

Communications Law Centre

**Submission to the Productivity Commission
Review of the Broadcasting Services Act 1992
and associated Licence Fees Acts**

June 1999

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*I recognise that much of my message has been sceptical. Go slowly.
Beware unanticipated consequences. Measure costs. Use market incentives. Know that
many objectives may be unattainable.*

*But it is also a hopeful one. We have a second chance in many respects -
to avoid the mistakes of telephony regulation, to prevent anticompetitive outcomes, and
to identify and address a range of
social and equitable problems.*

Richard Klingler, Sidley & Austin/Telstra Corporation
Keynote Address to the Communications Law Centre Conference
"Telecommunications after 1997: Carriage, Convergence, Consumers"
9 November 1994

1. Introduction

The Communications Law Centre is an independent public interest research, teaching and public education organisation specialising in media and communications law and policy. It was established in Sydney in 1988 and in Melbourne in 1990. It is affiliated with UNSW and Victoria University. It receives program funding from the Law Foundation of NSW, the Australian Film Commission and Victoria University. Around two-thirds of its income is earned from commissioned research, academic and professional teaching, the organisation of events and the sale of publications, including the monthly magazine, *Communications Update*, which recently published its 150th issue.

Recent publications have included:

- A Consumers's Perspective on Customer Service (1999), written by Maura Bollinger and funded by the Commonwealth Government's fund for consumer representation and research in telecommunications;
- The Death of Broadcasting? Media's Digital Future (1998), written by Jock Given and published by UNSW Press;
- Liability in Tort for Network and Service Failure (1998), written by Jane Hogan and Maura Bollinger, and funded by the AAPT, Australian Telecommunications Users Group, Gilbert & Tobin, Optus Communications, Telstra, Vodafone;
- Crossing the Digital Threshold (1997), written by Scott McQuire and funded by the Australian Key Centre for Cultural and Media Policy;
- Australian Telecommunications Regulation: The Communications Law Centre Guide (1997), edited by Alasdair Grant;
- Commercial Radio since the Cross Media Revolution (1997), written by Peter Collingwood;
- Competition, Diversity and Ownership in Broadcasting: Regulation by the ABA and the ACCC (1997), written by Holly Raiche.

Current activities include:

- a two-year research project on rural and regional communications issues funded by the Australian Research Council, Cable & Wireless Optus and the National Farmers Federation;
- a research project on Youth Mobile Phones and Debt, funded by the Victorian Consumer Credit Trust and the Commonwealth Government's fund for consumer representation and research in telecommunications;
- a major conference to be held in Melbourne in August on Freedom of Information and the Right to Know;
- two research projects commissioned by the Australian Key Centre for Cultural and Media Policy on "big screen" developments and international media and cultural regulation.

2. Executive Summary

Rationale and objects

The rationale for the special regulation of broadcasting lies not in the scarcity or public nature of broadcast frequencies but in the social and cultural importance of broadcast services and the belief that the benefits of certain interventions in broadcast markets will outweigh their costs.

The primary objects of broadcasting regulation should be to encourage freedom of expression and enterprise. A number of further goals should motivate the regulation of all communications carriage and content services:

- diversity and competition;
- access;
- relevance to Australia and Australians;
- quality; and
- accountability.

Despite its central place in the rhetoric of regulation under the BSA, "degree of influence" is not, and should not be, central to the mechanisms of current broadcasting regulation. It is an uncertain notion which is better replaced by the operative statutory concepts which actually inform assessments about appropriate levels of regulation.

A more helpful concept on which to base key regulatory judgements might be "social importance", the principle used in the Telecommunications Act to inform the particular services which are included in the universal service obligation. The concept might be used in a revised BSA/radiocommunications regulatory scheme to inform decisions about which services should be subject to:

- the special "broadcasting" planning process;
- arrangements to make them universally accessible to customers and audiences;
- special ownership and control regulation;
- access obligations;
- requirements to carry significant Australian content; and
- service quality performance standards and monitoring.

Planning and licensing

The Centre broadly supports the current arrangements for planning broadcasting services:

- They preserve ultimate control in the hands of a democratically-elected Minister, who has the ability to make broad decisions about the uses to which particular parts of the spectrum can be put.

- They provide a mechanism for ensuring structural diversity in the provision of particular services, a crucial contributor to diversity in content.
- However, they also provide considerable capacity for market mechanisms to be employed to determine the uses to which particular spectrum is put. Increasing use of these mechanisms will provide clearer evidence of likely efficiency gains.

The Productivity Commission may wish to consider a long-term strategy for migrating the perpetual tenure of broadcast licences towards the limited tenure of spectrum licences. This might involve:

- licensing the new digital commercial television services (not the national services) for a fixed duration of fifteen years after the date of shut-down of analogue transmissions (or 2008, whichever comes first); and
- scaling down commercial television licence fees over a period of twenty years, commencing in 2003.

To overcome the instability which might be caused at the end of the fifteen year licence period when all three (or the original three, if there are more than that by then) commercial licences in an area are re-allocated, it might be possible to hold a “mini-auction” amongst the existing licensees before 2008, to allocate licences with different durations - for example, one of 15 years, one of 17 years and one of 19 years.

Diversity and competition

Australia’s laws governing ownership, control and competition in media and communications need revision if they are to ensure a competitive and diversely controlled sector in the future:

- Cross media rules should be retained, but responsibility for administering them should pass to the ACCC, with formal advice from a revamped ABA with an enhanced research capacity and public education role.
- A new threshold for prohibited conduct should be established in relation to a range of media assets which deliver bottleneck power over sources of information, entertainment and ideas. Although already subject to general competition regulation, the significance of these assets should be acknowledged through a “declaration” process. Mergers and contractual and other arrangements involving declared assets would be subject to a lower test of anti-competitive behaviour (ie. behaviour would more easily satisfy it) than the “substantially lessening of competition” test in ss 46 and 50 of the Trade Practices Act.
- The ACCC should have flexible powers to impose a range of access and “use it or lose it” obligations on controllers of declared facilities.
- The federal government should consider liberalising the existing rules restricting foreign participation in pay television and perhaps commercial television in the context of the forthcoming round of multilateral services trade negotiations. It should only do so if this concession enables it to secure the ability to maintain, adapt or introduce measures to encourage domestic cultural activities and industries.

Access

One of the most important challenges in media and communications policy is to ensure universal access for consumers and audiences to the primary communications media of the day.

The BSA should include, as an object:

To ensure that broadcasting services of social importance are:

- (i) reasonably accessible to all people in Australia, on an equitable basis, wherever they reside or carry on business; and
- (ii) are supplied as efficiently and economically as practicable; and
- (iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community (s3).

Consistent with the drafting of the Telecommunications Act, "social importance" should not be further defined. The assessment of which services are of sufficient social importance to justify intervention to ensure their universal accessibility should involve a careful examination of the nature of the services and weigh the public benefits and costs of intervention. The principles outlined in the 1996 Review of the Standard Telephone Service might be used in practice to assist in assessing the social importance of particular services and the costs and benefits of intervening to ensure they are universally accessible.

Federal regulation should be only one element of the policy mix which addresses questions of accessibility of basic communications services. Targetted subsidies might be a transparent and cost-effective way of encouraging people to explore the possibilities of new technologies and innovative applications of them, at a time when penetration levels of particular services are still low. State and local governments, even without the constitutional power to regulate electronic communications, also need to play their parts, in such areas as libraries, the education sector and the work practices of government agencies.

Australia

The Centre supports the application of program quotas of the kind provided for in the Australian Content Standard.

It is critical that, in the context of multilateral trade negotiations, Australia does not accept obligations which compromise the national government's capacity to maintain, adapt or introduce measures to assist domestic audiovisual culture and industries.

Quality

The Centre supports the continued inclusion of “quality” object in the BSA. However, it believes it should be broadened to encompass “telecommunications-style” quality of service issues: service connection times, faults, the keeping of appointments and other matters - where relevant to the particular discretionary services.

- For “content” quality:
 - ◇ the primary regulatory mechanism is structural diversity - different kinds of institutions deciding what quality might mean for different audiences, without any regulatory attempt to define quality in a prescriptive way;
 - ◇ service providers often need sufficient capital to take significant financial risks money. This is not a justification for significant protection from competition, but it may be a public benefit to be articulated and weighed in seeking “authorisations” of mergers would otherwise breach the diversity threshold.

- For “service” quality:
 - ◇ socially important services should be supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community. This requires the integration of discretionary broadcasting services like pay TV into the quality of service monitoring and customer service guarantee mechanisms applying to telecommunications.

Accountability

The Centre is concerned about aspects of the accountability of current regulatory processes:

- lack of transparency in decision-making by the ABA, eg.
 - ◇ publication of information about individual complaints and determinations of licence categories; and
 - ◇ ownership and control investigations.; and

- the BSA’s emphasis for the ABA’s research and public education activities on “community attitudes” and the Authority’s resource constraints limit its ability to explore the full range of issues bearing on the exercise of its regulatory functions.

3. Why a Broadcasting Services Act? Rationales and Objects

3.1 Context

Since the commencement of the BSA in 1992, there have been at least four critical developments which provide context for this review of Australia's broadcasting legislation.

The first was the conclusion of the Uruguay Round of trade liberalisation negotiations in the then General Agreement on Tariffs and Trade, which became the World Trade Organisation (WTO). The Uruguay Round was of great significance for audiovisual services, including television and radio broadcasting. International agreements covering intellectual property and the use and allocation of radiofrequency spectrum had been very important for the activities of this sector for over a century. However, two of the most innovative elements of the Uruguay Round package, the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Services (TRIPS), were substantial new interventions. The GATS encompassed new types of economic and cultural activity not previously subject to trade disciplines and the TRIPS gave to the trade-focussed GATT/WTO a substantial role in the international administration of intellectual property, previously handled by IP-specific institutions, particularly the World Intellectual Property Organisation.

GATS covered measures maintained by member states affecting services provided through any of four modes of supply. It imposed:

- general obligations, particularly about -
 - ◊ transparency;
 - ◊ most-favoured nation (non-discrimination), together with a capacity for member states to take out exemptions from this obligation; and
 - ◊ subsidies (a weak obligation);
- specific obligations, undertaken through scheduling "commitments" in particular sectors or in relation to individual measures, particularly about -
 - ◊ national treatment; and
 - ◊ market access;
- an obligation to undertake progressive liberalisation over time, through scheduling additional commitments. Australia, like most other countries, made no commitments on national treatment or market access in audiovisual services.

While not requiring any immediate action by the Australian Government, the existence of an overarching international agreement which commits member states to progressive liberalisation of measures over time provides a significant new element in the consideration of policy and regulation, and, potentially, a constraint on domestic policy action.

The second major development has been the liberalisation and privatisation of the domestic telecommunications business in Australia and the commencement of pay TV services. This has greatly increased the number of players, many of them very substantial enterprises, with aspirations to participate in the Australian media and communications business, including providing broadcasting and broadcasting-like services, on a larger scale.

The third development has been the movement of many of the debates about media and communications policy and regulation from the margins of the political agenda to centre stage. While some media policy issues like ownership and control and censorship have always been in the news, the policy and public attention to the “communications revolution” and the “Information Age” is unusually intense. Governments which once fenced communications issues off in low status departments have called loudly for “whole of government” attention to the challenges of the Internet and electronic commerce. This has highlighted the extent to which some of the objects of broadcasting and communications policy have been pursued not only by the tier of government which has constitutional power over electronic communications, the Commonwealth, but by state and local governments which have major roles in providing libraries, education and other services.

The fourth development is the growth of the information economy, its increasing contribution to overall economic activity and the growth of the major media and communications enterprises which both participate in and inform others about economic and social activity.

3.2 Rationales

The rationale for the regulation of broadcasting lies not in the scarcity or public nature of broadcast frequencies but in the social, and cultural importance of broadcast services and the belief that the benefits of certain interventions in broadcast markets will outweigh their costs.

The regulation of broadcasting services has been justified on several grounds: mainly, that broadcasting services are important, and the resources used to deliver them are scarce, public and, if their use is not co-ordinated, easily squandered.

The 1976 Green Report, which preceded the establishment of the Australian Broadcasting Tribunal, argued that the scarcity of the electromagnetic spectrum, the “uniquely powerful impact of broadcasting on society” and the public ownership of the airwaves required the Commonwealth Government to be “concerned that the broadcast system as a whole operates in a way which it judges to be in the national interest”.¹

Post and Telecommunications Minister, Tony Staley, set out a similar mix of rationales in his Ministerial Statement on the development of public broadcasting in 1978. “Broadcasting,” he said, “is inextricably linked with matters of national policy”. Its

¹Green Report, p43-44

importance to "public information, freedom and expression is crucial," he said. "It projects, influences and reflects socio-cultural values and opinions to an extent unrivalled by any other medium." The electromagnetic spectrum is "by no means inexhaustible", a "valuable national resource" in strategic, technological, economic and social terms and one which requires national and international regulation to avoid interference. The airwaves, he said, are public property, and government "must accept the role, and attendant responsibilities, of custodian of those airwaves for, and in, the public interest".²

None of these factors, of itself, justifies intervention in broadcasting markets. Intervention can only be justified where it helps to achieve democratically-endorsed social goals which would not be achieved without it - and where the benefits of achieving the goals outweigh the costs of the intervention.

Further, despite their durability, arguments about the scarcity and public nature of the radiofrequency spectrum are no longer helpful as rationales for particular interventions in broadcasting markets, if they ever were. This is not because the spectrum is becoming less scarce, or because regulatory changes such as Australia's spectrum licences³ have seen a greater level of private participation in its allocation and in subsequent decisions about its use. It is because governments have always intervened in broadcast and other media markets, through the licensing of printing presses, the laws of defamation, contempt and sedition, censorship of print, cinema and video, and in other ways, even though these other media forms did not involve the allocation of a (scarce) public resource. The establishment, ownership and funding of national post and telecommunications companies, national broadcasters, film production companies and assistance agencies happened because governments thought it was in the public interest, not because of any necessary scarcity or inherently public character of the resources they employed.

The *Broadcasting Services Amendment (Online Services) Bill 1999*, currently before the Parliament, marks a striking acknowledgement of this. The basic mechanism of the BSA is to make certain activities unlawful without a licence, and then impose certain conditions on the activities of the limited number of people who get such a licence. The current Bill would impose restrictions on the activities of particular institutions (ISP's and Internet Content Hosts) regardless of the fact that they do not require a licence to undertake those activities. No scarce, public resource is being allocated, and no international convention makes us do it, but a democratically-elected Parliament with Constitutional power is likely to see fit to pass such a law. The only available rationale is the "influence of the medium" and a conviction that the regulation will deliver a different and better outcome than the market.

This is not to suggest that scarcity is dead as an issue relevant to media policy. Quite the reverse. The bidding at auctions for broadcast and non-broadcast spectrum and the debates about access to new spectrum for the delivery of digital TV and radio services show that there is not nearly enough of certain kinds of spectrum to satisfy all those who'd like it. Governments and regulators have imposed access obligations on controllers

²Staley, T (Minister for Post and Telecommunications) "Development of Public Broadcasting", Ministerial Statement, House of Representatives Hansard, 5 April 1978, p996

³provided for in the Radiocommunications Act 1992

of other "essential facilities", like telecommunications infrastructure or set-top boxes, which, although not inherently physically scarce, may not be economic to replicate in a way which allows for competitive service provision in downstream markets. Disputes about the allocation of Internet domain names show the scarcity of words, and the social value of regulating their use so as to prevent the misleading of consumers (trade practices law) and to provide a fair return on capital invested in and around them (trademarks law).

Scarcity and the public nature of the spectrum might provide the *tools* of broadcasting policy (eg. a licensing system) but they do not provide its *rationale*. That must lie in the "influence of the medium".

However, the "influence of the medium" does not deliver to us a convenient set of regulatory objects or mechanisms. Indeed, it is used equally but paradoxically to justify government intervention in broadcasting through legislation governing broadcasters' activities, and to exclude government from some of the the detailed regulatory processes - hence the creation of independent regulatory authorities such as the ABA. It is used to justify intervention through publicly funding national broadcasters in a market otherwise occupied only by commercially-motivated broadcasters, but also to exclude government from the national broadcasters' detailed programming decisions.

There is no single, simple answer to the question of whether government should intervene in the provision of broadcasting services. The importance of the medium seems to require democratically-elected governments simultaneously to get into and out of broadcasting. We must look at different aspects of broadcasting, and perhaps be prepared to accept different answers to the same question.

3.3 Objects

The primary objects of broadcasting regulation should be to encourage freedom of expression and enterprise.

There have been many attempts at objects for broadcasting regulation.⁴ The BSA established statutory objects in 1992. The purpose, said the Explanatory Memorandum, was "to set out clearly the outcomes Parliament wishes to see in the regulation of broadcasting, to assist with the formulation of decisions consistent with the policy enshrined in the Act, and to guide the ongoing administration and enforcement of the Act". But the Explanatory Memorandum also indicated that a good deal of discretion would need to be brought to the interpretation of the objects:

It is recognised that there are tensions between the objects. It is intended that the ABA, in the exercise of its regulatory powers, should have regard to the competing objectives, drawing on its ability to assess community views and needs, and to monitor developments in the broadcasting industry. It is expected that the relative

⁴Green Report, Duffy, Evans, Broadcasting Council...

importance of each object may vary over time, and vary in relation to different functions and powers of the ABA.⁵

Since the Act was passed, the High Court has found that the specific provisions of the Act effectively circumscribe the already limited impact of the objects. In *Project Blue Sky...*,⁶ the court found that the ABA could pursue its obligation "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity" (s3) only to the extent that is possible within its specific obligation under s120(d) to exercise its functions consistent with Australia's international obligations.⁷ So the Act means what it says, rather than what it says it says.

Nevertheless, it is important, as part of the exercise of reviewing the operation of the Act, to assess whether the currently stated objects are still appropriate. Broadly, they deal with:

- *diversity* of services and controllers of the more influential services;
- *Australian-ness* of content and controllers of the more influential services;
- efficiency, competitiveness and responsiveness of *industry*;
- *content* -
 - high quality and innovative
 - fair and accurate coverage of matters of public interest and appropriate coverage of matters of local significance
 - respect for community standards
 - protect children from exposure to material which may be harmful to them
- means for addressing *complaints*.

Since the BSA was passed, there has been a new Radiocommunications Act (1992) and a new Telecommunications Act (1997). The objects of these acts establish different regulatory purposes which reflect the different origins of the technologies and services they regulate. Historically, radiocommunications legislation has been about the allocation of a public resource (licensing and the management of interference), telecommunications regulation has been about the structure of an industry (monopoly, duopoly, triopoly, open competition) and broadcasting regulation has been about a deal - social and cultural obligations traded for protection from competition. While each of the three acts retain strong traces of their origins, their stated objects⁸ also provide clues to a more integrated future in which the following themes might drive the regulation of all communications carriage and content services:

- diversity and competition;
- access;
- relevance to Australia and Australians;
- quality; and

⁵Explanatory Memorandum, Broadcasting Services Bill 1992, p??

⁶

⁷The international obligations include the Trade in Services Protocol to the Closer Economic Relations Agreement with NZ.

⁸ s? *Radiocommunications Act 1992*, s? *Telecommunications Act 1997*

- accountability.

Minister Staley's government interpreted the "public interest" to require a system "which must, while remaining economically and administratively viable, be sufficiently flexible and diverse to respond to the very wide range of changing needs implicit within the complexities of Australian society". Government involvement, he thought, should be directed to ensuring "freedom of expression and enterprise in all forms of communication available to Australian society".⁹

Twenty years on, it's still a good place to start. The challenge lies in settling the forms of regulation, if any, which will allow these twin freedoms to flourish.

3.4 Levels of regulation - degrees of "influence"

Despite its central place in the rhetoric of regulation under the BSA, "degree of influence" is not, and should not be, central to the mechanisms of current broadcasting regulation. It is an uncertain notion which is better replaced by the operative statutory concepts which actually inform assessments about appropriate levels of regulation.

The "regulatory policy" of the BSA is that "different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that different types of...services are able to exert in shaping community views in Australia" (s4(1)).

Despite the centrality of this rhetoric of the BSA, the concept of "influence" does not inform the regulatory structures it creates in any systematic way. What was already a creaky foundation is wholly undermined by the Broadcasting Services Amendment (On-line Services) Bill 1999, whose interventions are informed less by any understanding of the degree of influence of on-line media than by the kind of naively apocalyptic vision of media power and influence which so often accompanies the introduction of new technologies.

The different levels of regulation applying to different classes of licences under the BSA reflect a number of factors, only some of which are relevant to the "degree of influence" of the services provided under those licences:

- whether the service is "text", "dial-up" [discretionary] or "point-to-point", all of which inform the fundamental decision about whether it is a broadcasting service at all and, for example, the different types of Australian content requirements which apply to free-to-air and pay TV;
- the size of the targeted and actual audiences and the technical accessibility of the service to all audiences and segments of them (eg. children), which informs the distinction between broadcast and narrowcast licence categories and the more liberal classification rules that apply within licence categories where secure conditional access systems are employed;

⁹ibid, p997

- the type of institution being regulated - so the national, commercial, community and other sectors have separate codes of practice;
- the type of programs provided, so commercial television is more regulated than commercial radio;
- the level of regulation applying to other media services (print, cinema, video, video games) which might be regarded as "equivalent" to the broadcast (or soon on-line) service under consideration.

None of these factors alone provides an easy prescription for the appropriate level of regulation for a particular media service. For example, daily newspapers have relatively small readerships by comparison with radio and television audiences, but are generally still regarded as highly influential, indeed "agenda-setting", media forms. A further problem is that "degree of influence" is a broad concept which the Act implies should determine the level of all types of regulation which apply to a particular service (eg. ownership and control, Australian content, censorship and classification). This overlooks the fact that it may be appropriate to apply a different level of regulation to one aspect of a particular service than to another aspect, because of its special characteristics (eg. the on-line Bill regulates levels of sexual and violent content, but not Australian content, on on-line services).

On balance, although the "influence of the medium" may be the fundamental motivator of why we regulate broadcasting in the first place, the "degree of influence" is an uncertain notion which has not assisted the more discriminatory task of deciding just how much regulating we do for particular broadcasting services. It would seem more appropriate if the legislation set out more specific factors, such as those outlined in the dot points above, which would supplement the objects of the Act, to guide the exercise of regulatory discretion.

[“social importance” - threshold for:

- special planning process
- including in universal service obligation
- ownership and control regulation
- access obligations
- significant Australian content
- service quality performance standards and monitoring

To be developed - substitute for “levels of influence”, “the more influential services”
 “social importance” already used in Telecoms Act re USO]

4. Diversity and competition

Freedom of expression requires a diverse range of media outlets through which Australians can send and receive media messages. Freedom of enterprise requires that people are able to establish and operate media businesses without impediments.

Governments in most countries have placed some limits on freedom of expression and enterprise in the media and communications business, often because they have argued that complete freedom for some can only be obtained at a cost to the freedoms of others. Without some restrictions on expression and enterprise, some people and groups in society will get little or no opportunity to conduct business or speak in a way which can be heard.

The BSA is one of the main sources of the limits which have been imposed on Australians. These include the regulatory and co-regulatory arrangements for censorship and classification of program content (dealt with below under “Accountability”) and the planning, licensing, ownership and control provisions.

4.1 Diversity of institutional structures

One of the most important sources of diversity in media content is competition amongst service providers. But different kinds of broadcasters compete for audiences in different ways - competition is enriched by diversity of institutional structure.

This requires different kinds of broadcasting institutions supported by different funding mechanisms with different kinds of relationships between the service provider and the audience. So profit-making commercial broadcasters funded by advertising compete with profit-making pay operators funded by a mix of subscriptions and perhaps advertising; national broadcasters funded by government appropriation (ABC) or by a mix of government appropriation and advertising and sponsorship (SBS) compete with non-profit-making community broadcasters funded by sponsorship and service subscriptions. A series of studies have demonstrated the significance of the contribution to program diversity made by diversely structured media institutions.¹⁰

The planning regime in the BSA, and the capacity for the Minister to reserve capacity for national and community broadcasters (s31), is the mechanism by which this structural diversity is preserved.

¹⁰ See the submission to this review by Terry Flew (No 48); Bureau of Transport and Communications Economics, (1991) *Elements of Broadcasting Economics*, Report 83, AGPS, Canberra; Turner, G., (1996) “Maintaining the News”, *Culture and Policy*, Vol 7 No 3; Withers, G., (1985) Television viewing and ABC program policy: an econometric study”, *Australian Journal of Management*, Vol 10 No 2 (December), pp99-112

4.2 Digital television: striking a deal

One of the most important broadcasting policy initiative in recent years has been the decisions taken about the introduction of digital television in Australia. It has been significant both because of its impact on the structure of the media and communications business in Australia and because it has been an important case study of “convergence”, and the capacity of existing regulatory arrangements to deal with it. As with so many previous major broadcasting policy initiatives (eg. regional commercial TV equalisation and AM/FM conversion in the 1980s), the government chose not to use the existing planning and licensing mechanisms provided for in current broadcasting legislation, but to introduce a wholly new scheme to manage the introduction of new services.

The Centre expressed mixed views about the decisions on digital TV:

...The strength of the decision lies in its provision of a structured path for free-to-air television services to move from analogue to digital transmission. That recognises the social and cultural importance of television, our most popular recreational activity, and the major engine of Australia's audiovisual production industry.

The decision also makes sense because it rejects the policy-without-a-policy of those who wanted simply to auction the 'digital spectrum' to the highest bidder. This was a recipe for handing Australia's communications future to those with the deepest pockets, like Telstra and News Corporation, our largest two companies, who already loom so large in our telecommunications, newspaper and, increasingly, pay TV markets.

The government's decision, along with the necessary commitment of additional funds to the ABC and SBS to finance their transition to digital production and transmission, maximises the chance of seeing a significant number of substantial, Australian-controlled media and communications enterprises with transmission capacity of their own and plenty of Australian programs.

But there are problems beyond these core strengths.

First, having listened to the good arguments about television and new players, the government also listened, closely, to the bad arguments, about limiting competition.

So the commercial networks who get frequencies can't use them to provide multi-channel TV services, because that would be competition for the pay TV business. And the 'new players' who get frequencies for 'datacasting' can't use them for television services, because that would be competition for the free-to-air TV business.

Policy is made by keeping the warring commercial interests equally unhappy, rather than by encouraging the creative exploration of the capacities of a new and cost-efficient technology to provide a flexible and interesting service mix.

Second, the government is committing itself to a high cost, high definition future for television with more conviction than any other country. 'It will enable the cinema and the concert hall to be transported to the home,' said Senator Alston.

This is a very expensive punt. Broadcasters are worried about the hundreds of millions they will have to spend, but the great issue of digital TV is the need for people to spend billions buying new TV sets and VCR's to be able to get access to the services. And if you haven't upgraded when the analogue signal gets turned off, you get no television.

Consumers must not be driven into expensive upgrades of their television sets to suit some timetable forced by broadcasters or governments seeking prematurely to recover analogue spectrum.

Third, to the extent that Australia's television business is being given the opportunity it has sought to move into the digital era, it is because it has central features which are worth supporting - it's free, it gets to just about everyone in the country, it's got a lot of Australian programs, it's not run by the same people who run the newspapers or radio stations. These ownership rules need to be restated firmly.

America's chief media and communications regulator, Bill Kennard said recently 'Broadcasters have been given new ways to expand into the digital age, so it is only fair to expect that they provide new ways of serving the public interest'.

That's one American show we should all be watching.

“Taking a punt on TV”, Sydney Morning Herald, 25 March 1998

4.3 Planning, licensing and the price of spectrum access

From 1905, the Australian Government asserted its Constitutional power over the radiofrequency spectrum.¹¹ There were three major types of users: the recently created national statutory agency, the Postmaster-Generals Department (PMG), users licensed by the PMG and the defence forces. When broadcasting technology was developed, the government again chose a mix of public and licensed private users to deploy it. From 1949, broadcast frequencies were allocated by a statutory regulator, the Australian Broadcasting Control Board. Other radiofrequency licences continued to be issued by the PMG until the establishment of the Spectrum Management Agency in 1992, whose functions passed to the Australian Communications Authority in 1997.

Allocation processes were very different for broadcasting frequencies and other parts of the spectrum, although the Minister retained ultimate control of the broad parameters of the planning process for both. Broadcasting frequencies were traditionally allocated after an invitation to apply for a licence by the Minister and a merit-based selection process, subject to the payment of fees calculated on the basis of station revenue. Other frequencies

¹¹Wireless Telegraphy Act 1905

were generally allocated by the PMG and its successors without specific invitation on a first-come-first-served basis, subject to the payment of fixed fees.

These processes have changed and converged to some extent in the 1990s. The scarcity which always underpinned the allocation of broadcast frequencies, has become a more public issue in non-broadcasting parts of the spectrum. This has occurred through the invention of technologies which have allowed new, commercially-valuable services to be delivered (mobile telephones provide the best example) and the liberalisation of markets, which has increased the range of organisations with an interest in gaining access to the spectrum. Auctions have been employed to allocate access to non-broadcast spectrum since they provided a mechanism both to select a limited number of licensees in circumstances where demand exceeded supply and to overcome the previously arbitrary nature of fee-setting.

At the same time, auctions were introduced to allocate access to broadcast spectrum, beginning with the auctions of a limited number of opportunities to convert AM commercial radio licences to FM in the late-1980s. This reflected a frustration with the time taken by merit-based selection processes, the capacity for post-allocation trading to undermine its results, and political hostility to the the scale of the private rents being earned through trading of publicly-allocated licences.

While much more prevalent in the late 1990s, these auction processes do not represent the sole form of allocation of access to the spectrum or payment for its use. The Minister and the ABA retain important rights and obligations to reserve spectrum for certain uses, initially for broadcasting itself, through the designation of "broadcasting services bands", and then, within this allocation, for national and community broadcasting services, which do not pay for their broadcast spectrum [radcom - defence, navigation etc?? Also public uses of radcomm spectrum] Community licences are still allocated through merit-based selection processes. Commercial television and radio licensees pay substantial special "licence fees" which are provided for in the licence fees Acts also being addressed in this review. They are calculated according to the broadcasting revenues of the licensees and are not subject to any competitive or market-based assessment.

There appear to be five key elements of the spectrum allocation model currently provided for in the BSA which deserve consideration:

- the nature and duration of the "property" rights granted through the licensing processes;
- the way decisions are made about the uses which can be made of particular parts of the spectrum;
- the way decisions are made about the individual users who gain access to particular parts of the spectrum;
- how much users pay for the right to use spectrum; and
- the way decisions are made about the timing of allocation of particular parts of the spectrum.

4.3.1 Nature and duration of “property rights”

Licences granted under Australia’s three main federal communications Acts give different types of rights to the licensees for different durations:

- Under the Radiocommunications Act -
 - Apparatus licences are granted for five years. They authorise a person to operate a specified transmitter or receiver or a transmitter of a specified kind in a particular part of the spectrum (Part 3.3). While there is no formal presumption of renewal, licensees can apply for renewal and the ACA is required to give formal reasons if it does not do so. Apparatus licensees may be required to quit their tenure by a spectrum re-allocation declaration or conversion plan. [war time resumptions] Licensees may authorise third party use and licences may be transferred, subject to ACA approval.
 - Spectrum licences are granted for 15 years. They authorise licensees to use spectrum space rather than to operate specific devices. Spectrum licences carry no presumption of renewability. Access to the same spectrum after the expiry of the licence is only available after a further allocation process. Licences can be traded in whole or in part, and may be assigned subject to any rules set by the ACA.
- Under the BSA, commercial and community television and radio licences are granted for five years. They authorise the provision of broadcasting services of the relevant kind. Separate "technology" licences are obtained from the ACA [check]. There is a clear presumption of renewal, the process for which is virtually automatic.¹² Commercial and subscription television broadcasting licences can be transferred (except "Licence C", allocated to the ABC) and commercial, subscription television and community licences can be surrendered. [refs]
- Under the Telecommunications Act, carrier licences are granted for no fixed term. They authorise the supply of carriage service to the public by the owner of one or more "network units".¹³ Broadly, carrier licences need to be held by the providers of telecommunications infrastructure. Since they have no duration, there is no issue about renewal. [third party use and transfer??]
- The Radiocommunications, Broadcasting Services and Telecommunications Acts all have provisions for "class licences". These allow certain kinds of services to be delivered without the need for a specific licence allocation process, provided the conditions of the class licence are met. Class licences cover the provision of, for example, low power mass consumer items such as cellular mobile handsets and citizen band radio where interference is minimal (Radiocommunications Act), "listed carriage services" (Telecommunications Act) and subscription broadcasting,

¹²See for example s46. The Second Reading Speech on the BSA, which introduced these provisions, said that the new arrangements "will allow automatic renewal in most cases": senate Hansard, 4 June 1992, p3601

¹³See Grant, A., (1997) *Australian Telecommunications Regulation: The Communications Law Centre Guide*, CLC, Sydney, p22 and Chapter 2 generally

subscription narrowcasting and open narrowcasting services (BSA). The nature of class licences means they have no duration and are not tradeable.

Broadcasters, effectively have unlimited tenure, but no flexibility in the use they can make of their frequencies. Apparatus licensees have an expectation of continuing tenure, subject to the ACA's strong powers to terminate that tenure to introduce spectrum licensing in a particular part of the spectrum. They also have flexibility in the services they can offer, to the extent that the technology is capable of multiple uses, though not in the technical transmission activity they undertake (in practice the technical conditions might specify ranges, which do provide some flexibility in technical operation). Spectrum licensees have fixed tenure but complete flexibility in what they can do with it. Curiously, the BSA, with its upgrade in the security of tenure provided by broadcasting licences (through the downgrading of the likelihood of non-renewal), was passed in the same year as the Radiocommunications Act, with its elimination of security of tenure beyond the licence term under the form of licensing which was seen as representing the future of spectrum allocation.

Significant questions about the nature of communications assets acquired through public bidding processes have arisen in recent years. Optus Communications and Vodafone both paid substantial sums for licences to provide communications services in the early 1990s. They signed agreements with the federal government under the then s70 of the Telecommunications Act which required the government to pay compensation if there were any changes to key elements of government policy upon which the new carriers had relied in drawing up their business models.¹⁴ These included the rules governing the planning permissions required for the roll-out of infrastructure and the shut-down of the analogue AMPS mobile telephone network, which proved in practice to have much better transmission and coverage characteristics than the GSM technology which was intended to "replace" it. The s70 agreements had the effect of shifting the cost of government policy change from the carriers and their customers to the Commonwealth, although negotiations achieved some narrow relaxation in the AMPS shut-down timetable and the planning rules were tightened for new networks after mid-1997.

These issues demonstrated the extent to which regulatory certainty affects private investment and the need for governments to change their minds on policy issues. However, the changed climate in which communications investment is occurring, with governments increasingly relying on private companies to provide what would once have been seen as public infrastructure, means that the costs of shifts in public policy will be more visible than they were in the days of public telecommunications monopolies and administrative allocation of spectrum.

However, the investment risk does not lie purely with service providers. It also rests with customers and audiences, who invest substantial sums of money in equipment to receive broadcasting and other communications services. Of course, these people have also invested substantial sums of money in other sorts of equipment - personal computers, home stereos, video cassette recorders - which not only carry no guarantee of long-term durability, but which appear to have acquired a culture of redundancy. Since consumers

¹⁴See Grey, L., (1996) "The hand beyond the grave", *Communications Update*, No 121 (May), p21-2

are unlikely to thank governments which unnecessarily force substantial new personal expenditure, this private investment risk also brings a substantial political risk.

The consideration of digital television placed all these questions on the policy table at a single decision point: huge investments in superceded industry and consumer infrastructure, a wide range of expectations about the nature of the property rights acquired by incumbent licensees and differing views about the likely directions of technological change and consumer demand. The centrepiece of the debate was the argument about who should get access to the relevant spectrum, how much, if anything, they should pay, and what they should be able to do with it. It was presented as a choice between the prescription of broadcast planning and the flexibility of radiocommunications. Less remarked upon was the very different kinds of “property rights” which might have been acquired had spectrum licensing been used to allocate “digital” frequencies.

If the features of spectrum licensing are indeed “best practice” for the allocation of spectrum, the Productivity Commission may wish to consider a long-term strategy for migrating the perpetual tenure of broadcast licences towards the limited tenure of spectrum licences. This might involve:

- licensing the new digital commercial television services (not the national services) for a fixed duration of fifteen years after the date of shut-down of analogue transmissions (or 2008, whichever comes first); and
- scaling down commercial television licence fees over a period of twenty years, commencing in 2003.

To overcome the instability which might be caused at the end of the fifteen year licence period when all three (or the original three, if there are more than that by then) commercial licences in an area are re-allocated, it might be possible to hold a “mini-auction” amongst the existing licensees before 2008, to allocate licences with different durations - for example, one of 15 years, one of 17 years and one of 19 years.

These licences need not be spectrum licences: the flexibility in the range of services which can be delivered using digital terrestrial “television” frequencies through the allocation of broadcasting/apparatus licences.

A final point about “property rights” is the potential for spectrum to be acquired and managed for anti-competitive purposes. While the commercial attractiveness of “broadcast” spectrum suggests it is unlikely that allocated spectrum would be left “idle”, the motivations of free-to-air broadcasters in demanding access to spectrum for digital HDTV transmissions despite their lack of enthusiasm for earlier generations of HDTV, hint at the possibility of “underutilisation”. The Productivity Commission may wish to consider the need for specific “use-it-or-lose-it” obligations, or the effectiveness of existing trade practices remedies to address this kind of market conduct.

4.3.2 Decisions about uses of the spectrum

Each step of the planning and allocation process for broadcasting licences involves prescription about the uses to which the spectrum will be put: the initial designation of broadcasting services bands, the determination of the number and characteristics of broadcasting services to be made available in particular areas, Ministerial reservations of capacity for national and community services, Ministerial directions about particular community interests, and the ABA's merit-based allocation process which may involve competition amongst services of different kinds. These mechanisms have been used to ensure:

- substantial amounts of the AM, FM, VHF and UHF bands are available for free-to-air television and radio broadcasting; and
- sectoral or structural diversity within the broadcasting industry.

This kind of prescription contrasts with the increased flexibility as to purpose which is available to spectrum licensees under the Radiocommunications Act. Alasdair Grant argues:

"...the wider use of a capacity-based licence in preference to a device-based licence (ie, an apparatus licence) and the attendant right to trade parts of a licence create a potential for market outcomes to determine the shape and nature of the market itself, both at the time of initial allocation and in later trading. In the present environment of open competition and rapidly evolving technologies, these wider objectives are particularly appropriate in relation to parts of the spectrum being re-planned to accommodate new services, such as mobile services."¹⁵

It is difficult to assess the realised efficiency gains of the flexibility which has been provided through spectrum licensing to date. The BTCE paper on which the spectrum licensing reforms were based argued a theoretical case about the inefficiencies of current allocation processes, without quantitative assessments of likely efficiency gains.¹⁶ The spectrum licences which have been allocated are being used by successful bidders to deploy technologies which are fairly predictable, given the transmission characteristics of the frequencies. There has also been no significant change in the uses of the relevant spectrum over time, to enable testing of any dynamic efficiency gains. Further, spectrum licensing has only been introduced in limited circumstances. It is also important to understand the high level of centralised planning which continues to be undertaken by the Minister and the ACA in determining which spectrum will be allocated through spectrum licences and the details of the auction design.

At this stage, it seems appropriate to continue to rely on a mix of market-based and administrative processes in the allocation of spectrum, as was recommended by the House

¹⁵Grant, A., (1997) "Spectrum Licensing and Allocation", Chapter 5 in Grant, A., (1997) *Australian Telecommunications Regulation: The Communications Law Centre Guide*, CLC, Sydney, p95

¹⁶ Bureau of Transport and Communications Economics (1990) *Management of the Radiofrequency Spectrum: An Economic Analysis*, BTCE, Canberra

of Representatives committee which explored management of the radiofrequency spectrum in 1991, after the publication of the BTCE's paper.¹⁷ The policy challenge is to strike an appropriate balance two potentially conflicting objectives:

- the desirability of ensuring that socially important communications services are able to be provided using parts of the radiofrequency spectrum with the most appropriate transmission characteristics, and that those socially important services are provided by a range of diversely structured institutions; and
- the desirability of decentralising decision-making about the most socially and economically beneficial ways to use the radiofrequency spectrum, given the pace and uncertainty of technological change and customer demand.

At this stage, the CLC believes the current planning procedures strike a reasonable balance in determining spectrum uses:

- They preserve ultimate control in the hands of a democratically-elected Minister, who has the ability to make broad decisions about the uses to which particular parts of the spectrum can be put.
- They provide a mechanism for ensuring structural diversity in the provision of particular services.
- However, they also provide considerable capacity for market mechanisms to be employed to determine the uses to which particular spectrum is put. Increasing use of these mechanisms will provide clearer evidence of likely efficiency gains.

Over time, as the services able to be delivered with new technologies converge, as “non-broadcast” services such as mobile telephony become increasingly important for effective participation in economic and social life, as mass audiences for broadcast services fragment and as the boundaries between passive and active use of communications services blur, it will become more difficult to distinguish the services which justify the special planning regime currently reserved for “broadcasting” services. However, it seems likely that the imperative of structural diversity will require at least some kind of reservation process or access requirements (see below), of the kind being used to ensure the carriage of a community television signal from one digital TV multiplex, although the criteria which may trigger it may need to be refined.

4.3.3 Decisions about particular spectrum users

Price-based allocation has been deployed fairly successfully for commercial broadcasting licences since 1992. Delays in the provision of new services have had more to do with the statutory planning processes than with the allocation processes.

The Centre supports the continuation of Ministerial reservations for particular national broadcasters and community broadcasters. It also believes that merit-based allocation continues to be the most appropriate way to choose amongst applicants for community

¹⁷ House of Representatives Standing Committee on Transport Communications and Infrastructure, (1991) *Management of the Radiofrequency Spectrum*, AGPS, Canberra

broadcasting licences. The criteria set out in s84(2) are central to the nature of community broadcasting. Encouraging competition among applicants on the basis of these criteria and preserving the right not to allocate a licence at all (s85) maximises the prospects for successful applicants to contribute to the goals of broadcasting legislation which this sector is best-placed to deliver.

In this context, we repeat the observation that the "core" statutory planning and allocation processes have often been replaced by specific legislative schemes (regional commercial television equalisation, AM/FM conversion and the National Metropolitan Radio Plan and the introduction of digital television) which involved the Parliament, rather than the Minister or the regulators, making threshold decisions about the uses and users of particular frequencies. Significantly, these schemes all provided unique opportunities to incumbents which were not available to potential new players.

4.3.4 Payment for spectrum use

The Centre believes that commercial users of the spectrum should pay market-based fees for their access. These are generally best set through price-based allocation processes.

However, it strongly supports the capacity for the Minister and the regulator to make spectrum available for particular "public" or non-commercial purposes, at no cost or a reduced cost to the user. This is vital to ensure that a range of social, cultural and economic objectives are met. A parallel can be seen between the ability of the Minister to reserve broadcasting spectrum for national and community purposes, and the ability of [the ACA?] to set spectrum access fees which have regard to the net social benefits of particular users gaining access to spectrum at something other than market rates.

We are not aware of any country which requires its national or community broadcasters to pay for their primary broadcast spectrum.

4.3.5 Timing of spectrum allocation decisions

Even if governments do nothing more than delegate their responsibilities for spectrum allocation to someone else, the timing of that decision may be crucial to the market structures which arise. If, more realistically, governments continue to play a major role in spectrum allocation, the timing of particular allocations, and the market's expectations about likely allocations, will also be critical to the market structures which arise. They will certainly shape the technologies which are developed to use the spectrum allocated.

The ACA and the ABA consult widely about their plans and have established a timetable of spectrum allocations and planning priorities respectively.¹⁸ Despite the deep enthusiasm within the ACA for expanding the program of spectrum licensing, it has been very careful in its thinking about the timing and nature of responses to new demands for spectrum for emerging technologies, especially spectrum likely to be suitable for third

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generation mobile telephone.¹⁹ This might be seen as undermining the very rationale for spectrum licensing - allowing the market to decide which technologies are deployed and the pace of deployment. But it might more fairly be seen as a sensible response to uncertain futures. It allows decisions about the allocation of resources, and their value, to be made at a point where more complete information about them is available. This seems an intelligent strategy, given the extent of the property rights granted as a result of these allocation processes.

However, it is important that the new processes of spectrum allocation introduced under the BSA and the Radiocommunications Act in 1992 are evaluated, particularly to assess the impact of the timing of allocations of particular parts of the spectrum. It may be useful to conduct research into the outcomes of auction processes already conducted in Australian broadcasting and communications: the AM/FM conversion auctions, the satellite pay TV auctions, the MDS apparatus licence auctions, the more recent spectrum auctions and commercial radio and television licence auctions since 1992. Such research could usefully compare revenue streams since the auctions with the amounts paid and the methodologies by which they were determined, to gain a better understanding of the risk premiums in this important, evolving field of resource allocation.

4.4 Ownership, control and competition

Australia's laws governing ownership, control and competition in media and communications need revision if they are to ensure a competitive and diversely controlled sector in the future:

- *Cross media rules should be retained, but responsibility for administering them should pass to the ACCC, with formal advice from a revamped ABA with an enhanced research capacity and public education role.*
- *A new threshold for prohibited conduct should be established in relation to a range of media assets which deliver bottleneck power over sources of information, entertainment and ideas. Although already subject to general competition regulation, the significance of these assets should be acknowledged through a "declaration" process. Mergers and contractual and other arrangements involving declared assets would be subject to a lower test of anti-competitive behaviour (ie. behaviour would more easily satisfy it) than the "substantially lessening of competition" test in ss 46 and 50 of the Trade Practices Act.*
- *The ACCC should have flexible powers to impose a range of access and "use it or lose it" obligations on controllers of declared facilities.*
- *The federal government should consider liberalising the existing rules restricting foreign participation in pay television and perhaps commercial television in the context of the forthcoming round of multilateral services trade negotiations. It should only do so if this concession enables it to secure the ability to maintain, adapt or introduce measures to encourage domestic cultural activities and industries.*

¹⁹This point was emphasised by the ACA's Manager, Spectrum Marketing, Ian Hayne, at a Communications and Media Law Association seminar "Mobile Mania" in Sydney on 2 June 1999.

Limits on the ownership and control of Australian broadcasting enterprises have existed since 1935. [ref] When the Forward Development Unit of the Department of Communications reviewed the history of the limits on commercial television in 1986, it identified five key principles which had generally been cited as the basis for ownership and control regulation:

- to avoid undue concentration of ownership or control of commercial licences;
- to promote local ownership and favour "independent" applicants;
- to limit foreign ownership and prohibit foreign control;
- to preserve the integrity of licensing decisions; and
- to encourage a diverse shareholding in licensee companies.²⁰

The report also notes the prominence given in licence inquiries to cross-media ownership.

Only the first and third of these objects remain in the BSA. The removal of the "two-station rule" for commercial television and of all state and national limits for commercial radio station ownership in the BSA, together with the introduction of price-based allocation for licences in these categories marked the formal end of any policies about local and independent ownership, the integrity of commercial licensing decisions and diversity of shareholdings.

The BSA includes as objects "to encourage diversity in control of the more influential broadcasting services" and "to ensure that Australians have effective control of the more influential broadcasting services" (s3). It also sets specific limits on the ownership and control of companies holding or controlling commercial television licences and subscription television broadcasting licences [check] and mechanisms for enforcing them. These provisions are supplemented by the provisions of the *Trade Practices Act 1974* and the *Foreign Acquisitions and Takeovers Act 1975* to provide a package of limits on the ownership and control of Australian media businesses:

- requirements to notify all proposals for foreign investment in the media enterprises, with a discretion for the Treasurer to prohibit proposals which he determines are contrary to the national interest, and specific limits on foreign ownership and a prohibition on foreign control of commercial television interests and limits on foreign ownership of subscription television broadcasting interests;
- a national limit preventing the same person or company owning or controlling companies in control of commercial television licences whose licence areas cover more than 75% of the national population; and
- limits on ownership and control of enterprises within an area -
 - ◊ one-to-a-market rule in commercial television and two-to-a-market rule in commercial radio;

²⁰Forward Development Unit, Department of Communications (1986) *Ownership and Control of Commercial TV: Future Policy Directions, Vol 1 Report*, AGPS, Canberra, p41

- ◇ cross-media rules preventing the same person or company owning a substantial stake or controlling more than one of the major kinds of media enterprise in the area - commercial television, commercial radio, major daily newspaper;
- ◇ a prohibition on mergers which would substantially lessen competition in a market (unless authorised on public benefit grounds). This prohibition can apply to a particular merger which would not breach the more specific limits in the BSA²¹;

The first of these types of rules is discussed in section X "Australia" [also below wrt competition]

The second does not appear to be having a major impact on the structure of the industry at present. Of the three largest commonly-owned groups of stations, the Seven Network controls six stations broadcasting to 72% of the population, Ten controls five stations broadcasting to 64% and Nine three stations broadcasting to 51%.²² All of them have common ownership of the largest three stations (Sydney, Melbourne and Brisbane). Nine and Ten at least appear to have judged that the commercial interests of the network can be adequately served by the sharing of programs without the need for common ownership of the maximum allowable number of stations.

To the extent that the current law may constrain Seven, it has had the effect of allowing the continued existence of another substantial player in the Australian media business which controls the Seven-affiliated regional stations (Prime). While this may have occurred without the law, on balance, it seems appropriate to retain it, particularly since the limit is already very high by international standards: the audience/population threshold for commercial terrestrial TV in the UK is X% and in the US Y%.

The third set of laws, about concentration of media ownership and control in an area, is much more complex.

4.4.1 Some propositions about the concentration of ownership of Australia's media

1. Ownership and control of media industry assets affects media content.

The ownership of particular media outlets with a commercial interest in the fate of Superleague influenced the coverage of the sport of rugby league and the newsgathering practices of media organisations.²³ The ownership of publishing company Harper Collins influenced its decision not to proceed with the publication of *East and West*, Chris Patten's book about Hong Kong, China, the world economy and post-Cold War politics. The coverage of the digital television in Australia's major daily newspapers appears to have been generally sympathetic to the corporate positions of those outlets. *Media Watch* has drawn attention to the cross-promotion of ABC current affairs stories in news bulletins.

²¹*Austereo Case*

²²Communications Law Centre (1999) *Communications Update* Issue 151 (February), p13

²³ See Masters, R., (1996) "Ensuring News scoops on league", *Communications Update* No 120 (April), p3

2. A wide range of voices, influences and practices in the production and dissemination of media content is critical to the health of social, economic and political life.

As the High Court said in *Nationwide News v Wills* that Australia's system of democratic government requires "a free flow of information and ideas and debate". [quote Max Suich at Friends of Fairfax dinner re decline of journalistic standards with newspaper duopoly]

3. Ownership and control of Australia's media industries is already heavily concentrated.

The Annual Media Ownership issues of *Communications Update* show the concentration of nearly 90% of Australia's major daily newspaper circulation in the hands of two organisations and the rationalisation of radio station ownership since the commencement of the BSA. The "new media" business of pay TV has brought a new player into regional television but the major metropolitan pay TV operator Foxtel is controlled by old media players, Telstra, News Limited and PBL, all of whom have extensive other media and communications interests. The involvement of a major free-to-air television player from the early stages of the development of pay TV contrasts sharply with the evolution of these markets in the US and the UK.

4. Further concentration would occur in the absence of regulation and will occur if existing regulation is removed.

PBL has made no secret of its desire to control John Fairfax, if the cross-media rules were amended to allow it. News Limited has made no secret of its desire to acquire a commercial television licence. John Fairfax has proposed liberalisation of ownership rules to allow it to acquire or be acquired. Cable & Wireless Optus has done its best to take over the next largest telecommunications company in the country. If they're allowed to, they'll do it.

Recommendation

The Centre supports the continued application of the cross-media laws currently set out in the BSA, to ensure that the major sources of information, entertainment and ideas in local areas are controlled by different people. However, the Centre proposes some changes to the administration of these and other laws regulating ownership, control and competition.

4.4.2 Emerging issues

The kinds of media industry assets which provide the capacity to restrict voices, influences and practices in the production and dissemination of media content have expanded. However, their impact is less predictable and durable. Alternate delivery systems, transmission standards, conditional access systems, set-top boxes, electronic program guides, computer operating systems and major program and other content rights

are becoming as important to the control of information, entertainment and ideas as the broadcasting licences and licensees regulated under the BSA.

When the cross media rules were introduced in 1987, the arguments that the rules adequately encompassed Australia's most important media forms - commercial television, commercial radio and major daily newspapers - were very strong. There was no pay TV, no narrowcasting, no CD-ROM's, no World Wide Web. Telecom was the sole provider of telecommunications services in the country, but it did not provide content services. The arguments about what should be included in the rules were mainly about text-based media: the Government decided to limit "newspapers" to "daily" newspapers (published at least four times a week) where at least 50% of the paid circulation occurred within the service area of the relevant television or radio licence. It therefore excluded magazines, national newspapers and newspapers most of whose circulation occurred outside the relevant service area.

In 1999, around 15% of the country's homes receive pay TV, there are many more licensed television and radio narrowcast services. We have some data on usage of these services. Pay TV data is even less publicly accessible than free-to-air ratings data. Research companies are grappling with methodological complexities in measuring Internet "use" for the purpose of valuing advertising and other services delivered over it. 47% of homes have a personal computer, Y% of which have a CD-ROM and 19% are connected to the Internet.²⁴ Technology is providing many new ways of delivering "content" services to broad and specialised audiences.

The BSA's "diversity" policy provides tools primarily to deal with ownership and control of commercial TV and radio licences and, by implication, major daily newspapers. But the alternate delivery systems, transmission standards, conditional access systems, set-top boxes, electronic program guides, computer operating systems, major program and other content rights of the emerging media and communications environment rival these old assets in the capacity they offer for market power and influence over media content.

The problem for policy-makers is that fragmentation and competition in the provision of these facilities and services is often precisely what the public *doesn't* want.

4.4.3 Competing priorities: why doesn't entry occur?

Media industries, where the goal of structural regulation has been a diversity of players (or at least a managed oligopoly), and telecommunications industries, whose regulatory history is monopoly, are converging into a single space where some regulated barriers to entry are removed and the structural goal is "competition".

But substantial barriers to entry remain a feature of the communications business, even in sectors where businesses can be established without licences.²⁵ These are not merely the

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²⁵ See, for example, House of Representatives Select Committee on the Print Media (1992) *News and Fair Facts: The Australian Print Media Industry*, AGPS, Canberra, Chapter 5

familiar barriers of high fixed costs, economies of scale, horizontal and vertical integration, brand loyalty and established personal and business relationships.

Barriers to entry exist in electronic media and communications because consumers demand demand co-operation amongst competitors:

- in television - a single transmission standard;²⁶
- in video cassette recorders - a single equipment standard (VHS);
- in local, long distance and international telephony - a single bill;
- in pay TV - a single service offering "all" the programming;
- in personal computing - software that will run on any computer and documents that can be readily exchanged.

Concentration in the media and communications industry often occurs through these kinds of demand side economies of scope rather than supply side economies of scale. Consumers often want "concentration" of a sort, and withhold their purchases until suppliers deliver it.

The traditional challenge for broadcasting regulation has been to maximise diversity of control of services. The one-to-one relationship between transmission infrastructure and services has allowed regulation directed at diversity of control of transmission infrastructure to result in diversity of control of services. In a changed environment where consumers are welcoming the lower prices offered by competitive service providers but demanding "concentration" of control of key facilities - common standards, portability of numbers and addresses, and interoperability - which may undermine it, regulators will need flexible powers.

4.4.4 Access and open systems

A familiar response to this concern is to demand "open access" to these facilities. There have already been several regulatory or judicial interventions to achieve this:

- alternate delivery systems: AUSTEL, before 1 July 1997, and subsequently the ACCC, have had to consider whether to mandate "open access" to cable television networks [ref] Also current AT&T/TCI debate
- transmission standards: The BSA requires satellite pay TV licensees to agree upon, or failing that the Minister to determine, a "full digital transmission system" (s94);
- conditional access and subscriber management systems: The BSA allows the ABA, possibly in response to a notice from the Minister, to impose a condition on a satellite subscription television broadcasting licence designed to ensure that the domestic reception equipment used by the satellite television broadcasting licensee is accessible by other satellite offer access to their subscriber management systems to other satellite television broadcasting licensees at a fair price;

²⁶ NBC introduced its NTSC system in the US in advance of other broadcasters and was successful in imposing it on them; British Satellite Broadcasting in the UK introduced the D-MAC transmission standard and was unsuccessful imposing it on its pay TV rival, Sky TV, which chose the existing PAL standard.

- televised rugby league players: the Full Federal Court’s Superleague decision, in a sense, provided “open access” to the services of footballers playing this code.

Overseas, the UK competition regulator has undertaken an extensive investigation of competition issues arising through the use of a common television interface or electronic program guide; courts have considered the competitive implications of co-operative organisation and marketing of broadcast rights for particular sports (German court decisions; precedents; Murdoch and Manchester United MMC/OFT decision); and one of the largest anti-trust cases in US history has been fought against Microsoft.

While “open systems” models in some areas will be critical to the development of competition in many parts of the media and communications business, they will always need to be justified against the reduced incentives they provide for those constructing facilities in the first place. “Open access” does not always sit easily beside facilities-based competition. New telecommunications entrants who have built their businesses on mandated access to the infrastructure of incumbents behave rather like those incumbents once they have infrastructure of their own. Newspaper companies which call for open access to the electronic delivery systems constructed with risk capital by other players are unlikely to be enthusiastic about providing open access to their printing presses to launch a rival masthead.

The imposition of “open access” obligations is not a simple solution to all the competitive problems of emerging media, but one tool which will need to be available to regulators to encourage not just competition and diversity but accessibility in the provision of services.

Legislators will need to impose open access obligations where they are appropriate and regulators will need flexible powers to determine when an access regime should be imposed and the kinds of obligations which it should contain. For example:

- an obligation to carry a particular content service - this is the kind of access obligation which is imposed under the digital television legislation for the community television channel;
- an obligation to reserve capacity for services of a particular kind (either free or at a fair and non-discriminatory price -
 - ◇ this is the kind of “access obligation” which the Minister imposes through the reservation of broadcast frequencies for national and community broadcasting;
 - ◇ it might also be imposed to require a pay TV operator to carry unaffiliated program services;
- an obligation to give fair and non-discriminatory access to any service-provider, subject to capacity and technical constraints.

4.4.5 Thresholds

While a greater reliance on the mechanisms of competition law enforcement is useful because of their adaptability to changing circumstances and emerging, the thresholds of prohibited conduct may be lower for competition law than they are for the aspirations of

“diversity”. The range of voices, influences and practices in the production and dissemination of media content may be insufficiently diverse for the health of social, economic and political life, without the owners or controllers of media industry assets being in a position to wield excessive market power.

ACCC Chair Alan Fels has indicated that the Trade Practices Act is unlikely to prevent PBL acquiring John Fairfax. That is, a merger expressly prohibited by the industry-specific cross-media laws might not create the capacity to exercise undue market power under the general industry competition laws.

4.4.6 A model for ownership, control and competition regulation

Issues to be addressed

- The ACCC is already extensively involved in issues relating to ownership, control and competition in media and communications. However, the TPA’s thresholds of prohibited conduct are set to achieve a competitive market rather than diversely controlled sources of information, entertainment and ideas.
- The ABA’s powers do not allow it:
 - ◊ to address key emerging issues in broadcasting ownership, control and competition - eg. conditional access systems, set-top boxes, electronic program guides, program rights
 - ◊ any flexibility in the approach it takes to particular transactions or situations (eg. weighing public benefits and costs)

Proposed Scheme

- New object in TPA: for media, communications and cultural industries, object of encouraging diversity in sources of information, entertainment and ideas and avenues for cultural expression. Corresponding change in BSA objects.
- Nothing in the new Scheme authorises any act or omission which would, but for the new Scheme, breach the TPA - that is, the new Scheme can’t be used to produce a less competitive outcome than would be the case without it and ACCC retains all its current powers.
- ACCC ‘declaration’ process modelled on existing declaration process for telecommunication services under Part XIC [provides certainty as to what entities are covered]:
 - ◊ ACCC may declare particular facilities, services, rights which have or are likely to have a significant impact on the diversity of sources of information, entertainment and ideas and the avenues for cultural expression in Australia, in parts of Australia or for particular groups of Australians.
 - ◊ ACCC must declare:
 - ⇒ commercial tv, commercial radio, major daily newspapers
 - ⇒ magazines, pay TV ??
 - ⇒ conditional access systems, set-top boxes, electronic program guides
- Process:

- ◇ prior approval process for mergers (cf. s50), contracts, arrangements or understandings (s45) that result in a substantial lessening in diversity of control of sources of information, entertainment and ideas and the avenues for cultural expression in Australia, in parts of Australia or for particular groups of Australians.
- ◇ decision to be made by ACCC after considering report provided by ABA (similar/reverse situation to that applying for ABA allocation of satellite pay TV licences which required report from ACCC) - ABA to have expanded research, information and public education role corresponding to ACCC under TPA s28
- Powers for ACCC/ABA:
 - ◇ to 'prohibit' merger, contract, arrangement or understanding (as at present - ACCC may commence action in courts to enforce TPA where it believes provisions have been breached)
 - ◇ to permit it subject to certain conditions designed to ensure the public benefits exceed the public costs (defined wrt objects of thge Acts), in particular, to order that controller of particular facilities make access to them available on fair, non-discriminatory terms.
- Retain cross-media rules, with responsibility for administering them passing to ACCC, with formal advice from revamped ABA with enhanced research capacity
- The ACCC should have flexible powers to impose a range of access and "use it or lose it" obligations on controllers of declared assets.
- The federal government should consider liberalising the existing rules restricting foreign participation in pay television and perhaps commercial television in the context of the forthcoming round of multilateral services trade negotiations. It should only do so if this concession enables it to secure the ability to maintain, adapt or introduce measures to encourage domestic cultural activities and industries.

5. Access

One of the most important challenges in media and communications policy is to ensure universal access for consumers and audiences to the primary communications media of the day. This principle should be included as an object of the BSA. The assessment of which services are of sufficient social importance to justify intervention to ensure their universal accessibility should involve a careful examination of the nature of the services and weigh the public benefits and costs of intervention.

The principles established will be very significant in informing the decision about when to shut down analogue television and radio transmissions. This is likely to be one of the most important issues for the accessibility of basic communications services over the next decade.

5.1 Universal services

Universal access to a basic level of communications service has long been a major aim of government policy. It has been pursued in different ways.

Public libraries have sought to provide universal access to the print medium. Public policies in this area have been funded primarily by state and local governments. [insert table ABS Cultural Trends n Aust 4172.0 Govt Outlays on Cultural Activities]. National governments in many countries established and maintained publicly-controlled post and telecommunications monopolies for more than a century, principally to facilitate "universal service". They argued that cross-subsidies available within a monopoly xservice provider were essential to finance investment in unprofitable infrastructure and uniform prices for services whose cost of supply varied significantly.

With the introduction of facilities-based competition into Australian telecommunications in 1991, the Government introduced new "universal service" arrangements. These imposed obligations on declared "universal service" carriers to make standard telephone services and payphones reasonably accessible to all Australians, and an obligation on all telecommunications carriers to meet a share of the cost of the uneconomic services.²⁷ The government has recently committed itself to upgrading the basic level of telecommunications service from standard voice telephony to a "digital data capability".²⁸ The Consumers Telecommunications Network has argued that universal service carries five different dimensions: universal geographic availability, accessibility, affordability, technological standard and participation in society.²⁹

A national broadcaster, the ABC, with a charter to provide, among other things, "comprehensive broadcasting services" (s6) and an obligation for its Board to ensure that the Corporation's functions are performed "with the maximum benefit to the people of

²⁷Telecommunications Act 1997 (Cwlth), Part 7

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²⁹Wilson, I. and Goggin, G., (1993) *Reforming Universal Service: the future of consumer access and equity in Australian telecommunications*, Consumers Telecommunications Network, Sydney

Australia" (s8), was established between the wars to provide all Australians with a shared radio, and subsequently television, service. Licensed commercial broadcasters have been required to provide "adequate and comprehensive" services, initially individually, and now as part of the range of services available in an area. The planning assumptions for terrestrial television (six high power services in all areas), the "equalisation" of regional commercial television services and the ABA's planning priorities for radio since 1993, which have given priority in planning and allocation to the least well-served areas, have all emphasised some notion of rough equity in the range of broadcasting services available to all Australians - a "basic" level of services which should be available to all Australians.

The digital television amendments to the BSA include as an objective the principle that digital television transmissions should have the same coverage areas as the analogue transmissions they supplement and replace (Schedule 4, s5), so that the rough equity already achieved is not compromised by the introduction of a new transmission technology.

Although the government has not included mobile telephony in the basic level of telecommunications service required to be made available under universal service arrangements, it has undertaken extensive work to ensure that mobile coverage is not compromised by the shut-down of the analogue AMPS network and its replacement by GSM services. It is providing funds to build transmission facilities to fill mobile phone "black-spots" on major highways³⁰ and has enthusiastically supported Telstra's introduction of CDMA technology with better coverage characteristics than GSM.³¹

The Government has also provided funds through the Regional Telecommunications Infrastructure Fund for the establishment of Internet "points-of-presence" (POP's) in rural centres, to expand the number of Australians who have untimed local call access to an Internet service provider.³² Initiatives to improve access to the Internet are also being implemented through schools.³³

These examples show the extent to which universal access to tools for communicating, transacting and getting access to media content has been pursued as a goal in broader areas than telecommunications, where the policy language of "universal service" has primarily been found.

For the purposes of this review of the BSA, television and radio broadcasting have been very important parts of the framework of policies which have sought to ensure universal access to the major communications forms, pursued by governments at all levels. However, the objects of the BSA do not include the language of universal service, other than "to promote the availability to audiences *throughout Australia* of a diverse range of radio and television services offering entertainment, education and information" (s3 - emphasis added).

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This contrasts with the Telecommunications Act, which establishes as an object:

To ensure that standard telephones services, payphones and other carriage services of social important are:

- (i) reasonably accessible to all people in Australia, on an equitable basis, wherever they reside or carry on business; and
- (ii) are supplied as efficiently and economically as practicable; and
- (iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community (s3).

5.2 Personalising services

A greater reliance on market outcomes for the delivery of media and communications services challenges the notion of a universal level of communications service to which all Australians should have access at the same price. It is argued that the future will see less homogeneity in the service demands of individual customers and audience members. There will be no such thing as a "standard service". A more competitive market, unconstrained by obligations to make an identical service available at a common price to all, will ensure that the particular services people do want are made available most quickly and at the lowest possible prices. John Browning calls it "a 1930s solution to a 21st century problem, an approach which may bring equality but also "fewer choices, fewer and bigger companies and fewer opportunities for innovation".³⁴

These arguments misunderstand the extent to which the practice of universal service has always fallen short of its rhetoric. "Universal service" has in practice tolerated differences in the number, range and quality of services, the time taken to connect them and their price.³⁵ The language has been universal service, but the practice has been rough equity. Periods of widening discrepancies as new services are introduced in the most heavily-settled areas, have been followed by periods of industrial and political catch-up as their popularity and profitability has been demonstrated.

Universal service, understood in this way, is still a goal worth pursuing in communications policy, for two main reasons. The first is about the provision of information to imperfectly informed markets. New media and communications services, especially those which are argued to fundamentally change the ways we live our lives, like the Internet and electronic commerce, are difficult to pre-sell to people who have no experience with them. This may not justify centralised commands for universal broadband infrastructure. But it may justify intelligent mechanisms to make infrastructure, services, training and education available to ensure citizens have the capacity to make an informed choice about whether they want new services or not.

³⁴ Browning, J., (1994) "Universal service: an idea whose time is past", *Wired* September, p102

³⁵ Standard Telephone Service Review Group (1997) *Review of the Standard Telephone Service* Department of Communications and the Arts, Canberra, p32

Second, the institutions of universal communications service - sending a standard letter anywhere in Australia for the same price, a telephone service, the ABC, the same radio stations and free-to-air TV channels as your neighbour's or your children's school friends' - are central to the democratic ideas of an inclusive Australian society and local communities, whose citizens have the technical capacity for communication and shared social and cultural experience. Indeed, as many kinds of economic and social borders continue to fall in the globalised 21st century, Australians' piece of cyberspace - ".au" - might, like the "61" country code of the telephone and fax, be one of the few things they share: one unique identifier amidst the post-colonial scramble for identities.

As Rob Glaser wrote in *Wired*:

"...without a thoughtful universal service policy, cyberspace could well end up as alien and cost-prohibitive to the general public as venturing out of town was during the reign of medieval highway robbers."³⁶

5.3 The price of universal service

If universal service still matters, the policy challenge is to determine its composition - the mix of services which make up the "basic communications service" which should be made universally accessible across Australia and within particular communities.

The 1996 Review of the Standard Telephone Service, which considered whether to upgrade the basic level of service required to be made accessible under the universal service arrangements in the Telecommunications Act, adopted the following process:

- assess whether the services under consideration are of "social importance";
- determine the extent to which they will be made available by the market;
- assess the costs of intervention...to ensure they are reasonable accessible;
- weigh the benefits of intervention against the costs, having regard to the distribution of benefits and costs and the effects on other policy goals..."³⁷

In assessing "social importance", the Group argued there were two essential elements:

- an objective assessment of the likely take-up of any particular service in places where the service is reasonably accessible; and
- a subjective assessment of the importance of the particular service in meeting social needs for interaction, transaction and getting or giving access to content.³⁸

The Review Group decided not to recommend the incorporation of a new level of service into the universal service obligation, but to establish, as a goal, the universal accessibility

³⁶Glaser, R., (1995) "Universal service *does* matter", *Wired* January, p96-7

³⁷ Standard Telephone Service Review Group (1997) *Review of the Standard Telephone Service* Department of Communications and the Arts, Canberra, p4

³⁸ Standard Telephone Service Review Group (1997) *Review of the Standard Telephone Service* Department of Communications and the Arts, Canberra, p154-61

of a "digital data capability" by 2000, and to review market progress towards it in 1998. These recommendations were accepted by government. The Review was "cautiously expansive", noting both the social and economic possibilities of new media and communications services, and the financial reality that early incorporation of new services into the universal service obligation would mean that early adopters of them would be subsidised by the rest of the customer base.

Subsequently, the Australian Communications Authority undertook this further review. It recommended that an upgrade in the universal service obligation was not justified, although the cost-benefit analysis it commissioned arrived at a more complex conclusion.³⁹

Recommendation

The BSA should include, as an object:

To ensure that broadcasting services of social importance are:

- (i) reasonably accessible to all people in Australia, on an equitable basis, wherever they reside or carry on business; and**
- (ii) are supplied as efficiently and economically as practicable; and**
- (iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community (s3).**

Consistent with the drafting of the Telecommunications Act, "social importance" should not be further defined. The principles outlined in the Review of the Standard Telephone Service might be used in practice to assist in assessing the social importance of particular services and the costs and benefits of intervening to ensure they are universally accessible.⁴⁰

Federal regulation should be only one element of the policy mix which addresses questions of accessibility of basic communications services. Targetted subsidies might be a transparent and cost-effective way of encouraging people to explore the possibilities of new technologies and innovative applications of them, at a time when penetration levels of particular services are still low. State and local governments, even without the constitutional power to regulate electronic communications, also need to play their parts, in such areas as libraries, the education sector and the work practices of government agencies.

³⁹See Given, J. (1998) "The executives' summary", *Communications Update* Issue 147 (September), p3; ACA (1998) Digital Data Capability report

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6. Australia

The BSA has, as some of its objects:

to ensure that Australians have effective control of the more influential broadcasting services (s3(d));

to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity (s3(e));

to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance (s3(g));

The limits on foreign ownership of companies controlling commercial television and subscription television broadcasting licences and the prohibition on foreign control of companies controlling commercial television licences provide the primary mechanism in the Act for addressing the first of these objects. This has been discussed above under “Ownership, control and competition”.

The planning process, with its provision to ensure structural diversity and the priority it gives to “wide public consultation” in determining planning priorities and preparing frequency allotment plans and licence area plans (ss24-7), is an important contributor to the second and third objects quoted above and to the “localism” element of the third. The other major measure addressing these objects is the Australian Content Standard, which the Act requires to be determined by the ABA (s122). Codes of practice address the issue of fairness and accuracy in coverage of matters of public interest.

The Centre supports the application of program quotas of the kind provided for in the Australian Content Standard. The most extensive recent study of these quotas, by Franco Papandrea,⁴¹ included a survey which found that “a large majority of Australians accepted the existence of external cultural benefits from consumption of Australian television programs”. Papandrea noted that free-to-air television’s ready accessibility in almost every home at a virtually negligible direct cost meant that the accumulation of what external cultural benefits accrue from the consumption of some programs can be achieved more readily with television than other media.⁴²

The study also found, using contingent valuation techniques, that “the valuation of those benefits by the community was...at least commensurate with the cost of supplying domestic programs”. It concluded that “social welfare is unlikely to be reduced by the regulation and may well be increased”,⁴³ although it proposed a number of changes to

⁴¹ Papandrea, F., (1997) *Cultural Regulation of Australian Television Programs*, Occasional Paper 114, Bureau of Transport and Communications Economics, Canberra

⁴² Papandrea (1997), p203

⁴³ Papandrea (1997), p208-9

the quotas and highlighted the likelihood that “the effectiveness of regulation designed for services reaching very large audiences [would be] substantially weakened” in an environment with a multitude of more specialised services, more blurred distinctions between broadcast and narrowcast services and direct broadcast of services into Australia from overseas.⁴⁴ The study concluded that the transmission quota “contributes the least to the objectives of the regulation”, while the arrangements for childrens programming, particularly drama, and, to a lesser extent, adult first release drama, “could be said to be effective in meeting the objectives of the regulation”.⁴⁵

Revised arrangement proposed by Papandrea included tradeable quotas, a better targetted transmission quota along the lines of the European Union’s Television Without Frontiers Directive and a greater emphasis on subsidies and the direct provision of programs, rather than quotas.

The Centre notes that quotas, while less transparent in their costs than subsidies, are particularly effective in achieving certain levels of programs screened in key timeslots, which is critical to the cultural objectives being pursued. This has been one of the critical weaknesses in New Zealand’s entirely subsidy-driven broadcasting policy arrangements.

Given the conclusions of Papandrea’s research, the recent comprehensive review by the ABA of the Australian Content Standard for commercial television, the continuing reality that virtually all television services received in most parts of Australia are still transmitted from Australian locations (although some of the channels may be retransmitted from overseas sources) and Australia’s on-going position as a substantial net importer of audiovisual product particularly television programs, the Centre does not see further reforms of Australian content requirements as a high priority, other than the promised legislation to make the pay TV requirement effective.⁴⁶ With two of Australia’s three pay TV players foreign-controlled and substantial foreign participation in the other, and foreign interests holding a majority economic interest in one of the three commercial TV networks (which has advised this Review that it supports Australian content requirements⁴⁷), it is difficult to see the existing regulations as significant barriers to entry into the Australian broadcasting market place.

The Centre believes it is critical that, in the context of multilateral trade negotiations, Australia does not accept obligations which compromise the national government’s capacity to maintain, adapt or introduce measures to assist domestic audiovisual culture and industries.

⁴⁴ Papandrea (1997), p209

⁴⁵ Papandrea (1997), p217-8

⁴⁶ Alston, Senator R (Minister for Communications, the Information Economy and the Arts) (1998) “Government to enforce Australian content rules for pay TV”, Media Release 49/98, 2 April

⁴⁷ Network Ten Submission (No 48): www.pc.gov.au (visited 7 June 1999)

7. Quality

The BSA has, as one of its objects:

“to promote the provision of high quality and innovative programming by providers of broadcasting services” (s3(f)).

The limit of three on the number of commercial television licences which can be granted in an area (s28) and the Australian Content Standard, determined by the ABA as required by the Act, are two provisions which might be argued to assist the achievement of this object, although the Second Reading Speech gives no clear indication of the rationale for the former.

The Centre supports the continued inclusion of “quality” object in the BSA:

- program quality - no further definition
 - ◇ primary mechanism is structural diversity - different kinds of institutions deciding what quality might mean for different audiences - not elitist - size of the prizes in a game-show, number of cameras at a sporting event, production values in a drama series, intensity of intellectual engagement
 - ◇ all require money. Not a justification for protection, but may be a public benefit to be articulated in seeking “authorisations” of mergers would otherwise breach diversity threshold
- “service quality” - telecoms definition - socially important services supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community. Integrate discretionary broadcasting services like pay TV into the quality of service monitoring and customer service guarantee mechanisms applying to telecommunications.

8. Accountability

The BSA has, as some of its objects:

to encourage providers of broadcasting services to respect community standards in the provision of program material (s3(h));

to encourage the provision of means for addressing complaints about broadcasting services (s3(i));

to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them (s3(j)).

Each can be seen as part of a process of accountability for broadcasters to their audiences and the communities they serve.

Key problems:

- lack of transparency in decision-making eg.
 - ◊ complaints processes and determinations of licence categories
 - ◊ ownership and control investigations
- research focus only on “community attitudes” and resource constraints limits ability to explore full range of issues bearing on exercise of regulatory functions

**Communications Law Centre
June 1999**

2. Executive Summary

Rationale and objects

The rationale for the special regulation of broadcasting lies not in the scarcity or public nature of broadcast frequencies but in the social and cultural importance of broadcast services and the belief that the benefits of certain interventions in broadcast markets will outweigh their costs.

The primary objects of broadcasting regulation should be to encourage freedom of expression and enterprise. A number of further goals should motivate the regulation of all communications carriage and content services:

- diversity and competition;
- access;
- relevance to Australia and Australians;
- quality; and
- accountability.

Despite its central place in the rhetoric of regulation under the BSA, "degree of influence" is not, and should not be, central to the mechanisms of current broadcasting regulation. It is an uncertain notion which is better replaced by the operative statutory concepts which actually inform assessments about appropriate levels of regulation.

A more helpful concept on which to base key regulatory judgements might be "social importance", the principle used in the Telecommunications Act to inform the particular services which are included in the universal service obligation. The concept might be used in a revised BSA/radiocommunications regulatory scheme to inform decisions about which services should be subject to:

- the special "broadcasting" planning process;
- arrangements to make them universally accessible to customers and audiences;
- special ownership and control regulation;
- access obligations;
- requirements to carry significant Australian content; and
- service quality performance standards and monitoring.

Planning and licensing

The Centre broadly supports the current arrangements for planning broadcasting services:

- They preserve ultimate control in the hands of a democratically-elected Minister, who has the ability to make broad decisions about the uses to which particular parts of the spectrum can be put.

- They provide a mechanism for ensuring structural diversity in the provision of particular services, a crucial contributor to diversity in content.
- However, they also provide considerable capacity for market mechanisms to be employed to determine the uses to which particular spectrum is put. Increasing use of these mechanisms will provide clearer evidence of likely efficiency gains.

The Productivity Commission may wish to consider a long-term strategy for migrating the perpetual tenure of broadcast licences towards the limited tenure of spectrum licences. This might involve:

- licensing the new digital commercial television services (not the national services) for a fixed duration of fifteen years after the date of shut-down of analogue transmissions (or 2008, whichever comes first); and
- scaling down commercial television licence fees over a period of twenty years, commencing in 2003.

To overcome the instability which might be caused at the end of the fifteen year licence period when all three (or the original three, if there are more than that by then) commercial licences in an area are re-allocated, it might be possible to hold a “mini-auction” amongst the existing licensees before 2008, to allocate licences with different durations - for example, one of 15 years, one of 17 years and one of 19 years.

Diversity and competition

Australia’s laws governing ownership, control and competition in media and communications need revision if they are to ensure a competitive and diversely controlled sector in the future:

- Cross media rules should be retained, but responsibility for administering them should pass to the ACCC, with formal advice from a revamped ABA with an enhanced research capacity and public education role.
- A new threshold for prohibited conduct should be established in relation to a range of media assets which deliver bottleneck power over sources of information, entertainment and ideas. Although already subject to general competition regulation, the significance of these assets should be acknowledged through a “declaration” process. Mergers and contractual and other arrangements involving declared assets would be subject to a lower test of anti-competitive behaviour (ie. behaviour would more easily satisfy it) than the “substantially lessening of competition” test in ss 46 and 50 of the Trade Practices Act.
- The ACCC should have flexible powers to impose a range of access and “use it or lose it” obligations on controllers of declared facilities.
- The federal government should consider liberalising the existing rules restricting foreign participation in pay television and perhaps commercial television in the context of the forthcoming round of multilateral services trade negotiations. It should only do so if this concession enables it to secure the ability to maintain, adapt or introduce measures to encourage domestic cultural activities and industries.

Access

One of the most important challenges in media and communications policy is to ensure universal access for consumers and audiences to the primary communications media of the day.

The BSA should include, as an object:

To ensure that broadcasting services of social importance are:

- (i) reasonably accessible to all people in Australia, on an equitable basis, wherever they reside or carry on business; and
- (ii) are supplied as efficiently and economically as practicable; and
- (iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community (s3).

Consistent with the drafting of the Telecommunications Act, "social importance" should not be further defined. The assessment of which services are of sufficient social importance to justify intervention to ensure their universal accessibility should involve a careful examination of the nature of the services and weigh the public benefits and costs of intervention. The principles outlined in the 1996 Review of the Standard Telephone Service might be used in practice to assist in assessing the social importance of particular services and the costs and benefits of intervening to ensure they are universally accessible.

Federal regulation should be only one element of the policy mix which addresses questions of accessibility of basic communications services. Targetted subsidies might be a transparent and cost-effective way of encouraging people to explore the possibilities of new technologies and innovative applications of them, at a time when penetration levels of particular services are still low. State and local governments, even without the constitutional power to regulate electronic communications, also need to play their parts, in such areas as libraries, the education sector and the work practices of government agencies.

Australia

The Centre supports the application of program quotas of the kind provided for in the Australian Content Standard.

It is critical that, in the context of multilateral trade negotiations, Australia does not accept obligations which compromise the national government's capacity to maintain, adapt or introduce measures to assist domestic audiovisual culture and industries.

Quality

The Centre supports the continued inclusion of “quality” object in the BSA. However, it believes it should be broadened to encompass “telecommunications-style” quality of service issues: service connection times, faults, the keeping of appointments and other matters - where relevant to the particular discretionary services.

- For “content” quality:
 - ◇ the primary regulatory mechanism is structural diversity - different kinds of institutions deciding what quality might mean for different audiences, without any regulatory attempt to define quality in a prescriptive way;
 - ◇ service providers often need sufficient capital to take significant financial risks money. This is not a justification for significant protection from competition, but it may be a public benefit to be articulated and weighed in seeking “authorisations” of mergers would otherwise breach the diversity threshold.

- For “service” quality:
 - ◇ socially important services should be supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community. This requires the integration of discretionary broadcasting services like pay TV into the quality of service monitoring and customer service guarantee mechanisms applying to telecommunications.

Accountability

The Centre is concerned about aspects of the accountability of current regulatory processes:

- lack of transparency in decision-making by the ABA, eg.
 - ◇ publication of information about individual complaints and determinations of licence categories; and
 - ◇ ownership and control investigations.; and

- the BSA’s emphasis for the ABA’s research and public education activities on “community attitudes” and the Authority’s resource constraints limit its ability to explore the full range of issues bearing on the exercise of its regulatory functions.