



In November next year it will be 50 years since the first live pictures of a major sporting event – the 1956 Olympic Games in Melbourne – effectively kick started the television revolution in Australia and began our love affair with live sport on television.

That may seem ancient history, but only a decade ago television viewing in Australia consisted of, at most, just 5 free to air stations, and only in the last few years has anything other than a small section of the population begun subscribing to pay TV.

Now, in 2005, broadband internet is dramatically expanding our viewing choices by providing new ways for consumers to watch content.

Take a look at the streaming video content that is freely available online from sources such as ABC, BBC, ninemsn and Fairfax Digital.

The recent Melbourne Cup Carnival could be watched live by subscribers to Telstra's BigPond website.

Even advertisers are starting to use the internet as an alternative to traditional television advertisements, with Carlton Draught's 'Big Ad' the most recent example of ads streamed online well before it was shown on television.

New technologies are starting to play a part as well.

AFL and NRL fans are now able to download highlights packages of games to their Sony PlayStation Portable. And recently in the United States, iPod users have been able to download episodes of popular TV shows such as Desperate Housewives and Lost for US\$1.99 from the iTunes store.

These examples highlight how new technology and services are encroaching on what has traditionally been the exclusive domain of television broadcasters.

And this is why there is so much talk now about the so-called 'convergence' between telecommunications and media and the impact that this will have. I believe that this has the potential to revolutionise the way media content will be delivered in the future.

Technological convergence

When we think of the media, we tend to think of it in its very traditional forms – newspapers we read over breakfast each morning, radio in the car on the way to work and TV when we come home at night. Perhaps in more recent times we have started to think also of the internet as part of this world. Nonetheless, we have generally differentiated these various silos, and defined them as different markets within the overall media industry.

Before I talk more about these traditional forms of media, though, I'd like to touch on some developments in telecommunications that I see as fundamentally changing the way media

content will be delivered in the future. This might not seem an obvious connection, but it is increasingly apparent that what is often termed a 'convergence' between these markets and the media has substantial implications for all concerned.

The internet and more recently, broadband internet, has obviously had a major impact on the way people communicate. The ACCC's Snapshot of Broadband Deployment showed that at the end of June 2005, there were nearly 2.2 million broadband services connected across Australia, an increase of over 1 million customers, or 108 per cent, in just 12 months. Yet what we have seen to date is likely to be just a small taste of the coming revolution as broadband access becomes even more widely available.

Whether it be ADSL, fibre or wireless broadband, as the speeds at which information gets sent to us increase, and the capacity of telecommunications networks to deliver greater volumes of information grows, so too does the range of uses to which these technologies can be applied. As an example, once speeds reach around 6 megabits per second, DVD quality TV can be delivered over the internet.

As technological developments and takeup of broadband continue to accelerate, a whole raft of new possibilities start to emerge. Telecommunications companies will have the capacity to deliver more than just telephone and internet services and increasingly, we see them moving into the delivery of broadcasting services.

This revolution seems inevitable. Consumers' demands for speed, convenience and quality will continue to rise as each new development raises their level of expectation. And suppliers of media content will have to find ways to embrace the challenges these new demands pose.

So tomorrow's media providers will help drive technological progress across a range of fronts. Advances in packet-switching technology, higher bandwidths, greater digital storage capacity, enhanced buffering and compression technologies – these will all play their part in facilitating the myriad choices available to tomorrow's media consumer.

It is pretty clear, then, that the internet will be a key driver of the next wave of competition to the current media players, and the markets we have traditionally defined as 'media' will change. And the possibility is there for not one, but hundreds of new competitors to today's broadcasters. What does all this mean for the free-to-air and subscription broadcasters of today? What does it mean for newspapers and radio? And what does it mean for current regulation of the media?

This is where telecommunications regulation meets possible media deregulation. Although convergence between telecommunications and media is often talked about, some may not find this an obvious leap.

Media regulation is about who may control different modes of retail distribution for conveying information. It is about who may control the newspapers, free to air and subscription TV channels and radio stations used to convey news and entertainment – the content – to individuals and households.

However as the traditional modes of conveying the content make way for delivery via the internet how people get the content they desire, and at what speed, will be increasingly determined by the control of the telecommunications networks – the pipes – that connect homes and businesses.

It is also the case that as we get greater competition in the ways in which content – including sporting content – can be delivered to our homes, the more important will become the control of the production and distribution of the content itself.

Unlike traditional media, the emerging online players are not subject to substantive limitations on content, ownership, geography or anything else. They can pick and choose the audiences they target, the content they buy, and the way they provide it, in much the same way that other businesses face myriad commercial choices.

It is the pressure that these new competitors can bring to bear on the current players that will provide the stimulus for higher quality, lower prices, and greater diversity for consumers.

But it poses challenges for policy-makers and regulators alike.

Media deregulation

I should state here that whatever changes are made to media ownership laws or broadcasting laws are entirely a matter for Federal Parliament and I therefore won't be commenting on such policy matters.

But there has been a lot of speculation about possible acquisitions in the event that the current cross-media ownership restrictions are eased, and more common ownership of newspapers, free-to-air television and radio is permitted.

Relative to most industries, the Australian media is highly regulated. Protection of the free-to-air television networks is the cornerstone of this regulation, on the grounds that it ensures diversity in the services available to Australians at large.

There is an outright prohibition on new entry into free-to-air television. Existing free-to-air broadcasters also have first rights of refusal over the most popular sporting content, with competition from pay-TV precluded by anti-siphoning legislation. Other potential competitors have spectrum available, but are defined as datacasters and subject to extensive limitations on the types of content they can offer.

On the flip-side, there is a prohibition on free-to-air broadcasters using currently available technology and spectrum capacity to start multi-channelling; that is, offering additional channels and choices to consumers, either on a subscription or free-to-air basis. This lessens the competitive pressures faced by pay-TV providers.

In my view, much of the discussion surrounding potential changes to these regulations misses the point. It's possible that the emphasis of potential media acquirers will shift from one *end* of the media spectrum – the means by which customers access their news (newspapers, radio stations, free-to-air TV, pay-TV, the internet), which may be using outdated technology or business plans - to control of the pipes that are increasingly being used to deliver media content, and control of the content itself.

Exclusive content

The importance of premium sporting content to media companies is highlighted by the current court case brought by Channel Seven against other media companies and sporting bodies – one of the biggest media court cases in Australia's history. It is also one of the

biggest trade practices cases as well and highlights the importance of the Trade Practices Act to the media sector.

It was reported recently that a media identity in Britain has set up a fund to acquire television rights to a range of content including news, entertainment and children's programming, enhance them and distribute them worldwide on emerging technologies such as digital television, broadband/internet television and 3G mobiles. The fund is intended to bridge the gap between producers of content and new media service providers and highlights the recognition by the industry of the importance of content.

You may wonder why the ACCC is taking such an interest in content.

Well, a key function of the ACCC is developing, to the best extent possible under the existing industry structure, a truly competitive environment in all aspects of telecommunications. To this end, the ACCC has regulatory powers specific to telecommunications, set out in Parts XIB and XIC of the Trade Practices Act.

These provisions exist because it is recognised that the networks over which telecommunications services are currently provided, and which in future may well be the conduit for a whole array of media services, often have bottleneck characteristics which differentiate these markets from the more traditional media.

In this respect, it's absolutely crucial that existing network owners not be allowed to use their market power to close down new forms of competition. This could happen either through the roll out of new technologies and networks being impeded or through existing network owners obtaining exclusive control of the content that could be offered on the new networks.

Increasingly, video and TV services will be provided together with internet and traditional telephone services as part of what the telcos call the 'triple play'. It's quite possible that mobile telephone services will also be added to this bundle.

Crucial to the success of any ventures using these technologies, though, will be content rights, and control of premium sporting content, such as AFL, rugby, rugby league, cricket and tennis, could be pivotal.

Certain content is considered to be so attractive to a wide range of viewers and subscribers that many broadcasters seek to acquire this 'compelling' content on an exclusive basis. Similarly, suppliers of such content often wish to sell on an exclusive basis in order to maximise their returns. Consequently, exclusive agreements for the supply of popular sporting content are common in both the free to air and pay-TV sectors.

The Trade Practices Act has always recognised the potential for exclusive contracts to be anti-competitive. Section 47 of the TPA prohibits a range of conduct collectively known as exclusive dealing. In particular, section 47 prohibits, for example, a business acquiring sporting content on condition that the owner not supply it to other businesses, if the arrangement substantially lessens competition. Where section 47 does not apply, section 45 prohibits companies from entering into any arrangements that result in a substantial lessening of competition. So, a telecommunications or media company exclusively acquiring sporting content might - at least potentially - breach the TPA.

However, exclusive agreements do not automatically raise competition concerns. Indeed, it would be unlikely that the acquisition of rights to one source of sporting content, for example, would raise competition concerns. That said, in the broadcasting sector there are increasing concerns about the potential anti-competitive consequences of cumulative acquisitions of exclusive rights to compelling content including sporting content. Both section 47 and section 45 of the TPA allow, in most circumstances, the combined effect of several exclusive acquisitions to be taken into account when determining whether a breach has occurred. So the ACCC would look closely at any company, and particularly a telecommunications network owner, which concurrently had exclusive broadcasting rights to a number of major sporting competitions or events in Australia.

Having said this, it seems less likely that acquisition of exclusive content by an FTA broadcaster would raise currently competition concerns. The current capacity constraint of having only one channel – and therefore being only able to broadcast a single program at any given time – and the need to appeal to a wide range of audience preferences, means that a FTA broadcaster is unlikely to be able to lock-up exclusive content deals to all the matches across a number of sporting codes. For example, Channel Nine has reportedly had difficulties fitting both AFL and NRL coverage into its broadcast schedule such that viewers in a particular geographic area have reasonable access to live coverage of both codes.

Sporting content is also highly time sensitive and the real value of exclusivity is derived from providing live or near-live broadcasting of events/matches. That is, while it is not crucial for a viewer's interest in such television programming as drama that the program is shown a week or year after it is produced, this time aspect is critical to the valuation of most sports programming. Thus, sporting content cannot usually be stockpiled by an FTA broadcaster with one channel only and broadcast at a later date. This time factor is also likely to limit the amount of exclusive sporting content that a single channel is effectively able to broadcast given its need to appeal to a mass audience.

However, these limitations do not apply to pay-TV, where experience suggests that premium content is particularly important.

Unlike free to air television, pay-TV operators are likely to have several channels, enabling them to broadcast a multitude of different content at the one time, including several different sporting codes. This immediately raises the issue of the potential for foreclosure of competition in pay-TV if a single network owner acquires exclusive rights to a significant amount of compelling content.

But this has implications not only for pay-TV services, but also for the development of new broadband networks.

The infrastructure used to deliver pay-TV services can typically also be used to deliver other communications services such as telephony and internet. As I indicated earlier, this has become known as “the triple play”. The triple play arises because of strong economies of scope, that is, the costs of offering an additional service are relatively low in comparison to the total service costs. Where a firm is deprived of the ability to offer the triple play - for example, if it is denied access to pay-TV content - it will find itself at a substantial disadvantage to its competitors.

So competition concerns are heightened if a pay-TV operator owns the relevant infrastructure and acquires exclusive rights for the most attractive content. If the bundle of

exclusive content it acquires is sufficiently compelling, prospective infrastructure competitors may not be able to offer an attractive pay-TV service, which may deter them from investing in infrastructure in the first place.

Thus, an inability to access premium content such as sport and movies has the potential to lessen competition in the supply of broadband and telecommunications services as well as pay-TV services, and result in a less-than-optimal level of investment in infrastructure.

The ACCC addressed the issue of access to premium content in its *Emerging Market Structures in the Communications sector* report. The ACCC found that Telstra's control over premium pay-TV content, through its part-ownership of Foxtel, was potentially a major barrier to the development of a viable infrastructure competitor to Telstra. By denying competitors access to broadcasting services and therefore denying them the economies of scope that their network infrastructure could deliver via the so-called triple play, Telstra has been able to limit the effectiveness of existing competitors and discourage the entry of new competitors.

The ACCC will continue to closely scrutinise the acquisition of exclusive rights to content to ensure that no carrier is able to use them to create a major barrier to entry into infrastructure markets. And we will continue to engage with the key industry players to hear their views on these trends in the market-place.

Emerging services

The issue of exclusive content is particularly relevant to new and emerging technologies.

There is a risk that the exclusive acquisition of such rights for new and emerging services like DSL broadband and 3G mobiles will allow the rights-holders to shut out competition across a range of services delivered over these new networks. Ultimately, this could deprive consumers of choice and quality not only for broadcasting, but also voice, internet and innovative services such as video calls, and determine the success or failure of a new competitor. I like to put it this way: if you can't control the arteries, what you do is get hold of the blood.

In Australia, 3G and broadband internet technologies are still in relatively early stages of development and therefore it is uncertain whether they will evolve in such a way as to give rise to problems analogous to those apparent in pay-TV.

However, even at this early stage, mobile telephone service providers are now seeking to source content for their 3G services from media, sports and internet companies. Most of this coverage involves exclusive agreements between the rights holder and the service provider. Consumers have access to replays, scores and news as well as live coverage of certain events such as the recent cricket series between Australia and the World XI via 3G mobile telephone services on Hutchison's 3 network.

A recent report by the European Commission on 3G sporting content noted that a survey of mobile operators indicated that they considered the price of voice telephony, the quality of mobile internet services and access to information and entertainment services as more important drivers of demand than sporting content. However, mobile operators also said that they expect that access to sports content will become a significant demand driver for

3G services and a key branding element given its high-profile and relevance with regard to marketing.¹

Demand for content is growing and 3G carriers are now beginning to produce programs specifically for the platform. Short, one to three minute episodes of soap operas or dramas, known as 'mobisodes', made especially for mobile phones are now available to 3G customers. In certain instances, the mobile user gets to vote on what will happen in the next instalment.

Another new platform where we are seeing potential for development is so-called 'IPTV' (internet protocol television) services. Several countries have seen the recent introduction of IPTV driven mainly by telecommunications operators. From telephone services, they have extended to data services and are now starting to offer television. Currently, several experimental and operational services exist in France, Germany, Italy, Spain, the UK and Hong Kong.

While there are some immediate technical barriers to operators providing IPTV services² in Australia today, (low broadband penetration, having appropriate bandwidth capabilities in access and backhaul networks, as well as mechanisms to ensure content security) overseas experience suggests these barriers are not insurmountable. However, it is an open question whether the same commercial and competitive incentives that have driven the roll-out of IPTV services overseas are present in Australia.

So while we are following with interest reports that some carriers are planning the introduction of TV-type services, no clear business model has yet emerged.

One possibility is that the IPTV developments witnessed overseas could put pressure on existing pay-TV business models should they be replicated in Australia. It may be that paid-for content is increasingly offered on a pay-per-view rather than subscription basis, or with smaller and/or tailored packages which allow consumers to select a set number of channels from a broad suite of offerings.

In a recent National Press Club address former Telstra CEO, Ziggy Switkowski, predicted that access to media content is likely to head more towards 'pay as you go' subscription models if free to air audiences continue to fall and advertising revenue gets squeezed.

For emerging services it is perhaps too early to judge how rights will be divided up, or whether the bundle of content that is compelling on your TV is the same as the bundle that is compelling on a mobile phone.

And while it is premature to conclude that content exclusivity is currently an issue in relation to broadband and 3G services, it is possible that, in future, competition concerns similar to those that have been identified in pay-TV may arise.

So the relationship between content and new networks is one area in which the ACCC may have an involvement. But as the regulator charged with protecting and promoting

¹ EC, Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks, Brussels, 21/09/2005

² IPTV involves packet-based digital TV content that is transmitted over Internet Protocol-based broadband networks, such as ADSL. IPTV requires transfer speeds of at least 4 Mbits/s (using MPEG-2 compression format) for the transmission of basic TV quality content and an IPTV set-top unit (STU) connected to a TV for reception.

competition, in telecommunications specifically but more importantly in the economy as a whole, the ACCC has another substantial role.

Media mergers and section 50 of the TPA

Regardless of any changes made to media ownership laws, section 50 of the Trade Practices Act – which prevents mergers or changes in ownership between two or more entities which result in a substantial lessening of competition – should continue to prevent undue concentration or accumulation of market power in the media which would result in higher prices or lower quality service for consumers.

Now the traditional approach when considering mergers in the media has been to regard television, radio and newspapers as separate markets, while acknowledging they are part of a much wider media and communications sector.

However, we are now seeing the traditional business models re-defining themselves.

The New York Times recently announced that it will become the latest newspaper to bring together its print and online newsrooms.

Fairfax Digital has provided a much richer form of content than traditional newsprint, with text, pictures, audio and visual reports of, for example, the Olympic Games. This not only changed the media experience for consumers, but required Fairfax journalists and editors to fundamentally re-engineer their traditional work processes – previously geared around day-end deadlines for overnight printing - to provide up to the minute text and quickly available video footage.

And notably, when The Age newspaper was criticised for not publishing a special edition to mark the death of the Pope after its deadline, the paper's response was that it had covered the event – on its website.

Fairfax Digital content might represent a breaking news complement to the more detailed analysis available through print journalism. But content might also be subject to more radical revolution. Research by the Carnegie Corporation³ of New York suggests that the ways in which younger people are accessing what we call 'news' is fundamentally changing.

It found general interest web sites such as Yahoo and MSN that include news streams all day, every day are now the number one source of daily news for 18 to 34 year olds, with 44 percent accessing such sites at least once a day for news. Local TV comes in second at 37 percent, followed by network or cable TV web sites at 19 percent and then newspapers at just 19 percent.

From 1972 to 1998, the percentage of people age 30-to-39 who read a paper every day dropped from 73 to 30 percent. And in just the years between 1997 and 2000, the percentage of 18-to-24-year-olds who say they read yesterday's newspaper dropped by 14 percent, according to the Newspaper Association of America.

And this trend appears to be becoming more pronounced. In a recent feature titled "Black and white and read by fewer" the Los Angeles Times reported that US newspaper

³ *Abandoning the News*, Carnegie Reporter Vol3, no2, Spring 2005, Carnegie Corporation of New York

circulation fell 1.9% in the six months to March this year. Daily newspaper circulation in the US has now fallen 9 million from its 1984 peak of 63.3 million, during a period when the US population grew by 58 million.

And it's a trend that is not confined to the United States. In a recent robust defence of the future of newspapers to crikey.com.au, The Age declared, apparently without irony, that it was wrong to declare the paper was dying because its circulation today was unchanged from a decade ago while its online site had a 22 per cent growth in unique viewers in just six months.

Not only is the internet surging up the list of most commonly accessed sources of news for 18-34 year olds, but the sources of that news are fragmenting. Increasingly, weblogs, or 'blogs', are the information source of choice for this age group.

As Rupert Murdoch acknowledged in a landmark address to the American Society of Newspaper Editors earlier this year:

What is happening is, in short, a revolution in the way young people are accessing news. They don't want to rely on the morning paper for their up-to-date information. They don't want to rely on a God-like figure from above to tell them what's important. And to carry the religion analogy a bit further, they certainly don't want news presented as gospel.

Instead, they want their news on demand, when it works for them. They want control over their media, instead of being controlled by it.

This revolution is also providing newspapers with competition for the advertising dollars from the newer, but increasingly powerful online search companies – the Googles, Yahoos and MSNs. *Advertising Age* is now predicting that the advertising revenues of Google and Yahoo will this year match those of America's three largest television networks, ABC, CBS and NBC. No wonder then that Bill Gates is forecasting that within five years the internet will attract \$30 billion in annual advertising revenue – equal to the entire advertising revenue of the world's newspapers.

The upshot of all these changes is that in the future a media market might be defined by the content, such as, for example, classified advertising, or even just employment advertising, rather than the medium used to convey the content.

In other words, the ACCC won't simply be saying, "one newspaper, one radio and one TV" doesn't amount to a substantial lessening of competition. In certain matters, that may no longer be the case. Interestingly, I notice a News Limited executive was recently quoted as emphasising their role as a 'content manufacturer' – not a newspaper company, not a TV company, but a *media* company.

In our market analysis, we might increasingly be focusing on markets such as classified advertising, maybe even markets as small as classified advertising for jobs, for motor vehicles, for real estate and display advertising.

A substantial lessening of competition in any one market could raise implications under section 50 and be possible grounds for us to intervene.

Now, some have suggested this would amount to a de facto cross media ownership rule. This is entirely false. It is no different from the way competition law applies to every other industry, and there is no reason why it should not apply to the media.

Nor should it be assumed that the markets we will be looking at will be narrower than the conventional media markets. The technological developments I referred to earlier may mean that individuals and households will have a much wider range of choice in the ways they obtain the news and entertainment they are seeking.

Hence, while we may focus on a market such as classified advertising, this could be classified advertising provided through the print media, internet, mobile phone, TV, etc. The content delineation of a market may be narrower but there could be many more mediums used to convey that content than has been the case in the past.

This is also the case for sporting content. Given that sections 47 and 45 of the TPA prohibit exclusive arrangements that substantially lessen competition in a market, the question is: what is the relevant market for sporting content? Is it a pay-TV market, a FTA market or could there even be a market for sporting content? The Channel Seven court case may well address these sorts of issues.

The way in which media markets are defined will inevitably change. However, market definitions could become either broader or narrower than the conventional media market definitions. It is also the case that the impact of convergence and technological developments on media market dynamics and market definitions may be much sooner than many might expect.

Conclusion

Many changes to television have taken place since the introduction of television nearly 50 years ago – colour, pay-TV and more recently, digital broadcasting services.

Now we are on the cusp of yet another revolution as big as the one that ushered in the television age, with technological change and convergence again set to alter the way consumers access sport, news, information and entertainment.

So is the technology making many of our existing concerns about media regulation irrelevant? This is the question that will need to be addressed by policy makers and regulators as we face the inexorable impact of new technology on consumer demands and preferences.

As I've made clear today, it is not the job of the ACCC to decide whether it is better for people to access their news and entertainment through the TV, the internet or even through the mobile phone.

But it is our job to ensure that existing players not be allowed to use their market power to close down new forms of competition, and that, as far as possible, it be left to consumers to decide what form this revolution takes and what services and content they wish to access.