

3 June, 1999

Professor Richard Snape
Deputy Chairman
Productivity Commission
Level 28
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Dear Commissioner

IPA Submission on Broadcasting Inquiry

Please find attached a copy of the IPA's submission to the inquiry on Broadcasting.

The submission is a Chapter (Chapter 8) from *Media Regulation in Australia and the Public Interest* by Robert Albon and Franco Papandrea published recently by the Institute of Public Affairs and available in PDF format from <http://www.ipa.org.au/> or in hard copy from the Institute.

Yours sincerely,

Dr Mike Nahan
Director, IPA

Submission: Productivity Commission's Inquiry into Broadcasting Legislation

Improving Media Regulation

Australian broadcasting has long been subject to regulations in three main areas: control of entry through licensing; restrictions on foreign and broad ownership; and control of content. The print media were not subject to special regulation until the cross-media ownership rules were introduced in 1987. The regulations affecting the media industries have evolved over the years in response to various forces including the advent of new technologies, changes in consumer demands and the decline of the 'social responsibility' approach. While these changes have been broadly in the direction of greater liberalisation, the media industries remain heavily regulated compared with most other industry groups.

In this study we have described, explained and evaluated Australian media regulations. The approach is both retrospective and prospective. The regulations have not always served well what we understand to be 'the public interest'. While characteristics of public good, natural monopoly and spectrum scarcity have meant that the market cannot be relied on totally to produce an efficient outcome, regulations have not always led to an improvement or, when they have, not to the maximum possible improvement. In this concluding chapter we canvass some possibilities for alternative regulatory directions that avoid some of the shortcomings inherent in the existing regulatory structure. The recommendations are based on four guiding principles:

1. Regulation should be retained or introduced only when correction of market failure is strictly necessary and justified or to achieve a clearly identified social goal whose benefits to society clearly outweigh all the cost associated with the regulation.
2. Regulation should be based on a clear, well-defined, transparent and predictable framework.
3. Regulation should be directed to outcomes and not to the way in which the outcomes are generated or delivered.
4. Regulation should be neutral in its impact on delivery technologies and on services with substantially similar attributes.

Specific Policy Implications

1. Freer Entry into Broadcasting

Regulation of entry into broadcasting has been overly restrictive, limiting the number of particular services in particular markets, and delaying the introduction of emerging services based on new technologies. Without these restrictions it appears that the present size, structure and performance of broadcasting services would have been substantially different from that observed. High licence values reflect the rents accruing to their holders and the presence of these rents is *prima facie* evidence of excessive restriction. There is also evidence that in the case of all new services based on new technologies (monochrome television, FM radio and pay-TV in particular), introduction was unnecessarily delayed with consequent efficiency costs. Further, the combination of carriage (signal transmission) and content (programme production) in Australian broadcasting has been a source of regulatory difficulties and has restricted policy flexibility. There are several elements that could help establish a freer and more coherent approach to broadcasting licensing:

Reduce entry barriers.

We recommend much freer entry into broadcasting. The only ‘public interest’ grounds for limiting entry are those of natural monopoly (economies of scale or scope) and technical considerations such as spectrum scarcity. However, natural monopoly provides only a *prima facie* case for intervention – it provides only a necessary condition for restriction, not a sufficient one. New entry that duplicates investment in infrastructure is not necessarily wasteful. Its benefits such as greater programme diversity and choice to consumers or lower prices for advertising could well exceed the cost of the investment. Technological changes have greatly reduced spectrum scarcity constraints and new delivery platforms, such as the Internet and international satellite, are largely beyond the reach of national regulations. Increased adoption of these technological advances will continue to reduce the effectiveness of restrictive entry barriers and would make their retention increasingly questionable.

Continue the auction system.

Where entry is to be restricted on public interest grounds, including spectrum scarcity, a market mechanism should continue to be used to allocate the available licences. However, there may be a case for consideration of alternative auction designs that facilitate a more efficient approach to market allocation and avoid some of the pitfalls experienced in recent years (e.g., allocation of satellite pay television licences).

Separation of carriage and content.

There is a case for the means of carriage and the content of broadcasting services to be licensed separately as is the case in the United Kingdom. This would be easy to apply to all new services immediately, but would be difficult for existing services. One approach for existing services would be a requirement that, after an appropriate period of notice, for owners to divest themselves of either the carriage or content element of their current licences.

Limit licence periods.

Currently, although licences are issued for a nominal period, they are held virtually in perpetuity. Separation of carriage and content would help establish enforceable fixed licence periods. Unless completely free entry were justifiable, the content licences should be allocated initially, and re-allocated when they expire, by a market mechanism, such as an auction, to secure any scarcity value for the government. The government could also retain the right to impose obligatory content clauses and would then be free to amend them each time a licence is re-allocated. Owners of transmission facilities would not necessarily be excluded from holding a content licence. The effectiveness of this approach has been demonstrated in the United Kingdom where it is used to allocate programming licences for television.

Spectrum management.

Efficient use of the scarce radio frequency spectrum would require broadcasters to purchase spectrum rights in competition with users in other industries. It would provide broadcasters with the flexibility to choose alternative delivery mechanisms (e.g. cable, satellites) should they prove to be more commercially attractive. The introduction of a tradeable spectrum-access rights system would need to give special consideration to the terms and conditions under which existing broadcasters could continue to retain tenure of the broadcasting frequencies currently assigned to them.

Technological neutrality.

The BSA sought to establish a technologically-neutral framework for the development of broadcasting. However, those intentions of the Act have not always been pursued in practice. In the short period since the enactment of the legislation the concept of technological neutrality has been overridden by two politically motivated initiatives (pay television and HDTV), which have had major implications for the development of broadcasting services. Issues surrounding the management of new technologies were treated at length in Chapter 7. In brief, wherever regulation is justified, considerable care should be exercised to ensure that it is not distortionary in its application to different technologies. Our recommendation is that any such regulation should be applied to outcomes irrespective of the technology by which they are delivered.

2. Fewer Restrictions on Ownership and Control

When evaluated on economic criteria, restrictions on audience reach, foreign ownership and cross-media ownership all have a number of adverse effects. In particular they have limited the development of industry structures exploiting economies of scale and scope, prevented the formation of multi-media groups, and given incentives to the creation of new financial instruments and other arrangements to avoid the regulations. At the same time, substantial diversification of the media industry has weakened the non-economic case for ownership restrictions, and, as the delivery of media services by non-traditional means becomes more widespread, the justification for continued restrictions on ownership of traditional media will be further eroded. In the case of restrictions on population reach, these have effectively been circumvented by television programming affiliation agreements. In the light of these considerations it is difficult to mount a case for continuing to restrict audience reach, foreign ownership and cross-media ownership.

3. Use More Efficient Means of Promoting Australian Content

Programme standards in television are quite extensive and include requirements for overall Australian content (type and quantity) of television programmes, children's programmes, Australian content in advertising (80 per cent must be produced in Australia) and limits on time devoted to advertising (maximum of 13 minutes an hour in prime time and 15 minutes an hour at other times).

The discussion of programme standards in Papandrea (1997) considered the desirability and appropriateness of Australian content requirements and found evidence that there was a willingness to pay for the additional cost of local content, but that the current means of delivery are inefficient. They distort broadcasters' programming decisions and provide a substantial, but hidden, level of assistance to drama production and employment.

Assuming that the current assistance is desirable, it would be possible to eliminate some of the current distortions and improve the efficiency of the scheme without significantly affecting its outcome. It is proposed that a direct and more transparent mechanism should be used to assist film and television programme production. A mechanism other than quota (e.g. a bounty or other direct assistance to production) which removed the relative price differential between Australian drama and foreign drama or other Australian programmes would allow programmers greater flexibility in choosing programmes on the basis of audience response.

Overall Conclusion

Our broad conclusion is that, while there have been substantial improvements in the regulatory structure and its outcomes (especially with the BSA), there are still problems in the approach and results in all three areas: licensing, ownership controls and content regulation. The traditional regulatory structure continues to be challenged by new technologies and the convergence of existing ones. The media industry needs to be managed very carefully to produce results that maximise the 'public interest'.

This leads us to reflect on how different the broadcasting landscape may have been with a more liberal, market based approach to the licensing of new services. Additional broadcasting services and new technologies such as FM radio, television and pay television would probably have been introduced much earlier. For instance, notwithstanding the invention of FM radio in the 1930s, its successful use overseas and in local test stations for decades, the existence of many unsatisfied applications for new radio services and 60 per cent receiver penetration by 1978 (Postal and Telecommunications Department, 1978), FM radio services were not introduced until 1980. The use of FM was prohibited by legislation in 1956 and the FM spectrum was allocated for use by television in 1961. Similarly, the introduction of television was delayed until 1956 even though the technology had been developed much earlier, and 20 applications for commercial television licences had been lodged as early as 1944 (Curthoys, 1986). The same pattern is repeated in the case of subscription television whose introduction 'as soon as practicable' had been recommended as early as 1982 in

a report by the ABT (1982). The government ignored the report until 1986 and then decided to impose a four-year moratorium on the introduction of subscription television. The moratorium was extended in subsequent years and pay television was finally introduced in 1995. Once again the pattern is about to be repeated with digital television. The government has mandated the introduction of HDTV and has banned alternative use of the digital spectrum that would have made possible the introduction of many additional standard television services. Of course, had the timely introduction of these technologies occurred in response to market demand, the community at large, rather than a select few, would probably have gained substantial social benefits and the present size, structure and performance of broadcasting services would be very different.

