innovate in meeting the requirements.

At the same time, while the Convergence Review and National Classification Scheme Review are being driven in some instances by the ‘broken concepts’ of broadcasting, telecommunications and classification legislation (ACMA, 2011; ALRC, 2012: 56–59), the Finkelstein Review came out of a widely-held perception of the failures of print media self-regulation. The question of hybrid forms of ‘soft law’, which has its origins in international law where there has not been a central government able to enforce norms or rules, has come to be more significant in regulatory practice:

At the borderline between the public and private, between law and non-law and between self-regulation, co-regulation and government regulation lies a range of rules, instruments, rulings, guidelines, codes and standards that occupies a very large part of the regulatory terrain (Freiberg, 2010: 186).

It is generally agreed that where law is both produced and enforced by non-state actors, as with the Codes of the Australian Press Council, then it truly is ‘soft’, but where it is combined with some scope for enforcement by state agencies, as with co-regulatory agreements, then it starts to move further along a spectrum towards direct government regulation, but with fewer of the issues of inflexibility, enforcement costs and lack of timeliness associated with formal legislation. Drawing on the work of several other writers, Freiberg (2010: 187–88) identifies the potential advantages of soft law as including:

- Can be applied more quickly and less expensively than legislation;

- Can provide more discretion to the regulator;
- Can be more flexible and adaptive to changing circumstances;
- Can allow for non-technical language to be used that can make the regulations more comprehensible to those engaged with the process;
- Can allow for a broader range of interpretation and a degree of trial-and-error in application;
- Can encourage industry innovation in meeting regulatory requirements or promoting behavioural change;
- Can encourage a more cooperative and less adversarial relationship between government and the regulated industries;
- Can provide cheaper and faster dispute resolution procedures and means to achieve regulatory compliance.

The potential disadvantages of soft law include:

- Lack of precision and clarity for potentially affected parties;
- May lack credible means of enforcement, and hence lack legitimacy with the wider public;
- May lack legitimacy as it has been prepared with industry itself being involved, rather than by elected legislators;
- May be poorly drafted, or difficult for lay people to access.

### **Soft law in practice: Influence and deeming**

I will conclude with a consideration of two issues arising in the inquiries where attempts to establish a clear-cut legislative foundation for addressing the issue in question will prove difficult: the question of media influence, and the deeming of classifications developed overseas to apply within Australia. In both instances, ‘soft law’ options have been advanced as alternatives to ‘command and control regulation’.

#### ***Influence***

One clear implication of convergence is that it blurs platform-based conceptions of a ‘market’ and an ‘industry’. This presents a considerable challenge for media policy, as we have traditionally drawn upon a clearly delineated notion of markets and industries in order to establish where concentrated ownership, and hence market power, may lie. Market power – and the related concept of market failure – provides well-established rationales for government intervention. This has been in both the direct sense of applying laws that set limits to the concentration of ownership within an industry/market, but also in the less direct sense that monopolistic or oligopolistic markets generate ‘market rents’ for participants, which may be redistributed for pro-social purposes through a series of *quid pro quos*. In Australia, the obvious case in point is the relationship between limits on the number of commercial broadcasting licences, the oligopolistic market that results, and the application of quotas for Australian content in the areas of locally-produced drama, children’s programming and documentaries (Flew, 2006). While the Productivity Commission famously condemned the *quid pro quo* regime in its 2000 report as “inward looking, anti-competitive and restrictive” (Productivity Commission, 2000: 6), political forces have allowed it to continue even as its original grounding in spectrum scarcity has manifestly disappeared. The Convergence Review also notes that the proposition that more regulations should apply to

'broadcasting services' than to other media because it makes use of spectrum is outdated, and the claim that it is more influential or has a wider reach than other media is increasingly tendentious (Convergence Review, 2012: 5–6).

As noted above, the Convergence Review addresses this conundrum with the bold concept of Content Service Enterprises (CSE). It is proposed that the focus of regulation shift towards "significant enterprises that produce professional content to Australians" (Convergence Review, 2012: 10). The distinguishing features of CSEs – which would be the primary focus of ownership and control, local content and community standards regulations – are defined by the Convergence Review as follows:

- They have control over the content that is supplied, i.e., it is professionally-produced media content;
- There are a large number of Australians who use or access that content;
- The enterprise derives significant revenue from supplying that content to Australians.

The view is taken that Australians continue to expect regulations to apply to the largest and most influential providers of media content in areas such as:

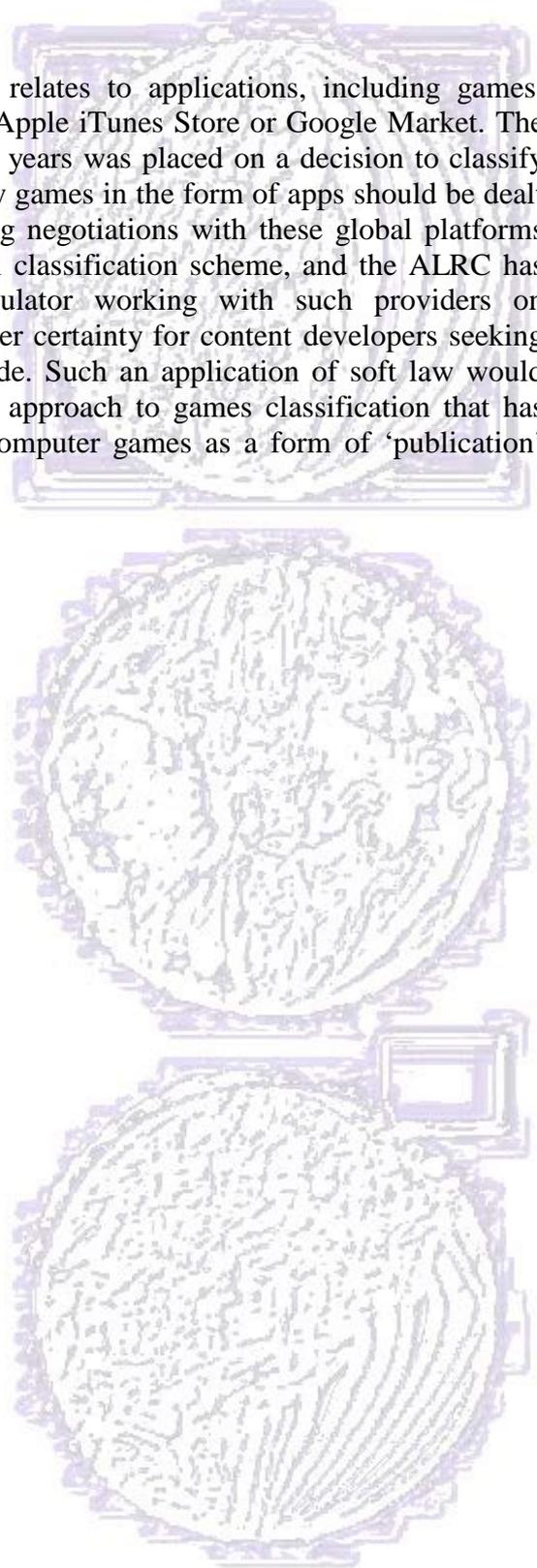
- A public interest test in relation to changes in ownership and control;
- Classification information about content and access restrictions where appropriate;
- Community expectations concerning fairness, accuracy and transparency in their reporting of news and information; and
- Contributing to the overall level of local content production, whether through:
  - investing a percentage of their Australian market revenue in new Australian drama, documentary and children's content; or through
  - contributing to a convergent content production fund administered by a government agency, and funded by a mix of contributions, direct government appropriations, and spectrum fees paid by radio and television broadcasters. This agency could invest in content such as games, online-only content or music, as well as highly localized content production.

### ***Deeming***

In considering the future of media classification in a convergent media environment, the ALRC noted that there is only limited demand for classification below certain threshold levels. While there is continued consumer value attached to classification categories below those where content may be restricted, the function is largely an informational one, as with parents seeking information about media content that is suitable for their children. The ALRC took the view that content that is below the level of R18+ is not expected to be classified, except in the specified cases of feature films, broadcast television and computer games. In relation to the increasingly globally-sourced nature of digital media content, the ALRC explored the scope that exists for deeming provisions to be applied to content classified elsewhere (ALRC, 2012: 164–170). In the games area, for example, two widely-used classification systems are the Entertainment Software Ratings Board (ESRB) classifications in the United States, and the Pan European Games Information (PEGI) system operating in the European Union. As games circulate in a global market, and as the shift from console-based to online and mobile gaming is dramatically reducing the time spent getting games to market, the ALRC has recommended that the Federal government consider deeming such content to have an equivalent Australian classification where it has been classified through an

approved system. It can be noted here that about 99 per cent of games played by Australians are produced outside of Australia, and all Australian games developers produce for an international rather than a domestic market, so there is little basis within the industry itself for a distinct set of local classification standards.

The other area where deeming questions arise relates to applications, including games, accessed from global online 'stores' such as the Apple iTunes Store or Google Market. The challenge here is that while a moratorium of two years was placed on a decision to classify 'apps' in 2011, there is no *prima facie* reason why games in the form of apps should be dealt with differently to console-based games. Ongoing negotiations with these global platforms are likely to be a key part of any future national classification scheme, and the ALRC has identified merit in the convergent media regulator working with such providers on classification guidelines in order to provide greater certainty for content developers seeking to make their digital products available worldwide. Such an application of soft law would replace the current, widely criticized, legislative approach to games classification that has evolved since the *Classification Act* identified computer games as a form of 'publication' rather than as digital content.



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