

## PRODUCTIVITY COMMISSION SUBMISSION

The Productivity Commission was recently forwarded Terms of Reference by the Treasurer to report, among other things, on ‘ways to improve the consumer policy framework so as to assist and empower consumers, including disadvantaged and vulnerable consumers to meet current and future challenges’<sup>1</sup> in the market. In furnishing this report, the Productivity Commission should consider the adequacy of consumer protection regulation of media content and, particularly, the ‘Late Night Interactive Gameshows’ which increasingly pervade the FTA mediascape. Consumers of these shows, themselves already vulnerable<sup>2</sup>, may be exposed to additional vulnerability by dint of the manner in which the ‘quizzes’ on ‘Late Night Interactive Gameshows’ are executed by producers.

The FTA mediascape is presently experiencing a decline in traditional advertising revenue. This has been precipitated by a process known as ‘media convergence’; a phenomenon which, in short, is the gradual converging of media platforms into one single, digital medium. Centrally, the internet is this digital medium and advertisers, rather than advertising their wares on the FTA market, are increasingly turning to the internet and other means of advertising to augment their own revenue streams.

The effects of ‘media convergence’ are manifold and not confined solely to the FTA advertising market. My thesis, however, focused on the response of FTA networks to a decline in traditional revenue streams through a new and increasing reliance on ‘interactive television’ programs. Such programs largely depend on audience interaction in order to determine the direction and narrative of the program. In order for members of the viewing audience to so ‘interact’, they must usually pay a premium services telephone charge. Up until recently, the ‘interaction’ of viewers was limited insofar as once they partook in the narrative – ie voted off a member from *Big Brother* or registered to become a contestant on *Who Wants to be a Millionaire* – the direction of the show would continue *without* further ‘interaction’ from audience members. This position has changed however with the recent emergence of ‘Late Night Interactive Gameshows’. These shows, and perhaps even the former incarnation of ‘interactive television’, leave consumers vulnerable to the whims of network producers. The regulatory framework which oversees the conduct of such producers presently seems incapable of offering consumers who pay premium services and other like charges the protection which ensures that they *get what they pay for*.<sup>3</sup> This paucity of regulation is something which the PC, within the purview of the Terms of Reference forwarded by the Treasurer, should consider in order to enhance competition in the FTA media market.

‘Late Night Interactive Gameshows’ emerged most notably in mid-2006. The shows aired originally on the three major commercial networks – Networks 7, 9 and 10 – but only *Quizmania* on Network 9 remains. This show is being re-branded in mid-late 2007, going under the name of *The Mint*, though it is expected it will largely follow the tried formula of the other ‘Late Night Interactive Gameshows’. The shows themselves, whether presently broadcast or cancelled, are hosted by young good looking presenters who introduce various ‘quizzes’ and encourage viewers to call a premium services number in order to offer an

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<sup>1</sup> Costello, above n 1.

<sup>2</sup> This vulnerability stems from the addictive nature of gambling and the large numbers affected. “[P]roblem gamblers” represent just over 290,000 people’, Productivity Commission, *Australia’s Gambling Industries (Report No 10)*, December 1999, Key Findings, 1. See also, Gary Banks, *The Productivity Commission’s Gambling Inquiry: 3 Years On*, November 2002.

<sup>3</sup> *Chaplin v Hicks* [1911] 2 KB 786; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 411-12; *Fink v Fink* (1946) 74 CLR 127 at 143; and *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

answer to the quiz such that they may win a prize. Routinely, the quizzes are framed in such a way that a vast, regularly incalculable, number of answers exist. The rank and file viewer who engages in the quiz, duly paying the premium services phone charge, relies on the probity of producers to award prizes when correct answers are given by contestants. At issue, moreover, is the idea that many potential answers usually exist for the quizzes and there is no way for contestants to genuinely know whether the answer they have forwarded was previously earmarked by producers as an answer to the quiz or whether prizes are awarded on an arbitrary basis so as to manipulate call volumes and secure maximum revenue. This latter issue was a main focus of my thesis.

The thesis focused initially on the reality of a change in the mediascape, particularly with respect to FTA, and the federal government's response to that change; the *Media Reform Package*. It went on to look at the emergence of 'interactive television' against the backdrop of falling FTA advertising revenue streams. Saliently for the PC, my thesis went on to look at the present regulatory framework, analysing how producers of shows such as *Quizmania* are regulated so as to ensure that when a contestant seeks to 'interact' with the show:

- That a preordained series of answers exists; and
- That the answers are reasonable.

My research established that the Australian Communications and Media Authority ('ACMA'), the Commonwealth Statutory Regulator which oversees broadcasting on FTA, has the ability to introduce Codes of Practice in relation to media content. Presently however, no Code of Conduct exists in relation to 'Interactive Television' generally, nor 'Late Night Interactive Gameshows' specifically. In addition, Telephone Information Service Standards Council ('TISSC') provides some ancillary Commonwealth regulation of the show by overseeing the premium charge phone service. It ensures that the premium charge phone service, which is outsourced to Legion Interactive, is provided by adequate infrastructure and that customers are charged correctly. It does not examine the conduct of *Quizmania*.

However, given that the *content* of the shows is a 'Trade Promotion Lottery', the major regulation of the show falls within the purview of State Gaming Authorities who have the task of ensuring the integrity of gambling. This is nevertheless problematic because each State Gaming Authority operates under different State legislation, whereas these shows are broadcast nationally. Compounding this issue is a scarcity of financial resources in State Gaming Authority budgets. In Victoria, the State which was the focus of my thesis, the regulation of *Quizmania* is relatively ad hoc. An analysis of the last year's Annual Report of the Victorian Commission for Gambling Regulation ('VCGR') revealed that less than 3.5% of all Trade Promotion Lotteries conducted with a permit are audited by the VCGR. *Quizmania* does not require such a permit. Furthermore, it was discovered that the VCGR is funded with just over \$17 million annually and yet is charged with the task of regulating; pokies, bingos, ordinary lotteries, and horse racing (including the Victorian Spring Carnival), among other things. It is contended that such funding is insufficient and leaves consumers of shows like *Quizmania* vulnerable to the whims of producers who are afforded a relatively unfettered discretion as to whether or not and how to award prizes.

The producers of shows such as *Quizmania*, for their part, are encumbered with an irreconcilable dichotomy on interests. Foremost, there is the interest canvassed above of contestants who, in giving answers, want an assurance that they are truly right or wrong. Secondly, and more importantly for producers, there is the interest in maintaining the profitability of the shows. If, as is asserted by various commentators, the shows are 'revenue vehicles' for the FTA networks<sup>4</sup>, then their ability to secure revenue is crucial to their

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<sup>4</sup> See variously: John Elder, 'Ring-a-ding-ding: TV's Late-Night Quiz Shows Call in the Cash' *The Sunday Age* (Melbourne), 20 August 2006, 4; Bridget McManus, 'The Games People Play in the Wee Hours' *The Age*:

continued existence. The profitability of the shows is obviously moderated by the amount of prize-money which must be given to contestants. If no regulation or inadequate regulation exists to uphold the integrity of these shows and the Trade Promotion Lotteries, then producers will logically subordinate the interests of contestants to their self-interest in maintaining the profitability of the show, thus the existence of the show and, hence, their continued employment as producer.

The PC would be apt to consider a change to the present regulatory framework of these shows. The urgency of the situation is elucidated by the fact that the producers of *Quizmania*, Crackerjack Productions, have already been charged with misleading and deceptive conduct by the ACCC in relation to a former show it produced in 2001. Again, contestants of *Quizmania* are reliant upon Crackerjack Productions to ensure the integrity of the various quizzes yet Crackerjack, for its part, is concurrently reliant upon the continued profitability of the quizzes to ensure its employment; something which can be controlled through a *lack* of integrity. This is clearly a dissonant chorus of interests.

An examination of the comparative experience in the UK is valuable in explicating why so much more scrutiny has been directed by authorities to such shows elsewhere. Foremost, in contrast to Australia, Ofcom, the UK equivalent of ACMA, takes a much less reactionary approach to regulation, not merely relying on consumer complaints prior to commencing investigation. Equally ICSIS, the UK equivalent of TISSC, has wider investigative power and looks at the general standards of telephone information services, not merely infrastructure and billing. Significant inquiry has been directed into the probity of 'Late Night Interactive Gameshows' by media and political forces in the UK. This resulted in the Parliamentary Commons Culture, Media and Sport Select Committee carrying out an investigation into television quiz shows. Among the tangible results of this Committee, and others, was the censure of several 'interactive gameshows' by Ofcom, including *Quizmania (UK)* which was reprimanded for making the answers to one of its quizzes too obscure.

Perhaps the level of domestic inquiry into *Quizmania* and other like shows has been affected by the fact that FTA still predominates the mediascape and each of the major commercial networks has or had its own 'Late Night Interactive Gameshow'. Unsurprisingly therefore, media criticism has thus far been confined to the media platforms of newspapers and the internet and this may have stymied momentum for regulatory reform. Nevertheless, as FTA networks lean increasingly on such programs in the future to shore up dwindling advertising revenue, and as long as the scope for a lack of integrity continues to exist, consumers will remain vulnerable and competition will thereby be lessened in the market. Inasmuch as the terms of reference forwarded by the Treasurer to your office concern competition generally, attention should be directed at Australia's changing FTA mediascape. Consumers need greater protection and the law needs to adapt by providing a national, uniform regulator. Given that ACMA can register Codes of Practice in relation to media content, perhaps a good starting point would be the registration of an 'Interactive Television' Code of Practice which obliges producers to adhere to certain standards and provide proof of such adherence.

A conflagration of forces conspire to make consumers of 'Late Night Interactive Gameshows' exceedingly vulnerable. Their decision-making may be affected by a desire to gamble and they may therefore be disabled from exercising the ordinary prudence of consumers in ideal 'market' conditions. The contextual setting of *Quizmania* is particularly amenable to producer impropriety and this can be exercised either by making answers to 'quizzes' unreasonably obscure or by changing answers to the 'quizzes' as the show goes on. This amenity has been

exploited by producers in UK equivalent ‘Late Night Interactive Gameshows’<sup>5</sup> and in the analogue UK *Quizmania*<sup>6</sup>. Crackerjack Productions – the production house of *Quizmania* – has a history of general impropriety of a character which portends that it would likely exploit the opportunity presented by the contextual setting of *Quizmania*.<sup>7</sup> And, further compounding this vulnerability, is the subsisting scarcity of a uniform statutory regulator which ensures that consumers of *Quizmania* are in fact afforded the consideration they contracted for: a chance to win. This *is* a case for regulatory reform.

The PC should take the proactive step of scrutinising the lack of consumer protection in relation to ‘Late Night Interactive Gameshows’ *before* a deeper reliance by FTA networks on such shows manifests and the issue becomes a more ingrained problem.

Sincerely,

Andrew Coffey

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<sup>5</sup> See Fergus Sheppard, n 159 above.

<sup>6</sup> ‘ITV Handbagged Over Its “Obscure” Quiz Questions’, *The Daily Mail* (London) 16/01/2007, cited on <<http://www.mediawatchuk.org/news%20and%20views/OFCOM.htm>> at 13 March 2007.

<sup>7</sup> ACCC website, <<http://www.accc.gov.au/content/index.phtml/itemId/88160/fromItemId/622035>> at 15 February 2007.