2. The state of regulation

Introduction

This chapter describes existing Commonwealth regulation of electronic mass communication in Australia. It describes the theoretical underpinnings of regulation, as have been identified by a range of authors, and considers the relationship between these and the provisions and mechanisms implemented in law.

Constitutional Authority

The Australian Constitution provides, at s.51(v), that the Commonwealth may make laws subject to the Constitution with respect to *postal, telegraphic, telephonic and other like services*. Armstrong notes that this is the only one of the exclusive Commonwealth powers contained in s.51 where the draftsmen included the prospective *other like services*, giving the Commonwealth virtually automatic extension of legislative right over all new developments in the field of electronic communication (as well as over postal services). Successive High Court judgements have held that this power extends to the Commonwealth being able to regulate broadcasting, including power to select licensees and control programming.[1]

Such a clear separation of power between the Commonwealth and the states in relation to communication has an important reverse effect. It restrains direct Commonwealth regulatory intervention for the purpose of regulating communication, over media that operate outside the definition. Industry specific communication related regulation of the press, the publishing industry, the film and video industry, the music industry, the computer software industry, in fact all other mass communication forms that rely solely on physical means of distribution, falls within the ambit of state, rather than Commonwealth responsibilities. Significantly, none of the states or territories have sought to apply the sorts of regulatory impositions to other media that the Commonwealth has applied to broadcasting.

Electronic Communication

At the time of Federation, the only widespread operating forms of electronic communication were the telephone and the telegraph. Responsibility for administering telegraphic and telephonic services rested with a Commonwealth Department of State, and the Ministerial office of Postmaster General. At the time of Federation, the principle of wireless telegraphy had been proved and was being adopted overseas for ship-to-shore communication, but its application was not widespread. Nevertheless, by 1905, the Commonwealth had introduced the *Wireless Telegraphy Act 1905* to administer the growing field of wireless communication (now known as radiocommunication). This remained the principle mechanism for administering radiocommunication until 1985,

when the *Radiocommunications Act 1983* was proclaimed. The only exception was a short period between the first world war and 1920, when control was passed to the Department of the Navy.[2] Over the years, technology has permitted the development of many new types of electronic communication, but Australian law still retains a fundamental distinction between guided electronic communication (with its roots in telegraphic and telephonic services, transmitted, along some form of physical guide) and the unguided communication (radiocommunication) that emerged as a later development. This distinction is still reflected in the regulatory arrangements, although in practical terms, the differentiation is becoming less rigid as telephony and telecommunications begin to rely increasingly on radiofrequency spectrum (e.g. cellular mobile telephones).

Broadcasting Regulation

The primary instrument of Commonwealth regulation of the broadcasting service industry is the BSA and its supporting, ancillary and amending Acts.[3] The regulatory scheme established under these Acts applies to all broadcasting services as defined at s.6, except national broadcasting services, which are specifically excluded.[4] The national broadcasting services are subject to their own enabling legislation.

Broadcasting began on the fringe of wireless telegraphy, and in 1923 the Commonwealth introduced regulations under the *Wireless Telegraphy Act 1905* to provide for a *sealed set scheme* for broadcasting, ostensibly to enable Amalgamated Wireless Australasia (AWA) to commence a broadcasting monopoly. Although the scheme failed, the place of broadcasting in communications law was set for the next 70 years. It was considered to be a subset of wireless telegraphy, with special conditions and special requirements. Following the failure of the sealed set scheme in 1924, the Government legislated for the introduction of “A” and “B” classes of licences for broadcasting. "A" class stations, which were to be funded by receiver licence fees, eventually evolved into an Australian Broadcasting Commission, forerunner of the ABC as it exists now.[5] Receiver licence fees were abolished as a means of providing funding support for the ABC in 1974. The ABC is now funded primarily by Government appropriation. "B" class licences were permitted to derive their operating revenue from advertisements, laying the ground for the separation of broadcasting into two sectors, one depending on public funding, the other on commercial funding.

The basic division of the broadcasting industry into these two sectors continued unaltered until 1975 when 12 public broadcasting licences were awarded.[6] The public broadcasting sector thus created, envisaged that services would operate on a non-commercial and non-government basis, deriving support from the community that they served through sponsorship and other forms of community involvement. In 1992, a further three industry sectors were introduced. These were for subscription broadcasting (pay TV), subscription narrowcasting and open narrowcasting services. The two narrowcasting categories were differentiated only on the basis of whether or not they

were funded by subscriptions.[7]

Despite periodic interest over the years, broadcasting was not, for most of its history in this country, an activity that legislators envisaged being carried over guided communication systems. Prohibitions on the use of cable for broadcasting (with only a few exceptions[8]) were contained in the *Broadcasting Act 1942* until its replacement by the BSA.[9]

The BSA introduced two new imperatives to the regulatory scheme for electronic mass communication that changed the whole conceptual approach to regulation. The first of these was recognition of the unsustainability of continuing to use technical distinctions to differentiate between broadcasting and non-broadcasting activities. Application of technical distinctions was convenient and justifiable only as long as there were no realistic technical alternatives to conventional broadcasting, but by the late 1980s, many viable technical alternatives were available. For example, the AUSSAT domestic satellite system which commenced operations in 1985[10] provided a means of extending broadcasting services to remote areas.[11]

The difficulty of the old scheme in dealing with technical issues is no better illustrated than by the case of the satellite system. Prior to the AUSSAT satellites being launched, transmission of commercial broadcasting services by satellite was not authorised. Special provisions authorising satellite transponders to be used for this purpose were introduced with the so-called service-based amendments to the *Broadcasting and Television Act 1942*, which were enacted in 1985. The amendments established the legislative machinery to allow licensing and operation of Remote Commercial Television Services (RCTS).[12]

As interest in the satellite system grew, some entrepreneurs proposed using it to deliver totally new service types (at least in Australia) such as pay TV, and services to closed-user groups, such as health professionals. In 1986, the Government created a regime where subscription services could be provided to non-domestic premises, but it also announced an intention to legislate a four year moratorium on the introduction of domestic pay TV[13] to allow television licensees to adjust to the requirements of the equalisation program in regional areas.[14]

Once the way had been opened for these new types of video and audio entertainment and information services (VAEIS), potential service providers began looking for alternative transmission systems to the satellite and, since the services were considered not to be broadcasting, they were not as restricted in their access to radiofrequency spectrum, or to particular types of transmission systems. When the Government invited expressions of interest in multi-point distribution systems (MDS) licences in the 2076 MHz to 2111 MHz and 2300 MHz to 2400 MHz bands of the radiofrequency spectrum (now known as the MDS Bands), it was overwhelmed by several hundred applications, reflecting a potentially high level of unfulfilled demand from groups interested in media

operations.[15] Since many of these new service proposals closely resembled traditional broadcasting, the continued application of technical distinctions between broadcasting and broadcasting-like services became increasingly unsustainable.

The second substantial change in the approach to regulation of electronic mass communication was a direct consequence of the emergence of these new types of service. Since the boundary between broadcasting and broadcasting-like services was so difficult to define, some public interest concern about the services was felt to apply, at least in part, to many of the new services. The introduction of VAEIS, to be licensed under the *Radiocommunications Act 1983*, expressly provided for a self-regulatory code of conduct for these services which closely mirrored the rules applying to traditional broadcasters:

> The Government recognises that there can be similarities in the nature of the programs being offered by both the traditional and new services and, accordingly, has decided that there should be equitable and appropriate regulation of the content of the new services.[16]

The VAEIS guidelines, as the self-regulatory scheme became known, and the moratorium of domestic pay TV, had an ultimately restrictive effect on development of new services. Despite the several hundred reported expressions of interest in delivering MDS services, by late 1988, only a limited number of licences had been issued for terrestrial VAEIS distributed by MDS.[17]

The BSA addressed this by instituting a regime whereby the level of regulatory intervention applied to services is intended to be commensurate with:

> the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia.[18]

This change allowed some services to be removed from the ambit of broadcasting law (as some have been[19]) and allowed the intensity of regulation to be scaled down for services that were felt to have less potential influence in shaping community views (including many VAEIS). This points to one of the underlying rationales for regulating broadcasting: that the media should be regulated because they are able to influence community views. This and other rationales that have, at various times, been applied to broadcasting regulation are discussed below.

The combined effect of these two changes to the approach to regulation of electronic mass communication allowed a conceptual separation of matters of *carriage* from matters of *content.* It can now be argued that the influence of the media in shaping community views has become the prime determinant of the level of regulatory attention, rather than the transmission method by which services are distributed to consumers.

Under the BSA, service regulation operates on a different plane that is transparent to

technology and technical regulation. Where once broadcasting was considered a subset of radiocommunications regulation, it is now conceptually an activity related to services and content, independent of the means of transmission. There remain some pockets of technical regulation in the BSA, but these relate to a limited range of special cases: the bands of the radiofrequency spectrum that are currently primarily used for broadcasting, and pay television services.

The Rationales for Broadcasting Regulation

The existence of a head of power under the Constitution to regulate broadcasting does not automatically confer a *necessity* to regulate. The necessity to regulate only arises in response to either the potential for, or the existence of, a set of circumstances that the Parliament agrees warrant regulatory intervention. Regulation is a means of satisfying objectives in society as expressed by Government, and is not an end in itself. It follows that the application of regulation to the broadcasting sector should have an underlying purpose, or rationale, that regulation seeks to satisfy.

Broadcasting policy has evolved over many years. Its development is best described as incremental. No more evidence of this is needed than a review of the history of the *Broadcasting Act 1942*. Between March 1983 (the election of the Hawke Labor Government) and the end of 1991, there were 20 substantial amendments to the principal Act,[20] none of which changed the overall character of the legislation, or the things that it sought to regulate. The amendments were, by and large, directed to implementing incremental changes in policy within a framework of assumptions that were unchallenged. Although the BSA enacted substantial reforms to the approach to regulation, it retained many of the regulatory assumptions and structures of the previous regime.

One of the central questions in this dissertation is: why does Australia regulate broadcasting and is that rationale reflected in the law? According to Armstrong,[21] the most comprehensive collection of principles said to underlie regulatory control of broadcasting is set out in the *Report on Australian Broadcasting* of Mr F J Green (the Green Report), former Secretary to the Postal and Telecommunications Department. The Green Report noted that the official rationales were based on:

- the notion of scarcity of broadcasting spectrum;
- concern about the impact of broadcasting in setting the agenda for public debate;
- that the radiofrequency spectrum was public property;

and that therefore the Government had an obligation to ensure that broadcasting operated *in the public interest.*[22]

While not disputing the rationales offered by Green, Armstrong noted that the rationale that came closest to articulating the assumptions of past Australian Governments and public servants was the so-called *quid pro quo* rationale first advanced by Mayer.[23] This rationale saw broadcasting regulation as a pragmatic mechanism of economic protection for incumbent broadcasters, extended by the Government in return for broadcasters satisfying a range of public policy objectives.[24]

Mayer, in his critiques of media policy in the late 1970s, also identified the issues of scarcity, the impact and influence of broadcasting on setting the agenda for debate, and the public property rationales put forward by Green, adding his *quid pro quo* rationale, and a further rationale related to promoting diversity of services.[25]

Various other Australian commentators have identified similar rationales. For example, Cunningham has also noted that notions of scarcity and pervasiveness have been used to justify regulation in Australia.[26] Pervasiveness can be seen in some ways as a heightened potential for impact and influence. Bonney and Wilson offered more practical articulations of the rationales by suggesting that government attention to the media was prompted by a government fear of the power of unrestrained media organisations, concern by government to limit concentration and promote diversity, promotion of local capital as against foreign capital, and concern for the interests of children as targets of advertising.[27] In a later essay, Bonney compressed his view as follows:

> The standard rationale for regulations of the commercial media relies on the fact that broadcasters make use of the electromagnetic spectrum, which is described as a "scarce national resource" to be used "in the public interest". Apart from technical matters, the regulation of commercial broadcasting falls into two main parts: ownership and control provisions and program standards.[28]

Contemporary rationales for regulating broadcasting in Australia appear in papers relating to the reform of broadcasting regulation which culminated in the enactment of the BSA. The first official statements in the context of reform come from the House of Representatives Standing Committee on Transport Communications and Infrastructure (HORSCOTCI) and its Chairman, John Saunderson MP. The HORSCOTCI outlined the rationale for regulation as follows:

> 3.33 The historical rationale for the regulation of commercial television is based on the acceptance of the "public trustee" model of regulation ....the model maintains that the spectrum is a scarce resource, that to grant a television licence is bestow a rare privilege and that in return commercial television licensees have a responsibility to enrich the moral, emotional and cultural life of our society.[29]

This is, in effect, the *quid pro quo* rationale, restated.

Saunderson, in address to the Communications and Media Law Association on 7 March 1989, said that:

> The case for regulation of television is based on two factors which make broadcasting unique. The first is the impact of television which is received into our lounge-rooms and seen by adults and children alike. It deals with the particularly sensitive commodities of ideas, information, thought and opinion, compounded by the public perception of the mass media as opinion makers, image formers and culture disseminators. The second factor is the structure of the industry where television is dominated by three commercial networks.
>
> It is television's powerful capacity to influence, combined with its ownership by a few, that has produced regimes of regulation and control throughout the world.[30]

Saunderson failed to point out that *ownership by a few* was a result of long standing government policies from both sides of politics to restrict access to the broadcasting industry, and thus, as a rationale for government regulation, *ownership by a few* is self-sustaining in the tradition of Catch-22.

In 1991, the Bureau of Transport and Communications Economics (BTCE) released its report *Economic Aspects of Broadcasting Regulation*, which formed an input to the process of developing the legislation. This report pointed to the reasons, as perceived by the BTCE, behind the Government's acceptance that it should regulate broadcasting:

> Many of the controls placed on broadcasters are based on the premise that broadcasting should be used for the collective good of society, which is likely to differ from the private interests of participants.
>
> Because of its immediacy and mass coverage, broadcasting is considered to have a powerful influence on society. Consequently, it is argued that private ownership of broadcasting is essentially the conferment of a public trust to be exercised within a defined set of parameters to ensure that the trust is not abused.[31]

In this passage, the BTCE points to there being a public interest imperative to regulate for the collective good of society and that regulation is considered necessary to deal with concerns about the influence of broadcasting on society. Hawke, in her analysis of the public interest discourse in broadcasting policy, also identified these two central themes as rationales for regulation, as well as the perennial rationale of scarcity of broadcasting spectrum.[32]

Former Australian Broadcasting Tribunal (ABT) Chairman, Peter Westerway, in an analysis of the exposure draft of the *Broadcasting Services Bill*, noted that:

> The rationale for regulating broadcasting has rested upon three central notions: scarcity, public interest and accountability. Scarcity because the electromagnetic spectrum is a limited (albeit renewable) natural resource. Public interest because broadcasting is uniquely powerful. Accountability, because the privilege of controlling these scarce, uniquely influential, natural resources can be granted only to a few. This implies a reciprocal obligation to serve the community; i.e. the broadcaster is a trustee.[33]

Westerway, too, sees a *quid pro quo* in broadcasting regulation.

In a critique of the exposure draft of the *Broadcasting Services Bill*, Davies noted, in response to suggestions that Governments should eschew any regulation of the media beyond trade practices regulation, that:

> In broadcasting, there is a competing interest. The social and cultural influence of the mass media, combined with the fact that access to the market is limited by the availability of spectrum, has necessitated regulatory intervention in the public interest.[34]

That all of these various articulations of a few central themes have persisted over a period of nearly 20 years attests to their strength in the collective consciousness of media professionals, commentators, regulators and politicians. At the time most of them were first proposed they were, no doubt, legitimate concerns for society and legitimate reasons to authorise regulation. However, in 1993, on a cursory evaluation, many of the rationales can be shown to be fragile. For example, while it may once have been true that spectrum for broadcasting services, as they have been traditionally defined, was scarce (and that should not be accepted without question), such a proposition becomes absurd in the age of digitally compressed video, broadband-fibre and satellites. As another example, despite a history of more than 70 years of research into media effects, the communication academy appear to be unconvinced about whether the media have effects, what the nature of the effects is, and how the effects might be reliably predicted. Even if it was to be proved that the media does have effects on audiences, it remains an open question as to whether the effects are *necessarily* bad. It is conceivable that media effects might be *positive* for societal development, and that regulation might effectively inhibit these positive effects, just as it is intended to inhibit the negative effects.

Questions relating to the validity of the rationales behind broadcasting regulation are not new. For example, as long ago as 1979, Mayer concluded that:

> On examination, the various rationales of current policy turn out to be more vulnerable than appears at first sight, and most of them are becoming still less plausible.[35]

In another paper the following year, Mayer noted that:

> If we start looking at the rationales for broadcasting control which are around today, they seem less convincing than they were a few years ago. It is not easy to see any of them becoming a central rationale, as for better or for worse, the scarcity of frequencies was or was seen to be.[36]

Mayer's observations were made before the commencement of the domestic satellite systems, before convergence had emerged as a practical concern (although it had been postulated as an issue for future concern) and before any of the new service types such as VAEIS or pay TV had commenced operations.

As will be shown in Chapter 4, most of the rationales are even less plausible today.

Rationales and the Current Regulatory Approach

Current Objectives

It can be shown that the BSA continues to apply the traditional rationales for regulation, reaffirming the view put in Chapter One that the BSA represents an incremental development on past practice. Indeed, it would be surprising if the BSA was not an incremental advance, noting the social and political interest shown in the media industry. Initial strong evidence of the BSA's reliance on long standing rationales can be found in the *Objectives* paragraph. There is strong and obvious correlation between many of the rationales for regulation identified in the previous pages and the formal statement of regulatory objectives in the BSA.[38]

For example, object 3 (a), which requires promotion of diversity of services, and object 3(c), which requires diversity in control of services, both articulate the rationale of using regulation to promote diversity. Object 3(d) requires that Australians have effective control of the more influential broadcasting services, and is an articulation of the rationale of promoting Australian, as opposed to foreign, capital. It also reflects concern about the cultural effects of the media and expresses a desire that Australian culture be managed by Australians. Object 3(e) similarly articulates the rationale of needing to protect Australian cultural identity, while objects 3(f), 3(g), 3(h) and 3(i) can be seen as a manifestations of a generally stated public interest. Finally, object 3(j) is directed towards the protection of children.

Further confirmation that the influence rationale is important to the BSA regulatory scheme can be found at s.4(1), which notes:

> The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia.[38]

The only object in the BSA that does not closely correlate with the historical rationales is object 3(b) which is new to this Act and represents the articulation by the Government of a wholly new objective in regulation; i.e. to promote the Government's micro-economic reform agenda and to improve the overall efficiency of the broadcasting sector. This new objective is so contemporary that it does not appear in any but the most recent studies of Australian media regulation. In some ways, it goes against the direction of past regulation and exists in tension with some of the more long standing rationales, such as scarcity of radiofrequency spectrum, and that the spectrum is public property.

In broad terms, the rationales for regulation fall into two groups; those related to a

purported need for economic regulation, to deal with issues such as scarcity of radiofrequency spectrum and the belief that spectrum is public property; and those related to concerns about the influence of the content displayed by the media. Different rationales prompt different regulatory responses, and not all of the provisions of broadcasting law are directed to satisfying all of the underlying rationales. The provisions of the BSA follow a similar separation between economic and public interest concerns.

Categories of Services

Part 2 of the BSA sets out the categories of broadcasting services that allow the sliding scale of regulation envisaged at s.4(1) of the Act to be applied. The approach recognises that some services have greater potential for influence than others. Generally, services that are felt to have a high level of influence are required to be individually licensed and are subject to more rigorous community obligations. These services include commercial, community and subscription broadcasting services.

A class licensing regime has been established for services that are thought not to have a significant level of influence in shaping community views. These categories are for open narrowcasting services and subscription narrowcasting services. Narrowcasting is defined as:

> ... a form of transmission, limited in either its appeal or its ability to be received, so it is unable to be considered in the same terms as conventional broadcasting. Narrowcast services do not raise many public interest concerns, and are subject to less regulation.[39]

Narrowcasting services are differentiated between services where a subscription is charged for access (and therefore, there is a presumption that the operator will take steps to restrict access by those who have not paid) and those that are not restricted, and are thus transmitted free-to-air.

Planning the Broadcasting Services Bands

Part 3 of the BSA provides for planning by the Australian Broadcasting Authority (ABA) of *broadcasting services bands*. This Part of the BSA is predicated on the rationale of scarcity of radiofrequency spectrum. However, the Part applies only to bands that have been designated *broadcasting services bands* by the Minister for Transport and Communications. The ABA has no role in planning any other bands of the radiofrequency spectrum, or of cable systems, or of any other means of delivery.

The planning process set out in the Act is intended to allow issues including:

- demographics;
- social and economic characteristics;

- the number of existing services in an area;
- demand for new services;
- technology and other technical considerations; and
- demand from the non-broadcasting sector for access to the spectrum

to guide the management and allocation of spectrum, rather than purely engineering concerns as might otherwise be the case.[40]

The broadcasting services bands that have been designated are limited to the bands used by traditional broadcasting services (i.e. radio and television) and include the VHF and UHF television bands and the AM and FM radio bands. These bands are recognised around the world as being for broadcasting, and nearly all consumer equipment is manufactured to operate in them.

Licensing services

Licensing provisions are used in many spheres of government activity as a means of rationing access, and for ensuring, through the threat and application of sanctions, that particular norms of behaviour are able to be enforced. The existence of a licensing regime is usually accompanied by a regime of sanctions that are applied when people operate without an appropriate licence. This is true of broadcasting law.

Licensing for broadcasting services was originally applied, both here and in many other countries, simply as a mechanism to manage use of the radiofrequency spectrum. Since then, it has come to be used as an instrument by which various public obligations were applied to broadcasters. The licensing scheme for broadcasting can therefore be seen as a means of giving effect to a whole range of rationales, and extends to the application of social obligations on licensees.

An important development for the future of the licensing regime is the provision for virtually automatic grant of licences that permit operation outside the broadcasting services bands. The effect of this development on the licensing regime is considered in Chapter 5.

Ownership and Control of Commercial Services

The ownership and control regime in the BSA represents an articulation of the rationales related to promotion of diversity of services, by limiting the concentration of ownership, and of promoting and protecting Australian investment in cultural industries by placing limitations on foreign ownership and control. The continued application of these provisions in the technological environment being forecast is considered in greater depth in

Chapter 5.

Class licensing

Class licensing is a new means of giving effect to public interest concerns (such as they are thought to exist) without having to depend on an administratively cumbersome licensing regime. Class licences are:

> provided via an open, standing authority. Those who wish to provide a service within the terms of the authority do not need do approach the ABA to obtain any form of service licence.[41]

In effect, a class licence is no more than a universal set of conditions (prohibitions and obligations) that apply to all operators of a particular class of service. There is no actual licensing by issuing a written form. There is still the potential to apply obligations that are able to be enforced, such as the program standards applying to individual licensees, although the mechanism for enforcement is different. There is no offence of operating without a licence, but there are still remedies available for breaching the terms and condition of the class licence.

Program Standards

Program standards are a more traditional means of giving effect to public interest concerns about media content, but in the BSA, they apply only to the services with individual licences. The BSA gives the ABA broad discretion to respond to community concerns about the program content of licensed broadcasters (commercial and community) by assisting in the development of industry codes of practice. When these fail, the ABA may develop and apply enforceable program standards. In the case of commercial television, the ABA is authorised to take a higher level of direct interest in the areas of children's programming and Australian content, and it is required to develop program standards as a first course of regulation.

Administrative Provisions of the BSA

The remainder of the BSA is given to establishing administrative mechanisms to give effect to the provisions that seem to flow directly from the rationales for regulating. The administrative provisions provide for:

- the creation and staffing of the ABA;
- powers to enable the ABA to fulfil its statutory role, such as in relation to gathering information and conducting investigations and inquiries;

- remedies that the ABA may apply to enforce the regulations; and
- administrative appeal mechanisms to properly protect the rights of those affected adversely by ABA decisions.

Summary

Australian broadcasting regulation is able to be applied by the Commonwealth by virtue of s.51(v) of the Constitution. Electronic media services are subject to Commonwealth regulation, while physical media forms such as newspapers, magazines, books, videos etc. are subject only to state regulation.

For a long time, broadcasting was conceptualised as being a specialised subset of the wireless telegraphy/radiocommunications regime, which, because of perceived scarcity of radiofrequency spectrum, prompted Commonwealth regulatory intervention, initially to allocate spectrum and to manage this alleged scarcity. Other rationales for Commonwealth regulatory intervention have traditionally included that:

- government has an obligation to apply economic management to further society's objectives, which include the promotion of a vigorous democracy, aided by diversity of views and opinions;
- the radiofrequency spectrum is public property, and therefore should be used for public good;
- the media have a unique capacity to influence the agenda for public debate and to shape our culture;
- that government has a general obligation to ensure that businesses such as broadcasting operate in the public interest;
- that government should protect the interests of children and Australian culture from commercial pressures; and
- that government should protect the viability of broadcasters in return for them satisfying a range of public goods such as provision of Australian content and children's programs.

The regulatory regime for broadcasting has recently been overhauled with the introduction of the BSA and broadcasting is now conceptualised solely in terms of content, permitting broadcasting services to be transmitted to their audiences using any means of delivery. Nevertheless, an analysis of the objectives and of the provisions of the BSA shows that the long standing rationales for regulation still underlie the regulatory approach in the BSA.

Notes on Chapter Two

1 Armstrong, M. (1982) *Broadcasting Law and Policy in Australia*, Sydney: Butterworths, p.6.

2 *ibid*, p.35.

3 These include the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* which provided transition from the arrangements set out in the *Broadcasting Act 1942*, and the *Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992* which provided for the introduction of pay TV.

4 Australia, Parliament, *Broadcasting Services Act 1992*, Canberra: AGPS, s.13(5).

5 Armstrong, *op cit*, p.35.

6 *ibid*, p.43.

7 Australia, Department of Transport and Communications (1993) *Broadcasting Reform - a New Approach to Regulation*, Canberra: DOTAC, pp.4-7.

8 s.6B of the *Broadcasting Act 1942* provided some limited exceptions to the prohibition on the use of cable for broadcasting. The effect of the exceptions was that cable could be used to extend the coverage of a radiated signal or could be used incidental to the act of broadcasting, but was not intended to substitute for a radiated signal as the primary means of transmission, except where a radiated signal was impractical.

9 Australia, Parliament, *Broadcasting Act 1942*, Canberra: AGPS, s.6B.

10 The first two AUSSAT A series satellites were launched in 1985, and services progressively commenced operations, although the official inauguration of the system took place on Australia Day 1986.

11 Duffy MP, The Hon M., *Commercial Satellite Television Service for Remote Areas Announced*, Press Release 84/97, 10 October 1984.

12 This enactment appeared in the licence warrant provisions of s.89D of the *Broadcasting Act 1942*.

13 Duffy MP, The Hon M., *Way Clear for New VAEIS Services, Minister Says*, Press Release 89/86, 2 September 1986.

14 Australia, Department of Communications (1985) *Future Directions for Commercial Television*, Canberra: AGPS.

Equalisation was the term coined for extending to regional areas the same level of choice of commercial television services as that enjoyed by metropolitan viewers. Two approaches to equalisation were canvassed in the paper: multi-channel service permits for existing licensees to broadcast additional signals in their own service area and the "aggregation" of three (or more) adjacent markets to provide three fully competitive services serving a larger area. Licensees ultimately elected to follow the aggregation path, but only with a number of concessions from the Government including a package of sales tax relief for new capital equipment purchased in implementing the policy.

15 Evans, QC, Senator the Hon G., *New Process for Licensing Multipoint Distribution Systems (MDS)*, Press Release 39/88, 19 April 1988.

16 Duffy MP, The Hon M., *Way Clear for New VAEIS Services, Minister Says*, Press Release 89/86, 2 September 1986.

17 Australia, Department of Transport and Communications (1989) *Future Directions for Pay Television in Australia*, Canberra: AGPS, p.35.

18 *Broadcasting Services Act 1992*, s.4(1).

19 *Broadcasting Services Act 1992*, s.6.

The definition of broadcasting service excludes teletext, text and data services and point-to-point services. Teletext and many text and data services were captured within the ambit of the *Broadcasting Act 1942*, and were ultimately recognised under the Limited Licence Regime in that Act at s.81B.

20 Beazley MP, The Hon K.C. (1991) *Draft Broadcasting Services Bill - Explanatory Papers*, Canberra: DOTAC, p.4.

21 Armstrong, *op cit*, p.15.

22 Australia, Postal and Telecommunications Department (1976) *Australian Broadcasting: a Report on the Structure of the Australian Broadcasting System and Related Matters*, Canberra: AGPS, pp.43-45.

23 Armstrong, *op cit*, p.15.

24 Mayer, H. (1979) *Dilemmas in Mass Media Policies*, Seventh Annual Lecture of the Academy of Social Sciences in Australia, 6 November 1979.

see also Mayer, H. *Broadcasting Regulation: the Eroding Bases* in Turbayne, D. (ed) (1980) *The Media and Politics in Australia*, Hobart: University of Tasmania.

25 Mayer, *op cit*, pp.36-38.

26 Cunningham, S., *Media Futures* in Cunningham, S and Turner, G (eds), (1993), *The Media in Australia - Industries, Texts, Audiences*, St Leonards: Allen and Unwin, p.346

27 Bonney, B. and Wilson, H. (1983) *Australia's Commercial Media*, Sth Melbourne: Macmillan, p.69.

28 Bonney, B. *Commercial Television: Regulation, Technology and Market Forces*, in Wheelright, T. and Buckley, K. (1987) *Communications and the Media in Australia*, Nth Sydney: Allen and Unwin, p.40.

29 Australia, House of Representatives Standing Committee on Transport Communications and Infrastructure (1988) *The Role and Functions of the Australian Broadcasting Tribunal*, Canberra: AGPS, p.21.

30 Saunderson MP, J. *The Australian Broadcasting Tribunal - Where to from Here?*, in *Communications Law Bulletin*, Vol. 9, No.2, May 1989.

31 Australia, Bureau of Transport and Communications Economics (1991) *Economic Aspect of Broadcasting Regulation*, Canberra: AGPS, p.xv.

32 Hawke, J. (1993) *Calculating Interest: The Rise and Fall of Public Participation in Broadcasting Policy*, Adelaide: Flinders Studies in Policy and Administration, p.11.

33 Westerway, P.B. *The Broadcasting Services Bill* in *Communications Law Bulletin*, Vol. 11, No.4, March 1992, pp.7-9.

34 Davies, A. *The Role of Government in Broadcasting Regulation* in *Communications Law Bulletin*, Vol. 11, No.3, Spring 1991, p.16.

35 Mayer, *op cit*, p.41.

36 Turbayne, *op cit*, p.27.

37 *Broadcasting Services Act 1992*, s.3.

38 *Broadcasting Services Act 1992*, s.4(1).

39 Australia, Department of Transport and Communications (1993) *op cit*, p.5.

40 *Broadcasting Services Act 1992*, s.23.

41 Australia, Department of Transport and Communications (1993) *op cit*, p.28.